BANKRUPTCY MYTHBUSTERS

What We Think We Know, And What's Really Happening in Commercial and Consumer Bankruptcy

Written Materials

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I. INTRODUCTION

The Bankruptcy Code is built upon a series of familiar propositions. Financially distressed individuals may obtain a fresh start; viable businesses may reorganize rather than liquidate; creditors are brought together in a collective proceeding in which similarly situated parties generally receive similar treatment; debtors in possession manage Chapter 11 estates subject to fiduciary obligations and judicial oversight; and bankruptcy courts apply federal law to determine whether proposed transactions and restructurings may proceed. These propositions are deeply embedded in bankruptcy law and practice, and each finds substantial support in the statutory structure Congress created.

Yet bankruptcy as practiced does not always fit neatly within that description. Statutory eligibility does not necessarily mean that an individual can afford to file a bankruptcy case, obtain competent counsel, or remain in a Chapter 13 case long enough to receive a discharge. A business may satisfy the requirements for Chapter 11 while lacking sufficient liquidity to pay the professionals, obtain financing, or withstand the contested proceedings necessary to reorganize. A debtor in possession may possess formal authority to operate its business while a secured lender controls the cash necessary for that business to survive. And a bankruptcy court may possess considerable statutory authority over a restructuring while confronting a capital structure, financing arrangement, or transaction largely negotiated before the petition was filed.

Those realities do not necessarily establish that the conventional understandings of bankruptcy are wrong. They do suggest, however, that there may be a meaningful difference between the Bankruptcy Code as a system of legal rights and remedies and the bankruptcy system as experienced by the individuals, businesses, creditors, fiduciaries, professionals, and judges who participate in it. That distinction, between formal legal architecture and practical operation, provides the starting point for these materials.

The title "Bankruptcy MythBusters" is therefore intended somewhat cautiously. A "myth," as used here, is not necessarily a proposition that is demonstrably false. Rather, it is a proposition about bankruptcy that sounds sufficiently familiar and intuitive that lawyers may be inclined to accept it without examining the assumptions on which it rests. The objective is to test those assumptions against the Bankruptcy Code, the cases interpreting it, and the economic and practical circumstances in which bankruptcy law now operates.

That inquiry is particularly appropriate because bankruptcy is both a legal system and an economic process. The Bankruptcy Code creates substantive rights, establishes priorities, imposes fiduciary responsibilities, defines the powers of trustees and debtors in possession, regulates the use and disposition of property, and assigns important responsibilities to bankruptcy courts. At the same time, bankruptcy cannot manufacture liquidity, eliminate information asymmetries, guarantee access to counsel, make an uneconomic business viable, or erase contractual and property rights simply because those rights complicate a restructuring. The practical operation of bankruptcy therefore reflects an ongoing interaction among statutory doctrine, nonbankruptcy law, private ordering, market forces, and economic power.

The tension is visible on both the consumer and business sides of the bankruptcy system. Consumer bankruptcy law promises a fresh start, but access to that fresh start may depend upon whether the debtor can pay a filing fee and retain counsel, whether the debtor satisfies statutory gatekeeping provisions, whether Chapter 7 or Chapter 13 is realistically available, and whether obtaining particular relief requires litigation that the debtor can afford. The distinction between *eligibility* for bankruptcy and meaningful *access* to bankruptcy is therefore significant. A person may have a legal right to seek relief without possessing a practical means of effectively exercising that right.

The same problem appears differently in business bankruptcy. Chapter 11 remains one of the most sophisticated restructuring regimes in the world, and Congress's enactment of Subchapter V reflects a deliberate effort to make reorganization more accessible to qualifying small-business debtors. Nevertheless, traditional Chapter 11 can require substantial liquidity, professional assistance, creditor cooperation, and access to postpetition financing. For some businesses, particularly those outside the practical reach of Subchapter V, the question is no longer simply whether Chapter 11 relief exists as a matter of law, but whether the enterprise can economically afford to use it. The increasing prominence of receiverships, assignments for the benefit of creditors, Article 9 dispositions, and consensual workouts consequently invites consideration of whether those alternatives represent healthy competition and innovation or reveal gaps in access to the federal bankruptcy system.

Questions concerning access lead naturally to questions concerning control. Chapter 11 ordinarily leaves the debtor in possession of its property and business and confers upon the debtor in possession most of the powers and duties of a trustee. 11 U.S.C. §§ 1107(a), 1108. The statutory structure therefore begins with a relatively straightforward proposition: absent appointment of a trustee, the debtor remains in possession and manages the bankruptcy estate.

Practical control, however, can be more difficult to identify. A debtor may operate its business but require a secured creditor's consent to use cash collateral under 11 U.S.C. § 363(c)(2). A debtor may possess the authority to seek postpetition financing while having only one lender willing to provide it under 11 U.S.C. § 364. A board may formally control corporate decisions while an independent director, special member, or other governance mechanism possesses the ability to prevent a bankruptcy filing. An official committee may possess broad statutory rights under 11 U.S.C. §§ 1102 and 1103 but enter the case only after important financing and sale arrangements have already been negotiated. Formal authority and practical influence are thus related concepts, but they are not necessarily synonymous.

This suggests several different meanings of the word "control." There is *legal control*. That is, the authority conferred by statute, organizational documents, or applicable nonbankruptcy law. There is *operational control*, which is the authority to make the day-to-day decisions affecting a debtor and its property. There is *economic control* consisting of the power to provide or withhold the money necessary for the debtor to continue operating. Finally, there is *outcome control*, commonly understood to be the ability to determine, or substantially constrain, which restructuring alternatives remain realistically available. A central question for modern bankruptcy practice is whether the party formally authorized to make a decision necessarily exercises the most consequential form of control, or whether control sometimes belongs to the party capable of preventing every realistic alternative.

That inquiry, in turn, leads to a third question concerning the bankruptcy court itself. Bankruptcy judges exercise substantial authority under the Bankruptcy Code. Among other things, they determine whether estate property may be used or sold outside the ordinary course under 11 U.S.C. § 363(b), whether priming financing satisfies the requirements of 11 U.S.C. § 364(d), whether a Chapter 11 trustee should be appointed under 11 U.S.C. § 1104, whether settlements should be approved, and whether a proposed plan satisfies the confirmation requirements of 11 U.S.C. § 1129. Those are substantive judicial responsibilities, and a negotiated agreement among the parties does not eliminate the statutory findings Congress has required a court to make.

Nevertheless, the existence of judicial authority does not necessarily mean that the bankruptcy court created the economic choices presented for adjudication. A debtor may enter bankruptcy with substantially all of its assets encumbered, a restructuring-support agreement already executed, a DIP financing commitment conditioned upon particular milestones, a sale process substantially negotiated, or contractual arrangements that allocate leverage among competing creditor groups. Liability-management transactions may alter creditor relationships before bankruptcy, while intercreditor agreements, subordination arrangements, lien structures, guarantees, and other features of prepetition deal architecture may substantially affect what can realistically occur after the petition is filed. By the time the dispute reaches the bankruptcy court, the range of economically feasible alternatives may therefore be considerably narrower than what the breadth of the court's statutory authority initially suggests.

None of this renders judicial review unimportant. To the contrary, the greater the influence of private ordering and economic leverage, the more significant questions of statutory compliance, fiduciary responsibility, procedural fairness, disclosure, due process, and adherence to bankruptcy priorities may become. The more difficult question is whether the bankruptcy court is actually determining the restructuring outcome or instead determining whether an outcome largely shaped elsewhere may lawfully receive the protections and consequences afforded by federal bankruptcy law.

These materials examine those issues through three propositions. “Myth No. 1: Bankruptcy Relief Is Equally Available to Those Who Need It” considers the distinction between formal eligibility and meaningful access in both consumer and business bankruptcy. “Myth No. 2: The Right People Control Bankruptcy Cases” examines the difference between statutory authority and practical control, including the roles of debtors in possession, secured lenders, independent fiduciaries, committees, receivers, restructuring professionals, and bankruptcy judges. “Myth No. 3: Bankruptcy Courts Determine Restructuring Outcomes” considers the extent to which modern bankruptcy outcomes are determined through judicial decision-making as opposed to capital structures, financing arrangements, contractual rights, prepetition transactions, and market forces.

The three inquiries are interconnected. The first asks who can realistically enter and use the bankruptcy system? The second asks who exercises power once the case is there? The third asks how much remains genuinely undecided when the bankruptcy court is ultimately called upon to act? Viewed together, they provide a means of examining a larger question: whether the formal structure of bankruptcy law and the practical operation of the bankruptcy system remain aligned?

The purpose is not to romanticize an earlier era of bankruptcy practice or to assume that every exercise of economic leverage is improper. Secured creditors are entitled to protect legitimate property interests; lenders need not finance cases on terms they regard as unacceptable; sophisticated parties are entitled to negotiate contractual protections; debtors and fiduciaries must make difficult decisions under conditions of financial distress; and bankruptcy judges must remain adjudicators rather than become substitute business managers. Market forces, private negotiation, and contractual ordering are not intrusions into bankruptcy law. They are part of the environment in which bankruptcy law necessarily operates.

Nor should differences between consumer and commercial bankruptcy automatically be regarded as evidence of inconsistency. Individuals and business entities present different economic circumstances, policy concerns, and statutory objectives. The comparison is nevertheless useful because it exposes a recurring question on both sides of the system: how much does possession of a legal right matter if practical circumstances make that right difficult to exercise? For the consumer unable to afford representation, the small business unable to finance Chapter 11, the debtor dependent upon a secured lender for cash collateral, and the creditor confronting a restructuring substantially shaped before the petition date, the answer may depend as much upon economic circumstances as upon the words of the Bankruptcy Code.

The discussion that follows therefore does not begin with the premise that the three myths must be "busted." Some may prove substantially true; others may be true only for certain debtors, cases, or market conditions; and still others may reveal a widening distance between statutory design and practical experience. The objective is instead to place familiar assumptions under closer examination and ask whether the bankruptcy system, as it operates today, produces the access, allocation of authority, and judicial decision-making that its formal structure appears to contemplate.

II. MYTH NO. 1: BANKRUPTCY RELIEF IS EQUALLY AVAILABLE TO THOSE WHO NEED IT

A. What Does "Available" Mean?

The first myth begins with an apparently simple premise: bankruptcy relief is available to financially distressed individuals and businesses that satisfy the eligibility requirements imposed by Congress.

But the word "available" conceals several different concepts. At least three should be distinguished: *eligibility*, meaning whether the debtor is legally entitled to be a debtor or seek relief under a particular chapter; *access*, meaning whether the debtor can realistically commence and prosecute the proceeding; and *effective relief*, meaning whether the debtor can actually accomplish the objective for which bankruptcy was sought. A debtor may satisfy the first of these requirements and nevertheless fail the second or third.

Consider an individual facing a wage garnishment, automobile repossession, and mounting credit-card debt. The individual may be unquestionably eligible for Chapter 7, but if the debtor cannot accumulate enough money to retain competent counsel, formal eligibility provides little immediate protection from creditors. Conversely, the debtor may be able to commence a Chapter 13 case because attorney compensation can be paid over time, but that does not necessarily establish that Chapter 13 is the most appropriate substantive remedy or that the debtor can successfully perform a three-to-five-year plan.

The business analogue is equally striking. A manufacturer may satisfy every formal requirement for relief under Chapter 11, possess a viable product and workforce, and have substantial going-concern value. Yet if the company lacks sufficient liquidity to make payroll, retain restructuring professionals, obtain the use of cash collateral, or finance the first weeks of the bankruptcy case, the availability of Chapter 11 may be largely theoretical.

The distinction matters because bankruptcy is not self-executing. A statute may create valuable rights, but debtors usually need knowledge, professional assistance, money, time, and procedural capacity to exercise them. Thus, the threshold question underlying Myth No. 1 is not simply who may file bankruptcy, but rather: If Congress creates a legal remedy that financially distressed individuals or businesses cannot realistically use, to what extent has that remedy meaningfully been made available?

That inquiry does not assume that Congress must provide identical remedies to every debtor. Consumer debtors, business owners, corporations, farmers, municipalities, and other debtors present different economic and policy considerations, and the Bankruptcy Code expressly reflects those differences. The more focused question is whether the distinctions Congress has drawn (and the economic realities surrounding those distinctions) produce a bankruptcy system in which similarly distressed persons have meaningfully different access to relief.

B. Equal Doors, Different Gatekeepers

One of the most revealing ways to examine access is to compare the mechanisms Congress and the courts use to regulate entry into bankruptcy. The Bankruptcy Code does not impose a single universal test of financial distress or deservingness. Instead, different debtors encounter different statutory and judicial gatekeepers.

Section 109 establishes the basic eligibility requirements for debtors under the various chapters. *See* 11 U.S.C. § 109. Yet satisfaction of § 109 does not end the inquiry, because other provisions regulate whether the debtor may remain in the chosen chapter and obtain the relief sought.

The contrast between an individual with primarily consumer debt and an individual with primarily business debt is particularly significant. Section 707(b)(1) authorizes dismissal, or with the debtor's consent conversion, of a Chapter 7 case filed by "an individual debtor under this chapter whose debts are primarily consumer debts" if granting relief would constitute an abuse of Chapter 7. 11 U.S.C. § 707(b)(1). The statutory definition of "consumer debt," in turn, means "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8).

For debtors within § 707(b), Congress established a detailed means test that uses "current monthly income," standardized expense allowances, secured-debt obligations, priority claims, and other specified deductions to determine whether a presumption of abuse arises. *See* 11 U.S.C. §§ 101(10A), 707(b)(2). Congress thus chose, at least in significant part, a formula to determine whether certain individual debtors should have access to a Chapter 7 discharge rather than relying exclusively upon individualized judicial evaluation.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 significantly altered this landscape. Before BAPCPA, § 707(b) permitted dismissal for "substantial abuse," and ability to pay developed as an important part of judicial analysis. BAPCPA removed "substantial," adopted the means-test presumption, and expressly authorized consideration of bad faith and the "totality of the circumstances ... of the debtor's financial situation" when the presumption does not arise or has been rebutted. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27–32; 11 U.S.C. § 707(b)(3).

The Supreme Court's means-test decisions illustrate both the rigidity and the flexibility of the resulting statutory system. In *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61 (2011), the Court held that a debtor who owned a vehicle free of any loan or lease obligation could not take the vehicle-ownership expense deduction under the applicable means-test provisions. The Court emphasized BAPCPA's effort to ensure that debtors who can pay creditors do so while interpreting the standardized expense provisions in accordance with their statutory function. *Id.* at 64–65, 71–75.

In *Hamilton v. Lanning*, 560 U.S. 505 (2010), however, the Court rejected an entirely mechanical use of historical income when calculating "projected disposable income" under Chapter 13. The Court permitted bankruptcy courts to account for changes in income or expenses that are "known or virtually certain" at confirmation, thereby recognizing that a backward-looking statutory calculation may sometimes produce an unrealistic prediction of the debtor's actual future ability to pay. *Id.* at 524–25.

The juxtaposition of *Ransom* and *Lanning* illustrates an important feature of the modern consumer system. Congress plainly sought greater uniformity and reduced judicial discretion, but financial lives do not always conform to standardized formulas. Bankruptcy courts therefore continue to confront the tension between statutory mathematics and economic reality.

Hypothetical: Same Income, Same Debt, Different Gatekeepers

Assume that Debtor A and Debtor B each earn $200,000 annually, have identical family sizes, possess comparable assets, and owe approximately $1 million. Debtor A's obligations consist predominantly of mortgage debt, medical obligations, credit-card debt, and personal loans, while Debtor B's obligations consist primarily of guaranties of debt incurred by a failed closely held business.

Debtor A may be subjected to § 707(b), including the means test, because the debts are primarily consumer debts. Debtor B, whose obligations are predominantly nonconsumer debts, is not subjected to § 707(b) in the same manner even though the two debtors may have essentially identical present repayment capacity.

That distinction follows from the statute. It nevertheless poses an important policy question: Why should the purpose for which a debt was incurred determine whether an individual with substantial repayment capacity encounters a statutory abuse screen? The question is not whether Congress lacked authority to make that distinction, but what the distinction tells us about the policies underlying access to Chapter 7.

The classification of debt therefore can become outcome determinative. Courts generally look to the purpose for which the obligation was incurred when determining whether a debt is consumer or nonconsumer in nature. See, e.g., *In re Stewart*, 175 F.3d 796, 806–07 (10th Cir. 1999); *In re Booth*, 858 F.2d 1051, 1054–55 (5th Cir. 1988). Obligations associated with employment, investments, rental properties, business guaranties, mixed-use credit cards, and other transactions may present difficult characterization questions. See, e.g., *Aspen Skiing Co. v. Cherrett (In re Cherrett)*, 873 F.3d 1060, 1067–68 (9th Cir. 2017).

The practical consequence is unusual. Two debtors may be equally distressed and equally capable of making some payment to creditors, yet one faces a statutory test of "abuse" that the other does not. Formal access therefore depends not only upon how much a debtor owes or can afford to pay, but also upon how the debtor came to owe it.

C. Section 707(a) and the Limits of Judicially Created Gatekeeping

The distinction becomes particularly significant when courts consider whether § 707(a) supplies an alternative vehicle for addressing ability to pay. Section 707(a) authorizes dismissal of a Chapter 7 case "for cause" and identifies three nonexclusive examples. 11 U.S.C. § 707(a). Because § 102(3) provides that "includes" and "including" are not limiting, the statutory examples do not exhaust the universe of possible cause. See 11 U.S.C. § 102(3).

The Third Circuit's decision in *Perlin v. Hitachi Capital America Corp. (In re Perlin)*, 497 F.3d 364 (3d Cir. 2007), is particularly important to the access question. There, the court held that a debtor's ability to repay creditors may be considered as part of the totality of circumstances under § 707(a), but ability to pay, standing alone, does not constitute cause for dismissal. *Id.* at 373–74.

The reasoning has significance beyond the particular facts of *Perlin*. Congress expressly created an ability-to-pay abuse regime in § 707(b) applicable to individuals whose debts are primarily consumer debts. Using § 707(a) simply to impose an equivalent judicial means test upon debtors outside § 707(b) risks diminishing Congress's decision to limit the statutory means-test regime to a particular class of cases.

Other courts have taken differing approaches to bad faith under § 707(a). Compare *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1127–29 (6th Cir. 1991) (recognizing bad faith as cause in sufficiently egregious circumstances), and *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1260–63 (11th Cir. 2013) (holding that prepetition bad faith may constitute cause), with *In re Padilla*, 222 F.3d 1184, 1191–94 (9th Cir. 2000) (taking a narrower approach to the use of § 707(a) to police conduct addressed elsewhere in the Code). The disagreement itself illustrates a recurring access problem: statutory eligibility may be national, but judicial standards governing permissible resort to bankruptcy may vary among jurisdictions.

D. Business Debtors and the Good-Faith Gatekeeper

There is no Chapter 11 analogue to the consumer means test. A business debtor is not required to demonstrate on a prescribed form that its income falls below a particular level or that standardized expenses leave insufficient money to satisfy a repayment formula. Nor does the Bankruptcy Code generally require balance-sheet insolvency as an express condition to commencement of a voluntary Chapter 11 case.

The absence of a means test, however, does not make Chapter 11 an unrestricted refuge. Courts have developed good-faith and valid-bankruptcy-purpose doctrines principally through § 1112(b), which authorizes conversion or dismissal "for cause." See 11 U.S.C. § 1112(b). In the Third Circuit, the resulting jurisprudence has imposed a particularly meaningful financial-distress requirement.

In *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999), the Third Circuit directed dismissal of the Chapter 11 case of a financially healthy company that sought bankruptcy principally to obtain leverage in antitrust litigation. The court explained that Chapter 11 petitions must serve a valid reorganizational purpose and cautioned against employing bankruptcy's substantial powers merely to obtain a tactical litigation advantage. *Id.* at 165–67.

The Third Circuit further developed that principle in *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108 (3d Cir. 2004). The debtor had substantial cash and sought Chapter 11 in significant part to cap a landlord's claim under § 502(b)(6), thereby increasing the amount potentially distributable to shareholders. The court concluded that the debtor lacked the financial distress necessary to invoke Chapter 11 in good faith and emphasized that bankruptcy's purposes include preserving going-concern value and maximizing estate value for creditors, not merely redistributing wealth from a creditor to shareholders. *Id.* at 119–29.

In *In re 15375 Memorial Corp.*, 589 F.3d 605 (3d Cir. 2009), the Third Circuit again emphasized that the debtor bears the burden of establishing good faith once that issue is placed in dispute. The court affirmed dismissal where the debtors lacked employees and meaningful operations and the filings principally served litigation objectives. *Id.* at 618–25.

More recently, *In re LTL Management, LLC*, 64 F.4th 84 (3d Cir. 2023), placed financial distress squarely at the center of Chapter 11 access. The Third Circuit concluded that LTL's first Chapter 11 case had not been filed in good faith because the debtor was not in financial distress, particularly in light of the funding agreement available to satisfy its talc liabilities. *Id.* at 101–10. The court stressed that bankruptcy's "extraordinary" tools are appropriately reserved for entities facing the kinds of financial difficulty for which bankruptcy was designed. *Id.* at 101.

The contrast with consumer bankruptcy is striking. For a consumer debtor subject to § 707(b), Congress asks a heavily formula-driven question that can be reduced, at least initially, to whether the debtor's income and allowable expenses produce a statutory presumption of abuse. For a business debtor, the inquiry may instead ask whether the debtor possesses sufficient financial distress and a sufficiently legitimate bankruptcy purpose to justify invoking Chapter 11.

Neither approach is necessarily irrational. Consumer and business bankruptcy serve different purposes, and a mathematical test suitable for recurring household income and expense questions may be poorly adapted to corporations facing contingent liabilities, market shocks, maturity walls, litigation exposure, or complex capital structures. The comparison nevertheless exposes fundamentally different legislative and judicial attitudes toward access.

Put somewhat provocatively, the consumer inquiry may begin with "Can you pay?" while the Chapter 11 inquiry may begin with "Should you be here?" Those questions reflect different forms of gatekeeping, and neither necessarily produces complete uniformity.

E. A Legal Right That Must Be Purchased: The Cost of Consumer Access

Passing the statutory gatekeepers does not place the debtor before the bankruptcy court. A debtor must still be able to pay the direct and indirect costs associated with seeking relief.

As of 2026, the filing fee for a Chapter 7 case is $338, while the Chapter 13 filing fee is $313. The Chapter 11 filing fee is dramatically higher at $1,738. Courts permit Chapter 7 and Chapter 13 filing fees to be paid in installments, and qualifying individual Chapter 7 debtors may seek waiver of the Chapter 7 filing fee. See 28 U.S.C. § 1930; Fed. R. Bankr. P. 1006.

The filing fee, however, may be only a small part of the cost of competent bankruptcy representation. The debtor may also incur attorney's fees, credit-counseling and debtor-education expenses, the cost of obtaining documents and valuations, lost wages associated with attending meetings or hearings, transportation or technology expenses, tax-preparation costs, and professional expenses in more complicated cases. A financially distressed debtor therefore encounters an apparent paradox: the debtor may need bankruptcy precisely because cash is unavailable, yet immediate access to bankruptcy may require cash.

The Supreme Court confronted one aspect of this problem in *United States v. Kras*, 409 U.S. 434 (1973). The Court held that an indigent debtor had no constitutional right to obtain a bankruptcy discharge without paying the required filing fee. *Id.* at 446–49. In distinguishing *Boddie v. Connecticut*, 401 U.S. 371 (1971), which involved indigent access to divorce, the Court emphasized that bankruptcy concerned economic regulation and that the government did not monopolize the only conceivable mechanism for adjusting debtor-creditor relations in the same manner that the state monopolized dissolution of marriage. *Kras*, 409 U.S. at 443–46.

Congress subsequently provided a statutory Chapter 7 filing-fee-waiver mechanism for qualifying debtors. See 28 U.S.C. § 1930(f). Yet the larger teaching of *Kras* remains important: bankruptcy access has never been treated as a constitutional entitlement that government must provide without regard to the debtor's ability to finance the process.

Hypothetical: The Debtor Who Cannot Afford Chapter 7

Assume that Sarah earns $48,000 annually, has no meaningful nonexempt property, and owes $70,000 in unsecured debt. Her wages are being garnished, her automobile lender has threatened repossession, and there is no apparent substantive reason she requires a Chapter 13 repayment plan.

Sarah can assemble several hundred dollars but cannot immediately pay the attorney's fee quoted for a fully represented Chapter 7 case. A Chapter 13 lawyer, however, can accept a smaller amount before filing and receive much of the remaining compensation through the Chapter 13 plan. Sarah is legally eligible for Chapter 7. Yet Chapter 13 may be the only chapter she can financially access with counsel when she needs the automatic stay.

The question presented by this scenario is not whether Chapter 13 is legally permissible. It is whether Sarah's selection of a bankruptcy chapter reflects substantive bankruptcy policy or the method by which the legal profession must be compensated. If attorney-payment structure influences chapter choice, the economics of legal representation has become part of the architecture of bankruptcy relief.

F. Attorney Compensation and Bifurcated Chapter 7 Representation

Attorney compensation makes this access problem particularly acute in Chapter 7. A prepetition obligation to pay the Chapter 7 debtor’s attorney ordinarily constitutes a prepetition claim that is subject to discharge unless an exception applies, and the discharge injunction prevents collection of discharged debt. See 11 U.S.C. §§ 523, 524(a). Moreover, *Lamie v. United States Trustee*, 540 U.S. 526 (2004), holds that § 330(a)(1) does not authorize compensation from estate funds for a Chapter 7 debtor's attorney unless counsel has been employed under § 327. *Id.* at 538–39.

Those rules help explain the traditional requirement that Chapter 7 counsel receive most or all compensation before filing. See, e.g., *Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125, 1127–29 (7th Cir. 2003). That timing requirement is understandable from the lawyer's perspective, but it can produce precisely the wrong incentive from an access perspective: a debtor urgently needing the stay may be advised to delay filing until enough money has been accumulated to pay counsel.

Bifurcated fee agreements emerged in part as a response to that problem. Under such arrangements, counsel divides representation into genuine prepetition and postpetition engagements, with the debtor entering a separate postpetition agreement for postpetition legal services and paying those fees after commencement of the case. Courts examining such arrangements have generally focused upon whether the division is real rather than artificial, whether disclosures are complete, whether the debtor has given meaningful informed consent, whether the total fee is reasonable, whether postpetition collection practices are appropriate, and whether counsel's professional responsibilities are compromised. See, e.g., *In re Smith-Freeman*, 674 BR 1 (Bankr. W.D. Pa. 2024).

In *In re Hazlett*, No. 16-30360, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019), the bankruptcy court rejected the proposition that bifurcated Chapter 7 arrangements are categorically impermissible and instead emphasized disclosure, informed consent, reasonableness, and genuine separation of services. Other decisions have scrutinized or rejected particular arrangements where the division of services, fee structure, factoring, or ethical implications were problematic. See, e.g., *In re Carr*, 613 B.R. 427, 433–49 (Bankr. E.D. Ky. 2020); *In re Slabbinck*, 482 B.R. 576, 588–94 (Bankr. E.D. Mich. 2012).

The competing considerations are substantial. Bifurcation may permit a debtor to file before garnishment, foreclosure, or repossession causes additional harm and may provide an alternative to an unrepresented filing. At the same time, an economically vulnerable debtor may pay a higher total fee, incur a new postpetition payment obligation, and confront potential tensions concerning counsel's continued representation if payments cease.

The larger MythBusters question is therefore more useful than a categorical judgment about bifurcation. Is bifurcation an access-to-justice innovation created by the market to solve a structural problem in Chapter 7, or does it merely finance access to the courthouse by imposing additional expense and risk upon the debtor least able to bear it? Depending upon how the arrangement is structured and supervised, the answer may be both.

G. The "Missing Middle" and the Availability of Counsel

The access problem is not limited to the poorest debtors. Indeed, one of the populations most likely to encounter difficulty may be what can be described as the consumer bankruptcy "missing middle": debtors whose income or circumstances make them ineligible for free legal services but whose available resources are insufficient to retain experienced private counsel.

Such debtors may have cases that are deceptively complicated. A former small-business owner may have guaranties, tax liabilities, disputed liens, preference exposure, and difficult consumer-debt classification questions. A homeowner may face mortgage arrears, judgment liens, exemption questions, and domestic-support obligations. A retiree may have significant nominal assets but require careful analysis of retirement accounts, exemption law, or inherited property.

Self-representation does not eliminate those substantive issues. Sections 521, 707, 727, and 1325 apply to the unrepresented debtor just as they apply to a represented debtor, and a pro se debtor must still navigate schedules, exemptions, disclosure requirements, deadlines, reaffirmation decisions, secured claims, and discharge rules. The legal right to file without counsel therefore should not be confused with the ability to obtain equivalent relief without counsel.

The issue is particularly acute where the debtor' problem is too difficult for routine legal-aid representation but economically unattractive to a private practitioner. Bankruptcy may then be theoretically available while competent assistance is functionally unavailable at a price the debtor can pay.

Geography can also compound the problem. A federal bankruptcy statute may operate differently in practice if one district contains a deep and experienced consumer bankruptcy bar while another covers large rural areas served by few lawyers. Remote consultations, electronic filing, virtual hearings, and remote § 341 meetings can reduce some geographic barriers, but they do not themselves create experienced counsel where the economics of practice do not support it.

H. Chapter 13: Rehabilitation or the Bankruptcy Debtor Can Afford?

Chapter 13 is among the Bankruptcy Code's most important rehabilitative provisions. It permits an individual with regular income to retain property while adjusting debts through a court-supervised plan, cure mortgage defaults, restructure certain secured obligations, address priority taxes, protect qualifying co-obligors through the co-debtor stay, and obtain a discharge after successful plan performance. See 11 U.S.C. §§ 1301, 1322, 1325, 1328.

Chapter 13 is not merely "Chapter 7 with payments." It serves substantive functions that Chapter 7 cannot perform. A homeowner seeking to cure mortgage arrears, a debtor seeking to retain nonexempt property, or an individual needing time to address priority obligations may have compelling substantive reasons to select Chapter 13.

But Chapter 13 also offers something that Chapter 7 often does not: a mechanism for paying debtor's counsel over time from postpetition income. See 11 U.S.C. §§ 330(a)(4)(B), 503(b)(2), 507(a)(2), 1326(b). That feature has created difficult cases involving so-called fee-only or fee-focused Chapter 13 plans in which attorney compensation is a principal reason for selecting Chapter 13.

In *In re Puffer*, 674 F.3d 78 (1st Cir. 2012), the First Circuit rejected a per se rule that fee-only Chapter 13 plans necessarily lack good faith. The court instead required individualized scrutiny under the totality of the circumstances. *Id.* at 82–83. The Eleventh Circuit reached a less favorable conclusion on the particular facts before it in *Brown v. Gore (In re Brown)*, 742 F.3d 1309 (11th Cir. 2014), affirming denial of confirmation where the proposed plan produced little apparent benefit other than payment of counsel. *Id.* at 1316–20.

The important point for present purposes is not whether any particular fee-only plan satisfies §§ 1325(a)(3) and (7). It is that the cases reveal a structural relationship between the economics of debtor representation and the chapter under which relief is sought.

Hypothetical: Chapter Choice by Wallet

Assume that Daniel has no mortgage arrears, no nonexempt property, no meaningful priority debt, and no secured claim requiring restructuring. His income is regular but modest, and his unsecured debts would ordinarily be dischargeable in Chapter 7.

Daniel cannot pay the fee required for Chapter 7 representation before filing. He can, however, afford the initial payment required by counsel to commence Chapter 13, with the balance of attorney compensation to be paid through the plan.

If Daniel files Chapter 13, the petition is legally voluntary. But in an economic sense, how voluntary was the choice of chapter? The hypothetical should not be used to suggest that every debtor in such circumstances should file Chapter 7. It instead raises the larger access question: Should the timing of attorney compensation materially determine which bankruptcy remedy an individual receives?

I. Does Chapter 13 Actually Rehabilitate Debtors?

The inquiry becomes still more important when one examines outcomes. A debtor's ability to commence Chapter 13 does not necessarily establish that the debtor has meaningful access to successful rehabilitation.

Chapter 13 demands performance over a long period during which ordinary life continues. Employment may change, medical expenses may arise, vehicles may fail, marriages may end, children may enter or leave the household, mortgage escrow obligations may change, rent may increase, and inflation may affect expenses that were reasonable when the plan was confirmed. Section 1329 permits postconfirmation modification in appropriate circumstances, and § 1328(b) provides a limited hardship discharge, but neither eliminates the economic fragility of a multi-year repayment undertaking.

The Administrative Office's most recent BAPCPA statistics make the issue concrete. Of the 183,808 Chapter 13 consumer cases terminated by either dismissal or plan completion during calendar year 2025, 82,099 (or approximately 45%) closed after the debtor completed the repayment plan and received a discharge, while 101,709 were dismissed. *See* Admin. Off. of the U.S. Cts., *2025 BAPCPA Report*, tbl. 6 (2026). The national plan-completion percentage had been 49% in 2024, and the 2025 data also showed substantial variation among districts.

Those statistics should be used carefully. A dismissal is not necessarily proof that the filing produced no benefit, and a discharge is not the only possible measure of success. A Chapter 13 case may permit a debtor to cure a temporary default, sell property in an orderly manner, avoid repossession during a critical period, or resolve another problem even if the case ultimately ends without completion of all plan payments.

But neither should noncompletion be ignored. A system described as rehabilitative should ask what occurs after years of payments if the debtor ultimately receives no discharge and returns to collection with unresolved debt. The empirical question of plan completion therefore exposes the difference between access to a case and access to a durable fresh start.

The geographic variation in Chapter 13 outcomes is also significant. The Administrative Office reported marked district-to-district differences in 2025 plan-completion percentages. Some variation undoubtedly reflects differences in debtor populations, local economies, case mix, and other legitimate variables, and statistics alone cannot establish causation.

Nevertheless, the variation makes an important conceptual point. Bankruptcy is federal law, but the debtor experiences the system locally. Standing-trustee practices, local plan forms, attorney compensation, judicial approaches, mortgage procedures, access to counsel, and local economic conditions may affect whether federal relief works similarly across district lines.

The appropriate MythBusters inquiry is therefore not merely, "What percentage of Chapter 13 debtors receive a discharge?" The more meaningful question is: What should count as successful rehabilitation, and does the present Chapter 13 system reliably provide it to the debtors for whom Chapter 13 is supposed to work?

J. Student Loans: When Substantive Relief Requires a Second Lawsuit

Student-loan discharge provides another useful illustration of the distinction between formal and practical access. Section 523(a)(8) does not provide that educational debt is "never" dischargeable. It provides that specified educational obligations are excepted from discharge unless requiring repayment would impose an "undue hardship" upon the debtor and the debtor's dependents. 11 U.S.C. § 523(a)(8).

In the Third Circuit, *Pennsylvania Higher Education Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298 (3d Cir. 1995), adopted the three-part test originating in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). Under that test, the debtor must establish an inability to maintain a minimal standard of living if required to repay, additional circumstances indicating that this condition is likely to persist for a significant portion of the repayment period, and good-faith efforts to repay. *Faish*, 72 F.3d at 304–06.

A debtor ordinarily must obtain the undue-hardship determination through an adversary proceeding. See Fed. R. Bankr. P. 7001(6), 4007. The Supreme Court confirmed the importance of that procedural requirement in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), although it held that a final confirmation order entered without the required undue-hardship adjudication remained enforceable where the creditor had actual notice and failed to object. *Id.* at 272–76. Recent federal policy has materially altered the litigation environment for federal student loans without changing § 523(a)(8) itself. The Department of Justice and Department of Education continue to employ a standardized attestation and evaluation process intended to reduce the burden on debtors and promote consistent treatment of cases in which the government believes undue hardship can be established. The Department of Justice's current guidance page, updated March 17, 2026, continues to provide the 2022 guidance and an updated attestation form.

That development is important, but it does not eliminate the access problem. The debtor must know that discharge is possible, understand the need for an adversary proceeding, locate counsel willing to pursue it, develop the necessary factual record, and remain engaged with the bankruptcy system after the underlying bankruptcy case has already demanded time and expense.

Hypothetical: The Discharge That Exists on Paper

Assume that Maria is permanently and partially disabled yet employed at modest wages, has substantial federal student-loan debt, has made years of efforts to manage the obligation, and appears to possess a credible argument under *Faish*. Her Chapter 7 case itself is uncomplicated, but counsel advises that litigating the student-loan adversary proceeding will require substantial additional work.

Maria cannot afford that additional representation. She receives a Chapter 7 discharge of her other debts but never files the adversary proceeding. Was student-loan relief "available" to Maria? Substantively, the answer may be yes. Practically, the answer may be far more complicated. Student loans thus demonstrate why access cannot be measured solely by reading the substantive rule. A legal right whose enforcement requires additional litigation may be worth very different amounts to parties with different financial resources.

K. Debt Settlement and the Market Outside Bankruptcy

Bankruptcy does not exist in a vacuum. Financially distressed consumers make decisions in a marketplace populated by debt-settlement companies, credit-repair services, consolidation lenders, nonprofit counseling organizations, bankruptcy attorneys, creditor workout programs, and a substantial amount of advertising.

A debtor deciding what to do therefore may not begin by comparing the legal consequences of Chapter 7, Chapter 13, and nonbankruptcy alternatives. The debtor may begin with whichever advertisement appears first in an internet search, television commercial, social-media feed, or mail solicitation.

Debt settlement may be appropriate for some consumers. The important access question is whether consumers select it because it offers a superior solution after an informed comparison or because bankruptcy appears expensive, stigmatizing, complicated, or inaccessible.

Delay can have substantive consequences. A debtor who spends eighteen months accumulating settlement funds while creditors pursue judgments may confront garnishment, liens, repossession, or foreclosure. A consumer who mistakenly believes that retirement funds will be lost in bankruptcy may liquidate property that otherwise would have been protected. See, e.g., 11 U.S.C. §§ 522, 541(c)(2); *Patterson v. Shumate*, 504 U.S. 753, 759–65 (1992).

The problem is not simply misinformation. It is the timing of information. Bankruptcy advice received before a debtor liquidates exempt property, borrows against retirement funds, permits a judgment lien to attach, or loses essential collateral may have dramatically greater value than identical advice received six months later.

Hypothetical: Relief Chosen Too Late

Assume that Robert owes $90,000 in unsecured consumer debt and has $80,000 in an ERISA-qualified retirement plan. Believing bankruptcy will require surrender of the retirement account, Robert withdraws $40,000, incurs tax consequences, and uses the proceeds to make payments under a debt-settlement program.

Eighteen months later, several creditors remain unpaid, one has obtained a judgment, and Robert consults bankruptcy counsel for the first time. He learns that the retirement assets might have been excluded from the bankruptcy estate under § 541(c)(2). See *Patterson*, 504 U.S. at 759–65.

Bankruptcy was legally available throughout the period. Yet by the time Robert understood what bankruptcy offered, part of the economic value of that remedy had already disappeared.

L. The Human Barrier: Stigma, Fear, and Misinformation

Access is not exclusively financial. Consumers may delay seeking bankruptcy advice because they believe they will lose their homes, retirement funds, jobs, security clearances, future ability to borrow, or reputations. Others may regard bankruptcy as a moral failure notwithstanding financial distress caused by illness, job loss, divorce, business failure, or other circumstances.

Those concerns matter because delay can alter the bankruptcy case itself. The debtor who consults counsel before a foreclosure, repossession, account levy, tax lien, or liquidation of exempt property may possess options that no longer exist after the event occurs.

Bankruptcy's traditional "fresh start" principle therefore has an informational dimension. The Supreme Court long ago described bankruptcy as giving the honest debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). A fresh-start regime cannot fully accomplish that purpose if misconceptions about the regime systematically cause debtors to avoid it until the opportunity for effective relief has materially narrowed.

This does not mean bankruptcy should always be filed sooner. An early filing may be unnecessary or affirmatively disadvantageous where a workout is possible, income is uncertain, assets will be received, tax consequences require planning, or the debtor has other reasons to delay. The point is that meaningful access includes the ability to obtain accurate advice early enough to make an informed choice.

M. The Business Side: Is Chapter 11 Becoming a Luxury Product?

The access problem takes a different form in commercial bankruptcy. A business may have substantial assets and revenue and nevertheless lack the liquidity necessary to purchase the restructuring process that Chapter 11 requires.

The contrast in filing fees alone provides a modest illustration. The Chapter 11 filing fee is presently $1,738, compared with $338 in Chapter 7, but the filing fee is almost immaterial in a meaningful Chapter 11 case. Debtor's counsel, accountants, financial advisors, valuation experts, claims agents, investment bankers, insurance, adequate-protection obligations, and the costs associated with operating while under bankruptcy supervision can dwarf the cost of opening the case.

Chapter 11 is also a liquidity process. A debtor whose lender has a security interest in cash proceeds may need consent or court authorization to use cash collateral. 11 U.S.C. § 363(c)(2). A debtor requiring new credit may need to satisfy the escalating requirements of § 364, including demonstrating the inability to obtain less protected financing before obtaining priority or secured postpetition credit. See 11 U.S.C. § 364(c)–(d).

For a large enterprise, these costs may be justified by the value preserved through the federal reorganization process. For a smaller enterprise, however, professional and administrative expense can consume the very value Chapter 11 is intended to preserve.

The problem can become self-reinforcing. A business experiencing financial distress may postpone bankruptcy in an effort to avoid Chapter 11's costs. During the delay, liquidity declines, vendors tighten terms, key employees depart, taxes accrue, collateral deteriorates, and lenders increase control over cash. When the debtor finally files, the business may have so little unencumbered liquidity that the only viable Chapter 11 strategy is an immediate sale.

The question then becomes difficult to answer: Did Chapter 11 fail the business, or did the business wait too long to use Chapter 11? In some cases the answer will plainly be the latter. In others, the cost of Chapter 11 may itself help explain why management reasonably delayed entering the system.

Hypothetical: The $15 Million Manufacturer

Assume that Keystone Components employs sixty workers and manufactures specialized components for regional industrial customers. The company generates meaningful revenue and has a sound product line, but it owes approximately $15 million to its secured lender, taxing authorities, equipment lessors, and trade creditors.

Management believes that operating performance can be restored if the company receives six to twelve months to restructure debt and improve margins. The secured lender has liens on substantially all assets and cash, however, and Keystone cannot fund debtor's counsel, a financial advisor, and a contested cash-collateral hearing without access to the lender's collateral.

Keystone is plainly eligible to seek relief under Chapter 11. But unless the secured lender consents to cash-collateral use or the company can obtain another source of financing, how meaningful is that eligibility? The hypothetical highlights an important bridge between Myth No. 1 and Myth No. 2. For a commercial debtor, the party controlling liquidity may influence not merely what occurs inside bankruptcy but whether bankruptcy is economically available in the first instance.

N. Subchapter V: Congress' Response to the Small-Business Access Problem

Congress expressly recognized the cost and complexity problems confronting small-business debtors when it enacted the Small Business Reorganization Act of 2019. The Act created Subchapter

V of Chapter 11, which became effective in February 2020 and was designed to provide a faster and less expensive reorganization procedure for qualifying small businesses.

Subchapter V makes substantial changes to traditional Chapter 11 architecture. A Subchapter V trustee is appointed, see 11 U.S.C. § 1183, but the debtor ordinarily remains in possession, see id. § 1184. An early status conference is required, id. § 1188, and the debtor ordinarily must file a plan within ninety days of the order for relief, subject to the statutory extension standard, id. § 1189(b).

The confirmation regime is likewise distinctive. Subchapter V does not employ the traditional absolute-priority rule in the same manner as ordinary Chapter 11 and permits nonconsensual confirmation through the requirements of § 1191(b) and (c). See 11 U.S.C. § 1191. A separate disclosure statement generally is not required unless the court orders otherwise, and Subchapter V debtors do not pay the quarterly U.S. Trustee fees imposed in ordinary Chapter 11 cases.

These reforms address genuine access problems. They reduce procedural complexity, compress the timetable, facilitate plan negotiations, and can materially reduce the expense of reorganization. They also create a conspicuous boundary. The temporary $7.5 million debt ceiling first enacted during the COVID-19 pandemic and later extended expired on June 21, 2024. After the April 1, 2025 triennial adjustment under § 104, the applicable aggregate noncontingent, liquidated debt ceiling for qualifying small-business debtors is $3,424,000, subject to the other requirements of § 101(51D).

That limit makes Subchapter V an especially useful vehicle for testing Myth No. 1. Congress created a more affordable form of Chapter 11 precisely because traditional Chapter 11 may impose disproportionate cost and complexity upon smaller debtors. But a debtor just above the statutory ceiling may confront the very traditional Chapter 11 architecture Congress determined was problematic for smaller businesses.

Hypothetical: One Dollar Over the Line

Assume that Business A and Business B operate similar family-owned enterprises. Their revenues, employee counts, assets, creditor structures, and prospects for successful reorganization are essentially identical.

Business A satisfies the applicable Subchapter V debt ceiling. Business B's noncontingent, liquidated qualifying debt exceeds the ceiling by a relatively modest amount. Business A may use Subchapter V's streamlined procedures and confirmation provisions. Business B must either proceed through traditional Chapter 11 or find another solution.

Any numerical eligibility limit necessarily produces line-drawing effects, and no debt ceiling can perfectly capture the complexity or economic resources of every business. The hypothetical nevertheless presents the policy question starkly: If traditional Chapter 11 is economically unavailable to Business B, has the Bankruptcy Code provided that otherwise viable enterprise with a meaningful reorganization remedy?

SIDEBAR: Congress Reconsiders the Bankruptcy Eligibility Thresholds

The question whether bankruptcy relief remains practically accessible to small businesses is presently before Congress. On March 3, 2026, a bipartisan group of senators introduced the Bankruptcy Threshold Adjustment Act of 2026, S. 3977, 119th Cong. (2026), which would again substantially increase the debt ceiling for businesses seeking the streamlined protections of Subchapter V. *See* Bankruptcy Threshold Adjustment Act of 2026, S. 3977, 119th Cong. § 2 (2026).

The legislation would restore the Subchapter V debt ceiling to $7.5 million, the level temporarily in effect following enactment of the CARES Act and subsequent extensions. The temporary $7.5 million ceiling expired on June 21, 2024, after which the eligibility threshold reverted to the lower statutory amount, subject to the periodic adjustments required by 11 U.S.C. § 104. The presently adjusted Subchapter V debt ceiling is $3.424 million.

S. 3977 would also address eligibility on the consumer side. The legislation would amend 11 U.S.C. § 109(e) to permit an individual with regular income to seek Chapter 13 relief with aggregate debts of less than $2.75 million, eliminating for this purpose the traditional distinction between secured and unsecured debt ceilings. *See* Bankruptcy Threshold Adjustment Act of 2026, S. 3977, 119th Cong. § 3 (2026).

The legislation is particularly relevant to the access-to-bankruptcy issues examined in Myth No. 1. The expiration of the temporary $7.5 million Subchapter V ceiling recreated what might be described as a "missing middle": businesses whose debts exceed the Subchapter V threshold but whose size and available liquidity may make a traditional Chapter 11 case prohibitively expensive. Raising the ceiling would not eliminate the costs of reorganization, but it would make the comparatively streamlined Subchapter V process available to a substantially larger group of financially distressed businesses. *See* Michael C. Blackmon, *Revising the Debt Limit for "Small Business Debtors": The Legislative Half-Measure of the Small Business Reorganization Act*, 14 Brook. J. Corp. Fin. & Com. L. 339, 339–42 (2020).

The proposed Chapter 13 amendment presents a parallel issue for individuals. Debt ceilings can make a debtor financially distressed enough to require bankruptcy relief while simultaneously rendering the debtor ineligible for the chapter that may offer the most practical means of rehabilitation. The proposed legislation therefore implicates the distinction at the heart of Myth No. 1: statutory eligibility rules do not merely regulate access to bankruptcy; they can determine which form of bankruptcy relief is realistically available.

As of the date of these materials, however, S. 3977 has not been enacted into law. Accordingly, practitioners must distinguish between the eligibility thresholds presently contained in the Bankruptcy Code, as adjusted pursuant to § 104, and the substantially higher thresholds Congress is presently considering. The pending legislation is nevertheless noteworthy because it reflects an ongoing congressional debate over precisely the question presented by this Myth: How broadly should the doors to bankruptcy rehabilitation be opened, and at what point do statutory debt ceilings themselves become barriers to meaningful access?

O. The Business "Missing Middle"

Subchapter V, as it is written today, therefore does not eliminate the business missing middle. Some enterprises may be too large, complicated, or indebted to qualify for the streamlined remedy yet too small to support the professional and financing infrastructure commonly associated with traditional Chapter 11.

This group can include regional manufacturers, family-owned construction companies, restaurants, transportation businesses, nursing facilities, professional practices, and other enterprises that have genuine going-concern value but modest liquidity. Their financial distress may involve several secured lenders, equipment lessors, taxing authorities, landlords, trade creditors, employee obligations, and litigation, making a simple liquidation inappropriate while rendering traditional Chapter 11 expensive.

The present filing environment makes the question increasingly important. For the twelve months ending June 30, 2026, total bankruptcy filings increased 12.2%, from 542,529 to 608,511**,** over the preceding twelve-month period, while business filings increased 16.9%, from 23,043 to 26,941. *See* Admin. Off. of the U.S. Cts., *Bankruptcies Rise 12.2 Percent* (July 28, 2026). Chapter 11 filings increased from 8,408 to 10,320 during the same comparison period. *See* Admin. Off. of the U.S. Cts., *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Filed, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending June 30, 2026*, tbl. F-2 (2026). Bankruptcy access is therefore not an abstract concern arising in a declining system; filings are again increasing materially.

Whether the missing middle can successfully reorganize may depend less upon statutory eligibility than upon financing, lender cooperation, local professional markets, and the amount of value available to support administrative expenses. That is precisely the distinction between a remedy existing and a remedy being usable.

P. When Businesses Leave Bankruptcy Behind

Businesses unable or unwilling to fund Chapter 11 do not necessarily disappear. They may restructure or liquidate through state-court receiverships, assignments for the benefit of creditors, Article 9 sales, consensual workouts, foreclosures, dissolutions, or negotiated lender-controlled dispositions. Those alternatives can have considerable advantages. They may be quicker, cheaper, more predictable, less procedurally cumbersome, and better adapted to a relatively simple capital structure.

Indeed, some of these alternatives are becoming more sophisticated. Assignments for the benefit of creditors ("ABCs"), in particular, have received renewed attention as a potentially less expensive state-law alternative to federal bankruptcy. In 2025, the Uniform Law Commission approved the Uniform Assignment for Benefit of Creditors Act ("UABCA"), an effort to modernize and bring greater uniformity to an insolvency device whose procedures historically have varied considerably from state to state. See Unif. Assignment for Benefit of Creditors Act (Unif. L. Comm'n 2025). The Act supplies a statutory framework governing the creation of the assignment, qualifications and duties of the assignee, notice to creditors, claims administration, disposition of assets, distributions, judicial involvement, and recognition of assignments across state lines. See id. §§ 3–23. Importantly, the process does not depend upon the continuous judicial supervision characteristic of a bankruptcy case, preserving one of the traditional attractions of an ABC: a comparatively streamlined mechanism for liquidating a distressed enterprise and distributing its assets.

The uniform-law effort has gained traction quickly. By mid-2026, Alabama, Arizona, Delaware, Iowa, Nebraska, and Utah had enacted versions of the UABCA. See 2026 Ala. S.B. 15; Ariz. Rev. Stat. Ann. §§ 44-601 to -625 (2026); Del. Code Ann. tit. 10, §§ 7301A–7326A (2026); Iowa Code §§ 681A.1–.26 (effective Jan. 1, 2027); L.B. 783, 109th Leg., 2d Sess. §§ 1–26 (Neb. 2026); Utah Code Ann. §§ 6-2-101 to -126 (2026). Delaware's enactment is particularly noteworthy. The Delaware statute generally permits an assignment by an organization whose internal affairs are governed by Delaware law, potentially extending the practical availability of the procedure to the substantial number of business entities organized in Delaware even when their principal operations are elsewhere. See Del. Code Ann. tit. 10, § 7303A (2026).

The emergence of a modernized ABC regime illustrates a broader point. State-law insolvency alternatives need not be primitive substitutes for bankruptcy. For a business with a relatively simple capital structure, cooperative secured creditors, and a liquidation rather than reorganization objective, an ABC or receivership may provide much of what the parties actually need: a fiduciary to marshal assets, an orderly sale process, a mechanism for resolving claims, and a means of distributing proceeds; all without assuming the expense and procedural architecture of a Chapter 11 case.

Bankruptcy nevertheless offers important features that these processes do not fully replicate. Among them are the automatic stay, federal avoidance powers, nationwide jurisdictional tools, a comprehensive statutory claims process, committee participation in appropriate Chapter 11 cases, court-supervised sales, debtor-in-possession financing, plan voting and confirmation rules, and federal priority and distribution requirements. Bankruptcy also supplies something more difficult to quantify: a federal collective proceeding capable of constraining individual creditor action and resolving competing interests within a single statutory framework.

The migration of businesses toward ABCs, receiverships, or other state-law processes therefore is not inherently evidence of bankruptcy failure. Competition among insolvency systems can encourage efficiency, reduce transaction costs, and allow parties to select procedures proportionate to the financial problem confronting the enterprise. If a $5 million business can accomplish through an ABC in several months what would require a substantially more expensive Chapter 11 case, choosing the ABC may demonstrate that the alternative works (not that bankruptcy does not).

The accessibility question becomes more difficult, however, when the choice is not truly a choice. Suppose the economically realistic alternatives are a lender-sponsored receivership, an ABC acceptable to the secured creditor, or a Chapter 11 case that the debtor cannot afford to commence and operate without that creditor's financial support. The nonbankruptcy process may prevail not because the affected constituencies collectively concluded that it provides the superior insolvency remedy, but because the federal remedy cannot be financed. In that circumstance, the existence of a theoretical right to seek Chapter 11 relief says relatively little about whether Chapter 11 is practically "available."

Hypothetical: Bankruptcy or Receivership?

A family-owned manufacturing business has $8 million in annual revenue, $4 million owed to its secured lender, $1.5 million in trade debt, 35 employees, and a potentially viable business if its assets can be sold as a going concern. Following a default, its lender has several options. It can finance a Chapter 11 case, seek appointment of a state-court receiver, cooperate in an assignment for the benefit of creditors, or exercise its Article 9 remedies against the collateral. The lender selects a receivership because it expects the proceeding to cost less, move more quickly, and afford it greater influence over the timing and terms of a sale. The debtor lacks sufficient unencumbered cash to commence and sustain a contested Chapter 11 without the lender's consent to the use of cash collateral or its willingness to provide postpetition financing.

From the lender's perspective, that choice may be entirely rational. It may also maximize the value of its collateral. But the calculus may look different to unsecured creditors, employees, taxing authorities, landlords, contract counterparties, or parties who might benefit from avoidance actions or other rights uniquely available in bankruptcy. Those constituencies do not necessarily participate in the lender's initial selection of the insolvency forum, yet the selection may materially affect their substantive and procedural position.

The MythBusters question, therefore, is not whether a secured lender should be compelled to finance a bankruptcy case, nor whether bankruptcy is invariably superior to an ABC, receivership, or other state-law remedy. It is more fundamental: Does increased reliance on nonbankruptcy insolvency processes reflect healthy competition among restructuring systems, or does it reveal that Chapter 11 has become practically inaccessible to a segment of the business community it was designed to serve?

That distinction matters. A business that chooses not to use Chapter 11 because another procedure is faster, cheaper, and better suited to its needs demonstrates the value of procedural choice. A business that cannot realistically use Chapter 11 because the price of admission exceeds its available resources presents a different problem. The first is competition. The second is accessibility.

Q. Geography and the Meaning of a National Bankruptcy System

Bankruptcy law is federal, but bankruptcy practice is local. That reality does not necessarily undermine uniformity, because local rules and practices often adapt national law to different docket conditions, professional communities, and administrative needs.

Yet geography can affect access. Availability of experienced counsel, legal-aid resources, presumptive Chapter 13 fees, trustee practices, mediation programs, remote-hearing procedures, local interpretations of good faith, and the depth of the restructuring bar may vary significantly.

The distinction between consumer and large corporate debtors is particularly noteworthy. An individual ordinarily has comparatively little practical flexibility concerning where a bankruptcy case will be filed, while sophisticated corporate debtors may have multiple legally permissible venue choices under 28 U.S.C. § 1408 and possess the resources necessary to retain national restructuring counsel.

Thus, two dimensions of access can coexist. Bankruptcy may be a single federal statutory system while operating through numerous local professional and institutional ecosystems. That should make lawyers cautious about treating experience in one district as proof of how bankruptcy functions nationally. It also invites a more difficult question: If a debtor's practical ability to obtain competent counsel and successfully use a federal remedy varies materially by geography, in what sense is access to bankruptcy equal?

R. Myth Versus Reality

Myth No. 1 does not yield comfortably to a binary verdict. Bankruptcy relief is broadly available as a matter of federal law, and the Bankruptcy Code provides remarkably powerful remedies to consumers and businesses across the country. Hundreds of thousands of individuals obtain bankruptcy relief each year, and Chapter 11 continues to reorganize, sell, and liquidate enterprises that might otherwise lose substantial going-concern value.

Yet statutory availability and meaningful availability are different propositions. A consumer may be legally eligible for Chapter 7 but unable to pay counsel before a garnishment or repossession occurs. A debtor may be able to enter Chapter 13 but unable to sustain a multi-year plan. A student-loan borrower may possess a legally viable undue-hardship claim but lack the resources to litigate it. A viable business may satisfy every formal requirement of Chapter 11 but lack the liquidity necessary to finance the case.

The different gatekeepers imposed upon different debtors add another dimension. Consumer debtors with primarily consumer debt confront § 707(b), the means test, mandatory counseling, extensive disclosures, and other statutory requirements. Individual nonconsumer debtors escape some of those restrictions, while business Chapter 11 debtors encounter a less mathematical but potentially demanding judicial inquiry into good faith, financial distress, and legitimate bankruptcy purpose.

Nor does the answer lie simply in eliminating gatekeepers. Bankruptcy imposes substantial consequences upon creditors and other stakeholders, and Congress has legitimate reasons to prevent abuse, require financial disclosure, insist upon feasibility, protect secured interests, and establish eligibility boundaries. The challenge is to determine whether the cost and complexity of those protections remain proportionate to the objectives they serve.

The same caution applies to Chapter 11. Professional expertise, judicial process, creditor participation, transparency, and statutory protections cost money because meaningful collective restructuring is complicated. The existence of less expensive receiverships and private workouts does not prove that Chapter 11 is inefficient; it may demonstrate that different problems appropriately require different tools.

The concern arises when the financially distressed person most in need of bankruptcy cannot afford to obtain it, or when an otherwise viable enterprise cannot enter bankruptcy until its resources have deteriorated so severely that reorganization is no longer possible. At that point, the formal availability of the remedy risks becoming detached from its practical utility.

The most useful conclusion is therefore a qualified one. Bankruptcy relief is broadly available, but meaningful access is not necessarily equal. It can depend upon what kind of debtor seeks relief, why the debt was incurred, where the debtor lives or operates, whether competent counsel is available, whether litigation can be funded, whether the debtor has sufficient income to sustain a plan, whether a business has enough liquidity to finance Chapter 11, and whether statutory or judicial gatekeepers permit the case to proceed. That conclusion also provides the transition to the second myth. A debtor that succeeds in entering bankruptcy has answered only the first question. Once the case begins, a different inquiry emerges: Who actually possesses the power to determine what happens next?

III. MYTH NO. 2:

THE RIGHT PEOPLE CONTROL BANKRUPTCY CASES

A. What Does "Control" Mean?

The second myth begins with a proposition that appears firmly grounded in the Bankruptcy Code. In Chapter 11, the debtor ordinarily remains in possession of its property and continues operating its business. Existing management generally remains in place, creditors may participate individually or through statutory committees, trustees and examiners may be appointed in appropriate circumstances, and the bankruptcy court resolves disputes and determines whether requested relief satisfies the requirements imposed by Congress.

That formal architecture appears to identify the relevant decisionmakers. The debtor in possession operates the business, the board exercises corporate authority, secured creditors protect their collateral, committees represent unsecured creditor interests, trustees and examiners provide independent oversight when necessary, and the bankruptcy judge serves as the neutral adjudicator responsible for enforcing the Bankruptcy Code.

Modern bankruptcy practice makes the picture considerably more complicated. A debtor may possess the legal authority to operate its business but be unable to spend cash without a secured lender's consent. Management may formally select a restructuring strategy while the only available DIP lender refuses to finance any strategy other than a sale. A committee may possess broad statutory investigatory powers but not be appointed until financing, bidding procedures, and restructuring milestones have already been negotiated. A bankruptcy judge may possess authority to reject a proposed transaction but lack the ability to create the liquidity, purchaser, financing, or creditor support necessary to produce an alternative.

The word "control" should therefore be used carefully. At least four forms of control can operate simultaneously in a bankruptcy case. *Legal control* concerns who possesses formal authority under the Bankruptcy Code, applicable nonbankruptcy law, and the debtor's organizational documents. *Operational control* concerns who makes the day-to-day decisions necessary to run the business. *Economic control* concerns who possesses or controls the liquidity necessary for the enterprise to continue functioning. *Outcome control* concerns who can determine, or meaningfully constrain, which restructuring alternatives remain realistically available.

These categories need not point to the same person. A debtor in possession may possess legal and operational authority while a secured creditor exercises economic control. A board may retain corporate authority while an independent director possesses a veto over a bankruptcy filing. A committee may possess legal standing to challenge a transaction but lack sufficient time, information, or economic leverage to alter the outcome. And a court may possess ultimate statutory approval authority while the realistic alternatives have already been substantially narrowed by parties outside the courtroom.

The central inquiry underlying Myth No. 2 is therefore more difficult than asking who is legally authorized to act. Who controls a bankruptcy case: the participant authorized to say "yes," or the participant capable of saying "no" to every realistic alternative?

B. The Debtor in Possession: Control in Theory

Chapter 11 begins with a strong presumption in favor of leaving the debtor in possession. Section 1101(1) defines "debtor in possession" generally as the debtor when no qualified trustee has been appointed and is serving, while § 1107(a) confers upon the debtor in possession most of the rights, powers, functions, and duties of a Chapter 11 trustee. See 11 U.S.C. §§ 1101(1), 1107(a). Section 1108 ordinarily permits continued operation of the debtor's business. See id. § 1108.

The arrangement reflects sound practical considerations. Existing management normally knows the debtor's employees, customers, suppliers, contracts, regulatory environment, assets, and business problems better than an outsider appointed after commencement of the case. Immediate displacement of management in every Chapter 11 case could destroy institutional knowledge, destabilize customer and employee relationships, increase administrative expense, and make reorganization more difficult.

The debtor in possession therefore ordinarily operates the business, controls estate property, employs professionals subject to court approval, investigates claims and transactions, negotiates with creditors, seeks financing, proposes asset dispositions, assumes or rejects contracts, settles litigation, and possesses an initial exclusive period in which to propose a plan. See 11 U.S.C. §§ 327, 363, 364, 365, 1107, 1108, 1121. At least formally, the statutory structure places considerable power in the debtor's hands.

Yet Chapter 11 does not simply preserve prepetition corporate autonomy. The debtor in possession assumes fiduciary responsibilities associated with administration of the bankruptcy estate. In *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985), the Supreme Court held that appointment of a bankruptcy trustee shifts control of a corporate debtor's attorney-client privilege from prior management to the trustee. *Id.* at 353–54. The decision illustrates the broader principle that control of a corporate debtor is not an immutable property of the prepetition managers who happened to occupy corporate office when financial distress arose.

Similarly, the Supreme Court recognized under the former Bankruptcy Act that officers controlling a debtor in possession occupy fiduciary positions and cannot use continuation of management as an opportunity for self-enrichment. *Wolf v. Weinstein*, 372 U.S. 633, 649–52 (1963). The debtor-in-possession model therefore represents continuity of management subject to changed responsibilities, not continuation of prepetition managerial prerogative without limitation.

That distinction becomes important when the interests of management, equity owners, lenders, and the estate diverge. Existing managers may have participated in prepetition transactions that warrant investigation. They may owe loyalty to sponsors or controlling shareholders, depend upon lenders for continued employment, possess change-in-control compensation arrangements, or favor a transaction that preserves management positions. Chapter 11 asks those same individuals to exercise statutory and fiduciary authority on behalf of an estate whose interests may no longer coincide with those of the parties who appointed them.

The problem is not proof that existing management is inherently untrustworthy. Continuity ordinarily remains valuable, and conflicts can often be addressed through independent directors, special committees, retention of restructuring professionals, derivative standing, or other targeted measures. The issue instead is whether the debtor-in-possession presumption should be confused with an assumption that nominal management necessarily exercises independent control.

A more accurate statement is that Chapter 11 begins by allocating formal authority to the debtor in possession. Whether the debtor possesses practical freedom to exercise that authority is a separate inquiry.

C. Fiduciary Duties and the Problem of Self-Investigation

One of the clearest illustrations arises when the debtor possesses potential claims against insiders. Ordinarily, the debtor in possession controls estate causes of action and decides whether litigation should be commenced. That arrangement becomes problematic if the potential defendants include the debtor's current management, controlling shareholder, equity sponsor, prepetition lender, or some other participant possessing influence over the debtor' decisions.

The Third Circuit addressed that control problem directly in *Official Committee of Unsecured Creditors v. Cybergenics Corp. (In re Cybergenics Corp.)*, 330 F.3d 548 (3d Cir. 2003) (en banc). The court held that a bankruptcy court may authorize an official creditors' committee to prosecute avoidance claims derivatively on behalf of the estate when the debtor in possession unjustifiably refuses to pursue them. *Id.* at 568–80.

Cybergenics is significant not merely as a standing decision. It recognizes a structural weakness in the debtor-in-possession model: the party ordinarily entrusted with estate causes of action may have reasons not to exercise them. Derivative standing permits another statutory constituency to act when formal control by the debtor would otherwise prevent potentially valuable estate claims from being pursued.

The doctrine demonstrates that bankruptcy law does not always respond to conflicted control by replacing management entirely. It can instead redistribute particular powers. Management may continue operating the business while the committee is authorized to pursue a specific estate claim.

That produces a useful distinction for Myth No. 2. The question "Who controls the debtor?" may be too broad to produce a meaningful answer. The better inquiry is often: Who controls the particular decision at issue, what is the source of that authority, and what mechanism exists when the holder of formal authority cannot exercise it disinterestedly?

D. The Party With the Money: Cash Collateral and Secured-Lender Influence

If statutory authority is the formal currency of control, liquidity is frequently its economic currency. A Chapter 11 debtor can possess every power granted by §§ 1107 and 1108 and nevertheless be unable to operate for a single week without access to cash.

Section 363(c)(2) prohibits a trustee or debtor in possession from using cash collateral unless each entity with an interest in that collateral consents or the court authorizes its use. 11 U.S.C. § 363(c)(2). Section 363(e) further requires the court, upon request, to condition use of property as necessary to provide adequate protection of an interested entity's property rights. See id. § 363(e).

These provisions protect legitimate secured-creditor interests. Bankruptcy does not erase security interests simply because the debtor needs the collateral to reorganize, and a secured creditor should not ordinarily be required to finance a debtor's operations through deterioration of its collateral position without the protections Congress prescribed.

At the same time, control of cash collateral can create substantial bargaining leverage. A debtor may need cash to pay employees, maintain insurance, purchase inventory, satisfy utilities, preserve licenses, fund litigation, and pay the ordinary costs of remaining in business. A secured creditor that can withhold consent may therefore influence budgets, reporting requirements, asset dispositions, restructuring milestones, and other decisions that go far beyond the mere preservation of collateral.

The Supreme Court's adequate-protection decisions illustrate the effort to balance these competing interests. In *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988), the Court held that an undersecured creditor is not entitled to compensation for the lost opportunity to foreclose during the automatic stay. *Id.* at 370–82. The decision confirms that bankruptcy alters some elements of prepetition creditor leverage even while protecting against diminution in the value of secured interests.

Similarly, in *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), the Court held that property seized prepetition by the Internal Revenue Service could become property of the bankruptcy estate subject to turnover, with the creditor's property interest protected through the Bankruptcy Code. *Id.* at 206–12. Bankruptcy thus can shift possession and operational control back to the estate while substituting adequate protection for the creditor's prepetition remedy.

These cases demonstrate that secured-creditor influence is neither absolute nor illegitimate. The harder question arises from the practical reality that a debtor dependent upon a secured creditor's cash may possess very little negotiating leverage concerning the conditions attached to its continued use.

E. DIP Financing: When Protection Becomes Control

The control problem becomes more pronounced when existing liquidity is insufficient and the debtor requires postpetition financing. Section 364 creates a graduated system intended to enable debtors to obtain credit while protecting existing property rights. A debtor may obtain ordinary-course unsecured credit under § 364(a), obtain nonordinary unsecured credit with court approval under §

364(b), grant priority or secured status when unsecured financing is unavailable under § 364(c), and obtain priming financing under the demanding requirements of § 364(d). See 11 U.S.C. § 364(a)–(d).

The statutory framework recognizes a fundamental reality: distressed businesses frequently cannot borrow on ordinary commercial terms. A lender willing to advance new money to a company already in bankruptcy will usually demand protection commensurate with the risk.

Those protections can include superpriority claims, liens on unencumbered assets, replacement liens, reporting covenants, borrowing-base requirements, budget compliance, variance limitations, financial milestones, sale deadlines, plan deadlines, defaults, and termination rights. Each protection may be commercially understandable when viewed individually.

The aggregate effect, however, can produce something approaching practical governance. If the debtor cannot spend outside the DIP budget, pursue a transaction not approved by the lender, miss a sale milestone, extend a timetable, or investigate prepetition lender conduct without risking termination of financing, the debtor may remain formally in possession while possessing only a narrow range of economically permissible decisions.

The Third Circuit's en banc decision in *Resolution Trust Corp. v. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.)*, 16 F.3d 552 (3d Cir. 1994), provides an important limit on the use of financing necessity to alter secured-creditor rights. The court rejected priming financing where adequate protection depended upon speculative future increases in property value. *Id.* at 564–68. A debtor's desire to continue operating therefore cannot itself satisfy § 364(d); the existing secured creditor must receive the statutory protection Congress required.

Older bankruptcy decisions also warn against financing arrangements that effectively transfer control from the debtor to the lender. In *In re Tenney Village Co.*, 104 B.R. 562 (Bankr. D.N.H. 1989), the court rejected financing terms that placed the lender in an excessively dominant position and substantially constrained the debtor's ability to perform its fiduciary role. *Id.* at 568–69. Similarly, *In re Ames Department Stores, Inc.*, 115 B.R. 34 (Bankr. S.D.N.Y. 1990), cautioned that a DIP lender should not use financing terms to dictate the debtor's business judgment or control the course of the reorganization. *Id.* at 37–40.

Those cases should not be read to suggest that lender-imposed milestones or meaningful financing protections are inherently improper. Chapter 11 lenders are not charitable institutions, and a lender cannot reasonably be expected to fund an unlimited bankruptcy case without deadlines, information rights, financial covenants, and remedies.

The useful inquiry is one of degree. At what point do terms necessary to protect a lender's new money become terms that effectively determine the debtor's restructuring strategy?

Hypothetical: The Lender-Controlled Chapter 11

Assume that Keystone Retail files Chapter 11 with enough unrestricted cash to operate for three days. Its prepetition secured lender is the only party willing to provide DIP financing.

The proposed financing requires Keystone to obtain approval of bidding procedures within twenty days, conduct an auction within fifty days, obtain sale approval within sixty days, and close the sale shortly thereafter. The facility includes a rollup of a portion of the lender's prepetition debt, stipulations concerning the validity and priority of prepetition liens, a thirty-day challenge period, reporting obligations, budget covenants, and events of default if the sale milestones are not achieved.

Management prefers to explore a standalone reorganization but has no financing available to pursue it. Without approval of the DIP facility, the company will be unable to make payroll.

Who selected the sale strategy? Formally, management did. Economically, the answer is less obvious. The appropriate judicial inquiry is not whether the lender should be required to fund a standalone reorganization that it does not wish to finance. The question is whether approval of the financing arrangement appropriately protects new capital or effectively transfers to the lender decisions that Chapter 11 ordinarily assigns to the debtor and the bankruptcy process.

F. Rollups, Challenge Periods, and the Use of Postpetition Leverage

The control question becomes especially difficult where the postpetition lender is also a substantial prepetition creditor. In that circumstance, the lender does not merely decide whether to provide new capital. It may use its position as the debtor's indispensable source of postpetition liquidity to seek protections concerning obligations that arose before bankruptcy.

One example is the rollup, through which some portion of prepetition debt is effectively refinanced or converted into postpetition DIP obligations. Rollups can be defended as necessary consideration for new money, a means of simplifying capital structures, or part of an integrated financing arrangement without which the debtor could not obtain liquidity.

They can also improve the lender's prepetition position at a point when other constituencies have had little opportunity to investigate liens, claims, transfers, or potential defenses. Similar concerns arise from debtor stipulations concerning the validity and priority of liens, releases, waivers of surcharge rights, liens on avoidance-action proceeds, and compressed deadlines within which committees or other parties must investigate lender claims.

The statutory structure makes timing particularly important. Section 1103(c)(2) expressly authorizes a committee to investigate the debtor's acts, conduct, assets, liabilities, and financial condition. See 11 U.S.C. § 1103(c)(2). Yet the committee ordinarily does not exist on the petition date, while the debtor may request interim financing immediately.

Thus, the entity Congress expected to perform an independent investigation may arrive only after the debtor has proposed stipulations concerning the matters to be investigated. The solution commonly employed is a challenge period during which the committee may investigate and assert estate claims notwithstanding the debtor's stipulations.

But a challenge period is meaningful only if the committee has enough time, information, professional resources, and financial incentive to use it. A nominal right to investigate may accomplish little if the relevant documents are extensive, the professionals were appointed days earlier, and the case timetable requires attention to simultaneous sale, financing, and operational matters.

The broader issue is one of procedural sequencing. If financing is approved before the statutory counterweights to debtor and lender power can realistically organize, should the bankruptcy court take additional responsibility for preserving meaningful optionality and investigation?

G. Equity Sponsors and the Persistence of Prepetition Control

Bankruptcy priority generally places equity behind creditors, but loss of economic priority does not necessarily eliminate an equity sponsor's practical influence. A controlling shareholder may select directors, influence management, choose restructuring advisors, negotiate prepetition financing, participate in restructuring-support agreements, and possess information accumulated over years of ownership.

Sponsors may also occupy multiple economic positions. The same participant may be an equity holder, secured lender, DIP lender, purchaser, plan sponsor, backstop party, holder of management appointment rights, or beneficiary of releases. Bankruptcy's familiar categories of "creditor" and "equity holder" become less descriptive when a single economic actor occupies several positions simultaneously.

That does not make sponsor participation improper. Existing owners may possess industry knowledge, access to capital, and incentives to preserve going-concern value that benefit the estate. A sponsor willing to provide new money may make a reorganization possible that otherwise would fail.

But multiple roles complicate fiduciary analysis. If management was appointed by the sponsor, the sponsor proposes the DIP, the sponsor wishes to purchase assets, and the restructuring preserves management employment, the debtor's nominal independence should not substitute for examination of whether the proposed transaction actually reflects disinterested business judgment.

The bankruptcy court confronted a version of that problem in *In re L.A. Dodgers LLC*, 457 B.R. 308 (Bankr. D. Del. 2011). The court declined to approve the debtor's preferred insider financing where a competing financing proposal was economically superior and the insider arrangement was affected by the controlling owner's personal interests. *Id.* at 313–15. The case illustrates that selection of financing is not merely a matter of identifying a lender willing to provide money; it is a fiduciary decision subject to scrutiny where control and insider interests intersect.

H. Independent Directors: Independent Judgment or Purchased Veto?

Corporate governance devices provide another important test of formal and practical control. Lenders and investors sometimes require borrowers to appoint independent directors or special members, particularly in special-purpose or bankruptcy-remote entities. These arrangements may provide valuable protection against opportunistic bankruptcy filings and may reduce credit risk by ensuring that an independent decisionmaker considers major insolvency actions.

Properly designed, an independent director can serve important fiduciary functions. The director may evaluate conflicting stakeholder interests, review transactions involving controlling shareholders, assess restructuring alternatives, investigate potential claims, and provide a degree of independent judgment that ordinary management cannot supply.

Difficulty arises when "independence" is defined principally by contractual form rather than fiduciary substance. If the lender selected the director, controls removal, created the position solely as a condition to financing, and expects the director to protect lender interests when considering bankruptcy, the arrangement begins to resemble a contractual waiver of the borrower's access to bankruptcy.

The Supreme Court established the starting rule in *Price v. Gurney*, 324 U.S. 100 (1945). Persons purporting to commence a voluntary corporate bankruptcy must possess authority under applicable state organizational law, and a bankruptcy court cannot simply create filing authority where state law does not provide it. *Id.* at 106–07.

Modern cases involving creditor blocking rights attempt to reconcile *Price* with the longstanding federal policy disfavoring contractual waivers of bankruptcy access. In *In re Lake Michigan Beach Pottawattamie Resort LLC*, 547 B.R. 899 (Bankr. N.D. Ill. 2016), the court refused to enforce a governance arrangement giving a secured creditor's nominee the ability to block bankruptcy while acting solely in the creditor's interests. *Id.* at 913–14. Similarly, *In re Intervention Energy Holdings, LLC*, 553 B.R. 258 (Bankr. D. Del. 2016), declined to enforce a provision under which a creditor obtained a nominal equity interest and corresponding consent right over a bankruptcy filing. The court treated the arrangement as the functional equivalent of an impermissible bankruptcy waiver. *Id.* at 265–66.

The Fifth Circuit provided an important counterpoint in *Franchise Services of North America, Inc. v. U.S. Trustee (In re Franchise Services of North America, Inc.)*, 891 F.3d 198 (5th Cir. 2018). There, the blocking party possessed a substantial bona fide equity interest rather than merely a nominal interest engineered to prevent bankruptcy, and the court upheld the consent requirement under applicable corporate law. *Id.* at 205–11.

The cases suggest that labels alone are inadequate. A "special member," "independent director," or "equity holder" may possess legitimate governance authority, but courts should examine the economic substance of the relationship, the source and purpose of the veto right, applicable fiduciary duties, and whether the arrangement represents genuine corporate governance or merely a purchased prohibition against bankruptcy.

Hypothetical: The Independent Director

Assume that a lender extends $30 million to an LLC on the condition that the borrower amend its organizational documents to require unanimous board approval before filing bankruptcy. The lender also requires appointment of an independent director selected from a list acceptable to the lender.

Three years later, the company faces severe liquidity distress. Management concludes that Chapter 11 offers the only realistic opportunity to preserve the business, but the independent director refuses to approve the filing because bankruptcy would delay the lender's foreclosure.

Is the director exercising independent fiduciary judgment, or has the lender effectively purchased the power to determine whether its borrower may seek bankruptcy relief? The answer should not depend solely upon the word "independent." Myth No. 2 requires examination of who appointed the decisionmaker, what duties that person owes, what interests the arrangement protects, and whether the decision reflects genuine fiduciary judgment or merely contractual control.

I. Receivers and the Authority to Commence Bankruptcy

Receivership cases present the control question in unusually direct form. A state court may appoint a receiver to possess and manage an entity's property, operate the business, investigate wrongdoing, preserve collateral, conduct a sale, or wind down operations. After the receivership begins, former management may attempt to commence bankruptcy and thereby shift the insolvency proceeding into federal court.

The Bankruptcy Code expressly contemplates this possibility. Section 101(11) defines "custodian" to include certain receivers, and § 543 generally requires a custodian with knowledge of the bankruptcy case to cease administration and deliver property of the debtor to the bankruptcy trustee or debtor in possession, subject to the court's authority to excuse turnover when creditor interests would be better served. See 11 U.S.C. §§ 101(11), 543.

Section 543 therefore reflects a federal preference, at least presumptively, for administration of debtor property through the bankruptcy process after a valid case has commenced. But § 543 does not itself answer the logically antecedent question: Who possessed authority to file the bankruptcy petition?

That issue remains grounded in organizational law and the effect of the receivership order. *Price v. Gurney* requires valid state-law authority to commence the case. A state court's mere appointment of a receiver does not necessarily eliminate the board's corporate powers, but a receivership order that validly removes directors or transfers governance authority may do so.

The Ninth Circuit confronted the issue in *Sino Clean Energy, Inc. v. Seiden (In re Sino Clean Energy, Inc.)*, 901 F.3d 1139 (9th Cir. 2018). The court affirmed dismissal of a bankruptcy petition filed by former directors after a state-court receiver had removed them and reconstituted the board, concluding that the displaced directors lacked authority to commence the case. *Id.* at 1142–46.

Other courts have distinguished between a receiver's possession of property and displacement of organizational authority. See, e.g., *In re Corporate & Leisure Event Productions, Inc.*, 351 B.R. 724, 731–32 (Bankr. D. Ariz. 2006); *In re Orchards Village Investments, LLC*, 405 B.R. 341, 349–51 (Bankr. D. Or. 2009). The precise language of the receivership order, governing organizational law, and corporate documents may therefore determine whether the board retains authority to seek federal relief.

Three questions should remain distinct. First, was the bankruptcy petition validly authorized? Second, if the case was validly commenced, must the receiver turn over property under § 543? Third, even if the petition was authorized and turnover ordinarily would be required, should the bankruptcy court dismiss, suspend, abstain, or excuse turnover because continuation of the receivership better serves the relevant interests?

Collapsing those questions can obscure the actual source of authority. A court may conclude that former management lacks filing authority without recognizing an unlimited state-court power to prohibit bankruptcy. Conversely, a validly authorized filing does not necessarily establish that federal bankruptcy provides the most appropriate forum for continuing the insolvency process.

Hypothetical: The Receiver and the Former Board

A secured creditor obtains appointment of a state-court receiver over a financially distressed company. The receivership order gives the receiver possession of all assets, authority to operate the business, and power to conduct a sale.

Two weeks later, the preexisting board votes to file Chapter 11 because unsecured creditors believe the receivership is dominated by the secured lender. The receiver moves to dismiss the bankruptcy case, arguing that the board ceased possessing authority when the receiver was appointed.

Who controls access to bankruptcy? The answer cannot be determined simply by deciding whether bankruptcy or receivership is the preferable process. The threshold inquiry is whether the board continued to possess corporate authority to file after entry of the receivership order.

The hypothetical illustrates a recurring theme. Control in bankruptcy frequently depends upon nonbankruptcy law created or altered before the bankruptcy case begins.

J. Official Committees: Statutory Counterweight or Late Arrival?

Official committees are one of Chapter 11's principal mechanisms for counterbalancing debtor and secured-creditor power. Section 1102 provides for appointment of an official committee of unsecured creditors in appropriate cases, while § 1103 authorizes the committee to employ professionals, consult with the debtor, investigate the debtor's affairs, participate in plan formulation, and perform other services in the interests of the constituency it represents. See 11 U.S.C. §§ 1102, 1103.

Section 1109(b) further gives a committee, like other parties in interest, the right to appear and be heard on any issue in the Chapter 11 case. See id. § 1109(b). Once exclusivity ends, a committee may also propose a plan. See id. § 1121(c).

The statutory powers are substantial. *Cybergenics* further confirms that the committee can, in appropriate circumstances, obtain authority to exercise estate litigation rights when the debtor unjustifiably refuses to act. 330 F.3d at 568–80. Yet committee power depends upon timing and economics. The committee is appointed only after the case begins. By then, the debtor may have negotiated DIP financing, cash-collateral terms, sale milestones, a restructuring-support agreement, management incentives, and other arrangements that shape the case.

The committee must then retain counsel and financial advisors, become familiar with the debtor, obtain documents, evaluate liens and claims, assess potential causes of action, and simultaneously respond to an expedited case timetable. If the debtor has only weeks of liquidity, the committee may possess extensive formal rights and very little practical time in which to exercise them.

Economic incentives matter as well. A committee representing creditors expected to receive a substantial recovery may have every reason to invest heavily in investigation and litigation. Where unsecured creditors are deeply out of the money, however, the costs of aggressive committee participation may themselves reduce the limited value otherwise distributable.

The relevant question is therefore not whether official committees possess meaningful statutory powers. They plainly do. The question is whether those powers arrive early enough and with sufficient resources to serve as an effective counterweight when the most consequential features of the restructuring were negotiated before the committee existed.

Hypothetical: The Committee Arrives Late

A debtor files Chapter 11 on Monday. At the first-day hearing on Wednesday, it receives interim approval of DIP financing containing a fifty-day sale milestone and stipulations concerning its prepetition secured lender's liens.

The United States Trustee appoints the official committee ten days later. By the time committee counsel and financial advisors are retained, approximately thirty days remain before the proposed auction.

The committee possesses statutory authority to investigate, object, negotiate, and seek derivative standing where appropriate. But does it possess a meaningful opportunity to alter the case? The hypothetical shows why formal participation rights do not necessarily equal practical control. Time itself can become a restructuring resource.

K. Ad Hoc Groups, Claims Trading, and Informal Power

Not all creditor influence is exercised through official committees. Sophisticated creditors frequently organize into ad hoc groups before bankruptcy, retain common counsel and financial advisors, accumulate blocking positions, negotiate restructuring-support agreements, and enter the Chapter 11 case with a developed strategy.

Such groups can perform valuable functions. They reduce coordination costs, permit creditors with common interests to negotiate efficiently, provide sophisticated counterparties for debtors seeking consensual solutions, and may contribute capital necessary to finance a restructuring.

Unlike an official committee, however, an ad hoc group ordinarily does not represent an entire statutory constituency and does not generally owe fiduciary duties to creditors outside the group. Its members are entitled to pursue their own economic interests, subject to applicable law.

That distinction can produce an interesting inversion. The official committee possesses statutory authority and representative responsibilities but may first organize after the petition is filed. An ad hoc lender group may have no statutory representative status but may enter the case having negotiated the transaction, committed financing, accumulated voting power, and retained sophisticated advisors months earlier.

Claims trading can magnify the influence of creditor constituencies in Chapter 11. Distressed investors may purchase debt precisely because the contractual position conveys blocking rights, plan leverage, access to information, or an opportunity to participate in postpetition financing or the equity of a reorganized debtor. The resulting market can enhance liquidity, provide an exit for creditors unwilling or unable to remain involved in a lengthy restructuring, and place claims in the hands of investors with the capital and sophistication necessary to participate actively in the reorganization.

But claims trading can do more than transfer the economic right to receive payment. Because bankruptcy claims frequently carry voting rights, standing, negotiating leverage, and the ability to affect confirmation, purchasing claims can become a means of purchasing influence over the restructuring itself. A distressed investor that had no relationship with the debtor when credit was originally extended may acquire a sufficiently large position to block a class, influence the terms of a plan, participate in financing, negotiate for new equity, or pursue control of the reorganized enterprise. In that sense, the market for distressed debt can sometimes function as a market for bankruptcy control.

Nothing about that phenomenon is inherently improper. The Bankruptcy Code does not require creditors to be altruistic, and a creditor ordinarily may vote its claim in pursuit of its own economic interests. Indeed, an active market for distressed claims can facilitate restructuring by concentrating claims in the hands of investors willing to negotiate, provide new capital, assume risk, and make the compromises necessary to achieve a confirmable plan.

Section 1126(e), however, establishes an important statutory boundary. It provides that, "[o]n request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith." 11 U.S.C. § 1126(e). The provision thus recognizes that although creditor self-interest is expected, circumstances may arise in which the acquisition or exercise of voting power ceases to reflect a legitimate creditor interest and instead serves an ulterior purpose sufficiently removed from that status to warrant designation.

The Western District of Pennsylvania confronted that distinction more than thirty years ago in *In re Allegheny International, Inc.*, 118 B.R. 282 (Bankr. W.D. Pa. 1990). Japonica Partners entered the Chapter 11 case as an investor rather than an original creditor and acquired substantial claims against Allegheny International. Its acquisitions gave it blocking positions in creditor classes and became part of a broader strategy through which Japonica sought control of the debtor. The bankruptcy court considered whether the votes associated with those acquired claims should be designated under § 1126(e), focusing not simply upon the fact that Japonica had purchased claims, but upon the purpose for which its resulting voting power was being exercised. *Id.* at 289–90, 298–99.

Allegheny International is important because it illustrates the line bankruptcy law attempts to draw between permissible creditor self-interest and the use of creditor status to accomplish an ulterior objective. The purchase of claims at a discount, the acquisition of a blocking position, or even the desire to influence a restructuring does not, standing alone, necessarily establish bad faith. The more difficult question is whether the investor is exercising the rights associated with its claims to maximize its position as a creditor or instead using those rights principally to obtain a collateral advantage not shared by creditors generally. *See id.* at 289–90.

The Second Circuit confronted a similar issue two decades later in *DISH Network Corp. v. DBSD North America, Inc. (In re DBSD North America, Inc.)*, 634 F.3d 79 (2d Cir. 2011). DISH, a competitor of DBSD, purchased substantial first- and second-lien claims after the bankruptcy filing and voted those claims against DBSD's proposed plan. The bankruptcy court designated DISH's votes under § 1126(e), concluding that DISH had acquired and voted the claims not merely to maximize its recovery as a creditor but as part of an effort to obtain a strategic advantage concerning DBSD's business and assets. The Second Circuit affirmed. *Id.* at 101–05.

DBSD is significant for what it does, and does not, say about claims trading. The Second Circuit did not hold that purchasing claims for strategic reasons, seeking a blocking position, or voting against a debtor's preferred plan necessarily constitutes bad faith. To the contrary, the court recognized that creditors ordinarily are permitted to act selfishly and to vote in accordance with their own economic interests. The problem arises when voting power is exercised to obtain an advantage outside the creditor's legitimate interests as a creditor. *Id.* at 102–05.

Read together, *Allegheny International* and *DBSD* expose an important feature of modern Chapter 11 governance. Formal control of the debtor may remain with the debtor in possession, while substantial practical control over the restructuring can be acquired in the secondary market. An investor need not own the debtor's stock or occupy a seat on its board to acquire meaningful influence. Purchasing the right claims, in the right classes, and in sufficient amounts may provide substantial power over whether a plan can be confirmed and what economic arrangements will be necessary to obtain creditor support.

The cases also reveal why § 1126(e) must be applied carefully. Claims trading itself serves legitimate and often valuable functions, and an overly expansive conception of "bad faith" could impair liquidity in the distressed-debt market or penalize sophisticated creditors simply because they purchased claims with a restructuring strategy in mind. The statutory inquiry therefore cannot turn merely upon whether the creditor is sophisticated, purchased rather than originated the debt, acquired a blocking position, or hopes to profit substantially from the restructuring. Those circumstances may demonstrate economic self-interest, but economic self-interest is ordinarily part of creditor behavior rather than evidence of its illegitimacy.

The more difficult inquiry concerns the capacity in which the power is being exercised**.** A creditor seeking a greater recovery, improved plan treatment, additional consideration, or protection of its investment ordinarily acts from its position as a creditor, even when it bargains aggressively. By contrast, a competitor or investor that acquires voting power principally as an instrument to secure a separate strategic advantage may present the different problem addressed by § 1126(e). *Allegheny International* and *DBSD* therefore illustrate that bankruptcy law tolerates substantial creditor self-interest while retaining a mechanism to police circumstances in which creditor voting rights are deployed for purposes sufficiently extraneous to creditor status.

That distinction also illuminates a broader issue underlying Myth No. 2. Economic power and fiduciary authority are not the same thing. A distressed investor purchasing claims ordinarily acts for its *own account* and owes no general fiduciary duty to maximize recoveries for the creditor body. A debtor in possession, trustee, or official committee occupies a fundamentally different position because its authority is exercised within a statutory or fiduciary framework that extends beyond its own economic interests.

Claims trading can therefore change the distribution of power within a Chapter 11 case without changing its formal governance structure. The debtor may remain in possession, the board may continue to govern, and the official committee may continue to represent unsecured creditors, while the acquisition of a blocking position by a sophisticated investor fundamentally changes the negotiations occurring among them. The distinction between who formally controls the case and who possesses sufficient economic leverage to influence its outcome is precisely the distinction at the center of Myth No. 2.

The resulting MythBusters question is not whether claims trading is good or bad. It is more fundamental: To what extent can control over a Chapter 11 restructuring be purchased through the acquisition of claims? *Allegheny International* and *DBSD* demonstrate both sides of the answer. Bankruptcy law generally permits investors to purchase claims and exercise the economic and voting rights that accompany them, even aggressively and in pursuit of profit. But § 1126(e) provides a statutory boundary when voting rights are exercised not simply as instruments of creditor self-interest, but in bad faith to advance an ulterior objective outside the legitimate interests associated with creditor status.

L. When Management Must Be Replaced: Chapter 11 Trustees

The strongest formal response to failed debtor control is appointment of a Chapter 11 trustee. Section 1104(a)(1) requires appointment for cause, including fraud, dishonesty, incompetence, or gross mismanagement, either before or after commencement of the case. Section 1104(a)(2) separately permits appointment when doing so is in the interests of creditors, equity security holders, and other interests of the estate. See 11 U.S.C. § 1104(a).

Appointment is commonly described as an extraordinary remedy because it displaces the management structure upon which Chapter 11 ordinarily depends. A trustee may bring independence, credibility, and disinterested investigation, but appointment can also increase expense, disrupt operations, eliminate institutional knowledge, destabilize financing relationships, and diminish prospects for reorganization.

The Third Circuit's decisions illustrate the balance. In *In re Sharon Steel Corp.*, 871 F.2d 1217 (3d Cir. 1989), the court affirmed appointment of a trustee in circumstances involving serious mismanagement and self-dealing. *Id.* at 1226–30. In *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463 (3d Cir. 1998), the Third Circuit affirmed trustee appointment amid extraordinary acrimony and conflicts among competing groups. The decision demonstrates that actual fraud is not the only circumstance in which management must be displaced; dysfunction and divided control can themselves undermine faithful estate administration. *Id.* at 471–74.

The doctrine poses a difficult institutional question. Courts should not appoint trustees merely because management made unsuccessful decisions before bankruptcy; financially successful management teams rarely seek Chapter 11. Yet the value of continuity diminishes when the managers controlling the debtor cannot exercise independent fiduciary judgment.

The issue can therefore be framed as follows: At what point does preservation of the debtor-in-possession model protect enterprise value, and at what point does it merely protect the people already exercising control?

M. Examiners: Investigation Without Displacement

The appointment of a Chapter 11 trustee represents a substantial transfer of control: the debtor's existing management loses its status as debtor in possession, and an independent fiduciary assumes responsibility for administration of the estate. An examiner occupies a materially different institutional position. The examiner can introduce independence into the case without displacing management, thereby separating control over investigation and information from control over the debtor's operations.

The statutory framework reflects that distinction. Section 1104(c) governs appointment of an examiner and provides, in relevant part, that the court "shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate" when the statutory requirements are satisfied. 11 U.S.C. § 1104(c). Section 1106(b), in turn, makes specified investigative and reporting duties of a trustee applicable to an examiner, except to the extent the court orders otherwise. *See* 11 U.S.C. § 1106(b).

An examiner therefore traditionally serves an investigative rather than operational function. Unlike a Chapter 11 trustee, whose powers may include operating the debtor's business and administering estate property, appointment of an examiner ordinarily leaves the debtor in possession and existing management in place. The examiner may investigate and report while management continues to run the enterprise. In that sense, the statutory mechanism permits independent scrutiny without transferring operational control of the debtor. *See* Jeffery A. Deller, *Examining the Examiner: Waiver of the Attorney-Client Privilege and the Outer Limits of an Examiner's Powers in Bankruptcy*, 43 Duq. L. Rev. 187, 193–95 (2005).

That distinction also explains why the examiner can matter even though the examiner ordinarily does not make the debtor's business decisions. Information itself can be a source of power in a Chapter 11 case. An independent investigation can test management's account of prepetition events, identify matters requiring further inquiry, illuminate transactions involving insiders or other constituencies, and provide information relevant to decisions later made by the debtor, creditors, committees, trustees, or the court. The examiner may therefore alter the informational environment in which control is exercised without assuming operational control itself.

The Third Circuit's decision in *In re FTX Trading Ltd.*, 91 F.4th 148 (3d Cir. 2024), gives the examiner's independent role particular contemporary significance. In *FTX*, the United States Trustee sought appointment of an examiner under § 1104(c)(2), which applies when the debtor's qualifying fixed, liquidated, unsecured debts exceed the statutory threshold. The bankruptcy court denied the request, reasoning in substantial part that appointment would impose significant expense and duplicate investigations already being undertaken by the debtors, the creditors' committee, and governmental authorities. The Third Circuit reversed. *Id.* at 151–53.

The court held that when § 1104(c)(2)'s statutory requirements are satisfied and a qualifying request is made, appointment of an examiner is mandatory. *Id.* at 153–59. Congress used the word "shall," and the bankruptcy court could not convert that mandatory direction into a discretionary one based upon its assessment that an examiner would be unnecessary, duplicative, expensive, or inconsistent with efficient case administration. *Id.* at 153–55. As the Third Circuit explained, "shall" means "shall" in this context; the statutory conditions, rather than the bankruptcy court's independent assessment of the wisdom of appointment, determine whether an examiner must be appointed. *Id.*

That holding is important for reasons extending well beyond statutory interpretation. Section 1104(c)(2) embodies a congressional judgment concerning the value of independent investigation in sufficiently large Chapter 11 cases. The provision is not merely a case-management tool available when the bankruptcy judge concludes that existing fiduciaries are performing inadequately. Once the statutory requirements are satisfied and appointment is properly requested, Congress has determined that an independent examiner serves an interest distinct from the court's assessment of whether another investigation is necessary or efficient. The Third Circuit specifically recognized the public-interest considerations underlying mandatory examination in large bankruptcy cases. *Id.* at 156–57.

FTX is especially instructive because there was no apparent vacuum of investigation. FTX's new management was already conducting an extensive inquiry into the conduct of prior management, the official committee was undertaking its own investigation, and governmental authorities were pursuing investigations as well. The argument against appointment was therefore intuitively powerful: why impose another layer of professional expense upon the estate to investigate matters that others were already investigating?

The Third Circuit's answer was essentially that Congress had made that policy judgment. Existing investigations could affect the appropriate *scope* of the examiner's work, but they could not eliminate the statutory requirement of appointment. *Id.* at 157–59. An investigation undertaken by management (even new and independent management) is not institutionally identical to an examination conducted by a disinterested statutory actor. Nor is an investigation undertaken by a creditors' committee necessarily the equivalent of an examiner's investigation. The debtor and committee each occupy their own statutory and fiduciary positions within the case; an examiner occupies another.

The distinction is subtle but important for purposes of Myth No. 2. The issue is not whether the debtor, committee, or their professionals are competent or trustworthy. Rather, Congress created an investigative actor whose independence does not depend upon affiliation with any of the principal constituencies competing for value or influence in the Chapter 11 case. The examiner can therefore provide an independent source of investigation and information even where the parties otherwise exercising substantial control over the case believe that no additional investigation is necessary.

At the same time, *FTX* does not require an unlimited examination or give an examiner unrestricted authority. The Third Circuit carefully distinguished between *whether an examiner must be appointed* and *what the examiner should be directed to investigate*. Section 1104(c)'s direction that the examiner conduct "such an investigation of the debtor as is appropriate" concerns the scope of the examination; it does not permit the court to refuse appointment altogether when § 1104(c)(2) applies. *Id.* at 154.

That distinction preserves substantial bankruptcy-court authority over administration of the examination. Existing investigations, expense, potential duplication, and the needs of the particular case may appropriately inform the examiner's mandate. The court can define the subjects to be investigated and tailor the examination to avoid unnecessary duplication and expense. Thus, § 1104(c)(2) can simultaneously make the existence of an independent examiner mandatory while leaving substantial discretion concerning the scope of the independent examination.

This division of authority reflects a broader feature of the examiner's statutory role. An examiner generally does not replace the debtor in possession, operate the business, or exercise all of the powers belonging to a Chapter 11 trustee. *See* Deller, *supra*, at 193–95. Independence of investigation should not be confused with displacement of management. Indeed, the usefulness of an examiner derives in part from the ability to introduce an independent fiduciary function into the case without necessarily producing the substantial governance consequences associated with appointment of a trustee.

For purposes of Myth No. 2, this suggests that "control" should not be understood solely as the power to operate the business, spend money, propose a plan, or select a restructuring transaction. There is also *informational control*, which is the ability to determine what gets investigated, what facts are developed, what questions are asked, and what information becomes available to other participants and ultimately to the court. A debtor may remain fully in possession and continue operating its business while an examiner materially changes that informational dynamic.

That function can be particularly important in a complex case dominated by sophisticated and well-organized constituencies. The debtor, secured lenders, official committee, ad hoc groups, and other major participants may possess substantial information and may even agree upon the principal direction of the case. Yet agreement among those parties does not necessarily eliminate the public or institutional interest in an investigation independent of all of them. As *FTX* demonstrates, Congress may require an independent actor precisely because that actor stands outside the constituencies otherwise shaping the proceeding.

This makes *FTX* an important counterpoint to the increasingly negotiated character of modern Chapter 11. Consensus is ordinarily valuable. It can reduce expense, preserve enterprise value, eliminate litigation, and facilitate successful reorganization. But consensus among the principal economic actors does not permit them to contract around statutory institutions that Congress has made mandatory. Where § 1104(c)(2) applies and appointment is properly requested, neither agreement among the parties nor a judicial determination that the examination is economically inefficient permits elimination of the examiner.

The decision therefore illustrates an important limitation upon private control of a Chapter 11 case. Economic leverage can determine which transactions parties will support. DIP financing can influence the debtor's strategic alternatives. Creditor holdings can affect voting power. Management ordinarily controls business operations. But Congress retains the ability to allocate particular functions to independent statutory actors, and those allocations themselves form part of the governance structure of Chapter 11.

For that reason, the examiner presents a particularly useful MythBusters question: If an examiner ordinarily cannot operate the debtor's business or dictate its restructuring strategy, can the examiner nevertheless meaningfully affect who controls the case? The answer should be yes; although the degree will depend upon the timing, scope, quality, and transparency of the examination. An examiner who independently develops facts, tests the narratives advanced by the principal parties, and provides information relevant to later judicial or fiduciary decisions may influence the course of a case without ever making an operational decision.

The examiner thus occupies an unusual but important position in the allocation of Chapter 11 power. A trustee can change who runs the debtor. An examiner can change what everyone knows about the debtor and the events being investigated. In a system in which information influences bargaining leverage, fiduciary decision making, litigation, settlement, and judicial approval, the latter form of authority should not be underestimated.

FTX ultimately reinforces the broader lesson of Myth No. 2. Control over a Chapter 11 case is not allocated exclusively by economic leverage, management authority, or agreement among the principal parties. Congress itself has allocated responsibilities among debtors in possession, committees, trustees, examiners, the United States Trustee, and bankruptcy courts. Where Congress makes one of those allocations mandatory, neither consensus among the parties nor understandable concerns about cost and efficiency permit the participants (or the court) to rewrite that statutory allocation of responsibility.

N. Chief Restructuring Officers and the Rise of the Professional Decisionmaker

Between ordinary management and appointment of a statutory trustee lies an increasingly important category of restructuring professionals. A chief restructuring officer may be installed before or after filing to manage liquidity, negotiate with creditors, supervise operations, conduct a sale process, develop a business plan, investigate transactions, or otherwise provide expertise that existing management lacks.

CROs can solve genuine governance problems. A founder who understands the business but has little restructuring experience may benefit from an experienced professional capable of communicating with lenders and implementing the disciplines required during financial distress. A CRO may also provide credibility to creditors concerned about prepetition management.

But the role presents an accountability question. Who selected the CRO? To whom does the CRO report? What relationships existed with the lender, sponsor, or restructuring counsel? Does compensation depend upon a sale or other particular outcome? Has the CRO effectively displaced management without the statutory protections accompanying appointment of a Chapter 11 trustee?

Similar questions apply to financial advisors, investment bankers, restructuring counsel, claims professionals, and other advisors. Their expertise can be indispensable, but expertise itself is a form of influence.

The Bankruptcy Code responds in part through professional-retention, disinterestedness, disclosure, and compensation requirements. See 11 U.S.C. §§ 327, 328, 330. The Third Circuit has repeatedly emphasized the importance of professional disclosure and freedom from disabling conflicts. See, e.g., *In re Pillowtex, Inc.*, 304 F.3d 246, 251–55 (3d Cir. 2002).

The question for Myth No. 2 is not whether professionals exert influence. They necessarily do. It is whether the parties with formal decision-making authority independently evaluate professional recommendations or simply implement a restructuring architecture designed by advisors possessing superior information and expertise. Put differently: Do restructuring professionals advise the decisionmakers, or can they become the practical decisionmakers themselves?

O. Information as a Form of Control

Money is not the only source of bankruptcy leverage. Information can be equally important.

The debtor and its principal lenders may spend months negotiating before the petition is filed. They may possess management projections, valuations, financing analyses, market testing, communications concerning rejected alternatives, information regarding potential claims, and detailed knowledge concerning the events that produced the proposed restructuring.

Other participants may enter the case without any comparable informational foundation. A newly appointed committee may receive lengthy declarations and hundreds of pages of financing documents shortly before a hearing. Small creditors may possess only the information contained in public pleadings. Employees and other affected stakeholders may not retain counsel at all.

This asymmetry becomes particularly consequential in expedited proceedings. A bankruptcy judge may receive a declaration explaining that a proposed financing arrangement or sale is the debtor's "only viable alternative." That conclusion may be accurate, but meaningful judicial review can require an understanding of what alternatives were considered, when they were considered, who rejected them, what information the board received, and whether the apparent emergency resulted from external circumstances or prepetition choices.

Declarations can efficiently establish undisputed facts, and expedited bankruptcy cases cannot convert every first-day matter into a trial. Yet speed should not cause a legal conclusion about necessity to substitute for an evidentiary record concerning how necessity arose.

The party controlling information therefore may possess an important form of procedural power. If only the parties who designed the transaction know why competing alternatives disappeared, can other stakeholders meaningfully evaluate whether the proposed transaction is truly inevitable?

P. Releases, Exculpation, and Accountability for Those Exercising Control

Control raises a particularly sensitive question when those exercising substantial influence over a restructuring also seek protection from liability through the restructuring itself. Plans, settlements, financing arrangements, and sale transactions may contain releases, exculpation provisions, indemnification rights, or other protections benefiting debtors, lenders, directors, officers, professionals, sponsors, committee members, or other participants. The greater the influence of a particular constituency over the architecture of the case, however, the more important it becomes to ask who negotiated the protection, whose claims are being affected, and what legal authority permits the court to grant it.

Some protections serve legitimate and important purposes. Fiduciaries and court-appointed professionals should not necessarily face unlimited liability merely for performing their functions in a restructuring. Settlements frequently require reciprocal releases, and parties contributing substantial value may reasonably insist upon finality as part of the consideration for a negotiated resolution.

It is also important to distinguish releases from exculpation. A third-party release may extinguish claims held by creditors or other parties against a nondebtor. An exculpation provision, by contrast, may prescribe a standard of liability for specified conduct undertaken in connection with the restructuring rather than extinguish the underlying claim altogether. See *In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000).

The accountability concern becomes more pronounced when parties that substantially controlled the restructuring process also influenced whether potential claims against themselves would be investigated, prosecuted, settled, released, or otherwise limited. A debtor dependent upon a secured lender for cash-collateral consent or debtor-in-possession financing, for example, may have little practical bargaining leverage when negotiating protections requested by that lender. Similar concerns may arise when insiders, sponsors, directors, or other powerful constituencies participate in negotiating a plan that simultaneously resolves potential claims against them. The problem is especially acute for absent or dissenting stakeholders who neither participated in the negotiations nor consented to the surrender or limitation of their rights.

The Third Circuit has long approached nonconsensual third-party releases cautiously. In *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203 (3d Cir. 2000), the court rejected the nonconsensual releases before it and emphasized the extraordinary character of such relief. *Id.* at 211–14. The court distinguished releases of claims belonging to the debtor or estate from provisions affecting direct claims belonging independently to creditors against nondebtor parties. See *id.* at 212–14.

The Supreme Court substantially clarified the latter category in *Harrington v. Purdue Pharma L.P.*. There, the Court held that the Bankruptcy Code does not authorize an ordinary Chapter 11 plan, over the objection of affected creditors, to extinguish claims held by those creditors against nondebtor third parties without their consent. 603 U.S. at 227. The significance of *Purdue Pharma* extends beyond third-party releases themselves. The decision reinforces a more fundamental proposition: asserted necessity, negotiated consensus among major constituencies, substantial economic contributions, and even the perceived desirability of a particular restructuring outcome cannot confer judicial authority that Congress has not supplied.

Purdue Pharma, however, did not hold that every exculpation provision constitutes an impermissible nonconsensual third-party release. That distinction has now assumed particular importance. In *In re Voyager Digital Holdings, Inc.*, 2026 WL 2241168 (S.D.N.Y. Aug. 4, 2026), Chief Judge Laura Taylor Swain considered an exculpation provision protecting specified participants from liability arising from actions undertaken in negotiating, executing, and implementing a confirmed Chapter 11 plan. Judge Swain concluded that the provision was materially different from the nonconsensual third-party release invalidated in *Purdue Pharma*. Unlike the release in *Purdue*, the Voyager provision did not broadly discharge preexisting claims against nondebtors for their own conduct; it addressed specified conduct associated with implementation of the plan and preserved liability for actual fraud, willful misconduct, and gross negligence. *Id.* at *6–7. In drawing that distinction, the court relied in part upon the Third Circuit's observation in *PWS Holding* that an exculpation provision may prescribe an applicable standard of liability rather than eliminate liability altogether. *Id.* at *7 (citing *PWS Holding*, 228 F.3d at 247). Judge Swain therefore concluded that "Purdue Pharma's condemnation of nonconsensual third-party releases" did not, standing alone, require rejection of the exculpation provision.

That conclusion did not end the inquiry. Judge Swain proceeded to ask a more fundamental question: what provision of the Bankruptcy Code affirmatively authorized the bankruptcy court to confer the proposed exculpation? The court rejected §§ 105(a), 1123(b)(6), 1129(a)(3), 1142(a), and 1142(b) as sufficient sources of authority. *Voyager*, 2026 WL 2241168, at *8–12. Section 105(a) could not independently supply substantive authority absent some other Code provision to which its exercise could be tethered. Nor, particularly after *Purdue Pharma*, could the catchall language of § 1123(b)(6) support the provision merely because the exculpation was considered useful or necessary to the reorganization. And the statutory authority to direct implementation of a confirmed plan did not, in Judge Swain's view, necessarily carry with it authority prospectively to immunize those implementing the plan from consequences imposed by otherwise applicable nonbankruptcy law.

Nor could the Voyager provision be sustained simply as an application of common-law quasi-judicial immunity. That doctrine provides important protection to persons performing functions sufficiently connected with the judicial process. But Judge Swain identified a critical distinction between recognizing immunity supplied by law *after* conduct has occurred and prospectively creating immunity through a confirmation order *before* the conduct occurs. Quasi-judicial immunity ordinarily operates ex post as a defense to an actual claim, when a court can examine the identity and function of the defendant, the conduct actually undertaken, the source and scope of the defendant's authority, and the law governing that conduct. The Voyager provision instead purported to establish ex ante that plan participants would be protected from liability for future conduct undertaken in implementing the plan. *Id.* at *13–15. Judge Swain found no adequate basis for transforming the traditional immunity doctrine into such a prospective grant of protection.

The quasi-judicial-immunity question has a significant Third Circuit dimension. In *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Properties, LLC)*, 872 F.3d 138 (3d Cir. 2017), a Chapter 7 trustee was sued under 42 U.S.C. § 1983 after taking control of leased premises while attempting to protect the bankruptcy estate's largest asset from further damage. The Third Circuit majority held that bankruptcy trustees are government officials entitled to *Harlow* qualified immunity from § 1983 claims by third parties when acting in their official capacity in a manner not contrary to clearly established law. *Id.* at 143. The court concluded that the trustee's actions were protected because she acted within her statutory responsibilities under § 704 to administer and preserve property of the estate and did not violate clearly established law. *Id.* at 143–46.

Although the majority did not decide whether quasi-judicial immunity independently protected the trustee's conduct before entry of an order expressly authorizing her actions, it recognized an important distinction relevant to plan exculpation. After the bankruptcy court entered an order expressly authorizing the trustee to control access to the property, the court regarded the trustee as protected by absolute quasi-judicial immunity for actions faithfully implementing that order. See *id.* at 146 n.3. The proposition that a trustee may be immune when carrying out a specific judicial command, however, is materially different from the proposition that a bankruptcy court may prospectively confer immunity upon a broader class of restructuring participants for future conduct merely by including that protection in a confirmation order.

Circuit Judge Fisher's separate concurrence in *J & S Properties* developed the quasi-judicial-immunity issue more fully. He traced the modern bankruptcy trustee's role to English bankruptcy commissioners and assignees, early American bankruptcy practice, and the equity receiver, emphasizing the trustee's longstanding function as an instrument of the court in administering property subject to judicial control. *Id.* at 149–51 (Fisher, J., concurring). Applying the Supreme Court's functional approach to quasi-judicial immunity, Judge Fisher would have held that Chapter 7 trustees possess such immunity for actions undertaken within the scope of their duties and necessary to the bankruptcy court's adjudication of the debtor's estate. *Id.* at 149–52.

Judge Fisher also drew an important distinction between claims by estate beneficiaries for breach of fiduciary duty and tort or contract claims asserted by third parties. He observed that trustees may be held personally liable for breaches of fiduciary duty, while courts have recognized quasi-judicial immunity for third-party claims arising from actions taken in the trustee's official capacity. *Id.* at 150–51 (Fisher, J., concurring). That immunity does not extend to ultra vires conduct. Nor, in Judge Fisher's view, is a prior court order invariably necessary for a trustee to invoke quasi-judicial immunity when the trustee acts on behalf of the estate and within the scope of the trustee's statutory authority.

J & S Properties therefore helps illuminate rather than undermine Judge Swain's analysis in *Voyager*. Traditional quasi-judicial immunity asks whether a particular actor performing a particular judicial or quasi-judicial function is protected for conduct actually undertaken within the scope of that function. Its application depends upon the actor, the function performed, the source and scope of authority, the conduct actually undertaken, and, in some circumstances, whether the actor faithfully implemented a judicial command. A plan exculpation provision may attempt to accomplish something materially different: determining in advance that numerous restructuring participants will be protected from liability for a category of future conduct before that conduct occurs and before the factual and legal predicates for immunity can be evaluated.

That temporal distinction carries substantive consequences. When immunity is asserted as a defense to an actual claim, the adjudicating court can determine whether the defendant was performing a protected function, whether the challenged conduct fell within the scope of that function, whether the conduct was authorized or directed by a court order, whether the asserted immunity extends to the particular cause of action, and whether an exception such as ultra vires conduct applies. Prospective exculpation may eliminate or substantially constrain that inquiry before the relevant facts even exist. Thus, the fact that a restructuring participant might ultimately possess quasi-judicial immunity does not necessarily mean that a bankruptcy court has authority to declare prospectively that the participant will possess it.

Read together, *J & S Properties* and *Voyager* therefore help define the boundary between legitimate immunity and prospective exculpation. *J & S Properties* demonstrates why bankruptcy fiduciaries require meaningful protection when exercising discretionary judgment in administering an estate or faithfully carrying out judicial directives. *Voyager* asks the different question whether that traditional protection can be transformed through confirmation into prospective immunity for future conduct by a broader collection of restructuring participants. The answer to the first question does not necessarily answer the second.

The distinction between prohibition and authorization is equally important. The fact that *Purdue Pharma* does not prohibit every exculpation provision does not establish that the Bankruptcy Code authorizes every such provision. Likewise, the existence of a common-law immunity that might protect a particular fiduciary for particular conduct does not necessarily authorize a bankruptcy court to confer that immunity prospectively upon restructuring participants through a plan. The proponent still must identify the legal source of the protection sought.

The same structural principle appears in *Czyzewski v. Jevic Holding Corp*. There, the Supreme Court rejected a structured dismissal that distributed estate property in violation of ordinary priority rules without the consent of the adversely affected creditors. 580 U.S. at 455–57, 465. Like *Purdue Pharma* and, more recently, *Voyager*, *Jevic* demonstrates that agreement among powerful constituencies cannot substitute for statutory authority or override protections Congress afforded to stakeholders who did not consent.

These authorities provide an important answer to Myth No. 2. Economic power unquestionably can shape the trajectory of a bankruptcy case. It can influence financing, litigation, settlements, asset sales, plan negotiations, and ultimately the range of outcomes realistically available to the debtor. But economic power does not itself create legal authority. Nor does control over the negotiating process necessarily carry with it the power to determine the legal consequences of that control.

One of the bankruptcy court's most important functions is preserving that distinction. Parties should be permitted to bargain vigorously within the framework Congress created, and fiduciaries performing legitimate functions of the bankruptcy system should receive the protections the law affords them. But neither economic leverage, negotiated consensus, nor the inclusion of protective language in a plan can substitute for the legal authority necessary to make that protection binding. The ultimate questions remain: who has the authority to confer the protection, upon whom, against whose claims, for what conduct, and at what point in time?

Q. The Bankruptcy Judge: Umpire or Supervisor?

The proper role of the bankruptcy judge brings the control inquiry to its institutional endpoint. One conception is that a bankruptcy judge should largely "call balls and strikes." Parties control litigation, debtors exercise business judgment, creditors protect their rights, markets determine value, and the judge neutrally applies the Bankruptcy Code to disputes properly presented.

There is considerable force to that view. Bankruptcy judges ordinarily lack the industry expertise of management, the financial expertise of investment bankers, the information possessed by lenders, and the ability to predict whether one business strategy will outperform another. An overly interventionist court can disrupt negotiations, deter financing, increase uncertainty, favor one constituency over another, and transform the neutral adjudicator into an unofficial participant in the restructuring.

The Code also imposes meaningful limits upon equitable authority. In *Law v. Siegel*, 571 U.S. 415 (2014), the Supreme Court made clear that § 105(a) and inherent equitable powers cannot be used to contravene express provisions of the Bankruptcy Code. *Id.* at 421–27. A bankruptcy court is a court of law exercising statutory authority, not a roving commission empowered to produce whatever outcome seems fairest.

But the opposing conception also has substantial force. Bankruptcy is not ordinary bilateral litigation. It is a collective proceeding affecting creditors and stakeholders who may be dispersed, unrepresented, unable to afford participation, or unaware that early orders will substantially affect their rights.

The Bankruptcy Code repeatedly assigns independent responsibilities to the bankruptcy court. Section 363(b) requires judicial approval for nonordinary-course dispositions. Section 364(d) requires findings before a priming lien may be granted. Section 1104 assigns the court responsibility for trustee and examiner determinations. Section 1129 requires the court independently to determine whether confirmation requirements have been satisfied. Rule 9019 similarly requires judicial approval of compromises affecting the estate.

Settlement law provides a particularly good example. In *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968), the Supreme Court required the bankruptcy court to exercise informed and independent judgment when evaluating a compromise. Agreement by the parties proposing the settlement does not relieve the court of its responsibility to evaluate whether the compromise is appropriate.

The Third Circuit similarly requires meaningful evaluation of settlements. See *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996). Among other matters, the court considers the probability of success in litigation, likely difficulties in collection, complexity and expense, and the paramount interests of creditors.

The supervisory role therefore need not mean that the bankruptcy judge becomes a business manager. It can instead mean that the court insists upon the evidentiary and statutory foundation necessary to exercise the authority Congress assigned to it.

The distinction is crucial. Judicial scrutiny is not judicial management. A court can insist upon disclosure, evidence, adherence to statutory standards, meaningful notice, appropriate investigation, and preservation of stakeholder rights without substituting its business judgment for the debtor's.

R. When Everyone at Counsel Table Agrees

Perhaps the hardest test of judicial supervision arises when the major organized parties agree. The debtor, secured lender, committee, sponsor, and principal creditor groups may jointly present a settlement or transaction and advise the court that no meaningful opposition exists.

Consensus is important evidence. Negotiated agreement among sophisticated parties frequently reflects compromise among competing interests, reduces litigation expense, and makes successful restructuring possible. Bankruptcy would function poorly if courts treated every consensual resolution with suspicion simply because it resulted from negotiation.

But consensus among organized parties is not necessarily consensus among everyone whose rights will be affected. Employees, retirees, consumers, small trade creditors, future claimants, taxing authorities, landlords, unrepresented creditors, and other parties may not be sitting at counsel table.

An absence of objection can mean agreement. It can also mean lack of notice, lack of information, inability to afford counsel, economic futility, or a conclusion that the cost of objecting exceeds the amount at stake.

That gives rise to one of the more important questions for the judiciary in complex bankruptcy cases: When everyone at counsel table agrees, should the court ask who is not at counsel table?

The answer should not be that courts must invent arguments for absent parties. Judicial neutrality remains essential. But where Congress requires independent statutory findings, the absence of an adversarial objection cannot relieve the court of the responsibility to make them.

Jevic and *Purdue Pharma* reinforce precisely that point. A highly negotiated solution may be economically sensible, widely supported, and perhaps even regarded by the organized constituencies as the only realistic outcome. Those considerations do not authorize relief inconsistent with the Bankruptcy Code.

Thus, the bankruptcy judge's most important control function may sometimes be a negative one: preventing practical consensus from becoming a substitute for legal authority.

Hypothetical: The Passive Judge

Assume that a debtor, its secured lender, and the official committee jointly support a comprehensive transaction. The DIP lender will finance a sale, the committee will receive a settlement fund for unsecured creditors, management will remain employed by the buyer, and major litigation will end.

No party objects. The evidence indicates that failure to approve the transaction will create a serious risk of liquidation. The judge nevertheless observes that the transaction releases potential claims against insiders, rests upon a truncated investigation, and leaves little value for stakeholders who did not participate in the negotiations.

Should the court approve the transaction because the affected organized constituencies have exercised informed business judgment? Or should the court independently examine whether the proposed releases, settlement, sale procedures, and distributions satisfy the Bankruptcy Code even when no one objects?

The answer should not turn on whether the judge favors the transaction. The relevant inquiry is which findings Congress and the Bankruptcy Rules independently require the court to make and whether the evidence supports them.

This demonstrates the difference between an active judge and a managerial judge. The former rigorously performs the adjudicative responsibilities assigned by law. The latter risks substituting personal restructuring preferences for the judgments entrusted to fiduciaries and market participants.

S. Control in Consumer Bankruptcy

Although Myth No. 2 naturally emphasizes Chapter 11, questions of control also arise in consumer cases. A Chapter 13 debtor technically proposes the plan, but the range of permissible plans is constrained by the Bankruptcy Code, secured-creditor rights, trustee positions, applicable plan forms, local rules, feasibility, disposable-income requirements, and judicial decisions.

Debtor's counsel may exercise particularly significant influence. The attorney often determines which chapter is recommended, how exemptions are claimed, whether liens can be avoided, what treatment of secured claims is possible, whether litigation is economically worthwhile, and whether the debtor has enough income to propose a feasible plan. A debtor lacking sophisticated financial or legal knowledge may formally make the choice while relying almost entirely upon professional advice concerning which choices actually exist.

Standing trustees also possess meaningful practical influence. They administer cases, review plans, examine debtor compliance, raise objections, monitor payments, and develop substantial institutional expertise. Local practices concerning plan payments, mortgage treatment, attorney compensation, documentation, and modification may materially affect the debtor's options.

Secured creditors can also determine whether particular rehabilitative objectives remain realistic. A debtor may wish to preserve a home or automobile, but the Bankruptcy Code's requirements concerning cure, adequate protection, valuation, interest, and plan feasibility constrain the available result.

The consumer context therefore reinforces the broader point. Formal debtor choice does not necessarily mean unconstrained debtor control. Often the debtor is choosing among a limited set of alternatives produced jointly by substantive law, economics, creditor rights, professional advice, and local practice.

T. Who Bears Responsibility When Formal and Practical Control Diverge?

A deeper problem emerges when practical control and legal responsibility are allocated to different participants. The debtor in possession may owe fiduciary duties while the lender effectively determines the available restructuring path. The board may formally approve a transaction largely designed by restructuring professionals. A committee may represent unsecured creditors while an ad hoc group possesses greater bargaining leverage. The judge may enter the order that authorizes the transaction even though the economic alternatives were constructed elsewhere.

This division creates an accountability problem. Bankruptcy law generally imposes duties upon parties holding formal office or statutory authority. Yet practical influence may be exercised by parties that owe no comparable fiduciary obligations.

That does not mean economic influence itself should create fiduciary status. Creditors ordinarily remain entitled to pursue their own interests, lenders may decline to provide financing, and advisors may properly advocate the positions of the clients they represent.

The question instead is whether formal decisionmakers are exercising their own judgment or merely serving as mechanisms through which economically dominant parties implement decisions. Fiduciary accountability has little meaning if the fiduciary retains the title while another participant determines every economically realistic choice.

Accordingly, courts should ordinarily focus not simply upon identifying influence but upon preserving genuine decision-making processes. Was the board informed? Were alternatives considered? Did management independently evaluate lender demands? Were conflicts disclosed? Did an independent committee possess adequate authority and information? Was the committee given a meaningful opportunity to investigate? Did the court receive evidence sufficient to make the findings required by statute?

Those questions do not eliminate economic power. They make its exercise visible and subject the legal decisionmakers to the responsibilities that accompany their authority.

U. Myth Versus Reality

The proposition that "the right people control bankruptcy cases" cannot fairly be labeled wholly myth or wholly reality. The Bankruptcy Code contains a sophisticated allocation of formal authority. Debtors in possession operate Chapter 11 businesses, boards retain applicable corporate authority, committees represent creditor constituencies, trustees can replace conflicted management, examiners can provide independent investigation, and bankruptcy judges exercise substantial statutory oversight.

Those structures matter. *Cybergenics* allows a committee to act when debtor control of estate litigation becomes problematic. Section 1104 permits or requires independent fiduciaries in specified circumstances. Sections 363 and 364 protect secured interests while conditioning transactions affecting estate property upon judicial review. Section 1129 prevents plan proponents from converting private agreement into a binding restructuring without satisfying congressional confirmation standards.

Yet practical control frequently follows something other than formal legal title. It may follow liquidity, contractual rights, information, appointment power, creditor voting positions, access to professionals, control over collateral, or the ability to terminate financing. A participant need not possess affirmative authority to dictate an outcome if that participant can veto every economically viable alternative.

The distinction between positive and negative control is particularly important. Management may possess the affirmative authority to propose a transaction, but a lender capable of refusing every alternative may have greater practical influence over which transaction will be proposed. A committee may possess authority to object, but that right may provide limited leverage if rejection of the transaction would result in immediate liquidation.

Recognizing those realities does not mean that lender influence, restructuring professionals, independent governance, or prepetition negotiation is improper. Bankruptcy cases require capital, expertise, speed, negotiation, and decisive action. A system in which every participant possessed equal bargaining power would be neither realistic nor necessarily efficient.

The relevant question is whether economic power remains bounded by the legal structure Congress created. A secured creditor may negotiate aggressively but remains subject to §§ 361, 363, and 364. A debtor may exercise business judgment but remains a fiduciary. A committee may advocate forcefully but represents a statutory constituency. A trustee displaces management only under the standards imposed by § 1104. An examiner exercises authority defined by statute and court order. And a bankruptcy judge may supervise the process but cannot use equitable powers to disregard statutory limitations.

The system therefore does not assign "control" to a single participant. Different actors control different decisions, at different times, for different purposes, under different sources of authority.

The more useful conclusion is accordingly nuanced. The parties formally authorized to control bankruptcy cases may not always be the parties who determine what outcomes are realistically possible. Practical control often follows money, information, contractual leverage, governance rights, timing, and the ability to withhold consent.

That observation suggests a more important question than simply asking who controls the case: Is the exercise of practical power visible, accountable, and constrained by the fiduciary obligations, statutory priorities, procedural protections, and judicial review that distinguish bankruptcy from a purely private workout? If the answer is yes, the formal structure of the Bankruptcy Code can accommodate substantial differences in economic power without surrendering the collective character of bankruptcy. If the answer is no, legal control risks becoming a matter of form while substantive decisions are made elsewhere.

That leads naturally to Myth No. 3. If lenders, investors, professionals, markets, contracts, and prepetition transactions substantially determine which choices remain economically possible, then the next inquiry is unavoidable: When a bankruptcy court ultimately approves a financing arrangement, sale, settlement, or plan, did the court determine the restructuring outcome? Or, did it determine whether an outcome constructed elsewhere could lawfully be implemented through the Bankruptcy Code?

IV. MYTH NO. 3: BANKRUPTCY COURTS DETERMINE RESTRUCTURING OUTCOMES

A. What Does It Mean to "Determine" a Restructuring Outcome?

The third myth begins with another proposition that is both intuitively appealing and substantially correct. Bankruptcy courts approve sales of significant estate assets, authorize postpetition financing, adjudicate disputes concerning claims and liens, approve settlements, determine whether disclosure and solicitation requirements have been satisfied, and ultimately decide whether a Chapter 11 plan may be confirmed. See 11 U.S.C. §§ 363, 364, 502, 1125, 1126, 1129. In the most literal legal sense, many of the transactions that define a restructuring cannot become effective without judicial action.

Yet legal authority to approve an outcome is not necessarily the same thing as economic power to create it. By the time a Chapter 11 case reaches the bankruptcy court, the debtor may have spent months negotiating with lenders and major creditor groups. The company's capital structure may have been established years earlier, substantially all assets may be encumbered, intercreditor agreements may constrain creditor behavior, a restructuring-support agreement may have already attracted substantial creditor support, and a debtor-in-possession financing commitment may require achievement of specified restructuring milestones.

The distinction between *legal determination* and *economic determination* is therefore central to Myth No. 3. A bankruptcy judge may determine whether a proposed transaction satisfies the Bankruptcy Code, but that does not necessarily mean the judge selected the transaction from among all theoretically conceivable alternatives. In many cases, the realistic alternatives were created, narrowed, or eliminated before the matter reached the courtroom.

The relevant question is consequently not whether bankruptcy courts possess substantial power. They plainly do. The more difficult question is: By the time the court is asked to exercise that power, how much of the restructuring outcome remains genuinely undecided?

That inquiry does not diminish the importance of judicial review. To the contrary, as private ordering becomes more sophisticated and restructuring transactions become increasingly negotiated before bankruptcy, judicial enforcement of statutory limits may become more important. But it does require a distinction between the court as architect of the restructuring and the court as adjudicator of whether a restructuring designed elsewhere may lawfully receive the benefits and consequences of federal bankruptcy law.

B. Bankruptcy Begins With the Capital Structure It Is Given

A Chapter 11 case does not commence on a blank economic canvas. The debtor arrives with assets, liabilities, liens, contracts, guarantees, organizational structures, maturities, intercreditor agreements, litigation claims, tax obligations, leases, intellectual property rights, and other legal relationships created before bankruptcy.

Section 541 generally brings the debtor's interests in property into the bankruptcy estate, but bankruptcy ordinarily takes those interests subject to limitations that existed under applicable nonbankruptcy law. See 11 U.S.C. § 541. As the Supreme Court famously explained in *Butner v. United States*, 440 U.S. 48 (1979), property interests ordinarily are created and defined by state law unless a federal bankruptcy interest requires a different result. *Id.* at 54–55.

Bankruptcy can alter the enforcement of those rights dramatically. The automatic stay prevents many unilateral collection actions, executory contracts may be assumed or rejected, liens may be avoided in circumstances authorized by Congress, claims may be modified, and a confirmed plan can bind dissenting creditors. See 11 U.S.C. §§ 362, 365, 544–553, 1123, 1129, 1141.

But bankruptcy generally does not erase the capital structure merely because a different capital structure would facilitate reorganization. A creditor holding a valid first-priority lien ordinarily begins the case in a very different position from an unsecured creditor. A creditor protected by a guarantee or structural seniority may possess different leverage from a creditor without those rights. A lender whose documents permit particular collateral transfers may possess different prepetition rights from a lender whose documents prohibit them. Bankruptcy can alter the enforcement and treatment of these rights, but the prepetition allocation of liens, priorities, guarantees, and contractual rights establishes the economic starting point from which the restructuring proceeds.

The Third Circuit's decision in *In re SubMicron Systems Corp.*, 432 F.3d 448 (3d Cir. 2006), illustrates the point. There, prepetition secured lenders ultimately participated in an acquisition vehicle that purchased the debtor's assets through a transaction involving a credit bid under § 363(k). In rejecting challenges to the secured claims underlying the transaction, the Third Circuit explained the relationship between the amount of the debt, the value of the collateral, and the secured status afforded by § 506(a). *Id.* at 455–59. The fact that collateral may be worth less than the total debt does not simply erase the underlying secured obligation or the rights arising from the lien; rather, § 506(a) determines the extent to which an allowed claim is treated as secured for particular bankruptcy purposes. *See id.*

SubMicron also illustrates why capital structure affects more than the order in which value is distributed. A secured creditor's position can provide *strategic optionality* unavailable to an unsecured creditor. Section 363(k), for example, generally permits a secured creditor, unless the court for cause orders otherwise, to credit bid its allowed claim when its collateral is sold. 11 U.S.C. § 363(k). The secured claim can therefore function not merely as an entitlement to receive sale proceeds, but as acquisition currency through which the creditor may compete to acquire the collateral itself. *See SubMicron*, 432 F.3d at 459–61. A creditor's place in the prepetition capital structure can consequently influence not only how much value it receives, but also what restructuring alternatives it possesses and who may ultimately own the enterprise or its assets.

Priority therefore affects optionality. If enterprise value substantially exceeds secured debt, junior constituencies may possess meaningful leverage concerning plan structure and distributions. If secured claims consume nearly all enterprise value, the senior creditor may possess considerably greater practical influence because the range of economically plausible outcomes narrows. And if no value remains for junior stakeholders, their ability to compel a different economic outcome may be limited even though they retain important procedural and statutory rights.

The point is not that priority invariably determines the restructuring outcome or that secured creditors possess unlimited control. The Bankruptcy Code imposes important constraints upon the exercise of secured-creditor rights, and valuation itself may be vigorously contested. Rather, capital structure establishes the parties' starting positions and helps define the alternatives realistically available to them. A first-lien creditor, an unsecured creditor, and an out-of-the-money equity holder may participate in the same Chapter 11 case, but they do not necessarily arrive with the same economic leverage, statutory tools, or ability to influence the restructuring.

The first determinant of many restructuring outcomes is therefore not a bankruptcy order. It is the capital structure that existed when the petition was filed. Bankruptcy determines what may lawfully be done with that capital structure; it does not begin by pretending that the capital structure does not exist.

Hypothetical: Same Business, Same Value, Different Capital Structure

Assume that Company A and Company B operate identical businesses. Each owns assets worth approximately $100 million, generates the same revenue and cash flow, employs the same number of workers, and has $80 million of funded debt. Each experiences the same temporary liquidity crisis and files Chapter 11 on the same day.

There is only one material difference. Company A's $80 million of debt consists of unsecured notes held by a dispersed group of institutional investors. Company B owes the same $80 million to a single lender holding a valid first-priority lien on substantially all of the company's assets, including its accounts, inventory, equipment, and cash.

Company A enters bankruptcy with substantially all of its assets unencumbered. Its noteholders possess significant claims and voting rights, but no single creditor possesses a lien on the company's operating assets or a right to prevent the debtor from using cash because it constitutes that creditor's cash collateral. The debtor may seek DIP financing secured by previously unencumbered assets, negotiate competing restructuring proposals, or attempt to confirm a standalone plan that distributes new equity to creditors.

Company B begins from a very different position. Its principal operating assets are already encumbered, its cash may constitute cash collateral subject to § 363(c)(2), and any attempt to prime the existing lender must satisfy § 364(d). If the business is sold, the lender may also possess the right to credit bid under § 363(k). The same $80 million debt burden therefore carries with it a substantially different collection of statutory rights, bargaining positions, and restructuring alternatives.

Suppose now that each company needs an additional $15 million to finance six months of operations while pursuing a reorganization. Company A may be able to offer a new lender a first lien on previously unencumbered assets. Company B cannot offer the same collateral package without confronting its existing lender's liens and the requirements of the Bankruptcy Code. If Company B's existing lender declines to consent to priming financing but is willing to fund a prompt sale process, the range of economically realistic alternatives may narrow considerably.

The businesses remain operationally identical. Their assets have the same value, their employees perform the same work, their revenues are the same, and their aggregate debt is the same. Yet the Chapter 11 cases may follow dramatically different paths because the prepetition capital structures allocated rights and leverage differently before either petition was filed.

The comparison also demonstrates why priority affects optionality. Company A's unencumbered assets may provide financing flexibility that permits management to purchase time in which to pursue competing restructuring alternatives. Company B's secured lender possesses not only priority in distributions but rights concerning cash collateral, adequate protection, priming, and potentially credit bidding that can materially affect which restructuring alternatives are feasible.

Neither outcome is dictated automatically by the Bankruptcy Code, and the bankruptcy court retains substantial authority concerning cash collateral, adequate protection, DIP financing, asset sales, and confirmation. But the court does not begin either case with a blank slate. It begins with the property rights and capital structures the parties brought into bankruptcy.

C. Contractual Architecture and the Allocation of Leverage

Modern financing documents do more than establish the amount of debt and interest rate. They allocate rights concerning collateral, guarantees, amendments, voting, debt issuance, asset transfers, lien priority, restricted subsidiaries, investments, distributions, and remedies following default.

Those provisions can profoundly affect restructuring leverage. An intercreditor agreement may determine which creditor can exercise remedies against collateral. A subordination agreement may alter distributions among creditors. Guarantee structures can create claims against multiple entities. Structural subordination can place value at subsidiaries beyond the direct reach of parent-level creditors.

Section 510(a) expressly provides that subordination agreements are enforceable in bankruptcy "to the same extent that such agreement is enforceable under applicable nonbankruptcy law." 11

U.S.C. § 510(a). Congress thus deliberately incorporated an important category of prepetition private ordering into the bankruptcy distribution system.

Other provisions impose bankruptcy-specific limits. Contractual provisions triggered solely by insolvency or bankruptcy may be unenforceable in circumstances prescribed by §§ 365(e) and 541(c). The automatic stay limits enforcement of contractual remedies. Section 1129 imposes confirmation requirements that private agreement cannot simply displace.

The system therefore simultaneously respects and modifies private ordering. Bankruptcy is neither a complete reset of prepetition contracts nor mechanical enforcement of every contractual term. That distinction matters because sophisticated parties increasingly negotiate credit documents with potential future restructuring strategies in mind. The availability of non-pro-rata exchanges, unrestricted subsidiary transfers, additional debt capacity, lien baskets, open-market purchase provisions, and amendment thresholds can affect what distressed borrowers and creditor groups are capable of accomplishing before bankruptcy. By the time Chapter 11 begins, those contractual rights may already have been exercised.

D. Liability Management Transactions: Restructuring Before Bankruptcy

Few developments illustrate the importance of prepetition deal architecture more clearly than the growth of liability management transactions. These transactions generally seek to restructure debt outside bankruptcy by using rights or flexibility contained in existing credit documents to raise new capital, extend maturities, exchange debt, transfer collateral, alter priorities, or otherwise change the debtor's capital structure.

The terminology encompasses a range of transactions. "Uptiering" transactions may provide participating creditors with new senior or priming debt while leaving nonparticipating creditors in a subordinated position. "Dropdown" transactions may transfer assets to unrestricted or non-guarantor subsidiaries and use those assets to support new financing. Other transactions may involve non-pro-rata exchanges, double-dip structures, new guarantees, or combinations of these techniques.

The legal disputes generated by such transactions frequently arise under state contract law rather than bankruptcy law. Courts may be asked to interpret definitions, amendment provisions, sacred rights, open-market purchase provisions, collateral covenants, pro rata sharing clauses, and implied contractual obligations. The validity of the transaction may therefore be determined principally by the language negotiated in credit documents years before distress arose.

The widely discussed litigation involving Serta Simmons illustrates the phenomenon. In *In re Serta Simmons Bedding, LLC*, 125 F.4th 555 (5th Cir. 2024), the Fifth Circuit rejected the debtor's position that its prepetition uptiering transaction qualified as an "open market purchase" within the governing credit agreement. The court's analysis turned substantially upon contractual interpretation and the terms of the prepetition financing documents.

Whatever one thinks of the policy merits of liability management transactions, they demonstrate an important feature of modern restructuring practice. Sophisticated borrowers and creditor groups may redistribute leverage substantially before a bankruptcy petition is filed.

That can affect the later bankruptcy in several ways. The transaction may determine which creditors hold senior claims, which creditors possess liens, which creditor group controls voting positions, which parties provide DIP financing, and which parties possess sufficient leverage to sponsor a plan. Litigation concerning the prepetition transaction may itself become one of the principal assets or liabilities of the bankruptcy estate.

The bankruptcy court may ultimately adjudicate claims arising from the transaction or determine how the resulting claims are treated. But the economic battlefield was substantially constructed before bankruptcy.

Hypothetical: The Uptier

A borrower owes $500 million under a syndicated credit facility. The loan documents permit specified amendments with majority lender consent but require unanimity for certain enumerated "sacred rights."

The borrower negotiates with lenders holding 55% of the debt. Those lenders provide $100 million of new money and exchange their existing loans for obligations secured by liens senior to the liens supporting the nonparticipating lenders' debt.

The excluded lenders file suit, arguing that the transaction violates the credit agreement. Six months later, the borrower files Chapter 11.

The bankruptcy court now confronts a company whose creditor hierarchy has already been materially altered. Whether that hierarchy is valid may depend upon interpretation of contracts drafted long before the petition date.

Did bankruptcy determine the restructuring hierarchy, or did the prepetition credit documents determine which restructuring strategies were legally available? The answer may determine much of what happens next.

E. Liability Management as an Alternative to Bankruptcy (or a Prelude to It)?

Liability management transactions can be defended as market-based alternatives to bankruptcy. A successful exchange or new-money transaction may provide liquidity, extend maturities, reduce interest expense, avoid the direct and indirect costs of Chapter 11, preserve customer and employee confidence, and permit an enterprise to restructure without judicial intervention.

From that perspective, liability management can enhance access to restructuring. If sophisticated parties can consensually solve a balance-sheet problem outside bankruptcy, there may be little reason to require them to incur the cost of a federal case.

The competing concern is that some transactions may merely postpone bankruptcy while changing who will possess leverage when bankruptcy ultimately occurs. New money may provide a temporary liquidity runway without addressing underlying operational problems. Seniority may be redistributed among creditor groups, leaving excluded creditors to challenge the transaction after substantial value has been consumed.

This produces a particularly useful MythBusters question: Did the prepetition transaction rescue the company from bankruptcy, or did it determine the winners and losers in a bankruptcy that had merely been postponed?

There is no universal answer. Some transactions genuinely solve financial distress; others fail. The important point is that modern restructuring outcomes increasingly may be shaped through transactions occurring outside the bankruptcy courthouse but designed with the possibility of a later bankruptcy very much in mind.

F. Restructuring Support Agreements and the Pre-Negotiated Case

Chapter 11 historically contemplated a period during which the debtor would formulate and negotiate a plan after filing. Modern practice often reverses that sequence. Debtors increasingly negotiate restructuring-support agreements, plan-support agreements, lockup agreements, or similar arrangements before commencement of the case.

These agreements can provide substantial benefits. They may establish support among major creditor groups, reduce uncertainty, shorten the Chapter 11 case, lower professional expense, preserve enterprise value, and permit the debtor to demonstrate to employees, vendors, customers, and financing sources that a viable exit strategy exists.

A prepackaged case takes the concept further by soliciting votes before filing, subject to the requirements of § 1126(b). See 11 U.S.C. § 1126(b). Properly implemented, a prepackaged bankruptcy can accomplish in weeks what an unplanned Chapter 11 might require months or years to achieve.

Efficiency, however, changes the temporal location of restructuring decisions. If creditor groups holding sufficient voting power have already agreed upon valuation, distributions, governance, exit financing, management treatment, releases, and the basic terms of the plan, the bankruptcy case may be primarily an implementation mechanism.

That does not make judicial review ceremonial. A court still must determine whether jurisdiction exists, disclosure and solicitation requirements have been satisfied, classification is permissible, impaired accepting classes satisfy § 1126, the plan complies with § 1129, and any other requested relief is authorized by the Bankruptcy Code.

But the range of realistic alternatives may already be narrow. A creditor bound by an RSA may have agreed to support the negotiated plan, oppose alternatives, and take specified actions necessary for implementation, subject to fiduciary and other contractual exceptions.

The question is consequently not whether RSAs are permissible. They are an established and often highly useful restructuring tool. The relevant inquiry is whether a Chapter 11 case built around a comprehensive prepetition agreement should be understood primarily as a forum for determining the restructuring or as a forum for testing and implementing a restructuring already negotiated.

G. When Agreement Becomes Lockup

Prepetition consensus can enhance reorganization, but the degree of commitment matters. An RSA may contain milestones, termination rights, voting commitments, fiduciary-out provisions, expense reimbursement, consent rights over amendments, and obligations to support specified transactions.

Each provision can serve a legitimate purpose. A party committing capital or restructuring support understandably wants assurance that the debtor will pursue the transaction for which that support was given. A debtor likewise benefits from knowing that creditor support will not disappear after the petition is filed.

The concern arises when the agreement becomes so restrictive that fiduciaries cannot meaningfully consider superior alternatives or when the bankruptcy process is used principally to bind constituencies that did not participate in the prepetition negotiations.

The problem resembles the DIP-financing issue discussed under Myth No. 2 but asks a different question. There, the concern was who controls the debtor. Here, the concern is whether the agreement has already determined the outcome that the bankruptcy process is supposed to evaluate.

The distinction can be subtle. A prepetition agreement supported by 90% of creditors may represent a remarkable achievement in consensus-building. The same agreement may also make an alternative transaction practically impossible even if a better proposal emerges after filing.

The appropriate analysis therefore should consider not merely the percentage of support but whether the agreement preserves a meaningful ability for fiduciaries to respond to changed circumstances and superior alternatives.

Hypothetical: The Deal Before the Case

A debtor spends four months negotiating an RSA with lenders holding 80% of its secured debt and noteholders holding 70% of its unsecured notes. The RSA establishes the treatment of each major creditor class, provides exit financing, allocates new equity, establishes management incentives, contains releases, and requires confirmation within sixty days after filing.

The debtor files Chapter 11 and immediately announces that the restructuring is "fully consensual." But 30% of the noteholders never participated in the negotiations, trade creditors were not at the table, and the official committee did not exist when the transaction was designed.

The court may ultimately confirm the plan. But did the court determine the restructuring outcome? The better answer may be that the court determined whether the previously negotiated outcome satisfied the statutory conditions necessary to bind parties who had not agreed to it.

H. DIP Financing as Outcome Architecture

DIP financing illustrates the overlap between Myths No. 2 and No. 3 particularly well. Under Myth No. 2, financing asks who exercises control over the debtor. Under Myth No. 3, financing asks whether the terms of postpetition liquidity determine which restructuring outcome can occur.

A DIP facility may provide enough liquidity to permit a broad marketing process, formulate a standalone plan, litigate disputed claims, and negotiate among competing creditor groups. In that circumstance, financing creates optionality.

Another DIP facility may do the opposite. It may contain milestones requiring an immediate sale, prohibit expenditures associated with alternative restructuring strategies, condition continued funding upon adherence to an RSA, or terminate if specified outcomes are not achieved. In that circumstance, financing narrows optionality.

Neither result is necessarily improper. The lender may be willing to finance only the transaction it regards as economically rational, and bankruptcy law ordinarily does not require a private lender to fund alternatives it considers unacceptable.

But the distinction matters when describing what the bankruptcy court is doing. A court may approve financing because no superior financing exists and because denial would cause immediate liquidation. If the financing simultaneously requires a sale within forty-five days, approval of the DIP facility may become the practical moment at which the sale outcome is determined.

The later sale hearing remains legally important, but its economic context has changed. By then, the debtor may have spent weeks operating under a budget built around the sale, bidders may have relied upon court-approved procedures, employees may have been told that the company is being sold, and the DIP lender may possess termination rights if closing does not occur.

Thus, the first-day financing order can sometimes be more outcome determinative than the later order formally approving the restructuring transaction.

I. Rollups and the Transformation of Prepetition Rights

Rollups make that point even more sharply. A rollup uses postpetition financing to pay, refinance, or convert some amount of prepetition secured debt into postpetition obligations. The effect can be to transform a prepetition claim subject to investigation, avoidance, valuation, and ordinary bankruptcy treatment into a postpetition administrative or superpriority obligation enjoying significantly enhanced protection.

Rollups may be necessary to induce lenders to provide new money. A prepetition lender may refuse to advance additional capital unless its existing exposure receives improved treatment, particularly where the lender believes its collateral is sufficient and liquidation would provide an adequate recovery.

But a rollup can alter the economic hierarchy early in the case. If approved before a committee has completed its investigation, the transaction may reduce the practical value of later challenges to prepetition liens or claims.

This is why courts frequently examine whether the rollup is necessary to obtain financing, whether the debtor tested the market, how much genuinely new money is being provided, whether the estate receives adequate benefit, and whether challenge rights remain meaningful.

The Myth No. 3 concern is temporal. If the capital structure is materially reordered in the financing order entered during the first days of the case, how much of the later restructuring is actually being determined at confirmation?

J. Section 363 Sales and the Restructuring That Occurs Before Confirmation

Section 363(b)(1) permits a trustee or debtor in possession, after notice and hearing, to use, sell, or lease property of the estate outside the ordinary course of business. 11 U.S.C. § 363(b)(1). Section 363(f) permits sales free and clear of specified interests when statutory conditions are satisfied. Id. § 363(f).

Section 363 sales can preserve enormous value. A financially distressed enterprise may not possess sufficient liquidity to remain in Chapter 11 while a plan is negotiated. Customers may leave, employees may depart, inventory may deteriorate, licenses may be jeopardized, and going-concern value may disappear. A prompt sale can preserve jobs and maximize creditor recoveries that would otherwise be lost.

Courts have accordingly recognized a debtor's ability to sell substantial assets before confirmation when an appropriate business justification exists. The influential Second Circuit decision *Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063 (2d Cir. 1983), rejected both an absolute prohibition on major preconfirmation sales and unfettered managerial discretion, requiring a sound business justification for the transaction. *Id.* at 1070–71.

The Third Circuit has likewise recognized the substantial role of § 363 sales while emphasizing statutory requirements and good faith. See *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147–50 (3d Cir. 1986). *Abbotts Dairies* requires an explicit finding of good faith before a purchaser receives the protection afforded by § 363(m). *Id.* at 149–50.

The difficulty is that a sale of substantially all operating assets may resolve the most important economic question in the case before a plan is ever proposed. Once the business has been sold, the remaining Chapter 11 process may largely concern allocation of sale proceeds, resolution of claims, litigation, and wind-down matters.

That does not make the sale an impermissible sub rosa plan. Section 363 expressly authorizes preconfirmation sales, and a legitimate sale does not become improper simply because it has significant consequences for the eventual plan.

The concern arises when a transaction attempts to dictate plan distributions, release claims, allocate consideration among creditor groups, or otherwise accomplish through § 363 what Congress required to occur through the plan-confirmation process. See, e.g., *Pension Benefit Guaranty Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 939–40 (5th Cir. 1983).

The distinction is important. A § 363 sale may legitimately determine what property the estate owns after the sale without necessarily being permitted to determine how all stakeholders must be treated under a future plan.

Hypothetical: The Sixty-Day Sale

A debtor enters Chapter 11 with $10 million of weekly operating expenses and only enough liquidity to survive for seventy days. Its DIP financing requires completion of a sale within sixty days.

The debtor conducts a court-approved auction and receives one qualified bid. The sale preserves 4,000 jobs and produces substantially more than liquidation value, but it leaves unsecured creditors with an expected recovery of only five cents on the dollar.

At the sale hearing, several creditors argue that a standalone reorganization would produce greater long-term value. No one, however, has offered financing that would permit the debtor to operate long enough to pursue one.

What outcome can the bankruptcy court actually choose? The court can deny the sale if statutory requirements are not satisfied. But denial does not itself produce the capital necessary for a standalone plan.

This is the central tension in Myth No. 3: legal power to reject an outcome is not the same as economic power to create an alternative.

K. Credit Bidding and the Relationship Between Debt and Market Price

Section 363(k) generally permits a secured creditor to credit bid its allowed claim when collateral securing that claim is sold, unless the court for cause orders otherwise. 11 U.S.C. § 363(k). Credit bidding protects a secured creditor from being forced to accept a cash sale price below the value it attributes to its collateral.

The Supreme Court reinforced the importance of credit bidding in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012). The Court held that a debtor could not confirm a cramdown plan proposing a sale of collateral free and clear of liens without permitting the secured creditor to credit bid when proceeding under § 1129(b)(2)(A)(ii). *Id.* at 644–49.

Credit bidding also affects sale dynamics. A secured creditor holding a large claim may be able to bid without providing additional cash except to satisfy senior claims and transaction expenses. Potential third-party bidders must provide actual capital.

That does not make the process unfair. The credit bid reflects a debt already supported by collateral, and § 363(k) embodies Congress's judgment concerning protection of secured-creditor interests.

But the structure can affect the market for distressed assets. If a secured creditor's credit bid establishes a practical floor that third-party bidders cannot economically exceed, the secured lender may become the purchaser.

The bankruptcy court supervises the sale and determines whether statutory requirements are satisfied. Yet the relationship among collateral value, lien amount, and § 363(k) may substantially determine the universe of plausible purchasers. Again, legal doctrine and market structure operate together to produce the outcome.

L. Case Underwriting: Who Pays for the Process?

Modern Chapter 11 cases increasingly require "underwriting" in a practical sense. Someone must provide enough liquidity to fund operations, professionals, litigation, sale processes, and the time necessary to reach confirmation or another exit.

The underwriter may be a prepetition lender, ad hoc creditor group, equity sponsor, purchaser, litigation funder, or other capital provider. Whoever supplies that liquidity will ordinarily negotiate economic protections in exchange.

This produces an unavoidable relationship between capital and process. The party willing to fund a restructuring may have considerable influence over how long the case lasts, what transactions are pursued, what litigation is funded, and what exit strategy is considered feasible.

The phenomenon is not unique to bankruptcy. Any distressed enterprise dependent upon outside capital will negotiate with those capable of providing it.

Bankruptcy makes the relationship particularly significant because the financing supports a collective legal process affecting parties who did not negotiate the financing. A lender's decision not to fund litigation, for example, may affect causes of action whose recoveries would benefit unsecured creditors rather than the lender.

The question is therefore not whether capital providers should receive influence. Without them, there may be no restructuring at all. The question is whether the financing arrangement preserves enough estate independence that bankruptcy remains a collective process rather than becoming simply the implementation vehicle for the underwriter's preferred transaction.

M. Manufactured Urgency and the Bankruptcy Clock

Few phrases are more familiar in complex Chapter 11 practice than "the debtor is running out of cash." Often that statement is entirely accurate. Financial distress is precisely why many companies file bankruptcy, and liquidity crises can develop rapidly through declining revenue, vendor tightening, customer loss, litigation, market shocks, or creditor enforcement.

A genuine emergency can justify expedited judicial action. Bankruptcy courts cannot preserve going-concern value by insisting upon leisurely procedures while a business collapses. Assets may deteriorate, employees may leave, customers may disappear, vendors may cease extending terms, and financing may evaporate. Sometimes the bankruptcy clock is simply the economic clock.

But urgency is not always entirely exogenous. Management may have delayed filing. A lender may have restricted access to liquidity. A debtor may have entered a short-term forbearance agreement requiring a particular filing date or restructuring outcome. Prepetition negotiations may have consumed the liquidity that otherwise would have provided breathing room in Chapter 11. An RSA, DIP commitment, or forbearance agreement may impose deliberately compressed milestones for a sale, plan, or other transaction.

The important inquiry therefore is not merely whether the debtor is actually running out of money on the hearing date. It may be. The additional question is *why* the debtor is running out of money, who controlled the decisions that produced the timetable, and whether prepetition choices created or intensified the emergency now offered as justification for immediate judicial relief.

The concern is not new. In *In re Humboldt Creamery, LLC*, 2009 WL 2820610 (Bankr. N.D. Cal. Aug. 14, 2009), the debtor sought approval of a sale of substantially all of its assets outside a confirmed plan, arguing that it lacked sufficient funds to continue operations and that its business therefore constituted a rapidly deteriorating "melting ice cube." *Id.* at *1. Judge Alan Jaroslovsky recognized that such circumstances can provide a compelling business justification for an expedited sale, but cautioned that the source of the emergency matters. As he memorably observed, "[t]he problem with the 'melting ice cube' argument is that it is easy enough for the debtor to unplug the freezer prior to bankruptcy." *Id.* at *2.

Judge Jaroslovsky contrasted the traditional strategy of filing early, conserving resources, and arranging postpetition financing with the possibility of waiting until the debtor reaches the courthouse with insufficient liquidity to survive a conventional Chapter 11 process. The latter strategy, he observed, can effectively compel a finding of the urgency and business justification necessary to approve the proposed sale. *Id.* The resulting time pressure affects not only the court but creditors as well, placing them "under the gun" with little meaningful alternative to the transaction presented for approval. *Id.* at *2 n.2.

The point is not that every "melting ice cube" has been deliberately melted. Nor does the existence of prepetition delay necessarily establish bad faith, manipulation, or lender control. Businesses frequently postpone bankruptcy for legitimate reasons, including efforts to achieve a consensual restructuring and avoid the expense and disruption of Chapter 11 altogether. The lesson of *Humboldt Creamery* is more modest but important; the existence of urgency and the origin of urgency are separate questions. A court may need to grant emergency relief because of circumstances existing when the matter reaches it while still recognizing that those circumstances were shaped, at least in part, by decisions made before the petition was filed.

This matters because urgency reallocates bargaining power. A court told that payroll cannot be made on Friday unless financing is approved on Thursday possesses far less practical flexibility than a court reviewing the same financing arrangement with thirty days of liquidity remaining. Creditors face the same constraint. An objection that might warrant discovery, negotiation, or an evidentiary hearing under ordinary circumstances becomes considerably more difficult to pursue when the asserted consequence of delay is immediate cessation of operations.

Time therefore can operate as a source of restructuring leverage. A party need not possess formal legal authority to dictate the outcome if it can substantially determine the timetable within which everyone else must act. A lender controlling access to liquidity, a sponsor participating in prepetition negotiations, or a debtor agreeing to aggressive milestones may shape the range of outcomes that remain practically available by the time the dispute reaches the bankruptcy court.

This dynamic also complicates the conventional understanding of judicial control. Formally, the bankruptcy judge retains authority to approve or deny financing, sales, settlements, and other requested relief. Practically, however, the range of realistic judicial choices may narrow as liquidity disappears. *Humboldt Creamery* put the point starkly: extreme urgency can reduce a judge who nominally "presid[es]" over the case to a "figurehead without any meaningful discretion." 2009 WL 2820610, at *2. The rhetoric is deliberately provocative, but the structural concern is serious. Formal decision-making authority means less when the economic consequences of exercising that authority have been predetermined by the timetable.

Hypothetical: The Manufactured Emergency

A company begins restructuring negotiations six months before filing and has $100 million of unrestricted liquidity. Management considers an earlier Chapter 11 filing but rejects it because the sponsor and secured lender believe a consensual restructuring may still be negotiated outside bankruptcy.

Five months later, unrestricted liquidity has fallen to $20 million. The negotiations have failed. The lender agrees to provide DIP financing, but the commitment requires the debtor to commence a sale process immediately and imposes milestones for entry of a sale order. The company files Chapter 11 with sufficient liquidity to operate for approximately ten days without the proposed financing.

At the first-day hearing, the debtor correctly tells the court that immediate approval of financing is necessary to avoid catastrophic business interruption. Payroll is approaching, vendors are demanding payment, and customers may leave if the company cannot assure them that operations will continue.

The emergency is real. But is it entirely external? Should the court consider that the debtor entered restructuring negotiations six months earlier with $100 million of liquidity? Does it matter who favored delaying the filing? Should the court distinguish between liquidity consumed in a reasonable effort to achieve an out-of-court restructuring and liquidity consumed pursuant to a strategy designed to narrow the alternatives available once Chapter 11 commenced? And if the court concludes that earlier choices contributed to the emergency, what practical consequence should follow when denying relief today might destroy the business tomorrow?

The answer may differ depending upon the statutory relief requested and the circumstances of the particular case. But the hypothetical exposes a central problem of modern restructuring: a compressed timetable can transform prior private choices into present judicial necessity. The party that controls the clock may therefore exercise substantial influence over the case without ever possessing formal authority to control the ultimate decision.

For purposes of Myth No. 2, that may be the most important point. Control in bankruptcy is not exercised solely through voting rights, statutory powers, or ownership of claims. It may also be exercised through control of liquidity and time. The bankruptcy judge may retain the formal power to say "no," but the practical significance of that power depends in part upon whether the case reaches the courthouse with enough time and liquidity for "no" to remain a realistic answer.

N. Merchant Cash Advances and Capital Structure Complexity

The relationship between prepetition deal architecture and bankruptcy outcomes is not limited to large public companies. Small and middle-market businesses increasingly arrive in bankruptcy with financing arrangements that can create equally difficult restructuring problems.

Merchant cash advance arrangements provide a useful example. Although transaction structures vary, an MCA provider may advance money in exchange for a purported purchase of a percentage of future receivables. Litigation frequently concerns whether the transaction is a true sale of receivables or a disguised loan subject to applicable lending and usury law.

The characterization matters enormously in bankruptcy. If receivables were truly sold prepetition, they may not constitute property of the bankruptcy estate to the same extent as collateral securing a loan. If the transaction is recharacterized as secured financing, the provider's rights may instead depend upon attachment, perfection, priority, and the Bankruptcy Code's treatment of secured claims.

MCA structures can also affect immediate liquidity. Multiple providers may sweep bank accounts or claim percentages of daily receipts, leaving the debtor with little unrestricted cash when bankruptcy begins.

Thus, a relatively small enterprise may confront capital-structure complexity resembling that of a much larger company, but without comparable access to restructuring professionals and financing. The problem connects Myth No. 3 back to Myth No. 1: prepetition financing architecture may not merely shape the restructuring outcome; it may determine whether the debtor can afford a restructuring at all.

Hypothetical: The Restaurant Group

A regional restaurant operator experiences a temporary revenue decline. Unable to obtain conventional financing, it enters three merchant cash advance transactions that collectively require substantial daily withdrawals from operating accounts.

Business later improves, but the daily withdrawals prevent the company from paying taxes and trade creditors. The company files Chapter 11.

The first dispute is not whether a plan should be confirmed. It is whether the MCA providers purchased receivables or made secured loans. Until that question is resolved, the debtor and court may not even know what property belongs to the estate or what cash is available to finance the case. The restructuring outcome therefore may turn substantially upon documents drafted before anyone contemplated Chapter 11.

O. Contractual Interest Rates and the Price of Delay

Interest-rate disputes provide another example of prepetition contracts shaping postpetition outcomes. Section 506(b) permits an oversecured creditor to receive postpetition interest and specified fees, costs, and charges. See 11 U.S.C. § 506(b). Unsecured claims ordinarily do not accrue postpetition interest because § 502(b)(2) disallows claims for unmatured interest, although important exceptions and solvent-debtor issues exist.

The applicable rate can materially affect restructuring value. A default interest rate several percentage points above the ordinary contract rate may transfer millions of dollars of value from junior creditors or equity to an oversecured lender during a lengthy Chapter 11 case.

Courts frequently begin with the parties' contract while considering whether bankruptcy law supplies a reason not to enforce the contractual default rate. See, e.g., *In re Energy Future Holdings Corp.*, 540 B.R. 109, 111–16 (Bankr. D. Del. 2015), aff'd, 842 F.3d 247 (3d Cir. 2016), and related make-whole litigation concerning contractual entitlements in sophisticated financing arrangements.

The larger point is not the resolution of any particular interest-rate dispute. It is that the cost of time in bankruptcy can itself be contractually allocated before bankruptcy. A lengthy case may increase an oversecured creditor's claim while diminishing residual value. Thus, parties can have dramatically different incentives concerning speed. A creditor earning a favorable default rate may tolerate delay that is economically costly to junior stakeholders, while an undersecured creditor may favor an immediate sale.

The bankruptcy judge controls the docket, but the economic consequences of time may have been fixed in the prepetition loan documents.

P. Valuation: The Judicial Decision That Can Determine Everything

Not every restructuring outcome is predetermined outside the courthouse. Valuation provides perhaps the clearest counterexample.

Chapter 11 frequently requires courts to determine value in connection with adequate protection, secured claims, asset sales, plan confirmation, cramdown, feasibility, and distributions. See, e.g., 11 U.S.C. §§ 361, 363, 506(a), 1129. The Supreme Court has repeatedly recognized that valuation is context dependent. In *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), the Court held in the Chapter 13 cramdown context that collateral retained by the debtor should be valued according to replacement value rather than foreclosure value. *Id.* at 962–65. Although *Rash* arose under Chapter 13, its broader lesson is that valuation depends upon the proposed disposition or use of property.

Valuation can determine who receives new equity, which classes are impaired, whether a secured creditor is oversecured, whether junior stakeholders possess economic interests, and whether a plan satisfies cramdown requirements. A relatively small change in enterprise value can shift substantial recoveries among creditor classes.

Here, the bankruptcy court may genuinely determine an economically central question. Experts may present competing discounted-cash-flow analyses, comparable-company valuations, precedent transactions, market evidence, and other methodologies, and the court must decide what evidence is persuasive.

Myth No. 3 therefore should not be overstated. Courts do not merely rubber-stamp outcomes created elsewhere. In contested cases, judicial decisions concerning valuation, contract interpretation, lien priority, claim allowance, fiduciary conduct, statutory authority, and confirmation can materially alter the restructuring.

The more accurate proposition is that the degree of judicial outcome determination varies substantially from case to case.

Q. The Plan Process: Where Judicial Authority Is Most Visible

Plan confirmation remains the formal centerpiece of Chapter 11. Section 1129 imposes extensive requirements concerning statutory compliance, good faith, creditor treatment, administrative expenses, acceptance, feasibility, priority, and other matters. See 11 U.S.C. § 1129(a). When a class rejects the plan, § 1129(b) permits confirmation only if the plan does not discriminate unfairly and is fair and equitable with respect to each impaired rejecting class. The provisions governing secured claims and unsecured claims establish important substantive limits upon what a restructuring may impose without consent. See id. § 1129(b)(2).

The court therefore does not merely count votes. It determines whether the plan satisfies federal law. The Supreme Court's Chapter 11 decisions reinforce the independent importance of confirmation doctrine. In *Bank of America National Trust & Savings Ass'n v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999), the Court held that old equity's exclusive opportunity to contribute new capital and receive ownership under the proposed plan violated the absolute-priority principles applicable to the case. *Id.* at 456–58. Similarly, in *RadLAX*, the Court enforced the specific statutory protection of credit bidding rather than allowing a debtor to rely upon a more general cramdown provision. 566 U.S. at 645–49. Statutory structure constrained what the debtor could accomplish even if the proposed transaction was thought economically desirable. Most dramatically, *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), held that an ordinary Chapter 11 plan cannot impose nonconsensual releases of direct claims held by creditors against nondebtor third parties. The decision demonstrates that overwhelming economic support and a carefully negotiated restructuring cannot substitute for statutory authority.

These cases refute an overly cynical version of Myth No. 3. Private parties can shape the choices presented to the court, but they cannot necessarily compel the court to approve a transaction Congress has not authorized.

R. Purdue Pharma and the Limits of "There Is No Alternative"

Purdue Pharma is particularly instructive because the case presented the Supreme Court with precisely the kind of argument that often makes modern restructuring difficult: the proposed plan was the product of extensive negotiations, substantial value had been committed by nondebtor parties, and proponents contended that the settlement represented the best realistically available recovery for victims and other creditors. The Supreme Court nevertheless concluded that the Bankruptcy Code did not authorize the nonconsensual third-party releases included in the plan. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024).

The significance for Myth No. 3 is profound. An outcome may be economically attractive, widely supported, and the product of extraordinary bargaining efforts, yet still fall outside the authority Congress granted the bankruptcy court.

The case therefore illustrates the difference between economic necessity and legal authority. Parties can determine what transaction they are willing to support, but they cannot determine what federal law authorizes a bankruptcy court to impose upon nonconsenting parties.

This is perhaps the strongest response to the proposition that bankruptcy judges merely ratify market outcomes. The court's role may not always be to create the deal, but it remains responsible for determining whether the deal can lawfully be transformed into a binding federal judgment.

S. Jevic and the Limits of Transactional Creativity

The Supreme Court's decision in *Jevic Holding Corp.* makes the same point in a different procedural setting. There, a structured dismissal distributed estate value in a manner that skipped certain priority wage claims without the affected creditors' consent. The Court held that the Bankruptcy Code did not authorize such a priority-violating distribution through a structured dismissal. 580 U.S. at 455–60.

The transaction had been negotiated and was supported by significant parties. The proponents argued that the settlement produced value that otherwise would not have been available. The Supreme Court nevertheless rejected the proposition that practical necessity alone justified deviation from the Code's priority structure. *Jevic* thus stands for more than a rule concerning structured dismissals. It demonstrates that transactional innovation has statutory boundaries.

That principle is central to modern restructuring. Lawyers and financial advisors can design extraordinarily sophisticated solutions to financial distress. But creativity in deal architecture does not itself expand bankruptcy jurisdiction or statutory authority. A bankruptcy court may therefore play its most important role not by selecting the restructuring outcome but by identifying the boundaries beyond which privately constructed outcomes cannot go.

T. Market Evidence and Judicial Valuation

Markets increasingly influence what bankruptcy courts regard as persuasive evidence of value. Asset-sale processes, debt trading prices, equity prices, financing proposals, rights offerings, and competing bids can provide information concerning what sophisticated participants believe an enterprise or asset is worth. Courts appropriately consider such evidence where relevant. Actual market transactions can sometimes provide stronger evidence than theoretical expert models.

But markets are not infallible. Distressed markets can be illiquid, informationally asymmetric, dominated by participants pursuing strategic objectives, or affected by the very capital structure being valued. A credit bid may discourage cash bidders; an accelerated auction may limit participation; debt prices may reflect litigation risk and liquidity rather than pure enterprise value.

The judicial task is therefore not simply to defer to "the market." It is to determine what market evidence actually proves in the circumstances presented. The tension again illustrates the hybrid character of bankruptcy. Courts adjudicate legal rights, but they frequently do so using economic information generated outside the judicial process.

U. What Bankruptcy Courts Actually Determine

A fair evaluation of Myth No. 3 requires identifying the matters bankruptcy courts genuinely do determine. Courts decide whether cash collateral may be used, whether adequate protection is sufficient, whether priming financing satisfies § 364(d), whether a purchaser acted in good faith, whether claims and liens are valid, whether contracts have been breached, whether settlements are fair and appropriate, whether fiduciaries satisfied their obligations, and whether plans satisfy § 1129.

Those decisions can fundamentally alter outcomes. A finding that a lender lacks a perfected lien can redistribute enormous value. Rejection of DIP financing can force renegotiation. Denial of sale procedures can create additional marketing time. A valuation decision can move an entire class in or out of the money. A ruling on contract interpretation can determine priority among billions of dollars of claims.

Courts also determine procedural legitimacy. Notice, opportunity to be heard, disclosure, voting, classification, and statutory findings are not merely technical requirements. They are mechanisms through which bankruptcy transforms private economic arrangements into judicially enforceable collective outcomes.

The court therefore supplies something markets cannot: legitimacy under federal law. A private agreement binds its parties. A confirmed plan can bind dissenting creditors and other parties to the extent Congress has authorized. See 11 U.S.C. § 1141.

That distinction helps explain why sophisticated parties continue to use Chapter 11 even when they have already negotiated much of the restructuring. Bankruptcy does not merely facilitate agreement; it can give qualifying agreements legal consequences that private contract alone cannot provide.

V. What Bankruptcy Courts Cannot Determine

The opposite limitation is equally important. A bankruptcy judge cannot order a private lender to make a new loan merely because financing would preserve more jobs. The court cannot create a buyer willing to pay more than the market will bear. It cannot make customers continue purchasing from a distressed company, force key employees to remain, manufacture enterprise value, or create creditor consent where the Code requires it.

Nor can the court rewrite every disadvantageous prepetition bargain. *Butner* preserves state-law property rights absent a federal reason for alteration, § 510(a) generally enforces subordination agreements, and the Code contains detailed provisions identifying when liens, contracts, claims, and transfers may be modified or avoided.

The limits are particularly visible in liquidity crises. A judge may conclude that a proposed DIP facility contains troubling provisions but still confront evidence that no other lender will provide money. The court can reject the financing. It cannot necessarily replace it.

Similarly, a court may believe that a longer sale process would produce better information but confront undisputed evidence that the debtor cannot survive long enough to conduct one. The court can decline to approve the accelerated process. It cannot ensure that enterprise value will survive the resulting delay.

This is why the phrase "the court approved the transaction" can sometimes obscure more than it reveals. Approval means that the court determined the requested relief satisfied applicable legal requirements. It does not necessarily mean that the court regarded the transaction as the best conceivable business outcome.

W. The Binary Choice Problem

The practical limitation becomes most acute when the court is presented with a binary choice: approve the proposed transaction or risk immediate value destruction. Such situations arise with DIP financing, cash collateral, § 363 sales, settlements, and confirmation. The debtor may establish convincingly that no superior alternative exists.

But a binary choice can be the product of events occurring long before the hearing. Contracts may have eliminated alternatives. Financing negotiations may have failed. Management may have delayed filing. A lender may have refused additional advances. An RSA may have committed the principal constituencies. Liquidity may have deteriorated. In these circumstances the judicial decision is real, but its practical range is constrained.

This suggests a useful distinction between *decision authority* and *choice architecture*. The bankruptcy court may possess decision authority, while private parties and economic circumstances have constructed the menu from which the decision must be made.

Hypothetical: Approve or Liquidate

A debtor seeks approval of a comprehensive restructuring transaction. The evidence establishes that the transaction will preserve the business, maintain most employment, and provide unsecured creditors a 20% recovery.

The court identifies several provisions it would not have included had it designed the transaction. No competing financing or transaction exists. If the court denies approval, the DIP lender will terminate funding and the debtor will convert to Chapter 7 within days.

The court plainly has authority to say no. But does the existence of a legal veto mean that the court determines the economic outcome? The distinction matters because judicial responsibility is not measured by whether a court can invent a superior transaction. It is measured by whether the transaction actually presented satisfies the law.

X. The Judicial Role: Preserving Optionality Without Becoming the Deal Maker

If courts do not control all economic inputs, what should they do when private arrangements substantially narrow restructuring choices? One possible response is greater judicial intervention intended to preserve optionality.

That approach has limits. Judges generally should not negotiate financing terms, select purchasers, formulate business plans, direct management concerning commercial strategy, or use confirmation leverage to create their preferred economic bargain. Such conduct would risk compromising neutrality and exceeding the judicial role.

But preserving optionality need not require judicial deal making. Courts can insist upon adequate notice, sufficient evidentiary records, meaningful challenge periods, disclosure of alternatives considered, reasonable marketing procedures, appropriate fiduciary processes, and compliance with statutory requirements.

Timing can also matter. A court may distinguish between genuinely emergency relief and provisions that can wait until a committee has been appointed and heard. Interim financing can preserve the business without necessarily granting every protection sought on a final basis.

The goal should not be maximum judicial discretion. It should be preservation of a process in which private economic power remains subject to the substantive and procedural limitations Congress imposed. This is especially important because some affected stakeholders will never possess bargaining power comparable to major lenders and creditor groups. Bankruptcy's collective structure has value precisely because it imposes legal rules upon circumstances in which private bargaining power is unequal.

Y. The Relationship Between Myths No. 2 and No. 3

The second and third myths necessarily overlap, but they ask different questions. Myth No. 2 asks *who exercises power within the bankruptcy case*. Myth No. 3 asks *when the restructuring outcome became substantially determined*.

A secured lender controlling cash collateral illustrates the difference. Under Myth No. 2, the question is whether the lender’s control of liquidity gives it practical control over the debtor. Under Myth No. 3, the question is whether the financing terms determine that the debtor will pursue a sale rather than a standalone plan.

An RSA provides another example. Myth No. 2 asks whether creditor groups bound by the RSA effectively control the debtor’s restructuring decisions. Myth No. 3 asks whether the agreement has substantially fixed the plan terms before the court becomes involved.

An expedited § 363 sale likewise presents both questions. Myth No. 2 asks who selected and controls the sale process. Myth No. 3 asks whether sale approval is the moment the restructuring outcome is determined or merely the final legal step in a result dictated by liquidity and prepetition negotiations.

Keeping those inquiries distinct prevents the three myths from collapsing into a single critique of creditor power. The broader issue is how statutory authority, contractual rights, economic leverage, markets, and judicial review interact.

Z. Myth Versus Reality

The proposition that "bankruptcy courts determine restructuring outcomes" contains substantial truth. Bankruptcy judges make decisions that can affect billions of dollars of value, determine whether businesses survive, affect thousands of employees, and establish the treatment of creditors and other stakeholders. Confirmation, sale approval, financing, valuation, claim allowance, lien adjudication, and statutory interpretation are consequential exercises of judicial power.

The proposition becomes misleading, however, if "determine" means that the bankruptcy court designs the restructuring from a broad universe of available outcomes. Modern Chapter 11 cases frequently arrive at the courthouse with that universe already substantially narrowed. The debtor's prepetition capital structure allocates priority and leverage; credit agreements establish contractual rights and flexibility; liability management transactions may alter creditor hierarchy; restructuring-support agreements may establish the architecture of a plan and lock in substantial creditor support; DIP financing may dictate timing and strategic direction; and liquidity may determine how long the restructuring process can continue. Markets, in turn, determine what financing is available, what purchasers are willing to pay, and sometimes whether a going-concern transaction is achievable at all. These forces may substantially shape (and sometimes effectively determine) the economically realistic alternatives before the bankruptcy judge is ever asked to act.

Yet that reality does not render the bankruptcy court a mere spectator or convert judicial approval into a ceremonial exercise. Private economic power can shape the choices presented to the court, but it cannot create federal bankruptcy authority. That authority comes from Congress through the Bankruptcy Code, and the same statute that grants extraordinary powers to the bankruptcy court also defines their limits.

The Supreme Court made that principle unmistakable nearly four decades ago: "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). The Court has repeatedly returned to that principle when confronted with innovative or equitable arguments for relief that exceeds the authority Congress supplied. *See, e.g.*, *Law v. Siegel*, 571 U.S. 415, 421 (2014) (quoting *Ahlers* and holding that a bankruptcy court may not exercise its statutory or inherent powers in contravention of specific provisions of the Bankruptcy Code).

That limitation is particularly important in modern restructuring practice because economic necessity and statutory authority are not synonymous. *Jevic* demonstrates that a negotiated resolution cannot disregard the Code's priority structure merely because the parties contend that the proposed transaction represents the best available economic outcome. *RadLAX* demonstrates that transactional creativity cannot circumvent a specific protection Congress afforded secured creditors. And *Purdue Pharma* demonstrates perhaps most forcefully that overwhelming creditor support, extraordinary economic contributions, years of negotiation, and assertions that no superior alternative exists cannot supply statutory authority that Congress did not confer.

Those cases identify a central, and sometimes underappreciated, function of the bankruptcy judiciary. The court may not have designed the restructuring, selected the capital structure, negotiated the RSA, provided the DIP financing, established the market price, or determined which economic alternatives survived to the hearing date. But the court must determine whether the restructuring presented to it may lawfully receive the extraordinary consequences that federal bankruptcy law can provide.

That distinction is critical. A private restructuring agreement can bind those who agree to it. A bankruptcy order, sale order, or confirmed plan can have consequences extending far beyond the parties who negotiated the transaction. Bankruptcy can stay creditors, alter contractual relationships, transfer assets free and clear of interests, modify claims, bind dissenting creditors, and impose the terms of a confirmed plan upon parties who affirmatively opposed it. *See*, *e.g.*, 11 U.S.C. §§ 362, 363, 1123, 1129, 1141. The extraordinary nature of those consequences is precisely why statutory authority and meaningful judicial scrutiny matter.

The most accurate conclusion is therefore neither that bankruptcy courts determine everything nor that they merely rubber-stamp privately negotiated outcomes. Bankruptcy courts exercise consequential legal authority within an economic environment in which the realistic choices are often shaped by markets, contracts, financing arrangements, capital structures, creditor coalitions, and decisions made long before the matter reaches the courtroom. The court may not control the menu, but it remains responsible for determining which items on that menu the Bankruptcy Code permits it to order.

That distinction should inform the manner in which judges approach modern restructuring cases. Judicial scrutiny may be especially important when urgency is greatest, alternatives are fewest, the principal organized constituencies are most unified, and the proposed transaction is described as inevitable. Those circumstances may demonstrate that the proposed transaction genuinely represents the best available outcome. But they may also indicate that the economic decisions producing that outcome occurred before meaningful judicial scrutiny became possible.

The ultimate MythBusters question is therefore not simply: “Did the bankruptcy court approve the restructuring?” The more revealing question is: “What remained for the bankruptcy court actually to decide?”

Sometimes the answer will be nearly everything. A contested valuation, disputed lien, competing plans, competing purchasers, disputed financing proposals, or unresolved confirmation contest may leave the court with substantial outcome-determinative responsibility. In those cases, the judicial decision may materially change both the legal rights of the parties and the economic result.

In other cases, the answer will be considerably narrower. The capital structure, contractual rights, creditor coalitions, financing commitments, restructuring-support agreements, available liquidity, and market conditions may already have reduced the economically realistic choices to a principal transaction on the one hand and liquidation or substantial value destruction on the other. The court still possesses the authority to say “no,” but the power to reject the transaction should not be confused with the economic ability to create a better alternative.

In those circumstances, the bankruptcy court's responsibility is different, but it is no less important. The court must determine whether the transaction was produced through a legally sufficient process, whether fiduciaries fulfilled their obligations, whether affected parties received the substantive and procedural protections Congress provided, whether the evidentiary record supports the findings required by law, and, ultimately, whether the relief requested falls within the authority conferred by the Bankruptcy Code.

That may be the most important distinction revealed by Myth No. 3. Markets can determine what parties are willing to finance. Contracts can determine what parties are entitled to demand. Capital structures can determine who possesses leverage. Negotiations can determine what sophisticated constituencies are willing to support. Economic circumstances can narrow the available choices to one. But none of those things can determine what a bankruptcy court is authorized to impose. That question remains one of law.

V. CONCLUSION: MYTHS, REALITIES, AND THE CONTINUING PROMISE OF BANKRUPTCY

Bankruptcy law has always existed at the intersection of law and economic reality. The Bankruptcy Code establishes rights, remedies, priorities, procedures, and institutions, but it does not operate in isolation from the circumstances that bring debtors and creditors to the courthouse. The cost of legal representation, availability of counsel, financial sophistication of the parties, access to capital, structure of prepetition contracts, existence of collateral, strength of creditor remedies, and simple ability to withstand delay can determine whether rights existing on paper can meaningfully be exercised in practice.

That observation does not demonstrate that the bankruptcy system has failed. Nor should the three myths examined in these materials be understood as propositions to be conclusively "busted." Each contains considerable truth, and each reflects an important aspiration of the bankruptcy system.

Bankruptcy relief is broadly available, but access is not equally available. The Bankruptcy Code allocates control among debtors, fiduciaries, creditors, trustees, committees, and courts, but formal authority does not necessarily correspond with practical economic power. Bankruptcy courts determine consequential legal questions and approve transactions that reshape economic relationships, but many of the realistic alternatives presented to them have been created, constrained, or eliminated before the judge is ever asked to act.

The difference between myth and reality therefore lies largely in the distance between what the Bankruptcy Code formally provides and how the bankruptcy system actually operates.

A. Myth No. 1: Eligibility Is Not the Same Thing as Access

The first myth asked whether bankruptcy relief is equally available to those who need it. The statutory answer initially appears straightforward. Congress has established several forms of bankruptcy relief and has identified who may seek them. See, e.g., 11 U.S.C. §§ 109, 301, 302. Individuals may seek a Chapter 7 discharge, qualifying debtors may attempt rehabilitation through Chapter 13, and businesses may reorganize or liquidate through Chapter 11.

But statutory eligibility answers only the first question. It does not establish practical accessibility. For consumer debtors, filing fees, attorney compensation, credit counseling, documentation requirements, means testing, local practice, and the ability to fund a Chapter 13 plan can determine whether bankruptcy is realistically available. A debtor may qualify for Chapter 7 under § 109 yet lack the money necessary to retain competent counsel. Another debtor may technically qualify for Chapter 13 but lack sufficient disposable income to fund a feasible plan. Still another may remain outside bankruptcy while paying a debt-settlement company because the perceived cost or complexity of bankruptcy makes the statutory remedy appear inaccessible.

The distinction is especially important because the debtors most in need of bankruptcy relief may be the least capable of purchasing access to it. A household experiencing wage garnishment, repossession, foreclosure, utility termination, or aggressive collection activity is not merely insolvent in an accounting sense. It may also be experiencing a liquidity crisis that makes payment of legal fees particularly difficult.

That produces an uncomfortable paradox. A system intended to provide relief from financial distress may require a financially distressed person to possess sufficient resources to purchase meaningful access to the system.

Chapter 13 provides one response by permitting attorney compensation and other administrative expenses to be paid through the plan. See 11 U.S.C. §§ 330(a)(4)(B), 503(b), 507(a)(2), 1322(a)(2). But that solution presents its own questions concerning completion rates, feasibility, attorney incentives, local practices, and whether a multi-year repayment plan consistently provides the rehabilitative pathway the statutory structure contemplates.

The access problem is not confined to individuals. Small and middle-market businesses face a different version of the same problem. Chapter 11 offers extraordinarily powerful restructuring tools, including the automatic stay, use of estate property, assumption and rejection of executory contracts, asset sales, postpetition financing, and binding plan confirmation. See 11 U.S.C. §§ 362, 363, 364, 365, 1123, 1129.

Those tools, however, require a process capable of being funded. Professional fees, United States Trustee fees, reporting obligations, valuation disputes, committee expenses, financing costs, and the indirect cost of operating under bankruptcy supervision can make traditional Chapter 11 economically unrealistic for smaller enterprises.

Congress responded to some of those concerns through Subchapter V. See 11 U.S.C. §§ 1181–1195. Its streamlined procedures, elimination of the ordinary requirement for an official committee absent court order, modified plan provisions, and elimination of the absolute-priority rule in the form applicable to traditional Chapter 11 cases can materially reduce some barriers to reorganization. But Subchapter V cannot solve the access problem for every financially distressed business. Eligibility limitations necessarily leave some businesses outside its reach, and even an eligible business must possess enough liquidity and operational viability to fund a restructuring.

The result is a business-bankruptcy version of the same problem confronting consumers. A business may be eligible for Chapter 11 as a matter of law while Chapter 11 is economically unavailable as a matter of fact. For those businesses, assignments for the benefit of creditors, receiverships, negotiated workouts, foreclosures, asset sales, and simple cessation of operations may become the actual restructuring alternatives. The movement toward those alternatives should cause bankruptcy practitioners to ask whether Chapter 11 remains practically available throughout the segment of the economy for which Congress ostensibly designed it.

The lesson from Myth No. 1 is therefore broader than a discussion of filing fees or Subchapter V eligibility. Rights that cannot realistically be exercised are different from rights that are genuinely available.

B. Myth No. 2: Authority Is Not the Same Thing as Control

The second myth asked who actually controls bankruptcy cases. Here too, the Bankruptcy Code provides a formal answer.

In Chapter 11, the debtor ordinarily remains in possession and exercises most of the powers of a trustee. See 11 U.S.C. §§ 1107, 1108. Official committees may investigate and represent creditor constituencies. See id. §§ 1102, 1103. Trustees may replace management in appropriate circumstances, and examiners may independently investigate matters affecting the estate. See id. § 1104. Bankruptcy judges adjudicate disputes and approve transactions when the Code requires judicial authorization.

But formal authority is only one form of control. A debtor may possess legal authority to operate the business while a lender controls the cash necessary to operate it. A board may formally approve a restructuring transaction while the only available financing supports one particular outcome. A committee may possess broad investigatory authority but arrive after the principal financing and restructuring arrangements have already been negotiated. An independent director may possess a formal vote concerning bankruptcy while the circumstances of that director's appointment raise questions concerning whose interests the governance arrangement was designed to protect.

Myth No. 2 therefore required distinguishing among legal control, operational control, economic control, and outcome control. Those forms of power frequently coexist, and they need not reside in the same participant.

Perhaps the most important distinction is between positive and negative control. The person possessing authority to propose a transaction may appear to exercise control, but the participant capable of vetoing every economically realistic alternative may possess greater practical power.

A lender need not direct management to sell the business if it can simply decline to finance any alternative. An equity sponsor need not formally control the bankruptcy case if its governance rights, relationships, financing position, and informational advantages substantially influence the decisions that management makes. An ad hoc creditor group need not possess the statutory status of an official committee if its holdings provide sufficient voting and economic leverage to determine whether a restructuring can succeed.

None of those circumstances necessarily demonstrates misconduct. Creditors are generally entitled to exercise contractual rights and pursue their own economic interests. Lenders are not required to advance new money merely because a different restructuring strategy would benefit junior stakeholders. Sophisticated creditors are entitled to organize, negotiate, trade claims, and protect their investments.

The Bankruptcy Code instead attempts to place legal boundaries around the exercise of economic power. Adequate-protection requirements constrain the use of secured property. Sections 363 and 364 impose requirements upon transactions affecting estate assets and postpetition financing. Fiduciary obligations constrain the debtor in possession. Section 1104 permits displacement or supplementation of management in appropriate circumstances. Section 1103 creates a statutory counterweight through official committees.

The Third Circuit's decision in *Cybergenics* provides an especially useful illustration. When the debtor in possession cannot appropriately exercise control over an estate cause of action, derivative standing can permit a committee to act on the estate's behalf. 330 F.3d at 568–80.

Likewise, *FTX Trading* demonstrates that Congress sometimes requires independent investigation even when other participants contend that an additional fiduciary is unnecessary. The statutory allocation of responsibility can therefore override the preferences of the parties otherwise controlling the case.

The lesson from Myth No. 2 is accordingly not that lenders, sponsors, professionals, or sophisticated creditor groups exercise too much power. It is that formal authority should not be confused with practical control, and practical control should remain visible enough that the legal decisionmakers can be held accountable for the decisions entrusted to them.

C. Myth No. 3: Approval Is Not Necessarily the Same Thing as Determination

The third myth completes the progression. If access to bankruptcy is affected by economic realities and control within bankruptcy is dispersed among participants possessing different forms of power, to what extent do bankruptcy courts actually determine restructuring outcomes? The answer depends considerably upon when one begins measuring the restructuring process.

If the analysis begins at the confirmation hearing, the bankruptcy court appears to occupy the center of the restructuring. The court determines whether the requirements of § 1129 have been satisfied and ultimately enters or denies the confirmation order. If the analysis begins months or years earlier, however, a different picture may emerge.

Prepetition loan documents establish collateral rights, guarantees, priorities, amendment thresholds, intercreditor obligations, and contractual flexibility. Liability management transactions may alter creditor hierarchy before bankruptcy. Restructuring-support agreements may establish the architecture of a plan before the petition is filed. DIP commitments may determine how much time the debtor has and which restructuring strategies can be funded.

The bankruptcy case therefore begins with a set of economic and legal relationships created elsewhere. *Butner* remains foundational because it recognizes that bankruptcy generally begins with property rights created under nonbankruptcy law. 440 U.S. at 54–55. Section 510(a) likewise expressly recognizes the continuing force of enforceable subordination agreements. 11 U.S.C. § 510(a).

Modern liability management transactions make that relationship particularly visible. The ability to transfer collateral, incur additional debt, conduct non-pro-rata exchanges, or create new priority positions may turn upon language negotiated in financing documents years before the company encounters financial distress. If those contractual provisions are exercised before bankruptcy, the resulting Chapter 11 case begins with a capital structure already altered by private ordering.

The same phenomenon occurs after filing through DIP financing and expedited sale processes. A financing order entered early in the case may establish milestones that make a later § 363 sale practically inevitable. When the sale ultimately reaches the court, the judge possesses genuine legal authority to deny it, but denial may produce liquidation rather than a different going-concern transaction.

This produces the distinction developed throughout Myth No. 3 between decision authority and choice architecture. The court may possess authority to decide the motion, while private contracts, available capital, market conditions, creditor positions, and liquidity have determined what choices realistically remain. Yet that observation should not be taken too far. Bankruptcy courts do determine matters of enormous consequence. Valuation, lien priority, claim allowance, contract interpretation, financing approval, sale approval, settlement approval, and confirmation can materially alter distributions and restructuring outcomes.

More fundamentally, courts determine whether privately constructed outcomes fall within the authority granted by federal law. *Jevic* demonstrates that economic pragmatism does not itself authorize a priority-violating structured dismissal. *RadLAX* demonstrates that a proposed restructuring cannot avoid a specific statutory protection by invoking a more general provision of the Code. And *Purdue Pharma* demonstrates that even a heavily negotiated restructuring supported by substantial economic contributions cannot impose nonconsensual third-party releases in an ordinary Chapter 11 case without statutory authority.

Those cases illuminate the judiciary's indispensable role. The market may construct the transaction, but the market does not determine the scope of federal bankruptcy power.

D. The Common Thread: Law and Economic Power

Viewed together, the three myths reveal a common theme. Bankruptcy operates through legal rules in an environment characterized by unequal economic power. A debtor with sufficient resources can purchase sophisticated representation while an equally deserving debtor may struggle to obtain counsel. A well-capitalized business can finance months of Chapter 11 proceedings while a smaller enterprise may have only enough liquidity for a receivership or liquidation. A secured lender can negotiate financing protections unavailable to unsecured creditors. A large institutional creditor can employ restructuring counsel and financial advisors while a small trade creditor may rationally conclude that active participation costs more than the claim is worth.

Bankruptcy does not eliminate those inequalities. It never has. What bankruptcy can do is subject their consequences to a collective legal process. The automatic stay prevents the fastest creditor from simply winning the race to the courthouse. See 11 U.S.C. § 362. Avoidance provisions can undo specified prepetition transfers and recover value for collective distribution. See id. §§ 544–553. Priority rules determine distribution according to congressional judgments rather than raw collection leverage. Plan-confirmation provisions can bind dissenting parties when statutory conditions are satisfied.

The Bankruptcy Code therefore does something more ambitious than merely provide another collection forum. It replaces, to a significant degree, individual enforcement with collective administration. That collective character explains why the questions raised by these myths matter. If access depends too heavily upon financial resources, some debtors never reach the collective process. If economic power completely overwhelms fiduciary and statutory control after the case begins, bankruptcy risks reproducing the same leverage that existed outside bankruptcy. If transactions negotiated by the most powerful participants can obtain judicial approval without meaningful statutory scrutiny, the collective proceeding risks becoming merely a mechanism for enforcing private bargains against parties who did not make them.

The continuing challenge is to preserve the advantages of negotiation, markets, private capital, and contractual ordering without allowing them to displace the collective protections that justify bankruptcy in the first place.

E. Consumer and Commercial Bankruptcy: Different Worlds, Similar Questions

One benefit of examining consumer and commercial bankruptcy together is that apparent differences sometimes conceal similar structural problems.

The consumer debtor considering Chapter 7 and the corporation considering Chapter 11 inhabit vastly different economic worlds. One may be concerned about keeping a modest automobile and stopping wage garnishment, while the other negotiates billion-dollar financing facilities and restructuring-support agreements. Yet both confront the same basic questions.

Can I realistically obtain relief?

Who controls the choices available to me?

Who determines the ultimate outcome?

For the consumer, access may depend upon attorney fees and the ability to satisfy eligibility and procedural requirements. For the corporation, access may depend upon liquidity and the ability to finance the Chapter 11 case.

For the consumer, practical control may be shared among the debtor, counsel, secured creditors, the trustee, and the requirements of a feasible plan. For the corporation, practical control may be shared among management, boards, secured lenders, sponsors, committees, ad hoc groups, and restructuring professionals.

For the consumer, the outcome may be constrained by income, exemptions, collateral value, mortgage arrears, and nondischargeable debt. For the corporation, the outcome may be constrained by capital structure, financing documents, market value, DIP terms, and creditor voting positions.

The scale is different, but the underlying tension is remarkably similar. Bankruptcy creates legal choices, but economic circumstances determine which of those choices can realistically be exercised. That insight may provide one of the most useful bridges between consumer and commercial practitioners. Neither system should be evaluated solely by reading the statutory text. Both should also be examined by asking what actually happens to the people and enterprises that attempt to use it.

F. Efficiency Is Important, but Efficiency Is Not the Only Value

Many developments discussed in these materials are justified by efficiency, often with good reason. Prepackaged cases reduce administrative expense. Restructuring-support agreements create certainty. DIP milestones limit the risk that new money will finance an indefinite bankruptcy case. Section 363 sales can preserve going-concern value. Subchapter V reduces procedural burdens for eligible small businesses.

Efficiency matters because bankruptcy itself consumes value. Every dollar spent unnecessarily on administration is a dollar unavailable to creditors, employees, owners, or the reorganized enterprise. But efficiency cannot be the only measure of a bankruptcy system. The fastest possible process would not necessarily be the fairest. The cheapest process would not necessarily produce the most accurate valuation. The transaction enjoying the greatest support among the largest creditors would not necessarily respect the statutory rights of smaller constituencies. Congress therefore designed bankruptcy with procedural friction. Notice takes time. Committees cost money. Disclosure is burdensome. Valuation litigation can be expensive. Confirmation requirements can prevent implementation of transactions supported by economically powerful constituencies.

Those features can appear inefficient when measured solely against transaction cost and speed. But some of that friction protects values other than efficiency: participation, transparency, investigation, accountability, equality of treatment, adherence to priority, and legitimacy. The appropriate objective should therefore not be eliminating friction. It should be distinguishing productive procedural protection from unnecessary administrative cost. That distinction is difficult, and reasonable practitioners and judges will disagree about where the line should be drawn. But the inquiry is essential if bankruptcy is to remain both economically functional and legally legitimate.

G. The Role of the Bankruptcy Lawyer

These myths also suggest a broader conception of professional competence in bankruptcy practice. Knowing the Bankruptcy Code is necessary, but increasingly it is not sufficient.

Consumer lawyers must understand not only dischargeability and exemptions but also the practical economics of Chapter 7 and Chapter 13, student-loan developments, mortgage servicing, debt-settlement alternatives, attorney compensation, and the consequences of local practice. Commercial lawyers must understand not only §§ 363, 364, and 1129 but also financing documents, intercreditor relationships, liability management techniques, valuation, capital markets, receiverships, and alternative insolvency processes.

The lawyer's responsibility is therefore partly translational. Counsel must translate legal rights into realistic choices. That responsibility is especially important when the client lacks financial sophistication. A debtor does not necessarily need a recitation of every theoretically available chapter.

The debtor needs to understand which alternatives are realistically available, what each will cost, what each can accomplish, and what risks accompany the choice.

The same obligation exists in sophisticated commercial practice. A board considering a liability management transaction or Chapter 11 filing requires more than an explanation that the transaction is contractually permissible. Directors need to understand how the decision may affect fiduciary obligations, litigation risk, future financing, creditor relationships, and a later bankruptcy.

Competent bankruptcy practice therefore requires an understanding of both the law on the books and the economics of the choices the law permits.

H. The Role of the Bankruptcy Judge

The same is true for judges. Bankruptcy courts should not attempt to become investment bankers, business managers, financial advisors, or substitute boards of directors.

Judicial restraint is particularly important because bankruptcy judges often confront decisions made by professionals with substantially greater industry and financial expertise. A judge's disagreement with a business strategy does not establish that the debtor failed to exercise appropriate business judgment. But restraint should not become passivity.

Congress repeatedly assigned bankruptcy courts responsibilities requiring independent findings. The court must determine whether statutory requirements have been satisfied even when sophisticated parties agree that the proposed transaction is desirable. That responsibility may be most important when opposition is weakest. A contested motion naturally produces competing evidence and argument. A fully consensual transaction may not.

The absence of objection should therefore be understood for what it is. Sometimes it demonstrates genuine consensus. Sometimes it reflects economic futility, lack of information, inability to afford participation, or the fact that the parties most affected hold claims too small to justify retaining counsel.

A bankruptcy judge should not manufacture objections on behalf of absent parties. But neither should the absence of an objection eliminate statutory requirements that Congress directed the court independently to enforce. The judicial task is consequently neither to "make the deal" nor simply to "call balls and strikes" without regard to the unusual collective nature of bankruptcy. It is to ensure that the adjudicative process remains faithful to the authority Congress provided. *Law v. Siegel*, 571 U.S. 415 (2014), supplies the corresponding limit. Bankruptcy courts cannot use equitable authority to disregard statutory commands merely because a different outcome appears more just or economically sensible. *Id.* at 421–27.

The judge's responsibility is therefore both powerful and constrained: independent statutory scrutiny without judicial ownership of the restructuring.

I. Three Myths, Three Questions

The three myths can ultimately be reduced to three questions. The first is: Who can realistically get into bankruptcy? That question requires looking beyond formal eligibility to filing costs, professional availability, financing, liquidity, procedural complexity, and the economic ability to sustain a case.

The second is: Once the case begins, who actually exercises power? That question requires looking beyond formal titles to cash collateral, financing, governance rights, creditor organization, information, contractual leverage, and the ability to veto alternatives.

The third is: When the bankruptcy court finally acts, what remains genuinely undecided? That question requires examining the capital structure, prepetition contracts, liability management transactions, restructuring-support agreements, DIP financing, sale milestones, and other forces that may have narrowed the universe of available outcomes before judicial approval is sought.

These questions are connected. A debtor without money may never obtain access. A debtor dependent upon another party for money may surrender practical control. And once financing and contractual arrangements determine the economically available choices, the court may confront an outcome substantially shaped before the hearing begins. That progression (from *access*, to *control*, to *outcome*) provides a useful framework for evaluating contemporary bankruptcy practice.

J. Bankruptcy's Continuing Promise

None of this should obscure what bankruptcy continues to accomplish. For individuals, bankruptcy can stop collection activity, protect essential property, discharge overwhelming debt, permit cure of defaults, restructure secured obligations where Congress allows, and provide the financial fresh start that has long been central to American bankruptcy policy. The Supreme Court has repeatedly recognized the fresh-start principle as fundamental to bankruptcy law. See, e.g., *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). For businesses, Chapter 11 can preserve going-concern value, maintain employment, facilitate asset sales, reject burdensome contracts, resolve mass litigation, restructure capital, attract new financing, and bind disparate creditor groups to a common solution. These are powers that private contract and state collection law often cannot replicate. For creditors, bankruptcy provides centralized administration, disclosure, investigation, avoidance remedies, priority rules, voting rights, judicial adjudication, and the possibility of preserving enterprise value that individual enforcement might destroy.

The remarkable feature of bankruptcy is not that it eliminates economic conflict. It is that it provides a legal structure within which economic conflict can be resolved collectively. That structure inevitably evolves. Consumer finance changes. Credit markets innovate. New restructuring techniques develop. Distressed investors identify contractual opportunities that earlier generations of lawyers did not contemplate. Congress responds to perceived deficiencies, courts interpret statutory boundaries, and practitioners design new transactions within those boundaries.

Some innovations improve bankruptcy. Others test its limits. The responsibility of the bankruptcy community is not to resist innovation simply because it is new, nor to embrace innovation simply because markets have produced it. The responsibility is to continue asking whether the system remains faithful to the purposes Congress assigned to it.

Does the system provide meaningful access to relief? Does it allocate decision-making authority in a manner consistent with fiduciary responsibility and statutory rights? Does it permit efficient private ordering without allowing economic power to displace protections Congress provided to parties lacking comparable bargaining power? Does judicial review remain meaningful when transactions are negotiated before bankruptcy and presented under severe time constraints? And does bankruptcy continue to provide something sufficiently valuable and distinctive that financially distressed individuals and businesses will choose it over the alternatives? Those questions do not admit simple answers. That is precisely why the myths are useful.

The purpose of "Bankruptcy MythBusters" is not to declare the traditional understandings of bankruptcy false. It is to test them against contemporary practice. Bankruptcy relief *is* broadly available, but eligibility should not be confused with accessibility. Debtors, fiduciaries, creditors, trustees, committees, and courts *do* possess carefully allocated statutory powers, but legal authority should not be confused with practical economic control. Bankruptcy courts *do* determine enormously consequential matters, but judicial approval should not be confused with authorship of every restructuring outcome. The distance between those propositions and the realities encountered in actual cases is where many of the most important questions confronting bankruptcy law now reside.

Perhaps that is the ultimate lesson of the three myths. The Bankruptcy Code is not merely a collection of remedies for financial distress. It is an institutional choice about how financial distress should be resolved; collectively rather than individually, transparently rather than entirely privately, according to law rather than solely according to economic leverage, and subject to judicial process rather than simply the power of the party with the greatest ability to wait, finance, foreclose, or walk away.

Markets matter. Contracts matter. Capital matters. Bargaining power matters. And the economic realities confronting debtors and creditors cannot be wished away by statutory text. But law matters too. The enduring challenge for bankruptcy is maintaining the proper relationship between them.

The enduring responsibility of bankruptcy lawyers and judges is to recognize when the difference between the law's formal promise and the system's practical operation becomes consequential. And the enduring promise of bankruptcy is that financial distress (whether involving a family facing impossible debt, a small business struggling to survive, or a multinational enterprise confronting billions of dollars of obligations) will not be resolved solely by economic power. It will also be governed by law.