BANKRUPTCY'S GUARDIAN GAPS

by

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Introduction

Large-case chapter 11 bankruptcy practice is constantly evolving. In response to the complexities of this practice, some commentators have begun advocating for the repeal of Bankruptcy Rule 9031, which prohibits the appointment of special masters—typically, attorneys with expertise in a specific field[1]—in bankruptcy cases.[2] Critics of the rule say that the prohibition of special masters in bankruptcy is "out of date and out of touch" with "the reality of today's complex Chapter 11 cases."[3]

The push to repeal Rule 9031 is emblematic of a larger issue that has arisen as large-case chapter 11 practice has become increasingly complex.[4] Bankruptcy has also become a popular vehicle for corporations to tackle problems with significant social ramifications.[5] These trends have raised

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[1] *Special Masters*, ADR SERV., INC., https://www.adrservices.com/services-2/special-masters/ ("Special masters have increasingly been appointed for their expertise in particular fields. . . .").

[2] Fed. R. Bankr. P. 9031 (2024).

[3] Mark Conlan & Noel L. Hillman, *Bankruptcy Rule 9031: Out of Date and Out of Touch—Why an Amendment is Long Overdue*, GIBBONS (June 7, 2024), https://www.gibbonslaw.com/resources/publications/bankruptcy-rule-9031-out-of-date-and-out-of-touch-why-an-amendment-is-long-overdue.

[4] *See generally* Laura N. Coordes, *Bankruptcy Overload*, 57 GA. L. REV. 1133 (2023); *see also* Oscar Couwenberg & Stephen J. Lubben, *Mitigating By Monitoring: Saving Corporate Restructuring from Controllers' Opportunism*, 98 CHI.-KENT L. REV. 361, 366 (2023) ("The LATAM plan features the kind of mind-bending complexity one can expect to see in RSA-driven plans; the complexity often operating as a kind of screen for what is actually going on."); Donald L. Swanson, *ABCs & Bankruptcy, Part 1: The Need for "An Expert Equitable Tribunal" to Provide Court-Supervision (Granfinanciera v. Nordberg)*, MEDIATBANKRY (Jan. 14, 2025) ("[E]ach business in financial stress, whether large or small, presents a unique set of circumstances that magnifies the complexities inherent in our bankruptcy system, requiring flexibility and ongoing creativity within the system.").

[5] *See* Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41, 43 (2023) (describing "social debt" as "financial liability for serious (e.g., criminal) misconduct, often involving violations of health and safety laws, made unsustainable due to persistent governance failures of transparency and

concerns about how well equipped the bankruptcy system is to handle such complex and wide-ranging challenges. In recent years, scholars and policymakers have expressed concern about bad faith filings, due process threats, abuse of the bankruptcy system, a process characterized by lawlessness, and the silencing of mass tort victims and other creditors.[6]

To address these problems, scholars and practitioners have often suggested either appointing additional actors in a bankruptcy case to serve as "guardians" of the system or the case itself or expanding the use of existing bankruptcy guardians.[7] The push to allow special masters in bankruptcy cases

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accountability").

[6] *See, e.g.*, S. 4746, Ending Corporate Bankruptcy Abuse Act of 2024, 118th Cong. (2023–2024) (proposing to amend the Bankruptcy Code "to make the filing of a petition for relief under chapter 11 that is objectively futile or in subjective bad faith a cause for dismissal of the case"); Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1159 (2022) ("If left unchecked, bankruptcy can serve as an accelerant for the gravest due-process threats facing mass-tort victims."); Benjamin Miles, *The Erosion of Public Trust in the U.S. Bankruptcy System: Causes and Consequences*, USC GOULD'S BUS. L. DIG. (Apr. 24, 2023), https://lawforbusiness.usc.edu/the-erosion-of-public-trust-in-the-u-s-bankruptcy-system-causes-and-consequences/ ("[M]isuse of the bankruptcy system by some individuals and businesses has further eroded public trust in the process."); Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1261 (2023) ("Bankruptcy is being used as a tool for silencing survivors and their families."); Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 251 (2022) ("Belk, and a handful of other one-day Chapter 11s, have achieved a high degree of lawlessness."); Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1730 (2018) ("[F]eatures of modern Chapter 11 distort the public-private balance and delink extraordinary legal tools from public standards and oversight."); Couwenberg & Lubben, *supra* note 4, at 362 ("Self-regard and collusion have made restructuring a forum for behavior that is nasty and brutish."); Vincent S.J. Buccola, *Unwritten Law and the Odd Ones Out*, 131 YALE L.J. 1559, 1583 (2022) ("Reorganizers' commitment to value preservation will tend to sanction maneuvers not obviously allowed under written law. . . ."); Lynn M. LoPucki, *False Venue Claims Signed Under Penalty of Perjury*, 80 BUS. LAW. 689, 691 (2025) (claiming that "it is routine for large, public companies and the courts in which they file to ignore the Bankruptcy Code and Rules").

[7] *See, e.g.*, John C. Weitnauer, *Should an Examiner Prosecute Claims? A Response to Proposed Changes to the Role of Examiner Contained in the Second Report of SABRE*, AM. BANKR. INS. J. (Mar. 2005), https://www.abi.org/abi-journal/should-an-examiner-prosecute-claims-a-response-to-proposed-changes-to-the-role-of#1a ("Proposal Three calls for changes to the Bankruptcy Code that would, among other things, (1) *expand* the role of an examiner and (2) *eliminate* the requirement that an examiner's report be filed with the bankruptcy court.") (emphasis in original); *id.* ("A plan facilitator is to mediate or facilitate negotiations over the terms of a reorganization plan, and if facilitated negotiations fail, may be authorized to propose the terms of, or file, a plan."); Jonathan C. Lipson & Christopher Fiore Marotta, *Examining Success*, 90 AM. BANKR. L.J. 1, 43 (2016) ("[A]n examiner appointment may actually produce greater recoveries, and so perhaps [investors] should seek examinations more frequently."); Jonathan C. Lipson & David A. Skeel, *FTX'd: Conflicting Public and Private Interests in*

Chapter 11, 77 STAN. L. REV. 369, 457 (2025) ("A critical tool to help avoid these conflicts already exists, in the form of examiners."); *Final Report and Recommendations of the ABI Commission to Study the Reform of Chapter 11*, AM. BANKR. INST. 12 (2014) [hereinafter "ABI Report"] (describing proposed estate neutral as "an individual that may be appointed depending on the particular needs of the debtor or its stakeholders to assist with certain aspects of the chapter 11 case, as specified in the appointment order"); Elizabeth S. Stong, *Some Reflections From the Bench on Alternative Dispute Resolution in Business Bankruptcy Cases*, 17 AM. BANKR. INST. L. REV. 387, 387 (2009) ("[A]s a bankruptcy judge, I see more, not fewer, reasons for counsel, clients, and parties to consider ADR tools and techniques, including facilitated negotiations and mediation, to resolve and even to avoid disputes."); Ralph R. Mabey, Charles J. Tabb & Ira S. Dizengoff, *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C.L. REV. 1259, 1265 (1995) ("Adequate statutory, case, and inherent authority exist to support the imposition by the bankruptcy courts of mandatory ADR, notably mandatory mediation."); Michelle M. Harner, *The Search for an Unbiased Fiduciary in Corporate Reorganizations*, 86 NOTRE DAME L. REV. 469, 475 (2011) ("The primary goals of the case facilitator proposal are to correct information asymmetry and reduce conflict (and related costs) in Chapter 11 cases, thereby protecting and enhancing value for the benefit of all stakeholders."); Merril Hirsh & Sylvia Mayer, *It Is Way Past Time to Allow Bankruptcy Judges to Use Court-Appointed "Masters"*, 61 NO. 4 JUDGES' J. 22, 25 (2022) ("Bankruptcy Rule 9031 should be amended to authorize bankruptcy judges to exercise their judgment and inherent authority so they can appoint neutrals as needed to efficiently manage their cases and proceedings."); Donald Swanson, *Special Masters are Needed in Bankruptcy, Part 1: Use of Special Masters in Federal District Courts Under Rule 53*, MEDIATBANKRY (Feb. 22, 2024) https://mediatbankry.com/2024/02/22/special-masters-are-needed-in-complex-bankruptcy-cases-part-1-use-of-special-masters-in-federal-district-courts-under-rule-53/ ("Fed. R. Bankr. P. 9031 . . . needs to be amended to authorize the utilization of special masters in complex bankruptcy proceedings."); Paulette J. Delk, *Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031*, 67 MO. L. REV. 29, 29 (2002) ("[B]ankruptcy courts regularly hear cases in which the court and the parties could benefit from the services of a special master and . . . bankruptcy courts are hampered in their ability to handle cases in the most just and efficient manner possible because of their inability to appoint special masters."); *ABA President Letter Requesting Bankruptcy Rule Change* (Feb. 12, 2024), https://www.courtappointedneutrals.org/resource-center/aba-president-letter-requesting-bankruptcy-rule-change/ ("The American Bar Association (ABA) respectfully requests that the Judicial Conference of the United States recommend that the Federal Rules of Bankruptcy Procedure be amended to permit the use of 'court-appointed neutrals'…in proceedings under the Bankruptcy Code."); Jonathan C. Lipson & Pamela Foohey, *The End(s) of Bankruptcy Exceptionalism: Purdue Pharma and the Problem of Social Debt*, 46 CARDOZO L. REV. 861, 923 (2025) ("The appointment of multiple [future claims representatives] may be warranted in some cases."); Diane Lourdes Dick & Joseph W. Yockey, *Recent EdTech Failures: Another Perspective on Higher Education Insolvency*, 45 NO. 1 BANKR. L. LETTER NL 1, 9 (2025) ("Congress should consider amending the Bankruptcy Code to require the appointment of a 'student ombudsman' in certain higher education bankruptcies."); Alexander Gouzoules, *Going Concerns and Environmental Concerns: Mitigating Climate Change Through Bankruptcy*

is but one example of this pattern. As described in more detail below,[8] although the term "guardian" is not a bankruptcy term, this article uses the term "guardian" to describe a broad set of actors who may perform one or more of the following roles: (1) a neutral overseer; (2) an advocate for particular rights and interests; and (3) a technical expert. Relatedly, bankruptcy guardians primarily address three concerns with large-case chapter 11 practice: (1) that the bankruptcy process is being "captured" by certain powerful players, such as debtors and their attorneys; (2) that some parties are being silenced through bankruptcy or are otherwise not adequately represented; and (3) that the issues in a bankruptcy case are overly complex or technical.[9]

Yet, numerous actors already serve guardian roles in bankruptcy cases, raising questions of whether there are indeed guardian gaps in complex chapter 11 practice and, if so, how those gaps are best filled.[10] This article answers these questions. By holistically examining bankruptcy's existing guardians and their shortcomings, this article reveals bankruptcy's guardian gaps and makes informed proposals for filling them.

As discussed, plenty of scholars have advocated for more guardians or greater use of guardians in bankruptcy; this article is, however, the first to conduct a comprehensive assessment of these guardians considering modern chapter 11 practice. Examining the bankruptcy system through the lens of those protecting it provides a unique perspective on how to address the problems of large-case chapter 11 practice. Although this article focuses on guardians' shortcomings, it also shows what bankruptcy's guardians are capable of. While other legal scholars have focused on the shortcomings of specific guardians,[11]

Reform, 63 B.C.L. REV. 2169, 2211–13 (2022) (proposing the mandatory appointment of an environmental trustee to focus on public interest concerns in liquidation proceedings involving environmental issues); Jeanne M. Goche, *The Increased Importance of the PCO Post-Pandemic*, AM. BANKR. INST. J., Dec. 2024, at 24 (calling for more health care cases to appoint a patient care ombudsman).

[8] *See infra* Part I.A.

[9] *See infra* Part I.A and notes 19–21 for a fuller explanation of these concerns.

[10] Filling guardian gaps is, of course, not the only way to resolve concerns with large-case chapter 11 practice. However, this article focuses on filling guardian gaps for two primary reasons. First, there are already numerous scholarly proposals for altering aspects of large-case chapter 11 practice directly, but a focus on guardians is understudied. Second, filling guardian gaps may in turn encourage more direct changes in large-case chapter 11 practice itself.

[11] *See, e.g.*, Melissa B. Jacoby, *Other Judges' Cases*, 78 N.Y.U. ANN. SURV. AM. L. 39 (2022) (highlighting problems with judges as mediators); Yesha Yadav & Robert J. Stark, *The Bankruptcy Court as Crypto Market Regulator*, 96 S. CAL. L. REV. 1479 (2024) (discussing problems that arise when bankruptcy judges preside over cases involving cryptocurrency); Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C.L. REV. 1297, 1310–11 (2020) (expressing concerns about the Department of Justice's influence on the

this article examines bankruptcy's guardians holistically as part of the larger system of checks and balances that undergirds bankruptcy law.[12] In doing so, this article uncovers insights about the ways bankruptcy's guardians work together that allow for more informed decisions about guardians' role in future bankruptcy practice.

In addition to assessing bankruptcy's guardians in modern chapter 11 practice, the article provides important historical context. It shows that bankruptcy professionals have long countered calls for more guardians and have consistently sought less oversight, particularly in restructuring cases.[13] As U.S. bankruptcy law developed, there was a near constant tug-of-war between policymakers, who typically sought more oversight, and restructuring professionals, who sought less.[14] Congress has generally chosen a path of less oversight on the ground that less oversight leads to greater efficiency.[15] This historical context is important to understanding how to plug bankruptcy's guardian gaps today; in particular, it illustrates the need to articulate the benefits of any additional guardians and why these benefits outweigh possible losses in efficiency.

The time is particularly ripe to assess and address bankruptcy's guardian gaps. Bankruptcy law and practice have changed significantly since the enactment of the Bankruptcy Code in 1978. As the bankruptcy system faces increasing pressure and unprecedented challenges, calls for reform have

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U.S. trustee); *The Many Roles of a Neutral in Bankruptcy*, AM. BANKR. INST., *available at* https://www.abi.org/committee-recording/the-many-roles-of-a-neutral-in-bankruptcy [hereinafter "Many Roles"] (discussing the fee examiner's unpopularity in the *Lehman Brothers* bankruptcy).

[12] There have also been holistic studies of chapter 11 practice; however, the most recent of these, the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11, is based on information from over a decade ago, when many of bankruptcy's newest challenges were nascent at best. *See generall*y ABI Report, *supra* note 7 (noting that the Commission met beginning in January 2012 and that it conducted a three-year study).

[13] *See, e.g.*, DAVID A. SKEEL, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 79 (Princeton Univ. Press 2014) ("Bankruptcy professionals derailed the administrative proposals for good in 1932.").

[14] *See infra* Part I.

[15] *See* Donald L. Swanson, *Special Masters are Needed in Bankruptcy, Part 3: Evolution of Bankruptcy Referees and Courts Show Why Needed*, MEDIATBANKRY (Feb. 29, 2024), https://mediatbankry.com/2024/02/29/special-masters-are-needed-in-complex-bankruptcy-cases-part-3-the-evolution-of-bankruptcy-referees-and-courts-show-why-needed/ (noting that Congress sought a more "efficient" bankruptcy system through vesting "broad powers and jurisdiction directly in the bankruptcy courts").

become more pervasive.[16] Even Congress has become interested in bankruptcy reform.[17] This article supplies critical information for implementing any reforms to bankruptcy law, as it will be necessary to understand the role bankruptcy's guardians can and will play in future iterations of the law.

This article proceeds in four parts. Part I begins with a focus on history, demonstrating that law- and policymakers have typically favored a slimmer bankruptcy system that trends toward comparatively less oversight. It then considers some significant changes to modern chapter 11 practice. Part II provides a typology of guardians in chapter 11. It examines the role each guardian is designed to serve and how complex chapter 11 trends have impeded these guardians' ability to fulfill their intended functions. Part III then discusses ways to fill the guardian gaps identified in Part II. It proposes a two-step process to address these gaps. The first step is to designate certain cases as "complex chapter 11 cases," and the second step is to provide an additional guardian in those cases only. However, Part III also recognizes that, even without significant change to the bankruptcy laws, periodic assessments of the bankruptcy system are necessary to ensure that the system is working efficiently and effectively. This article thus aligns with scholarship that seeks a broader restructuring of the bankruptcy system but illustrates the value of holistically examining the system as a precursor to designing any reform. The article concludes with a brief summary and endorsement for change.

I. Background

This part supplies critical context for the rest of the article. It begins by explaining the term "guardian" as used in the article and then traces various attempts to add guardians throughout the development of U.S. bankruptcy law. It then provides an overview of present changes in complex chapter 11 practice and the calls for guardians to address these changes.

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[16] *See infra* Part I.B.5.

[17] In July of 2025, the House Judiciary Subcommittee on the Administrative State, Regulatory Reform, and Antitrust held a hearing to examine, *inter alia*, whether bankruptcy law is correctly balancing debtor and creditor rights. *Bankruptcy Law: Overview and Legislative Reforms*, HOUSE JUDICIARY COMMITTEE, 119th Cong. (2025) https://judiciary.house.gov/committee-activity/hearings/bankruptcy-law-overview-and-legislative-reforms-0.

A. Bankruptcy Guardians

Because the term "guardian" is not an established part of bankruptcy's lexicon, this subsection explains how the term is used in this article.

The term "guardian" is commonly understood to refer to "a person who guards, protects, or preserves;" a guardian is someone "entrusted . . . with the care" of someone or something else.[18] Thus, for this article's purposes, a bankruptcy "guardian" is someone who: (1) oversees a bankruptcy case; (2) provides expertise or oversight as to issues that arise; or (3) protects and preserves underrepresented interests.[19]

Bankruptcy's guardians may also be understood in terms of the concerns they address. Although guardians may be used in a variety of capacities, a bankruptcy guardian typically (1) protects the integrity of the bankruptcy process; (2) advocates for underrepresented interests; and/or (3) provides technical expertise to facilitate the resolution of issues. Bankruptcy's guardians thus primarily address three concerns with large-case chapter 11 practice: that the bankruptcy process is being "captured" by certain powerful parties, such as debtors and their counsel;[20] that some parties' interests are not adequately represented in a bankruptcy case;[21] and concerns about technical or complex issues within a bankruptcy case.[22]

The term "guardian" is intended to be broadly construed for this article's purposes. However, this article does exclude certain parties from its analysis. For example, counsel to the debtor, creditors, and other parties are not considered separately as part of this article's guardian typology. This is because

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[18] *Guardian*, DICTIONARY.COM, https://www.dictionary.com/browse/guardian.

[19] *See* AURELIO GURREA-MARTINEZ, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES 9 (Cambridge Univ. Press 2023) ("[A]n insolvency proceeding usually requires the involvement of independent and reliable third parties (e.g., insolvency courts and IPs) that can facilitate an environment of trust between debtors and creditors.").

[20] *See generally* Jessica R. Graham, Note, *Institutional Capture: Why We're Overdue for a New Bankruptcy Act*, 19 N.Y.U.J.L. & BUS. 409 (2023) (documenting institutional capture in the bankruptcy system); *see also* Steven Church & David Voreacos, *FRG Lawyers Too Conflicted for Bankruptcy, US Trustee Argues*, BLOOMBERG L. (Jan. 13, 2025) (discussing the U.S. Trustee's contention that the law firm representing debtor Franchise Group Inc. was "too conflicted to counsel the Debtors in these cases" and should be dismissed from the bankruptcy case).

[21] *See generally* Foohey & Odinet, *supra* note 6 (advocating for increased representation mechanisms in chapter 11 cases involving "onslaught litigation").

[22] *See generally* Couwenberg & Lubben, *supra* note 4 (observing complexity and complex strategies in chapter 11 cases).

the article's focus is on the actors within a bankruptcy case rather than the attorneys that advise them even though these attorneys may well influence and guide the actors. Thus, while a guardian's attorney may assist the guardian in fulfilling its role, lawyers are not the focus of this article.

B. Bankruptcy Guardian Advocates and Resistance

Guardians have been present throughout U.S. bankruptcy's long history. This subsection explores how guardians have developed in bankruptcy, beginning with pre-Code discussions and continuing to the present day. It illustrates how Congress has repeatedly considered, but often rejected, calls for increased oversight and representation in large business bankruptcy cases. It then turns to an examination of the ways in which complex chapter 11 practice has evolved and the calls for guardians to address these changes, setting the stage for Part II's typology of bankruptcy guardians.

1. Pre-Code History

Bankruptcy in the United States originally looked quite different from modern-day chapter 11. Initially, Congress looked to England as a model when it began drafting the nation's earliest bankruptcy laws. Mid-1800s English law largely put creditors in control of a restructuring.[23] However, in 1883, England pivoted to an administrative system and required that an official receiver be appointed to administer each case.[24] This administrative approach undergirds much of English bankruptcy law today.[25]

Although Congress at first sought to copy many aspects of the English system, an administrative approach to bankruptcy fell out of favor as the federal bureaucracy expanded in other ways. As one congressman put it in the 1890s, "In my judgment the people do not want any more Federal officials over them."[26] Consequently, Congress moved away from an administrative bankruptcy process, albeit somewhat slowly.[27] For example, an early version of a bankruptcy bill still envisioned at least three forms of oversight: district courts would administer bankruptcy cases, bankruptcy "commissioners" would

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[23] SKEEL, *supra* note 13, at 37.

[24] *Id.*

[25] *Id.* (noting that in England, an official receiver has wide-ranging authority to investigate the debtor, oversee a trustee's appointment, and make recommendations to the court).

[26] *Id.* at 39 (quoting Congressman Abbott of Texas).

[27] *Id.* at 40.

handle the day-to-day aspects of the cases, and "supervisors" would oversee matters at the regional level.[28]

Ultimately, however, Congress settled on a judicial, adversarial structure for bankruptcy where cases were overseen by a part-time "bankruptcy referee" whose primary job was to assist the district courts administering the cases.[29] These bankruptcy referees were not full-fledged government officials; until Congress put them on a salary in 1946, they received only a fixed percentage of the assets they distributed in a bankruptcy case as compensation for their work.[30]

Thus, in general, the bankruptcy system in the resulting 1898 Bankruptcy Act was much less focused on administrative oversight and much more adversarial than either the English system or previous, brief iterations of the U.S. system.[31] Indeed, the U.S. system now contrasted sharply with England. Whereas government officials were heavily involved in bankruptcy administration in England, U.S. bankruptcy referees mostly let the parties sort matters out themselves.[32] The referees' hands-off approach allowed other professionals, namely banks and lawyers, to become influential bankruptcy actors.

In fact, from the time of the 1898 Act onward, Wall Street banks and lawyers began to play a significant role in the development of bankruptcy law, and they sought to retain that role when reformers "completely revamped" the bankruptcy system around the time of the New Deal.[33] This "revamp" was instigated by a series of complaints about New York City bankruptcy practice in the late 1920s.[34] A federal grand jury, formed in response to these complaints, reported that bankruptcy practice was in fact "characterized by serious abuses and malpractices upon the part of attorneys, receivers, trustees, appraisers, custodians, auctioneers and other persons, associations or

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[28] *Id.*

[29] *Id.*; Donald L. Swanson observes that the bankruptcy referee historically was a "special master" whose role was "to hear and report generally or upon specified matters to the district court judge." Donald L. Swanson, *Special Masters are Needed in Bankruptcy, Part 3: Evolution of Bankruptcy Referees and Courts Show Why Needed*, MEDIATBANKRY (Feb. 29, 2024), https://mediatbankry.com/2024/02/29/special-masters-are-needed-in-complex-bankruptcy-cases-part-3-the-evolution-of-bankruptcy-referees-and-courts-show-why-needed/.

[30] SKEEL, *supra* note 13, at 40.

[31] *Id.* at 43.

[32] *Id.*

[33] *Id.* at 4.

[34] *Id.* at 76.

corporations within and subject to the jurisdiction of the United States District Court."[35]

Later investigations revealed that "the primary reason for dissatisfaction with bankruptcy administration lies in the abuse and misuses of proxies"—essentially, cronyism.[36] In response to these reports, members of Congress initially sought to revert back to a more administrative system with more oversight.[37] For example, one early report sought the creation of "a staff of 10 full-time salaried administrators under the Attorney General."[38] Under this proposal, these administrators would oversee the appointment of bankruptcy trustees and would also hire civil service employees to serve as examiners.[39] These employees would perform "a searching examination of each bankrupt who filed a bankruptcy petition."[40]

Other proposals around this time also sought to imbue the bankruptcy process with greater governmental oversight. For example, the Sabath Bill proposed a new bankruptcy "conservator" to oversee bankruptcies and select trustees and other officials.[41] Another bill, the Lea Bill, would have given the Securities and Exchange Commission (SEC) more involvement and, in particular, more control over deposit accounts.[42]

However, bankruptcy professionals mobilized and pushed back against these changes. Their efforts mostly succeeded.[43] Thus, bankruptcy has no governmental overseer, distinguishing U.S. bankruptcy practice from that in most other countries.[44] Although later proposals to add a government overseer continued to pop up, particularly in the 1930s and 1970s, critics defeated these proposals by arguing that additional government oversight would increase costs

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[35] *Id.*

[36] *Id.* at 78.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 113 (noting that the practice of party selection of officials in bankruptcy "had led to cronyism, patronage appointments, and other evils").

[42] *Id.* at 114.

[43] *Id.* at 79 ("Bankruptcy professionals derailed the administrative proposals for good in 1932.").

[44] *Id.* at 89 ("If there is a 'dog that didn't bark' in American bankruptcy law, surely it is the absence of governmental overseer serving as gatekeeper to the bankruptcy process. In other nations that permit debtors to discharge their debts, one or more government officials review each bankruptcy petition, examine the debtor, and have an important say in whether the debtor receives a discharge."); *see* GURREA-MARTINEZ, *supra* note 19, at 8 ("[M]ost jurisdictions around the world require the appointment of an insolvency practitioner ('IP') to monitor or even replace the directors in the management of the debtor's property and business affairs.").

and further bloat government bureaucracy.[45] Creditors were especially concerned that introducing an overseer would diminish their own control in a case.[46]

Still, a weak form of government oversight persisted. Under the provisions of the Chandler Act, which predated the Bankruptcy Code, large corporations that filed for bankruptcy under provisions designed for publicly held companies had their management replaced by a trustee as a matter of course.[47] This arrangement was the product of a compromise between the bankruptcy bar and the SEC, which had continued to seek an oversight role in bankruptcy cases.[48] Although the bar succeeded in limiting changes for corporate reorganizations in general, the SEC, via the Chandler Act, managed to promote an entirely new chapter of the Bankruptcy Act dedicated to the reorganization of publicly held firms.[49] For these bankruptcies only, the SEC insisted that management be removed and an independent trustee put in place so as to better loosen the grip of Wall Street practitioners and bankers on these reorganizations.[50] This new chapter became Chapter X of the Chandler Act of 1938,[51] and independent trustees were mandatory for firms that filed under that chapter.[52] The SEC also took on an important role "as policeman on investors' behalf" in all Chapter X cases.[53]

Notably, the Chandler Act's provisions required the bankruptcy judge (or referee) to appoint the independent trustee.[54] This practice soon came under fire as it "seemed to . . . implicate the judge too deeply in the administration of the case," particularly in certain cities like New York, "where bankruptcy rings seemed to control the choice of trustee."[55]

Thus, perhaps unsurprisingly, Chapter X became very unpopular.[56] Firms did not like the independent trustee's replacement of their management,

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[45] SKEEL, *supra* note 13, at 90.
[46] *Id.* at 91.
[47] *Id.* at 10.
[48] *Id.* at 97.
[49] *Id.*
[50] *Id.* at 112.
[51] *Id.*
[52] *Id.* at 119. An independent trustee could not be a company's banker or its attorney; an independent trustee had to be "disinterested." *Id*. "Disinterested" was defined specifically to exclude these actors. Lipson & Skeel, *supra* note 7, at 389.
[53] SKEEL, *supra* note 13, at 121.
[54] Lipson & Skeel, *supra* note 7, at 389.
[55] SKEEL, *supra* note 13, at 18 n.71.
[56] *Id.* at 125 (noting that the Chandler Act's "independent trustee requirement discouraged

even as critics fretted over the coziness of the appointment process. By contrast, Chapter XI of the Chandler Act, designed for smaller companies, became much more popular as it was recognized as more debtor friendly. Under Chapter XI, there was no displacement of management by a trustee, and the SEC was not involved.[57] By the 1970s, more large corporations were filing under Chapter XI, rendering Chapter X "a dead letter."[58] Indeed, bankruptcy professionals encouraged the use of Chapter XI whenever possible because of the comparative lack of oversight in that chapter.[59]

As practice evolved, Congress again began considering changes to bankruptcy law. In 1973, the National Bankruptcy Review Commission recommended that Congress create a governmental overseer to "act as gatekeeper to the bankruptcy process."[60] Perhaps predictably, this recommendation faced immediate backlash from the bankruptcy bar.[61] However, given the experience under the Chandler Act, Congress saw a need to provide "a unitary reorganization procedure for all debtors with features borrowed, blended and altered from both Chapter X and Chapter XI."[62]

In summary, prior to the Bankruptcy Code's enactment, Congress deliberately shifted away from bankruptcy as an administrative process and instead moved toward a more judicial and adversarial framework. Although Congress encountered several proposals to increase the government's role in bankruptcy, it typically rejected those proposals in favor of paring down the government's role. Only the highly unpopular Chapter X preserved significant oversight in the form of an independent trustee and the SEC. Pre-Code bankruptcy thus represents a tug-of-war between reformers, who sought additional oversight to curb problems of cronyism and abuse, and bankruptcy

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the managers of large firms from filing for bankruptcy if there was any way to avoid it").

[57] Daniel J. Bussel & Austin J. Damiani, *Chapter 11 at the School of Subchapter V: Part I*, 44 NO. 6 BLL-NL 1 (2024).

[58] *Id.*

[59] SKEEL, *supra* note 13, at 170 ("Appointing a trustee was a distraction, and the trustee had to get up to speed on the firm. The SEC itself was a source of delay, since the parties had to wait for the SEC to review any proposed plan in large cases. Perhaps more importantly, although some courts welcomed its input, the SEC was in a sense a competing source of authority, since the SEC report inevitably carried great weight. The smoother waters of Chapter XI thus held a powerful allure for the bankruptcy judge, just as they did for the debtor's managers and lawyers.").

[60] *Id.* at 92.

[61] *Id.* (noting that "[p]roposals to establish an administrative overseer have always brought out bankruptcy lawyers' passions faster than any other single issue").

[62] Bussel & Damiani, *supra* note 57.

professionals and creditors who ultimately persuaded Congress that less was more when it came to governmental oversight.

2. Development of the Bankruptcy Code

As discussed further in Part II, chapter 11 practice today occurs under the eyes of two consistent bankruptcy guardians. The bankruptcy judge oversees the case and carries out the associated judicial tasks, and the United States trustee provides administrative oversight. This structure was far from certain, however, because Congress considered and rejected other options for bankruptcy guardians in the years leading up to the Bankruptcy Code's development.[63]

Recall that under the Chandler Act, the SEC played a significant role only in cases brought under Chapter X. Because debtors tended to prefer Chapter XI whenever possible, the SEC's influence in bankruptcy proceedings had waned in the years preceding enactment of the Bankruptcy Code.[64] Thus, when Congress began considering changes to bankruptcy law, it sought to decrease the SEC's role in bankruptcy and turned instead to the bankruptcy judge and a new guardian (the U.S. trustee) for case oversight.[65]

Congress wanted to add the U.S. trustee as an additional bankruptcy guardian because the system under the Bankruptcy Act had become too difficult for judges to administer alone.[66] Specifically, bankruptcy judges were performing both administrative and judicial roles, and their judicial responsibilities sometimes suffered as a result.[67] Congress therefore sought to relieve judges of administrative duties and transferred those responsibilities to panel trustees.[68] Initially, Congress once again sought to create an

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[63] SKEEL, *supra* note 13, at 132 (noting that the 1973 commission report "called for Congress to establish a bankruptcy agency to shoulder much of the oversight responsibility long located in the judicial system").

[64] *Id.* at 19.

[65] *Id.* (noting that the Bankruptcy Code "almost completely repudiated both the SEC and the New Deal vision of bankruptcy"); *id*. at 164–65 ("During the hearings that led to the 1978 Code, several offered horror stories of cases in which the SEC intervened in the waning moments of a reorganization, roiling the negotiations as they neared completion.").

[66] Craig A. Gargotta, *Who Are Bankruptcy Judges and How Did They Become Federal Judges?*, FED. BAR. (Apr. 2018),https://www.fedbar.org/wpcontent/uploads/2018/04/Bankruptcy-Brief-pdf-1.pdf.

[67] *Id.* (noting that they were "hampered . . . in performing [their] judicial duties").

[68] *Id.*; Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 35 (1995) ("An attempt was made to relieve bankruptcy judges of

administrative agency to oversee bankruptcy; however, professionals pushed back, claiming that a bankruptcy administrator would be expensive and fraught with conflicts of interest.[69] In lieu of a bankruptcy agency, bankruptcy today consists of a trustee system (most of whom do not play a role in chapter 11 cases), along with the U.S. trustee and the judge to handle the administrative[70] and judicial[71] aspects of cases. The Commission on the Bankruptcy Laws further emphasized the administrative role that bankruptcy trustees play when it recommended that trustees should "remain free of involvement other than as a neutral successor to the referee's or district judge's administrative responsibilities."[72]

These case trustees (and debtors-in-possession) would be overseen by the newly created United States Trustee Program (USTP).[73] The USTP began as a pilot program and became permanent after a Department of Justice (DOJ) study concluded that "case administration within the pilot districts was better than in the non-pilot districts."[74] Notably, however, the DOJ study also observed that "[t]he main issue raised throughout the hearings was the potential

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administrative duties, thereby permitting them to focus more exclusively on their judicial roles.").

[69] SKEEL, *supra* note 13, at 139 (noting that a proposed agency, the United States Bankruptcy Administration, "would assume all of the administrative functions previously performed by bankruptcy judges and would provide counseling services for would-be debtors"); *id.* at 143.

[70] *Process – Bankruptcy Basics*, US COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics (noting that the U.S. trustee oversees the administrative aspects, which are carried out by either a case trustee or, in the case of chapter 11, by the debtor-in-possession).

[71] *Id.*

[72] COMMUNICATION FROM THE EXECUTIVE DIRECTOR, COMMISSION ON THE BANKRUPTCY LAWS, TRANSMITTING A REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS – July 1973, 93rd Cong., 1st Sess., H.R. DOC. NO. 93-137, pt. II (Sept. 6, 1973), Doc. 22.

[73] *Administration of Cases Under the Bankruptcy Code*, NAT'L BANKR. REV. COMM'N, https://govinfo.library.unt.edu/nbrc/report/19admini.html [hereinafter *Administration of Cases*]; *see* Jared A. Ellias, *Regulating Bankruptcy Bonuses*, 92 S. CAL. L. REV. 653 (2019) (noting that Congress created the USTP to "oversee the then-new system of bankruptcy courts"); Joseph A. Guzinski, *Response: Small Business Reorganization and the SABRE Proposals*, 7 FORDHAM J. CORP. & FIN. L. 295, 296 (2002) ("Past proposals for neutral facilitators of the bankruptcy process were attempts to reduce cases that languished in Chapter 11 without any reasonable prospect for reorganization. The drafters of the Bankruptcy Code of 1978 created the United States Trustee Program in part to address this problem. The deliberations of the National Bankruptcy Review Commission considered a type of neutral expert in each Chapter 11 case who would evaluate the debtor at the early stages of a Chapter 11 case and report to the court on the debtor's prospects for reorganization.").

[74] *Administration of Cases*, *supra* note 73.

for conflicts of interest should the program be administered by the DOJ, since the agency represents most governmental agencies in bankruptcy cases."[75] The judicial branch was also "strongly" opposed to the DOJ housing the USTP and proposed a "bankruptcy administrator" system located in the judicial branch as an alternative.[76] Nevertheless, the DOJ continues to house the USTP to this day, and U.S. trustees oversee bankruptcy administration in all but six judicial districts.[77] This is due to a congressionally made exception that allows certain districts to opt in to the USTP at a later date.[78] The USTP was later permanently expanded via the 1986 amendments to the Bankruptcy Code to 48 states, Puerto Rico, the U.S. Virgin Islands, and Guam.[79]

Congress hoped that the USTP would help address cases that were "languishing" in bankruptcy.[80] However, U.S. trustees were not the only option Congress considered. Notably, the National Bankruptcy Review Commission (NBRC) had discussed using a neutral expert in every chapter 11 case to perform an early evaluation of the debtor and provide the court with a report on the debtor's prospects for reorganization.[81] However, Congress ultimately jettisoned this option in favor of the U.S. trustee whose "ethical oversight" of bankruptcy cases today is one of the "principal safeguards of the public interest in integrity and fairness."[82]

Having relieved bankruptcy judges of their administrative responsibilities, Congress sought increased efficiency by vesting "broad

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[75] *Id.*

[76] *Id.* (noting that the "proposal authorized the Judicial Conference to determine the number of bankruptcy administrators, who would be appointed for a term of five years and were removable only for cause by the courts of appeals. The Proposal strongly resembled earlier Proposals for separate administrative systems, especially with regard to the duties to be performed by the bankruptcy administrators").

[77] Six judicial districts—those in Alabama and North Carolina—use bankruptcy administrators, which are housed in the judicial branch. Jeffery J. Hartley & John A. Gose, *The Bankruptcy Administrator Program and the U.S. Trustee Program*, NAT'L BANKR. REV. COMM'N, https://govinfo.library.unt.edu/nbrc/report/24commvi05.html.

[78] *Administration of Cases*, *supra* note 73, at 853–54 ("As a compromise to satisfy those who opposed the UST program's expansion—principally members of the judiciary and attorneys in certain jurisdictions—the bill provided an 'opt out' alternative. . . . Although [the ultimate compromise] did not contain an 'opt out' provision, it provided that the judicial districts in Alabama and North Carolina would not come into the UST program until 1992, unless they decided to 'opt in' sooner. The 'opt in' provision has since been extended.").

[79] *Id.*

[80] Guzinski, *supra* note 73, at 296.

[81] *Id.*

[82] Lipson & Skeel, *supra* note 7, at 390.

powers and jurisdiction directly in the bankruptcy courts."[83] However, the Supreme Court had other ideas: in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held that Congress had unconstitutionally granted "the essential attributes of the judicial power" to non-Article III bankruptcy judges.[84] In response to *Northern Pipeline*, Congress amended the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure to cabin some of this power.[85] These amendments eliminated the role of a "special master" in bankruptcy cases, a move some commentators believe was inadvertent.[86]

In summary, when Congress developed the Bankruptcy Code, it minimized the role of the SEC, allowed the elimination of special masters, and divided case oversight responsibilities between the bankruptcy judge and the U.S. trustee (and case trustees). In the process of making these changes, Congress once again considered and rejected other options for increased guardianship such as the NBRC's proposal for neutral experts and, for the most part, a system of bankruptcy administrators housed outside the executive branch.

3. Refining the Code: Pre-BAPCPA

In the time since the Bankruptcy Code's enactment, practitioners and academics have floated other proposals for additional bankruptcy guardians. In the early 2000s, the Select Advisory Committee on Business Reorganization (SABRE), established by the American Bar Association, published a series of reports (collectively, the SABRE Report) which contained several proposals for new bankruptcy guardians. Specifically, the SABRE Report proposed a new, court-appointed independent facilitator and a neutral business expert to assist with chapter 11 cases.[87] Both of these parties were intended to serve as an "intermediary" between the debtor and its creditors.[88]

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[83] Donald L. Swanson, *Special Masters are Needed in Bankruptcy, Part 3: Evolution of Bankruptcy Referees and Courts Show Why Needed*, MEDIATBANKRY (Feb. 29, 2024), https://mediatbankry.com/2024/02/29/special-masters-are-needed-in-complex-bankruptcy-cases-part-3-the-evolution-of-bankruptcy-referees-and-courts-show-why-needed/.

[84] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

[85] Swanson, *supra* note 83.

[86] Fed. R. Bankr. P. 9031; *see* Swanson, *supra* note 83 ("[I]t may have been the haste and confusion of the day that led to the unexplained conclusion that special masters should not be appointed in bankruptcy cases.") (emphasis omitted); *see* INTRODUCTION, *supra*, for a discussion of attempts to revive this role.

[87] Guzinski, *supra* note 73, at 296.

[88] *Id.* at 298.

The SABRE Report envisioned the neutral facilitator's role as similar to that of a mediator: the facilitator was supposed to "foster consensus" and encourage the parties to overcome their differences if they could not agree on a plan within a "reasonable" time.[89] However, the facilitator could do more than mediate; it could also file a plan with the bankruptcy court's approval.[90] SABRE envisioned that facilitators would become a "regular and favored practice" within chapter 11.[91]

The SABRE Report also proposed allowing the bankruptcy court to appoint neutral business experts for small business chapter 11 cases.[92] These experts would conduct analyses and be compensated by the estate.[93] With this proposal, SABRE hoped to replace "multiple, partisan, business experts with court-appointed, independent, business experts who will generate neutral" analyses for the benefit of all parties.[94] Though conceived as primarily applying in small business cases, these experts could also be used in larger cases.[95] And with respect to both the facilitator and the expert, SABRE recommended that either the Bankruptcy Code or Rules be amended to provide "clear standards and uniformity" for the appointment of these new guardians.[96]

Although SABRE acknowledged that the U.S. trustee performed a guardian role in bankruptcy cases, it sought to add facilitators and experts to the mix because it viewed the U.S. trustee as a "monitor of last resort."[97] In addition, SABRE found that bankruptcy was becoming increasingly adversarial.[98] In non-bankruptcy litigation, courts regularly used independent experts and mediators to curtail unnecessary litigation and streamline the process.[99] SABRE's proposals sought to align bankruptcy with these litigation practices. Although SABRE recognized that incorporating additional players

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[89] Karen M. Gebbia-Pinetti, *Small Business Reorganization and the SABRE Proposals*, 7 FORDHAM J. CORP. & FIN. L. 253, 267 (2002) (quoting the SABRE proposal).

[90] *Id.*

[91] *Id.* at 271.

[92] *Id.* at 272.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 274.

[96] *Id.*

[97] *Id.* at 285 (noting that the U.S. trustee "rarely steps in to seek conversion or dismissal unless the debtor has failed to file required reports or the case has languished for a lengthy period and shows no prospect of confirmation").

[98] Guzinski, *supra* note 73, at 297.

[99] Gebbia-Pinetti, *supra* note 89, at 292.

into chapter 11 would add costs, it believed that the facilitator and expert were worth it because they would streamline chapter 11 practice.[100]

A second formal proposal came over ten years after the SABRE Report. In 2014, the American Bankruptcy Institute's (ABI) Commission to Study the Reform of Chapter 11 (Commission) issued its Final Report and Recommendations (ABI Report). The ABI Report contained a plethora of proposals for improving the chapter 11 process based on the Commission's in-depth study of chapter 11 law and practice.[101] One of the Commission's proposals was the addition of an "estate neutral," an individual appointed to assist with specific aspects of a chapter 11 case depending on the needs of the debtor or other stakeholders.[102]

The Commission envisioned the estate neutral as a replacement for the bankruptcy examiner.[103] Like a bankruptcy examiner, an estate neutral's appointment would not be mandatory or necessary in every case.[104] However, an estate neutral would be more flexible than a bankruptcy examiner, and this flexibility would allow it to respond to the needs of the particular case in which it was appointed.

The Commission proposed that a court could be permitted to order the U.S. trustee to appoint a qualified individual as an estate neutral if a trustee is not appointed in a chapter 11 case and either (1) the appointment is in the best interests of the estate, or (2) there is cause for the appointment.[105] The appointing order would specify the duties of the estate neutral and the duration of the appointment.[106] The estate neutral would be required to be a "disinterested person" as defined in the Bankruptcy Code, and parties in interest could object to the appointment.[107]

Although the estate neutral was designed to be flexible, the Commission also sought to establish some limitations on the role. Under no circumstances, said the Commission, should an estate neutral be permitted to propose a chapter 11 plan.[108] And under only limited circumstances should an estate neutral be

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[100] *Id.* at 293 ("SABRE believes that the cost savings associated with [these and other proposals], together with the incidental improvements these reforms will make to the bankruptcy system, will exceed any costs associated with implementing these proposals.").

[101] ABI Report, *supra* note 7, at 13.

[102] *Id.* at 12.

[103] *Id.* at 38.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

permitted to act as a mediator, initiate litigation on behalf of the debtor or estate, or operate the debtor's business.[109] The estate neutral would be compensated by the estate and would be permitted to retain professionals as authorized by the court.[110]

The Commission believed that an estate neutral would add value to the chapter 11 process because most chapter 11 cases did not include a case trustee as guardian. In the absence of a case trustee, the Commission noted, "all parties in the chapter 11 case have potentially diverging interests and may be motivated purely by self-interest."[111]

Given the Commission's emphasis on the estate neutral being neutral, it was a somewhat unusual move for the ABI Report to also suggest that courts could authorize the estate neutral to act as a "professional service provider" for the estate—for example, as an attorney or accountant.[112] However, the ABI Report did caution that the "employment of a trustee or an estate neutral to act as a professional service provider should remain subject to appropriate limitations and restrictions to avoid self-dealing or other action that is improper or not in the best interests of the estate."[113]

Flexibility was the hallmark of the proposed estate neutral. At various places throughout the ABI Report, the Commission suggested that estate neutrals could take on expanded roles in the case, including as a mediator or valuation expert.[114] Though nominally "neutral," the estate neutral would be representing the estate and could advocate on the estate's behalf.[115] To ensure "objectivity and fairness" in the estate neutral's appointment, the Commission advocated that the U.S. trustee be responsible for the appointment.[116]

With the estate neutral, the Commission sought to add a new player to bankruptcy cases—a flexible party who could respond to the particular needs of the debtor and case.[117] The Commission emphasized that the neutral's role

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[109] *Id.*
[110] *Id.* at 43.
[111] *Id.*
[112] *Id.* at 54.
[113] *Id.*
[114] *Id.* at 189.
[115] *Id.* at 257.
[116] *Id.* at 300.
[117] Michelle M. Harner et al., *Corporate Bankruptcy Panel: ABI Commission's Report on the Reform of Chapter 11: Small and Medium Businesses, Sales of Assets, Financing, and Plans*, 32 EMORY BANKR. DEV. J. 267, 278 (2016) ("So on whole, the Commission was trying to make the role of an estate neutral more flexible so that judges absolutely could help a particular debtor.").

was not "cookie cutter" as different needs would arise in different cases.[118] The flexible estate neutral concept would allow the appointment of an individual whose role could adapt to the needs of the case.[119] Although the Commission was very familiar with the existing guardians in chapter 11 cases, the implication of the ABI Report is that those existing roles do not have sufficient flexibility to effectively facilitate a case and to respond to the variety of needs arising across chapter 11 cases.

The Commission's estate neutral would thus be a guardian with a combination of neutrality and expertise: the neutral would be independent but would have expertise in whatever area(s) it was expected to facilitate within the chapter 11 case.[120] The court would delineate the role of the estate neutral, allowing it to serve as a "targeted tool" rather than a roving overseer.[121]

In developing the estate neutral concept, the Commission examined current chapter 11 practice through testimony and reports as well as bankruptcy and insolvency schemes abroad.[122] Drawing on the experiences of 13 different countries, the Commission recognized the value of an additional overseer in bankruptcy and proposed the estate neutral to fill that role.[123]

The Commission also recognized that an estate neutral would come with a price tag. However, it sought to mitigate costs (as well as conflicts issues) both by giving the court the ultimate control over the decision to appoint the neutral, its duties, and its compensation and by having the U.S. trustee actually "vet and appoint" the neutral.[124] The Commission viewed the added expense of an additional party as justified because an estate neutral was a way for parties and the court to be more proactive and because an estate neutral would be "uniquely situated to provide an independent and neutral perspective" throughout the case.[125]

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[118] *Id.* at 280 ("You need an informed bankruptcy judge to help craft a process that works for the company, and so the concept is the order appointing the neutral when warranted would specify the role and make sure that it was tailored to the particular issues, and one not mandatory but also not cookie cutter.").

[119] *Id.* at 278.

[120] Michelle M. Harner, *Creating Right Tools for Distressed Companies and Their Creditors*, AM. BANKR. INST. J., Nov. 2015, at 8 (describing the estate neutral as "an independent party with expertise in the areas identified as relevant to, or problematic in, the chapter 11 case").

[121] *Id.*

[122] *Id.* at 9.

[123] *Id.*

[124] *Id.* at 65.

[125] *Id.* at 8 n.6 (quoting ABI Report, *supra* note 7, at 37).

It has now been more than ten years since the Commission issued the estate neutral proposal and over 20 years since the SABRE Report. Yet, Congress has not chosen to adopt a facilitator, an expert, or an estate neutral for large chapter 11 cases. As in the past, some bankruptcy professionals have pushed back against these recommendations. For example, the Loan Syndications and Trading Association published a response to the ABI Report which labeled the report's approach to reform "misguided."[126] The Association warned that, if Congress were to adopt the ABI Report's recommendations, the changes would be "overwhelmingly harmful to debtors, creditors and credit markets, increasing the cost of credit to both performing and distressed businesses alike."[127]

Despite Congress's lack of action, the desire for more and different guardians in bankruptcy persisted. In 2005 and again in 2019, Congress added some guardians to the bankruptcy system, albeit in limited ways.

4. BAPCPA and Subchapter V

Although Congress has not adopted the proposals in either the SABRE Report or the ABI Report with respect to large chapter 11 cases,[128] relatively recent changes to the Bankruptcy Code have brought additional guardians onto the scene. In 2005, Congress made significant changes to the Bankruptcy Code with the passage of the Bankruptcy Abuse, Prevention and Consumer Protection Act (BAPCPA). Then, in 2019, Congress passed the Small Business Reorganization Act (SBRA), which established a new subchapter V of chapter 11 of the Bankruptcy Code for small business debtor reorganization. This subsection outlines the guardian-related changes introduced by these two pieces of legislation.

BAPCPA, CPOs, and PCOs. BAPCPA introduced two new guardian roles to bankruptcy practice: the consumer privacy ombudsman (CPO) and the

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[126] *The LSTA Publishes Detailed Response to the ABI Commission's Proposed Bankruptcy Reforms*, CHAPMAN (Feb./Mar. 2016), https://www.chapman.com/publication-LSTA-Bankruptcy-Reform-ABI-Report.

[127] *Id.*

[128] The ABI Report did include recommendations for an estate neutral in cases involving small and medium-size enterprises, which helped to guide the creation of the subchapter V trustee in the Small Business Reorganization Act of 2019. *See* ABI Report, *supra* note 7, at 291 ("Any estate neutral should represent the interests of the estate and be paid by the estate. The Bankruptcy Code could establish a fee structure available for the estate neutral in an SME case to control costs and increase certainty.").

patient care ombudsman (PCO). Both guardians are specialized, becoming a part of the bankruptcy process only in certain specific circumstances.

A CPO is a "neutral third party" appointed in bankruptcy to deal with the privacy aspects of data sales.[129] The data a company collects about its customers is a valuable asset; however, if a company seeks to sell that data in bankruptcy, it may violate its own or other privacy laws and policies.[130] To address privacy concerns in these situations, BAPCPA amended the Bankruptcy Code to provide for the appointment of a CPO in certain cases involving customer data sales.[131] The CPO's role is to advise the court and the parties on how to proceed with a customer data sale while protecting consumer privacy interests.[132] The CPO does this through the production of a report which the bankruptcy court can use to help determine whether a proposed data sale can and should proceed.[133]

At the same time Congress introduced the CPO, it added provisions to the Code to protect patient rights in the context of a bankruptcy of a healthcare business.[134] In these situations,[135] Congress provided for the appointment of a PCO.[136] A PCO is appointed within 30 days of the commencement of a healthcare provider bankruptcy case and is responsible both for monitoring patient care quality and representing the interests of the healthcare business's

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[129] *In re* Celsius Network LLC, 2022 WL 14193879 (Bankr. S.D.N.Y. Oct. 24, 2022), at *11 (citing 3 WILLIAM MILLER COLLIER, COLLIER ON BANKRUPTCY ¶ 332.02 (16th ed. 2022)).

[130] Laura N. Coordes, *Unmasking the Consumer Privacy Ombudsman*, 82 MONT. L. REV. 17, 17 (2021) (discussing RadioShack as an example).

[131] 11 U.S.C. § 332(b) (2018).

[132] *Id.* (providing that a CPO provides "information to assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale").

[133] Coordes, *supra* note 130, at 18 ("In practice, bankruptcy courts look to the CPO to determine whether a sale of customer data can proceed, giving the CPO (and the report the CPO produces for the court) deference and sometimes even refusing to approve a sale until the CPO's conditions for that sale have been fulfilled."); *see* Kyle W. Miller, *The Increasing Need for Consumer Privacy Ombudsmen*, AM. BANKR. INST. J., May 2025, at 18, 53 (pointing out that courts have the discretion to use a CPO "to ensure that individuals' rights are not ignored").

[134] Kenneth Rosen, *Bankruptcy Code Should Better Protect Continuing Care Patients*, BLOOMBERG L. (Feb. 18, 2025), https://news.bloomberglaw.com/us-law-week/bankruptcy-code-should-better-protect-continuing-care-patients ("A patient care ombudsman has a distinct focus from the financial and operational restructuring efforts typically involved in debtor-in-possession financing and plan negotiations.").

[135] Diane Lourdes Dick, *The Case for a Bankruptcy Shareholder Ombudsman*, 41 NO. 1 BANKR. L. LETTER NL 1, 4 (2021) (noting that appointment of an ombudsman is not required if the court finds one is not necessary for the protection of patients).

[136] 11 U.S.C. § 333.

patients.[137] Like the CPO, the PCO must make a report to the bankruptcy court: in the PCO's case, a report is made every 60 days about patient care quality.[138] Indeed, the report is at the heart of the PCO's job; otherwise, it has "no formal powers and no direct ability to influence" a debtor's bankruptcy plan.[139] However, the PCO "is uniquely qualified to help translate complex bankruptcy matters so that patients and their families are able to understand the potential impact of the case on their own important interests."[140]

CPOs and PCOs can play a valuable role in smoothing the way for companies with particular challenges (relating to privacy or healthcare) to succeed in bankruptcy. They provide specialized expertise that assists the bankruptcy judge in better understanding the risks and benefits involved in any proposed action and can serve as a source of information for the court and parties. However, the Bankruptcy Code provides little detail about the specifics of their roles, and they are used only in cases raising specialized concerns about data privacy or patient care.

Recently, Kenneth Rosen has argued for an expanded role for the PCO. Rosen contends that, in the context of a healthcare bankruptcy, either an examiner or the PCO should be directed to report to the court on some of the debtor's pre-bankruptcy transactions if no creditors' committee is formed.[141] As both the CPO and the PCO are relatively new players—and the cases in which they are appointed are specialized—further development of these roles may be encouraged in the future.

SBRA: The Subchapter V Trustee. With the passage of the SBRA and the creation of subchapter V, Congress introduced an even newer guardian to bankruptcy: the subchapter V trustee. Like the CPO and the PCO, the subchapter V trustee only comes into play in a subset of chapter 11 cases—in the subchapter V trustee's case, only in cases filed under subchapter V, dealing with small business reorganizations. Although a subchapter V trustee is a type of case trustee, its role and function are different than that of a chapter 11 case trustee. In fact, the subchapter V trustee's role is more akin to the ABI Commission's vision for an estate neutral than to any other guardian role.[142]

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[137] *Id.*

[138] 11 U.S.C. § 333(b)(2).

[139] Laura N. Coordes, *Reorganizing Healthcare Bankruptcy*, 61 B.C.L. REV. 419, 450 (2020).

[140] Dick, *supra* note 135, at 6.

[141] Rosen, *supra* note 134.

[142] *See* ABI Report, *supra* note 7, at 297, 300.

The U.S. trustee appoints a disinterested subchapter V trustee to oversee every subchapter V case. The subchapter V trustee's primary roles include helping the debtor propose a plan that a bankruptcy court can confirm[143] and facilitating dispute resolution. Like an examiner, the subchapter V trustee's role can also be investigative in nature.[144]

The subchapter V trustee's role was intentionally designed to be facilitative, rather than adversarial, although the subchapter V trustee is not precluded from taking on a more adversarial role if necessary.[145] In the rare event the debtor is removed from possession, the subchapter V trustee may also operate the debtor's business and exercise powers more consistent with a case trustee.[146] Still, in general, the subchapter V trustee, acts in a neutral, facilitative role.[147]

Perhaps because of this characteristic, debate has arisen over some of the contours of a subchapter V trustee's role. For example, there is ongoing debate about whether a subchapter V trustee may also serve as a mediator in the case.[148]

As a relatively new player in the bankruptcy space, the subchapter V trustee seems to reflect a desire for more "neutrality" in bankruptcy cases. In contrast to case trustees' appointments in chapter 11, complaints about a subchapter V trustee's appointment are minimal despite the added expense of

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[143] Many Roles, *supra* note 11.

[144] *Id.* (citing the *Free Speech Systems* case as an example).

[145] Donald L. Swanson, *Sub V Task Force Report In a Nutshell: Part 6—Subchapter V Trustee as Mediator?*, MEDIATBANKRY (June 6, 2024), https://mediatbankry.com/2024/06/06/sub-v-task-force-report-in-a-nutshell-part-6-subchapter-v-trustee-as-mediator/ (noting that the subchapter V trustee may object to the debtor's discharge or take a position on issues before the court).

[146] Donald L. Swanson, *Sub V Task Force Report in a Nutshell: Part 8—Plan Filing After Debtor's Removal*, MEDIATBANKRY (June 20, 2024), https://mediatbankry.com/2024/06/20/sub-v-task-force-report-in-a-nutshell-part-8-plan-filing-after-debtors-removal/.

[147] *See* Bill Rochelle, *Sub V Trustee Lacks Standing to Pursue an Adversary Proceeding for the Debtor*, ROCHELLE'S DAILY WIRE (June 6, 2024) (describing a Houston bankruptcy judge's position that a subchapter V trustee "occupies a unique position as contrasted with its counterparts in traditional chapter 11 and other cases, who tend to be adversarial to the debtor by virtue of their duties to protect the bankruptcy estate and its creditors").

[148] Swanson, *supra* note 145 (noting the recommendation of the ABI's Subchapter V Task Force that subchapter V trustees not serve as mediators unless a court order details the scope of the trustee's role); John Patrick M. Fritz, *The Subchapter V Trustee as Mediator: Lessons Learned over Five Years*, ABI MEDIATION COMM. NEWSL. (Apr. 1, 2025), https://www.abi.org/committee-post/the-subchapter-v-trustee-as-mediator-lessons-learned-over-five-years#_ftn1 (arguing that there is value in the subchapter V trustee acting as a mediator because more adversarial roles are already present in a case).

having another player in a small business case because a subchapter V trustee is an accepted part of every such case (and possibly because there is no creditors' committee to otherwise represent interests countervailing to the debtor's).[149] Thus, subchapter V trustees have expertise, the power to facilitate, and guidelines for their role, even if these guidelines are still being shaped.[150] The subchapter V trustee's inherent flexibility in turn allows bankruptcy to be flexible and to adapt to the particular challenges of small business cases. Although Congress allowed the role to be flexible, the contours of the role are shaped and refined through practice.[151]

Although debtors' attorneys expressed concern that the addition of the subchapter V trustee adds unnecessary costs to a small business bankruptcy case, the overarching consensus seems to be that these costs are worth the benefit that the subchapter V trustee provides.[152] Specifically, "some of the biggest savings come from the presence of a trustee focused on moving creditors and debtors towards a consensual plan and away from contentious litigation and plan objections."[153] The fact that the subchapter V trustee's goal is to reach a consensual plan may also alleviate fears that subchapter V is too debtor friendly.[154]

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[149] *See* Donald L. Swanson, *History & Progress of Subchapter V (Interview With Judge Harner)*, MEDIATBANKRY (June 27, 2024), https://mediatbankry.com/2024/06/27/history-progress-of-subchapter-v-interview-with-judge-harner/ (noting the ABI Task Force's consensus that Subchapter V is working to make small business bankruptcies faster, cheaper, and more effective).

[150] *See* Shane G. Ramsey, *ABI's Subchapter V Task Force Releases Final Report on Subchapter V Recommendations*, NELSON MULLINS (Apr. 23, 2024), https://www.nelsonmullins.com/insights/blogs/red-zone/bankruptcy-rules/abi-s-subchapter-v-task-force-releases-final-report-on-subchapter-v-recommendations (noting the Task Force's recommendation of further training and programming for subchapter V trustees "to promote uniformity and consistency in skill sets").

[151] Sara L. Abner, *Subchapter V Trustee Role in Chapter 11 Bankruptcy*, FROST BROWN TODD (Oct. 12, 2022), https://frostbrowntodd.com/subchapter-v-trustee-role-in-chapter-11-bankruptcy/ ("Subchapter V provides little detail about the role of these trustees."); *see* Thomas T. McClendon, *Is It in the Name? A Sub V Trustee's Pursuit of Avoidance Actions*, AM. BANKR. INST. J., May 2025, at 16 (arguing that the subchapter V trustee's powers can include bringing avoidance actions).

[152] Jim White, *Understanding the Purpose of the Subchapter V Trustee*, N.C. BAR BLOG (Nov.11, 2021), https://www.ncbarblog.com/bk-understanding-the-purpose-of-the-subchapter-v-trustee/.

[153] *Id.* (noting that "[h]aving a facilitator overseeing the bankruptcy from the beginning almost necessarily eliminates some of the procedural maneuvering engaged in traditional 11s").

[154] *Id.* ("Some creditors' attorneys have expressed concerns that Sub V tilts the playing field toward the debtor, but the trustee/facilitator is tasked with getting not merely a confirmed

5. Present Day Guardian Proposals

Proposals for bankruptcy guardians have persisted in recent years. Judges, academics, practitioners, and even some members of Congress are once again calling for additional bankruptcy guardians to provide expertise, representation, and oversight. While some have indirectly sought an increased guardian presence in bankruptcy through arguments for an increased role for mediation and other alternative dispute resolution mechanisms in bankruptcy,[155] others have advanced more direct proposals such as for the use of special masters in bankruptcy.[156] For example, in a series of blog posts, Donald Swanson has argued that special masters can perform a unique and currently unfilled role in bankruptcy cases.[157]

A special master, or "court-appointed neutral," is appointed by a judge to perform specific duties within a case.[158] These duties can include ensuring that judicial orders are followed, hearing evidence on behalf of the judge, and making recommendations to the judge as to the resolution of specific issues.[159] Outside of bankruptcy, district courts have used special masters for a long time in a variety of complex cases.[160] However, Bankruptcy Rule 9031 precludes the appointment of special masters in bankruptcy cases.[161] There is little explanation surrounding the reasoning behind Rule 9031; the available evidence seems to suggest that the rule drafters did not see a need for bankruptcy judges to appoint special masters.[162] Scholars and commentators have long advocated for the use of special masters in bankruptcy proceedings,

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plan, but a consensual plan. To do this, the trustee needs to keep the interests of all parties in mind.").

[155] *See, e.g.*, Stong, *supra* note 7, at 387 (supporting "facilitated negotiations and mediation"); Mabey, Tabb & Dizengoff, *supra* note 7, at 1265 (advocating amendment of the Bankruptcy Rules to "regularize" alternative dispute resolution procedures); Gebbia-Pinetti, *supra* note 89, at 270 ("[A]n approach worth serious study would be the use of established mediation experts.").

[156] *See, e.g.*, Swanson, *supra* note 7; Hirsh & Mayer, *supra* note 7.

[157] Swanson, *supra* note 7.

[158] Keith Blackman, Joshua Klein & Russell Gallaro, *Time Has Come for Special Masters to Streamline Bankruptcy Cases*, BLOOMBERG L. (Feb. 13, 2024), https://news.bloomberglaw.com/us-law-week/time-has-come-for-special-masters-to-streamline-bankruptcy-cases; Sylvia Mayer, *It is Time to Enhance Judicial Efficiency by Amending Rule 9031*, AM. BANKR. INST. J., June 2024, at 20.

[159] *Id.*

[160] Swanson, *supra* note 7.

[161] Fed. R. Bankr. P. 9031.

[162] Delk, *supra* note 7, at 40–42; Mayer, *supra* note 158, at 20 ("Truthfully, no one really knows why Bankruptcy Rule 9031 was adopted in 1983, because no rationale was provided.").

and calls for a special master have increased in recent years in response to the growing complexity of chapter 11 cases.[163]

The special master proposal, however, is far from the only call for additional bankruptcy guardians. Michelle Harner has suggested that a player like the ABI's proposed estate neutral can correct information asymmetries and promote objectivity and fairness within bankruptcy.[164] Oscar Couwenberg and Stephen J. Lubben have also proposed additional oversight in bankruptcy in the form of a Canadian-style monitor to "mitigate opportunistic dealings of claimants in chapter 11."[165] Couwenberg and Lubben's monitor would make "a more nuanced assessment" of the chapter 11 plan in order to counter the "extreme deference that chapter 11 judges show plan proponents."[166] The monitor would act as an "advisor to the court," "working not for the benefit of the debtor alone, or any one participant in particular, but for all of the claimants."[167] Couwenberg and Lubben's monitor would therefore provide "a mitigating influence . . . on participants' opportunistic behavior" and would "help judges reclaim their role in confirming fair and equitable plans."[168] Couwenberg and Lubben's proposal hearkens back to the early development of the Bankruptcy Code, when a more administrative system with a more hands-on monitor was proposed and rejected during that time.[169]

Scholars have also sought to incorporate additional guardians in specific contexts. For example, in the mass tort bankruptcy context, Anthony Casey and Joshua Macey have suggested appointing independent board members to represent tort claimants or even replacing a debtor's existing board and management with a trustee or custodian.[170]

Other scholars have sought increased responsibility for existing guardians. Barry Zaretsky was an early advocate for the increased use of trustees and examiners in chapter 11 cases.[171] He observed that a consequence of the chapter 11 debtor-in-possession model is "a relatively unstructured

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[163] *See, e.g.*, Blackman, Klein & Gallaro, *supra* note 158; Swanson, *supra* note 7; Hirsh & Meyer, *supra* note 7; Delk, *supra* note 7.

[164] Harner, *supra* note 7, at 475.

[165] Couwenberg & Lubben, *supra* note 7, at 383.

[166] *Id.* at 385.

[167] *Id.* at 388.

[168] *Id.* at 390.

[169] *See supra* Part I.B.

[170] *See* Anthony J. Casey & Joshua C. Macey, *Bankruptcy by Another Name*, 133 YALE L.J. FORUM 1016 (2024).

[171] Barry L. Zaretsky, *Trustees and Examiners in Chapter 11*, 44 S.C.L. REV. 907 (1993).

chapter 11 process in which no independent party is responsible for moving the case along."[172] Trustees and examiners are independent third parties that can "often investigate and act more credibly than the debtor or committees."[173] Zaretsky advocated for a "broad, flexible standard" for the appointment of trustees and examiners and for their "imaginative use" to facilitate resolution of a case.[174] He suggested that trustees and examiners can add "credibility" to the case, especially if a party in interest is uncomfortable with the debtor-in-possession or a committee.[175] More generally, Zaretsky advocated for more creative uses of trustees and examiners so as to give parties in interest confidence that their rights were being protected during the case.[176]

Others have similarly proposed using more powerful or frequent examiners to curb abuses in bankruptcy. For example, Daniel Bussel has proposed "an inquisitorial model," grounded in bankruptcy's equitable roots, where "an active and informed neutral investigates the facts and then assesses and applies the law to justly resolve a legal dispute."[177]

Inspired by the creation of an ad hoc shareholder group in the *J.C. Penney* bankruptcy, Diane Dick has called for the creation of a "shareholder ombudsman" for public company bankruptcies to "promote an informed and engaged shareholder class."[178] She argues that the needs of public equity investors in chapter 11 cases are unmet and that a shareholder ombudsman could help "restore fairness and efficiency" to these cases.[179]

Finally, Stephen Lubben has recently proposed a return, of sorts, to Chapter X of the Chandler Act.[180] He suggests that some large corporate debtors would be better off reorganizing under neutral oversight.[181] Lubben therefore advocates for chapter 11 to be split into four distinct tools, including an improved version of old Chapter X, to better address variation and the potential for abuse in chapter 11 practice.[182] Other scholars have also noted that

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[172] *Id.* at 909.
[173] *Id.* at 910.
[174] *Id.*
[175] *Id.* at 911.
[176] *Id.*
[177] Daniel J. Bussel, *A Third Way: Examiners as Inquisitors*, 90 AM. BANKR. L.J. 59, 66 (2016).
[178] Diane Lourdes Dick, *The Case for a Bankruptcy Shareholder Ombudsman*, 41 NO. 1 BANKR. L. LETTER NL 1, 3 (2021).
[179] *Id.*
[180] Stephen J. Lubben, *A New Deal for Corporate Bankruptcy: Bring Back Chapter X*, 99 AM. BANKR. L.J. 225 (2025).
[181] *Id.* at 233.
[182] *Id.* at 234.

the development of subchapter V may inform the need to have a multi-track chapter 11 process.[183]

Although Congress has not adopted any of these proposals, it has recognized that bankruptcy practice is changing, and recent bills pending in Congress have sought to address perceived abuses in the bankruptcy system through other means. For example, the Bankruptcy Venue Reform Act seeks to curb forum shopping;[184] the Ending Corporate Bankruptcy Abuse Act[185] would make bad faith filing a cause for dismissal of a case; and the Non-Debtor Release Prohibition Act (in the Senate, the SACKLER Act[186]) would ban third-party releases.[187] Although none of these bills have come to pass, they indicate a growing awareness by Congress that current large-case chapter 11 practice is changing in ways that may require additional checks within the system.

Indeed, these scholarly proposals and bills may be viewed as a response to significant changes in large-case chapter 11 practice. Four of these significant changes are outlined below.

Powerful Debtors' Counsel. The role of debtors' counsel has become more powerful with time. As this part has already shown,[188] bankruptcy professionals have always played a significant role in shaping bankruptcy law and practice. However, in recent years, this trend has been amplified: as the *Wall Street Journal* put it a few years ago, "Corporate bankruptcy is increasingly shaped by a handful of powerful law firms and advisers working in courts in New York and Delaware."[189] In 2019, Kirkland & Ellis, a firm that frequently represents large chapter 11 debtors, boasted that its attorneys "are making headlines for their recent 'rocket docket' Chapter 11 filings and emergences."[190] Recent scholarship has also recognized the power and

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[183] Bussel & Damiani, *supra* note 57; Daniel J. Bussel & Austin J. Damiani, *Chapter 11 at the School of Subchapter V: Part II*, 44 NO. 7 BANKR. L. LETTER NL 1 (2024).

[184] H.R. Res. 1017, 118th Cong. (2023–2024).

[185] H.R. Res. 9110, 118th Cong. (2023–2024).

[186] S. Res. 2831, 118th Cong. (2023–2024).

[187] H.R. Res. 9223, 118th Cong. (2023–2024).

[188] *See supra* Part I.B.

[189] Tom Corrigan, Joel Eastwood & Jennifer S. Forsyth, *The Power Players That Dominate Chapter 11 Bankruptcy*, WALL ST. J. (May 24, 2019), https://www.wsj.com/graphics/bankruptcy-power-players/.

[190] *Kirkland Completes the Two Fastest Chapter 11 Bankruptcies in U.S. History*, KIRKLAND.COM (May 6, 2019), https://www.kirkland.com/marquee-stories/two-fastest-chapter-11-in-us-history.

influence major law firms exert in large bankruptcy cases, particularly as private equity becomes a power player in these cases as well.[191]

Professionals, especially debtors' counsel, are becoming ever more powerful and more creative.[192] Recent scholarship has posited that professionals may push the boundaries of both bankruptcy law and ethical rules to try to maximize recoveries for their powerful clients.[193] More generally, creative workarounds and solutions have become commonplace in chapter 11 practice.[194] For example, the "Texas Two-Step," a procedure used to facilitate corporations' entry into bankruptcy to shed mass tort liability, was the brainchild of attorneys at a large law firm, Jones Day.[195]

A Changing Role for the Unsecured Creditors' Committee. The rise in debtors' counsel's influence in a complex chapter 11 case has been accompanied by a changing role for the unsecured creditors' committee. For example, Katherine Waldock has observed that, because unsecured creditors are diverse, it can be difficult to meaningfully aggregate their preferences, especially with regard to the pursuit of litigation.[196] Her data indicate that, although the U.S. trustee was able to form an official committee of unsecured creditors in most cases,[197] it was often unable to do so in the Southern District of Texas, one of the most popular venues for complex cases.[198] Furthermore,

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[191] *See generally* Crawford G. Schneider, Comment, *Private Equity, Conflicts, and Chapter 11: The Three Types of Attorney Conflicts That Undermine Corporate Restructuring*, 172 U. PENN. L. REV. 1125 (2024) (discussing new types of attorney conflicts that have emerged due to private equity's dominant force in distressed investing and chapter 11 reorganizations).

[192] *See generally* Laura N. Coordes, *Elite Bankruptcy*, B.Y.U. L. REV. (forthcoming 2025) (documenting and discussing this trend).

[193] Schneider, *supra* note 191, at 1137–38 (describing three types of conflicts that may arise due to private equity's growing influence in chapter 11 cases).

[194] Bussel & Damiani (Part II), *supra* note 183, at 6 ("Meanwhile complaints about the cost and difficulty of the standard chapter 11 process fester and attempts to creatively find workarounds increasingly dominate standard chapter 11 practice.").

[195] *See* James Nani, *DOJ Objects to J&J Unit Hiring Jones Day as Bankruptcy Counsel*, BLOOMBERG L. (Nov. 13, 2024), https://news.bloomberglaw.com/bankruptcy-law/doj-objects-to-j-j-unit-hiring-jones-day-as-bankruptcy-counsel (noting that the U.S. trustee objected to debtor's selection of Jones Day as bankruptcy counsel because the firm "orchestrated the legal maneuver that helped saddle the subsidiary with mass tort liabilities" and because Jones Day "cannot be on both sides of the same deal") (internal quotations omitted).

[196] Katherine Waldock, *Fighting Fire With Fire: Bankruptcy Committees in the Age of Hostile Restructurings*, 2022 COLUM. BUS. L. REV. 1097, 1100 (contending that "today's Official Committees are not structurally compatible with the new litigation regime" in chapter 11, where large firms enter bankruptcy with almost nothing for unsecured creditors).

[197] *Id.* at 1111 ("In 91% of cases [in Waldock's sample], the U.S. Trustee was able to form an official committee of unsecured creditors.").

[198] *Id.* at 1112 (observing that the formation failure rate of an unsecured creditors'

Waldock's data show that the official committees appointed by the U.S. trustee often do not actually consist of representatives of the seven largest claims as § 1102(b) of the Bankruptcy Code indicates should "ordinarily" be the case.[199] Waldock suspects that many unsecured creditors these days may "prefer to free ride rather than to expend the effort and incur the litigation risk" associated with committee service.[200]

Litigation risk appears to be a genuine threat; as Waldock notes, "the mood has become markedly more acrimonious" in recent years, due primarily to a rise in pre-bankruptcy transactions by distressed market participants.[201] In all, Waldock concludes that the "composition and responsibilities of standard Official Committees today are not consistent with the notion that the primary source of value available for unsecured creditors are litigation rights."[202]

As the official creditors' committee's role becomes more complicated, ad hoc creditor coalitions have begun to exercise more power.[203] Since creditors have become increasingly fragmented, ad hoc committees can often act more nimbly—and powerfully—than the official creditors' committee.[204] In many cases, these ad hoc coalitions enhance recoveries for their members and other creditors.[205] However, recent research has also observed that large creditor coalitions in particular have "amplified conflict, delayed case resolutions, and heightened litigation risks."[206] Thus, even as ad hoc coalitions can be a means of consolidating power, they can also exacerbate existing inefficiencies in a case.[207]

Yet another indicator of creditors' changing role in complex cases, Dan Kamensky has argued that the balance of power in chapter 11 has shifted from

committee was highest in the Southern District of Texas, accounting for 38% of the cases in Waldock's sample but 80% of the cases without an official committee).

[199] *Id.* at 1112; 11 U.S.C. § 1102(b)(1) ("A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee . . . .").

[200] Waldock, *supra* note 196, at 1112.

[201] *Id.* at 1117.

[202] *Id.* at 1121.

[203] Jing-Zhi Huang, Stefan Lewellen & Zhe Wang, *Creditor Coalitions in Bankruptcy*, HARV. BANKR. ROUNDTABLE (Feb. 11, 2025), https://bankruptcyroundtable.law.harvard.edu/2025/02/11/creditor-coalitions-in-bankruptcy/(calling such coalitions "game-changers").

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

creditors to financial sponsors.[208] These sponsors use "increasingly aggressive tactics" to shift value from creditors to themselves both before and during bankruptcy proceedings.[209] Kamensky has urged courts to intervene to correct these problems and this power imbalance.[210]

Power imbalances among the debtor-in-possession (DIP) lender[211] and other creditors are particularly salient. Robert Miller has documented how some DIP lenders aggressively push for favorable lending terms early in a bankruptcy case "when notice is limited, cash is scarce, creditors are disorganized, and the proposed DIP lender's leverage is at its zenith."[212] For their part, bankruptcy judges are often willing to give final approval to key lending terms, even at the stage where the lender is requesting interim relief; as Miller documents, this practice "risks entrenching favored lenders, distorting market dynamics, and discouraging alternative DIP financing proposals."[213]

Jared Ellias and Elisabeth de Fontenay have found that creditor composition itself is changing. Private investment funds dominate the capital structures of many firms.[214] This dominance may exacerbate information asymmetries as private credit typically results in less information about firms and their transactions.[215] To counter these trends, Ellias and de Fontenay suggest that bankruptcy judges "assert a more muscular role in administering bankruptcy law as a safety valve to promote efficient asset reallocation"[216] and that greater disclosure will be necessary as a check on powerful lenders.[217]

Finally, cases involving a mixed group of creditors, such as mass tort cases or cases involving cryptocurrency platforms, may present special challenges. When creditors have differing and possibly divergent interests, it is

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[208] Dan Kamensky, *The Rise of the Sponsor-in-Possession and Implications for Sponsor (Mis)Behavior*, 171 U. PA. L. REV. 19, 19 (2024).

[209] *Id.*

[210] *Id.* at 20.

[211] A DIP lender provides financing to a debtor so that the debtor can continue to operate while in bankruptcy. For an overview of the various types of permissible DIP financing arrangements, see 11 U.S.C. § 364.

[212] Robert W. Miller, *Creeping Interim DIP Orders*, 45 NO. 6 BANKR. L. LETTER NL 1, 3 (2025).

[213] *Id.* at 11.

[214] Jared A. Ellias & Elisabeth de Fontenay, *The Credit Markets Go Dark*, 134 YALE L.J. 779, 786–87 (2025) ("[W]e should anticipate a world in which the entire capital structure . . . of many or most American firms is held primarily by private investment funds.").

[215] *Id.* at 787 ("[W]ith the addition and expansion of private credit, information about firms, investors, and transactions will change, and, for larger firms, grow scarcer.").

[216] *Id.* at 789.

[217] *Id.* at 857.

difficult for an unsecured creditors' committee to present a united front.[218] While more sophisticated creditors may overcome this limitation by forming an unofficial ad hoc group, smaller or less sophisticated creditors may not have the means or ability to organize and thus risk having their interests sidelined.[219]

In sum, existing research illustrates that the role of creditors in a complex chapter 11 bankruptcy case is in flux. The unsecured creditors' committee, historically the standard-bearer for creditors in a case, has struggled to act as a coordinating mechanism. Although ad hoc coalitions may sometimes fill the void, these coalitions may not increase recoveries for all creditors.

Increased Complexity, Increasing Consequences. Complex bankruptcy cases today may raise unfamiliar or socially challenging issues. In recent years, bankruptcy has become a magnet for increasingly sophisticated actors to try out intricate restructuring techniques.[220]

Bankruptcy judges have, of course, seen these challenges in their courtrooms and, in some cases, have expressed difficulty addressing them. A 2024 letter from Judge Michael Kaplan, a federal bankruptcy judge sitting in New Jersey, to the Federal Committee on Rules of Practice and Procedure describes "an increasingly onerous caseload rife with complex issues like cryptocurrency filings, mass torts and corporate asset valuations."[221] Kaplan's letter argues that bankruptcy judges lack adequate tools to address this "deluge" of complex filings, causing bankruptcy cases to be "held hostage to litigation/discovery overload."[222]

Judge Kaplan's observations align with those of practitioners who have pointed out that, in recent years, new financial products and services and financial market globalization have together produced "increasingly complex financial instruments and transactions."[223] As regulators have sought to reduce

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[218] Andrew Glantz, *The Illusion of Advocacy: Creditor Committees and Divergent Interests in Complex Chapter 11 Cases*, AM. BANKR. INST. J., July 2024, at 22.

[219] *Id.*

[220] Charles Dale, David Hillman, Vincent Indelicato, Matthew Koch, Steve Ma & Patrick Walling, *The Evolving New Normal 2024 Private Credit Restructuring Year in Review*, JD SUPRA (Jan. 29, 2025), https://www.jdsupra.com/legalnews/the-evolving-new-normal-2024-private-2587279/ ("[M]arket participants grew more sophisticated and their tactics more complex.").

[221] Joshua Klein & Russell W. Gallaro, *Time Has Come for Special Masters to Streamline Bankruptcy Cases*, BRACEWELL.COM (Feb. 13, 2024), https://www.bracewell.com/resources/time-has-come-special-masters-streamline-bankruptcy-cases/ (discussing the letter).

[222] *Id.* (internal quotations omitted).

[223] *Why Complex Bankruptcy and Restructuring Strategies are on the Rise*, CSC (May 25, 2023), https://blog.cscglobal.com/why-complex-bankruptcy-and-restructuring-strategies-are-

systemic risk in global financial markets, they have themselves added complexity to the system through the introduction of new rules and regulations.[224]

As this all plays out in bankruptcy, some courts have sought to manage increased complexity with the help of additional parties.[225] An early example is *In re Owens Corning*[226] where the Delaware district court appointed advisors to assist it in managing a complex asbestos case. As bankruptcy proceedings have become "larger and more complicated,"[227] bankruptcy judges are routinely asked to deal with these complexities across multiple sectors including in retail, finance, health care, environmental, and mass tort cases, the latter of which may involve numerous claims arising from any number of tortious actions or product exposure.[228]

Thus, although bankruptcy is often equated with a means to sort out financial issues, bankruptcy cases frequently involve noneconomic issues as well.[229] When noneconomic issues are present in a case, factions among creditors may emerge, as some push primarily for financial recovery while others seek recognition of nonmonetary benefits including "regulatory relief, better corporate governance, or more robust reporting practices."[230] As discussed above, courts may appoint ad hoc or special committees so that creditors representing diverse groups can each have a voice,[231] although the efficacy of these committees is debatable.

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[224] *Id.*

[225] Mark Conlan & Noel L. Hillman, *Bankruptcy Rule 9031: Out of Date and Out of Touch–Why an Amendment is Long Overdue*, GIBBONS (June 7, 2024), https://www.gibbonslaw.com/resources/publications/bankruptcy-rule-9031-out-of-date-and-out-of-touch-why-an-amendment-is-long-overdue.

[226] 305 B.R. 175, 179 (D. Del. 2004) ("As events progressed, it became clear to the Court that the primary service this distinguished group could render was to give the Court the necessary background to understand the proceedings before it.").

[227] Conlan & Hillman, *supra* note 225.

[228] *Id.*

[229] Jeffrey P. Bast & Christopher Hampson, *It's All About the Bottom Line-Or Is It? Noneconomic Issues in Bankruptcy*, AMER. BAR ASS'N (Nov. 7, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-november/noneconomic-issues-bankruptcy/?login (citing the bankruptcies of Purdue Pharma, the Catholic dioceses, Boy Scouts of America, USA Gymnastics, the Weinstein Company, Alex Jones, and FTX as examples of cases that involve noneconomic issues).

[230] *Id.*

[231] *Id.*

As bankruptcy becomes more complex and takes on more socially fraught issues, bankruptcy judges face significant pressure.[232] Thirteen years ago, prominent bankruptcy attorney Harvey Miller stated that,

> The introduction of free trading of bankruptcy claims, distressed debt traders, hedge funds dedicated to the bankruptcy and reorganization process, and the innovations in financing involving derivatives, credit default swaps and other opaque, esoteric securities and financing techniques have materially complicated the world of reorganizations and the manner in which the bankruptcy law is applied and administered.[233]

That statement continues to ring true today as bankruptcy complexity has continued to advance.

A Greater Governmental Role. Finally, the government is taking on a larger and more complex role in many bankruptcy cases. That role is not necessarily the neutral overseer that Congress might have envisioned in the early days of U.S. bankruptcy law. For example, through their cogent discussion of the FTX bankruptcy, Jonathan Lipson and David Skeel demonstrate how different public actors can pursue different types of public interests in bankruptcy, thereby creating tension within the process.[234]

Similarly, Yesha Yadav and Robert Stark have observed the ways in which regulatory agencies use the bankruptcy process to advance specific policy objectives without the typical political or rulemaking obstacles they would face outside of bankruptcy.[235] In particular, Yadav and Stark have documented how bankruptcy courts presiding over cryptocurrency cases serve as a sort of proxy financial regulator for this new industry and are forced into doing some of the work historically entrusted to regulatory agencies.[236] They note that bankruptcy judges, while doing the best they can, are nevertheless inadequate substitutes for the oversight of an administrative agency.[237]

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[232] *See* Coordes, *supra* note 4, at 1136; Miller, *supra* note 212, at 4 (discussing how parties may "camouflage aggressive terms" in the "mountain of papers that interested parties, the United States Trustee, and the bankruptcy judge must review and analyze in the hours prior to the first day hearing").

[233] *Statement of Harvey R. Miller Before the Financial Advisory Committee in Connection With ABI Commission to Study the Reform of Chapter 11* (Apr. 19, 2012), https://commission.abi.org/sites/default/files/statements/miller_statement.pdf.

[234] Lipson & Skeel, *supra* note 7, at 434.

[235] Yadav & Stark, *supra* note 11, at 1487.

[236] *Id.* at 1532.

[237] *Id.* at 1488–89 ("[E]ven as bankruptcy is (by case necessity) doing important regulatory work, it is far from its natural functionality and is an inherently inadequate substitute for

In the specific context of mass torts, William Organek has found that government intervention is the force behind the trend of companies moving from multi-district litigation to bankruptcy.[238] As governments increasingly intervene in mass tort bankruptcies, Organek proposes that policy changes are needed to police conflicts of interest that have developed due to "governments' competing roles as creditors, representatives, and sovereigns."[239]

This part has shown that, for almost the entirety of U.S. bankruptcy law's history, there has been a struggle to determine the "right" mix of guardians. As chapter 11 has developed, Congress has typically opted for less oversight in complex cases. However, when Congress rejected an administrative system, bankruptcy practice looked markedly different than it does today. Specifically, today's complex chapter 11 practice has evolved to the point where concerns about abuse, bad faith, and underrepresentation have arisen along with an increasing workload for many bankruptcy courts. Thus, as chapter 11 practice changes, the "right" mix of guardians may also need to change.

However, bankruptcy already has a significant number of players who fulfill guardian roles. To assess whether additional guardians are needed or whether existing guardians' roles should change, it is important to understand bankruptcy's existing guardians, their strengths, and their limitations.

II. Bankruptcy's Existing Guardians

Just as a security team regularly and comprehensively examines a building's existing security system to identify gaps in coverage, a regular and comprehensive examination of bankruptcy's existing guardians allows for both an easier identification of what might be missing in chapter 11's system of checks and balances and a better understanding of why existing guardians are not addressing the problems scholars have identified. This part catalogues bankruptcy's existing guardians and examines the ways in which they are inadequately suited to address the previously identified challenges of large-case, complex chapter 11 practice. Subsection A examines guardians present in

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administrative agencies whose mandates include establishing a set of robust, lasting, and standardized rules that protect marketplaces both in peacetime and in crisis.").

[238] William Organek, *Mass Tort Bankruptcy Goes Public*, 77 VAND. L. REV. 723, 729–30 (2024) ("[G]overnments are uniquely capable of employing bankruptcy to further their own ends because of their simultaneous roles as representatives of injured citizens, creditors in their own right, and sovereigns with broader social duties and regulatory powers.").

[239] *Id.* at 766.

every bankruptcy case, while subsection B discusses guardians involved in only some cases.

A. Consistent Guardians

Two guardians are present in every bankruptcy case: the bankruptcy judge and the U.S. trustee (or bankruptcy administrator).

1. The Bankruptcy Judge

The bankruptcy judge, an Article I adjunct of the district court, presides over the bankruptcy case and oversees all the judicial aspects of the bankruptcy process. However, the judge does not act alone. Bankruptcy judges frequently rely on other guardians, including the U.S. trustee, mediators, and other experts, for information about the parties and the case.[240] Judges frequently take an active role and interest in the cases they are deciding and are often bankruptcy specialists themselves.[241]

Bankruptcy judges are the gatekeeper to the case, helping to police fraud and abuse within the system.[242] Although bankruptcy judges are often recognized as effective gatekeepers, what constitutes "abuse" may be highly subjective.[243] Bankruptcy judges also have a relatively large amount of discretion in overseeing their cases, meaning that there can be inconsistencies from one case to the next.[244] Although the Supreme Court has recently sought

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[240] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) ("The judge is the dominant figure in organizing and guiding the case, and he draws support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel."). Chayes was describing federal trial judges in civil litigation, but this description aptly describes bankruptcy judges as well.

[241] *Id.* at 1302 ("In actively shaping and monitoring the decree, mediating between the parties, developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager.").

[242] Donald L. Swanson, *Bankruptcy Abuse Rarely Works Because of Gatekeepers—Bankruptcy Courts (Part 4)*, MEDIATBANKRY (Mar. 28, 2024), https://mediatbankry.com/2024/03/28/bankruptcy-abuse-rarely-works-because-of-gatekeepers-bankruptcy-courts-part-4/.

[243] *Id.* ("'[A]buse' is in the eye of the beholder.").

[244] *See* Jonathan M. Seymour, *Bankruptcy in Conflict*, 98 AM. BANKR. L.J. 561, 561 (2024) ("Bankruptcy judges face the difficult task of giving effect to a sometimes loosely-written code replete with open-textured provisions.").

to curtail a judge's equitable powers in bankruptcy cases,[245] judicial discretion remains alive and well.[246]

A large, complex bankruptcy case can bring a judge prestige and attention but also a tremendous amount of information to digest. Judges frequently bear the brunt of the increased complexity of bankruptcy cases, and they face significant pressure to decide issues both quickly and competently.[247]

Most judges exercise their power responsibly and admirably. However, a former bankruptcy judge, David Jones, recently came under fire for concealing a long-term intimate and cohabitational relationship he had with a lawyer who regularly worked on matters before him when he sat on the bench in the Southern District of Texas.[248] Numerous disputes and accusations have arisen from those cases, and the U.S. trustee has sought to examine over 30 cases where Jones either presided over or mediated matters involving his romantic partner's law firm, Jackson Walker.[249]

The scandal involving ex-judge Jones has reverberated throughout the bankruptcy bench in the Southern District of Texas. In a survey of voters in that district, 81% said they did not believe that Judge Isgur, a judge who was a close friend of Jones's and who received many of his cases after Jones resigned from the bench, could be impartial in deciding motions seeking relief against Jackson Walker.[250] This was the case even though the chief bankruptcy judge in the Southern District of Texas had already determined both that there was no evidence Judge Isgur knew of the relationship between Jones and the Jackson Walker attorney and that there was no appearance of impropriety stemming from Judge Isgur's friendship with Jones.[251] Nevertheless, in April 2025, a federal district judge shifted lawsuits involving Jones from his former

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[245] *Law v. Siegel*, 571 U.S. 415, 427–28 (2014) (holding that a bankruptcy court cannot use its equitable powers to "contravene express provisions of the Bankruptcy Code").

[246] Laura N. Coordes, *Narrowing Equity in Bankruptcy*, 94 AM. BANKR. L.J. 303, 305 (2020) (noting that the Bankruptcy Code's "grants of discretion do not have the restrictive language present in the Code's grant of equity").

[247] Coordes, *supra* note 4, at 1136 ("[A]ctors using the bankruptcy system are putting enormous pressure on it to do more, to resolve more issues, and to satisfy the needs and wants of an increasing number of players.").

[248] Alex Wolf, *Jackson Walker in Legal Hot Seat Following Judge Romance Scandal*, BLOOMBERG L. (Mar. 26, 2024), https://news.bloomberglaw.com/bankruptcy-law/jackson-walker-in-legal-hot-seat-following-judge-romance-scandal.

[249] James Nani & Ronnie Greene, *Bankruptcy Judge Tasked With Scandal Cleanup of 'Adopted Son,* BLOOMBERG L. (May 31, 2024), https://news.bloomberglaw.com/bankruptcy-law/bankruptcy-judge-tasked-with-scandal-cleanup-of-adopted-son.

[250] *Id.*

[251] *Id.*

colleagues on the bankruptcy bench to district court in order to avoid the appearance of impropriety.[252] The fallout continues to this day, with the U.S. trustee seeking to claw back millions in legal fees paid to Jackson Walker in cases overseen by Jones.[253]

The Jones scandal illustrates a scenario where a key bankruptcy guardian—the bankruptcy judge—failed to adequately serve as an independent guardian. Of course, a single scandal does not make a pattern. Nevertheless, the highly publicized scandal and related fallout resulted in a period of faltering confidence in the judiciary, at least in the Southern District of Texas.[254] It also hearkens back to the concerns about cronyism that caused Congress to consider more oversight when the Bankruptcy Code was being developed. And it contributes to a perception of judges as potentially biased, a perception that reflects negatively on the bankruptcy system as a whole.[255]

Putting scandal to one side, bankruptcy judges must also contend with enormous complexity, all while policing the process for signs of abuse. In large chapter 11 cases, there can be immense pressure on bankruptcy judges to decide issues quickly and competently. Although bankruptcy judges are experts in the field,[256] they are increasingly called upon to decide issues affecting areas of the law in which they may lack expertise. Cryptocurrency bankruptcies provide a salient example.[257] Yesha Yadav and Robert Stark have documented the ways

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[252] Alexander Gladstone, *U.S. Judge Seizes Control of Bankruptcy Scandal Cases From Houston Court*, WALL ST. J. (Apr. 10, 2025), https://www.wsj.com/articles/u-s-judge-seizes-control-of-bankruptcy-scandal-cases-from-houston-court-449c852a.

[253] Clara Geoghegan, *JC Penney Says Emails Show Jackson Walker Hid Romance*, LAW360 (May 2, 2025), https://www.law360.com/bankruptcy/articles/ 2334838?nl_pk=b84d2071-dabe-4070-95f5-23565868983&utm_source=newsletter&utm_medium=email&utm_campaign=bankruptcy&utm_content=2025-05-05&read_main=1&nlsidx=0&nlaidx=0.

[254] James Nani, *Houston Bankruptcy Cases Fell 65% After Judge Exit, Report Says*, BLOOMBERG L. (Oct. 2, 2024), https://news.bloomberglaw.com/bankruptcy-law/houston-bankruptcy-cases-fell-65-after-judge-exit-report-says (citing a report finding a 65% drop in large corporate bankruptcy filings in the Southern District of Texas in the first half of 2024 compared with the first half of 2023). *But see* Alicia McElhaney, *Companies From Afar Tap Houston Bankruptcy Court Despite Minimal Local Ties*, WSJ PRO BANKR. (Jan. 16, 2025), https://www.wsj.com/articles/sweden-northvolt-houston-bankruptcy-court-6ded8b5b?st=8NkEKr (showing recent filings in Houston, possibly indicating that confidence is returning).

[255] Nancy B. Rapoport, *Nuance or Necessity for Conflicts in Bankruptcy Cases?*, CREDITOR RTS. COAL. (June 5, 2024), https://creditorcoalition.org/special-feature-professor-nancy-rapoport-on-recent-disqualification-decisions/.

[256] Seymour, *supra* note 244, at 563 ("Bankruptcy judges are subject-matter experts in a way that, broadly, is untrue for Article III judges.").

[257] Yadav & Stark, *supra* note 11.

in which cryptocurrency cases push bankruptcy courts "to function in an almost quasi-regulatory capacity."[258] The bankruptcy of a company that deals with cryptocurrency, such as Celsius or FTX, forces bankruptcy courts to confront issues that regulators have not even addressed.[259] Through their decisions, bankruptcy courts then fill the void regulators such as the SEC or the Federal Reserve would otherwise need to address.[260] When bankruptcy judges take on this "quasi-regulatory role," they are stepping out of their zone of expertise.[261] These cases essentially ask bankruptcy judges to play regulator as well as adjudicator, and they test the bounds of bankruptcy judges' expertise by requiring the judge to assess how cryptocurrency fits into a regulatory framework that, by and large, has not addressed cryptocurrency's challenges. Jonathan Seymour has also worried about bankruptcy judges' roles in crypto and other complex cases, arguing that a judge's expertise may make them overly susceptible to resolving non-bankruptcy problems using a bankruptcy lens.[262]

Mass tort bankruptcy cases can similarly put pressure on bankruptcy judges. For example, the bankruptcy of Purdue Pharma was intertwined with both civil and criminal litigation and was linked to resolution of the U.S. opioid crisis more broadly.[263] Other scholars have noted that, as a more general matter, bankruptcy judges may face both information asymmetries and expertise deficits when deciding certain issues such as the propriety of a bonus given in bankruptcy.[264]

In sum, as new industries like crypto and new challenges like those posed by mass torts enter the bankruptcy realm, judges and their dockets get more work.[265] Indeed, bankruptcy judges now regularly decide cases that raise complex issues of law and policy—issues that receive attention in the

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[258] *Id.* at 1483.

[259] *Id.* at 1484 (noting that bankruptcy courts are asked to decide issues of first impression for the crypto industry).

[260] *Id.* (noting that bankruptcy law and bankruptcy courts have been "drafted into quasi-regulatory service").

[261] *Id.* at 1487 (recognizing bankruptcy's advantages in this area but commenting that "reliance on bankruptcy courts to perform regulatory functions comes with serious shortcomings").

[262] Seymour, *supra* note 244, at 564 ("[A]s hammers see only nails, so too do the specialists of bankruptcy identify ordinary legal problems as problems unique to bankruptcy.").

[263] *See* Coordes, *supra* note 4, at 1157.

[264] Ellias, *supra* note 73, at 657.

[265] *See generally* Coordes, *supra* note 4 (describing various ways in which parties have injected more work into the bankruptcy system).

mainstream media for their impact on everyday life.[266] They are called upon to knowledgeably decide issues, such as those involving cryptocurrency, that are still relatively new to the legal community at large. Although bankruptcy judges are typically highly competent bankruptcy experts, the more the system places on their dockets, the more it strains their ability to police abuse and fraud and to be effective guardians on their own. The rest of this part examines other players that may assist the bankruptcy judge in carrying out its guardian role.

2. The U.S. Trustee

The U.S. trustee is the other consistent bankruptcy guardian. Involved in every bankruptcy case to varying extents, the U.S. trustee carries out and oversees the administrative functions of the case.[267] The U.S. trustee is often referred to as the "watchdog" of bankruptcy, ensuring that the bankruptcy process works for all involved[268] and protecting the system's integrity.[269]

The U.S. trustee is specifically tasked with watching out for "conflicts of interest . . . cronyism, [and] debtor misconduct."[270] It has a good deal of ability to do this: it may raise and be heard on any issue within a bankruptcy

[266] *See, e.g.*, Max Eddy, *23andMe Just Filed for Bankruptcy. You Should Delete Your Data Now*, WIRECUTTER (Mar. 25, 2025), https://www.nytimes.com/wirecutter/reviews/23andme-data-bankrupt/.

[267] 28 U.S.C. § 586. Six judicial districts in the United States, comprising those in Alabama and North Carolina, have bankruptcy administrators rather than U.S. trustees. A bankruptcy administrator is functionally equivalent to a U.S. trustee, although bankruptcy administrators are part of the Administrative Office of the United States Courts rather than the United States Trustee Program, which is part of the Department of Justice.

[268] Press Release, *U.S. Trustee Program Updates Safeguards for Bankruptcy Funds Through Modernized Depository Agreement*, OFF. OF PUB. AFFS. (June 6, 2024), https://www.justice.gov/opa/pr/us-trustee-program-updates-safeguards-bankruptcy-funds-through-modernized-depository ("The USTP's mission is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors and the public."); Lipson & Skeel, *supra* note 7, at 390 n.116 (noting also the U.S. trustee's unpopularity with bankruptcy practitioners and judges); Tara Twomey, *Questions and Answers With USTP Director Tara Twomey*, AM. BANKR. INST. J., May 2024, at 12, 12 (indicating that the USTP advocates for all stakeholders in the bankruptcy system).

[269] Lipson & Skeel, *supra* note 7, at 390 ("The principal safeguards of the public interest in integrity and fairness in most cases are extensive disclosure obligations and ethical oversight conducted by an entity created under the 1978 Code called the Office of the United States Trustee.").

[270] *Id.* at 432 (internal quotations omitted).

case.[271] In addition, U.S. trustees "can take legal action to prevent fraud and abuse, refer matters to be investigated for criminal prosecution, review disclosure statements, and make sure that professionals such as attorneys charge reasonable fees."[272] Unlike other actors in a bankruptcy case, who may be motivated primarily by pecuniary interests, the U.S. trustee's "public interest standing" is meant to imbue the role with a broader protective function.[273] Historically, however, the U.S. trustee has had a more limited role in chapter 11 cases.[274]

Scholars have criticized the U.S. trustee's oversight on at least two fronts that are relevant to its guardian role. First, the U.S. trustee may lack necessary expertise. Jared Ellias has concluded that the U.S. trustee, like bankruptcy judges, is susceptible to information asymmetries and expertise deficits.[275]

Second, as part of the government, the U.S. trustee may be unduly susceptible to pressure from other government entities, including Congress or the DOJ, in which it is housed.[276] Given increased governmental intervention in bankruptcy, this may be cause for concern. Notably, Jonathan Lipson and David Skeel have suggested that the U.S. trustee may have had a conflict of interest in the *FTX* bankruptcy, where federal government actors were perhaps reticent to appoint an examiner.[277] The U.S. trustee's role may become even more precarious given that the government may "assume multiple incompatible roles" within a case, creating "conflicts of interest that bankruptcy law does not currently police."[278] In other words, the very fact that the U.S. trustee is a

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[271] 28 U.S.C. § 586; 11 U.S.C. § 307.

[272] Casey & Macey, *supra* note 170, at 1026.

[273] *In re Columbia Gas Sys., Inc.*, 33 F.3d 294, 295–96 (3d Cir. 1994).

[274] SKEEL, *supra* note 13, at 181 ("In Chapter 11, [the U.S. Trustee's] role is limited to appointing the creditors committee and occasionally intervening on matters such as approval of attorneys fees for the debtor's lawyers.").

[275] Ellias, *supra* note 73, at 669.

[276] *Id.* at 695 (finding that "there is some public evidence of that pressure" in the context of objecting to bonus plans); Lipson & Skeel, *supra* note 7, at 435 (surmising that there may have been pressure on the U.S. trustee from the Department of Justice); Simon, *supra* note 11, at 1310–11 (expressing concerns about the Department of Justice's influence on the U.S. trustee); Peter C. Alexander, *A Proposal to Abolish the Office of United States Trustee*, 30 U. MICH. J.L. REFORM 1, 37 (1996) (arguing that moving the U.S. trustee out of the Department of Justice "would eliminate separation of powers issues and avoid conflicts of interest in cases where the DOJ represents the United States as a creditor in bankruptcies").

[277] Lipson & Skeel, *supra* note 7, at 433 ("We don't know for sure, but the Trustee's reticence may have reflected a different conflict of interest—between that office and other government actors, who might not have wanted an independent examiner.").

[278] Organek, *supra* note 238, at 724.

government actor may compromise its public protective function, especially as the government, for better or worse, seeks to play a more active—and decidedly adversarial—role in bankruptcies.[279]

Concerns about the U.S. trustee's governmental nature have only been heightened by the recent removal of Tara Twomey, the head of the U.S. Trustee Program, by the Trump administration. Commentators have expressed concern that Twomey's removal could "send[] the previously nonpolitical bankruptcy watchdog into unknown territory."[280] In addition, many USTP employees recently took buyouts offered by the administration, "leaving the office at a time when experts say it is already running a lean operation and risking its ability to efficiently execute on its mission if future cuts are made."[281]

Apart from any concerns stemming from its role as part of the government, the NBRC has also criticized the U.S. trustee as being inconsistent from one region of the country to the next in terms of its policies and positions.[282] Recently, the U.S. trustee was singled out for criticism by none other than Justice Kavanaugh in his dissenting opinion in *Harrington v. Purdue Pharma*.[283] In a footnote, Justice Kavanaugh questioned the U.S. trustee's continued appeals of the debtor's bankruptcy plan: "The U.S. Trustee purports to look out for victims and creditors, but here the victims and creditors made emphatically clear that the 'U.S. Trustee does not speak for the victims of the opioid crisis' and is indeed thwarting the opioid victims' efforts at fair and equitable recovery" by continuing to appeal the case.[284]

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[279] *See id.* at 744 ("In public mass tort bankruptcies, governments assume far more prominent roles because they intervene both as representatives of individual claimants and as creditors with their own proprietary claims."); Jared A. Ellias & George Triantis, *Government Activism in Bankruptcy*, 37 EMORY BANKR. DEV. J. 509, 550 (2021) ("[I]t is not surprising that governments have moved from a defensive to activist posture in bankruptcy, to exploit analogous opportunities to pursue their policy and political objectives.").

[280] Rick Archer, *Bankruptcy Watchdog Ouster Crosses Into Uncharted Waters*, LAW360 (Mar. 14, 2025), https://www.law360.com/bankruptcy-authority/articles/2309890/bankruptcy-watchdog-ouster-crosses-into-uncharted-waters.

[281] Vince Sullivan & Clara Geoghegan, *Already Lean US Trustee Program Sees 58 Take Buyouts*, LAW360 (Apr. 7, 2025), https://www.law360.com/bankruptcy-authority/articles/2321458/already-lean-us-trustee-program-sees-58-take-buyouts.

[282] *Administration of Cases*, *supra* note 73, at 854 ("[T]he U.S. Trustee program is subject to a great deal of inconsistency in the implementation of its policies and in the positions it takes from region to region.").

[283] 603 U.S. 204 (2024).

[284] *Id.* at 2130 n.4 (Kavanaugh, J., dissenting).

In a similar vein, in November of 2024, the law firm Jackson Walker accused the U.S. trustee of overreach. The U.S. trustee had argued that the firm should disgorge fees after its failure to disclose the relationship between one of its lawyers and ex-judge David Jones.[285] However, Jackson Walker accused the U.S. trustee of overstepping its role, claiming that the U.S. trustee does not have standing to take control of bankruptcy estate claims under the guise of an enforcement action.[286] The firm claimed that there is a "world of difference between the 'oversight' and 'supervisory' authority" that bankruptcy law vests with the U.S. trustee and the U.S. trustee's actions with respect to the firm.[287] Jackson Walker argued that the U.S. trustee's push to recover fees deprives potential relief to "real parties," such as debtors and creditors, to pursue against Jackson Walker for the same alleged wrongdoing: "The Bankruptcy Code gives the U.S. Trustee authority to police Jackson Walker and other professionals; it does not, however, allow the U.S. Trustee to trample on the rights of debtors and other third parties in order to carry out this mission."[288] According to the firm, the U.S. trustee's push for recovery, styled as a sanction, is really an impermissible quest to recover estate property.[289]

As the rebukes above illustrate, even though the U.S. trustee is clearly the bankruptcy "watchdog," what this means in practice is subject to debate. Other commentators have criticized the "bureaucracy" of the U.S. Trustee Program, expressing concerns about the U.S. trustee's ability to function efficiently and with needed flexibility.[290]

Thus, although the U.S. trustee may seem at first glance to be the quintessential bankruptcy guardian, it is, in fact, susceptible to pressures, information asymmetries, expertise deficits, and bureaucratic red tape that may compromise its ability to effectuate a guardian role in many complex chapter 11 cases.

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[285] James Nani, *DOJ is Overstepping in Bankruptcy Fee Fight, Jackson Walker Says*, BLOOMBERG L. (Nov. 1, 2024), https://news.bloomberglaw.com/bankruptcy-law/doj-is-overstepping-in-bankruptcy-fee-fight-jackson-walker-says.

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] Alexander, *supra* note 276, at 2; *see id.* at 21 ("A criticism frequently levied against the UST is that it is an inflexible bureaucracy, preferring form over substance.").

B. Guardians Present in Some Cases

The bankruptcy judge and the U.S. trustee are bankruptcy's consistent guardians. Still, gaps remain. Although Congress divided bankruptcy oversight between the judge and the U.S. trustee, both guardians are limited in the protections they can provide, especially in today's complex cases. Thus, bankruptcy law allows for the appointment of additional guardians. This subsection examines guardians that may be present in certain bankruptcy cases.

1. Examiners

Examiners are appointed in some chapter 11 cases to perform an investigation as directed by the bankruptcy court.[291] Although there is some dispute over whether examiners are mandatory in certain circumstances, most courts believe that an examiner appointment is at the discretion of the bankruptcy judge.[292] However, the tide may be changing as the Third Circuit recently held that the Bankruptcy Code mandates an examiner appointment under the conditions specified in § 1104 of the statute.[293] Even if examiners become mandatory under those circumstances, there is still significant variation in their roles. Indeed, judges have discretion to substantially narrow an examiner's role in a case.[294]

Examiners may perform a range of duties as authorized by the court; however, they do not typically operate the debtor's business or file a plan. Instead, their primary role is to gather and report information to the court.[295] The independent and neutral nature of examiners can be valuable in a case

[291] 11 U.S.C. §§ 1104(c), 1106(b).

[292] Many Roles, *supra* note 11; *see* Casey & Macey, *supra* note 170, at 1046 (noting that the Third Circuit requires the appointment of an examiner upon request for debtors with debts exceeding $5 million).

[293] *In re* FTX Trading Ltd., 91 F.4th 148 (3d Cir. 2024).

[294] Paul Silverstein, *Mandatory Appointment of Examiner: 3rd Circuit in FTX Makes Clear that "Shall" Means "Shall"*, CREDITOR RIGHTS COALITION (Feb. 25, 2024), https://creditorcoalition.org/lets-examine-examiners/ (noting courts' ability to "show flexibility in limiting or tightly tailoring the scope of the examiner's investigation, budget and timeline given the facts of the case").

[295] Kovalesky v. Carpenter, 1997 WL 630144 at *3 (S.D.N.Y. Oct. 9, 1997) ("Examiners therefore play a chiefly information-seeking role and, like the court itself, must remain a neutral party in the bankruptcy process."); Swanson, *supra* note 15 (noting that the examiner's role is to examine and report, rather than to manage, a case).

where most of the parties are looking out for themselves.[296] However, judges have on occasion expressed uncertainty over the evidentiary value of an examiner's report.[297]

Examiners may have significant power and authority to investigate the debtor in a bankruptcy case, but the extent of their power depends on the scope of their appointment, which is determined by the bankruptcy judge.[298] An examiner's objectivity and independence are hallmarks of the role. Their objective is to increase transparency for the judge and the parties in a case.[299] By gathering and reporting information to the court, examiners can address and rectify information asymmetries and expertise deficits.

Scholars have generally extolled the virtues of examiners; one study found that a case with an examiner is likely to be more "successful" than a case without one.[300] Others have noted that they "can serve a major role in uncovering prior misconduct and serving . . . public-regarding values."[301] However, examiners come with a cost, and some courts have been reluctant to appoint an examiner due to that cost and the potential that greater disclosure of information may disrupt or stall the chapter 11 case.[302] For example, in the *FTX* bankruptcy, FTX's CEO expressed concerns over an examiner appointment, saying it would lead to too many duplicative investigations. The bankruptcy judge agreed that a sufficient number of people who were "independent enough" were involved in the case such that an examiner was not necessary.[303]

The bankruptcy of Silvergate Capital shows the potential value an examiner can bring to the table.[304] In that case, the examiner reviewed the

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[296] ABI Report, *supra* note 7, at 42.

[297] Many Roles, *supra* note 11.

[298] *See* Lipson & Skeel, *supra* note 7, at 437 (discussing the limited scope of the FTX examiner).

[299] Casey & Macey, *supra* note 170, at 1026–27 ("Bankruptcy examiners can be appointed to investigate the debtor's prepetition conduct and provide additional transparency to parties that are affected by the bankruptcy filing.").

[300] *See generally* Lipson & Marotta, *supra* note 7 (reporting results of a study of chapter 11 cases from 1991 to 2010).

[301] Casey & Macey, *supra* note 170, at 1046.

[302] Yadav & Stark, *supra* note 11, at 1540 ("Examiner appointments can, in other words, enervate the official creditors committee (among others) and that may not help the parties reach consensus on a plan.").

[303] Many Roles, *supra* note 11. The bankruptcy judge's decision with respect to an examiner appointment was overturned by the Third Circuit, which held that appointment of an examiner was mandatory in cases such as FTX's bankruptcy. *See* Jonathan C. Lipson, *Third Circuit Rules Examiner Mandatory in FTX Bankruptcy*, THE TEMPLE 10-Q (Mar. 5, 2024), https://www2.law.temple.edu/10q/third-circuit-rules-examiner-mandatory-in-ftx-bankruptcy/.

[304] Alex Wolf, *Silvergate Capital Examiner Finds Board Investigation Deficient*,

findings of an independent director's investigation into Silvergate's bankruptcy plan, which sought to release the bank's executives from legal liabilities. The examiner found that the findings of the independent director were "not reasonable" and that the investigation suffered from a conflict of interest because the director used a law firm employed by Silvergate to conduct the investigation.[305] Stephen Lubben also criticized the director's appointment, saying that "the DIP's fiduciary duties are not taken all that seriously anymore" and warning that "[t]he SEC promoted old Chapter X under the Chandler Act because it believed that corporate reorganizations too often swept viable claims against officers and directors under the rug. That such claims are today routinely released and ignored suggests that we are right back to that moment. If the industry—bench, bar, and advisors—does not clean up its act, Congress might eventually wake up and do it for us."[306]

Thus, examiners could be effective guardians, but they are so rarely appointed,[307] and the obstacles to their appointment are so significant, that it is difficult to assess how effective they could be if they were used more frequently or permitted to take on different roles. Examiners can help address the information asymmetry and expertise deficits that bankruptcy judges and U.S. trustees sometimes possess. But examiners do not oversee an entire bankruptcy case. Their powers are limited, and they are appointed infrequently. Parties resistant to the appointment of an examiner may also be uncooperative if an examiner is appointed. Thus, examiners are only as good or as powerful as their appointment order allows them to be. Sometimes, a court may feel compelled to appoint an examiner but may limit the scope of the appointment by giving the examiner a tight budget and timeline in which to complete the assigned work.

As changes in chapter 11 practice have opened more channels for overload and abuse, it has simultaneously become more difficult to secure viable representation for the voiceless. Although the role of an examiner may be more important than ever in this environment, the obstacles to an examiner's appointment and efficacy within chapter 11 are still significant.

BLOOMBERG L. (Apr. 7, 2025), https://news.bloomberglaw.com/bankruptcy-law/silvergate-capital-examiner-finds-board-investigation-deficient.

[305] *Id.*

[306] *Contributors Speak Up*, CREDITOR RIGHTS COAL., https://viewstripo.email/template/e37eeea7-ec4d-4df0-aa43-a58a20ba5dae.

[307] Many Roles, *supra* note 11, at 9:11 (remarks of Hon. Barbara J. Houser) (noting that examiners have not been used very often).

2. Case Trustees

Although case trustees are a part of every bankruptcy case under some Bankruptcy Code chapters, in chapter 11 (with the exception of subchapter V), they are not the norm and are not appointed on a regular basis.[308] When a case trustee is appointed in chapter 11, it is because the debtor has done something wrong,[309] such as committing fraud or mismanaging the estate.[310] For example, in Rudolph Giuliani's recent bankruptcy, creditors asked for the appointment of a trustee out of concern that Giuliani was improperly handling his finances.[311]

A trustee is a representative of the bankruptcy estate.[312] As such, a trustee is a fiduciary,[313] meaning it must put the estate's interests ahead of its own.[314] In practice, this may translate to the trustee taking an adversarial position to a debtor that has mismanaged its estate as the trustee is supposed to protect the estate and the creditors.[315]

A trustee is appointed by the bankruptcy judge. The trustee, when appointed, is thus in the unique position of being responsible for the debtor's property (that comes into the bankruptcy estate) without being the debtor itself.[316]

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[308] Lipson & Skeel, *supra* note 7, at 456 n.536 (finding that trustees are "rarely appointed in chapter 11").

[309] Swanson, *supra* note 15.

[310] 11 U.S.C. § 1104 (providing that a court shall order the appointment of a trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case").

[311] Scott Flynn, *Creditors Ask for Trustee to Oversee Rudy Giuliani's Spending Amid Accusations He's Hiding Money*, WSBTV.COM (May 30, 2024), https://www.wsbtv.com/news/local/atlanta/creditors-ask-trustee-oversee-rudy-giulianis-spending-amid-accusations-hes-hiding-money/L3RXJJCWNFABLHFCFWSL7FYLYA/.

[312] 11 U.S.C. § 323(a); *Administration of Cases*, *supra* note 73, at 858 ("The Bankruptcy Code provides that the trustee is the representative of the estate and can sue and be sued.").

[313] *Administration of Cases*, *supra* note 73 ("Bankruptcy trustees have statutory as well as common law fiduciary duties governing the operation and liquidation of property of the estate."); *see* Evan Ochsner, *Warren Wants DOJ to Intervene in For-Profit Hospital Bankruptcy*, BLOOMBERG L. (June 3, 2024), https://news.bloomberglaw.com/bankruptcy-law/warren-wants-doj-to-intervene-in-for-profit-hospital-bankruptcy (characterizing the case trustee as "an independent fiduciary").

[314] *See generally* Christopher D. Hampson, *Bankruptcy Fiduciaries*, 110 IOWA L. REV. 1701 (2025); 28 U.S.C. § 959(b) (requiring trustee to manage and operate property in the same manner as the debtor would outside of bankruptcy).

[315] Marla S. Benedek, Mark E. Fleger & Leslie A. Berkoff, *The Quirks of Mediation in Sub V*, AM. BANKR. INST. J., Apr. 2024, at 26.

[316] *Administration of Cases*, *supra* note 73, at 863 ("A trustee, unlike the debtor who often

As mentioned, however, appointment of a case trustee in chapter 11 is the exception, not the rule. A judge may be disinclined to appoint a trustee when, for example, an appointment risks slowing down the case or otherwise impeding the outcome.[317] The debtor may also vehemently protest and may be disinclined to cooperate with a trustee if one is appointed.[318]

As the discussion in Part I indicates, the desirability of chapter 11 would decrease significantly if a case trustee were appointed in every chapter 11 case because one of chapter 11's key benefits is the default rule that the debtor remains in possession of the estate. Furthermore, case trustees "tend to be adversarial to the debtor by virtue of their duties to protect the bankruptcy estate and its creditors."[319] Thus, a case trustee is not always available to step into a guardian role in a chapter 11 case.

3. Mediators

A mediator is a third party who assists the parties in the case with the resolution of one or more disputes. Like many of the other guardians discussed in this part, a mediator is appointed by the bankruptcy judge. A judge may appoint a mediator to expedite a case or if the parties are locked in a stalemate.[320]

In recent years, scholars and practitioners alike have tended to call for increased use of mediation and other alternative dispute resolution techniques in bankruptcy cases.[321] Yet, mediators are not appointed in every case. Indeed,

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purchased the assets and created the problems which caused the filing, never holds a 'full deck of cards to play.'").

[317] Martin Z. Braun, *Bankrupt Arizona Sports Park Wins Ruling Backed by Bondholders*, BLOOMBERG L. (Aug. 10, 2023), https://www.bloomberg.com/news/articles/2023-08-10/bankrupt-arizona-sports-park-wins-ruling-backed-by-bondholders (noting that bankruptcy judge denied U.S. trustee's motion for a case trustee out of concerns that naming a case trustee would "gravely jeopardize" the sale of the debtor's sports park and its ability to continue as a going concern).

[318] *See* MELISSA B. JACOBY, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL 79 (The New Press 2024) ("The parties controlling access to money for the company will not tolerate a trustee looking over their shoulder.").

[319] *In re* Ozcelbi, 639 B.R. 365, 381–82 (Bankr. S.D. Tex. 2022).

[320] Many Roles, *supra* note 11.

[321] *See, e.g.*, Stong, *supra* note 7; Mabey, Tabb & Dizengoff, *supra* note 7, at 1265 ("The Bankruptcy Rules should be amended to regularize the procedures for using ADR and to further its salutary use.").

parties may resist working with a mediator if the court appoints one without their consent.[322]

As Melissa Jacoby has argued, the identity of the mediator matters. A mediator may be another judge, a lawyer, or even someone with no legal training. Jacoby has strongly suggested that the practice of using other bankruptcy judges as case mediators is problematic, raising separation-of-powers problems and introducing potentially coercive dynamics that undercut the transparency and impartiality of both the case and the judge.[323] She points out that, "while some judges are known to be proactive as presiding judges, accountability mechanisms are likely to be more germane as applied to presiding judges than as to mediating judges."[324]

Although a mediator's role is usually as a passive facilitator,[325] the role of a mediator is poorly defined and differs from case to case. Some mediators are more willing than others to take a more active and less neutral role in a case.[326] In addition, local rules related to mediation, if any, vary from one jurisdiction to the next. Some judges may not even support the appointment of a mediator at all.[327] Whether a mediator may make a "proposal"—essentially, a way to resolve or settle the matter that is made to both sides—is also a hotly contested topic.[328]

Thus, although mediators can be neutral facilitators, they can also be more than that if the parties ask, the mediator is willing, and the rules allow it. There are no clear, consistent guidelines for the appointment and use of mediators in bankruptcy cases, with the result that mediators are not used consistently from case to case.[329] The amount of power the mediator has can

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[322] Many Roles, *supra* note 11.

[323] Melissa B. Jacoby, *Other Judges' Cases*, 78 N.Y.U. ANN. SURV. AM. L. 39, 40–41 (2022).

[324] *Id.* at 41.

[325] Swanson, *supra* note 15.

[326] Louis H. Kornreich, *Achieving a Balance Between Absolute Neutrality and a Participant's Desires in Mediation*, AM. BANKR. INST. J., May 2017, at 28 (noting that some parties may wish mediators to play a role in "case evaluation and settlement direction").

[327] Many Roles, *supra* note 11.

[328] *See, e.g.*, Hon. Wynne S. Carvill (Ret.), *The Danger of Mediator's Proposals*, JAMS ADR (June 9, 2020), https://www.jamsadr.com/blog/2020/the-danger-of-mediators-proposals (pointing out that frequent use of mediator's proposals "distorted the settlement process, usually foreclosed the possibility that parties would come to an agreement on their own and caused a number of other adverse consequences").

[329] *See generally* Laura N. Coordes, *Chapter 11 Mediation*, 41 EMORY BANKR. DEV. J. 153 (2025) (contrasting the relative lack of guidance for mediations with the guidance provided for the bankruptcy system generally in the form of the Bankruptcy Code and Rules).

vary substantially, and the identity of the mediator may affect the parties' perception of the mediator as a truly disinterested party.

4. Fee Examiners, Ombudsmen, and Other Court-Appointed Experts

Bankruptcy judges appoint fee examiners to review and critique the fee applications of professionals retained in a bankruptcy case.[330] They are considered experts in reviewing fee applications, and they therefore function somewhat similarly to special masters in non-bankruptcy cases.[331] However, a fee examiner's role in the case is limited to reviewing and critiquing the fee applications; fee examiners are not involved in any other aspects of a case.[332]

Fee examiners are more commonly appointed in large cases where bankruptcy judges are inundated with fee applications.[333] They may negotiate with the parties submitting fee applications, file objections to applications, and help the court evaluate the reasonableness of the fees.[334] However, they are not appointed routinely in bankruptcy cases, and they may be unpopular with the parties whose fees they are scrutinizing.[335] In addition, the NBRC recommended that the Bankruptcy Code be amended to "explicitly preclude the appointment of fee examiners as an improper delegation of the court's duty to review and award compensation."[336] Thus, appointment of a fee examiner can also be controversial.

This article has previously discussed the role of ombudsmen such as the PCO and CPO.[337] These roles are highly specialized and appear only in certain types of cases to facilitate the bankruptcies of certain types of industries and transactions. In addition to the ombudsmen prescribed by the Bankruptcy Code, bankruptcy judges have, at times, appointed other experts to assist them with discrete matters or technical issues within a complex bankruptcy case. For example, in the bankruptcy involving Johnson & Johnson subsidiary LTL Management, Judge Kaplan appointed Kenneth Feinberg as an "estimation expert" to assist with valuing and tabulating the talc claims that victims had

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[330] *Administration of Cases*, *supra* note 73.
[331] *Id.*
[332] *Id.*
[333] Many Roles, *supra* note 11.
[334] *Id.*
[335] *Id.* (discussing the fee examiner's unpopularity in the *Lehman Brothers* bankruptcy).
[336] *Administration of Cases*, *supra* note 73.
[337] *See supra* Part I.B.4.

asserted against the debtor.[338] Courts have also appointed experts in other circumstances, such as when they have had to understand the differences in expert opinions submitted by opposing parties.[339] In addition, judges may use experts to help them understand technical issues within a case.[340]

In a recent example, Judge Meredith Grabill, who is overseeing the bankruptcy of the Archdiocese of New Orleans, hired an "outside expert" to assess whether the parties in the case can reach a viable settlement.[341] The expert, Mo Meghji, is a "business-turnaround expert" who will review the case and file a report with the court opining as to whether the Archdiocese can pay its claimants.[342] Judge Grabill has also ordered the parties to cooperate with Meghji and his team.[343]

Other players are sometimes appointed in specific cases to advocate for underrepresented interests. These may include ad hoc committees and future claims representatives.[344] In short, there are various ways in which other actors may be appointed in a bankruptcy case to serve one or several guardian roles. However, guardians that lack statutory support risk challenges due to the undefined and ad hoc nature of their appointments, and the statutorily-supported guardians discussed in this subpart play only limited roles in specific types of cases.

In summary, there are two consistent guardians used in large-case chapter 11 practice: the bankruptcy judge and the U.S. trustee. However, due in large part to the changes in chapter 11 practice described in Part I of this article, these two "mainstay" bankruptcy guardians have experienced challenges in recent years. As scholars and practitioners document increasing pressure, growing information asymmetries, and expertise deficits for these two stalwarts,[345] it is natural to ask whether additional guardians should be

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[338] Many Roles, *supra* note 11.

[339] *Id.*

[340] *Id.*

[341] David Hammer, *Judge Calls for Outside Expert in New Orleans Archdiocese Bankruptcy Case*, THE GUARDIAN (Aug. 20, 2024), https://www.theguardian.com/us-news/article/2024/aug/20/new-orleans-archdiocese-bankruptcy-case-outside-expert.

[342] *Id.*

[343] *Id.*

[344] *See, e.g.*, James Nani, *Future Claims Rep for J&J Loses Bid to Revive Bankruptcy Plan*, BLOOMBERG L. (Apr. 18, 2025), https://news.bloomberglaw.com/bankruptcy-law/future-claims-rep-for-j-j-loses-bid-to-revive-bankruptcy-plan (discussing the future claims representative in another bankruptcy involving a Johnson & Johnson subsidiary, Red River Talc).

[345] *See, e.g.*, LoPucki, *supra* note 6; Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1083 (2022) (arguing that there

appointed to strengthen bankruptcy's security system[346] and to prevent it from declining into a system that is increasingly unfair and unjust.[347]

The existing menu of additional bankruptcy guardians, outlined in Part II.B above, face their own challenges. They are appointed inconsistently, frequently encounter resistance from other parties, and their roles are often ill-defined. These guardians, therefore, cannot be counted on to always correct the shortcomings of the bankruptcy judge and the U.S. trustee. Thus, there are guardian gaps in complex chapter 11 cases.

III. Filling the Guardian Gaps

As large-case chapter 11 practice becomes more complex, bankruptcy's guardians are not always able to fulfill their roles. However, history shows that proposals for additional bankruptcy guardians frequently encounter resistance. Filling bankruptcy's guardian gaps, therefore, requires precision. This part outlines a two-step proposal for addressing guardian gaps in complex chapter 11 practice before turning to a discussion about the implications and concerns raised by bankruptcy's guardian gaps.

A. Step One: Case Identification

The first step in addressing bankruptcy's guardian gaps is to identify the types of cases where these gaps are most likely to arise. As this article has shown, the changes in complex chapter 11 case practice have led to challenges for bankruptcy's existing guardians. Therefore, this article proposes that the Bankruptcy Code be amended to include a complex chapter 11 case definition and designation.

To do this, it will be necessary to define the term "complex chapter 11 case." This definition should not be based on size alone but should include one

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has been a "breakdown of Chapter 11 bankruptcy's checks and balances"); Jason Jia-Xi Wu, *How Do "Bankruptcy Grifters" Destroy Value in Mass Tort Settlements? In re Purdue Pharma as a Bargaining Failure*, 32 AM. BANKR. INST. L. REV. 243, 243 (2024) (claiming that "'bankruptcy grifters' alter the bargaining dynamics, incentives, and strategies undertaken by each party" in a settlement negotiation).

[346] *See* Randi Love, *Robertshaw Bankruptcy Judge Appoints Mediator Amid Lender Battle*, BLOOMBERG L. (Feb. 22, 2024), https://news.bloomberglaw.com/litigation/robertshaw-bankruptcy-judge-appoints-mediator-amid-lender-battle (describing stakeholder struggles and "significant issues" with creditors in a chapter 11 case).

[347] JACOBY, *supra* note 318.

or more indicators of complexity.[348] Although this may seem like a daunting task, there is ample guidance already available.

For example, several commentators have already recognized that complex chapter 11 cases are simply different from other types of bankruptcy cases. As stated by former bankruptcy judge Catherine E. Bauer,

> Mega Chapter 11 cases are a category all their own. These are single cases or jointly administered or consolidated cases that involve 100 million or more dollars, 1,000 or more creditors and that generate much public interest. Some courts have adopted their own definitions of mega cases in their local rules and set their own procedures for identifying and managing these types of large Chapter 11 case. . . . Obviously, these are complex cases and not just any bankruptcy attorney will do.[349]

As Bauer indicates, some courts already have complex case panels or special rules for complex cases and therefore have already taken steps toward defining a complex case.[350] For example, the Southern District of Texas defines a "complex case" as "a case or group of affiliated cases in which (i) the total liabilities of the debtors and their non-filing affiliates exceed $10 million; (ii) there are more than 50 parties in interest; or (iii) any claims against or interests in the debtors are publicly traded."[351] The Southern District of New York

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[348] Basing the designation primarily on size risks duplicating some of the problems that are occurring with subchapter V, where the debt limit "has cut off the use of Subchapter V for many small businesses and individuals." Scott Fleischer, *Streamlining Business Bankruptcy: Subchapter V Compared to Chapter 11*, BARCLAY DAMON (Mar. 12, 2025), https://www.barclaydamon.com/alerts/streamlining-business-bankruptcy-subchapter-v-compared-to-chapter-11#:~:text=Under%20the%20initial%20eligibility%20rules,many%20small%20businesses%20and%20individuals.

[349] Catherine E. Bauer, *Are Mega Attorney Fees in Mega Chapter 11s Unavoidable?*, DAILY J. (May 18, 2021), https://signatureresolution.com/wp-content/uploads/2022/01/Signature-Resolution-Group-DJ-5-18-21.pdf.

[350] The Committee on the Administration of the Bankruptcy System of the U.S. Judicial Conference recently issued guidelines recommending that bankruptcy courts avoid establishing complex case panels so as to deter judge-shopping. For a discussion of the Committee's guidelines and a response by Judge Marvin Isgur, see *Federal Judicial Conference Bankruptcy Committee Issues Guidelines Targeting Houston Complex Panel Chapter 11 Assignment Procedure to Deter 'Judge-Shopping' by Debtors*, OCTUS (Sept. 25, 2025), https://octus.com/resources/articles/bankruptcy-committee-guidelines-houston-complex-panel-chapter-11/ [hereinafter "Complex Panel Guidelines"]. Even if complex case panels are ultimately abolished, the criteria used to establish these panels may nevertheless be helpful in defining a "complex case" for purposes of a Bankruptcy Code amendment.

[351] *Procedures for Complex Cases in the Southern District of Texas* (Sept. 18, 2024), https://www.txs.uscourts.gov/sites/txs/files/Complex_11_Procedures_9_18_24_FINAL.pdf.

classifies a chapter 11 case as a "mega" case if the assets or liabilities of the debtor are at least $100 million.[352] And the Bankruptcy Court for the Central District of California defines a "complex case" as "a case or group of affiliated cases in which (i) the total liabilities of the debtor (a single debtor or a group of affiliated debtors whose cases are intended to be jointly administered) exceeds $10 million; (ii) there are more than 50 parties in interest; or (iii) any claims against or interests in the debtors are publicly traded, all as reported on the debtor(s) bankruptcy petition(s)."[353] There is also an option for debtors to opt out of the complex case designation if they have more than $10 million but less than $20 million in liabilities.[354]

To move away from a definition based solely or primarily on numbers, a complex case definition could also be modeled from that used by data analytics company LexisNexis, defining mega cases as chapter 11 filings involving $100 million or more, 1,000 or more creditors, or that hold a "high degree of public interest."[355]

Although defining and designating complex chapter 11 cases within the Bankruptcy Code may seem like a radical step, in actuality, it represents the law catching up to the facts on the ground. Practitioners and judges already understand that a complex chapter 11 case is different and requires special handling. Although it would be up to Congress to determine the exact contours of a complex chapter 11 case definition, Congress has plenty of resources to draw upon to create this definition.

B. Step Two: Introduce a Guardian-Fixture

Once a complex chapter 11 case is statutorily defined, the second step is to make an additional guardian a fixture in those cases. In many respects, this additional guardian could be modeled from the subchapter V trustee, which is also a fixture in the subset of cases in which it comes into play.

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[352] *Modification in Assignment of Mega Chapter 11 Cases*, U.S. BANKR. CT. S.D.N.Y. (Nov. 22, 2021), https://www.nysb.uscourts.gov/news/modification-assignment-mega-chapter-11 cases#:~:text=A%20multi%2Ddebtor%20case%20qualifies,or%20greater%20than%20$100 %20million (noting that mega cases "will be assigned on a random basis to the bankruptcy judges of this district irrespective of the courthouse in which the case is filed").

[353] General Order 23-02, U.S. Bankr. Ct. C.D. Cal. (Jul. 31, 2023), https://www.cacb.uscourts.gov/sites/cacb/files/documents/general-orders/GO%2023-02.pdf

[354] *Id.*

[355] Roy Strom, *Kirkland Tops Big Bankruptcy Cases as Alum Helps Rivals Close Gap*, BLOOMBERG L. (July 10, 2025), https://news.bloomberglaw.com/business-and-practice /kirkland-tops-big-bankruptcy-cases-as-alum-help-rivals-close-gap.

The complex chapter 11 guardian would need to be appointed on the first day of the case. This is necessary because, in many instances, key deal terms are already in place when a chapter 11 debtor arrives in bankruptcy court.[356] If a debtor has already struck deals with key creditor groups, other creditors may be left out, and a complex chapter 11 guardian could play a key role in protecting the interests of these "out" groups from day one.

For related reasons, the appointment of a complex chapter 11 guardian would need to be mandatory. As Adam Levitin warns, in many complex cases, debtors' counsel has chosen not just the venue for the case but also the judge, raising concerns that the debtor (and its chosen allies) already have a proverbial thumb on the scale.[357] The mandatory appointment of a chapter 11 guardian could serve as a counterweight for interests that have not yet been represented in the case.

While the timing and nature of the complex chapter 11 guardian's appointment should be set in stone, the role of the guardian could have greater flexibility. Again, drawing an analogy to a subchapter V trustee, the complex chapter 11 guardian might initially serve as a facilitator; however, its role could change as needed depending on the complexities of the case. In that facilitator role, a complex chapter 11 guardian could assist with key aspects of a case, such as the facilitation of discovery,[358] and could serve as a hub or interface for information-sharing among the parties and the judge.[359] Like a subchapter V trustee, the complex chapter 11 guardian should have standing to appear and be heard on key issues in the case as determined by the appointing order.[360]

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[356] *See* Miller, *supra* note 212, at 4 (noting that "parties may still attempt to camouflage aggressive terms" in DIP financing documents filed before the first day hearing and warning, "Do not let the 'interim' label fool you, most of the relief granted in an interim DIP financing order is final").

[357] Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 354 ("In recent years, judge shopping has become standard practice in large chapter 11 bankruptcy cases.").

[358] Indeed, some (non-bankruptcy) courts have discovery facilitator programs for this very purpose. *See, e.g.*, *Discovery Facilitator Program*, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA, https://santaclara.courts.ca.gov/divisions/civil-division/civil-adr-providers/discovery-facilitator-program (noting that the discovery facilitator program in that court allows "parties and counsel to resolve discovery disputes in a manner that is more cost-effective, efficient, and participant-controlled than a standard discovery motion, and that avoids the risk of sanctions inherent in formal discovery motion practice").

[359] *See* Diane Lourdes Dick, *The Case for a Bankruptcy Shareholder Ombudsman*, 41 NO. 1 BANKR. L. LETTER NL 1, 8 (2021) ("In larger cases, the [proposed] ombudsman may also establish and oversee an information-sharing platform, such as a designated website designed to distribute information to shareholders.").

[360] Specifically, the subchapter V trustee may appear and be heard at any hearing

Special attention will need to be paid to the selection and payment of the complex chapter 11 guardian. One option is to allow the complex chapter 11 guardian to be paid by the bankruptcy estate, similar to other professionals in a bankruptcy case, and to select that guardian from a group of people who have experience with issues that tend to arise in complex chapter 11 cases.[361] Paying the complex chapter 11 guardian out of estate funds and treating those payments as administrative expenses of a bankruptcy case would help attract professionals to the role.[362]

To minimize concerns that a professional will be appointed as a complex chapter 11 guardian based on either their relationship with a particular bankruptcy judge or their willingness to simply go along with whatever the debtor wants, Congress could consider requiring random distribution of appointments among panels or a system to even out appointment frequency. For example, once a professional has been appointed as a complex chapter 11 guardian, that professional would move to the "back of the line" and not be eligible for selection again for a period of time. The benefits of such a system would need to be weighed against the potential disadvantage of potentially precluding selection of a guardian based on their unique expertise.

In short, there will inevitably be a significant number of details to work out if a new complex chapter 11 case guardian were to become a fixture in these cases. Congress may choose to set parameters or, as it has also done in the subchapter V context, it may choose to allow issues to develop in practice before setting up additional constraints on the selection, appointment, and role of the complex chapter 11 guardian. The key is to understand that, as a newcomer to the bankruptcy space, the complex chapter 11 guardian will necessarily be a work in progress for a time.

Thus, this article's two-step proposal for the introduction of a new complex chapter 11 case guardian is necessarily a sketch as details will need to

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concerning "(A) the value of property subject to a lien; (B) confirmation of a plan filed under [Subchapter V]; (C) modification of the plan after confirmation; or (D) the sale of property of the estate…." 11 U.S.C. § 1183.

[361] There is some resemblance to a subchapter V trustee here as well. *See Role of a Subchapter V Trustee*, NAT'L ASS'N OF BANKR. TRS., https://www.nabt.com/page/Role_SubVTrustee ("In every Subchapter V case, a Subchapter V trustee is appointed by the Department of Justice from a pool of qualified bankruptcy professionals, based upon their knowledge or experience with the debtor's type of business . . . Subchapter V trustees are assigned from a pool of professionals . . . on a case-by-case basis, based upon their experience, in order to be able to assist the debtor and creditors in each unique situation.").

[362] *See* Glantz, *supra* note 218, at 22 ("Guaranteed estate reimbursement of reasonable fees and expenses attracts highly competent professionals from which the UCC can choose.").

be refined over time. However, no aspect of the proposal need come completely from scratch. As this article has shown, there are numerous guardian proposals that Congress can draw upon to create a robust complex chapter 11 guardian. In addition, policymakers can look to other models for guidance, including those used in other countries.[363] The work of this article has been primarily to show that such a guardian is needed for these particular cases. This proposal thus contemplates a three-part division of chapter 11, with special procedures for small cases (subchapter V), a new guardian for complex cases (this proposal),[364] and the current chapter 11 process applying to all other chapter 11 cases.

C. Concerns and Implications

The introduction of a complex chapter 11 case guardian will undoubtedly encounter resistance. History cautions that the addition of a guardian for chapter 11 cases risks making chapter 11 an unattractive option for debtors. Furthermore, any proposal requiring changes to the Bankruptcy Code necessitates congressional action, which is always a challenging prospect.

Nevertheless, it is possible to make an additional guardian both practically and politically palatable. One way to do this is to focus on framing. Professionals dislike "overseers," but they consistently praise expertise.[365] Thus, introducing the guardian as an "expert" and highlighting the technical expertise and capacity that such a guardian can bring to the table could go a long way toward increasing receptiveness to an additional guardian.

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[363] For example, Mexican bankruptcy proceedings involve a conciliator. *See* Julio Butrón Romero, *The Role of the Conciliator in achieving a Bankruptcy Agreement*, SANTAMARINA+STETA (Jul. 19, 2024), https://www.santamarinasteta.mx/en/publicaciones-y-eventos/newsletter-ss/el-papel-del-conciliador-para-la-consecucion-de-un-convenio-concursal/#:~:text=The%20Conciliator%20is%20a%20professional,creditors%20reach%20a%20Bankruptcy%20Agreement ("The Conciliator is a professional with experience in financial restructuring. . . . It is essential that the Conciliator's performance be governed by the principles of independence, impartiality, transparency, publicity, speed and good faith.").

[364] As discussed further in Part III.C, *infra*, other changes to chapter 11 may well be needed for complex cases. This article's proposal with respect to guardians is not intended to foreclose other scholars' proposals to alter the structure or procedure of large-case chapter 11 practice.

[365] *See* Jared Ellias, *Bankruptcy Law: Explaining Bankruptcy Forum Shopping*, THE JUDGES' BOOK 11 (2019) (noting that "[o]ne camp [of scholars] believes that…experienced courts attract firms because they have expert judges and stores of legal precedent that make bankruptcy more predictable"); Anthony J. Casey & Joshua Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEV. J. 463, 466 (2021) (noting the argument that "competition for cases improves efficiency and predictability as judges develop expertise in overseeing large Chapter 11 cases").

A second concern involves the cost of adding a new player to an already expensive chapter 11 case. However, the point of creating a complex case designation is to identify those cases where the benefits of an additional player—in the form of increased expertise and greater representation of disparate interests—would outweigh the costs. Thus, the complex case definition should be designed to capture those cases. Furthermore, similar concerns about cost were raised with respect to the enactment of subchapter V and the addition of a new player in the form of a subchapter V trustee; however, it appears that subchapter V has actually reduced costs for debtors.[366]

Alongside a carefully crafted definition, another possible cost-cutting measure is to create a presumption that, in a complex chapter 11 case, no unsecured creditors' committee is needed.[367] This is because a complex chapter 11 guardian could play a role similar to that played by a committee. As unsecured creditors are often out of the money anyway in complex cases, a creditors' committee may make little sense, and it may be more practical to allow the guardian to take on the role of addressing unsecured creditors' interests.[368]

Another concern is that a complex chapter 11 guardian's flexibility may in fact be its downfall. This article has shown that inconsistent or ad hoc guardians can result in increased costs, a slower process, aggravation of the parties, and guardian ineffectiveness. A new guardian would be an unknown quantity and may be difficult for parties to accept. However, this article posits that, like the subchapter V trustee, a complex chapter 11 guardian would benefit from consistency in its appointment even if the contours of its role changed from case to case. Indeed, the subchapter V trustee is today a widely accepted part of practice for small business cases even as its role continues to develop.[369]

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[366] Daniel A. Lowenthal & Kimberly Black, *Popularity of Subchapter V Bankruptcy Filings*, PATTERSON BELKNAP (Mar. 29, 2024), https://www.pbwt.com/bankruptcy-update-blog/popularity-of-subchapter-v-bankruptcy-filings (citing data showing reduced costs for debtors in terms of faster plan confirmations, the lack of an unsecured creditors' committee, and lower average professional fees, even with the addition of the subchapter V trustee).

[367] This is also similar to subchapter V, where no creditors' committee is appointed unless the court orders otherwise. 11 U.S.C. § 1181(b).

[368] *See* Douglas G. Baird & Robert K. Rasmussen, *Anti-Bankruptcy*, 119 YALE L.J. 648, 653 (2010) (discussing "how the prototypical general creditor has changed").

[369] *See* Andrew O'Keefe, *Subchapter V – Reorganization Within Reach*, ENGELMAN BERGER (Apr. 11, 2024), https://eblawyers.com/subchapter-v-reorganization-within-reach/ (noting that the subchapter V trustee "transforms the role of the trustee from one of prosecutor to that of mediator, requiring the trustee to work hand-in-hand with the debtor and creditors" and contending that "SBRA has overwhelmingly had positive impacts on small business

This experience shows that bankruptcy practitioners are highly adaptive, and they will adjust to an additional guardian whose role, in turn, will gain more definition with time.[370]

As important as a complex chapter 11 guardian can be, additional guardians, by themselves, will not resolve all the problems scholars have identified with complex chapter 11 practice. Other adjustments to the Bankruptcy Code and Rules may well be necessary. However, a complex chapter 11 guardian could help resolve issues beyond the need for additional guardianship. For example, there is an ongoing scholarly concern that complex cases are concentrated in only a few jurisdictions.[371] The appointment of a complex chapter 11 guardian could serve to assist jurisdictions that typically do not see complex cases and that may otherwise feel unequipped to handle the challenges of such a case. Alternatively, the existence of a complex case designation within bankruptcy law could align with other proposals to enable alternative solutions to the forum shopping problem. For example, cases designated as "complex" could be assigned to a central panel of judges who in turn would allocate complex cases to venues across the country.[372]

Even if this article's proposals are not used as a vehicle to curb forum shopping, the addition of a complex chapter 11 guardian could reduce judicial overload at a critical time when non-bankruptcy issues are playing an increasing role in bankruptcy practice.[373] As proponents of special masters in bankruptcy have long argued, it makes little sense to deny bankruptcy judges the same tools as their counterparts, especially given the invasion of non-bankruptcy issues into bankruptcy courtrooms.[374] Guardians, in short, can

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debtors across the country") (internal quotations omitted).

[370] *See* Coordes, *supra* note 192, at 106 ("Lawyers adapted quickly to changes as reorganization law continued to develop.").

[371] *See, e.g.*, Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11 (1991) (describing "extensive forum shopping" to New York City among large bankruptcy debtors).

[372] *See* Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159 (2013) (suggesting various changes to the venue statute, bankruptcy procedure, and court structure to curtail forum shopping). This central panel would differ from the current practice of individual districts establishing complex case panels, a practice recently discouraged by the Committee on the Administration of the Bankruptcy System of the U.S. Judicial Conference. *See* Complex Panel Guidelines, *supra* note 350.

[373] *See generally*, Coordes, *supra* note 4 (cataloging circumstances where non-bankruptcy issues have been presented in bankruptcy).

[374] Although this article does not take a specific position on whether special masters should be allowed in bankruptcy cases, nothing in its proposals would preclude the use of special masters in appropriate cases, should the Bankruptcy Rules be amended to permit them.

allow bankruptcy judges greater flexibility to respond to the needs these complex cases often present. Tailoring chapter 11 to allow bankruptcy judges to better address today's challenges is a key benefit of this article's proposals.

Finally, it is worth emphasizing another key throughline of this article: the need to periodically reassess the bankruptcy system to ensure that it can handle the challenges of modern practice. As scholars have recognized in other contexts, the rule of law is fragile but essential to the proper functioning of a legal system.[375] If chapter 11 has become "lawless,"[376] it is past time to strengthen the system by assessing its failures. This article has sought to do just that by shining a spotlight on bankruptcy's guardians. In this process, the hope is that guardians' potential and value also come through. Even if there are no changes to the law of bankruptcy coming soon, it is critical to recognize guardians' benefits and to explore ways to utilize their full potential. Reviewing guardians' roles as part of a periodic assessment of the bankruptcy system is a way to recognize and celebrate guardians' strengths even as we seek to identify and resolve their shortcomings.

Conclusion

The tension over whether and how to provide more oversight and guardrails in bankruptcy is ongoing. This tension will continue as long as bankruptcy practice continues to evolve. Thus, it is important to periodically re-examine bankruptcy's "security system" and to be alert to the promise and perils of bankruptcy's guardians.

Complex chapter 11 bankruptcies have emerged as a distinct type of bankruptcy requiring different handling from other types of cases. These cases can push bankruptcy in newer, more exciting, and more challenging directions. If bankruptcy practice is embracing these changes, it is time for the law—and the resources the law can provide—to catch up.

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[375] *See* Joanna Kusiak, *Why Has the Rule of Law Become So Fragile?*, LPE PROJECT (July 25, 2024), https://lpeproject.org/blog/why-has-the-rule-of-law-become-so-fragile/.

[376] LoPucki, *supra* note 6.