NOTE

BEGINNER'S LUCK THAT HERTZ: BANKRUPT COMPANIES AND THE TRAP FOR RETAIL INVESTORS

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In United States bankruptcies, the absolute priority rule dictates that shareholders recover no value unless creditors are paid in full. Because unsecured creditors are typically not paid in full, shareholders lose their ownership interest and recover little to nothing in bankruptcy. Despite the minuscule chances that debtors' shareholders will recover their investment in bankruptcy, debtors' stocks continue to trade in large volume during bankruptcy. Amateur investors, who know little about the small chance of shareholder recovery, buy bankrupt company stock—especially that of well-known public companies trading at low prices—from sophisticated, institutional investors. Consequently, amateur investors can see huge losses during the bankruptcy process, while institutional investors are able to hedge some of their losses from now-insolvent companies.

The current public and private regulatory regimes do not have the authority or desire to protect amateur investors trading bankrupt company stock. This Note proposes that Congress adopt an amendment to the Bankruptcy Code that grants bankruptcy courts a limited power to suspend trading

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in a company's stock after the company files for bankruptcy. To trigger this measure, the courts must determine that shareholders are likely to receive little to no value in bankruptcy and that amateur investors will ignorantly purchase such bankrupt company stock. This Note then discusses the proposed amendment and its potential consequences and responds to expected criticisms of the amendment.

I. INTRODUCTION

The Securities and Exchange Commission (SEC), whose mission is, in part, "to protect investors,"[1] warns investors that trading in bankrupt company stock "is extremely risky and is likely to lead to financial loss" and that "[i]n most instances, the company's plan of reorganization will cancel the existing equity shares."[2] Bankrupt companies themselves caution investors "that it is realistic to conclude that ultimately there will be no shareholder equity value remaining."[3] Despite these ominous warnings, for at least the

[1] *About the SEC*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about.shtml [https://perma.cc/FH3M-X4EQ] (last modified Nov. 22, 2016).

[2] *Bankruptcy: What Happens When Public Companies Go Bankrupt*, U.S. SEC. & EXCH. COMM'N (emphasis omitted), https://www.sec.gov/reportspubs/investor-publications/investorpubsbankrupthtm.html [https://perma.cc/A3HR-X5NW] (last modified Jan. 19, 2016) ("Management continues to run the day-to-day business operations but all significant business decisions must be approved by a bankruptcy court."). Debt holders, rather than existing shareholders, typically "become the new owners of the shares." *Id.*

[3] Press Release, Am. Home Mortg. Inv. Corp., American Home Mortgage Investment Corp. Files for Chapter 11 Bankruptcy (Aug. 6. 2007), https://www.sec.gov/Archives/edgar/data/1256536/000091412107001892/am9746838-99_1.txt [https://perma.cc/EEV3-6NY5]; *see also* Reuters, *UAL Tells Owners It Plans To Cancel Common Stock*, L.A. TIMES (June 11, 2003, 12:00 AM), https://www.latimes.com/archives/la-xpm-2003-jun-11-fi-ual11-story.html [https://perma.cc/8RWU-QUD3] ("United Airlines parent UAL Corp. told owners of its common stock Tuesday that they can expect their investments to be wiped out once the airline emerges from bankruptcy protection."); Hertz Glob. Holdings, Inc., Prospectus Supplement (Form 424B5) (June 15, 2020) ("We are in the process of a reorganization under chapter 11 of title 11, or Chapter 11, of the United States Code, or

past couple of decades unsophisticated investors have frequently purchased stock after its issuer files for bankruptcy.[4] This historically does not end well for these investors.[5]

Yet, this trend has continued throughout the COVID-19 pandemic.[6] Speculation on the reasoning behind such trading spans from investors staving off boredom[7] to individuals

Bankruptcy Code, which has caused and may continue to cause our common stock to decrease in value, or may render our common stock worthless. Investing in our common stock involves a high degree of risk." (emphasis omitted)).

[4] *See, e.g.*, Eliza Carter, *Record Numbers of Retail Investors Buy up Bankrupt Company Shares*, MORNING BREW: RETAIL BREW (June 9, 2020), https://www.morningbrew.com/daily/stories/2020/06/09/record-numbers-retail-investors-buy-bankrupt-company-shares [https://perma.cc/D3BV-RD3G] (noting day traders' purchases of shares of JCPenney and Whiting Petroleum after their respective bankruptcy filings); Ken Bensinger, *Big Risk-Takers Keep Zombie Stocks Moving*, L.A. TIMES (Sept. 24, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-sep-24-fi-bankrupt-stocks24-story.html (on file with the Columbia Business Law Review) (highlighting the increased trading and stock gains of bankrupt companies in 2009); *Profiting from Bankruptcy Unlikely*, DAILY NEWS, https://www.dailynews.com/2007/08/19/profiting-from-bankruptcy-unlikely/ [https://perma.cc/Z9QX-K4LY] (last updated Aug. 29, 2017, 2:21 AM) (detailing examples of trading of 2002 and 2007 bankrupt company stock).

[5] *See, e.g.*, Michelle Singletary, *Kmart Stock Teaches Investors a Bitter Lesson*, ORLANDO SENTINEL (May 18, 2003), https://www.orlandosentinel.com/news/os-xpm-2003-05-18-0305170444-story.html [https://perma.cc/QU7C-WRJC] (reporting that Kmart issued new stock after the bankruptcy and cancelled its old shares, leaving existing shareholders with nothing); Lynne Marek & John Hughes, *Delta Shares To Become Worthless*, DESERET NEWS (Mar. 16, 2006, 12:34 AM), https://www.deseret.com/2006/3/16/19943388/delta-shares-to-become-worthless [https://perma.cc/DHM7-NC2Y].

[6] Yun Li, *The Hot New Thing To Make Your Stock Pop: Go Bankrupt*, CNBC, https://www.cnbc.com/2020/06/09/the-hot-new-thing-to-make-your-stock-pop-go-bankrupt.html [https://perma.cc/84DW-3Y34] (last updated June 9, 2020, 12:17 PM) ("It's sort of this speculative behavior that we saw at the end of 1999 and the beginning of 2020. It really doesn't make rational sense." (internal quotation marks omitted)).

[7] *See e.g.*, Eliza Ronalds-Hannon, *Amateur J.C. Penney Traders Beg Judge To Save Them from Wipeout*, BLOOMBERG: L. (July 13, 2020, 12:23 PM), https://www.bloomberglaw.com/document/X9T7VL1S000000 (on file

treating stocks like lottery tickets.[8] Regardless, the outcome is the same: amateur investors are pouring money into nearly worthless bankrupt company stock. Due to the absolute priority rule, which only allows shareholders to recover in bankruptcy once creditors are paid in full, shareholders frequently have their shares wiped out in bankruptcy.

This Note raises concerns about amateur traders investing in worthless bankrupt company stock and proposes an amendment to the Bankruptcy Code (Amendment) that would grant the courts power to regulate trading in such stock to protect amateur investors. Part II outlines the current regimes that govern trading in bankrupt company stock, including practical and regulatory reactions by stock exchanges and the federal government triggered by a bankruptcy filing.

Part III continues by highlighting increased accessibility to stock trading, which has resulted in increased participation in the stock market by amateur investors. Next, Part IV stresses how poorly bankrupt company stock performs, and those amateur investors take much of the loss in value. Part IV underlines that even with guidance from the SEC and companies themselves, amateur investors do not understand how the bankruptcy process affects stock value, leading to pervasive confusion and large financial losses for such investors.

Part V proposes that the bankruptcy courts step in to protect amateur investors. First, this Note posits that national securities exchanges, government regulatory agencies, and bankruptcy courts do not have the authority to prevent amateur investors from trading bankrupt company stock. Second, this Note argues the bankruptcy court is the

with the Columbia Business Law Review); Matt Levine, *The Bad Stocks Are the Most Fun*, BLOOMBERG: OP. (June 9, 2020, 12:08 PM), https://www.bloomberg.com/opinion/articles/2020-06-09/the-bad-stocks-are-the-most-fun (on file with the Columbia Business Law Review).

[8] Felix Salmon, *Gambling on Worthless Stock*, AXIOS (June 11, 2020), https://www.axios.com/bankrupt-penny-stocks-hertz-jcpenney-25e71e25-1821-4023-af5a-4f99639494aa.html [https://perma.cc/2JDQ-XYLW].

best institution to protect those investors based on the bankruptcy judges' experience and authority in evaluating the long-term prospects of bankrupt companies. Third, this Note proposes that Congress amend the United States Bankruptcy Code to grant the bankruptcy courts the authority to restrict certain trading in bankrupt company stock to protect amateur investors. Under the proposed Amendment, the bankruptcy courts would have the ability to issue injunctions allowing all investors to sell their positions in bankrupt companies but making it more difficult for amateur investors to purchase new bankrupt stock. The Note concludes by countering potential opposition to its proposal.

II. CURRENT REGULATION OF THE STOCK MARKET

To consider the problems of permitting trading of bankrupt company stock, it is imperative to understand the governing laws and regulations. The regulatory regime overseeing trading in bankrupt company stock does not differ significantly from that which supervises trading in other equity securities. The public and private sectors make up the institutions that oversee stock regulation. The SEC represents the public, while the private sector consists of stock exchanges and the Financial Industry Regulatory Authority (FINRA). In Part II, this Note considers the current regulatory landscape, which can be broken down into three categories of oversight: national securities exchanges, over-the-counter markets, and regulatory agencies. In considering these sources of oversight, this Note details how each treats publicly traded stock once the company that issued stock files for bankruptcy.

A. National Securities Exchanges

Exchanges registered under section 6 of the Securities Exchange Act of 1934 are called "national securities

exchanges."[9] The NYSE and the Nasdaq Stock Market (Nasdaq), both national securities exchanges, have the two highest market capitalizations of all stock exchanges in the world[10] and combined comprise thirty-nine percent of the value of the entire global stock market.[11] While each national securities exchange has its own listing standards, this Note

[9] *See* 15 U.S.C. § 78f(a)–(b) (2018). Trading takes several forms after investors initiate a trade through their brokers. Brokers can execute an order within their own brokerages, called "internalizations." At the same time that an investor wants to buy 100 shares of a stock, another investor with one of those brokers may want to sell 100 shares of the same stock. The broker will execute the trade internally, earning a profit on the "spread." *Executing an Order*, U.S. SEC. & EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/how-stock-markets-work/executing-order [https://perma.cc/E95A-CG62] (last visited Nov. 17, 2020). The "spread" is the difference between the "bid" price and the "ask" price: a broker may buy a stock at $100 ("bid" price) while, at the same time, selling the same stock at $100.05 ("ask" price). *Id.* The "spread" is the five cents the broker earns. Another option is for the broker to route an investor's trade to a "market maker" that actively buys and sell stocks on behalf of traders, ensuring that those who want to buy and sell stock can do so. *See* Ben Lobel, *Nasdaq vs NYSE: Top 7 Differences Traders Should Know*, DAILYFX (Dec. 10, 2018, 6:47 AM), https://www.dailyfx.com/nas-100/NASDAQ-vs-NYSE.html [https://perma.cc/4W5D-DAWD]. Market makers post a sale and buy price for each stock for which they are responsible and use their own inventory to complete orders. *See Executing an Order*, *supra*. For example, if an investor wants to buy (sell) 100 shares of a stock, and there are not investors at that time that wish to sell (buy) 100 shares of that stock, a market maker sells (buys) 100 shares of that stock to the investor. Market makers also earn money off the "spread." *See id.* Market makers will pay brokers a small fee per trade for the broker to direct trading to that market maker, a practice called "payment for order flow." *Id.* Lastly, a broker can route the trade to an electronics communication network that automatically matches buyers and sellers. *See* Michael J. Barclay, Terrence Hendershott & D. Timothy McCormick, *Competition Among Trading Venues: Information and Trading on Electronic Communications Networks*, 58 J. FIN, 2637, 2637–38 (2003).

[10] Ben Winck, *Here Are the 10 Biggest Stock Exchanges in the World, Ranked by Market Cap*, BUS. INSIDER: MKTS. INSIDER (June 19, 2020, 2:21 PM), https://markets.businessinsider.com/news/stocks/biggest-stock-exchanges-world-ranked-market-cap-nyse-nasdaq-trading-2020-6-1029325478 [https://perma.cc/RL3A-8AQN].

[11] *60 Stock Market Statistics & Facts for 2020*, LEXINGTON L. (Jan. 2, 2020), https://www.lexingtonlaw.com/blog/finance/stock-market-statistics.html [https://perma.cc/KJ63-VZP4].

will consider those of the NYSE and Nasdaq due to their dominance in the United States and the global stock market.

The NYSE and Nasdaq retain discretion to determine whether to list a stock.[12] Both exchanges have separate standards for initial[13] and continued[14] listings. Stocks that do not meet these requirements may be suspended from trading on the exchanges[15] or delisted from the exchanges altogether.[16] The NYSE and Nasdaq each have special rules for shares of bankrupt companies. When a company files for bankruptcy, "the [NYSE] may exercise its discretion to continue the listing and trading of the securities of the company."[17] In certain situations, the NYSE rules strip the exchange of its discretion to suspend and delist bankrupt company stock.[18] Depending on the violation, Nasdaq must

[12] *See* LISTED CO. MANUAL § 101.00 (N.Y. Stock Exch. 2021) ("The Exchange has broad discretion regarding the listing of a company."); RULEBOOK § 5001 (The Nasdaq Stock Mkt. 2021) ("This Rule Series 5000 . . . contains rules related to the qualification, listing and delisting of Companies on The Nasdaq Stock Market.").

[13] *See* LISTED CO. MANUAL §§ 102.01–.08; RULEBOOK § 5415.

[14] *See* LISTED CO. MANUAL §§ 802.01–.03; RULEBOOK § 5450.

[15] When the NYSE suspends trading in a stock, it stops trading immediately. *See* LISTED CO. MANUAL § 804.00 (providing for suspension "as soon as practicable" after the proper procedure for determining the propriety of suspension). A NYSE or Nasdaq trade suspension should not be confused with a "trading halt." The NYSE and Nasdaq implement trading halts, which typically last about one hour, when a company is set to announce significant news that may affect the value of its stock. *See Trading Halts and Delays*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answerstradinghalthtm.html [https://perma.cc/9S4M-AGZR] (last modified July 23, 2010). A "delayed opening" is used when such news is announced at the beginning of the trading day. *Id.*

[16] *See* LISTED CO. MANUAL § 802.01 (detailing the consequences of failing to meet continued listing requirements).

[17] *Id.* § 802.01(D). The NYSE may suspend or delist stocks that violate certain criteria. An intent to file for reorganization or an actual filing for reorganization under any country's bankruptcy laws falls under this category. *Id.*

[18] Securities issued by a company that announces an intent to file for bankruptcy or that files for bankruptcy and also does not have an average market capitalization of at least $50 million over a thirty trading-day period and does not have at least $50 million market capitalization on

immediately delist and suspend trading in a stock,[19] allow the company to cure the deficiency,[20] or issue a public reprimand.[21] A company may appeal either exchange's decision to suspend and delist its stock.[22]

Hertz Global Holdings, Inc. (Hertz) is a prime example of the NYSE's delisting and suspension procedures in practice. On May 22, 2020, Hertz filed for Chapter 11.[23] On May 26, the next trading day,[24] the NYSE informed Hertz it would delist its stock.[25] In turn, Hertz announced it would appeal the decision.[26] Hertz lost its appeal and was finally suspended from trading on the NYSE on October 29.[27] Therefore, for more

the day in question are "subject to immediate suspension and delisting." *Id.* There is a narrow exception for companies that are "profitable . . . or . . . demonstrably in sound financial health." *Id.*

[19] *See* RULEBOOK § 5810(c)(1) (explaining that if a company fails to meet one of seven requirements it will be subject to immediate suspension and delisting).

[20] *Id.* § 5810(c)(2)–(3) (listing "[d]eficiencies for which a [c]ompany may [s]ubmit a [p]lan of [c]ompliance for [s]taff [r]eview" and "[d]eficiencies for which the [r]ules [p]rovide a [s]pecified [c]ure or [c]ompliance [p]eriod" (emphasis omitted)).

[21] *Id.* § 5810(c)(4).

[22] *Id.* § 5815(a); LISTED CO. MANUAL § 804.00. On Nasdaq, a suspension is not stayed pending a hearing for suspension and delisting as a result of filing under bankruptcy laws. RULEBOOK § 5815(a)(1)(B)(ii). The suspension and delisting of a stock is stayed pending an appeal for certain, non-bankruptcy related suspensions. *Id.* § 5815(a)(1)(B).

[23] Reuters, *Hertz Files for U.S. Bankruptcy Protection as Car Rentals Evaporate in Pandemic*, CNBC (May 22, 2020, 10:13 PM), https://www.cnbc.com/2020/05/23/hertz-files-for-us-bankruptcy-protection-as-car-rentals-evaporate-in-pandemic.html [https://perma.cc/DAF9-NF74].

[24] Hertz filed on Friday, and the NYSE notified Hertz of delisting on Tuesday. Monday, May 21, 2020 was Memorial Day, and, thus, not a trading day.

[25] *See* Hertz Glob. Holdings, Inc., Current Report (Form 8-K), at 2 (May 16, 2020). The delisting decision by NYSE Regulation was discretionary since Hertz's market capitalization was well above $50 million on at the time. *See* Hertz Global Holdings, Inc. Statistics, YAHOO!: FIN., https://finance.yahoo.com/quote/HTZGQ/key-statistics?p=HTZGQ [https://perma.cc/VZ7U-FVRT] (las visited June 15, 2021) (giving a March 2020 market capitalization near $880 million).

[26] *See* Hertz Glob. Holdings, Inc., *supra* note 25, at 2.

[27] *See* Press Release, N.Y. Stock Exch., NYSE Announces Decision To Suspend and Remove Hertz Global Holdings, Inc. (HTZ) from the List 1

than five months, Hertz traded on the NYSE while also in bankruptcy. Frequently, when the NYSE informs a company that its stock will be delisted, the company decides not to appeal, which tends to lead to immediate suspension of trading until the delisting becomes official.[28]

Despite the continued listing standards promulgated by the NYSE and Nasdaq, both exchanges retain immense discretion in determining whether to delist and suspend bankrupt company stock. Sometimes stock is delisted and suspended from trading immediately upon a company's bankruptcy filing.[29] Other times, it may take years between a bankruptcy filing and delisting.[30] In a study of a sample of

(Oct. 29, 2020), https://s2.q4cdn.com/154085107/files/doc_news/NYSE-Announces-Decision-to-Suspend-and-Remove-Hertz-Global-Holdings-Inc.-HTZ-From-the-List-2020.pdf [https://perma.cc/42DT-8ZDZ]. To successfully appeal, the issuer must show it can become compliant with the NYSE continued listing requirements within eighteen months by submitting a "Plan." LISTED CO. MANUAL § 802.02. The NYSE will rule on appeal within forty-five days after the company submits its Plan. *Id.* An issuer of stock traded on the NYSE that files for bankruptcy may be subject to delisting but nevertheless continue trading on the exchange. *Id.* § 802.01(D).

[28] For example, JCPenney filed for bankruptcy on May 15, 2020. Chris Isidore & Nathaniel Meyersohn, *JCPenney Files for Bankruptcy*, CNN: BUS., https://www.cnn.com/2020/05/15/business/jcpenney-bankruptcy/index.html [https://perma.cc/9AQR-N8UF] (last updated May 15, 2020, 10:21 PM). On May 18, the next trading day, NYSE Regulation announced it was moving to delist JCPenney stock. *NYSE To Suspend Trading in J.C. Penney Company (JCP)*, STREETINSIDER (May 18, 2020, 5:06 PM), https://www.streetinsider.com/Corporate+News/NYSE+to+Suspend+Trading+in+J.+C.+Penney+Company+%28JCP%29/16901254.html?classic=1 [https://perma.cc/L8EJ-YSK8]. That same day, JCPenney announced it would not appeal the decision to delist. *Id.* In response, NYSE Regulation immediately suspended trading in JCPenney's stock. *See id.*

[29] *See supra* note 28 and accompanying text.

[30] For example, on October 5, 2000, Owens Corning filed for bankruptcy, but its stock was only delisted from the NYSE on December 19, 2002, two years after the bankruptcy filing. DON EBERTS & KATIE STEELE, OWENS CORNING, OWENS CORNING MILESTONES 36, 43 (2017), https://www.owenscorning.com/owenscorning.com/assets/sustainability/about-us/our-story/Milestones_4-b4968e25a428aebbaa6022423803a8fab9075abdfdd9681346f7e6229c6e1ffd.pdf [https://perma.cc/KL3J-9UQ5].

firms delisted from the NYSE in 2002, the average time between bankruptcy filing and stock delisting was 131 trading days.[31] Longer waits for delisting occur on Nasdaq.[32] Due to this discretion, bankrupt company stock frequently trades on the NYSE or Nasdaq after the company files for bankruptcy, allowing investors, especially amateurs, to easily trade such stock.

B. Over-The-Counter Markets

If a security is not traded on a national securities exchange, it may still trade on an over-the-counter (OTC) market.[33] The OTC Bulletin Board (OTCBB) and the OTC Markets Group[34] operate within the OTC market.[35] FINRA regulates the OTCBB and only allows securities that meet

[31] Jonathan Macey, Maureen O'Hara & David Pompilio, *Down and out in the Stock Market: The Law and Economics of the Delisting Process*, 51 J.L. & ECON 683, 695 (2008).

[32] For example, on September 14, 2007, the SCO Group (SCO) filed for bankruptcy. Grace Leong, *SCO Stock Delisted from Nasdaq*, DAILY HERALD (Dec. 26, 2007), https://www.heraldextra.com/business/sco-stock-delisted-from-nasdaq/article13107e1f-d384-5be3-8d57-3763827e487d.html [https://perma.cc/223M-S377]. Nasdaq sent SCO a delisting notice on September 18. *Id.* SCO appealed the delisting, and despite the bankruptcy filing and the fact that SCO's common stock had been closing below one dollar for more than a month, Nasdaq did not suspend trading in the stock. *Id.* Trading was only suspended on December 27, 2007, two trading days after SCO lost its appeal. *Id.*

[33] *Over-The-Counter-Market*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/divisions/marketreg/mrotc.shtml [https://perma.cc/EP7V-FTY2] (last modified May 9, 2013).

[34] The OTC Markets Group runs the following exchanges in order of most to least stringent reporting requirements: OTCQX, OTCQB, and the Pink Open Market (Pink Sheets). *See Our Company*, OTC MKTS., https://www.otcmarkets.com/about/our-company [https://perma.cc/E7N4-LLT5] (last visited Nov. 1, 2020).

[35] *Over-The-Counter-Market*, *supra* note 33. Stock that does not trade on an OTC market may trade on what is colloquially known as the "grey market," which contains securities that are not publicly quoted by broker dealers. It is an unofficial, but legal, market. *See Glossary*, OTC MKTS., https://www.otcmarkets.com/glossary [https://perma.cc/N256-RE8U] (last visited Nov. 1, 2020).

certain requirements to be quoted.[36] Unlike national securities exchanges, the OTCBB does not have any financial requirements for securities to be quoted.[37] Still, OTCBB securities must be registered with the SEC (or other appropriate federal agency), and their issuer must be current in its filings.[38]

Of the OTC Markets Group's three exchanges, only the Pink Open Market requires no financial standards or disclosure requirements.[39] As a result, after being delisted, bankrupt companies often trade on the Pink Open Market.[40] As long as the OTC Markets comply with federal securities regulation, bankrupt company stock freely trades on those markets.

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[36] *OTCBB Frequently Asked Questions*, FINRA, https://www.finra.org/filing-reporting/market-transparency-reporting/otcbb/faq [https://perma.cc/T8VS-TFCB] (last visited Nov. 15, 2020).

[37] *Id.*

[38] *Id.*

[39] *Compare Information for Pink Companies*, OTC MKTS., https://www.otcmarkets.com/corporate-services/information-for-pink-companies [https://perma.cc/2LA2-CHJX] (last visited Nov. 15, 2020) (Pink Open Market), *with OTCQB*, OTC MKTS., https://www.otcmarkets.com/corporate-services/get-started/otcqb [https://perma.cc/5F79-Y55Z] (last visited Nov. 15, 2020) (OTCQB). Broker-dealers are required to have at least some information about a stock to quote it publicly. *See OTC Link LLC*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answerspinkhtm.html [https://perma.cc/F95J-LRWG] (last modified May 9, 2013); 17 C.F.R. § 240.15c2-11(a)(1) (2020). The OTCQX and OTCQB do not list securities that are in bankruptcy. *See OTCQX U.S.*, OTC MKTS., https://www.otcmarkets.com/corporate-services/get-started/otcqx-us [https://perma.cc/YSU3-MQ6L] (last visited Nov. 15, 2020); *OCTQB Eligibility Requirements*, *supra*.

[40] *See, e.g.*, Rob Bates, *J.C. Penney Stock To Be Traded on "Pink Sheets"*, JCK (May 26, 2020),

https://www.jckonline.com/editorial-article/jc-penney-traded-on-pink-sheets/ [https://perma.cc/N3MY-33GG] (reporting that JCPenney stock would be traded on the Pink Open Market after its delisting from the NYSE). Bankrupt company stocks that trade have ticker symbols ending in "Q." *Over-The-Counter-Equities*, FINRA, https://otce.finra.org/otce/fifth-char-identifier [https://perma.cc/94DB-KRYP] (last visited Nov. 15, 2020).

C. Government Regulation of the Stock Market

Despite the detailed government regulation concerning trading of public company stock, "[t]here is no federal law that prohibits trading of securities of a company solely because it is in bankruptcy."[41] The SEC and FINRA require companies to file information about securities they wish to trade on the open market.[42] However, there are various exceptions to these requirements that allow stock of companies no longer in business to continue trading.[43]

It is important to understand the scope of authority the SEC and FINRA hold to regulate stock. The SEC may "suspend trading in any security" for as long as ten business days "[i]f in its opinion the public interest and the protection of investors so require."[44] Common reasons the SEC suspends trading include the absence of current or adequate information about a stock, issues with "the accuracy of publicly available information," or concerns about fraud or insider trading.[45] The Supreme Court has ruled, on statutory

[41] Off. of Inv. Educ. & Advoc., SEC, *Investor Bulletin: Bankruptcy for a Public Company*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/oiea/investor-alerts-bulletins/ib_bankruptcy.html [https://perma.cc/Y7DL-5QTD] (last modified Sept. 18, 2019).

[42] *See, e.g.*, FINRA MANUAL r. 6432(a)–(c) (Fin. Indus. Regul. Auth. 2021).

[43] *Defunct Company, Stock Continues To Trade*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answersdfnctcohtm.html [https://perma.cc/3QE9-M3RJ] (last modified Jan. 15, 2013) ("The SEC does not have a rule that prohibits the trading of stock once a company becomes defunct because it does not want to forbid transactions between willing buyers and sellers, including those holding shares in defunct companies[.]"). But the SEC can revoke company stock if the company fails to comply with securities laws. *Id.*

[44] 15 U.S.C. § 78*l*(k)(1)(A) (2018). The SEC may also "suspend all trading on any national securities exchange" for as long as ninety calendar days if it notifies the President and "the President does not disapprove." *Id.* §78*l*(k)(1)(B) (flush language).

[45] Off. of Inv. Educ. & Advoc., SEC, *Investor Bulletin: Trading Suspensions*, U.S. SEC. & EXCH. COMM'N (Dec. 3, 2018), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/investor-5 [https://perma.cc/6LHX-FCDJ]. For example, the SEC has suspended

grounds, that the SEC may not issue successive ten-day trading orders against a company "based upon a single set of circumstances."[46] After a trading suspension concludes, trading on national securities exchanges automatically resumes.[47]

This is not the case for trading on the OTC market.[48] FINRA Rule 6432 requires broker-dealers to have and maintain certain information, pursuant to Exchange Act Rule 15c2-11, in order to initiate a quote of a security in an OTC market.[49] These requirements are "reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices."[50] They are also intended to ensure the availability of accurate information about publicly traded stocks. In addition to providing FINRA with the relevant information, a broker-dealer must "have a reasonable basis for believing that the information is accurate and obtained from reliable sources."[51] However, securities that are delisted from national security exchanges frequently rely on the "piggyback" exception, which allows a broker-dealer to quote a stock that had been previously quoted, to get around this requirement.[52]

trading in over thirty securities due to questions about the accuracy of COVID-19-related information represented by issuers. *See* Steven R. Peikin, *SEC Enforcement Chief Discusses How the Division Is Responding During the Pandemic*, THE CLS BLUE SKY BLOG (May 13, 2020), https://clsbluesky.law.columbia.edu/2020/05/13/sec-enforcement-chief-discusses-how-the-division-is-responding-during-the-pandemic/ [https://perma.cc/46SD-YUK8].

[46] SEC v. Sloan, 436 U.S. 103, 106 (1978).

[47] Off. of Inv. Educ. & Advoc., SEC, *supra* note 45.

[48] *Id.*

[49] FINRA MANUAL r. 6432(a)–(b) (Fin. Indus. Regul. Auth. 2021). To comply with the rule, broker-dealers must file Form 211 with FINRA. FIN. INDUS. REGUL. AUTH., FORM 211, at 1 (2014), https://www.finra.org/sites/default/files/AppSupportDoc/p126234.pdf [https://perma.cc/7WHZ-PELP].

[50] 17 C.F.R. § 240.15c2-11(a) (2020).

[51] *Id.* § 240.15c2-11 prelim. note.

[52] *Cf. Defunct Company, Stock Continues To Trade*, *supra* note 43. Issuers of securities that qualify for the "piggyback" exception need not file Form 211 pursuant to FINRA Rule 6432. *OTCBB Forms & Documentation*, FINRA, https://www.finra.org/filing-reporting/otcbb/otcbb-forms-documentation [https://perma.cc/G3ZW-PJ9L] (last visited June 15, 2021).

Much like the SEC, FINRA can initiate trading halts under certain circumstances, including Foreign Regulatory Halts, Derivative Halts, or Extraordinary Event Halts.[53] An Extraordinary Event Halt initiated by FINRA lasts only until the issue surrounding the halt has been resolved or for ten business days, whichever comes first.[54]

That is not true, however, for bankrupt issuers. FIN. INDUS. REGUL. AUTH., RULE 15C2-11 EXEMPTION REQUEST FORM 2 (2014), https://www.finra.org/sites/default/files/AppSupportDoc/p126235.pdf [https://perma.cc/4AJJ-GSXU]. As of December 28, 2020, a security qualifies for the "piggyback" exception as long as four business days have not gone by without a one-way priced quotation. *See* Publication or Submission of Quotations Without Specified Information, Securities Act Release No. 10,842, Exchange Act Release No. 89,891, 85 Fed. Reg. 68,124, 68,126 (Oct. 27, 2020) (to be codified at 17 C.F.R. pts. 230, 240). In the context of trading suspensions, a broker-dealer may not rely on the "piggyback" exception if a security was subject to a trading suspension by the SEC until sixty calendar days after the end of the suspension. *Id.* The previous rule stated that as long as an OTC security has been quoted during the past thirty days, and during those thirty days the security was quoted on at least twelve days without more than four consecutive business days without quotations, then a broker-dealer could "piggyback" off the previous quotation and need not meet certain filing requirements. *See* 17 C.F.R. § 240.15c2-11(f)(3).

[53] FINRA can issue a Foreign Regulatory Halt if the security is also listed on a foreign securities exchange and the exchange issues a trading halt "because of public interest concerns or for news pending." FINRA MANUAL r. 6440(a)(1). FINRA can issue a Derivative Halt if the security is a derivative or component of another security listed on a national securities exchange or foreign exchange, and that exchange issues a trading halt. *Id.* r. 6440(a)(2). Finally, FINRA can issue an Extraordinary Event Halt if the agency determines that an "extraordinary event has occurred or is" occurring with "a material effect on the market" for the security or "has caused or has the potential to cause major disruption to the marketplace or significant uncertainty in the settlement and clearance process." *Id.* r. 6440(a)(3).

[54] *Id.* r. 6440(b)(3). For Extraordinary Event Halts, it appears FINRA may issue successive ten-day trading halts if the agency determines the extraordinary event is ongoing. *Id.* supp. material .01 (permitting extension of a trading halt if an "extraordinary event is ongoing and [FINRA] determines that the continuation of the halt beyond the prior 10 business day period is necessary in the public interest and for the protection of investors"). It appears that the legality of such successive trading halts, unlike the legality of successive SEC trading suspensions, has not been challenged in court. It also appears that the SEC has more discretion in

Despite the discretion held by the SEC, FINRA, and securities exchanges in their oversight of stock trading, they have similar reactions to bankruptcy filings made by publicly traded companies. On most occasions, once a company files for bankruptcy, the relevant national securities exchange informs the company of its intent to delist the stock.[55] Sometimes this is coupled with an immediate suspension.[56] The company frequently accepts the delisting and begins trading on an OTC market shortly thereafter.[57] The company may appeal the delisting, allowing it to trade on the national securities exchange until an appeal is heard.[58] If the appeal is denied, the company will then move to trading on an OTC market.[59] If the appeal is successful, the stock will continue trading on the national securities exchange.[60] Existing shares of

issuing trading suspensions than FINRA has in issuing trading halts. *Compare id.* r. 6440(a)(3) (Extraordinary Event Halts), *with* 15 U.S.C. § 78*l*(k)(1) (SEC suspensions). It follows that the proposition that FINRA can issue successive trading halts may be dubious.

[55] *See, e.g.*, *NYSE To Suspend Trading in J.C. Penney Company (JCP)*, *supra* note 28 (JCPenney bankruptcy); Leong, *supra* note 32 (SCO bankruptcy); Press Release, Sienna Biopharmaceuticals, Inc., Sienna Biopharmaceuticals Announces Successful Appeal of Nasdaq Delisting Notice (Nov. 14, 2019), https://www.biospace.com/article/releases/sienna-biopharmaceuticals-announces-successful-appeal-of-nasdaq-delisting-notice-/ [https://perma.cc/3K4G-N69H] (Sienna Biopharmaceuticals bankruptcy).

[56] *See, e.g.*, *NYSE To Suspend Trading in J.C. Penney Company (JCP)*, *supra* note 28 (JCPenney suspension).

[57] For example, after announcing it would be delisted from trading on the NYSE, JCPenney said it would move to trading on the Pink Open Market. Bates, *supra* note 40.

[58] *See, e.g.*, *supra* notes 24–27 (Hertz delisting).

[59] *See supra* note 32 (SCO bankruptcy).

[60] For example, on September 17, 2019, Sienna Biopharmaceuticals filed for bankruptcy, Alex Keown, *Sienna Biopharmaceuticals Files for Bankruptcy, Delaying Phase III Psoriasis Trial*, BIOSPACE (Sept. 18, 2019), https://www.biospace.com/article/sienna-biopharmaceuticals-files-chapter-11-delaying-phase-iii-psoriasis-trial/ [https://perma.cc/699X-5PNG], and, on that same day, was informed that it would be delisted from trading on Nasdaq. Press Release, Sienna Biopharmaceuticals, Inc., *supra* note 55. The company appealed, and, on November 12, 2019, Nasdaq granted the appeal, allowing it to continue trading on Nasdaq if it continued to meet certain standards. *Id.* However, Sienna Biopharmaceuticals failed to meet these

companies that trade on an OTC market due to bankruptcy typically do not return to trading on a national securities exchange.[61] Therefore, one's ability to trade stock once a company files for bankruptcy remains relatively unchanged once a company files for bankruptcy. In most situations, equity shareholders receive little to nothing in bankruptcy, and their stock is wiped out.[62]

III. AMATEUR INVESTORS SHOULD NOT TRADE BANKRUPT COMPANY STOCK

With an understanding of private-public regulatory oversight of the stock market in hand, Part III investigates the problem of amateur investors trading in bankrupt company stock. First, it describes the trend of "democratized" trading that started with Robinhood's launch in 2013. As a consequence of this trend, individual trading of bankrupt company stock has increased—especially during the COVID-19 pandemic. With amateur investors dominating the trading of bankrupt company stock, massive drops in stock price disproportionately affect these investors. Second, Part III details how the Bankruptcy Code treats shareholders of bankrupt company stock, leading to poor performance of such stock during and after bankruptcy. Finally, Part III details the story of stock trading during General Motors' bankruptcy, exemplifying how amateur investors make frequent mistakes

standards, and Nasdaq suspended trading on December 17, 2019, with final delisting on February 14, 2020. *Cf.* Sienna Biopharmaceuticals, Inc., Notification of Removal from Listing and/or Registration (Form 25-NSE), at 1 (Feb. 25, 2020) (confirming the delisting).

[61] If a company reorganizes and its shareholders retain control over the firm, the stock may immediately return to trading on a national securities exchange. But this is rare. When a formerly bankrupt company moves its stock from an OTC market to a national securities exchange, pre-bankruptcy equity holders usually receive a small portion of the new stock. *See, e.g.*, *infra* notes 72–79 and accompanying text (discussing the Whiting Petroleum bankruptcy).

[62] In such situations, the stock may continue to trade on an OTC market until its registration is revoked. *See Defunct Company, Stock Continues To Trade*, *supra* note 43.

when investing and that, in some cases, they need to be protected from themselves.

A. Accessibility of Trading and Increased Amateur Investor Trading

Trading stock has become cheaper and more accessible in recent years. Nowadays, anyone with a smartphone and a social security number can trade stock with a few taps. Robinhood and Webull launched commission-free trading apps[63] in 2013 and 2018, respectively.[64] In partial response to these commission-free apps, the brokerage industry has effectively eliminated commissions for trading of most U.S. stocks, including those traded on the NYSE and Nasdaq.[65] Brokerages handle OTC trading differently than trading on national securities exchanges. Robinhood and Webull do not

[63] Robinhood and Webull only charge customers for small regulatory fees imposed by the SEC and FINRA. *Trading Fees on Robinhood*, ROBINHOOD, https://robinhood.com/us/en/support/articles/trading-fees-on-robinhood/ [https://perma.cc/TBW9-4NLG] (last visited Nov. 15, 2020); *Webull Financial Fee Schedule*, WEBULL, https://www.webull.com/pricing [https://perma.cc/SET3-BVQY] (last visited Nov. 15, 2020).

[64] Maggie Fitzgerald, *The End of Commissions for Trading Is Near as TD Ameritrade Cuts to Zero, Matching Schwab*, CNBC, https://www.cnbc.com/2019/10/02/the-end-of-commissions-for-stock-trading-is-near-as-td-ameritrade-cuts-to-zero-matching-schwab.html [https://perma.cc/8M8B-LWWQ] (last updated Oct. 2, 2019, 4:05 PM); Webull (@WebullGlobal), TWITTER (May 21, 2018, 12:07 AM), https://twitter.com/WebullGlobal/status/998414894977376261 [https://perma.cc/DUY7-GC8J].

[65] *See* Fitzgerald, *supra* note 64.

offer OTC trading.[66] Most brokerages charge a fee for OTC trades,[67] though some brokerages offer no-fee OTC trading.[68]

Commentators have attributed the recent spike in amateur retail trading to the rising prevalence of easy-to-use, low cost trading platforms—such as Robinhood—and a marked increase in free time due to COVID-19 lockdowns beginning in 2020.[69] Retail equity trading volume has

[66] *See What Happens if I Own a Stock That's Delisted?*, ROBINHOOD, https://robinhood.com/us/en/support/articles/what-happens-if-i-own-a-stock-thats-delisted/ [https://perma.cc/HYA4-WBLC] (last visited Nov. 15, 2020); *I Bought Stock on the NYSE/ NASDAQ. It Has Now Been Delisted and Is Currently Being Traded on the OTC Markets. What Should I Do?*, WEBULL, https://www.webull.com/hc/categories/fq338?caseCode=personal&visitSource=10 [https://perma.cc/95R7-3JKS] (last visited Dec. 30, 2020). However, investors that own stock before it is delisted can sell, but not buy, the delisted stock. *What Happens If I Own a Stock That's Delisted?*, *supra*; *I Bought Stock on the NYSE/ NASDAQ. It Has Now Been Delisted and Is Currently Being Traded on the OTC Markets. What Should I Do?*, *supra*.

[67] For example, E*Trade and TD Ameritrade charge a base of $6.95 per trade on the OTC market. *Etrade Penny Stock Fees. Etrade OTC Stocks Trading.*, BROKERAGE-REVIEW.COM, https://www.brokerage-review.com/discount-broker/pennystocks/etrade-pennystocks.aspx [https://perma.cc/55Z4-TMXU] (last visited Nov. 15, 2020); *Pricing*, TD AMERITRADE, tdameritrade.com/pricing.page [https://perma.cc/M84H-J46P] (last visited Nov. 15, 2020).

[68] Two such firms are Fidelity, *Fidelity Penny Stocks Fees. Fidelity OTC Stocks Trading.*, BROKERAGE-REVIEW.COM, https://www.brokerage-review.com/discount-broker/pennystocks/fidelity-pennystocks.aspx [https://perma.cc/X2D8-4HSJ] (last visited Nov. 15, 2020) and Charles Schwab, *Charles Schwab Penny Stock Fees. Charles Schwab OTC Stocks Trading.*, BROKERAGE-REVIEW.COM, https://www.brokerage-review.com/discount-broker/pennystocks/charlesschwab-pennystocks.aspx [https://perma.cc/42PH-NXXU] (last visited Nov. 15, 2020).

[69] *See, e.g.*, Annie Nova, *Many Are Chasing the Stock Market by Day Trading in the Pandemic. It Could End Badly*, CNBC, https://www.cnbc.com/2020/09/21/many-people-turn-to-day-trading-in-pandemic-few-will-be-a-winners.html [https://perma.cc/5MED-ST7B] (last updated Sept. 21, 2020, 1:01 PM) ("Bored at home, many people are turning to the stock market and dabbling in day trading for entertainment and profits."); Imani Moise & Elizabeth Dilts Marshall, *Bored Bank Customers Flock to Day-Trading Platforms During Pandemic*, REUTERS (July 17, 2020, 7:14 AM), https://www.reuters.com/article/us-usa-banks-results-wealth/bored-bank-customers-flock-to-day-trading-platforms-during-

skyrocketed since February 2020, including a 522% increase on Robinhood from February 2020 to June 2020.[70] Robinhood users in particular have heavily invested in stocks *after* their issuers file for bankruptcy.[71]

One example is Whiting Petroleum, a major U.S. shale company, which filed for bankruptcy on April 1, 2020.[72] At the time, the company's stock was trading at $0.67 a share, with a little more than 12,000 Robinhood users holding the stock.[73] Three weeks later, on April 24, Whiting Petroleum announced a restructuring agreement that would give old equity holders 3% of the shares in the restructured company.[74] In spite of this

pandemic-idUSKCN24I1EM [https://perma.cc/TD8U-5UCG]; Ben Branch & Min Xu, *Investing in Bankrupt Stocks: Is It a Sweet Trick?*, 2 J. BUS. ECON. & FIN. 33, 45 (2013) (arguing that bankrupt companies' "low stock prices attract unsophisticated investors who rush into this extremely volatile and uncertain market").

[70] Annie Massa & Sarah Ponczek, *Robinhood's Addictive App Made Trading a Pandemic Pastime*, BLOOMBERG: BUSINESSWEEK, https://www.bloomberg.com/news/features/2020-10-22/how-robinhood-s-addictive-app-made-trading-a-covid-pandemic-pastime [https://perma.cc/WQY6-6PM9] (last updated Oct. 22, 2020, 4:12 PM). In the first quarter of 2020, Robinhood added 3 million users to its 10 million previous users. Aziz Abdel-Qader, *Robinhood Tops 13 Million Users, Raises $280M at $8.3B Valuation*, FIN. MAGNATES (Apr. 5, 2020, 8:22 PM), https://www.financemagnates.com/forex/brokers/robinhood-tops-13-million-users-raises-280m-at-8-3b-valuation/ [https://perma.cc/TYQ9-QE72].

[71] *See* Sarah Ponczek & Vildana Hajric, *Hundreds of Thousands of Tiny Buyers Swarm to Insolvency Stock*s, BLOOMBERG (June 9, 2020, 2:23 PM). https://www.bloomberg.com/news/articles/2020-06-09/hundreds-of-thousands-tiny-investors-swarm-to-insolvency-stocks (on file with the Columbia Business Law Review) ("[I]ndividual investors on [Robinhood] have been flocking to bankruptcy-protected companies in droves.").

[72] *See* Collin Eaton & Andrew Scurria, *Whiting Petroleum Becomes First Major Shale Bankruptcy as Oil Prices Drop*, WALL ST. J., https://www.wsj.com/articles/u-s-shale-driller-whiting-petroleum-to-file-for-bankruptcy-11585746800 (on file with the Columbia Business Law Review) (last updated Apr. 1, 2020, 5:38 PM).

[73] Whiting Petroleum Robinhood Holdings, ROBINTRACK, https://robintrack.net/symbol/WLL [https://perma.cc/Z2TK-8AXC] (last visited Mar. 4, 2021).

[74] Whiting Petroleum Corp., Current Report (Form 8-K), exhibit 99.3 (Apr. 24, 2020).

news, Robinhood traders continued to purchase stock in Whiting Petroleum: The number of users holding stock in Whiting Petroleum soared to more than 46,000 unique Robinhood shareholders by August 13, a significant increase of over 260%.[75] On August 31, Whiting Petroleum closed at $0.80 a share.[76] On September 1, Whiting Petroleum exited bankruptcy, and shareholders received one share of new stock for seventy-five shares of old stock.[77] On September 2, Whiting Petroleum's reorganized stock opened at $28 per share.[78] Based on the August 31 stock price of $0.80 per share, old equity holders lost more than 50% once Whiting Petroleum started trading on September 2.[79] Thus, despite an announcement by Whiting Petroleum months before exiting bankruptcy that shareholders would receive only 3% of value in a reorganized company, Robinhood traders continued to

[75] Whiting Petroleum Robinhood Holdings, *supra* note 73. August 13 is last date with Robinhood user data available. *See* Sarah Ponczek, *Robintrack, Chronicler of Day Trader Stock Demand, To Shut*, BLOOMBERG, https://www.bloomberg.com/news/articles/2020-08-08/robintrack-chronicler-of-day-trader-stock-demand-to-shut-down (on file with the Columbia Business Law Review) (last updated Aug. 8, 2020, 8:40 AM) (reporting the end of data tracking). Given that there is a gap in the data between August 13 and August 31, the last date one could exit their position before the stock conversion, it is impossible to know for sure whether Robinhood traders held Whiting Petroleum stock until September 2. Because Robinhood investors initially bought the stock despite Whiting Petroleum's announcement on April 24 that shareholders would only get three percent of the company, it is unlikely that the same traders sold their stock between August 13 and August 31.

[76] WYCO Researcher, *Reality Hits Shareholders of Formerly Bankrupt Whiting Petroleum*, SEEKING ALPHA (Sept. 2, 2020, 7:43 AM), https://seekingalpha.com/article/4372075-reality-hits-shareholders-of-formerly-bankrupt-whiting-petroleum (on file with the Columbia Business Law Review).

[77] Whiting Petroleum Corp., Current Report (Form 8-K), exhibit 99.2, at 2 (Sept. 1, 2020).

[78] Whiting Petroleum Corp. Historical Data, YAHOO!: FIN., https://finance.yahoo.com/quote/WLL/history?p=WLL [https://perma.cc/649M-3WKV] (last visited June 15, 2021).

[79] Old equity holders traded in seventy-five shares for one $28 share. Seventy-five shares at eighty cents are valued at $60; exchanging these for one $28 share, the old equity holders suffered a 53.3% loss of value.

purchase the stock and lost more than half of their investments.

Amateur investors purchase bankrupt company stock while institutional investors tend to shed their equity positions in a company's stock around its bankruptcy filing.[80] These amateur investors are responsible for most purchasing of bankrupt company stock, making up around ninety percent of shareholders post-bankruptcy filing.[81] On average, such "traders are young, relative[ly] less educated, poor, single males, who hold poorly diversified portfolios, and who live in counties with [a] higher non-white percentage of inhabitants, and a higher ratio of Catholics to Protestants, and reside in areas with greater per-capita lottery spend[ing]."[82] Amateur trading of bankrupt company stock is even more pronounced with attention-grabbing companies (companies of whose existence ordinary members of the public are aware).[83] Increased ease of trading in bankrupt company stock both on national securities exchanges and over-the-counter markets,

[80] Yuanzhi Li & Zhaodong (Ken) Zhong, *Investing in Chapter 11 Stocks: Trading, Value, and Performance*, 16 J. FIN. MKTS. 33, 35 (2013).

[81] *See id.*; Luis Coehlo et al., Bankruptcy Sells Stocks. . . But Who's Buying (and Why)? 29 (Apr. 24, 2014) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427770 (on file with the Columbia Business Law Review) (finding in a sample of bankrupt firms that institutional investors own, on average, 11.6% of stock post-bankruptcy filing); Palani-Rajan Kadapakkam & Hongxian Zhang, *Investor Ignorance in Markets for Worthless Stocks*, J. FIN. MKTS., June 2014, at 197, 198 ("The market for bankrupt firm stocks is dominated by individual investors."); *cf. also* Jinwoo Park, Posang Lee & Yun W. Park, *Information Effect of Involuntary Delisting and Informed Trading*, PACIFIC-BASIN FIN. J., Nov. 2014, at 251, 268 (finding that, in Korean markets, prior to delisting, institutional investors are net sellers of delisted firms, while individuals are net buyers).

[82] Coehlo et al., *supra* note 81, at 39.

[83] Tomas Reyes & Nicolas Waissbluth, *Saddled with Attention: Overreaction to Bankruptcy Filings*, 19 INT'L REV. FIN. 787, 788–89, 816 (2019) (using Google search volume as a measure for attention-grabbing companies); *cf. also* Brad M. Barber & Terrance Odean, *All That Glitters: The Effect of Attention and News on the Buying Behavior of Individual and Institutional Investors*, 21 REV. FIN. STUD. 785, 786, 813 (2008) (finding that, in general, "individual investors are more likely to buy attention-grabbing stocks," regardless of whether the news is positive or negative).

combined with amateur investors making up the vast majority of shareholders in bankrupt companies, make it is essential to understand how bankruptcy treats these shareholders and how bankrupt company stock typically performs.

B. The Absolute Priority Rule and Bankrupt Company Stock Performance

The Bankruptcy Code's treatment of shareholders of bankrupt company stock highlights why trading this stock is irrational. An integral part of the Code is the "absolute priority rule." The absolute priority rule requires, absent creditor consent, that secured and unsecured creditors be paid in full before equity shareholders receive any value for their stock.[84] As a result, at the end of bankruptcy unsecured creditors are frequently issued equity in the reorganized company to satisfy their debt, and former shareholders lose all or most of the value of their stock.[85] Bankruptcy Judge

[84] *See Substantive Requirements of Section 1129(b)(1); Cramdown*, *in* 7 COLLIER ON BANKRUPTCY ¶ 1129.03, LexisNexis (Henry J. Sommer & Richard Levin eds., database updated June 2021) ("Except as specifically modified by statute . . . a plan of reorganization may not allocate any property whatsoever to any junior class on account of their interests or claims in a debtor unless all senior classes consent, or unless such senior classes receive property equal in value to the full amount of their allowed claims or the debtor's reorganization value, whichever is less." (emphasis omitted)); 11 U.S.C. § 1129(b)(2)(B) (2018); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 978 (2017) (finding that bankruptcy courts do not have the power to skip creditors that "would have been entitled to payment ahead of general unsecured creditors in a Chapter 11" or Chapter 7 case). Sometimes unsecured creditors consent to a deviation from the absolute priority rule. To prevent delays in bankruptcy confirmation "deviations from an absolute priority rule are common, with shareholders often receiving some value, albeit small, typically at the expense of unsecured creditors." Jeff Hubbard & Kevin Stephenson, *Bankrupt Stocks, Reorganization Plans and Market Efficiency: Are Bankrupt Stocks Overpriced?*, 37 Q. REV. ECON. & FIN. 547, 550 (1997). Even in such situations, shareholders receive much less than the value of their stock. *Id.* at 549.

[85] *See, e.g.*, Michael A. Fagone, Column, *Claims Trading Injunctions and Preservation of NOLs*, AM.

David Jones of the Southern District of Texas described shareholders' situation aptly during a conference in JCPenney's 2020 bankruptcy: "No one ever loses equity in a bankruptcy case . . . . Equity gets lost long before the case is filed."[86]

Research has shown that a strategy of buying bankrupt stock traded on national securities exchanges on the day of a company's bankruptcy filing and holding it until the reorganization sees significant losses of, on average, twenty-five percent of the original investment if sold on the day of reorganization, and losses of more than seventy-six percent if one takes into account final distributions from bankruptcy.[87] Over half of a sample of 295 bankrupt firms from 1978 to 2008 had their stock cancelled or had extinguished pre-filing shares.[88] Another study found that in forty-two bankruptcies from 2009 to 2010 only four (about ten percent) resulted in substantial recoveries for shareholders, while the remaining thirty-eight (about ninety percent) resulted in nominal to no recovery.[89] Jeff Hubbard and Kevin Stephenson speculate that "[m]ost investors purchasing [bankrupt company] stock . . . probably did not understand the bankruptcy process and were therefore either unaware of the plan provisions or

BANKR. INST. J., Feb. 2003, at 32, 32 ("[T]he absolute priority rule . . . often mandates the issuance of stock in satisfaction of creditors' claims. In these circumstances, the reorganization plan will almost always create an ownership change."). One study found that, at most, twelve percent of reorganization plans deviate from the absolute priority rule, and "[i]n at least 82 percent of those cases, equity holders received nothing" from bankruptcy. Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 1 J. LEGAL ANALYSIS 511, 513 (2009).

[86] Jeremy Hill & Steven Church, *Retail Traders Flout Legal Logic by Buying up Bankrupt Stocks*, BLOOMBERG (internal quotation marks omitted), https://www.bloomberg.com/news/articles/2020-06-08/retail-traders-flout-legal-logic-in-dash-for-bankrupt-stocks [https://perma.cc/95TK-PCE6] (last updated June 8, 2020, 7:16 PM).

[87] Branch & Xu, *supra* note 69, at 45.

[88] *Id.* at 34, 36.

[89] Andrew A. Wood, *The Decline of Unsecured Creditor and Shareholder Recoveries in Large Public Company Bankruptcies*, 85 AM. BANKR. L.J. 429, 441 tbl. 1 (2011).

overestimated the likelihood of a favorable plan revision."[90] "Given that corporate insiders and institutional investors *do* understand the reorganization process,"[91] such buying of bankrupt company stock is likely done by amateur investors, not institutional ones. The frequency with which amateur investors buy bankrupt company stock, combined with this class of stock's dismal performance, is concerning.

The combination of the absolute priority rule, the poor performance of bankrupt company stock, and heavy amateur trading in bankrupt company stock leads to the need for regulation of this trading. One may argue that these regulations should be focused on trading on national securities exchanges since there is a higher barrier to OTC trading. As such, one may think that amateur investors do not trade in such markets. This argument is flawed. First, while trading on national securities exchanges is more convenient, investors still have easy access to the OTC markets, with some brokerages offering no-fee trading.[92] Second, given the trend of falling trading costs, it would not be surprising to see trading apps and brokerages expand trading into the OTC markets and charge little to nothing for such trading.[93] Third, OTC investors not infrequently get confused and behave irrationally when trading on the OTC markets.[94] While it is

[90] Hubbard & Stephenson, *supra* note 84, at 554, 556. In a study of bankrupt stocks traded on the NYSE and the American Stock Exchange from 1988 to 1993, Hubbard and Stephenson found these stocks, on average, traded at higher prices after submission of a bankruptcy plan than after bankruptcy. *Id* at 549. In fact, investors that purchased stock immediately after the first plan was filed lost, on average, thirty-eight percent by the end of the bankruptcy. Those investors also had a median loss of eighty-three percent. *Id.* Of the sixty-eight firms studied, twenty-eight (about forty-one percent) traded one month after bankruptcy filing gave shareholders zero dollars. *Id.* at 553. Even after the worst possible outcome was announced—shareholders would receive zero dollars—many companies' stock price increased. *Id.* at 554.

[91] *Id.* at 560.

[92] *See supra* notes 67–68 and accompanying text.

[93] *See supra* notes 63–65 and accompanying text.

[94] Consider "ticker confusion," where investors purchase defunct company stock with a similar ticker symbol to that of a company in the news. A recent example is with Zoom Video Communications (ZM), the

not certain if amateur investors are responsible for these trades on the OTC markets, it is fair to infer that more sophisticated, institutional investors would not behave in this way. To avoid confusion, regulation of bankrupt company stocks should not only come to those traded on national securities exchanges, but also to ones traded on OTC markets.

Bankrupt company stocks trading on OTC markets highlight that unsophisticated investors are actively and irrationally trading on OTC markets. One study examined 264 companies that traded on the OTC markets from 2000 through 2011 after a court confirmed a reorganization plan

popular video communications platform trading on Nasdaq, and Zoom Technologies (ZOOM), a Delaware corporation trading on the OTC market which last reported having its executive offices in China, and had not issued any public disclosures since 2015. Zoom Techs., Inc., Exchange Act Release No. 88,477, 2020 WL 10143344 (Mar. 25, 2020). On March 26, 2020, Zoom Video Communications was trading up 112% year-to-date, due to COVID-19 as people increasingly began working from home, while Zoom Technologies was up almost 900% during the same period. Jessica Bursztynsky, *SEC Pauses Zoom Technologies Trading Because People Think It's Zoom Video*, CNBC, https://www.cnbc.com/2020/03/26/sec-pauses-zoom-technologies-as-traders-confuse-it-with-zoom-video.html [https://perma.cc/4A5C-REKM] (last updated Mar. 26, 2020, 11:58 AM). It appears that investors were confusing the two stocks due to their similar names and ticker symbols. In response, the SEC temporarily suspended trading in Zoom Technologies for ten days until April 9, 2020. *Zoom Technologies*, 2020 WL 10143344 (suspending trading in Zoom Technologies in part, "because of concerns about . . . investors confusing this issuer with a similarly-named NASDAQ-listed issuer"). On April 9, FINRA then imposed a temporary trading halt on the stock and changed the ticker symbol to "ZTNO," allowing trading to resume on April 14. Press Release, Fin. Indus. Regul. Auth., Zoom Technologies, Inc. (ZOOM) Trading Halt & Symbol Change to (ZTNO) (Apr. 10, 2020), https://www.finra.org/sites/default/files/2020-04/UPC_12-2020_ZOOM-ZTNO.pdf [https://perma.cc/4F8D-XFCM].

Such ticker confusion is not uncommon. *See, e.g.*, Vadim S. Balashov & Andrei Nikiforov, *How Much Do Investors Trade Because of Name/Ticker Confusion?*, J. FIN. MKTS., Nov. 2019, at 1, 1–2. One study looked at 254 pairs of stocks that could potentially be confused with one another due to similar ticker symbols. The authors found that around twenty-five percent of the stocks showed statistically and economically significant co-movements in trading. *Id* at 23.

wiping out shareholder recovery from the stock.[95] There were forty-four events where one of those stocks increased at least one cent and $100,000 in associated trading volume could be tied to information about the firm emerging from the bankruptcy process.[96] The problem? At that point, the old stock had been deemed essentially worthless, and new equity had been issued to creditors.[97] This news should have caused the old stock to decrease in value. Rational investors would not have bought such stock.

One illustrative example took place in 2009, when General Motors filed for Chapter 11. GM's assets were split into two companies: Motors Liquidation Company (MLC), which held old GM stock, and new GM, owned by the Canadian and United States governments, the United Auto Workers, and other creditors and bondholders, which controlled GM's valuable assets.[98] GM told investors that MLC stock was essentially worthless.[99] From June 2, 2009 until July 10, 2009, GM's old stock traded over-the-counter under the ticker

[95] Kadapakkam & Zhang, *supra* note 81, at 198.

[96] *Id.* at 208.

[97] *Id.*

[98] *See* Bernard Simon & Richard Milne, *Left To Sift Through GM's Wreckage*, FIN. TIMES (Nov. 10, 2009), https://www.ft.com/content/a3602ade-ce30-11de-a1ea-00144feabdc0 (on file with the Columbia Business Law Review).

[99] Matt Phillips, *GM Common Shares: Even GM Says They're Likely Worthless*, WALL ST. J. (July 2, 2009), https://www.wsj.com/articles/BL-MB-9316 (on file with the Columbia Business Law Review) ("GM management continues to remind investors of its strong belief that there will be no value for the common stockholders in the bankruptcy liquidation process, even under the most optimistic of scenarios. Stockholders of a company in chapter 11 generally receive value only if all claims of the company's secured and unsecured creditors are fully satisfied. In this case, GM management strongly believes all such claims will not be fully satisfied, *leading to its conclusion that GM common stock will have no value*." (emphasis added) (quoting Press Release, Gen. Motors, GM Statement re: GM Stock Price and Volume (July 1, 2009, 11:30 AM)). During bankruptcy, MLC and affiliated entities reported total assets of $1.24 billion with $33.48 billion in total liabilities. *See* Kadapakkam & Zhang, *supra* note 81, at 206 n.17 (citing Motors Liquidation Co., Current Report (Form 8-K), exhibit 99.1, at 22 (Apr. 6, 2010)).

symbol "GMGMQ."[100] Despite the old GM stock being worthless, trading was so active that FINRA halted it because the SEC and FINRA "believe[d] there may be widespread misunderstanding by investors that stock in the 'old' General Motors Corporation (now known as Motors Liquidation Company) is related to the 'new' General Motors Company (new GM)."[101] FINRA allowed trading to resume under the new ticker symbol "MTLQQ."[102] The SEC and FINRA reminded investors that "there is a real possibility that [MTLQQ] stockholders will receive nothing from the[] [bankruptcy] proceedings."[103]

Those advocating for educating amateur investors to prevent them from making irrational stock purchases would expect irrational trading in old GM stock to cease after the ticker symbol change.[104] This was not the case. Despite the ticker change and warnings by the SEC and FINRA, there were ten instances after the ticker symbol changed where the old GM stock increased by twenty percent in daily price with trading volume above $1 million.[105] During each of these ten

[100] *See Investing in a Bankrupt Company: A High Risk Venture*, FINRA, https://www.finra.org/investors/alerts/investing-bankrupt-company-high-risk-venture [https://perma.cc/HBF6-NZXF] (last updated July 14, 2019).

[101] *Id.*

[102] FIN. INDUS. REGUL. AUTH., REGUL. NOTICE 09-37, TRADING IN MOTORS LIQUIDATION COMPANY (FORMERLY KNOWN AS GENERAL MOTORS CORPORATION) 2 (2009), https://www.finra.org/sites/default/files/NoticeDocument/p119356.pdf [https://perma.cc/LFS2-BRZ8].

[103] *See Investing in a Bankrupt Company: A High Risk Venture*, *supra* note 100.

[104] The SEC suspending trade in a stock with a confusing ticker symbol, followed by changing the lesser-known company's ticker symbol, sometimes succeeds in educating confused investors. Shortly after trading resumed in Zoom Technologies, *see supra* note 94, the stock's value dropped over ninety percent. *See* Zoom Technologies Inc. Quotes: Five Years, GOOGLE FIN., https://www.google.com/finance/quote/ZTNO:OTCMKTS?sa=X&ved=2ahUKEwicwZ_w3ZzxAhUiQzABHfyzDhMQ3ecFMAB6BAgCEBo&window=5Y (on file with the Columbia Business Law Review) (last visited June 16, 2021).

[105] Kadapakkam & Zhang, *supra* note 81, at 206.

instances, there was a positive news event about the new GM .[106] For example, on August 16, 2010, more than a year after GM, the SEC, and FINRA said that MTLQQ was essentially worthless, GM completed paperwork for a public offering of their new stock, which did not include MTLQQ.[107] Yet, MTLQQ shares rose 20.2% with a trading volume of $5.6 million, [108] likely because investors still thought MTLQQ's value was tied to the new General Motors.

The data show that unsophisticated traders disproportionately invest in bankrupt company stock, are easily misguided, and behave irrationally. While it is incredibly likely—and in some cases guaranteed—that shareholders will receive nothing in bankruptcy, amateur investors continue trading this stock. One response to the phenomenon is caveat emptor: at most, regulatory agencies should focus on education. Yet, as shown, these education efforts have not been successful.[109] Moreover, it is not unprecedented for the government or the courts to step in to protect investors. The SEC's mission "is to protect investors,"[110] and "FINRA is dedicated to protecting investors."[111] One way these agencies achieve their respective

[106] *Id.* at 207.

[107] *Id.* at 207 tbl 3.

[108] *Id.* Other examples of irrational trading occurred with Kmart, U.S. Airways, and VeraSun Energy Corp. *See id.* at 208–10.

[109] The SEC and FINRA warn investors of the risk of investing in bankrupt company stock on their respective websites. *See, e.g.*, *Bankruptcy: What Happens When Public Companies Go Bankrupt*, *supra* note 2. The SEC could require brokerages to provide pop-up warnings of the risk of investing in bankrupt stock before traders execute these trades. However, it is dubious that a pop-up would contain enough information to deter investors from trading bankrupt stock while simultaneously remaining brief enough that people read the pop-up. *Cf.* Caroline Cakebread, *You're Not Alone, No One Ever Reads Terms of Service Agreements*, BUS. INSIDER (Nov. 15, 2017, 7:30 AM), https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11 [https://perma.cc/DG33-WJT5] ("A . . . survey . . . found that 91% of people consent to legal terms and services conditions without reading them.").

[110] *About the SEC*, *supra* note 1.

[111] *About FINRA*, FINRA, https://www.finra.org/about [https://perma.cc/RPM9-3MWB] (last visited Nov. 20, 2020).

missions is by issuing trade suspensions.[112] While "protecting an investor who has no prepetition relationship with the debtor is not a bankruptcy purpose,"[113] courts have extended protection to unsophisticated creditors as a general matter of policy.[114]

Amateur investors should be protected from irrational trading of bankrupt company stock. In the context of this Note, irrational trading is not simply trading when economic factors would lead an "informed" investor to conclude that a trade is financially irresponsible. Rather, irrational trading requires another factor that all but guarantees investors will not recover value from a stock. A non-bankruptcy example is ticker confusion, where investors purchase stock that has a poor outlook because they mistakenly think they are trading a different stock.[115] As noted, the absolute priority rule in

[112] *See supra* notes 44–46, 53–54 and accompanying text.

[113] *See* Anthony J. Casey & Joshua C. Macey, *The Hertz Maneuver (and the Limits of Bankruptcy Law)*, U. CHI. L. REV. ONLINE (Oct. 7, 2020), https://lawreviewblog.uchicago.edu/2020/10/07/casey-macey-hertz/ [https://perma.cc/R7TD-NCKE].

[114] Section 547 of the Bankruptcy Code is an example of bankruptcy courts "promot[ing] equality of distribution among creditors—one of the Bankruptcy Code's primary goals." Rebecca L. Saitta, *Preference Action Primer: Understanding Section 547 Avoidance Actions*, BANKR. L. NEWS, Spring 2014, at 9, 12. Under certain circumstances, § 547 requires creditors to return payments by debtor made during the time immediately preceding a bankruptcy filing. *See* 11 U.S.C. § 547(b) (2018). One benefit is that this limits a debtor's ability to favor one creditor over another by paying back preferred creditors prior to bankruptcy. A clear example of the bankruptcy courts using discretion to protect unsophisticated creditors took place prior to amendment of the Bankruptcy Code in 1991. In *In re Revere Copper & Brass, Inc.*, the Bankruptcy Court was concerned that sophisticated investors were paying unsophisticated creditors much less than the creditors would receive during bankruptcy. 58 B.R. 1, 2 (Bankr. S.D.N.Y. 1985). In that case, Phoenix Capital Corporation bought creditors' claims for twenty cents on the dollar, even though a potential proposed plan would give claimants sixty-five cents on the dollar. *Id.* at 2–3. "[T]he court [was] concerned that the assignor-creditors ha[d] not been plainly advised of their options." *Id.* at 2. As a result, the court postponed the claim transfers, allowing sellers thirty days to revoke their decision upon new information about the reorganization plan. *Id.* at 3.

[115] *See supra* note 94 (describing ticker confusion).

bankruptcy is a legal mechanism that artificially results frequently in investors recovering no value after bankruptcy.[116]

These situations are distinct from the recent, controversial trade restrictions imposed by brokerages on particular stocks, including GameStop and AMC Entertainment. On January 28, 2021, many brokerages restricted investors from buying these stocks, which were skyrocketing due to amateur investors betting against hedge funds that had heavily "shorted" them.[117] Investors looking to trade these shares may have been ignorant of the economic conditions of the companies in question.[118] However, there were no other factors present that fundamentally jeopardized the chance of investor recovery; that is, there was no "ticker confusion," nor was there a law making it unlikely that investors would recover. Congress, the SEC, and the courts should not simply protect investors from poor economic decisions. They should, however, protect investors when there are non-economic considerations that nearly guarantee there will be no recovery.

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[116] *See supra* notes 84–85 and accompanying text.

[117] *See* Harry Robertson, *Robinhood, Webull, M1, and These Other Platforms Have Resumed Trading of GameStop and AMC Shares*, BUS. INSIDER: MKTS. INSIDER (Jan. 29, 2021, 2:39 PM), https://markets.businessinsider.com/news/stocks/robinhood-webull-m1-reopen-gamestop-stock-trading-2021-1-1030019926 [https://perma.cc/4GEG-LNQT]; Jonathan R. Macey, *Securities Regulation and Class Warfare*, 2021 COLUM. BUS. L. REV. 803–04. Such trading is referred to as a "short squeeze." Shares of GameStop traded at $17.25 on January 4 and climbed to $469.42 on January 28, the day trading was temporarily restricted, a more than 2,600% increase. GameStop Corp. Historical Data, YAHOO!: FIN., https://finance.yahoo.com/quote/GME/history?p=GME [https://perma.cc/7JMX-EJUD] (last visited June 16, 2021).

[118] *See, e.g.*, Adam Epstein, *The Video Game Industry Is Leaving GameStop Behind*, QUARTZ (Jan. 28, 2021), https://qz.com/1965538/why-did-hedge-funds-short-gamestop-in-the-first-place/ [https://perma.cc/HFP6-UYMD] (explaining that hedge funds shorted GameStop due to the changing landscape of the video game industry).

IV. PROTECTING AMATEUR INVESTORS

With evidence indicating amateur investors consistently make poor decisions investing in bankrupt company stock—leading to huge losses—trading in such stock must be regulated to protect these investors. There are three regimes in place to protect these investors: the stock exchanges, regulatory agencies, and the bankruptcy courts. However, none of these regimes has the authority or is in a position to adequately protect these investors. First, national securities exchanges cannot alone protect amateur investors from trading in worthless bankrupt company stock because such investors could still trade this stock over-the-counter. Second, trading suspensions by the SEC and FINRA only last for ten trading days and prevent sophisticated investors from trading with one another. Lastly, bankruptcy courts do not have the authority to prohibit amateur investors' trading. Therefore, Congress must grant one of these regimes authority to adequately protect amateur investors from trading shares of bankrupt firms. While regulatory agencies may appear to be in the best position to implement trading suspensions, the bankruptcy courts are actually better equipped to do so. As a result, this Note proposes an Amendment to the Bankruptcy Code that would grant the bankruptcy courts authority to protect amateur investors from trading in risky bankrupt company stock.

A. The Current Regulatory Regime Is Not Equipped To Adequately Protect Amateur Investors

One may expect the national securities exchanges to be a natural fit to protect amateur investors from trading bankrupt company stock. The exchanges have listing standards that determine which securities are eligible to trade on their exchanges.[119] One proposal would be for the national securities exchanges to automatically suspend trading in and delist a stock once its issuer files for

[119] *See supra* Section II.A.

bankruptcy. This proposal would deviate from the current discretionary rules surrounding suspension and delisting of bankrupt company stock.[120] These changes may protect some amateur investors. However, once delisted, stock typically trades on the OTC markets.[121] In order to protect amateur investors, the OTC markets would also have to prevent such trading. OTC markets would not prevent such trading. The Pink Open Market, where many bankrupt company stocks trade once delisted, prides itself on trading stocks of "distressed, delinquent, and dark companies" and on its minimal regulatory oversight.[122] As such, intervention by national securities exchanges will not adequately protect amateur investors from trading such stock.

With the national securities exchanges unable to effectively protect amateur investors, the federal regulatory regime appears poised to offer protection. The SEC's mission "is to protect investors; maintain fair, orderly, and efficient markets; . . . facilitate capital formation. . . .[; and] to promote a market environment that is worthy of the public's trust."[123] One of the most powerful tools in the SEC's arsenal for protecting amateur investors is the implementation of trade suspensions.[124] It is not uncommon for the SEC to suspend trading in individual stocks to alleviate confusion, like when investors mix up stock ticker symbols.[125] Extending suspensions to trading when amateur investors are confused about the performance of bankrupt company stock is not a

[120] *See supra* notes 29–32 and accompanying text.

[121] *See supra* note 40 and accompanying text.

[122] *Information for Pink Companies*, *supra* note 39.

[123] *About the SEC*, *supra* note 1.

[124] SEC Commissioner Allison Herren Lee recently commented that trade suspensions are "a powerful tool, especially because [they] can be quickly deployed to minimize investor losses." Andrew Ramonas, *Covid-19 Scam Crackdown Prompts Spike in SEC Trading Suspensions*, BLOOMBERG: L. (July 22, 2020, 6:30 AM), https://news.bloomberglaw.com/securities-law/covid-19-scam-crackdown-prompts-spike-in-sec-trading-suspensions (on file with the Columbia Business Law Review) (internal quotation marks omitted).

[125] *See, e.g.*, Zoom Techs., Inc., Exchange Act Release No. 88,477, 2020 WL 10143344 (Mar. 25, 2020).

substantial deviation from the current use of trade suspensions. As already noted, however, these trade suspensions may only last a maximum of ten days and are non-renewable.[126] Therefore, if the SEC were to suspend trading in a company's stock after the company files for bankruptcy, amateur investors would only be protected for ten days.[127] Even if the SEC could suspend trading for more than ten days, doing so would not lead to an ideal outcome. Since SEC trade suspensions are all-or-nothing,[128] there would be no mechanism for investors to sell their shares of bankrupt company stock to institutional investors who want to buy such stock. Investors would be stuck in a holding pattern, unable to unload their stock.[129]

[126] SEC v. Sloan, 436 U.S. 103, 105–06 (1978).

[127] Perhaps even a temporary trade suspension of stock when a company files for bankruptcy would signal to investors not to trade in the bankrupt company stock once the suspension is lifted. However, since amateur investors are already acting irrationally in trading bankrupt company stock, there is little reason to believe a temporary trading suspension would affect their behavior.

[128] *See* 15 U.S.C. § 78*l*(k)(1) (2018). Strictly, the suspension power does not reach "an exempted security," *id.* § 78*l*(k)(1)(A), with the effect that securities acquired in certain small or intrastate offerings might continue to trade. *See id.* § 77c(a)–(b).

[129] The amended "piggyback" exception gives SEC trading suspensions longer-term effect. Under the previous rule, once a trading suspension ended, a stock automatically restarted trading. *See* Off. of Inv. Educ. & Advoc., SEC, *supra* note 45. Now, the amended rule prevents companies from relying on the "piggyback" exception to maintain trading in their stock immediately after a trading suspension concludes. *See* Publication or Submission of Quotations Without Specified Information, Securities Act Release No. 10,842, Exchange Act Release No. 89,891, 85 Fed. Reg. 68,124, 68,126 (Oct. 27, 2020) (to be codified at 17 C.F.R. pts. 230, 240). Even with this amended rule, an SEC trading suspension of bankrupt company stock would have limited long-term effect. It is true that securities with the least publicly available information would not trade immediately after a trading suspension concludes because a market maker would unlikely be willing to vouch for such stock. However, trading suspensions would end near the beginning of a bankruptcy case (ten days after filing), and most companies, especially well-known corporations in which amateur traders invest, would likely provide the SEC with up-to-date information about the company, allowing the stock to trade without the benefit of the "piggyback" exception. *See* 17 C.F.R. § 240.15c2-11(a)(1)(i) (2020). As a

With the national securities exchanges and the SEC unable to protect amateur investors in trading bankrupt company stock, the bankruptcy courts should step in to do so. One may argue that the bankruptcy courts already have the authority to restrict the sale of bankrupt company stock to protect amateur investors. Their authority could come from the automatic stay power,[130] which has been used to restrict trading in certain stock, or from the court's general injunctive power.[131] However, neither of these sources of authority actually permit the bankruptcy courts to restrict the sale of bankrupt company stock to protect investors.

Such a trade restriction would not be the first bankruptcy court action to prevent stock from being traded. The IRS allows corporations to carry forward net operating losses (NOLs) to offset future income[132] and tax credits to lower future tax liabilities.[133] However, an ownership change limits, based on the pre-ownership-change company value, the ability of a company to use NOLs to offset future income.[134] Often in a reorganization, creditors gain ownership of a debtor, triggering a change in ownership, which would prevent the debtor from utilizing the NOLs. In response, Congress crafted two exceptions to protect a debtor's NOLs in bankruptcy even if ownership of the company changes pursuant to confirmation.[135]

result, the SEC suspending trade in stock once its issuer files for bankruptcy would not be sufficient to protect amateur investors.

[130] 11 U.S.C. § 362 (2018).

[131] *Id.* § 105.

[132] 26 U.S.C. § 172(b) (2018).

[133] *Id.* § 39.

[134] *Id.* § 382(a). The annual limit is usually capped at four to five percent of the value of a company's stock. Mark A. Speiser et al., *NOLs: The Policy Conflicts Created by Trading Orders*, COM. LENDING REV., May-June 2005, at 21, 22.

[135] One exception allows a company to utilize NOLs based on the value of the stock *after* confirmation, as opposed to the much lesser value of the pre-confirmation stock. 26 U.S.C. § 382(*l*)(6); *See* Speiser et al., *supra* note 134, at 22. Alternatively, if existing shareholders and qualified creditors retain control of at least fifty percent of ownership of a company after reorganization, there is no limit on taking NOLs. 26 U.S.C. § 382(*l*)(5); *see also* Speiser et al., *supra* note 134, at 22–23.

NOLs are not preserved, however, when an ownership change happens before confirmation—for example, through a stock sale during bankruptcy.[136] Such ownership changes could cost debtors billions in NOLs and hundreds of millions in tax savings.[137] In response, bankruptcy courts have issued trading injunctions restricting the sale of certain bankrupt company stock. In *In re Prudential Lines, Inc.*, the debtor's parent, PSS Steamship Company, attempted to take a worthless stock deduction, which would have resulted in a loss of $74 million in tax savings for the reorganized debtor.[138] The bankruptcy court prevented the worthless stock deduction, and the Second Circuit affirmed. The bankruptcy court classified the NOLs as property of the estate, subjecting it to the automatic stay and preserving the NOLs for the reorganized debtor.[139] Courts have extended *Prudential Lines* to restrict certain stock transfers during bankruptcy to prevent ownership changes and to preserve NOLs for the

[136] The Internal Revenue Code defines an ownership change for the purpose of preservation of NOLs as an ownership shift involving a five-percent shareholder such that the percentage of the stock of the company owned by the five-percent shareholders increases by more than fifty percentage points over the lowest percentage of stock owned by such shareholders during a specific period of time. 26 U.S.C. § 382(g)(1). The Internal Revenue Code puts all non-five-percent shareholders into one bucket, which itself may be treated as a five-percent shareholder. *Id.* § 382(g)(4). In practice, this means an ownership change is triggered if a five-percent stockholder sells their stock to get to under five-percent ownership, or if a non-five-percent shareholder purchases enough stock to own five-percent of the company.

[137] *See*, *e.g.*, Fagone, *supra* note 85, at 32 (observing that an ownership change in *In re Conseco, Inc.* would have limited the debtor to $7 million of NOL carryforwards yearly, eliminating over $1 billion in NOLs, or $392 million in tax savings); Interim Ord. Under 11 U.S.C. § 105(a), 362(a)(3) & 541(A) Limiting Certain Transfers of, & Trading in, Equity Ints. of the Holding Co. Debtors & (B) Approving Related Notification Procs., Conseco, Inc. v. Adams (*In re* Conseco Inc.), 318 B.R. 425 (Bankr. N.D. Ill. 2004) (No. 02 B 49672) (restricting equity trading under the automatic stay power).

[138] Off. Comm. of Unsecured Creditors v. PSS Steamship Co. (*In re* Prudential Lines, Inc.), 107 B.R. 832, 833–34 (Bankr. S.D.N.Y. 1989), *aff'd*, 119 B.R. 430 (S.D.N.Y. 1990), *aff'd*, 928 F.2d 565 (2d Cir. 1991).

[139] *Prudential Lines*, 107 B.R. at 841–42.

estate.[140] Such trading injunctions are typically structured to prevent any five-percent shareholder from increasing its ownership or to prevent any entity or person from becoming a new five-percent shareholder prior to confirmation.[141]

Courts' willingness to issue trading injunctions preventing the sale of certain stock during bankruptcy shows that courts are comfortable implementing trading suspensions. This familiarity with exercising trading injunctions could, in part,

[140] *See, e.g.*, *In re* Se. Banking Corp., No. 91-14561, 1994 WL 1893513, at *2 (Bankr. S.D. Fla. July 21, 1994)

(preventing through the automatic stay power sales resulting in an ownership change); *In re* Phar-Mor, Inc., 152 B.R. 924, 926–27 (Bankr. N.D. Ohio 1993) (enforcing the automatic stay to prevent stock sales between certain shareholders).

[141] *See* Fagone, *supra* note 85, at 33. For example, in FLYi, the bankruptcy court issued a trading injunction to preserve NOLs for the estate. The court required shareholders owning approximately 4.5% of common stock in debtor who wished to increase their share of stock, or those seeking to purchase stock to become a 4.5% shareholder, to notify the court. The court would then give the debtor a chance to object to the stock transfer, and the court would decide whether to allow the transfer. The court ordered that "[a]ny purchase, sale, or other transfer of equity securities in the Debtors in violation of the[se] [and other] procedures . . . shall be null and void and shall confer no rights on the transferee." Notice of (A) Entry of an Interim Ord. Establishing Notification and Hearing Procs. for Trading in Equity Sec. & (B) Hearings To Consider Entry of Final Ord. on Such Notification and Hearing Procs. & Similar Procs. for Trading in Claims Against the Debtors, *In re* FLYi, No. 05-20011 (Bankr. D. Del. Mar. 15, 2007) (emphasis omitted). In many cases, courts require the debtor to post security to compensate large shareholders for the inability to sell their stock. *See, e.g.*, *In re* UAL Corp., 412 F.3d 775, 779 (7th Cir. 2005) (demanding such security). In such situations, if the debtor's stock price decreases before the injunction is lifted, the large shareholders would be able to recover for the difference in price. Posting such security is not always required by courts. *See* State St. Bank & Tr. Co. v. UAL Corp., No. 03 C 2328, 2004 WL 2452715, at *1 (N.D. Ill. Oct. 28, 2004), *vacated on other grounds and remanded sub nom. In re* UAL Corp., 412 F.3d 775. In this case, the bankruptcy court did not require the debtor to post a bond for a stock trade injunction. While the Seventh Circuit allowed the injunction to stand, it admonished the bankruptcy court for not requiring a bond, saying the justification for the injunction was "weak enough to make a bond or adequate-protection undertaking obligatory before a bankruptcy judge may forbid investors to sell their stock on the market." *In re UAL*, 412 F.3d at 779.

justify courts being tasked with issuing such injunctions to prevent sale of bankrupt company stock to protect amateur investors. However, courts' authority to issue trading injunctions to preserve debtors' NOLs does not extend to injunctions to protect amateur investors. Courts' ability to issue injunctions to preserve debtors' NOLs stems from classifying the NOLs as "property of the estate" under § 541 of the Bankruptcy Code and then keeping that property within the estate under the automatic stay.[142] If certain stock trading is allowed, the debtor would lose full access to its NOLs, and money would actually be lost from the estate. For example, without a trading injunction in *Conseco*, the debtor may have lost $392 million in tax savings.[143] Trading injunctions to protect amateur investors, conversely, do not protect property of the estate. As long as it does not affect the preservation of NOLs, a stock sale from Person *A* to Person *B*, during bankruptcy, does not affect the debtor in any way. It does not increase or decrease the value of the estate. For example, a Whiting Petroleum stock sale from a sophisticated investor to an amateur investor during bankruptcy is not part of the property of Whiting Petroleum's estate. Without amateur investors' shares in the debtor qualifying as property of the estate, the automatic stay cannot be applied to prevent those stock transfers.[144] Therefore, although preserving NOLs and protecting amateur investors require the court to issue trading injunctions, only the preservation of NOLs is allowed under the automatic stay.

Courts could search for authority to prevent stock trading to protect amateur investors in their § 105 injunctive power. Section 105 gives bankruptcy courts the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[145] Bankruptcy courts

[142] Off. Comm. of Unsecured Creditors v. PSS Steamship Co. (*In re* Prudential Lines Inc.) (*Prudential Lines III*), 928 F.2d 565, 571 (2d Cir. 1991).

[143] Fagone, *supra* note 85, at 32.

[144] *See* 11 U.S.C. § 362(a) (2018) (automatic stay); *id.* § 541(a) (property of the estate).

[145] *Id.* § 105(a).

must consider traditional requirements for an injunction to grant relief: (1) likelihood that the movant will prevail on the merits,[146] (2) irreparable injury if the injunction is not granted,[147] (3) balance of the harms,[148] and (4) consideration of public policy.[149] One should keep in mind that these are merely four factors to be considered, and they "simply guide the discretion of the court; they are not meant to be rigid unbending requirements."[150]

The courts' injunctive power must be combined with another section of the Bankruptcy Code or promote the purpose of the Code. In fact, Congress contemplated that courts would issue such injunctions "'to stay actions not covered by the automatic stay,' with the courts determining . . . 'whether a particular action which may be harming the estate should be stayed.'"[151] Section 105 gives the bankruptcy courts broad equitable powers, but it "does not give the bankruptcy court carte blanche."[152] "A § 105 injunction must

[146] Likelihood that the movant will succeed on the merits can be shown, for example, by convincing the court that the likelihood of a plan of reorganization will be confirmed or that litigation defense will be successful. *Section 105 Injunctions Generally*, *in* 2 COLLIER ON BANKRUPTCY, *supra* note 84, ¶ 105.03.

[147] As *Collier* points out, "The key, however, is the harm to the estate, not to the individual." *Id.* The movant must show that without an injunction irreparable harm "is *likely*." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (emphasis added).

[148] This is particularly important for the bankruptcy courts, which may limit the scope of an injunction to minimize the harm to an enjoined party. *Section 105 Injunctions Generally*, *supra* note 146.

[149] Many courts find a company reorganizing satisfies this prong. *See id.*

[150] Am. Imaging Servs., Inc. v. Eagle-Picher Indus. (*In re* Eagle-Picher Indus.), 963 F.2d 855, 859 (6th Cir. 1992) (citing Friendship Materials, Inc. v. Mich. Brick, Inc., 679 F.2d 100, 102 (6th Cir. 1982)).

[151] Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 969 (quoting S. REP. NO. 95-989, at 51 (1978)).

[152] Caesars Ent. Operating Co. v. BOKF, N.A. (*In re* Caesars Ent. Operating Co.), 808 F.3d 1186, 1188 (7th Cir. 2015); *see also In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 791 F.2d 524, 528 (7th Cir. 1986) ("The fact that a [bankruptcy] proceeding is equitable does not give the judge a

be consistent with the rest of the Bankruptcy Code."[153] The bankruptcy courts cannot grant "substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity,"[154] or conflict with another section of the Code.[155]

Despite bankruptcy courts' broad injunctive powers, these courts do not have the authority to grant an injunction preventing trading in bankrupt company stock. Such injunctions do not combine with another section of the Bankruptcy Code, nor do they promote the purpose of the Code. The purpose of the injunction—to protect amateur investors—is incredibly important. But the Code does not recognize that purpose, which goes beyond implementing an ordered process to creditor collection, increasing the value of the debtor's estate, and reorganizing distressed companies.[156] As such, for the bankruptcy courts to protect amateur investors by restricting the trade of bankrupt company stock, Congress must grant them the authority to do so.

B. Congress Should Amend the Bankruptcy Code To Grant It the Authority To Restrict Trading in Certain Bankrupt Company Stock

The bankruptcy courts are in the best position to determine whether unencumbered trading should continue in

free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be."), *superseded by statute on other grounds*, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 362, 92 Stat. 2549, 2570–72 (codified as amended at 11 U.S.C. § 362 (2018)).

[153] Feld v. Zale Corp. (*In re* Zale Corp.), 62 F.3d 746, 760 (5th Cir. 1995) (citing Chiasson v. J. Louis Matherne & Assocs. (*In re* Oxford Mgmt., Inc.), 4 F.3d 1329, 1334 (5th Cir. 1993)).

[154] *Overview of Section 105*, *in* 2 COLLIER ON BANKRUPTCY, *supra* note 84, ¶ 105.01 (internal quotation marks omitted) (quoting United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986)).

[155] *Id.* (citing Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988)).

[156] *Cf.* Adam J. Levitan, *Bankruptcy Markets: Making Sense of Claims Trading*, 4 BROOK. J. CORP. FIN & COM. L. 67, 68, 71–72 (2009) (identifying conventional views of the bankruptcy process).

a company's stock once it files for bankruptcy. Congress has already granted the bankruptcy courts immense power that requires judges to make complex economic judgments about the future.[157] As previously noted, the bankruptcy courts already routinely issue trading injunctions preventing the sale of stock to preserve bankrupt company NOLs.[158]

The two broadest powers the bankruptcy courts exercise arise under §§ 362 and 105 of the Bankruptcy Code. Section 362 provides for the automatic stay, which enables

> a broad stay of litigation, lien enforcement and other actions, judicial or otherwise that are attempts to enforce or collect prepetition claims. It also stays a wide range of actions that would affect or interfere with property of the estate, property of the debtor or property in the custody of the estate.[159]

The court may also exercise broad equitable power under section 105.[160]

Beyond these injunctive powers, courts also must make complex economic decisions about the future outlook of

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[157] *See, e.g.*, *Overview of Section 105*, *supra* note 154 (section 105 power); *Overview of Section 362*, *in* 3 COLLIER ON BANKRUPTCY, *supra* note 84, ¶ 362.01 (section 362 power); Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 ARIZ. ST. L.J. 793, 794 (2003).

[158] *See supra* notes 137–141 and accompanying text.

[159] *Overview of Section 362*, *supra* note 157; *see also* 11 U.S.C. § 362(a)–(b) (2018) (setting forth the breadth and limits of the automatic stay).

[160] *See* 11 U.S.C. § 105(a); *supra* notes 145–155 and accompanying text. In their equitable discretion, some courts have held that bankruptcy courts have the power to find parties in civil contempt, including imposing incarceration. *See, e.g.*, *In re* Duggan, 133 B.R. 671, 672–73 (Bankr. D. Mass. 1991). The bankruptcy courts can enjoin collection against third parties such as guarantors, *see, e.g.*, Caesars Ent. Operating Co. v. BOKF, N.A. (*In re* Caesars Ent. Operating Co.), 808 F.3d 1186, 1190–91 (7th Cir. 2015), and sureties, *see, e.g.*, Celotex Corp. v. Edwards, 514 U.S. 300, 309–11 (1995). Moreover, bankruptcy courts have broad powers to act sua sponte, such as by re-opening cases and reversing previous decisions without further hearing. *See* 11 U.S.C. §§ 105(a), 350(b); *In re* Weinstein, 217 B.R. 5, 8–9 (D. Mass 1998).

debtors. For example, courts may dismiss or suspend a case filed under the Bankruptcy Code, a decision that cannot be reviewed on appeal.[161] Congress gave the courts broad discretion to calculate whether there is a reasonable likelihood that the debtor will survive in order to determine whether to convert or dismiss a Chapter 11 case. In other words, courts must determine "whether the debtor's business prospects justify continuance of the reorganization effort."[162] The courts also estimate uncertain claims. The courts must estimate a "contingent or unliquidated claim" that "would unduly delay the administration of the case," as well as claims to "any right to payment arising from a right to an equitable remedy for breach of performance."[163] Limited only by substantive state law, the Federal Rules of Bankruptcy Procedure, and the Federal Rules of Evidence, bankruptcy courts may estimate a claim in whatever way the judges see fit.[164] Bankruptcy judges are given immense responsibility in estimating claims within the context of mass tort bankruptcy cases. In such cases, courts may approve the creation of claims trusts that limit tort claims to assets allocated to that trust.[165]

[161] 11 U.S.C. § 305(c).

[162] *Conversion to Chapter 7 or Dismissal for Cause; § 1112(b)*, *in* 7 COLLIER ON BANKRUPTCY, *supra* note 84, ¶ 1112.04 (collecting cases); *see also* Tenn. Publ'g Co. v. Am. Nat'l Bank, 299 U.S. 18, 22 (1936) ("However honest in its efforts the debtor may be, and however sincere its motives, the District Court is not bound to clog its docket with visionary or impractical schemes for resuscitation.").

[163] 11 U.S.C. § 502(c).

[164] *Contingent or Unliquidated Claims; § 502(c)*, *in* 4 COLLIER ON BANKRUPTCY, *supra* note 84, ¶ 502.04 ("Courts have significant leeway to determine the manner in which claims are estimated, as section 502(c) does not provide a set procedure." (first citing *In re* N. Am. Health Care, Inc., 544 B.R. 684, 689 (Bankr. C.D. Cal. 2016); and then citing *In re* Farley, Inc., 146 B.R. 748, 753 (Bankr. N.D. Ill. 1992)). "Congress has not precisely defined the mode or method of claim estimation . . . . Instead, it has left the particular mode or method of claim estimation to a bankruptcy court's sound discretion[.]" *N. Am. Health Care*, 544 B.R. at 689. In fact, such estimations may only be overturned on appellate review for abuse of discretion. Bittner v. Borne Chem. Co., Inc., 691 F.2d 134, 136 (3d Cir. 1982).

[165] *See* Kane v. Johns-Manville Corp., 843 F.2d 636, 640, 649–50 (2d Cir. 1988); *Contingent or Unliquidated Claims; § 502(c)*, *supra* note 164.

Bankruptcy judges must then estimate the amount of assets that should fund the trust.[166] These are just a few examples of the decisions bankruptcy judges must make within this context.[167]

Bankruptcy judges ultimately must decide whether a reorganization plan is likely to succeed.[168] As the Ninth and Tenth Circuits explain, "[t]he purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation."[169] Courts have considered the following broad factors when deciding whether a plan may succeed:

> (1) the adequacy of the debtor's capital structure;
> (2) the earning power of its business;
> (3) economic conditions;
> (4) the ability of the debtor's management;
> (5) the probability of the continuation of the same management; and
> (6) any other related matters which determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[170]

[166] *Contingent or Unliquidated Claims; § 502(c)*, *supra* note 164 (providing examples of different methods bankruptcy courts have used to estimate mass tort claims).

[167] Other decisions bankruptcy judges make include finding that the number of claims cannot be forecasted, finding whether the absence of a plan to pay for claims would threaten an ability "to deal equitably with future claims," and determining whether the debtor would be threatened by assertion of future injury claims. *See* 11 U.S.C. § 524(g)(2)(B)(ii)(I)–(III).

[168] *See* 11 U.S.C. § 1129(a)(11) ("Confirmation of the plan [is impermissible unless it] is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.").

[169] Travelers Ins. Co. v. Pikes Peak Water Co. (*In re* Pikes Peak Water Co.), 779 F.2d 1456, 1460 (10th Cir. 1985) (internal quotation marks omitted) (quoting Pizza of Haw., Inc. v. Shakey's, Inc. (*In re* Pizza of Haw., Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985)).

[170] *Substantive Requirements of Section 1129(a); Consensual Confirmation*, *in* 7 COLLIER ON BANKRUPTCY, *supra* note 84, ¶ 1129.02

These are significant economic determinations that Congress has tasked the bankruptcy courts with making. As such, Congress has already determined that bankruptcy judges have the expertise to make quick, difficult economic forecasts about debtors' financial outlooks.

Therefore, the bankruptcy court should be tasked with protecting unsophisticated, amateur investors by selectively restricting trading of bankrupt company stock. The court must already determine from the outset of the case whether a debtor has a chance at rehabilitation. The court should also be in a position to gauge whether equity shareholders will be able to recover and to examine whether, based on a debtor's popularity and notoriety, amateur investors would irrationally purchase the stock. Moreover, unlike a unilateral SEC or FINRA trading restriction, the bankruptcy process is adversarial, allowing debtors, creditors, or equity shareholders to argue against such trading restrictions. Importantly, if a party disagrees with the court's decision, it may appeal the decision. By including the SEC, FINRA, and the United States Trustee in the adversarial process, the court can benefit from these offices' expertise when considering restriction of stocks that amateur investors would be especially prone to irrationally purchasing.[171]

(quoting *In re* Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 226–27 (Bankr. D.N.J. 2000)).

[171] Some may argue that the SEC, and not the bankruptcy courts, should be tasked with issuing trading injunctions to protect amateur investors, especially since its mission is "to protect investors." *About the SEC*, *supra* note 1. Moreover, the SEC has historically reviewed the likelihood that shareholders will recover any value from the bankruptcy to determine whether to recommend to the United States trustee that an equity committee should be formed to represent such shareholders' interest. Alistaire Bambach & Samuel R. Maizel, *The SEC's Role in Public Company Bankruptcy Cases Where There Is a Significant Enforcement Interest*, 2005 ANN. SURV. BANKR. L. 99, 100. It should be noted, though, that the SEC's current involvement in such determinations is in an advisory role. *Id.*

Surely, the SEC's mission and expertise demand that it be part of the injunction process to protect amateur investors. This is why this Note's proposal includes the SEC as a party in interest when a court determines whether to issue a trading injunction. *See* Part VI app., § (b). But the SEC's expertise does not justify it unilaterally deciding whether to issue an

Opponents of these trading injunctions may argue they are too speculative. First, the court has to speculate that amateur investors will attempt to purchase the stock in significant numbers to qualify as cause for concern. Second, the court must estimate that shareholders will receive little to nothing as part of the bankruptcy. However, it is not actually so speculative that amateur investors will try to purchase significant shares in a debtor's stock, especially when the bankrupt company is well known. As noted, a large percentage of shareholders of bankrupt companies receive little value as part of the reorganization.[172] If anything, it would be speculative to think that shareholders would receive sufficient value from such stock.

Even if such determinations are speculative, this should not preclude trading injunctions under the proposed Amendment. Bankruptcy courts do not require one-hundred percent certainty when making determinations that may result in a trading suspension. For example, when restricting trade to preserve a debtor's NOLs, courts consider the NOLs property of the estate,[173] even though their value depends on the debtor's future income, against which it seeks to apply the NOLs.[174] In *Prudential Lines*, the Second Circuit opined that

injunction. Empowering the bankruptcy courts ensures that the process is adversarial. The inclusion of the bankruptcy courts provides the government, debtors, creditors, shareholders, and others with the opportunity to have their voices heard. Of course, Congress could create a robust adversarial process where the SEC would decide whether to restrict trade in such stock. But the procedural simplicity of using the existing adversarial setting that debtors already utilize during bankruptcy—the court—is undoubtedly preferable. It is preferable especially because the court would likely already be aware of the facts necessary to make an informed decision on an injunction due to its existing role in the bankruptcy process. Moreover, using the court limits the ability of a presidential administration to unilaterally issue a policy categorically allowing or dismissing these injunctions.

[172] *See supra* notes 87–90 and accompanying text.

[173] *See In re* Phar-Mor, Inc., 152 B.R. 924, 926 (Bankr. N.D. Ohio 1993).

[174] *See* Off. Comm. of Unsecured Creditors v. PSS Steamship Co. (*In re* Prudential Lines, Inc.), 107 B.R. 832, 834–35 (Bankr. S.D.N.Y. 1989), *aff'd*, 119 B.R. 430 (S.D.N.Y. 1990), *aff'd*, 928 F.2d 565 (2d Cir. 1991).

"[t]he speculative nature of carryforwards does not place them outside the definition of property of the estate."[175] Despite this speculative nature, the Second Circuit affirmed the bankruptcy court's order preventing the debtor from taking a worthless stock deduction to preserve NOLs.[176] Courts are also willing to prevent trading of certain bankrupt company stock to preserve a debtor's NOLs on the basis that none of the affected parties have "stated any intent to sell their stock, and Debtors have not shown that a sale is pending which would trigger [an] ownership change."[177]

This is not to say that courts will never issue trading injunctions on bankrupt company stock that turns out to be valuable. In fact, the inspiration for this Note was the (at the time) seemingly reckless investment by amateur investors in Hertz stock after the company filed for bankruptcy. On May 22, 2020, Hertz filed for Chapter 11 bankruptcy with roughly $19 billion in debt.[178] As it filed for bankruptcy, Hertz traded at $2.84 per share on the NYSE.[179] After the filing, Hertz's stock price dropped precipitously, closing at $0.55 cents per share on May 26.[180] While sophisticated investors like Carl Icahn[181] were liquidating their positions in Hertz, amateur

[175] Off. Comm. of Unsecured Creditors v. PSS Steamship Co. (*In re* Prudential Lines, Inc.) (*Prudential Lines III*), 928 F.2d 565, 572 (2d Cir. 1991).

[176] *Id.* at 575.

[177] *Phar-Mor*, 152 B.R. at 927.

[178] Alexander Gladstone & Nora Naughton, *Rental-Car Company Hertz Files for Bankruptcy*, WALL ST. J. (May 22, 2020), https://www.wsj.com/articles/hertz-preparing-bankruptcy-filing-as-soon-as-friday-night-sources-say-11590182538 (on file with the Columbia Business Law Review).

[179] Hertz Global Holdings Inc. Quotes: Five Years, GOOGLE: FIN., https://www.google.com/finance/quote/HTZGQ:OTCMKTS?window=5Y (on file with the Columbia Business Law Review) (last visited June 17, 2021).

[180] Lou Whiteman, *Why Hertz Global Holdings Shares Crashed Today*, THE MOTLEY FOOL (May 26, 2020, 5:41 PM), https://www.fool.com/investing/2020/05/26/why-hertz-global-holdings-shares-crashed-today.aspx [https://perma.cc/E9M3-J374].

[181] Theron Mohamed, *Billionaire Investor Carl Icahn Dumped All of His Hertz Shares at an Almost $2 Billion Loss After the Car-Rental Giant's Bankruptcy*, BUS. INSIDER: MKTS. INSIDER (May 28, 2020, 4:51 AM),

investors on the commission-fee securities trading platform Robinhood started purchasing the company's stock.[182] Interest in Hertz's stock was so intense that the company asked the bankruptcy court for approval to sell up to $1 billion in new shares.[183] In its filing, Hertz explicitly acknowledged its stock may be worthless.[184] The bankruptcy court approved the sale.[185] However, Hertz halted the sale after issuing only $29 million in new shares because the SEC had "comments on [Hertz's] disclosure."[186] On October 30, the day after Hertz's

https://markets.businessinsider.com/news/stocks/investor-carl-icahn-sells-entire-hertz-stake-2-billion-loss-2020-5-1029240688 [https://perma.cc/FS2C-D5LP] (reporting Icahn sold his thirty-nine percent stake in Hertz at a nearly $2 billion loss).

[182] On the day of Hertz's bankruptcy filing, nearly 44,000 Robinhood users held equity in the company. Hertz Robinhood Holdings, ROBINTRACK, https://www.robintrack.net/symbol/HTZ [https://perma.cc/8J3Y-RM7Y] (last visited Feb. 16, 2021). After the bankruptcy, Robinhood traders increased their positions in Hertz, until a peak of 170,822 unique Robinhood users held stock in the company on June 13. *Id.* On August 13, the last date with such data available, roughly 137,000 unique Robinhood traders owned Hertz stock. *Id.* On August 13, 2020, Robinhood stopped providing data that Robintrack, an unaffiliated website, used to provide hourly updates on Robinhood user positions in stock. Robinhood says it stopped providing the data because "it is not representative of how our customer base uses Robinhood," a reference to Robintrack's data "paint[ing] Robinhood as being full of day traders" acting irrationally. *See* Ponczek, *supra* note 75 (internal quotation marks omitted).

[183] Becky Yerak, *Bankrupt Hertz Wants To Sell Up to $1 Billion in New Shares*, WALL ST. J., https://www.wsj.com/articles/bankrupt-hertz-wants-to-sell-up-to-1-billion-in-new-shares-11591917121 (on file with the Columbia Business Law Review) (last updated June 11, 2020, 8:11 PM). This may be the first time a debtor issued stock in bankruptcy. *See* Casey & Macey, *supra* note 113.

[184] Hertz Glob. Holdings, Inc., *supra* note 3.

[185] *See* Dave Michaels, *Bankrupt Hertz Suspends $500 Million Stock Sale as SEC Poses Questions on Deal*, WALL ST. J., https://www.wsj.com/articles/bankrupt-hertz-suspends-500-million-stock-sale-as-sec-poses-questions-on-deal-11592424158 (on file with the Columbia Business Law Review) (June 17, 2020, 5:19 PM). Bankruptcy courts must approve most business decisions that are not considered day-to-day operations. *See* 11 U.S.C. § 363(b)(1) (2018); *Bankruptcy: What Happens When Public Companies Go Bankrupt*, *supra* note 2.

[186] Michaels, *supra* note 185 (internal quotation marks omitted); *see also* Becky Yerak, *Hertz Sold $29 Million in Stock Before SEC Stepped*

stock was suspended from trading on the NYSE,[187] trading in its stock closed at $0.70 per share.[188] Those who purchased Hertz stock on the day of filing and sold it on October 30 lost 75% of their original investment. As late as April 15, 2021, Hertz put forward a reorganization plan that would pay out nothing to shareholders, which would have wiped out 100% of equity investments.[189] As far back as when Hertz filed for

in, WALL ST. J. (Aug. 10, 2020, 6:55 PM), https://www.wsj.com/articles/hertz-sold-29-million-in-stock-before-sec-stepped-in-11597100128 (on file with the Columbia Business Law Review). The SEC's Division of Corporate Finance maintains the obligation and authority to periodically review reporting companies. *See Filing Review Process*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/divisions/corpfin/cffilingreview.htm [https://perma.cc/4VBT-5DBB] (last modified Sept. 27, 2019). Typically, when a company wants to issue securities, the SEC reviews relevant filings and may offer "comments" when it determines a company can better comply with applicable requirements. *Id.* A company may only issue securities once it has adequately responded to the SEC's comments. *Id.* However, public companies, like Hertz, that meet certain requirements and that plan to put forward a public offering after an initial public offering, have the option to file a shelf registration statement. *See* LLOYD S. HARMETZ & BRADLEY BERMAN, MORRISON & FOERSTER LLP, FREQUENTLY ASKED QUESTIONS ABOUT SHELF OFFERINGS 9–10 (2017), https://media2.mofo.com/documents/faqshelfofferings.pdf [https://perma.cc/3FJF-GGZ9]. A shelf registration statement allows a company to offer securities on a continuous or delayed basis without requiring review by the SEC's Division of Corporate Finance. *Id.* at 1–2. Hertz had actually previously filed disclosures in May 2019 for a new offering, which was approved by the SEC in June 2019. *See* Michaels, *supra* note 185. Therefore, it is unclear whether Hertz required the SEC's approval to issue new stock in June 2020. *Cf. id.* ("But since it had an effective set of disclosures, the rental-car chain didn't need SEC approval to sell new shares[.]"). Regardless of the SEC's authority to suspend the offering, Hertz filed a statement with the SEC that its offering was "promptly suspended pending further understanding of the nature and timing of the Staff's review." Hertz Glob. Holdings, Inc., Current Report (Form 8-K), at 2 (June 17, 2020).

[187] Press Release, N.Y. Stock Exch., *supra* note 27.

[188] Hertz Global Holdings Inc. Quotes: Five Years, *supra* note 179.

[189] Becky Yerak, *Hertz Insists Stockholders Remain out of the Money*, WALL ST. J. (Apr. 15, 2021, 4:49 PM), https://www.wsj.com/articles/hertz-insists-stockholders-remain-out-of-the-money-11618519746 (on file with the Columbia Business Law Review).

bankruptcy, many commentators predicted that Hertz was a terrible investment.[190]

But then something spectacular happened. With COVID-19 vaccinations leading to increased travel and a shortage of rental cars,[191] a bidding war ensued, and, on May 14, the bankruptcy court approved a deal for a group led by Knighthead Capital to take over Hertz which will end up paying shareholders between seven and eight dollars per share.[192] Had the bankruptcy court issued a trading injunction when Hertz filed for bankruptcy, investors would not have been able to take advantage of Hertz's low stock price.[193] But

[190] *See e.g.*, William D. Cohan, *"This Is Just F—king Unbelievable!": Bankrupt Hertz Is a Pandemic Zombie*, VANITY FAIR (June 15, 2020), https://www.vanityfair.com/news/2020/06/bankrupt-hertz-is-a-pandemic-zombie [https://perma.cc/ZKR6-462K] ("There is no circumstance—zero—where Hertz shareholders will ever get a recovery once a plan of reorganization with creditors is agreed upon[.]"); Matt Levine, *Day Traders Might Have Fun Saving Hertz from Bankruptcy*, BLOOMBERG: OP. (June 12, 2020, 11:59 AM), https://www.bloomberg.com/opinion/articles/2020-06-12/if-you-want-hertz-have-some-hertz (on file with the Columbia Business Law Review) (poking fun at unsophisticated Robinhood Hertz investors). *But see* Casey & Macey, *supra* note 113 (speculating, quite on the nose, that "there was at least some possibility that the firm had residual value that could be realized before a reorganization wiped out the firm's stockholders. The most obvious possibility is that Hertz stock offered investors an opportunity to bet that the pandemic would end quickly, and this would lead to a rapid recovery of Hertz's business. Moreover, because Hertz is highly invested in the used car market, an increase in the price of used cars might increase the value of Hertz's assets. Finally, the pandemic has reduced demand for taxis, ride-hailing companies, air travel, and public transportation. If people substitute private rental car travel for these other modes of transport, it may create new demand.").

[191] *See* David J. Lynch & Yeganeh Torbati, *How the Pandemic Led to a Rental Car Crisis Just as Americans Are Ready To Bust Loose*, WASH. POST (May 1, 2021, 6:00 AM), https://www.washingtonpost.com/business/2021/05/01/rental-car-shortage-economy/ [https://perma.cc/8PGQ-YAJA].

[192] Becky Yerak, *Hertz Gets Court Approval for Bankruptcy Deal with Top Bidders Knighthead and Certares*, WALL ST. J. (May 14, 2021, 6:02 PM), https://www.wsj.com/articles/hertz-gets-court-approval-for-bankruptcy-deal-with-top-bidders-knighthead-and-certares-11621026273 (on file with the Columbia Business Law Review).

[193] For examples of these investors, see Gunjan Banerji & Alexander Osipovich, *'God Told Me To Put Money into Hertz': Small*

this does not mean that courts should not have the authority to issue trading injunctions—even if occasionally an investment would have been a good bet. Bankrupt company stocks are, in fact, "lottery" stocks[194]—sometimes one of the tickets will hit. But the vast majority of these stocks, in which unsophisticated investors disproportionately invest, will suffer substantial losses.[195] Moreover, regulators already prevent investors from making some kinds of bets, especially when there is an outside force, such as the absolute priority rule, artificially affecting the value of an investment—for example, when there is alleged ticker confusion,[196] propping up of stock when there is no basis for trading in such stock,[197] or fraud.[198]

1. Scope of the Trading Injunction

The proposed amendment, a complete version of which can be found in the Appendix, allows the bankruptcy court to issue an injunction, upon request from a party in interest, preventing any holder of the bankrupt company stock in question from selling their stock to someone who is

Investors Are Winning Big Again, WALL ST. J. (May 27, 2021, 5:40 PM), https://www.wsj.com/articles/god-told-me-to-put-money-into-hertz-how-small-investors-are-upending-wall-street-11622113200 (on file with the Columbia Business Law Review).

[194] Coehlo et al., *supra* note 81, at 2.

[195] *See supra* Section III.B.

[196] *See, e.g.*, Zoom Techs., Inc., Exchange Act Release No. 88,477, 2020 WL 10143344 (Mar. 25, 2020).

[197] Press Release, U.S. Sec. & Exch. Comm'n, SEC Suspends Trading in Multiple Issuers Based on Social Media and Trading Activity (Feb. 26, 2021), https://www.sec.gov/news/press-release/2021-35 [https://perma.cc/K4DQ-5Y42] ("Today's order states that trading is being suspended because of questions about recent increased activity and volatility in the trading of these issuers, as well as the influence of certain social media accounts on that trading activity. The order also states that none of the issuers has filed any information with the SEC or OTC Markets, where the companies' securities are quoted, for over a year.").

[198] Andrew Ramonas, *Covid-19 Scam Crackdown Prompts Spike in SEC Trading Suspensions*, BLOOMBERG: L. (July 22, 2020, 6:30 AM), https://www.bloomberglaw.com/bloomberglawnews/securities-law/XBHU26T8000000 (on file with the Columbia Business Law Review).

purchasing less than $20,000 of that stock. This means that Person *A* cannot sell $5,000 in bankrupt company stock to Person *B*, if Person *B* is purchasing less than $20,000 in that company's stock. Table 1 illustrates different scenarios and whether the court would allow the transaction envisioned.

Table 1. Sale of Bankrupt Company Stock

Person *A*	Person *B*	Allowed or Restricted?
Sells $5,000	Buys $5,000	Restricted
Sells $20,000	Buys $20,000	Allowed
Sells $5,000	Buys $5,000 from Person *A* and $15,000 from Person *C*	Allowed
Sells $20,000	Buys $5,000 from Person *A*; Person *C* buys $15,000 from Person *A*	Restricted
Sells any amount	Market maker or brokerage is the purchaser	Allowed

The structure of the trading restriction allows both amateur and institutional investors to sell bankrupt company stock as long as they find a buyer who is purchasing at least $20,000 of that stock in one transaction. In essence, the injunction restricts those seeking to purchase less than $20,000 of bankrupt company stock on the theory that those individuals are more likely to be amateur investors. Sophisticated investors are still welcome to buy bankrupt company stock if they are willing to purchase at least $20,000 at one time.

The Amendment establishes three types of orders. First, the court may enter a preliminary injunction without a hearing for a maximum of ten trading days.[199] This allows the court to stay trading in a debtor's stock while it hears the parties on whether to allow a longer-term order. Second, by the end of the ten-day trading injunction, the court must hold a hearing to determine whether to issue a second, longer-term injunction. Third, the bankruptcy court may restrict trading

[199] *See infra* Part VI app., § (d)(2).

in a stock upon confirmation or discharge from bankruptcy.[200] This targets stock in a company whose discharge gives shareholders zero value while issuing new stock to creditors.

An important exception allows shareholders to sell stock to a market maker even if the sale is for less than $20,000.[201] Market makers are sophisticated investors, and, thus, should be allowed to purchase any amount of stock. Allowing such trades will provide liquidity to the market while also making it more likely that investors owning less than $20,000 in stock can unload their stock. Shareholders would be matched with market makers through their brokers, similar to how trading typically operates.[202] Market makers, however, would be unable to sell stock to an investor buying less than $20,000, since these investors are likely to be unsophisticated.

One consequential drafting decision is determining the minimum amount of bankrupt company stock one must buy to overcome a trading restriction. Inevitably, no cutoff will perfectly restrict unsophisticated investors from buying additional shares, and any cutoff will prevent sophisticated investors from making smaller purchases. Nevertheless, several studies suggest that unsophisticated investors usually make smaller trades than sophisticated ones.[203]

As a threshold point, it is better to use a dollar-based cutoff, as opposed to a shares-based cutoff.[204] Dollar-based

[200] *See infra* Part VI app., § (e).

[201] *See infra* Part VI app., § (f)(1).

[202] *See Executing an Order*, *supra* note 9.

[203] *See, e.g.*, Nilabhra Bhattacharya, *Investors' Trade Size and Trading Responses Around Earnings Announcements: An Empirical Investigation*, 76 ACCT. REV. 221, 222 (2001) (collecting studies showing less wealthy and less sophisticated investors make smaller and less informed trades); Charles M.C. Lee & Balkrishna Radhakrishna, *Inferring Investor Behavior: Evidence from TORQ Data*, 3 J. FIN. MKTS., 83, 87 (2000) ("[W]e find that trade size is still highly effective in separating institutional and individual investor activities.").

[204] *See* Lee & Radhakrishna, *supra* note 203, at 101; Brad M. Barber, Terrance Odean & Ning Zhu, *Do Retail Trades Move Markets?*, 22 REV. FIN. STUDIES 151, 158 (2009) (using a dollar-based cutoff). *But see* Mark C. Dawkins, Nilabhra Bhattacharya & Linda Smith Bamber, *Systematic Share Price Fluctuations After Bankruptcy Filings and the Investors Who*

cutoffs are logically preferable because they incorporate differences in stock prices. One would expect unsophisticated, wealth-constrained individuals to determine how much stock they will purchase based off the stock price, not the number of shares.[205]

When classifying trades by dollar-based amount, the literature considers trades of $5,000 or less to be individual trades and trades of more than $50,000 to be institutional trades.[206] Trades worth between $5,001 and $50,000 are usually not treated as proxies for individual or institutional trades because there is a significant overlap of individual and institutional trades.[207] However, for purposes of the Amendment, the middle tier ($5,001 to $50,000) cannot be ignored. Otherwise, a significant number of individuals would be able to buy bankrupt company stock, defeating the purpose of the Amendment—to protect these investors.

As Table 2 represents, the dollar-based cutoff will be both underinclusive and overinclusive. Individual investors that still purchase stock under an injunction can be referred to as a "Type I error," while institutional investors that are enjoined from buying stocks can be classified as a "Type II error." As Type I error increases, Type II error decreases, and vice versa.

Drive Them, 42 J. FIN.& QUANTITATIVE ANALYSIS 399, 414 (2007) (using a shares-based cutoff).

[205] *See* Lee & Radhakrishna, *supra* note 203, at 101 (arguing that "[d]ollar-based cutoffs are conceptually superior" to shares-based cutoffs). Especially with bankrupt company stock, which usually trades at low dollar values, a shares-based cutoff would yield significantly different results than a dollar-based cutoff. If Stock *A* is trading at $1 and Stock *B* is trading at $2, a $20,000 dollar-based cutoff would prevent purchases of Stock *A* below 20,000 shares and of Stock *B* below 10,000 shares. A 10% loss of each of these stock's value would result in a $2,000 loss. However, a stock-based cutoff of 20,000 shares would allow an investor to purchase $20,000 of Stock *A* and $40,000 of Stock *B*. A 10% loss of each stock's value would result in a $2,000 loss for Stock *A*, but a $4,000 loss for Stock *B*. In an effort to protect amateur investors, the dollar-based cutoff is more successful.

[206] *See, e.g.*, Barber et al., *supra* note 204, at 158; Lee & Radhakrishna, *supra* note 203, at 103.

[207] *See, e.g.*, Barber et al., *supra* note 204, at 158; Lee & Radhakrishna, *supra* note 203, at 103.

Table 2: Dollar-Based Cutoff vs. Shares-Based Cutoff

Purchase of Bankrupt Stock	≥$20,000	<$20,000
Amateur Investor	Allowed (Type I Error)	Restricted
Institutional Investor	Allowed	Restricted (Type II Error)

Based on data from one pair of researchers, a cutoff of $5,000 or less would only prevent 39% of individual trades, resulting in a probability of 26% that allowed trades would be made by individual investors.[208] While a cutoff of $50,000 or more would prevent 95% of individual trades, it would lead to a probability of 65% that institutional trades would be restricted.[209] Of the trades that would be restricted, 37% would be institutional trades.[210] This Note favors a larger Type II error over a larger Type I error, as this more effectively protects individual investors, and an institutional investor can always increase their purchase of shares above the restricted amount. As such, this Note endorses a $20,000 cutoff, restricting trades of $20,000 or less under the Amendment.[211] This would capture 84% of individual trades and 47% of institutional trades.[212] Most importantly, only 7% of the allowed trades would be by individual investors.[213] Of course, 16% of individual trades could still be made, and individual investors could also raise the amount of money they trade, allowing them to make trades despite a court order. However, one can speculate that traders willing to trade more money are actually more sophisticated than those looking to trade lower amounts.

2. Factors Courts Should Consider To Determine

[208] Lee & Radhakrishna, *supra* note 203, at 104 tbl.6.

[209] *Id.* at 104 tbl.6.

[210] *Id.* at 103.

[211] This would not implicate trades where market makers and brokerages purchase securities for less than $20,000.

[212] Lee & Radhakrishna, *supra* note 203, at 103.

[213] *Id.* at 104 tbl.6.

Whether To Issue a Trading Injunction

When considering whether to issue an order under the Amendment, the court should evaluate whether "there is a substantial chance that equity holders of the debtor will recover substantially less than the present value of the stock."[214] The key language is the word "may," which gives the bankruptcy judge discretion to halt the sale of bankrupt company stock. The judge may consider factors the judge deems relevant in determining whether to issue an order under the Amendment. It is paramount that the judge finds that there is a substantial likelihood shareholders will not recover close to the value of debtor's stock, as the Amendment seeks to protect amateur investors from buying worthless or nearly worthless bankrupt company stock.

The judge has discretion to determine whether the judge expects equity holders to recover value substantially equivalent to or greater than the present value of the stock. The judge can consider a debtor's balance sheet, the value of the debtor's assets, and why the debtor filed for bankruptcy. Congress should trust bankruptcy judges' experience to make these determinations, just as Congress does with so many other aspects of the bankruptcy process.[215] For example, a

[214] *See infra* Part VI app., § (c).

[215] *See, e.g.*, Brown v. Chestnut (*In re* Chestnut), 422 F.3d 298, 303–04 (5th Cir. 2005) ("[Congress has] provid[ed] bankruptcy courts broad discretion to lift stays . . . . [which] gives bankruptcy courts flexibility to address specific exigencies on a case-by-case basis." (citing Bustamante v. Cueva (*In re* Cueva), 371 F.3d 232, 236 (5th Cir. 2004))); Claughton v. Mixson, 33 F.3d 4, 5 (4th Cir. 1994) ("Congress . . . has granted broad discretion to bankruptcy courts to lift the automatic stay to permit enforcement of rights against property of the estate."); United States v. Energy Res. Co. 495 U.S. 545, 549 (1990) ("[Congress's] statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."); Consumer News & Bus. Channel P'ship v. Fin. News Network (*In re* Fin. News Network), 980 F.2d 165, 169 ("[F]irst and foremost is the notion that the bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the [Bankruptcy] Code." (second alteration in original) (internal quotation marks omitted) (quoting Comm.

judge may be less likely to issue a trading halt if a debtor filed for bankruptcy due to substantial litigation and the judge finds that a resolution allowing shareholders to retain significant value in their stock is likely.[216] A judge also may have an easier time predicting the future value of existing shareholders' stock in prepackaged and prearranged bankruptcies because the proposed capital structure is agreed before filing. Furthermore, a judge can refuse to issue a trading injunction, and, upon a proposed reorganization plan by the debtor, limit trading in the debtor's stock if shareholders are expected to be wiped out.[217]

of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel Corp.), 722 F.2d 1063, 1069 (2d Cir. 1983))); Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 766 (2010) ("[Recent developments] have resurrected much of the autonomy that Congress granted to bankruptcy judges in 1978[.]").

[216] Companies that file for bankruptcy protection due to overwhelming potential liability from litigation may not wipe out shareholders. Such bankruptcies allow companies to stay pending litigation while working out a settlement with litigants. In January 2019, Pacific Gas & Electric (PG&E), a utility company, filed for bankruptcy due to litigation concerning its alleged contribution to California wildfires. *See* Dan Caplinger, *Stock Market Today: The 1 Bankrupt Stock That Could Be Worth Something*, THE MOTLEY FOOL (June 17, 2020, 12:17 PM), https://www.fool.com/investing/2020/06/17/stock-market-today-the-1-bankrupt-stock-that-could.aspx [https://perma.cc/2ANG-Q5SD]. PG&E emerged from bankruptcy with a roughly $25 billion settlement with plaintiffs affected by the wildfires. *See* Press Release, Pac. Gas & Elec. Co., PG&E Emerges from Chapter 11 (July 1, 2020), https://www.pge.com/en/about/newsroom/newsdetails/index.page?title=20200701_pge_emerges_from_chapter_11 [https://perma.cc/4JVZ-UBS5]. As part of the deal, pre-petition shareholders did not have their equity wiped out. In fact, "PG&E repaid all of its creditors and reserved $1.25 billion of its . . . post-reorganization stock issuance to investors who owned stock as of June 19, 2020." Casey & Macey, *supra* note 113.

[217] For example, Whiting Petroleum announced a plan of reorganization on April 24, 2020 that proposed existing shareholders would get only three of value in the new company, and on September 1, shareholders received three percent of the value of Whiting Petroleum's new company. *See supra* notes 72–79 and accompanying text. Knowing shareholders would only get three percent of the value of the new company, the court could have utilized the Amendment to restrict trading in such stock to protect amateur investors who purchased the overvalued stock, *see supra* note 75 and accompanying text, between April 24 and September 1.

3. The Trading Injunction Does Not Prohibit Short Sales

The Amendment also contains an exemption to allow investors to cover short sales made prior to a bankruptcy judge issuing an order.[218] Without this exemption, it would be impossible to cover short sales valued at less than $20,000, which could discourage short selling. One would be unable to cover a short sale if they borrowed the stock after an injunction was issued.

4. Requesting a Trading Injunction

Under the Amendment, any party in interest can petition the court for an injunction restricting the sale of bankrupt company stock.[219] The Amendment also gives standing to the United States Trustee, the SEC, and FINRA to ask for an injunction,[220] resolving any ambiguity as to whether these parties could petition the court for a trading injunction.[221] Moreover, all three entities can appeal, whereas the Code currently restricts the SEC from appealing "any judgment, order, or decree entered in the case."[222] In practice, it is unlikely a party other than the SEC, FINRA, or the United States Trustee would ask the court to restrict the sale of stock. Debtors, creditors, and shareholders all would want the stock to continue trading. Debtors and creditors may benefit from inflated stock prices and the rare instances when the debtor can raise money by issuing new stock during bankruptcy.[223]

[218] *See infra* Part VI app., § (f)(2).

[219] *See infra* Part VI app., § (d).

[220] *See infra* Part VI app., § (b)(1).

[221] While the Bankruptcy Code currently allows the SEC to raise or appear on any issue in a Chapter 11 case, the Code does not give explicit authority for the United States Trustee or FINRA to be heard. 11 U.S.C. § 1109 (2018).

[222] *Id.* § 1109(a).

[223] For example, Hertz attempted to issue new securities during bankruptcy. *Supra* notes 183–186 and accompanying text. Hertz selling new securities could benefit creditors because Hertz would have more money that could be paid to creditors. With more money available to pay creditors, the debtor, Hertz, is more likely to reorganize. Some speculate,

Shareholders prefer more flexibility to unload stock at their convenience. As such, it is essential that the Amendment allows the SEC, FINRA, and the United States Trustee to intervene to ask the court to issue a trading injunction.

5. Enforcing the Trading Injunction

The Court may task the United States Trustee or another party with monitoring trading in the stock and informing the court of any violations.[224] This will prevent the court from being burdened with the task of monitoring trading. Once a violation is brought to the court and, after notice and hearing, the court finds a violation, the court has the discretion to issue a fine not exceeding $500 to the shareholder that sold stock in violation of the order and to the national securities exchange and broker-dealer involved in the transaction.[225]

C. Addressing Potential Issues with the Proposed

though, that Hertz was the first company to issue new stock while in Chapter 11. *See* Casey & Macey, *supra* note 113.

While not a bankruptcy example, the recent trading mania with AMC Entertainment's stock hints at how debtors and creditors could benefit from an analogous situation in bankruptcy. As AMC Entertainment struggled with heavy debt and fought to avoid bankruptcy, amateur investors began to heavily trade in its stock. *See* Alexander Gladstone & Soma Biswas, *AMC's Pandemic Survival Gets Boost from Trading Mania*, WALL ST. J., https://www.wsj.com/articles/amcs-pandemic-survival-gets-boost-from-retail-mania-11611787370 (on file with the Columbia Business Law Review) (last updated Jan. 27, 2021, 8:07 PM). The stock price increased so much that investors invested $917 million in debt and equity financing, leading the CEO to announce that "the risk of an imminent bankruptcy was 'off the table.'" *Id.* If a similar situation were to occur in bankruptcy, creditors could get paid in full, and the debtor would be able to quickly exit Chapter 11.

[224] *See infra* Part VI app., § (i).

[225] *See infra* Part VI app., § (j). Market makers selling stock for less than $20,000 to amateur investors can be fined as "equity security holders." *See id.* Ideally, in addition to a party, such as the United States Trustee, monitoring trading in the market, any individual could approach the monitoring party with an alleged violation. The monitor would then forward the complaint to the court.

Amendment

This Section addresses three concerns with implementing trading injunctions: (1) that investors may be unable to sell stock to trigger tax losses, (2) that the Amendment violates the Takings Clause, and (3) that those affected by the injunction do not receive adequate protection.

1. Investors Can Still Realize Tax Losses Despite a Trading Injunction

One concern is that restricting trading will prevent holders from realizing tax losses. Typically, stock prices decline upon bankruptcy filing,[226] so holders would be eligible for a tax loss. But to realize a loss, one must actually sell the affected stock.[227] Therefore, if a court restricts stock sales, a holder would be unable to trigger a loss. It is unlikely that a holder could take a worthless stock deduction until, at the very least, the bankruptcy discharges with an injunction preventing stock trading.[228] While this concern is valid, it affects fewer shareholders than one would expect.

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[226] *See, e.g.*, Sudip Datta and Mai E. Iskandar-Datta, *The Information Content of Bankruptcy Filing on Securityholders of the Bankrupt Firm: An Empirical Investigation*, 19 J. BANKING & FIN. 903, 917 (1995).

[227] 26 U.S.C. § 1001(b) (2018). However, one need not sell stock to realize a loss if one takes a worthless stock deduction. *See id.* § 165(g)(1).

[228] To qualify for a worthless stock deduction, the taxpayer must demonstrate that the stock has no value. *See In re* Steffen, 294 B.R. 388, 393–94 (Bankr. M.D. Fla. 2003). Proof of worthlessness usually requires the showing of an "identifiable event" demonstrating lack of value. Cole v. Comm'r, 871 F.2d 64, 67 (7th Cir. 1989) (citing Estate of Mann v. United States, 731 F.2d 267, 276 (5th Cir. 1984)). Importantly, "the mere fact that a company has filed bankruptcy, became insolvent, or was placed in receivership is not enough to establish a total loss of the value of the stock." *Steffen*, 294 B.R. at 393 (first citing Genecov v. United States, 412 F.2d 556, 561 (Fifth Cir. 1969); and then citing Brimberry v. Comm'r, 588 F.2d 975, 979 (5th Cir. 1979)). As such, a taxpayer would have to show, by a preponderance of evidence, *Cole*, 871 F.2d at 67 (citing *Mann*, 731 F.2d at 275), that the asset has no current liquidating value and no potential future value. *See* Morton v. Comm'r, 38 B.T.A. 1270, 1278 (1938), *aff'd*, 112 F.2d 320 (7th Cir. 1940). Even with a trading restriction under this the

First, anyone seeking to sell $20,000 in stock of a bankrupt company would not be prevented from selling stock through the order issued under the Amendment. For example, if a holder owns $100,000 of the bankrupt company stock in question and wishes to sell at least $20,000 of that stock, that holder would be allowed to do so. The caveat, of course, is that the holder would have to sell to a purchaser who wishes to buy at least $20,000 of said stock.[229]

Second, holders that own less than $20,000 in stock are not entirely precluded from selling their stock. The Amendment only prevents a buyer from purchasing stock less than $20,000. For example, if a holder of $19,999 stock wants to sell their bankrupt stock, the holder cannot sell it to a buyer only purchasing $19,999 in said stock. However, if ten holders owning a total of $20,000 in stock want to sell, the ten holders can sell their stock to one purchaser who buys at least $20,000 in said stock. Such a transaction can be accommodated by a brokerage.

Amendment, the bankrupt company stock would retain some value because trading would not be barred altogether. Moreover, the bankrupt company stock would retain future value, as there is always a chance stock will retain some value after discharge. For example, old shareholders may be entitled to litigation payoffs or be allowed to convert old stock into reorganized company stock. *See* Coleman v. Comm'r, 31 B.T.A. 319, 325–26 (1934), *aff'd*, 81 F.2d 455 (10th Cir. 1936) (finding that the stock was not worthless because the holders of old stock were entitled to warrants allowing them to purchase new stock). Therefore, a worthless stock deduction could likely only be taken after discharge from bankruptcy and if the cancelled stock retained zero value. *See* Delk v. Comm'r, 113 F.3d 984, 988 (9th Cir. 1997) (allowing a worthless stock deduction for cancelled stock where the only benefit held by old shareholders was the ability to get new stock if they invested additional capital).

[229] Undoubtedly, an order issued under this Amendment would lower liquidity in the market by virtue of eliminating buyers of less than $20,000 of the bankrupt company stock. However, sellers of such stock may struggle to find buyers, even without an order under this amendment. OTC Markets generally have less liquidity. Per one study, a significant subsample of stocks quoted on the Pink Sheets had zero trades on ninety percent of trading days. JOSHUA T. WHITE, OUTCOMES OF INVESTING IN OTC STOCK 8 (2016), https://www.sec.gov/files/White_OutcomesOTCinvesting.pdf [https://perma.cc/AM68-A6W3].

Third, shareholders can sell any amount of the debtor's stock to a market maker. Lastly, unless the bankruptcy court permanently restricts trading in a stock after the case has been discharged, holders can sell as they were able to prior to the court's order. It is not unusual for trading in stock to be temporarily restricted by the SEC, FINRA, or national securities exchanges.[230] In theory, these trade restrictions could lead to similar issues with tax losses.

2. The Proposed Amendment Does Not Violate the Takings Clause

One may argue that orders under the Amendment violate the Fifth Amendment's Takings Clause. The Takings Clause provides, "nor shall private property be taken for public use, without just compensation."[231] Jean Morris argues that an injunction issued under the court's § 105 equitable power "to enjoin the trading of certain public debt and equity securities without compensating the holder for the loss of liquidity" violates the Takings Clause.[232] She relies on the likelihood that a loss of liquidity would have "a substantial economic impact" on shareholders, and that an injunction would interfere with investors' reasonable expectations that they would be able to freely trade their securities.[233] Trading restrictions under § 105, unlike those under § 362(a),[234] and similar to those under the Amendment, do not offer "adequate protection."[235]

[230] *See supra* Section II.C.

[231] U.S. Const. amend. V.

[232] Jean Morris, *Imposition of Transfer Limitations on Claims and Equity Interests During Corporate Debtor's Chapter 11 Case To Preserve the Debtor's Net Operating Loss Carryforward: Examining the Emerging Trend*, 77 AM. BANKR. L.J. 285, 302 (2003). Morris was arguing in the context of trading restrictions to preserve NOLs. *Id.* at 302–03.

[233] *Id.* at 302.

[234] A non-debtor is entitled to relief from the automatic stay for lack of "adequate protection." 11 U.S.C. § 362(d)(1) (2018).

[235] Federal Rules of Bankruptcy Procedure 7065 provides an exemption from the adequate protection requirement in Rule 65 of the Federal Rules of Civil Procedure for "a temporary restraining order or

Nevertheless, a court is unlikely to rule that an order under the Amendment violates the Takings Clause.[236] First, a court could find that the risk of the trading restriction would be factored into the price of the security. Second, an order under the Amendment still allows for limited trading of the security. An inability to find a buyer of $20,000 worth of a given security is a liquidity issue, not a constitutional issue. Third, there do not appear to be any challenges under the Takings Clause to trading injunctions enjoining *all* trading of a particular security by the SEC. Lastly, the case most on point supports the argument that an order under the Amendment does not violate the Takings Clause.[237]

In that case, the district court ruled that an injunction without adequate protection of stock trades to preserve a debtor's NOLs did not violate the Takings Clause. The court held that the injunction was not a "physical taking" because the government did not take physical possession of the property for a public purpose.[238] The court also rejected the argument that the injunction was a regulatory taking.[239]

preliminary injunction . . . issued on application of a debtor, trustee, or debtor in possession." FED. R. BANKR. P. 7065.

[236] *See* Erik Stegemiller, Note, *Winning Losses: Trading Injunctions and the Treatment of Net Operating Loss Carryovers in Chapter 11*, 32 YALE J. REGUL. 161, 184, 185 & n.180 (2015) (arguing that a Takings Clause challenge may be merely "academic" since there has yet to be "a significant constitutional challenge to" trading restrictions under Chapter 11, but also acknowledging that restrictions are "relatively recent phenomen[a]").

[237] State St. Bank & Tr. Co. v. UAL Corp., No. 03 C 2328, 2004 WL 2452715, at *1 (N.D. Ill. Oct. 28, 2004), *vacated on other grounds and remanded sub nom. In re* UAL Corp., 412 F.3d 775 (7th Cir. 2005). On appeal, in dicta, the Seventh Circuit argued the bankruptcy court should have issued adequate protection. *See In re UAL*, 412 F.3d at 779 ("[I]t is enough for current purposes to say that an argument based on § 105(a) and § 362(a)(3) is weak enough to make a bond or adequate-protection undertaking obligatory before a bankruptcy judge may forbid investors to sell their stock on the market. But it is too late to require either form of security." (citing Mead Johnson & Co. v. Abbott Lab'ys, 201 F.3d 883, 887–88 (7th Cir. 2000))).

[238] *State St. Bank*, 2004 WL 2452715, at *7.

[239] *Id.* at *8.

> To determine whether a regulatory taking has occurred, a court must make "an ad hoc factual inquiry into the particular circumstances of the case, [examining]: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[240]

The court ruled there was no devastating economic impact because the shareholder still owned the stock.[241] The court also held that even though the shareholder may have had the expectation it could sell the stock, it should reasonably expect there may be government action limiting its ability to sell stock.[242] Finally, the court held that the injunction could not be an unlawful taking because it was the result of an adversarial process.[243] All three factors come out the same way with an injunction under the Amendment. In fact, an injunction under the Amendment explicitly authorizing the court to stop the sale of debtor's stock, as opposed to one under § 105, provides actual notice to shareholders that trading in stock they own may be restricted in bankruptcy.[244] As a result, the injunction does not violate the Takings Clause.

3. The Court Need Not Provide Adequate Protection

Usually, a court may only issue a preliminary or temporary injunction if the movant provides security "to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."[245] In theory, this

[240] *Id.* (quoting Davon, Inc. v. Shalala, 75 F.3d 1114, 1127 (7th Cir. 1996)).

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Compare infra* Part VI app., § (g) ("A court issuing an order under this section must provide notice to those affected by the order."), *with* 11 U.S.C. 105(a) (2018) (allowing injunctions without explicitly requiring notice).

[245] FED. R. CIV. P. 65(c).

would require the bankruptcy court to make the movant post a bond to compensate shareholders for any loss in the value of their bankrupt company stock due to an erroneous trading injunction of that stock. Consider a shareholder that owns 100 shares of bankrupt company stock. On the day the trading injunction is issued, the stock trades at $5 a share, so the shareholder's stake is worth $500. Ten days later, the stock drops to $3 a share; the value of the shares plummets to $300. If, on day ten, an appellate court determines that trading in the stock was wrongfully enjoined, then the court would require the movant to pay the shareholder $200 to cover the loss in the stock's value.

There are, however, two relevant exceptions to the requirement to post security. First, if the bankruptcy court issues a preliminary injunction on request of the debtor, debtor in possession, or trustee, the court need not require security.[246] Second, "[t]he United States, its officers, and its agencies are not required to give security."[247] Therefore, if the SEC, FINRA, the United States Trustee, the debtor, or the debtor in possession moves for an injunction under the Amendment, the court would not require security to be posted.[248]

A concern similar to a lack of adequate protection is that a trading injunction under the Amendment would negatively affect the stock prices of both bankrupt and non-bankrupt companies. If the Amendment were adopted, it may be argued, a company's stock would drop upon the filing of a bankruptcy

[246] FED. R. BANKR. P. 7065; *see, e.g.*, Med. Educ. & Health Servs. v. Indep. Mun. of Mayagiez, Nos. 10-04905, 10-00148, 2015 WL 859505, at *7 (Bankr. D.P.R. Feb. 12, 2015) ("The express language of Federal Rule of Bankruptcy Procedure 7065 relieves a debtor from the mandatory obligation of giving security ordinarily required by Fed.R.Civ.P. 65(c) before the issuance of a preliminary injunction.").

[247] FED. R. CIV. P. 65(c); *see, e.g.*, United States v. Zen Magnets, LLC, 104 F. Supp. 3d 1277, 1280, 1284 n.6 (D. Colo. 2015) (ruling that the Consumer Product Safety Commission is not required to post a bond, even though the court issued a preliminary junction at the Commission's request).

[248] The only party that could seek a trading halt that would be required to post security would be a creditor. *See supra* Section IV.B.4.

petition even more than it already does.[249] Investors may try to sell their stock immediately after a bankruptcy filing out of a fear of an injunction, even if one has yet to be issued. While many trades could be executed even under an injunction, institutional investors could no longer rely on amateur investors to purchase their stock in smaller increments. Moreover, these liquidity concerns may spook investors in non-bankrupt company stock, especially those investing in companies nearing insolvency, potentially depressing stock prices across the board.

Such a decline in stock prices is not necessarily a bad result, however. Under the current regime, the ability to easily trade bankrupt company stock may inflate stock prices, and the losers are amateur investors who purchase the stock of bankrupt companies. A repricing of stock would more realistically value the stock and more equitably assign losses associated with the bankruptcy filing to pre-petition equity holders. Instead of pre-filing shareholders receiving large gains while avoiding bankruptcy related losses, they would own stock with the risk of an injunction priced in.[250]

V. CONCLUSION

During discussion of the Bankruptcy Reform Act of 1978, a Senate report argued that "[i]n a large public company, whose interests are diverse and complex, the most vulnerable today are public investors who own subordinated debt or equity securities."[251] More than forty years later, it is clear the United States Senate got it wrong—the most vulnerable today are not existing public investors, but the future investors of bankrupt companies. The current regimes overseeing trading of bankrupt company stock provide for relatively unfettered trading despite that the bankruptcy process rarely results in

[249] *See, e.g.*, Datta & Iskandar-Datta, *supra* note 226, at 917 (discussing price drops).

[250] With the injunction reflecting a lesser chance of bankruptcy recovery, the price would also more accurately price in the chance of recovery.

[251] S. REP. NO. 95-989, at 10 (1978).

equity holders of bankrupt company stock recovering their investments. Instead, these investors are usually fully or nearly wiped out through bankruptcy, with secured and unsecured creditors taking control of reorganized companies, and shareholders' ownership stakes being cancelled. Considering that these investors are predominately amateurs with little understanding of the bankruptcy process, it is imperative that the regulatory regime step in to protect them.

Unfortunately, the current regulatory regime cannot adequately protect these investors. National securities exchanges can only regulate their own exchanges, and the OTC markets are not in the business of protecting investors. The SEC and FINRA can issue only short-term solutions via trade suspensions. The bankruptcy courts do not have the authority to suspend the sale of stock to protect amateur investors. As such, Congress should amend the Bankruptcy Code to grant the courts the authority to suspend, in a limited manner, the sale of stock after a company files for bankruptcy. Building off their existing responsibilities to determine the likelihood of reorganization for bankrupt companies, the bankruptcy courts are well positioned to limit trading in bankrupt company stock if they determine that there is a substantial chance the bankrupt company stock is fully or nearly worthless.

VI. APPENDIX: PROPOSED AMENDMENT

The proposed amendment Congress should adopt to authorize the bankruptcy courts to issue a trading injunction to halt trading in certain bankrupt company stock in order to protect amateur investors is as follows:

> (a) Definitions. In this section the following terms have the meanings indicated:
>
> (1) The term "broker" has the same meaning as in section 78c of title 15.
>
> (2) The term "market maker" has the same meaning as in section 78c of title 15.
>
> (b) Notwithstanding section 1109 of title 11 or any other provision of law,
>
> (1) the court must permit the Securities and Exchange Commission, the Financial Industry Regulatory Authority, and the United States Trustee to intervene with respect to a request for relief under this section, and
>
> (2) the Securities and Exchange Commission, the Financial Industry Regulatory Authority, and the United States Trustee may appeal any order or denial of an order entered under this section.
>
> (c) The court may issue an order under this section if there is a substantial chance that equity holders of the debtor will recover substantially less than the present value of the stock.
>
> (d) Except as provided in subsection (f) of this section, and on request from a party in interest or any person given the right to intervene as provided by subsection (b) of this section, the court may enter an order prohibiting any equity security holder from selling equity securities issued by the debtor to a buyer who is not purchasing at least $20,000 of equity securities issued by the debtor in one transaction.
>
> (1) The court may enter a preliminary order under subsection (d) of this section prior to a hearing.
>
> (2) The court must hold a hearing and determine whether to issue an order within 10 trading days of

a request for an order under subsection (d) of this section.

(e) Except as provided in subsection (f) of this section, and on request from a party in interest or any person given the right to intervene as provided by subsection (b) of this section, and after notice and a hearing, upon discharge or confirmation, the court may issue a permanent order prohibiting any equity security holder from selling equity securities issued by the debtor to a buyer who is not purchasing at least $20,000 of equity securities issued by the debtor in one transaction.

(f) The court may not prohibit any equity security holder from

(1) selling equity securities issued by the debtor to market makers or brokers, notwithstanding the amount of equity securities the buyer purchases, or

(2) covering short sales made prior to an order under this section.

(g) A court issuing an order under this section must provide notice to those affected by the order.

(h) The court may revoke any order under this section at any time.

(i) After the court issues an order under this section, and until the order expires or is rescinded, the United States Trustee or any other party designated to do so by the court must notify the court of any violations of the order issued under this section.

(j) If an equity security holder fails to follow a court order issued under this section, the court may, after notice and hearing, fine any combination of the following no more than $500 or the value of the equity security sold, whichever is more, for each failure to comply with a court order:

(1) The equity holder that sold the equity security in violation of a court order under this section;

(2) The national securities exchange or other exchange that constituted, maintained, or provided a marketplace or facilities that brought together

> purchasers and sellers of the sale of an equity security in violation of an order issued under this section; or
>
> (3) The broker-dealer that facilitated a sale in violation of an order issued under this section.
>
> Any person or entity fined under this section must turn over the funds within thirty days of service of such order.