CHAPTER 11'S QUIET COMPETENCE
A RESPONSE TO COORDES AND LUBBEN

by

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Introduction

Chapter 11 presents a puzzle. A growing body of academic and media commentary describes U.S. bankruptcy proceedings for large corporate debtors as flawed and corrupt.[1] Reading this commentary, one might think the system has failed. The reader is told that large cases are captured by conflicted debtors' counsel,[2] private equity sponsors,[3] and repeat player professionals; that restructuring support agreements (RSAs) turn chapter 11

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[1] *See generally* Laura N. Coordes, *Bankruptcy's Guardian Gaps*, 99 AM. BANKR. L.J. 471, 472–76 (2025) (citing commentary); Stephen J. Lubben, *A New Deal for Corporate Bankruptcy: Bring Back Chapter X*, 99 AM. BANKR. L.J. 225, 229–35, 252–56 (2025) ("Modern chapter 11 practice has been heavily criticized by academics of all stripes."); *see also, e.g.*, Jonathan C. Lipson & David A. Skeel, *FTX'd: Conflicting Public and Private Interests in Chapter 11*, 77 STAN. L. REV. 369, 457 (2025); Jared A. Ellias, *Regulating Bankruptcy Bonuses*, 92 S. Cal. L. Rev. 653 (2019); Diane Lourdes Dick, *The Case for a Bankruptcy Shareholder Ombudsman*, 41 NO. 1 BANKR. L. LETTER NL 1 (2021); Katherine Waldock, *Fighting Fire with Fire: Bankruptcy Committees in the Age of Hostile Restructurings*, 2022 COLUM. BUS. L. REV. 1097, 1100; Douglas G. Baird & Robert K. Rasmussen, *Anti-Bankruptcy*, 119 YALE L.J. 648, 653 (2010); Vincent S.J. Buccola, *Unwritten Law and the Odd Ones Out*, 131 YALE L.J. 1559, 1582–83 (2022); David A. Skeel, *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 79 (Princeton Univ. Press 2014); Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1083 (2022); Melissa B. Jacoby, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL (The New Press 2024). For a collection of older critiques of chapter 11, see Aurelio Gurrea-Martínez, *Insolvency Law in the Global South: Lessons for the Global North*, at 12 (work in progress), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5203364.

[2] *See, e.g.*, Bruce Markell, *The Academics Speak Up: Silvergate Part 1*, CREDITOR RTS. COAL. (Apr. 26, 2025), https://creditorcoalition.org/the-academics-speak-up-silvergate-part-1/; Nancy B. Rapoport, *Special Feature: Professor Nancy Rapoport on Recent Disqualification Decisions,* CREDITOR RTS. COAL. (June 5, 2024), https://creditorcoalition.org/special-feature-professor-nancy-rapoport-on-recent-disqualification-decisions; *see also* Anthony Casey & Emma Lotts, *Finding Debtor's Counsel*, 51 BYU L. REV. 673 (2026).

[3] *See* Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization,* 90 U. CHI. L. REV. 1 (2023).

into a coercive or pre-scripted ratification exercise;[4] that liability management exercises (LMEs) move negotiations beyond the reach of judicial guardrails;[5] and that bankruptcy judges are overwhelmed by mass torts, cryptocurrency platforms, increasingly aggressive financial engineering, and the complexity of modern cases.

In contrast, outside the United States, chapter 11 enjoys a positive reputation. Lawmakers and reformers around the world continue to adopt—or advocate for the adoption of—core features of chapter 11, including debtor control, automatic moratorium protection,[6] rescue financing,[7] prepackaged plans, and cramdown.[8]

For example, Singapore's 2017 restructuring reforms expressly adopted core chapter 11 features, including rescue financing with superpriority, automatic moratorium protection, cramdown procedures, and prepackaged schemes.[9] Singapore's Ministry of Law explicitly described these reforms as "adding key elements of Chapter 11 of the US Bankruptcy Code which have been instrumental in establishing the US as a pre-eminent debt restructuring centre."[10]

Likewise, in 2020, the United Kingdom introduced the new restructuring plan under Part 26A of the Companies Act 2006, which supplemented its existing scheme process with U.S.-style cramdown procedures.[11] The 2019 European preventive restructuring directive similarly

[4] Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 BROOK. J. CORP. FIN. & COM. L. 169 (2018); David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366 (2020); Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 AM. BANKR. L.J. 593 (2017); *see also* Anthony J. Casey, Frederick Tung & Katherine Waldock, *Restructuring Support Agreements: An Empirical Analysis* (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4823317.

[5] Lubben, *supra* note 1, at 229–35, 252–56.

[6] Also known as an automatic stay.

[7] Also known as debtor in possession (DIP) financing.

[8] It is often referred to as "cross-class cramdown" in other jurisdictions. This may sound a bit redundant to an ear trained in the United States, where all cramdown is "cross-class."

[9] Singapore Ministry of Law, *A New Era for Debt Restructuring in Singapore*, at 1–2 (2017) ("The enhanced regime retains these two features but builds upon and strengthens them by adding key elements of Chapter 11 of the US Bankruptcy Code which have been instrumental in establishing the US as a pre-eminent debt restructuring centre."), https://www.mlaw.gov.sg/files/NoteonDebtRestructuring.pdf.

[10] *Id.*

[11] *See* Kristin van Zwieten, *Mid-Crisis Restructuring Law Reform in the United Kingdom*, 24 EUR. BUS. ORG. L. REV. 287 (2023); Jennifer Payne, *Debt Restructuring in Transition* (2022), https://ora.ox.ac.uk/objects/uuid:d153b995-5f4e-471f-8ccc-b15311f4a270

borrows from chapter 11 when it directs Member States toward frameworks that keep debtors in possession, stay enforcement, classify affected parties, and permit court confirmed plans, while cautioning that restructuring professionals should not be mandatory in every case.[12]

While these foreign systems have not copied chapter 11 wholesale, they have praised its virtues and borrowed several of its distinctive features. As one article put it, "Chapter 11 of the U.S. Bankruptcy Code is the 'gold standard' of business financial reorganization laws."[13] At the same time, these foreign jurisdictions have sought to avoid what many view as chapter 11's biggest weaknesses: costs and procedural delays.[14] The most common criticism of the U.S. system that one hears abroad is that it is expensive and often more procedurally burdensome than international alternatives like the scheme of arrangement.[15]

These observations fit uneasily with the objections and policy recommendations that appear in U.S. commentary. If chapter 11 is as

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/files/rjd472x00s; *see also* CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020, sch. 9, Companies Act 2006, pt. 26A, §§ 901A–901L (U.K.).

[12] Directive (EU) 2019/1023, recital 30, https://www.legislation.gov.uk/eudr/2019/1023/introduction/data.html.

[13] Michelle M. Harner & Robert Hockenbury, *Reflections on Business Bankruptcy Reform*, 71 SYRACUSE L. REV. 501, 501 (2021).

[14] Traditionally, not many U.S. debtors made the opposite journey to file abroad. But those that did were usually seeking the lower costs and procedural streamlining available in some other jurisdictions. More recently, speculation has arisen that U.S. firms might leave the United States because of recent constraints that have been placed on bankruptcy courts by the Supreme Court of the United States. *See* Anthony J. Casey, *The Lure of English Proceedings: Forum Selection from the United States to England*, in CORPORATE RESTRUCTURING LAW IN FLUX (Jennifer Payne & Kristin van Zwieten eds., Hart 2025); *see also* Markell, *supra* note 2.

[15] *See, e.g.*, Horst Eidenmüller, *Comparative Corporate Insolvency Law*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2d ed. 2025) (comparing the costs of chapter 11 with European alternatives); Sarah Paterson, CORPORATE REORGANIZATION LAW AND FORCES OF CHANGE (Oxford Univ. Press 2020); Gurrea-Martínez, *supra* note 1, at 12 (collecting critiques); Sarah Paterson, *Reflections on English Law Schemes of Arrangement in Distress and Proposals for Reform*, 15 EUR. CO. & FIN. L. REV. 472 (2018); Lubben, *supra* note 1, at 257; National Bankruptcy Conference, Proposed Amendments to the Bankruptcy Code to Facilitate Restructuring of Bond and Credit Agreement Debt (2015) (proposing a new chapter 16 that would permit a debtor to restructure only its bond and credit-agreement debt in a streamlined proceeding—functionally similar to a U.K. scheme of arrangement—in order to reduce the cost and disruption of a full chapter 11 case), https://nbconf.org/wp-content/uploads/2015/07/Proposed-Amendments-to-Bankruptcy-Code-to-Facilitate-Restructuring-of-Bond-and-Credit-Agreement-Debt.pdf; *see also* Jared A. Ellias, *Has Chapter 11 Become More Expensive?*, YALE J. REG. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5128371.

pathological as the commentary suggests, how is it also the "gold standard" and "pre-eminent restructuring centre"[16] that other jurisdictions look to as a model for reforms? And if its weaknesses are cost and complexity, why do so many proposed reforms focus on adding costly procedures or additional neutral guardians?

One explanation is that the domestic critics too often focus on the noise and drama of contested proceedings, while reformers in other jurisdictions focus on the system's capacity to produce outcomes. Dysfunction and conflict are more sensational and more likely to attract attention than the consensual outcomes that dominate large chapter 11 cases.[17] But the existence of conflict should not be equated with institutional failure. A system designed to coordinate complex bargaining among distressed parties will produce complex disputes, and some cases will produce dysfunction. No legal system can perfectly resolve the conflicts that accompany corporate financial distress. Of course, dysfunctional cases warrant some attention, but critics should not lose sight of the success of the broader system. And any reforms should be finely calibrated to the scope of dysfunction.

In this article, I suggest that chapter 11 has a quiet competence that most commentators have missed. The salience of private equity disputes or a judicial ethics scandal[18] distracts from the routine work of bankruptcy courts. In the vast majority of cases, these courts quietly shepherd complex renegotiations among sophisticated parties toward resolution. Those cases proceed without drama, scandal, private equity abuse, or cryptocurrency fraud. And they end in consensual agreement reached under the guidance of an expert bankruptcy bench and other neutral professionals, including the Office of the United States Trustee and, when necessary, court appointed examiners and mediators.

Two excellent articles in this journal provide useful occasions to test that claim. In *Bankruptcy's Guardian Gaps*, Professor Laura Coordes argues that recent chapter 11 cases expose gaps in the system's guardianship structure and proposes a reform that would mandate the appointment of a complex chapter 11 guardian from day one.[19] Similarly, in *A New Deal for*

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[16] Singapore Ministry of Law, *supra* note 9.

[17] *See* Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930 (2006) (explaining how negotiated settlement, rather than litigated cramdown, dominates the resolution of large chapter 11 cases); Casey et al., *supra* note 4 (presenting empirical evidence on the prevalence of consensual, RSA-supported plans in large cases).

[18] Coordes, *supra* note 1, at 508.

[19] *Id.* at 523–30.

Corporate Bankruptcy: Bring Back Chapter X, Professor Stephen Lubben argues that modern chapter 11 has become too rough, too strategic, and too lawless. He thus proposes a new menu of restructuring tools, including a revived Chapter X-like process for large corporate debtors with a trustee or monitor who is able to tell the court what is "really happening."[20] The proposals differ in many details,[21] but they share a core prescription: more mandatory neutral oversight.

There is much that these articles get right. Coordes and Lubben aptly identify several cases in which the system was imperfect. They show that modern chapter 11 is faster, more strategic, and more pre-negotiated than the system imagined in 1978. Coordes and Lubben are also right that RSAs, LMEs, insider settlements, releases, and first day orders can create serious information problems for courts.[22] And, in the hardest cases, courts do sometimes fall short, allowing bargains to suppress information or prepetition transactions to predetermine the reorganization plan.

But Coordes and Lubben ultimately draw the wrong institutional inference. Chapter 11 does not lack guardians, monitors, trustees, or public-regarding tools. Challenging cases arise because of the underlying purpose of the law. Chapter 11 was designed to address opportunistic behavior that emerges in financial distress.[23] It creates a process that comes into play when bargaining is expected to fail. Courts must therefore distinguish value-preserving renegotiation from opportunistic value shifting under conditions of incomplete information. Their charge is to reconcile two conflicting goals: respect nonbankruptcy private ordering and intervene when parties opportunistically exploit those nonbankruptcy rights. With such an ambitious task, one should not expect perfection. Just as parties cannot write perfectly complete financial contracts, no legislature can write a perfectly complete set of bankruptcy rules.

Thus, much of what appears as "creditor-on-creditor violence"[24] or "guardian gaps"[25] is the hard bargaining inherent in corporate financial distress. But the prevalence of that self-interested bargaining is not itself a systemic problem. A systemic bankruptcy problem would arise if the

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[20] Lubben, *supra* note 1, at 233.

[21] *See infra* Part IV.

[22] Coordes, *supra* note 1, at 471–76, 502–06; Lubben, *supra* note 1, at 229–33, 236–41, 252–56.

[23] Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709 (2020).

[24] *See* Lubben, *supra* note 1.

[25] *See* Coordes, *supra* note 1.

bargainers used the court's coercive power to conceal information, evade statutory limits, distort voting, suppress estate claims, or impose unequal treatment that the Code does not permit. If such a problem does exist, the remedy for it is not a new mandatory guardian or trustee whose own incentives, costs, and authority must then also be policed.[26] The appropriate response is to facilitate more disciplined use of the tools chapter 11 already provides.

In crafting any response, one must also be mindful of the distinction between discretionary tools and mandatory fixtures. Chapter 11 already lets judges deploy trustees, examiners, mediators, fee examiners, and ombudsmen when a particular case calls for them. These are targeted instruments—matched to a diagnosed failure, defined by an appointing order, and controlled by the court. Coordes and Lubben would instead install a permanent actor in every complex case, whether or not the case needs one. I have no quarrel with expanding the menu of discretionary tools. The current push to amend Bankruptcy Rule 9031 to permit special masters in bankruptcy, for example, fits comfortably within the framework defended here.[27] My objection is to mandates. A mandatory fixture imposes its costs in every case to address failures that appear in only a few.

This article proceeds in four Parts. Part I explains the international perspective and why it counsels against adding cost and new mandatory processes. Part II develops the account of chapter 11 as a process for structured renegotiation and explains why bargaining, even hard bargaining, is not itself failure in the law's design. Part III considers the information problem created by prepetition bargaining and describes the guardrails judges already possess. Part IV suggests that Coordes's guardian and Lubben's revived Chapter X would add costs, create role confusion, and bring new capture risks without solving the problems at which they are directed.

[26] And, of course, one must ask, "By whom?" It is guardians all the way down. *But see* Gurrea-Martínez, *supra* note 1, at 28–29 (suggesting that insolvency law should empower creditors with the power and discretion to appoint a neutral trustee directly and noting that such practices exist in other jurisdictions).

[27] Fed. R. Bankr. P. 9031 (prohibiting the appointment of special masters in cases and proceedings under the Code); *see* Coordes, *supra* note 1, at 471–72, 496–97 (describing proposals to repeal or amend the rule).

I. The International Perspective

Chapter 11 looks different when viewed from an international perspective. The global movement in restructuring law has not been a move away from chapter 11. Rather, it has been toward selected chapter 11 features.

Singapore provides the clearest example. In adopting recent reforms, Singapore's government described the United States as a preeminent debt restructuring center, and Singapore's enhanced scheme and debtor in possession regime added key chapter 11 tools: rescue financing, superpriority, moratorium protection, cramdown procedures, and prepackaged schemes.[28] The United Kingdom's restructuring plan likewise added the ability to bind dissenting classes through cross-class cramdown.[29] The European directive similarly embraces debtor control, early restructuring, stays, voting, class formation, and cramdown procedures, while warning against mandatory appointment of a restructuring practitioner in every case.[30]

Of course, this does not prove chapter 11 is perfect or that it is the best restructuring system for every jurisdiction.[31] But it does show that chapter 11's core architecture remains attractive to sophisticated reformers. Foreign systems want to adopt chapter 11-like mechanisms that can stop value-destructive debt-collection efforts, preserve going-concern value, enable new financing, bind holdouts, and permit a court supervised bargain to become legally effective.

Just as revealing are the features these systems usually try to avoid. Central among them are costs and procedural complexity. Chapter 11 is widely recognized as the most expensive restructuring ecosystem in the world. While large companies often forum shop into chapter 11, even more find its costs too high. Even within the United States, the costs of chapter 11 limit its usefulness to large companies. This was a driving factor behind the adoption of subchapter V for small businesses.[32]

It is also worth noting that jurisdictions undertaking recent reforms have generally not moved toward old Chapter X's mandatory displacement

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[28] Singapore Ministry of Law, *supra* note 9, at 1–2.

[29] Explanatory Notes to the Corporate Insolvency and Governance Act 2020, paras. 9–15, https://www.legislation.gov.uk/ukpga/2020/12/pdfs/ukpgaen_20200012_en.pdf.

[30] Directive (EU) 2019/1023, *supra* note 12, at recitals 24, 30.

[31] *See* AURELIO GURREA-MARTÍNEZ, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (Cambridge Univ. Press 2024) (noting the importance of considering local institutions and practices in designing insolvency law).

[32] *See infra* Part IV (discussing subchapter V).

model.[33] Nor have they been adding mandatory guardian-like professionals. To the contrary, the European directive's caution against mandatory restructuring practitioners reflects a concern that is fundamental to any sensible bankruptcy reform debate: additional professionals may be useful in particular cases, but mandatory professionals increase costs, delay, and procedural burden.[34]

That comparative pattern cuts against the Coordes and Lubben prescriptions. If chapter 11 is the gold standard, but a costly one, reform should preserve its outcome-producing machinery while reducing unnecessary cost. A mandatory complex-case guardian and a revived Chapter X-style trustee move things in the opposite direction. They respond to an expensive system by making it more administratively elaborate.

The international perspective also exposes a selection problem in domestic commentary. Criticism tends to focus on the most salient or sensational cases involving companies whose names are either household brands or notorious bad actors, like Purdue, Boy Scouts, FTX, J. Crew, Toys "R" Us, and Johnson & Johnson.[35] These cases do not represent the majority of chapter 11 cases. The run-of-the-mill case is one in which parties bargain hard and reach a consensual resolution without becoming shorthand for collapse or corruption. The connection between those salient cases and a need for system-wide redesign is far from obvious.

The same point appears in cross-border practice. Debtors with global operations often work hard to file their restructuring in a U.S. bankruptcy court when their home systems lack an effective stay, rescue financing, or a mechanism to bind holdouts.[36] In these cases, sophisticated parties see chapter

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[33] Likewise, chapter 11's examiner provisions have not been popular with international reformers.

[34] Directive (EU) 2019/1023, *supra* note 12, at recital 30.

[35] *See* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071 (2024); *In re* Boy Scouts of Am., 137 F.4th 126 (3d Cir. 2025); *In re* FTX Trading Ltd., 91 F.4th 148 (3d Cir. 2024); *In re* Chinos Holdings, Inc., No. 20-32181 (KLP) (Bankr. E.D. Va. filed May 4, 2020) (J. Crew); Kenneth Ayotte & Christina Scully, *J. Crew, Nine West, and the Complexities of Financial Distress*, 131 YALE L.J.F. 363 (2021) (describing the J. Crew "trapdoor" transaction); *In re* Toys "R" Us, Inc., No. 17-34665 (KLP) (Bankr. E.D. Va. filed Sept. 18, 2017); *In re* LTL Mgmt., L.L.C., 64 F.4th 84 (3d Cir. 2023).

[36] It is also worth noting that for years, large international debtors have worked mightily to lodge their reorganization case in a U.S. bankruptcy court when their home jurisdictions lack the tools necessary to effectuate a viable reorganization. *See, e.g.*, *In re* LATAM Airlines Grp. S.A., No. 20-11254 (JLG) (Bankr. S.D.N.Y. filed May 26, 2020); *In re* GOL Linhas Aéreas Inteligentes S.A., No. 24-10118 (MG) (Bankr. S.D.N.Y. filed Jan. 25, 2024); *In re* Philippine Airlines, Inc., No. 21-11569 (SCC) (Bankr. S.D.N.Y. filed Sept. 3, 2021); *In re* Corp Group Banking S.A., No. 21-10969 (JKS) (Bankr. D. Del. filed June 25, 2021); *In re*

11 as capable of preserving value. By these debtors' own account, chapter 11 provides a useful toolkit, including sophisticated judges and a well-developed bargaining ecosystem.

II. Chapter 11 as Structured Renegotiation

Corporate bankruptcy exists because ordinary debtor-creditor law is poorly suited to financial distress.[37] Outside bankruptcy, creditor enforcement can be collectively destructive when the debtor's assets are worth more together than apart. Bankruptcy responds by imposing a stay, gathering parties into a common forum, preserving estate value, and permitting a plan to bind dissenters subject to statutory constraints.

But the collective action story is not enough. Financial distress also reveals gaps in the parties' contracts. No loan agreement, bond indenture, lease, supply contract, settlement agreement, or corporate charter can specify every contingency that will matter when a firm approaches insolvency. When distress arrives, parties have incentives to hold one another up. Secured lenders threaten to withdraw liquidity. Junior creditors threaten litigation. Managers gamble with estate value. Sponsors exploit control. Tort claimants race for judgments. One creditor group uses a blocking position to extract value unrelated to its underlying entitlement.

These practices are difficult to police. Chapter 11 responds by creating a structured renegotiation framework.[38] It does not provide a hard rule for

Grupo Aeroméxico, S.A.B. de C.V., No. 20-11563 (SCC) (Bankr. S.D.N.Y. filed June 30, 2020); *see also* White & Case LLP, *Navigating Turbulence: Latin American Airlines in Chapter 11* (2023), https://www.whitecase.com/insight-our-thinking/latin-america-focus-fall-2023-navigating-turbulence (explaining that Latin American carriers filed in the United States because chapter 11 offers restructuring tools—rescue financing, a robust stay, and contract rejection—that are unavailable or untested in their home jurisdictions). Of course, the debtor's choice of forum (often made on the eve of filing) is less compelling evidence of the efficiency of the system. Debtors may choose a forum for various reasons including those that are not indicative of good policy. *See* Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEV. J. 463 (2021); Anthony J. Casey, Aurelio Gurrea-Martínez & Robert K. Rasmussen, *A Commitment Rule for Insolvency Forum*, 4 U. CHI. BUS. L. REV. 51 (2025).

[37] The ideas in this section are more fully laid out in Casey, *supra* note 23.

[38] *See* Casey, *supra* note 23. This is not to say chapter 11 is the best option in all scenarios. For smaller cases, the new subchapter V provides a simple framework. *See infra* Part IV. Likewise, capital markets in some countries may not use the complex capital structures that pervade medium and large company borrowing in the United States. For those countries, a simplified procedure may be more appropriate. *See* Gurrea-Martínez, *supra* note 31 (noting that the complex machinery of chapter 11 may not be necessary in all

every distributive question in advance. Instead, it creates a process in which parties renegotiate under statutory constraints and judicial review. This structure provides valuable flexibility. A rigid statute cannot anticipate the needs of a distressed airline, hospital system, retailer, cryptocurrency platform, manufacturing firm, or mass tort defendant. Chapter 11 allows the parties closest to the firm to bargain over a value-preserving solution while preserving the court's authority to reject bargains that violate the Code's limits.

That institutional allocation is important. Chapter 11 is neither pure private ordering nor public administration. If it were pure private ordering, courts would simply ratify deals struck by dominant parties. If it were public administration, a neutral official would manage the business and design the distribution. Chapter 11 occupies a space between those poles. It lets parties negotiate, but it requires disclosure, voting, equal treatment, good faith, feasibility, best interests protection, and fair and equitable treatment in cramdown.

Chapter 11 thus tries to create conditions under which bargaining can solve hold-up problems without becoming an occasion for opportunistic value shifting. The judge's task is not to make the bargain come out in an independently attractive way. It is to decide whether the parties go too far in their bargaining. Bankruptcy is a balancing act that seeks to constrain opportunistic behavior *as much as possible* without interfering *too much* with private ordering. The court must ultimately understand the deal that was made, the alternatives that realistically existed, the value that the deal preserves, and the entitlements it alters. Then it must decide whether that deal goes too far. No guardian can relieve the court of the need to make that judgment call.

This matters for both Coordes and Lubben. Under this procedural account, much of what appears as "creditor-on-creditor violence" is bargaining among parties with incomplete contracts and incompatible positions. Calling the losing side "underrepresented" or the winning side "violent" does not by itself identify a bankruptcy problem. It identifies a distributive outcome that one dislikes. Bankruptcy reforms should not seek to create a system in which guardians ensure that bargaining comes out differently whenever the result is unattractive.

One important caveat is necessary. The bargaining framework works only when parties can bargain with each other. Mass tort victims, future claimants, patients, and other dispersed or involuntary creditors are often

jurisdictions).

absent from the bargain altogether. In these cases, providing adequate representation is important. But the system's response to absence has been—and should remain—targeted rather than universal: future claims representatives, statutory ombudsmen, official and ad hoc committees, and, where governance itself is compromised, independent fiduciaries appointed for the particular case.[39] Professor Joshua Macey and I have argued, for example, that mass tort bankruptcies may warrant independent directors or a trustee to represent tort claimants.[40] The difference between that kind of intervention and the proposals examined here is the difference between a remedy matched to a diagnosed representation failure and a fixture installed regardless of whether any such failure exists.

By the very nature of this design, chapter 11 courts will let some unsavory deals stand. That does not mean anything goes. For example, some bargains can be too opportunistic, and side deals can violate equal treatment. These problems arise because of the difficult task bankruptcy courts face, not because there are too few neutral guardians. Chapter 11 provides a judicial toolkit designed to address them, even if imperfectly.

III. Bargaining in the Shadow of the Guardrails

Much of the recent criticism treats prepetition bargaining as suspicious in itself. Of course, sophisticated parties bargain in the shadow of the law. As a result, it is the potential outcomes in chapter 11 that will drive those negotiations and set the bargaining leverage of the parties. If chapter 11 is too costly or burdensome for a particular party, that will show up in the prepetition bargains. By the same token, if chapter 11 functions well and with a quiet competence, that will also show up in the prepetition bargains. In addition, there is some value in predictability regardless of the substantive outcome. And while the law of chapter 11 has changed over time, the change has been slow. At any given time, chapter 11 is a predictable legal background against which parties can negotiate before (or without) invoking the court's coercive power.

And so, RSAs and LMEs are not signs of systemic failure.[41] They are signs that parties understand the legal environment and bargain accordingly.

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[39] *See* 11 U.S.C. § 524(g)(4)(B)(i) (future claims representatives); *id.* §§ 332, 333 (consumer privacy and patient care ombudsmen); *id.* § 1102(a)(2) (additional committees).

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

[41] *See* Baird, *supra* note 4.

The harder question is when bargaining in the shadow of chapter 11's guardrails becomes bargaining *around* those guardrails.

That question lies at the heart of commentators' growing skepticism about these bargaining environments. And it is a problem that courts are now confronting. On the one hand, RSAs that coordinate support among dispersed creditors may preserve value. On the other hand, an RSA that locks up votes, hides side payments, or disables meaningful judicial review distorts the process. Similarly, while one LME might raise new money and avoid a destructive default, another might transfer value to favored creditors and then present the resulting capital structure as inevitable. The first is laudable; the second is the type of opportunism that chapter 11 should prevent.

Coordes and Lubben argue that the need to examine these practices closely calls for a new neutral actor. But why? A guardian appointed on the first day has no more knowledge about the pre-filing transactions than the judge or the U.S. Trustee. That guardian's existence does not undo the transaction. The guardian cannot be expected to nullify or rewrite these transactions based on professional experience alone.

The necessary inquiry is the kind of work bankruptcy judges already do. Someone must decide what legal effect the pre-bankruptcy bargain should have—whether it was authorized by contract, whether it transferred value improperly, whether it violates some bankruptcy provision or principle, and whether it deprives the court or the parties of crucial information.[42]

Bankruptcy judges are familiar with these kinds of questions and are adept at using chapter 11's toolkit to answer them. Likewise, the U.S. Trustee may appear and be heard on any issue;[43] official committees may investigate and litigate;[44] and courts may appoint trustees or examiners when investigation is required.[45] Disclosure statements must contain adequate information,[46] and plans must satisfy equal treatment,[47] good faith,[48] best interests,[49] feasibility,[50] and cramdown requirements.[51]

[42] *See* Kenneth M. Ayotte, Anthony J. Casey & David A. Skeel, Jr., *Bankruptcy on the Side*, 112 NW. U. L. REV. 255 (2017).

[43] 11 U.S.C. § 307; *see also* Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C. L. REV. 1297 (2020).

[44] 11 U.S.C. §§ 1102, 1103.

[45] 11 U.S.C. § 1104(c); *cf. In re* FTX Trading Ltd., 91 F.4th 148, 153 (3d Cir. 2024) (holding that the court *must* appoint an examiner when one is requested in a large case).

[46] 11 U.S.C. § 1125.

[47] *Id.* § 1123(a)(4).

[48] *Id.* § 1129(a)(3).

[49] *Id.* § 1129(a)(7).

[50] *Id.* § 1129(a)(11).

These are the features of the existing guardianship structure.[52] To be sure, they are not self-executing. Judges must enforce them and be willing to appoint an examiner when the record is inadequate and to step in when the bargain cannot be reconciled with the Code.

Recent experience shows these checks operating. In *Harrington v. Purdue Pharma L.P.*, the neutral U.S. Trustee challenged nonconsensual third-party releases at the Supreme Court and won.[53] That episode does not present a system that lacks functioning guardians. The same is true of cases involving opportunistic liability management. In *Serta Simmons*, the Fifth Circuit held that the debtor's uptier transaction was not a permissible "open market purchase" and struck the participating lenders' indemnity from the confirmed plan.[54] These cases show chapter 11's guardrails doing their job.

The process is imperfect. But it is both the mechanism through which chapter 11 separates value-preserving bargains from opportunistic ones and the core feature that has made chapter 11 the gold standard. The imperfections do not arise primarily because the judges have the wrong incentives or are not up to the task. It is hard to see what value an additional guardian would add—especially in a world where the court can appoint a trustee or examiner or empower a committee to investigate.

IV. The Wrong Diagnosis and the Wrong Cure

Coordes's article presents a useful framework for thinking about the various institutional actors in the bankruptcy system. The article shows how the system employs these actors to oversee the process and protect particular interests. But the fact that the system already contains judges, the U.S. Trustee, committees, examiners, trustees, mediators, and the like[55] suggests that the problem is not a shortage of guardians.

The notion that complexity necessitates an additional guardian is hard to justify without some formal notion of what this new guardian could do that the existing guardians cannot. Coordes identifies dysfunction in bankruptcy cases, but never fully explains how the guardian role resolves it.

At some points, she leans on the success of subchapter V. This has become a common theme in bankruptcy scholarship. Subchapter V appears to be a highly successful reform. It is hard to find critics among those with

[51] *Id.* § 1129(b).
[52] *See* Casey, *supra* note 23.
[53] Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2088 (2024).
[54] *In re* Serta Simmons Bedding, L.L.C., 125 F.4th 555 (5th Cir. 2024).
[55] Coordes, *supra* note 1, at 507–23.

experience with the new law. But it bears noting that the reason subchapter V was enacted was that small cases were viewed as meaningfully different from large chapter 11 cases. It was designed to operate in small cases with starkly different debtor-creditor dynamics. The complex-case guardian would operate in the largest cases in the system, adding one more neutral actor to the already crowded bargaining table. Indeed, the perceived problem was that chapter 11 was working for large debtors but not for small ones. Arguments that we should now import subchapter V into large cases are at odds with this history.

Nor does subchapter V's cost experience translate. The subchapter V trustee appears to have lowered total costs, but largely through substitution. There is ordinarily no creditors' committee in a subchapter V case, and the trustee's facilitation displaces plan litigation that small estates cannot afford.[56] Coordes notes the point, proposing a presumption against an unsecured creditors' committee in complex cases overseen by her guardian.[57] In large cases, however, the substitution is implausible. Complex-case committees do work—investigation, litigation, negotiation backed by statutory information rights—that a single neutral facilitator cannot replicate, and the professionals whose fees actually drive the expense of large cases would all remain.

Lubben's proposal raises the same questions. He provides a thorough history of Chapter X. But that history does not establish the case for reviving it. The relevant evidence would concern the system's actual costs and outcomes and the competence of those who participated in it.

A revived Chapter X would create a mandatory remedy that currently is an option available to every chapter 11 judge. Current law permits the appointment of a chapter 11 trustee when management cannot be trusted.[58] It permits an examiner when there is a discrete information failure.[59] Some cases require independent intervention, but again, as with Coordes's guardian, the creation of an additional mandatory actor requires some account of what that actor brings to the table that existing guardians do not.

Scandals do not change that conclusion. Coordes points to the scandal involving Judge Jones and the Jackson Walker law firm.[60] That incident

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[56] *See* 11 U.S.C. § 1181(b); 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 (attributing the cost savings of subchapter V to faster confirmations, the absence of a committee, and lower professional fees).

[57] Coordes, *supra* note 1, at 529.

[58] 11 U.S.C. § 1104(a).

[59] *Id.* § 1104(c).

[60] Coordes, *supra* note 1, at 508–09, 514.

involved serious ethical violations, and its full implications are still playing out. But there was nothing bankruptcy specific about the violation. Examples of judicial scandals can be found in all types of courts and cases. More importantly, the connection between the Jones case and bankruptcy guardians is hard to comprehend. How would a guardian—rather than the U.S. Trustee—have been uniquely successful in preventing the undisclosed conflict?

Finally, there is the question of cost. The addition of a trustee or guardian is likely to generate additional professional fees, duplicative investigations, delays, and ancillary litigation in highly contested cases. The selection of the guardian or trustee will be litigated, as will their compensation and the scope of their powers. When the chief concern of outsiders is that chapter 11 is the most expensive system in the world, one should be reluctant to add costly additional professionals.

Conclusion

Chapter 11 is easy to criticize because its conflicts are highly visible. That visibility should not be confused with failure. The quiet competence of chapter 11 lies in its capacity to make conflicts legally tractable. It halts value-destructive collection tactics, brings all parties before a common tribunal, allows parties and judges to demand information, gives all interested parties the right to object, and imposes strict confirmation rules on reorganization plans, even those that are supported by all classes.

Coordes and Lubben have identified genuine stresses in some modern chapter 11 cases. Their proposed responses are more complexity and additional guardians. That misses the mark. Sustaining chapter 11's quiet competence requires judges to enforce its guardrails proactively. Where that is not being done, reform is appropriate, but it should be narrow and directed. Such reforms might include enhanced disclosure requirements for RSAs, side agreements, backstop fees, and the like; enhanced scrutiny of pre-filing bargains embodied in DIP terms, RSAs, or LMEs; targeted use of examiners; healthy skepticism about "melting ice cubes" and other emergency arguments for compressed process; and other context specific reforms for categories of cases that present novel problems, such as mass tort or crypto asset bankruptcies.

The modern restructuring environment is difficult because the underlying bargains are difficult. Sophisticated parties structure around legal rules, exploit gaps in contracts, and seek advantage before and during the case. But that is precisely why chapter 11 exists. Its success depends on bankruptcy judges distinguishing bargains that solve hold-up problems from bargains that exploit them. Neither a mandatory guardian nor a revived Chapter X will relieve judges of that challenge. Judges must face it themselves. Fortunately, chapter 11 already provides them the tools to do so.

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