BANKRUPTCY ABSTENTION

Christopher D. Hampson[*]

Courts have been finding ways to avoid hearing bankruptcy cases for a long time. This practice distinguishes bankruptcy from other types of federal cases. The federal district courts operate under the twin principles that they are courts of limited jurisdiction and have a "virtually unflagging" obligation to exercise it. But those twin principles are inverted in bankruptcy. That is because bankruptcy courts do more than just resolve disputes; they solve problems.

Bankruptcy jurisdiction is expansive and dramatic. When a debtor commences a bankruptcy case, the bankruptcy court has jurisdiction not only over the case itself and proceedings "arising in" the case, but also a broad swath of cases "related to" the bankruptcy proceedings. Yet, unlike their district court cousins, bankruptcy courts have much broader authority to dismiss or abstain from hearing cases before them, as well as to reshape the contours of a bankruptcy case by lifting the stay or by allowing custodians to maintain control of property of the estate.

Bankruptcy courts wield that authority in a host of pragmatic, equitable, and surprising ways: pulling back when the case lacks a

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[*] Associate Professor of Law, University of Florida Levin College of Law. For insightful discussions and helpful comments, I'm grateful to Lynn LoPucki, Tony Casey, Melissa Jacoby, Ted Janger, Gary Lawson, Ralph Brubaker, David Skeel, Leandra Lederman, Stephen Ware, Jared Ellias, Kara Bruce, Chris Bradley, Pamela Foohey, Brook Gotberg, Laura Coordes, Alvin Velazquez, Elise Maizel, Michael Francus, Jeffrey Katz, and Sarah Jones, as well as panelists and participants at the American Bankruptcy Institute's Northeast Bankruptcy Conference and Consumer Forum, the Southeastern Association of Law Schools 2025 Annual Conference, the 2025 Chicago-Harvard-Wharton Insolvency and Restructuring Conference, and the Criser Workshop Series at the University of Florida Levin College of Law. For disclosure, the author was actively involved in the litigation of several cases covered in this Article, including *EB Holdings*, *Rosenberg*, *MV Realty*, *3M/Aearo*, and *MOAC Mall Holdings*, though in many instances not the exact issue under discussion here. All discussion and analysis comes from publicly available sources. Nader Abou Mrad ('25), Xianjun Liang ('26), Braden Ridlehoover ('26), and Ryan Burton ('27) provided superb research assistance. All errors are my own. My deep gratitude to Cecilia, Olivia, and Jonathan for their love and support — and for affirming me when I had to abstain from family activities to complete this research.

bankruptcy purpose, policing against a range of forum-shopping practices, abstaining when other insolvency proceedings are underway, and (most strikingly) stepping back when debtors and creditors are engaged in informal, out-of-court workouts. This Article refers to all these abstention or abstention-adjacent decisions as "bankruptcy abstention," a mix of permissive and mandatory rules that provide contours to the jurisdiction of the bankruptcy courts by limning out bankruptcy's "negative spaces."

This Article maps out three situations when the bankruptcy courts pull back, explores what this unusual practice tells us about bankruptcy as an area of law, suggests how bankruptcy abstention might be refined, and proposes some lessons about the nature of courts along the way. While federalism principles can explain much of bankruptcy abstention, bankruptcy courts also pull back from re-adjudicating out-of-court workouts that they deem fair and efficient — even when the matters have not yet seen the inside of a courtroom. Bankruptcy courts also pull back when they perceive that the tools at their disposal are a poor fit for the problem they are being asked to solve. Bankruptcy abstention thus goes beyond federalism principles and demonstrates the character of the bankruptcy courts as courts of equity — courts that nurture what Alexander Bickel called the "passive virtues." The Article suggests that we can rethink some of bankruptcy's most contentious doctrines through that lens, coins the phrase "bankruptcy ripeness," and provides new insight into the debate over bankruptcy exceptionalism. This reframing can, in turn, suggest guidance to attorneys, judges, and policymakers for how best to fine-tune the bankruptcy system — as well as provide lessons for other courts of equity in the American legal system. Finally, the Article proposes that bankruptcy abstention represents a new battlefield for old debates about bankruptcy theory and suggests that bankruptcy scholars think of institutionalism as a third way of theorizing bankruptcy law.

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INTRODUCTION

Courts have been finding ways to avoid hearing bankruptcy cases for a long time.[1] In Oklahoma, during the Great Depression, a men's clothing store called Smith-Cole, Inc. began to experience financial distress, and its creditors put it into a state court receivership.[2] The receiver sold all the property and was able to disburse twenty-five cents on the dollar to creditors. One of the creditors, International Shoe Co.,[3] refused the payout and filed an involuntary bankruptcy instead. The lower court dismissed the case for lack of jurisdiction.[4] International Shoe appealed, arguing that its statutory right to file an involuntary petition squeezed out any role for equity.[5] But the Tenth Circuit affirmed the bankruptcy court on equitable grounds:

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[1] *See Ecclesiastes* 1:9 ("there is nothing new under the sun") (KJV).

[2] *See* Int'l Shoe Co. v. Smith-Cole, Inc., 62 F.2d 972, 973–74 (10th Cir. 1933).

[3] Many readers will have had at least minimum contacts with a different case involving the American shoe manufacturer, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[4] *Int'l Shoe Co.*, 62 F.2d at 973. The Tenth Circuit commented that the matter had been "informally tried," *id.*, and indeed, the lower court dismissed the bankruptcy case in two perfunctory paragraphs, concluding that International Shoe could not meet the required number of parties for an involuntary case by itself. *See In re* Smith-Cole, Inc., No. 6023, Order (E.D. Okla. Mar. 7, 1932), *reprinted in* Tr. of Record, U.S. Circuit Court of Appeals for the Tenth Circuit, vol. 706, at 17, 23 (on file with author) [hereinafter *Smith-Cole*, Tr. of Record].

[5] *Int'l Shoe Co.*, 62 F.2d at 974. Smith-Cole first raised the equitable basis for affirming the bankruptcy court on appeal, arguing that when a receivership was "being handled to the best interest and satisfaction of a vast majority of the creditors," the bankruptcy court should not "cause delay and add extra expense." *Smith-Cole*, Tr. of Record at 1141. In its briefing to the Tenth Circuit, Smith-Cole's counsel pointed to several prior opinions, including one penned by future President and Supreme Court Justice William Howard Taft. *See In re* Smith-Cole, Inc., No. 6023, Order (E.D. Okla. Mar. 7, 1932), *reprinted in* Tr. of Record, at 17, 23 (on file with author) (quoting Simonson v. Sinsheimer, 95 F. 948 (6th Cir. 1899) (Taft, J.) (observing that granting bankruptcy relief would not change the distribution to creditors, so "[t]he bankruptcy proceedings will only increase the costs"); *see also* Bojan Mishko Srbinovski, *The Two Poles of Article III: Formalism and Functionalism in Bankruptcy Jurisdiction*, 71 DRAKE L. REV. 173, 214–217 (2024) (analyzing *Simonson*, including subsequent history, as an example of functionalism in bankruptcy law).

> Courts are organized to adjudicate controversies of substance, and not to declare abstract rules of law. There is neither charge, proof, nor intimation, that appellant or any other creditor would get a cent more if the effort now made to unscramble the state court proceedings were successful. … Courts have enough to do in passing on substantial controversies without wasting their time in superintending the transfer of money from one pocket to another. … The avowed purpose of the suit being to assert an abstract right at the expense of the creditors, and that being its inevitable result, the action was properly dismissed.[6]

This practice distinguishes bankruptcy from other types of federal cases. The federal district courts operate under the twin principles that they are courts of limited jurisdiction[7] and have a "virtually unflagging" obligation to exercise it.[8] But those twin principles are inverted in bankruptcy.[9] Bankruptcy jurisdiction is

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[6] *Id.* A few years later, the Supreme Court ruled that a bankruptcy court had abused its discretion when it exercised jurisdiction over an "unsettled question[] of state property law" — whether the trustee had a fee simple or an easement to a rich oil field. Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 483 (1940); *see also* Susan Block-Lieb, *Permissive Bankruptcy Abstention*, 76 WASH. U. L.Q. 781, 798 (1998) (describing *Thompson* as the forerunner to *Pullman* abstention).

[7] *See* U.S. CONST. art. III, sec. 2 (listing the "cases and controversies" that fall within the judicial power of the United States); *see also, e.g.*, Royal Canin U.S.A., Inc. v. Wullschleger, 145 S. Ct. 41 (2025) ("'Federal courts,' we have often explained, 'are courts of limited jurisdiction.'") (quoting Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994)).

[8] Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). The obligation is subject only to narrow exceptions. The *Rooker-Feldman* doctrine teaches that lower federal courts, pursuant to 28 U.S.C. § 1257, do not sit in appeal over state courts on matters of state law. *See* Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005). Federal courts can also decline to exercise jurisdiction under the ancient doctrine of *forum non conveniens* ("*fnc*") or abstain under narrow doctrines like *Pullman* abstention (to allow states to clarify the meaning of a potentially unconstitutional state law); *Burford* abstention (to allow states to regulate complex issues of state law); *Younger* (to allow states to complete a prosecution underlying a civil rights tort); and *Colorado River* (to allow parallel litigation to advance in state court). *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Younger v. Harris, 401 U.S. 37 (1971); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

[9] Professors Susan Block-Lieb and Ralph Brubaker observed this inversion

expansive and dramatic. When a debtor commences a bankruptcy case, the bankruptcy court has jurisdiction not only over the case itself and proceedings "arising in" the case, but also a broad swath of cases "related to" the bankruptcy proceedings,[10] all of which the bankruptcy court (or the district court sitting in bankruptcy) can hear.[11]

Preliminary relief offered in bankruptcy is similarly wide-ranging. Although the Supreme Court has severely curtailed the nationwide preliminary injunction, the automatic stay in bankruptcy lives on. Indeed, on the same day that *Trump v. CASA, Inc.*[12] came down — instructing a Maryland district judge to

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more than twenty-five years ago. *See* Block-Lieb, *supra* note 6, at 781–85. Professor Ralph Brubaker further theorized the interplay between expansive bankruptcy jurisdiction and expansive bankruptcy abstention, calling it "symbiotic" and "synergistic." Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 798 (2000).

[10] Bankruptcy's jurisdictional statute can be found in 28 U.S.C. § 1334, and the removal statute, *id.* § 1452(a), governs the process by which pending state court actions can be removed to bankruptcy court. The leading test for bankruptcy's "related-to" jurisdiction asks whether "the outcome of th[e] proceeding could conceivably have any effect on the estate being administered in bankruptcy." Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984). This "any conceivable effect" means, by negative inference, that if it were "inconceivable" that an action could affect the bankruptcy estate, the bankruptcy court would not have jurisdiction over that action. Bankruptcy courts across the country thus keep using that word; hopefully it means what they think it means. *Cf.* THE PRINCESS BRIDE (20th Century Fox 1987).

[11] In a seminal separation-of-powers decision, the Supreme Court decided in 2011 that the Constitution requires that Article III courts hear private causes of action that historically would have been heard at common law, equity, or admiralty, unless the claim arose under the bankruptcy statute or would "necessarily be resolved in the claims allowance process." Stern v. Marshall, 564 U.S. 462, 499 (2011). In *Stern*, that meant that a compulsory counterclaim against the estate had to be heard by the federal district court.

[12] *See, e.g.*, Trump v. CASA, Inc., 145 S. Ct. 2540 (2025) (holding that a federal district court may only grant preliminary injunctions to the extent necessary to provide complete relief to each plaintiff with standing). The Supreme Court in *CASA* did not mention bankruptcy's "automatic stay," nor did it need to. The analysis undertaken by the majority, stemming from *Grupo Mexicano de Desarrolo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), was whether the remedy was available in equity at the time of the Judiciary Act of 1789. *See CASA*, 145 S. Ct. at 2551 (discussing the English bill of peace). But that analysis only matters because there is no other law giving federal courts

tighten her preliminary injunction to be no "broader than necessary to provide complete relief to each plaintiff with standing to sue"[13] — her three bankruptcy colleagues down the hall at 6500 Cherrywood Lane saw twenty new bankruptcy cases filed, each of which came with an immediate, automatic, and global stay.[14]

Yet, unlike their district court cousins, bankruptcy courts have much broader authority to dismiss or abstain from hearing cases before them, as well as to reshape the contours of a bankruptcy case by lifting the stay or by allowing custodians to maintain control of property of the estate by excusing turnover. And bankruptcy courts wield that authority in a host of pragmatic, equitable, and surprising ways: pulling back when the case lacks a bankruptcy purpose, policing against a range of forum-shopping practices, abstaining when other insolvency proceedings are underway, and — most strikingly — stepping back when debtors and creditors are engaged in informal, out-of-court workouts.

This Article maps out three situations when the bankruptcy courts pull back, explores what this unusual practice tells us about bankruptcy as an area of law, suggests how bankruptcy abstention might be refined, and proposes some lessons about the nature of courts along the way. While federalism principles can explain much of bankruptcy abstention, bankruptcy courts also pull back from re-adjudicating out-of-court workouts that they deem fair and efficient — even when the matters have not yet seen the inside of a courtroom. Bankruptcy courts also pull back when they perceive that the tools at their disposal are a poor fit for the problem they are being asked to solve. Bankruptcy abstention thus goes beyond federalism principles and demonstrates the character of the bankruptcy courts as courts of equity — courts that nurture what

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the ability to enter a nationwide injunction. In bankruptcy, section 362 of the Code provides statutory authorization for the automatic stay. *See* 11 U.S.C. § 362.

[13] *Trump v. CASA*, 145 S. Ct. at 2562–63.

[14] *See* 11 U.S.C. § 362. To be fair, there is some debate about the extraterritorial application of the automatic stay. That said, the stay refers to "property of the estate" in several places, *see id.* § 362(a)(2), (3), (4), and that property, in turn, is defined to encompass all property "wherever located and by whomever held," *id.* § 541(a). So the better view is that the stay does apply worldwide. *See, e.g.*, Amber M. Carson, *The Extraterritorial Power of the U.S. Bankruptcy Code's Automatic Stay*, Tex. Bar College (Apr. 30, 2019), https://texasbarcollege.com/the-extraterritorial-power-of-the-u-s-bankruptcy-codes-automatic-stay/.

Professor Alexander Bickel called the "passive virtues."[15] This reframing can, in turn, suggest guidance to attorneys, judges, and policymakers for how best to fine-tune the bankruptcy system — as well as provide lessons for other courts of equity in the American legal system.

Today, the authority of the bankruptcy courts to dismiss, abstain, lift the stay, or excuse turnover all have statutory hooks. Bankruptcy courts can dismiss a chapter 11 case for "cause," which includes sixteen enumerated reasons to which courts have added the nebulous concept of "bad faith."[16] Under the statute and related caselaw, bankruptcy courts look not only at failure to comply with procedural and disclosure rules, but also at whether the debtor really needs bankruptcy,[17] and (if so) whether the case has any reasonable chance of success.[18]

As for abstention, depending on the circuit,[19] all our familiar friends from federal court —like *Rooker-Feldman*, *Colorado River*, and *forum non conveniens* (*fnc*)[20] still apply in bankruptcy, plus a complex set of bankruptcy-specific abstention rules, which come in mandatory and discretionary flavors. When federal jurisdiction exists over the civil action due only to the bankruptcy[21] and the

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[15] *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

[16] *See* 11 U.S.C. § 1112(b). The list is nonexhaustive per 11 U.S.C. § 102(3), which specifies that the words "includes" and "including" in the Bankruptcy Code are not limiting. Bankruptcy courts can dismiss chapter 7 cases under section 707(a).

[17] LTL Management, LLC v. Those Parties Listed on Appendix A to Complaint (*In re* LTL Mgmt., LLC), 64 F.4th 84 (3d Cir. 2023) (Ambro, J.).

[18] *See* 11 U.S.C. § 1112(b)(4)(A) (defining "cause" to include "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation").

[19] *See* Block-Lieb, *supra* note 9,at 819 & n.187 (describing circuit split over whether section 1334 codifies or overrides judicial abstention doctrines). Block-Lieb is surely correct, *id.* at 820–21, that Congress is presumed to legislate on the background of pre-Code practice, and nothing in the statute indicates that Congress meant to displace judicial abstention doctrines.

[20] *See supra* note 8 (listing federal abstention doctrines); *see also* Tiber Creek Partners, LLC v. Ellume USA LLC, No. 23-1882, 2024 WL 1950071, at *5 (4th Cir. July 16, 2025).

[21] That is, a federal court could not otherwise have heard the matter via federal-question or diversity jurisdiction, whether it is newly filed in bankruptcy court or removed there pursuant to 28 U.S.C. § 1452(a) (providing for removal

action can be "timely adjudicated" in state court, the bankruptcy court must abstain from hearing it or remand it to state court.[22] And yet the bankruptcy court may abstain from hearing civil actions "in the interest of justice" or "in the interest of comity … or respect for State law"[23] and can remand civil actions "on any equitable ground."[24]

Then, under section 305, the bankruptcy court may "at any time" dismiss a case or suspend all proceedings entirely when "the interests of creditors and the debtor would be better served by such dismissal or suspension."[25] Bankruptcy courts underscore that this is an extraordinary, case-by-case remedy and that the statute requires an analysis of the best interests of *both* creditors *and* the debtor.[26]

Importantly, Congress has limited jurisdiction over appeals from these decisions. The decision of the bankruptcy courts to abstain from hearing either a proceeding or the whole case can be appealed only to the district court or to a bankruptcy appellate

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to the jurisdiction where the bankruptcy is pending when the federal court has jurisdiction under section 1334). Personal injury tort or wrongful death claims against the estate are handled in a unique way: while the bankruptcy court may estimate them for purposes of confirming a plan, only the federal district court can liquidate or estimate them for purposes of distribution, *see* 28 U.S.C. § 157(b)(2)(B), and those claims are not subject to the mandatory abstention provisions of section 1334(c)(2), per 28 U.S.C. § 157(b)(4). Congress thus balanced the need to have personal injury torts coordinated in a collective, federal proceeding, while also ensuring that tort victims would have access to a jury trial.

[22] *See* 28 U.S.C. §§ 1334(c)(2).

[23] *See id.* § 1334(c)(1).

[24] *See id.* § 1452(b).

[25] 11 U.S.C. § 305(a). Note that chapter 15 cases are treated differently. *See infra* notes 163–169 and accompanying text.

[26] Courts also emphasize that this is a fact-bound assessment that must be supported by factfinding on the record. *See, e.g.*, *In re* Globo Comunicacoes e Participacoes S.A., 317 B.R. 235, 255–56 (S.D.N.Y. 2004) (reversing for further factfinding on abstention and *forum non conveniens* analysis); *Monsour Med. Ctr., Inc. v. Stein*, 154 B.R. 201, 207 (Bankr. W.D. Pa. 1993) ("A determination under [§ 305] must be made on a case-by-case basis.").

panel ("BAP"), but not to the courts of appeals or to the Supreme Court.[27]

But dismissal and abstention are not the only ways bankruptcy courts pull back from exercising jurisdiction. They also have broad authority to reshape the contours of the bankruptcy case by lifting the automatic stay[28] and by excusing a pre-existing custodian from the normal requirement that everyone must turn over property of the estate to the bankruptcy trustee.[29]

With all this at play, even though the bankruptcy courts are wielding Article III power, it is unclear whether the "virtually

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[27] *See* 11 U.S.C. § 305(c), 28 U.S.C. §§ 1334(d); 1452(b); *see also* Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) (dismissing appeal of remand order based on untimeliness of notices of removal). Due to the tight limits on abstention appeals, bankruptcy courts routinely underscore that the remedy should be used only rarely, to keep abstention "as the exception rather than the rule." *See, e.g.*, *In re* Luftek, 6 B.R. 539, 548 (Bankr. E.D.N.Y. 1980).

But the history of jurisdiction-stripping points in the opposite direction. The 1978 Bankruptcy Code originally provided for no appeals whatsoever of abstention from entire cases. *See* Bankruptcy Reform Act of 1978, Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2549, § 305 (codified as amended in scattered provisions of 11 U.S.C and 28 U.S.C.). But three of the four published opinions in the Supreme Court's groundbreaking decision on the new Bankruptcy Code, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), strongly suggested that jettisoning Article III appellate review would violate the separation of powers, even in that limited context. *See id.* at 76–77 (majority op.); *id.* at 91 (Rehnquist, J., concurring); *id.* at 100–101, 115 (White, J., dissenting). So Congress decided to get ahead of the question. In the Judicial Improvements Act of 1990, Pub. L. 101-650, Dec. 1, 1990, 104 Stat. 5089. Congress provided for limited appeals of abstention decisions to the district courts and BAPs, even as it decried the "problems of cost and delay in civil litigation" and called for "differential treatment" of cases "according to their needs, complexity, duration, and probable litigation careers." *Id.* § 102(1), (5)(A); *see also id.* § 309 (amending 11 U.S.C. § 305(c), 28 U.S.C. § 1334, and 28 U.S.C. § 1452). Plus, when a party invokes the mandatory abstention provision and the bankruptcy court decides not to abstain, Congress allowed for full appellate rights. *See* 28 U.S.C. § 1334(d) (excepting "a decision not to abstain in a proceeding described in subsection (c)(2)" from the limited jurisdiction that otherwise would apply). The better view is that the lack of full appellate review should not place a thumb on the scale one way or the other. Bankruptcy courts should not assume that appellate jurisdiction-stripping somehow signals that they should abstain less frequently than they otherwise would.

[28] *See* 11 U.S.C. § 362(d).

[29] *See id.* § 543.

unflagging" obligation even applies to them.[30] Bankruptcy courts are different: they don't just resolve disputes, they solve problems.

This Article brings a fresh look to an old problem. Over the last few decades, most of the judicial, practitioner, and scholarly attention on the purpose and powers of the bankruptcy courts has focused on the "tools in the toolkit." Can a bankruptcy court order a "structured dismissal"? No.[31] Can it include nonconsensual third-party releases in a chapter 11 plan? No.[32] Can it surcharge a homestead exemption? No.[33] Everyone seems to feel that equitable mootness is next.[34]

This string of Supreme Court cases nudging the bankruptcy courts back into strict adherence with the Code has brought many bankruptcy professionals to wonder whether bankruptcy courts are indeed "exceptional" — and even whether they are still courts

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[30] While the federal district courts have used that language more than 4,500 times in reported cases, the bankruptcy courts have used it only 74 times. When the courts of appeals use the phrase "virtually unflagging" in the bankruptcy context, in the main they are thinking about bankruptcy *appeals*, particularly equitable mootness. *See, e.g.*, Excluded Lenders v. Serta Simmons Bedding, LLC (*In re* Serta Simmons Bedding, LLC), 125 F.4th 555, 585 (5th Cir. 2024) (Oldham, J.) ("We are aware of our virtually unflagging obligation to exercise the jurisdiction that the Constitution and Congress have conferred on us.") (internal quotation marks and citations omitted); Lujan Claimants v. Boy Scouts of America (*In re* Boy Scouts of America), 137 F.4th 126, 159 (3d Cir. 2025) (Ambro, J.) ("In the normal course, there is a virtually unflagging obligation of federal courts to exercise the jurisdiction conferred on them.") (internal quotation marks and citations omitted).

[31] *See* Czyzewski v. Jevic Holding Corp., 580 U.S. 451 (2017).

[32] *See* Harrington v. Purdue Pharma (*In re* Purdue Pharma), 144 S. Ct. 2017 (2024); *see also*, *e.g.*, Anthony J. Casey, *Does Chapter 11 of the Bankruptcy Code Authorize Nonconsensual Nondebtor Releases?*, 51 PREVIEW U.S. SUP. CT. CAS. 25 (2023); Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 FORDHAM L. REV. 429 (2022); Ralph Brubaker, *An Incipient Backlash Against Nondebtor Releases? (Part I): the "Necessary to Reorganization" Fallacy*, 42 BANKR. L. LETTER No. 2, at 1 (Feb. 2022).

[33] *See* Law v. Siegel, 571 U.S. 415 (2014).

[34] *See, e.g.*, Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377 (2019); Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 KY. L.J. 269 (2018); Paul A. Avron, *Equitable Mootness: Is it Time for the Supreme Court to Weigh In?*, 36 AM. BANKR. INST. J. (2017); Nicole Langston, *Reexamining the Doctrine of Equitable Mootness in Light of the Detroit Bankruptcy*, 31 COM. L. WORLD 8 (2017).

of equity.[35] After all, in the last several decades of the Supreme Court interpreting the Bankruptcy Code, it has not once endorsed or blessed any of the creative, problem-solving mechanisms devised by bankruptcy lawyers in the halls outside the courtroom.

But the "tools in the toolkit" are only the easiest things to look at, both because action is easier to see than inaction, and because the limits on appellate review of abstention bring at least some of this activity outside the purview of the courts of appeals and the U.S. Supreme Court.

This Article, by contrast, looks at the "negative spaces" of bankruptcy law. It stands out among both the federal courts and bankruptcy literatures for doing so. There is, of course, a sustained literature on abstention doctrines among federal courts scholars, but these pieces do not delve into bankruptcy abstention (which is by far the most interesting).[36] For their part, bankruptcy scholars have analyzed bankruptcy abstention too, most prominently Block-Lieb[37] and Brubaker,[38] but their focus is mostly on bankruptcy jurisdiction vis-à-vis state courts.[39] Of course, plenty of

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[35] This very question prompted a symposium issue of the *American Bankruptcy Law Journal* — yet only one of the submissions accounted for bankruptcy courts' abstention powers. *See* Diane Lourdes Dick, *Equitable Powers and Judicial Discretion: A Survey of U.S. Bankruptcy Judges*, 94 AM. BANKR. L.J. 265, 298–99 (2020) (reporting survey results of bankruptcy judges indicating that they relied on section 105(a), *inter alia*, for finding equitable mootness, abstaining or dismissing cases); *see also* Michelle M. Harner & Emily A. Bryant-Alvarez, *The Equitable Powers of the Bankruptcy Court*, 94 AM. BANKR. L.J. 189 (2020) (recounting the history of bankruptcy courts as courts of equity); Jay Lawrence Westbrook, *Equity in Bankruptcy Courts: Public Priorities*, 94 AM. BANKR. L.J. 203 (2020) (analyzing the role of the public interest in bankruptcy cases); Bruce A. Markell, *Courting Equity in Bankruptcy*, 94 AM. BANKR. L.J. 227 (2020) (arguing that bankruptcy courts are courts of equity); Laura N. Coordes, *Narrowing Equity in Bankruptcy*, 94 AM. BANKR. L.J. 303 (2020) (distinguishing between equity and discretion).

[36] *See, e.g.*, John Harland Giammatteo, *The New Comity Abstention*, 111 CALIF. L. REV. 1705 (2023) (describing a new phenomenon of federal courts abstaining from hearing substantive, constitutional challenges to state court proceedings); Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63 (2019) (analyzing and critiquing new doctrine of "international comity abstention").

[37] *See* Block-Lieb, *supra* note 9.

[38] *See, e.g.*, Brubaker, *supra* note 9.

[39] Similarly, Peter H. Carroll III presented a comprehensive catalog of bankruptcy abstention doctrines in 1988 but does not derive any theoretical

bankruptcy scholars and professionals have written about out-of-court workouts, but usually not the bankruptcy doctrines that prevent them from being unsettled.[40] The leading exception is a 2003 article by Anup Sathy, Jason A. Cohen, Melissa B. Jacoby, and Matthew N. Kleiman.[41] Most recently, the *LTL Management*[42] and *Bestwall*[43] cases have precipitated new writing from Professor Anthony Casey on "bad faith" dismissals and from Sarah Jones on the potential for abstention and venue transfer to address forum shopping.[44]

This Article aspires to break new ground on these discussions, to bring a distinctive and more comprehensive analysis to the underlying questions, and to provoke future research. The Article's approach is to uncover, analyze, and organize a strain of precedent. Bankruptcy courts naturally decline to abstain as well, but the Article does not attempt to quantify the rate at which they do so. That kind of hard-numbers approach would be challenging in the bankruptcy context, because once the bankruptcy courts signal that they are not receptive to hearing a certain kind of case, clever attorneys will begin to shift cases out of the bankruptcy courts and into non-bankruptcy proceedings or out-of-court workouts, for which we have limited data.

The Article is organized pragmatically, not doctrinally. Instead of dedicating parts to each statutory font of authority for bankruptcy abstention (dismissal, abstention, lifting the stay,

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lessons from them. *See* Peter H. Carroll III, *Abstention under Section 305 of the Bankruptcy Code*, 25 BULL. SEC. CORP. BANKING & BUS. L. 29 (Feb. 1988).

[40] *See, e.g.*, Lillian E. Kraemer & Richard B. Paige, *Consensual Workouts — Bankruptcy Alternative for the 1990s?*, 1994 BANKING & COMMERCIAL LENDING L. (Mar. 10).

[41] Anup Sathy, Jason A. Cohen, Melissa B. Jacoby & Matthew N. Kleinman, *Using the Doctrine of Abstention to Protect Your Consensual Restructuring*, 22 AM. BANKR. INST. L. 24 (2003) (discussing *In re NRG Energy Inc.*, 294 B.R. 71 (Bankr. D. Minn. 2003) and ways to protect consensual workouts through abstention).

[42] LTL Management, LLC v. Those Parties Listed on Appendix A to Complaint (*In re* LTL Mgmt., LLC), 64 F.4th 84 (3d Cir. 2023) (Ambro, J.).

[43] Bestwall LLC v. The Official Committee of Asbestos Claimants of Bestwall, LLC, No. 24-1493 (4th Cir. May 8, 2025).

[44] *See, e.g.*, Sarah Jones, Note, *Ameliorating Bankruptcy's Forum Shopping Crisis Through Abstention and Venue Transfer*, 76 FLA. L. REV. 405 (2024); Anthony J. Casey, *Good-Faith Filing in Chapter 11* (unpublished manuscript), https://wifpr.wharton.upenn.edu/wp-content/uploads/2024/09/WIFPR-Chapter-11-Casey.pdf.

excusing turnover), I have assigned parts based on *why* bankruptcy courts do what they do. The Article, therefore, proceeds as follows: Part I examines when bankruptcy courts abstain because the case lacks a bankruptcy purpose: the debtor isn't in financial distress, the tools of the bankruptcy process won't help, or the legal fight is really a two-party dispute masquerading as a collective, insolvency proceeding. Part II explores when bankruptcy courts abstain because the parties are forum-shopping, running away from state or federal regulators, filing bankruptcy as a tactical move in collateral litigation, trying to press the "reset" button on multi-district litigation, or even trying to move the insolvency case from one insolvency proceeding to another. And Part III investigates when bankruptcy courts abstain because the parties are working it out through a purely private process.

From there, Part IV steps back and discusses several implications of this analysis for our understanding of bankruptcy purpose and power. I analyze three theoretical insights we can derive from this study, connecting bankruptcy abstention to federalism, equity, and private ordering. I argue that while federalism can explain some of bankruptcy abstention, the long tradition of the bankruptcy court's pulling back from exercising jurisdiction over out-of-court workouts requires a different theoretical frame: an appreciation of the bankruptcy courts as courts of equity. The Article suggests that we can rethink some of bankruptcy's most contentious doctrines through that lens, coins the phrase "bankruptcy ripeness," and provides new insight into the debate over bankruptcy exceptionalism. That conclusion can, in turn, suggest guidance to attorneys, judges, and policymakers for how best to fine-tune the bankruptcy system as well as lessons for other courts of equity in the American legal system. Lastly, these insights further suggest a new way of thinking about bankruptcy theory. Rather than focusing only on fairness or efficiency, traditionalism or proceduralism, we can also analyze the character of the bankruptcy courts as institutions. A brief conclusion follows.

Several important legal and scholarly debates are outside the scope of this Article, although the analysis here may prove relevant to those debates. First, the Supreme Court has developed separation-of-powers doctrines in bankruptcy cases that govern which proceedings and cases may be heard by bankruptcy courts

versus Article III courts.[45] While significant, these doctrines regulate the distribution of bankruptcy labor *between* different types of federal tribunals and thus differ analytically from the doctrines discussed in this Article — all of which regulate whether something is indeed a bankruptcy matter or rather something else. Second, the venue rules in bankruptcy are notoriously loose,[46] and Professor Lynn LoPucki and others have long criticized the bankruptcy courts for (among other things) failing to transfer venue to a different, more appropriate bankruptcy court.[47] This problem, too, is analytically distinct from the topic of this Article, because venue concerns regulate *which* bankruptcy court ought to hear a matter, not whether it should be heard in bankruptcy court at all.[48] Lastly, the Article focuses on business bankruptcy cases,

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[45] Stern v. Marshall, 564 U.S. 462 (2011).

[46] *See* 28 U.S.C. § 1408 (providing that a business can file bankruptcy in any venue where an affiliate bankruptcy is pending).

[47] *See, e.g.*, LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005); Lynn M. LoPucki, *False Venue Claims Signed Under Penalty of Perjury*, 80 BUS. L. 689 (2025).

[48] For example, consider *In re NRG Energy, Inc.* 294 B.R. 71 (Bankr. D. Minn. 2003). As part of an out-of-court workout, NRG Energy identified key constituencies, organized creditors into classes, and even offered to make distributions. During the process, some creditors even agreed to forbear from further debt collection activities. *Id.* at 76–79. The process broke down when some of NRG's former executives and officers banded together and commenced an involuntary proceeding in the District of Minnesota. The involuntary petition had been pending for almost six months when the court decided to abstain under section 305. The court noted that the debtor's workout was comprehensive, orderly, fair, and efficient, and "intentionally mimicked many of the functions of a debtor in the opening stages of a Chapter 11 case." *See id.* at 76, 81; *id.* at 85 ([T]here is a significant risk that forcing the maintenance of the bankruptcy jurisdiction over negotiations well-started under different assumptions and rules would unduly distort the process, reduce creditors' ultimate realizations, and prejudice the results"). The debtor asked to be dismissed from bankruptcy so that it could determine whether and when to file, and the court agreed, declining to hear concerns about forum-shopping and rejecting one creditor's request that dismissal be conditioned on re-filing in Minnesota. *See id.* at 87 n.21. The petitioners had argued that NRG Energy would take its bankruptcy case to a more debtor-friendly forum, like the District of Delaware or the Southern District of New York, but the judge declined to consider that argument, noting that the Bankruptcy Code's venue statute would govern that determination and that the court only had the abstention question before it: it would be premature to consider the venue of a bankruptcy case that had not yet been filed. *See id.* at 87 & n.20. Yet the court made that ruling with eyes wide

not individual consumer cases. Consumer cases raise different legal issues and thus different types of policy. While consumer bankruptcy law is not hermetically sealed from business bankruptcy law, individual cases are subject to different and significant eligibility rules, like the means test. And because the discharge is the *sine qua non* of most consumer cases, individuals cannot readily use state receiverships, ABCs, or out-of-court workouts as alternatives to the bankruptcy process.

I. WHEN THE CASE LACKS A BANKRUPTCY PURPOSE

Bankruptcy courts are problem-solving courts, and across innumerable opinions they have recognized that the two problems at the core of all bankruptcy cases are either "can't pay" or "won't pay" debtors. And the bankruptcy courts are more likely to abstain from hearing cases when the case lacks a bankruptcy purpose.

To be sure, the Bankruptcy Code does not say what the purpose of bankruptcy is. But courts have long recognized that bankruptcy offers a process for preserving go-forward value when reorganization is possible and for orderly liquidation when it is not. The Bankruptcy Code accomplishes this result by providing an automatic stay, giving "breathing room" for negotiations.[49] It also erects a structure for classifying and prioritizing claims against the estate and for allowing parties to propose and vote on plans, with the potential to bind holdouts who try to extract value for their recalcitrance.[50] We can also glean from chapter 15 that a bankruptcy proceeding is collective and either judicial or administrative,[51] distinguishing it from two-party disputes and

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open. *See id.* at 86 ("NRG may be positioning itself for a filing under Chapter 11 in one of these districts, right now; if its management has elided the issue to some degree in this case, not a soul has been fooled."). Two days later, NRG Energy filed its voluntary petition for bankruptcy in the Southern District of New York — along with a fully drafted, 103-page proposed plan. *See, e.g.*, Voluntary Petition, *In re* NRG Energy, Inc., No. 1:03-bk-13024 (Bankr. S.D.N.Y. May 14, 2003), Dkt. No. 1; Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code, *In re* NRG Energy, Inc., No. 1:03-bk-13024 (Bankr. S.D.N.Y. May 15, 2003), Dkt. No. 42; *see also* Sathy *et al.*, *supra* note 41, at 40.

[49] *See* 11 U.S.C. § 362.

[50] *See* 11 U.S.C. § 1129 (providing voting rules for a chapter 11 plan).

[51] In chapter 15, a foreign representative asks a bankruptcy court to

out-of-court workouts. Thus, while bankruptcy purpose is not spelled out in the Code, numerous provisions hint at it, and courts enforce its spirit by pulling back from cases that do not conform to bankruptcy ends. They do this by dismissing or suspending cases under sections 305 or 1112 or by lifting the stay under section 362(b).

The difference between the federal district courts and the bankruptcy courts here is stark: While Federal Rule of Civil Procedure 12(b) authorizes federal courts to dismiss claims for lack of jurisdiction, improper venue, procedural failings, or failure to state a claim,[52] bankruptcy courts can also dismiss or abstain for additional, bankruptcy-specific reasons, such as when the interests of the creditors and the debtor "would be better served"[53] by doing so or, in chapter 11, if the estate is dropping in value and hope for rehabilitation grows dim.[54] That degree of authorization to refrain from exercising jurisdiction would be unthinkable in any other court. Imagine if a federal district court dismissed a complaint because it concluded that the interests of the plaintiff and the defendant would be better served by not proceeding with the lawsuit.

This Part will discuss three types of cases where bankruptcy courts have developed a tradition of pulling back: cases where the debtor is not suffering financial distress; cases where efforts to reorganize are futile; and cases that are not collective at all, but rather two-party disputes.

A. Financial Distress

First, bankruptcy courts underscore that their courtroom is for debtors suffering from financial distress, just like an emergency

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recognize and coordinate with a main insolvency proceeding happening abroad. To do this, bankruptcy courts must know what counts as an insolvency or bankruptcy proceeding. The Code defines "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign country under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a … court, for the purpose of reorganization or liquidation." 11 U.S.C. §§ 101(23) (emphasis added); *see also id.* § 1515(a).

[52] Fed. R. Civ. Proc. 12(b).

[53] 11 U.S.C. § 305(a).

[54] *See id.* § 1112(b)(4) (defining "cause" for dismissal).

room is for patients suffering from serious health problems. To be sure, bankruptcy courts recognize, as the Supreme Court did in *Constitutional Illinois National Bank & Trust Co.*,[55] that bankruptcy courts can preside over cases where the debtor "can pay" but is actively hiding assets or simply refuses to pay.[56] Even so, bankruptcy courts look critically at debtors who are not undergoing serious financial distress. The proceedings involving such "solvent debtors" are either thrown out of court or subject to old, pre-Code equitable principles under the "solvent debtor exception."

To be clear, solvent debtors are not always running schemes or absconding with assets. Some debtors use bankruptcy to coordinate fair, pro rata payment to millions of claimants, as in the case of Pacific Gas & Electric Co., which filed for bankruptcy in 2019 after facing $50 billion in liability stemming from Northern California wildfires.[57] Or sometimes, a debtor reaches the steps of the bankruptcy courthouse, indisputably insolvent, but the value of the estate goes up after the filing. That effect can occur when the debtor's estate is tied to commodities whose value can fluctuate wildly, such as Ultra Petroleum[58] or Energy Future Holdings.[59] It can also occur when the estate trends upward alongside a general economic recovery. Hertz, the car rental company, was insolvent when it filed, but as the nation emerged from the COVID-19 pandemic, so too did Hertz.[60]

Congress has erected express tests for insolvency at some entry points to bankruptcy relief.[61] Municipalities must be insolvent to

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[55] Constitutional Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648 (1935).

[56] *Id.* at 672–73 ("[T]he 'subject of bankruptcies' is nothing less than 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief.") (quoting *In re* Reiman, 20 F. Cas. 490, 496 (S.D.N.Y. 1874)). Indeed, some of bankruptcy's most powerful tools, such as trustees, examiners, clawback actions, and substantive consolidation, help creditors reach assets that may have been improperly or fraudulently shuttled away from creditors.

[57] *In re* PG&E Corp., 46 F.4th 1047 (9th Cir. 2022).

[58] *In re* Ultra Petroleum Corp., 51 F.4th 138, 143 (5th Cir. 2022).

[59] *In re* Energy Future Holdings, 842 F.3d 247 (3d Cir. 2016).

[60] *In re* Hertz, 117 F.4th 109 (3d Cir. 2024), *amended and superseded by*, 120 F.4th 1181 (3d Cir. 2024).

[61] For individuals, Congress also established a "means test" in 2005 that

file under chapter 9 of the Code,[62] and for involuntary cases, the Code requires that petitioning creditors show that the debtor is "generally not paying such debtor's debts" or that the debtor's property is in the control of a custodian, such as a receiver, trustee, or assignee.[63]

By contrast, Congress has not imposed any express insolvency requirement at the threshold of voluntary chapter 11 cases. That does not mean that bankruptcy courts always abstain from solvent debtor cases. Instead, bankruptcy courts apply a longstanding rule called the "solvent debtor exception." While bankruptcy contains numerous equitable principles to reduce a debtor's debt overhang, the solvent debtor exception means that a solvent debtor, as a general matter, must pay its debtors in full, before any equity returns to the old owners.

For example, consider a funded debt that the debtor agreed to pay back pursuant to a maturity schedule. The Bankruptcy Code allows claims for the unmatured principal,[64] but disallows claims for any unmatured interest,[65] effectively accelerating all outstanding loans but freezing the interest clock on all of them.[66]

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creates a presumption of abuse if debtors who can make sufficient payments on their general unsecured debt file for chapter 7 instead of chapter 13. While not framed as a solvency requirement, it effectively functions in much the same way, ensuring that solvent individuals cannot receive a quick discharge under chapter 7 of the Code but must attempt to confirm a plan under chapters 11, 12, or 13.

[62] *See* 11 U.S.C. § 109(c)(3).

[63] *See id.* § 303(h). Congress has tinkered with those requirements over the years. Before 1898, under the 1847 and 1867 Acts, debtors filing for bankruptcy voluntarily had to plead that they were unable to pay their debts, but "the law [took] him at his word." Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 190–91 (1902). And until the 1978 Code, voluntary petitioners had to show that they were insolvent or unable to pay debts as they came due, while involuntary petitioners had to show that the debtor had committed one or more "acts of bankruptcy." *See, e.g.*, *In re* Johns-Manville Corp., 36 B.R. 727, 732 (Bankr. S.D.N.Y. 1984) ("[W]ith specific regard to Chapter 11, the Code eliminates the requirement contained in former Sections 77(a), 130(1), 323 and 423 of the Act that the debtor be insolvent or unable to pay his debts as they mature.).

[64] 11 U.S.C. § 101(5).

[65] *Id.* § 502(b)(2).

[66] Nor can the debtor pick a favorite lender and attempt to assume the debt contract as an executory contract: contracts for loans, debt financing, or other financial accommodations are excluded from assumption in bankruptcy. *See* 11 U.S.C. § 365(c)(2).

In a chapter 7 liquidation, the Code's distribution regime requires the trustee to pay postpetition interest, at the legal rate, before the debtor receives any funds from the estate.[67] And in *Ultra Petroleum*, *PG&E*, *Energy Future Holdings*, and *Hertz*, courts imposed a similar requirement for solvent debtors attempting to confirm a chapter 11 plan, even without a clear statutory mandate.[68] The courts reasoned that Congress legislated against the backdrop of the solvent debtor exception.

Other limited interventions in solvent debtor cases could involve a court lifting the stay, refusing to allow the debtor to reject executory contracts, or refusing to confirm a plan.[69]

Some bankruptcy courts have refused to exercise jurisdiction over solvent debtor cases altogether. In some jurisdictions, the statutory hook is that a solvent debtor filing must be dismissed for cause under section 1112 for filing in "bad faith."[70] This strain of caselaw become one of the ways that bankruptcy courts have rejected the "Texas Two-Step," a gambit in which an enterprise first consummates a divisional merger under Texas law, putting all the assets and operations into one company ("GoodCo") and loading up an affiliate with all the liabilities ("BadCo"), then sends the affiliate into bankruptcy. To avoid a ruling that the transaction was a constructive fraudulent transfer (it still might be an actual fraudulent transfer, of course), GoodCo gives BadCo a funding agreement, offering to repay it for the liabilities. The premise behind the maneuver is twofold: first, the operating company, GoodCo, can continue operating without the expenses and hurdles of a formal bankruptcy case; second, the debtor company, BadCo, will have to dedicate its assets to repaying debts, but the enterprise has decided in advance how valuable the available assets will be.

Some Texas Two-Step cases confronted a solvency requirement because their funding agreements were uncapped or, put differently, too generous. Johnson & Johnson was facing liability over talc in its baby powder, so it created a new entity called LTL

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[67] *See* 11 U.S.C. § 726(a)(5).

[68] *See, e.g.*, *In re* Ultra Petroleum Corp., 51 F.4th 138, 143 (5th Cir. 2022); *In re* PG&E Corp., 46 F.4th 1047 (9th Cir. 2022); *In re* Energy Future Holdings, 842 F.3d 247 (3d Cir. 2016); *In re* Hertz, 117 F.4th 109 (3d Cir. 2024), *amended and superseded by*, 120 F.4th 1181 (3d Cir. 2024).

[69] *See* 11 U.S.C. § 1129(a)(3) (requiring that chapter 11 plans be proposed "in good faith").

[70] 11 U.S.C. § 1112.

Management, loaded it up with the liability and an uncapped funding agreement, and sent it into bankruptcy.[71] Once there, the talc claimants in *LTL Management* asked the bankruptcy court to dismiss the case for cause. The bankruptcy judge denied the motions, but the Third Circuit reversed, insisting that a debtor in bankruptcy must be facing financial distress that is both "apparent" and "immediate enough to justify a filing."[72]

Asbestos claimants have made similar arguments in *Bestwall*, giving them a constitutional dimension.[73] They argued that the Bankruptcy Power in the U.S. Constitution is limited by an implicit insolvency requirement baked into the word "Bankruptcies," such that a bankruptcy court lacks subject-matter jurisdiction over solvent debtors. The Fourth Circuit recently rejected that view in a split decision.[74] That said, the majority opinion underscores that the asbestos claimants were really trying to shoehorn a constitutional argument into a jurisdictional one,[75] and when the bad faith arguments are wrapped into a final, appealable order — or resurrected at the end of the case — it remains to be seen whether the Fourth Circuit in *Bestwall* will follow the Third Circuit in *LTL Management*.[76]

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[71] The *LTL Management* case has been tortuous. It began in bankruptcy court in North Carolina, but the judge transferred the case to the District of New Jersey.

[72] *In re* LTL Mgmt., LLC, 64 F.4th 84, 102 (3d Cir. 2023) (Ambro, J.).

[73] The asbestos claimants had previously tried, and failed, to get the bankruptcy court to dismiss the case for bad faith. *See In re Bestwall LLC*, 605 B.R. 43, 54 (Bankr. W.D.N.C. 2019). When they attempted to get the Fourth Circuit to take up their appeal on an expedited schedule, the Fourth Circuit declined. *See* Off. Comm. of Asbestos Claimants of Bestwall, LLC v. Bestwall LLC, No. 19-408, 2019 WL 13512209 (4th Cir. Nov. 14, 2019).

[74] Bestwall LLC v. The Official Committee of Asbestos Claimants of Bestwall, LLC, No. 24-1493 (4th Cir. May 8, 2025).

[75] *Id.* at *13.

[76] The Fourth Circuit would have to confront how to square the rule in *LTL Management* with longstanding circuit precedent that states "[d]ecisions denying access at the very portals of bankruptcy, before an ongoing proceeding has even begun to develop the total shape of the debtor's situation, are inherently drastic and not lightly to be made." Carolin Corp. v. Miller, 886 F.2d 693, 700–01 (4th Cir. 1989). Similarly, in *General Growth Properties*, a bankruptcy court declined to dismiss a chapter 11 petition when balloon payments were not yet due. *In re* General Growth Props., Inc., 409 B.R. 43, 57 (Bankr. S.D.N.Y. 2009); *id.* at 60 ("In light of the statute, this Court declines the

We can make several statutory and pragmatic observations about this line of cases. To start, a finding of "cause" under section 1112(b) requires the bankruptcy court to convert or dismiss the case; it is not discretionary.[77] The statute includes a list of sixteen examples of cause, all of which look more like futility[78] or misconduct in the litigation — not a "can-pay," "will-pay" debtor. Even though the list is not exclusive,[79] additional types of "cause" ought to resemble the items in the enumerated list under the canon of *ejusdem generis*.[80]

Plus, critics of using financial distress as a gateway to bankruptcy, most prominently Professors Anthony Casey[81] and Brook Gotberg,[82] underscore the difficulties in litigating a squishy standard of financial distress at the outset of a case. Enterprise valuation, whether in bankruptcy or not, is famously tricky. Requiring the bankruptcy courts to hold a contested solvency hearing at the beginning of the case seems imprudent, especially when the solvent debtor exception provides numerous

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invitation to establish an arbitrary rule, of the type desired by Movants, that a debtor is not in financial distress and cannot file a Chapter 11 petition if its principal debt is not due within one, two, or three years.").

[77] *See* 11 U.S.C. § 1112(b) (providing that the court "shall convert … or dismiss" the case, "whichever is in the best interests of creditors and the estate"). To be fair, the Code does include some carve-outs. The court might decide to appoint a trustee or an examiner instead, a measure that makes more sense in the context of mismanagement than here. Other than that, the Code provides only one narrow exception: so long as the cause was not futility of the bankruptcy case under paragraph (4)(A) and the debtor is still on track to confirm a plan within statutory deadlines, and if the debtor had "reasonable justification" for the offending act or omission and can readily cure it, then the court can identify "unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate." 11 U.S.C. § 1112(b)(2).

[78] *See infra* Section I.B.

[79] In the Bankruptcy Code, the word "includes" and "including" are not limiting, per 11 U.S.C. § 102(2).

[80] Even if we were to focus on Texas Two-Step cases, those prepetition actions most resemble fraudulent transfers, and while Congress could have included prepetition fraudulent transfers as a reason for dismissing a bankruptcy case for cause, it did not do so. By comparison, Congress did think that intentional fraudulent transfers shortly before or after filing the case are a reason to deny an individual debtor a discharge in chapter 7. *See* 11 U.S.C. § 727(a)(2).

[81] *See* Casey, *supra* note 44.

[82] *See* Brook Gotberg, *The Burden of Financial Distress* (unpublished manuscript) (on file with author).

opportunities for the bankruptcy court to intervene in the name of fairness, efficiency, or formation.

In the wake of the *LTL Management* decision, scholars and practitioners have rightly pointed out that the Code imposes no strict insolvency requirement at the gateway to bankruptcy.[83] But that is not the end of the analysis. Instead of dismissing solvent debtor cases under section 1112, a better statutory hook for cases like *LTL Management* and *Bestwall* is abstention. That equitable standard, codified in section 305, gives the bankruptcy courts discretion and provides a comprehensive, objective standard: whether "the interests of creditors and the debtor would be better served by such dismissal or suspension."[84] If so, the bankruptcy court may (not must) abstain. Shifting the "solvent debtor" cases away from dismissal and toward abstention would provide courts with the discretion to abstain from cases where solvency is coupled with other "bad facts," like forum shopping or other forms of what Professor Lindsey Simon calls "bankruptcy grifting"[85] — without erecting expensive and ungainly gateways at the beginning of every (arguably) solvent debtor case.

B. Futility

Second, and conversely, bankruptcy courts tend to dismiss or abstain from hearing cases when they cannot see how the bankruptcy process can help. To be sure, bankruptcy provides debtors with lots of tools for managing financial distress. Upon filing for bankruptcy, debtors can negotiate under the calm of the automatic stay,[86] ask the court for permission to borrow funds to finance a turnaround,[87] assume or reject executory contracts,[88] recover funds from preferential or fraudulent transfers,[89] and — most importantly — propose a plan of reorganization that can bind holdouts.[90]

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[83] *See, e.g.*, Casey, *supra* note 44.
[84] 11 U.S.C. § 305.
[85] *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022).
[86] *See* 11 U.S.C. § 362.
[87] *See id.* § 364.
[88] *See id.* § 365.
[89] *See id.* §§ 544, 547, 548.
[90] *See id.* § 1129.

Yet sometimes those tools are not enough. For example, the financial distress might be so pronounced that the bankruptcy court concludes that the debtor does not have an ongoing business to reorganize.[91] So, rather than convert a reorganization case to a liquidation,[92] the court might dismiss or abstain from hearing it altogether, telegraphing to the debtor that its rosy vision for a restructuring is misguided.[93]

Futility operates at both the case level and the asset level. When the debtor has no equity in a piece of collateral and the asset is "not necessary to an effective reorganization," the court must lift the stay to allow the secured creditor to repossess it.[94] When the debtor is underwater on several pieces of important collateral and no effective reorganization is on the table, that rule suggests, *a fortiori*, that the court should dismiss the whole case. After all, it defeats the purpose of the bankruptcy case to keep the debtor in the courtroom while sending the secured creditors outside to repossess core assets.[95]

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[91] For example, in *In re* Davis Heritage GP Holdings, LLC, 443 B.R. 448 (Bankr. N.D. Fla. 2011), the court sized up the debtor's assets as "one parcel of vacant land in Mississippi that is fully encumbered" and ownership interests in mezzanine companies with no estate assets, concluding that "this Debtor does not own anything that it can reorganize"), *id.* at 458. Similarly, in *Fitzgerald Group*, the debtor partnership had automatically dissolved under state law, and the only remaining asset was a typewriter worth $2,500. *See In re* Fitzgerald Grp., 38 B.R. 16, 18 (Bankr. S.D.N.Y. 1983).

[92] Debtors in chapter 11 can convert their cases to a chapter 7 liquidation voluntarily under most circumstances. *See* 11 U.S.C. § 1112(a). But upon a party's request, the court must dismiss the case, convert it, or appoint a trustee or examiner for cause, "whichever is in the best interests of creditors and the estate," *id.* § 1112(b)(1) — and cause includes, among other things, "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation," *id.* § 1112(b)(4)(A). That said, a bankruptcy court cannot convert farm or nonprofit bankruptcies to chapter 7 and can only suggest that the debtor request conversion if the court believes that a liquidation is the best outcome. *See* 11 U.S.C. § 1112(c).

[93] *See, e.g.*, Sapphire Dev., LLC v. McKay, 549 B.R. 556, 557, 567–68 (D. Conn. 2016) (affirming bankruptcy court's dismissal of a case when the debtor "has had no employees for almost a decade, has failed to pay taxes on the property to which it has title, has received income only from related entities, and has done nothing of significance in recent years other than hold the property on which its principal resides").

[94] 11 U.S.C. § 362(d)(2).

[95] *See also* 11 U.S.C. § 1112(b)(4)(A) (providing that cause for dismissal

When bankruptcy courts abstain due to futility, that does not always mean that an insolvency could never help the debtor. The problem, in some cases, is that the judge does not yet have enough information to decide.

In re MV Realty was such a case. The debtor, MV Realty, was a real estate brokerage company, based in South Florida, that wrote checks (for a few thousand dollars) to homeowners, in exchange for a promise that if the homeowners were to sell the home during the next forty years, they would hire MV Realty as a real estate broker or pay a 3% penalty on the sale. Most troublingly, to enforce their contract, MV Realty filed the agreements in the title system, effectively preventing homeowners from working with any other real estate brokers.[96]

The bankruptcy judge faced a predicament. It was premature to call a reorganization utterly futile, but the estate's only assets of any value were thousands of these contracts, governed by the laws of more than a dozen states. And Attorneys General from Massachusetts to Florida were challenging the contracts in state court as fraudulent, unconscionable, against public policy, and illegal. On the federal level, the Consumer Financial Protection Bureau (the "CFPB") opened an investigation. Thus, the enterprise value of the bankruptcy estate was impossible to discern without making rulings of state law.[97] And even though the automatic stay did not apply to the law enforcement actions,[98] any proposed reorganization necessarily turned on whether the contracts were lawful or not.

The bankruptcy judge could have ruled on those state-law issues, but he decided to abstain, declining to embark upon a multi-state survey of mortgage and contract law.[99] But once he had

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includes "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation").

[96] *See* MV Realty v. Office of the Attorney General, State of Florida (*In re* MV Realty PBC, LLC), 658 B.R. 194, 198 (Bankr. S.D. Fla. 2024).

[97] *See MV Realty*, 658 B.R. at 204 ("[T]he plaintiff's potential for success in the state actions is a necessary consideration in determining whether they have a reasonable likelihood of successful reorganization.").

[98] *See* 11 U.S.C. § 362(b); *MV Realty*, 658 B.R. at 200, 202–03 (clarifying scope of the automatic stay and declining to extend it over the law enforcement actions).

[99] *See MV Realty*, 658 B.R. at 207–08. The bankruptcy judge had also decided not to interfere with a proceeding in North Carolina that could have

decided to let the state courts reach rulings on the merits, the propriety of retaining jurisdiction over the case made much less sense. With multiple motions to dismiss pending, and a hearing on the calendar, the debtor voluntarily dismissed the case.[100] That decision appears to have been prescient. Since exiting bankruptcy, in the Sunshine State alone, lawmakers passed a statute criminalizing MV Realty's business model[101] and a judge forced MV Realty to clear the homeowners' titles.[102]

Whether the debtor is an empty shell or a messy scramble, the doctrine calls for bankruptcy courts to assess whether bankruptcy can provide a workable liquidation or reorganization process. If it cannot, they may find a way to abstain from hearing the case altogether.

C. Two-Party Disputes

Third, bankruptcy law allows courts abstain from hearing disputes between only two parties. Indeed, bankruptcy courts may take this step even when the debtor is undergoing financial distress that bankruptcy could otherwise remediate.[103] The justification for not exercising jurisdiction is that a bankruptcy

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stripped a valuable real estate license from the debtor. *See* MV Realty of N.C., LLC v. N.C. Real Est. Comm'n (*In re* MV Realty PBC, LLC), 2023 WL 8592795 (Bankr. S.D. Fla. Dec. 9, 2023).

[100] *See* Debtors' Notice of Consent to Voluntary Dismissal Without Prejudice, *MV Realty*, No. 23-17590 (Bankr. S.D. Fla. May 13, 2024), Dkt. No. 1419; Order Dismissing Cases, *MV Realty*, No. 23-17590 (Bankr. S.D. Fla. May 24, 2024), Dkt. No. 1523.

[101] *See* FLA. STAT. § 475.279 (2023) (providing that "residential loan alternative agreements" lasting longer than two years are not liens, cannot be assigned, and must come with services beginning within ninety days — or the agreement is unenforceable and an unfair or deceptive trade practice).

[102] *See* David Minsky, *Fla. Realty Co. Sued Over Home Liens Told to Pay Ch. 11 Bills*, Law360 (Apr. 16, 2025, 6:53 P.M.), https://www.law360.com/bankruptcy-authority/articles/2325972/fla-realty-co-sued-over-home-liens-told-to-pay-ch-11-bills; Office of the Attorney General, State of Florida v. MV Realty PBC, LLC, No. 22-CA-009958, Motion for Order to Show Cause As to Why Defendants Should Not Be Held in Indirect Contempt of Court (Apr. 11, 2025).

[103] *See, e.g.*, Cedar Short Resort, Inc. v. Mueller (*In re* Cedar Shore Resort, Inc.), 235 F.3d 375, 381 (8th Cir. 2000) (affirming dismissal of chapter 11 petition for bad faith "even though the debtor might be capable of effectuating a reorganization").

proceeding must be collective,[104] and that other courts are adequately equipped to handle most two-party disputes.[105] Indeed, bankruptcy courts bristle when judgment creditors run straight to them after winning a money judgment, using the court as a sort of debt collection agency.[106] Conversely, courts are more hospitable to debtors when they explain their need for tools available only in bankruptcy court, such as fraudulent conveyance actions, equitable subordination, or even the appointment of a trustee.[107]

Some courts have put a federalist gloss on this requirement, explaining that the restriction to collective proceedings helps keep bankruptcies within constitutional limits. As the Fourth Circuit put it in a commercial landlord-tenant dispute that wound up in bankruptcy court,

> [This case] was at bottom a straightforward contractual dispute between a landlord and tenant and should not have been creatively refashioned as a bankruptcy matter or constitutional controversy brought "for the sole purpose of halting and/or delaying [the debtor's] ultimate eviction" …. If these sorts of suits are deemed proper subjects for bankruptcy, then those courts (to their own dismay) would be well on their way to becoming courts of general jurisdiction.

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[104] *See supra* note 51 and accompanying text.

[105] *See, e.g.*, *In re* Outta Control Sportfishing, Inc., 642 B.R. 180, 185 (Bankr. S.D. Fla. 2022) (noting that bankruptcy courts dismiss cases arising from two-party disputes when the dispute can be handled by the other forum). Conversely, the fact that a debtor and one of its creditors are litigating in state court does not rule out a bankruptcy case. *See, e.g.*, *In re* Sapphire Development, LLC, 523 B.R. 1, 8–9 (D. Conn. 2014) (reversing bankruptcy court's abstention decision when debtor had three mortgages, a tax lien, and several unsecured creditors in addition to the matter pending in state court). Ironically, upon remand, the bankruptcy court dismissed the case as a bad faith filing. *See In re* Sapphire Development, LLC, No. 13-50043, 2015 WL 5579545 (Bankr. D. Conn. June 26, 2015), *aff'd*, 549 B.R. 556 (D. Conn. 2016).

[106] *See, e.g.*, *In re* Mountain Dairies, Inc., 372 B.R. 623, 635 (Bankr. S.D.N.Y. 2007); *In re* SBA Factors of Miami, Inc., 13 B.R. 99, 100 (Bankr. S.D. Fla. 1981).

[107] *See, e.g.*, *In re* 9281 Shore Road Owners Corp., 187 B.R. 837, 855 (E.D.N.Y. 1995) (reversing bankruptcy court's dismissal of SARE case when debtor needed tools unavailable in state court); *In re* Sirius Sys., Inc., 112 B.R. 50, 55 n.1 (Bankr. D.N.H. 1990) (noting that the court had declined to dismiss involuntary case when preference and fraudulent transfer actions could have increased the estate); *id.* at 55 (declining to dismiss a voluntary petition when the two deadlocked shareholders jointly asked the court to appoint a chapter 11 trustee, a move that would break the deadlock in state court).

> Both the bankruptcy and district courts refused to permit this, and we affirm the judgment.[108]

The principle against hearing two-party disputes in bankruptcy court stands as a statutory requirement for involuntary cases, which can only be brought by three or more qualifying creditors when the debtor has twelve or more such creditors,[109] but it shines through in voluntary cases too, through dismissal, abstention, and lift-stay orders.[110]

Sometimes the one-on-one nature of the dispute is easy to see. In *Westerleigh Development Corp.*,[111] for example, two 50% shareholders were deadlocked in state court when one of them caused his family owned corporation to file an involuntary petition against the company. The bankruptcy court dismissed the bankruptcy case, noting that the debtor company could not even contest the involuntary petition, because "its only two shareholders are on either side of the case, with neither having authority to act for the corporation."[112]

Or consider Asanda Air, whose sole business was operating spas in Delta's Sky Clubs.[113] When Delta delivered a notice terminating its contract, Asanda Air threatened to file for bankruptcy to invoke the automatic stay.[114] Delta sued in Georgia, but Asanda Air filed for bankruptcy the day before its answer was due.[115] "[T]his reorganization essentially involves the resolution of a two-party dispute," concluded the bankruptcy court, pointing to the fact that

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[108] Maryland Port Administration v. Premier Automotive Servs., Inc. (*In re* Premier Automotive Servs., Inc.), 492 F.3d 274, 285 (4th Cir. 2007).

[109] 11 U.S.C. § 303(b).

[110] *See, e.g.*, Argus Grp. 1700, Inc. v. Steinman, 206 B.R. 757, 765 (E.D. Pa. 1997) (dismissing when the debtor filed for bankruptcy "to obtain federal-court jurisdiction" over a two-party dispute; Wechsler v. Macke Int'l Trade, Inc. (*In re* Macke Int'l Trade, Inc.), 370 B.R. 236, 247 (B.A.P. 9th Cir. 2007) (affirming bankruptcy court's abstention from a two-party dispute when the debtor had already commenced an ABC with other creditors).

[111] *In re* Westerleigh Dev. Corp., 141 B.R. 38 (Bankr. S.D.N.Y. 1992).

[112] *Id.* at 40; *see also In re* Runaway II, Inc., 168 B.R. 193, 198 (Bankr. W.D. Mo 1994) (abstaining from two-party dispute between two 50% shareholders).

[113] *See In re* Asanda Air II LLC, 600 B.R. 714, 717 (Bankr. N.D. Ga. 2019).

[114] *See id.* at 718.

[115] *See In re* Asanda Air, 600 B.R. at 718. As the bankruptcy court later noted, "[t]he Debtor presents no evidence that any other creditor acted, or even threatened action, which might justify the need for the automatic stay." *Id.* at 722.

Asanda Air hadn't missed any payments to its only other unsecured creditor (PayPal) — and that Delta was the only creditor actively litigating.[116]

But other cases require deeper investigation, and bankruptcy courts rigorously police the two-party line. Maury Rosenberg ran a medical imaging business called National Medical Imaging, LLC ("NMI"). Beginning in 2000, NMI entered into lease agreements on several pieces of very expensive medical imaging equipment, leases that it almost immediately struggled to pay. After a voluntary business bankruptcy, thirteen lawsuits in state court, and an involuntary business bankruptcy, Rosenberg's creditors (indirectly owned by U.S. Bank) forced him to execute a personal guarantee of the leases.[117]

In 2008, six lessor entities (collectively, the "DVI entities") commenced two involuntary proceedings, one against Rosenberg personally and one against NMI, his company. Bankruptcy Judge Jay Cristol, an icon of the Miami insolvency bench, determined that Rosenberg's obligations didn't run to the six DVI entities, which he called "pass through vehicles," but to an intermediate entity as part of a novation.[118] That conclusion meant that NMI had only one petitioning creditor, not six — leaving the numerosity requirement for the involuntary petition unmet.[119] The bankruptcy courts dismissed the involuntary petitions.

In other contexts, bankruptcy courts hold the concept of a "two-party dispute" loosely. When "one side of the v" is actually a coordinated group of creditors, bankruptcy courts may interpret that group as a single "creditor" for purposes of dismissal or abstention. Courts have abstained when the debtor is embroiled

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[116] *See id.* at 721–22. Of course, in other cases, the bankruptcy court concludes that a small number of creditors does not signify an improper purpose. *See, e.g.*, *In re* Frontline Med. Servs. LLC, 665 B.R. 8188, 828–29 (B.A.P. 10th Cir. 2024) (affirming bankruptcy court that determined a bankruptcy case with three unsecured creditors was not filed in bad faith).

[117] *See In re* Rosenberg, 414 B.R. 826, 832–34 (Bankr. S.D. Fla. 2009), *aff'd in part, rev'd in part*, 2011 U.S. Dist. LEXIS 158828 (S.D. Fla. Sept. 28, 2011), *aff'd*, 472 F. App'x 890 (11th Cir. 2012).

[118] *In re* Rosenberg, 414 B.R. at 841.

[119] *Id.* In Pennsylvania, the bankruptcy court gave preclusive effect to that ruling and dismissed the business case too. *See In re* Nat'l Medical Imaging, LLC, 439 B.R. 837 (Bankr. E.D. Pa. 2009) (dismissing the business bankruptcy case), *aff'd*, 529 B.R. 607 (E.D. Pa. 2015), *aff'd*, 648 F. App'x 251 (3d Cir. 2016).

in disputes against shareholders as a group[120] or a syndicate of lenders as a group.[121]

When the bankruptcy courts are uncertain whether enough creditors have joined an involuntary petition, they may abstain out of caution. In *EB Holdings*, a collective of hedge funds filed an involuntary petition against the parent company of Ecobat, a car-battery recycler, which had defaulted on a multimillion dollar payment-in-kind (or "PIK") loan. Noting that litigation was pending in state court and citing concerns about numerosity,[122] the bankruptcy court abstained from advancing the bankruptcy case[123] but kept the automatic stay in place while the state court proceeding continued.[124]

For similar reasons, bankruptcy courts hesitate to hear cases when the debtor's motivation for filing is solely to frustrate foreclosure efforts. Drawing that line can be challenging, of course, since the whole point of the automatic stay is to impose an immediate pause on debt collection efforts.[125] But bankruptcy courts ask whether the debtor is facing debt collection activity on multiple fronts or merely seeking to move a foreclosure action to a more favorable forum.[126] A particularly egregious example of fleeing foreclosure is the so-called "new debtor syndrome," when a

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[120] *See, e.g.*, *In re* Cedar Shore Resort, Inc., 235 F.3d 375, 381–82 (8th Cir. 2000) (describing a shareholder complaint as a two-party dispute). Similarly, a filing timed to interrupt a state court fight between "two blocs of shareholders" indicated some bad faith, although other factors persuaded the court not to dismiss. *In re* Greenwood Supply Co., 295 B.R. 787, 794 (Bankr. D. S. Car. 2002).

[121] *See, e.g.*, *infra* note 122 and accompanying text.

[122] *In re* EB Holdings II, Inc, 589 B.R. 704, 720 n.50 (Bankr. D. Nev. 2017).

[123] *Id.* at 728.

[124] *See In re* EB Holdings II, Inc., 591 B.R. 10, 23 (Bankr. D. Nev. 2018). The parties eventually agreed to carry on their battle in bankruptcy court, and EB Holdings filed a voluntary, prepackaged bankruptcy in 2019. *See* Order Approving Debtor's Disclosure Statement and Confirming the Pre-Packaged Chapter 11 Plan of Reorganization, *In re* EB Holdings II, Inc., No. BK-S-19-16364 (Bankr. D. Nev. Nov. 6, 2019), Dkt. No. 109.

[125] *See* 11 U.S.C. § 362(a).

[126] *See, e.g.*, *In re* Outta Control Sportfishing, Inc., 642 B.R. 180, 186 (Bankr. S.D. Fla. 2022) (dismissing bankruptcy petition as filed in bad faith when corporate debtor sought to avoid paying a bond while negotiating mortgage payments on a sport fishing vessel); *In re* Trina Assoc., 128 B.R. 858, 871–72 (Bankr. E.D.N.Y. 1991) (noting that the parties had settled a foreclosure action in state court and concluding that it would be better to consummate that agreement in state court).

business transfers an encumbered asset to a newly formed entity (one that holds few to no other assets) and files it for bankruptcy.[127]

Another common category of two-party disputes is the single-asset real estate case, or "SARE"). In one of the seminal SARE cases, *Phoenix Piccadilly*,[128] the Eleventh Circuit noted that the debtor had only one asset, which was subject to security interests and a pending foreclosure action.[129] In 1994, Congress reacted to SARE cases by amending the automatic stay to allow creditors to resume foreclosure actions unless the debtor promptly files a plan of reorganization or starts making appropriate monthly payments.[130] While SARE cases are a type of two-party dispute that can be heard in bankruptcy court, Congress's express codification of a process for handling SARE cases reinforces the idea that most two-party disputes do not belong in bankruptcy court. Put differently, the SARE provisions are the exception that proves the rule.

Most strikingly, even though the Bankruptcy Code expressly allows a sole creditor to commence an involuntary bankruptcy when the debtor has fewer than twelve qualifying creditors, many bankruptcy courts still hesitate to exercise jurisdiction over such cases — with some courts adopting an "almost *per se* rule" against sole creditor involuntary cases.[131] Other courts push back,

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[127] *See, e.g.*, *In re* N.R. Guaranteed Retirement, Inc., 112 B.R. 263 (Bankr. N.D. Ill. 1990) (discussing cases).

[128] *In re* Phoenix Piccadilly, Ltd., 849 F.2d 1393 (11th Cir. 1988).

[129] *Id.* at 1394–95.

[130] *See* 11 U.S.C. §§ 362(d)(3)–(4); *see also* 11 U.S.C. § 101(51B) (defining "single asset real estate"). SARE debtors are also ineligible to elect subchapter V of the Bankruptcy Code. *See id.* § 1182(1)(A). As courts of equity, bankruptcy courts are resistant to efforts to elude these statutory provisions. In *McGrath*, for example, the debtors rented a warehouse to three commercial tenants, but a state court had ordered the tenants to pay the bank directly before the debtors filed for bankruptcy. *In re* McGrath, No. 3:20-bk-3689, 2021 WL 2405722, at *1 (Bankr. M.D. Fla. June 10, 2021). So, when they filed, the debtors were technically eligible for subchapter V of the Bankruptcy Code because they did not receive any revenue from their commercial real estate. "[T]hey technically escaped designation as a SARE," the bankruptcy court noted as it dismissed the case for cause. "Now, they want to spin about and use a Subchapter V plan to grab back the rents and … reorganize a SARE in Subchapter V. This is a subversion of Congress' express exclusion of SAREs from Subchapter V and is not 'good faith.'" *Id.* at *4.

[131] *See, e.g.*, *In re* Mountain Dairies, Inc., 372 B.R. 623, 634–35 (Bankr.

observing that the Bankruptcy Code expressly authorizes sole creditor involuntary cases and that equity should not override express statutory rules.[132] That said, the Code's numerosity requirement can be met only by petitioning creditors who hold uncontingent, undisputed claims,[133] not creditors in general. When a sole petitioning creditor is the only creditor of any kind, bankruptcy courts are correct to recognize such cases as two-party disputes, even though the technical requirements for the involuntary petition are met. But one can readily imagine situations where the debtor is facing financial distress on multiple fronts — but only one creditor technically qualifies to file the involuntary case. In such situations, bankruptcy courts should be careful not to apply a *per se* rule.

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By dismissing, abstaining, or lifting the stay in these circumstances, the bankruptcy courts make clear that they are open for business for only certain kinds of cases. When bankruptcy courts fail to observe sufficient financial distress or more than two parties, they draw back from exercising jurisdiction over the case, invoking both legal and equitable principles when doing so. They do the same thing when they conclude that even the massive bankruptcy toolbox cannot fix the debtor's problems.

S.D.N.Y. 2007) ("Even if [creditor] were an eligible petitioner … this Court would be compelled to abstain … because this is essentially a two-party dispute for which the parties have adequate remedies in state court."). Sole creditor cases are, for obvious reasons, more common in the individual context. *See, e.g.*, *In re* Murray, 900 F.3d 53, 60 (2d Cir. 2018) (affirming dismissal of a sole creditor case and noting that the involuntary requirements "do permit single creditors to file an involuntary petition" but that "courts tend to scrutinize such petitions closely"). But see *In re* Fischer, 202 B.R. 341, 348 (E.D.N.Y. 1996) (holding that a *per se* rule against sole creditor involuntary cases impermissibly conflicts with the express language of the Bankruptcy Code); .

[132] *See, e.g.*, *In re* Corrine Inter., LLC, 516 B.R. 106, 142–43 (Bankr. S.D. Tex. 2014); *In re* DemirCo Holdings, Inc., No. 06-70122, 2006 WL 1663237 (Bankr. C.D. Ill. 2006); *In re* Euro-American Lodging Corp., 357 B.R. 700 (Bankr. S.D.N.Y. 2007); *see also In re* Phoenix Swimming, LLC, No. 25-10052, 2025 WL 1019906, at *8 and n.12 (Bankr. D.N.H. Apr. 4, 2025) (observing that debtor was generally paying its debts, other than the sole petitioning creditor, and describing the controversy as a two-party dispute more appropriate for state court).

[133] *See* 11 U.S.C. § 303(b)(2); *cf. id.* § 101(5) (defining "claim").

II. WHEN THE PARTIES ARE EVADING OTHER FORUMS

As problem-solving courts, bankruptcy courts are also particularly keen to avoid exercising jurisdiction when the driving problem is already being handled in another forum. Federal district courts do this as well, of course, under the first-filed rule and various other abstention doctrines. But in bankruptcy the concern seems to be heightened, perhaps because legal disputes can blossom quickly into financial distress.

This Part will explore the various legal doctrines under which bankruptcy courts pull back to allow other legal processes to resolve bankruptcy-adjacent disputes: regulators, state courts, multi-district litigation, and other insolvency proceedings.

A. Regulators

First, bankruptcy courts have developed a doctrine of abstaining when the debtor is evading regulators rather than seeking to address financial distress.[134] Of course, trouble with regulators can come alongside financial distress too,[135] but when the bankruptcy case is primarily a tactical move in a wrestling match with regulators, most bankruptcy courts are inclined to step back.

The National Rifle Association ("NRA") tried such a gambit in 2020. After the New York Attorney General sued to dissolve the NRA for misusing charitable funds, the NRA filed for bankruptcy in the Northern District of Texas.[136] Dismissing the case for cause, the bankruptcy court noted that the threat of an unpayable judgment often sends debtors to bankruptcy court, but the

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[134] The same principle applies to criminal investigations, too, but since criminal proceedings are not subject to the automatic stay, 11 U.S.C. § 362(b)(1), fewer cases press the issue whether the entire case is an effort to evade regulators.

[135] For example, in *Forest Hill Funeral Home & Memorial Park*, 364 B.R. 808 (Bankr. E.D. Okla. 2007), the debtor was a funeral home trying to evade a Tennessee regulatory body that had filed a receivership hearing against it. *Id.* at 822. The court decided to dismiss the case for bad faith, and said it had enough basis to abstain anyway.

[136] *In re* Nat'l Rifle Assoc. of America, 628 B.R. 262, 264 (Bankr. N.D. Texas 2021).

"existential threat" to NRA was different: it was "the intended relief sought in a state's regulatory action."[137] Even though the NRA said it was facing a "barrage of litigation" and "death by a thousand cuts," it was in strong financial condition and was facing down regulators, not creditors.[138] The motivation for the bankruptcy was not to stop the regulatory action entirely, but to "take dissolution off the table."[139] The court also noted that, if the NRA wanted to reincorporate in Texas, it could do so outside bankruptcy, so long as it complied with applicable nonbankruptcy law.[140]

MV Realty also fits into this category.[141] Sued by state AGs from Massachusetts to Florida, the debtor seems to have invoked bankruptcy protection as a tactical move to shift litigation away from unfriendly state courts and experienced regulators and into another forum.[142] Similarly, in 1999, SGL Carbon Corp. filed for bankruptcy after a Department of Justice investigation into price-fixing provoked costly class action antitrust lawsuits.[143]

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[137] *Id.*

[138] *Id.* at 272, 280; *see also id.* at 281 ("[T]he Court believes the NRA's purpose in filing bankruptcy is less like a traditional bankruptcy case in which a debtor is faced with financial difficulties or a judgment that it cannot satisfy and more like cases in which courts have found bankruptcy was filed to gain an unfair advantage in litigation or to avoid a regulatory scheme.").

[139] *Id.* at 281.

[140] *See id.* at 282.

[141] *See supra* at notes 96–102 and accompanying text.

[142] *See* MV Realty v. Office of the Attorney General, State of Florida (*In re* MV Realty PBC, LLC), 658 B.R. 194, 207 (Bankr. S.D. Fla. 2024). While the debtor voluntarily dismissed its own bankruptcy case before the dismissal hearing, groups of creditors had already briefed arguments that the debtor had filed to gain a tactical advantage in the litigation against the AGs. *See, e.g.*, Motion of Committee of Home Benefits Agreement Holders for Relief Under Section 1112(b) of the Bankruptcy Code, at 7, *MV Realty*, 658 B.R. 194 (Bankr. S.D. Fla. Feb. 27, 2024), Dkt. No. 959; Br. of Amicus Curiae The Nat'l Consumer Law Center in Support of Mot. to Dismiss, at 11–12, *MV Realty*, 658 B.R. 194 (Bankr. S.D. Fla. Apr. 10, 2024), Dkt. No. 1215 ("MV Realty wants to escape regulators with experience and expertise, and most importantly, regulators who have access to an array of effective state law remedies to protect consumers.").

[143] Official Committee of Unsecured Creditors v. SGL Carbon Corp. (*In re* SGL Carbon Corp.), 200 F.3d 154 (3d Cir. 1999). Indeed, SGL Carbon Corp. explained in a press release that it had filed for bankruptcy "to protect itself against excessive demands made by plaintiffs in civil antitrust litigation and in order to achieve an expeditious resolution of the claims against it." *Id.* at 157.

B. State Courts

Second, bankruptcy law allows courts to abstain from hearing bankruptcy cases that are filed to thwart state court litigation — or even merely to obtain a tactical advantage.[144] As above, improper use of the Bankruptcy Code can be hard to disentangle from proper use. But the analysis that courts use frequently incorporates elements of bankruptcy purpose.[145] For example, when the owners or directors of a company are not trying to manage financial distress but are wrangling over control or management of the business, bankruptcy courts are more likely to point them to state court.[146]

Bankruptcy courts try to police the difference between inappropriate, "tactical" use of bankruptcy as a gambit within separate litigation and appropriate, "legitimate" use of bankruptcy to manage financial distress.[147] For example, courts distinguish

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[144] *See, e.g.*, *In re* Reg'l Evangelical Alliance of Churches, Inc., 592 B.R. 375 (Bankr. D. Kan. 2018) (dismissing when bankruptcy filing was a carefully timed effort to thwart granting of a remedy for breach of contract under state law); Antelope Techs., Inc. v. Lowe (*In re* Antelope Techs, Inc.), No. 07-31159, 2010 WL 2901017, at *7–8 (S.D. Tex. July 21, 2020) (affirming dismissal when debtor's board authorized bankruptcy petition and debtor sat on it for two years, then filed just before trial), *aff'd*, 431 F. App'x. 272 (5th Cir. 2011); Investors Group, LLC v. Pottorff, 518 B.R. 380, 384 (N.D. Tex. 2014) (affirming dismissal when debtor filed for bankruptcy a day before a key deposition and less than two weeks before trial). Both debtors and creditors can attempt this move, though when creditors try it through an involuntary petition, they run the risk of damages for an improper involuntary case. Strikingly, courts have upheld the granting of fees under section 303(i) even when the involuntary petition met all the statutory requirements and the court abstained. *See, e.g.*, *In re* TPG Troy, LLC, 793 F.2d 228, 235 (2d Cir. 2015).

[145] *See supra* Part I.

[146] *In re* Fax Station, Inc., 118 B.R. 176, 178 (Bankr. D. R.I. 1990) (abstaining from hearing "private dispute between competing interests over the ownership of a business"); *In re Win-Sum Sports, Inc.*, 14 B.R. 389, 394 (Bankr. D. Conn. 1981) (abstaining from attempt "to use the bankruptcy court as an alternate approach to state court proceedings to resolve intra-company management and stockholder problems").

[147] This framing may be more helpful than "good faith" or "bad faith." *See In re Liptak*, 304 B.R. 820, 828 (Bankr. N.D. Ill. 2004) ("[C]ourts have noted that focusing on such terms as good or bad faith in filing is misleading to some degree, as the question is really whether the debtor has presented a legitimate reorganizational objective within the scope of the Bankruptcy Code or rather has

between a debtor facing an avalanche in litigation costs (legitimate) from a debtor trying to skirt an unfavorable ruling by seeking a stay and trying to relitigate the matter before a new judge (tactical).[148] Or between a debtor buried in an adverse judgment who needs bankruptcy but plans to appeal (legitimate) from a debtor merely trying to avoid paying a supersedeas bond by filing for bankruptcy (tactical).[149] The distinction is difficult to sketch on a principled basis, but the numbers matter: when the state court litigation looms large, the bankruptcy looks more like a tactic; when it comes alongside other, significant debts, the bankruptcy looks more legitimate. The timing of the bankruptcy filing is often an implicit factor in such cases, too: debtors who "size up" state court litigation, realize that the potential for an adverse verdict puts them in financial distress, and file early are likely to find refuge in bankruptcy court,[150] while debtors who wait until the eve of trial are likely to encounter skepticism.[151]

C. Multi-District Litigation

Third, bankruptcy courts abstain when the debtor seems to be trying to evade multi-district litigation ("MDL"). Of course, the presence of mass tort liability can sometimes blossom into full-blown financial distress, so a transition from multi-district

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presented "tactical reasons unrelated to reorganization.") (quoting *In re* Marsch, 36 F.3d 825, 828 (9th Cir. 1994) (internal citations omitted)).

[148] For example, in *Bullseye Energy*, the court refused to dismiss or abstain when a small business debtor had been weighing up bankruptcy for years, had over 500 creditors, and filed bankruptcy in response to "the crushing weight of ongoing litigation expenses" — not in response to an unfavorable ruling. *In re* Bullseye Energy, LLC, No. 20-11144, 2020 WL 6928198 (Bankr. N.D. Okla. Nov. 23, 2020). But in *Tucson Estates*, the Ninth Circuit directed the bankruptcy court to abstain from presiding over a state court action when the debtor had spent six years in litigation in state court and only filed for bankruptcy after having lost "a very important summary judgment motion." *In re* Tucson Estates, Inc., 912 F.2d 1162, 1169 (9th Cir. 1990).

[149] *See, e.g.*, *In re* Holm, 75 B.R. 86, 87 (Bankr. N.D. Cal. 1987).

[150] *See, e.g.*, *In re* The Bible Speaks, 65 B.R. 415 (Bankr. D. Mass. 1986) (declining to dismiss when the company filed for bankruptcy at the *pro hac vice* stage of state court litigation and the expense of litigation created cash flow problems); *In re* Johns-Manville Corp., 36 B.R. 727, 730 (Bankr. S.D.N.Y. 1984) (declining to dismiss when tort claims were being filed daily and the company had to book a reserve of at least $1.9 billion for its asbestos liability).

[151] *See, e.g.*, *Tucson Estates*, 912 F.2d at 1169.

litigation into bankruptcy court makes sense in some cases. But when the debtor appears to be running away from judges or juries that have issued adverse rulings — forum-shopping at its worst — bankruptcy courts may hesitate to exercise jurisdiction.[152]

The *3M/Aearo* litigation is a poignant example of this phenomenon. 3M Corporation is a multinational technology and manufacturing company that produces Post-it Notes and Scotch Tape, among other products.[153] Beginning in 2016, servicemembers began to sue 3M and its subsidiary Aearo (which it had acquired in 2008) on the basis that their Combat Arms earplugs were defective and failed to protect them from tinnitus.[154] By 2019, the cases had been consolidated into a multidistrict litigation in the Northern District of Florida[155] and the "trickle of suits eventually became a tsunami" — the largest MDL in American history.[156]

When several bellwether verdicts came down with sizeable verdicts against 3M and Aearo (including "eye-popping" figures such as $72.5 million in one case for punitive damages[157]), Aearo filed for bankruptcy in the Southern District of Indiana, claiming it was there to resolve its mass tort liability.[158] The bankruptcy court dismissed the bankruptcy case for cause, concluding that Aearo was financially healthy (in large part due to a funding agreement from 3M).[159] But the court also went on to underscore

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[152] *See, e.g.*, Asbestosis Claimants v. Apex Oil Co. (*In re* Apex Oil Co.), 980 F.2d 1150 (8th Cir. 1992) (affirming district court's abstention from Jones Act and maritime claims so that they could be heard in the district where an MDL was pending).

[153] *See In re* Aearo Tech. LLC, No. 22-02890, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023).

[154] *Id.* at *3.

[155] In re Combat Arms Earplug Prods. Liab. Litig., MDL No. 2885 (N.D. Fla).

[156] *In re* Aearo Tech. LLC, 2023 WL 3938436, at *3.

[157] *Id.* at *3 & n.7.

[158] *Id.* at *4. Aearo also asked the bankruptcy court to confirm that the automatic stay applied to the MDL, arguing that the proceedings were subject to the stay or that the court should extend the stay over 3M pursuant to section 105(a). The court denied that request, pointing out that the funding agreement meant that the pending actions would not have any "actual economic effect" on the estate. *See* 3M Occupational Safety LLC v. Those Parties Listed on Appendix A to the Complaint (*In re* Aearo Tech. LLC), 642 B.R. 891, 912 (Bankr. S.D. Ind. 2022).

[159] *In re Aearo Tech. LLC*, 2023 WL 3938436, at *17–18.

that the bankruptcy had been filed as a tactical maneuver in the MDL process:

> From the very beginning of these cases, Aearo made clear that the filings were not prompted by concerns over financial distress or impending insolvency but were initiated to manage the MDL process, a process that Aearo insisted was "broken." These cases were and are a litigation management tactic and not a rehabilitative effort.[160]

A few months after the bankruptcy was dismissed, 3M and Aearo announced a $6 billion global settlement in the MDL, reinforcing the wisdom in the bankruptcy court's approach.[161]

D. Insolvency Proceedings

Fourth, bankruptcy courts pull back from hearing bankruptcy cases when another insolvency proceeding is already pending, whether in a foreign jurisdiction or under state law. Unlike abstaining from disputes pending in other forums,[162] the assessment here requires no analysis of whether a litigant truly needs bankruptcy. Pulling back under these circumstances is both eminently pragmatic and expressly supported by the Code itself.

1. Foreign Proceedings

To start, bankruptcy courts abstain when a foreign proceeding is pending or would be preferable to an American bankruptcy case. Chapter 15 of the Bankruptcy Code is dedicated to fair and efficient coordination with foreign insolvency proceedings.[163] That chapter empowers a foreign representative to apply to a U.S. bankruptcy

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[160] *Id.* at *20.

[161] *See, e.g.*, Brendan Pierson, *3M agrees to pay $6 billion in U.S. military earplug lawsuit settlement*, Reuters (Aug. 29, 2023 2:15 PM), https://www.reuters.com/legal/3m-co-agrees-pay-6-billion-earplug-lawsuit-settlement-2023-08-29/.

[162] *See supra* Part II.

[163] Unlike the other chapters of the Bankruptcy Code, chapter 15 begins with a subsection laying out the purpose of the chapter. *See* 11 U.S.C. § 1501(a). That subsection makes clear that Congress intended to incorporate the Model Law on Cross-Border Insolvency to handle cross-border cases appropriately, with an eye to bankruptcy policy, international cooperation, and certainty for international trade and investment. *See id.*

court for recognition of a foreign proceeding, which — when granted — extends the automatic stay over the debtor's property in the United States and gives the foreign representative the powers of a trustee, as the debtor-in-possession would have in chapter 11.[164]

In sharp contrast with other types of abstention in this Article, chapter 15 recognition is very well defined. The Code even defines what counts as a "foreign proceeding":

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.[165]

The Code also allows Bankruptcy Courts to deny recognition when it would be "manifestly contrary to the public policy of the United States."[166]

Yet chapter 15 recognition is also tightly tied to bankruptcy abstention. When a foreign proceeding is already underway and a few creditors file an involuntary petition in the United States, the foreign representative may file a chapter 15 petition, gain recognition, and then ask the bankruptcy court to abstain from hearing the involuntary case.[167] Once the foreign proceeding has been recognized, even creditors or the court *sua sponte* could ask

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[164] *See* 11 U.S.C. § 1520 (providing the effects of recognition of a foreign main proceeding).

[165] 11 U.S.C. § 101(23).

[166] 11 U.S.C. § 1506.

[167] *See id.* § 305(b); *see, e.g.*, *In re* Board of Directors of Multicanal S.A., 314 B.R. 486, 521–22 (Bankr. S.D.N.Y. 2004) (recognizing Argentinian insolvency proceeding and abstaining from involuntary chapter 11); Universal Cas. & Surety Co. v. Gee (*In re* Gee), 53 B.R. 891, 904–05 (Bankr. S.D.N.Y. 1985) (recognizing Cayman Islands proceeding and abstaining from involuntary chapter 11). In at least one case, the bankruptcy court short-circuited the statutory process. No foreign insolvency proceeding under Bahamian law had been filed at the time of the U.S. involuntary chapter 11. Yet the court determined that Bahamian insolvency law should govern the case, lifted the stay to allow a creditor to file insolvency proceedings in the Bahamas, and entered an abstention order "contingent and effective upon the actual commencement of an insolvency proceeding in the Bahamas." *In re* Spanish Cay Co., Ltd., 161 B.R. 715, 724 (Bankr. S.D. Fla. 1993).

for abstention from an involuntary petition.[168] The standard for such assessments is whether "the purposes of chapter 15 of this title would be best served by such dismissal or suspension."[169]

Bankruptcy courts do not always abstain from cases of foreign entities, though, particularly when no foreign proceeding is pending.[170] Early in the 2003 case of Avianca S.A., Colombia's largest airline, the bankruptcy court was asked to abstain from hearing the case — a move that would have forced Avianca to file in Colombia.[171] The bankruptcy court declined to do so, underscoring that all of Avianca's aircraft were leased from United States–based office[172] and refusing to create an obligation to file a chapter 15 petition.[173] Indeed, the court even suggested that Avianca could not have reorganized under Colombian insolvency law, which would have required it to cure defaults within 90 days or risk being forced into liquidation.[174]

Similarly, in *Underwood v. Hilliard (In re Rimsat, Ltd.)*,[175] Judge Posner, writing for the Seventh Circuit, affirmed a bankruptcy court that declined to abstain when a receiver,

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[168] *See id.* § 305(a)(2).

[169] *Id.* § 305(a)(2)(B). That principle suggests, of course, that when the debtor seeks recognition of a foreign main proceeding in order to coordinate a cross-border insolvency, courts should hesitate to abstain upon creditor request. *See, e.g.*, *In re* Oi Brasil Holdings Coöperatief U.A., 578 B.R. 169, 212–16 (Bankr. S.D.N.Y. 2017) (recognizing Dutch proceeding, maintaining recognition of prior Brazilian proceeding, refusing to abstain, and coordinating with foreign courts consistent with chapter 15 and principles of comity).

[170] Sometimes courts split the baby. In *Soundview Elite*, the bankruptcy court acknowledged that the debtors had filed chapter 11 petitions "at the eleventh hour" for the express purpose of preventing liquidators from being appointed in a Cayman Islands proceeding but did not think it amounted to bad faith. *See In re* Soundview Elite, Ltd., 503 B.R. 571, 580–81 (Bankr. S.D.N.Y. 2014). Instead, the court appointed a chapter 11 trustee, *id.* at 583, and lifted the stay to allow the proceedings in the Cayman Islands to continue, *id.* at 589.

[171] *In re* Aerovias Nacionales de Colombia S.A., 303 B.R. 1 (Bankr. S.D.N.Y. 2003).

[172] *Id.* at 12.

[173] *Id.* at 14–15 (discussing whether, under a predecessor statute to chapter 15, a foreign company had an obligation to file a foreign proceeding in its home county and commence a chapter 15 case in the United States).

[174] *Id.* at 10 (pointing out that chapter 11, by contrast, allowed the airline to reject burdensome leases in exchange for damages).

[175] Underwood v. Hilliard (*In re* Rimsat, Ltd.), 98 F.3d 956 (7th Cir. 1996) (Posner, J.).

appointed in the Federation of Saint Kitts and Nevis, expanded his powers in contravention of the automatic stay.[176]

Bankruptcy courts, moreover, sometimes range beyond the express provisions of the statute, abstaining from presiding over domestic bankruptcy cases when a foreign insolvency proceeding is underway but the debtor has not sought chapter 15 recognition.[177] Indeed, in *Tiber Creek Partners, LLC v. Ellume USA LLC*,[178] the district court dismissed a breach of contract action on *forum non conveniens* ("*fnc*") grounds.[179] On appeal, the creditors argued that the debtor's representatives had to seek recognition under chapter 15 before the foreign insolvency proceeding could be given any weight in the *fnc* analysis.[180] The Fourth Circuit rejected that logic, confirming that a foreign representative need not file for chapter 15 to make a *fnc* argument.[181]

2. Assignments for the Benefit of Creditors

For similar reasons, bankruptcy courts abstain when state insolvency proceedings are underway.[182] Both through the abstention statute and through excusing turnover under section

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[176] *Id.* at 961 (affirming the bankruptcy court). Additionally, the court said, that the Nevis receivership "has … not been shown to be a sufficiently close substitute for the U.S. bankruptcy proceeding to warrant abstention." *Id.* at 962.

[177] *See, e.g.*, *In re* Compañía de Alimentos Fargo, S.A., 376 B.R. 427 (Bankr. S.D.N.Y. 2007) (dismissing involuntary petition that creditors filed four years into an Argentinian *concurso preventivo* out of dissatisfaction with its progress).

[178] No. 1:23-cv-0148, 2023 WL 5987385 (E.D. Va. Aug. 1, 2023), *aff'd*, No. 23-1882, 2024 WL 1950071 (4th Cir. July 16, 2025).

[179] *Id.*

[180] Tiber Creek Partners, LLC v. Ellume USA LLC, No. 23-1882, 2024 WL 1950071, at *5 (4th Cir. July 16, 2025).

[181] *Id.* The dissent disagrees with the majority on the outcome of the *fnc* analysis, but it does not disagree on the irrelevance of chapter 15. *See id.* at *6–7 (Richardson, J., dissenting).

[182] The Constitution does not mandate this result, of course: the Bankruptcy Clause gives Congress power to pass "uniform laws on the subject of Bankruptcies." U.S. CONST. art I, sec. 8. Still, Congress has not completely displaced state law in this field, and the states may pass insolvency proceedings so long as they do not discharge debt. *See* Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518, 525 (1933) (upholding Wisconsin ABC statute from charge of express preemption when it did not contemplate "discharge of solvent debtors"); Sturges v. Crowninshield, 17 U.S. 122, 199, 203 (1819) (noting that the Contracts Clause prohibits states from discharging debts).

543, the Bankruptcy Code empowers bankruptcy courts to abstain in favor of state proceedings.

Under an assignment for the benefit of creditors ("ABC"), a debtor conveys its property to an assignee, who then liquidates it and distributes the proceeds to creditors pursuant to their statutory priority.[183] ABCs receive special solicitude under the Bankruptcy Code. Under section 543(d), when property of the estate is already in the hands of a "custodian"[184] and a bankruptcy case is commenced, the general rule is that the custodian must immediately stop all disbursements and administrative actions and turn the property over to the trustee in bankruptcy.[185] But the court may excuse turnover where the interests of creditors "would be better served" by letting the custodian continue in possession — and *must* excuse turnover when the debtor implemented an assignment for the benefit of creditors ("ABC") more than 120 days before the bankruptcy.[186] Numerous courts have described section 543(d) as a "modified abstention provision."[187] Indeed, the legislative history of the provision states that it "reinforces the general abstention policy in section 305."[188]

Since a debtor commences an ABC (usually under creditor pressure), the typical setup for such cases is an involuntary petition filed shortly after the debtor commences the ABC. *In re*

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[183] In some states, ABCs are purely contractual; in others, they take place under judicial supervision and are commenced by filing a petition with a court.

[184] The Code broadly defines "custodian" to include any receiver or trustee of the debtor's property, appointed in a case or proceeding not under the Bankruptcy Code, an assignee in an ABC, or other similar trustees, receivers, or agents. *See* 11 U.S.C. § 101(11). Importantly, such custodians need not be based in the United States. In cross-border cases, custodians under foreign law still fall within the statutory definition.

[185] *See* 11 U.S.C. § 543(a), (b).

[186] *Id.* § 543(d). Note the interplay here with the involuntary petition statute: if an assignee has been serving for 120 days or longer, the court must continue the receivership; if an assignee has been serving 120 days or fewer, however, the court must order relief against the debtor in an involuntary case. *Id.* § 303(h)(2).

[187] *See, e.g.*, *In re* Constable Plaza Associates, 125 B.R. 98, 103 (Bankr. S.D.N.Y. 1991).

[188] Sen. Report No. 95-989, 95th Cong., 2d Sess. (1978) 84, 85; *see also* House Report No. 95-595, 95th Cong. 1st Sess. (1977) 370 (same); *In re* Pine Lake Village Apartment Co., 17 B.R. 829, 833 (Bankr. S.D.N.Y. 1982) (declining to excuse turnover when court had previously declined to abstain).

Short Hills Caterers, Inc.[189] provides a quintessential example. Short Hills Caterers was a kosher catering facility that commenced an ABC on April 18, 2008.[190] The assignee began to gather information about the estate, made payroll and paid insurance, and sent a letter to creditors describing the ABC process.[191] On May 5, the assignee gave an update over the phone to an attorney for some of the creditors. Three days later, those creditors filed an involuntary case.[192] The court abstained, underscoring the efficiency and fairness of the ABC and pointing out that New Jersey law empowered the assignee to avoid fraudulent transfers if necessary.[193]

Bankruptcy courts even abstain from more recent ABCs.[194] In *Artists' Outlet, Inc.*,[195] the ABC had been set up just a few months before the court ruled on the abstention motion.[196] But the assignee had already liquidated the assets of the corporation, and the court could not see why bankruptcy was needed.[197]

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[189] *In re* Short Hills Caterers, Inc., No 08-18604, 2008 WL 2357860 (Bankr. D.N.J. 2008).

[190] *Id.* at *1.

[191] *Id.*

[192] *Id.*

[193] *Id.* at *5.

[194] By contrast, bankruptcy courts almost never intervene in ABCs that have been pending for more than six months. *But see, e.g.*, *In re* Cincinnati Gear Co., 304 B.R. 784, 785 (Bankr. S.D. Ohio 2003) (refusing to abstain in favor of ABC pending for seven months when involuntary petition was filed).

[195] *In re* Artists' Outlet, Inc., 25 B.R. 231 (Bankr. D. Mass. 1982).

[196] *Id.* at 232; *see also* Wechsler v. Macke Int'l Trade, Inc. (*In re* Macke Int'l Trade, Inc.), 370 B.R. 236, 241 (B.A.P. 9th Cir. 2007) (affirming bankruptcy court's abstention from an involuntary petition when an ABC had been pending in state court for about a week).

[197] *Id.* at 233 ("There is little money available for distribution to the unsecured creditors. The court can see no reason why protection of the bankruptcy court is *now* needed, although such protection may have been warranted prior to the sale of the assets of Artists' Outlet.").

3. Receiverships

Bankruptcy courts also routinely let receivers remain in control of the property of the estate.[198] As in *International Shoe Co.*,[199] this tradition predates the Bankruptcy Code and builds upon precedent tracing back at least to the early twentieth century.[200] Ordinarily, of course, the filing of the bankruptcy petition would "supersede" the custodianship, but as with ABCs, the Code empowers bankruptcy courts to "continue" the receivership and "excuse" the receiver from the duty to turn the assets over to the trustee in bankruptcy.[201] Plus, of course, the bankruptcy court can simply abstain from the case entirely. In at least one case, the bankruptcy judge dismissed the case even though it was the receiver that had sought bankruptcy relief, concluding that the receiver lacked authority to file the bankruptcy on behalf of the corporation.[202]

Bankruptcy courts frequently take one or either of these measures when the state or federal receivership has been pending

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[198] *See In re* Picacho Hills Utility Co., Inc., No. 11-13-10742, 2013 WL 1788298 (Bankr. D. N. Mex. 2013) (suspending case to allow receiver to sell debtor's assets).

[199] *See supra* notes 2–6 and accompanying text.

[200] *See, e.g.*, Lowenstein v. Henry McShane Mfg. Co., 130 F. 1007, 1009 (D. Md. 1904) (dismissing bankruptcy case when a receivership had been pending for almost four months and two dissatisfied creditors "turned to the bankrupt court"); Woolford v. Diamond State Steel Co., 138 F. 582, 599 (D. Del. 1905) (dismissing case and denying leave to amend when the vast majority of creditors were satisfied with an ongoing receivership and bankruptcy proceedings would therefore bring "no possible advantage" and would "inure only to [the creditors'] detriment"); *In re* Harper & Bros., 100 F. 266, 268 (S.D.N.Y. 1900) (denying involuntary petition when 90% of creditors approved of a state court dissolution); *In re* Hudson River Elec. Power Co., 173 F. 934, 944 (N.D.N.Y. 1909) (denying involuntary petition when an equitable receivership was pending before a federal court "for the benefit and advantage of all"); *In re* Commonwealth Lumber Co., 223 F. 667, 672 (W.D. Wash. 1915) (noting that involuntary petitioners chose to administer the estate in state court and could not later "repudiate the proceedings").

[201] *See, e.g.*, *In re* 245 Assoc., LLC, 188 B.R. 743, 748–49, 753–54 (Bankr. S.D.N.Y. 1995) (declining to compensate receiver who did not promptly cease administration or move the court to continue the receivership upon the filing of the bankruptcy).

[202] *See* Order, *In re* Assoc. Grocers of Maine, Inc., No. 11-11196 (Bankr. D. Me. Sept. 15, 2011); Audio Recording of Sept. 12, 2011, Hr'g at 1:22:02–1:36:14, *id.* (Sept. 15, 2011), Dkt. No. 49.

for some time[203] or will be more efficient at a simple dissolution than the more convoluted bankruptcy process.[204] While state receiverships are far more common, including under statutory regimes like the Uniform Commercial Real Estate Receivership Act (UCRERA), bankruptcy courts have also abstained from exercising jurisdiction over federal receiverships.[205]

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There is, of course, significant overlap between the bankruptcy purpose cases and the forum-shopping cases. In some of them, it is hard to discern which feature of the case drove the decision. Sometimes dogs and tails wag each other. But even when debtors have colorable claims to multi-party financial distress that could be remediated by the tools of the bankruptcy court, bankruptcy courts abstain when the timing suggests that the debtor is really just trying to evade the authorities or the jurisdiction of another court.

When debtors or their creditors invoke an ABC or assignment to handle financial distress, it makes little sense to reduplicate

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[203] *See In re* L&M Video Prods., Inc., No. 07-31798, 2007 WL 1847387, at *6 (Bankr. N.D. Ohio June 25, 2007) (abstaining from bankruptcy case filed when receivership had been pending for over two years); *In re* Onyx Records, Inc., 42 B.R. 156 (Bankr. S.D.N.Y. 1984) (abstaining when a receiver had been in place for seven years). When bankruptcy courts refuse to abstain from receiverships, it is sometimes because the receiver has not had enough time to make meaningful progress in the case. *See, e.g.*, *In re* R&K Realty, 2021 WL 4047472, at *6 (declining to abstain when involuntary petition was filed later the same day that the receiver was confirmed).

[204] *See, e.g.*, *In re* Williamsburg Suites, Ltd. 117 B.R. 216, 220 (Bankr. E.D. Va. 1990) (abstaining from involuntary chapter 11 petition when principals agreed that a single-asset company needed to be dissolved).

[205] *In re* Michael S. Starbuck, Inc., 14 B.R. 134 (Bankr. S.D.N.Y. 1981) (abstaining from hearing involuntary case filed against debtors when SEC equity receiver had already spent 1,400 hours administering the estate); *see also* 28 U.S.C. § 3013 (governing federal receivers). A few opinions have suggested that section 305 contemplates abstention due to the pendency of a "non-federal insolvency." *See, e.g.*, *In re* Lang, 5 B.R. 371, 374 n.4 (Bankr. S.D.N.Y. 1980); *In re* Nina Merchandise Corp., 5 B.R. 743, 747 (Bankr. S.D.N.Y. 1980). But this phrase is best understood as a shorthand for a non–Title 11 insolvency, not as a rule that federal receivers were not contemplated by the statue. As the court in *Colonial Ford* pointed out, the statute itself draws no such distinction. *See In re* Colonial Ford, Inc., 24 B.R. 1014, 1020 n.11 (Bankr. D. Utah 1982).

efforts in bankruptcy court, especially when the custodian has already begun to administer the debtor's assets.

That said, ABC and assignment practice vary widely from state to state, just as foreign insolvency proceedings vary widely from jurisdiction to jurisdiction. Bankruptcy courts can refine their approach by borrowing from the chapter 15 recognition context when considering whether to abstain or continue an ABC or receivership. For example, just as the court in *Avianca* examined whether the non-bankruptcy process had the tools to make a reorganization work (there, rejection of contracts), so too bankruptcy courts should examine whether the assignee or receiver has the right tools to resolve the case.[206]

All other things being equal, receiverships and court-supervised ABCs should receive more deference than purely contractual ABCs.[207] And receivers and ABCs that endeavor to liquidate or reorganize efficiently, and treat all creditors fairly, should earn greater deference from the bankruptcy court.[208]

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[206] An assignee under Florida law, by contrast to Colombian law, does have the power to reject unexpired leases of nonresidential real property or personal property. *See* FLA. STAT. 727.108(5); *see also, e.g.*, *In re* Nader Homes, Inc., No. 11-22760, 2011 WL 2267735, at *4 (Bankr. D.N.J. 2011) (refusing to abstain in favor of ABC when 63% of the non-insider claims supported the bankruptcy and a chapter 7 trustee could take advantage of the longer look-back period for preference actions).

[207] In Florida, for example, the assignee must file a petition with the circuit court. FLA. STAT. § 727.104(2)(b). For similar reasons, informal or quasi-receivers might get no deference at all. *See, e.g.*, *In re* Mylotte, David & Fitzpatrick, No. 07-14109, 2007 WL 3027352 (Bankr. E.D. Pa. Oct. 11, 2007) (refusing to abstain when state court judge was acting as quasi-receiver and liquidation had not yet taken place).

[208] Here, the draft Uniform Law on the Assignments for the Benefit of Creditors provides great cause for optimism. *See* Uniform Assignment for Benefit of Creditors Act, Uniform Law Commission (June 19, 2025) (draft). The uniform ABC law requires assignees to notify creditors within 30 days of the effective date, § 7(a), and to "use reasonable care to maximize distributions," § 9(a)(2). It also empowers assignees to incur new debt, § 10(b)(2), assert any causes of action that the assignor could have asserted, § 10(b)(4), and avoid transfers made by any creditor that files a proof of claim, § 10(b)(12); *see also* § 10(d) (giving the assignee a strong-arm power similar to that given a trustee by 11 U.S.C. § 544). From there, the uniform law contains a detailed priority regime, incorporating both 31 U.S.C. § 3713 (requiring that non-bankruptcy

III. WHEN THE DEBTORS AND CREDITORS ARE WORKING IT OUT

Lastly, the law allows bankruptcy courts to abstain from adjudicating cases when the debtor and creditors are involved in an out-of-court workout. For those accustomed to nonbankruptcy courts, this feature of bankruptcy law is surely the most surprising. This is nothing like *Rooker-Feldman*, *Colorado River*, or *forum non conveniens*. No other courts are involved in the dispute or a related dispute. Imagine a federal district court abstaining from hearing a contract dispute because the parties were close to settling prior to the complaint, or a family court abstaining from hearing a divorce petition because the spouses were having encouraging conversations before things fell apart.[209]

Yet the practice has an express statutory basis in the Bankruptcy Code. First, the Code authorizes debtors to develop a prepackaged bankruptcy plan and even to solicit votes prior to commencing a case,[210] and Congress clearly contemplated some debtors doing so.[211] Second, the Code allows creditors to organize

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insolvency regimes prioritize debts owed to the U.S. government) and 11 U.S.C. § 507 (the Bankruptcy Code's priority regime).

Florida, too, has a developed ABC statute that includes all these elements as well. *See* FLA. STAT. §§ 727.101 *et seq*. Florida first codified its ABC law in 1889 and completely reworked it in 1987 and 2007. *See* Jeffrey Davis, *Florida's Beefed-up Assignment for the Benefit of Creditors as an Alternative to Bankruptcy*, 19 U. FLA. J. L. & PUB. POL'Y 17, 19 (2008).

[209] Even in jurisdictions that have adopted alternative dispute resolution ("ADR") procedures, the court retains jurisdiction over the matter while the ADR process plays out. The best parallel to this bankruptcy practice that I have encountered is a truth and reconciliation commission, which often proceeds only upon the promise of withholding criminal prosecution. I thank Zach Kaufman for this point.

[210] *See* 11 U.S.C. §§ 1121(a); 1126(b); 341(e); 1125(g). Prepackaged plans trace back to nineteenth-century receivership practice, were banned in the Bankruptcy Act under chapter X, and brought back in the 1978 Bankruptcy Code. *See* Christopher D. Hampson & Jeffrey A. Katz, *The Small Business Prepack: How Subchapter V Paves the Way for Bankruptcy's Fastest Cases*, 92 GEO. WASH. L. REV. 851, 878–79 (2024) (recounting the history and statutory basis for prepackaged bankruptcy provisions); DOUGLAS G. BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS 138–39 (2022) (discussing bankruptcy attorney J. Ronald Trost's advocacy for prepetition negotiations during the drafting of the 1978 Code).

[211] *See, e.g.*, Robert K. Rasmussen & David A. Skeel Jr., *The Economic*

into a committee prior to the commencement of the case and to continue in that capacity once the case is filed.[212] Third, the legislative history of section 305 indicates that Congress expressly envisioned bankruptcy courts pulling back from disrupting out-of-court workouts.

> A principle of the common law requires a court with jurisdiction over a particular matter to take jurisdiction. This section recognizes that there are cases in which it would be appropriate for the court to decline jurisdiction. The court may dismiss or suspend under [§ 305(a)], for example, if an arrangement is being worked out of court, there is no prejudice to the rights of creditors in that arrangement, and an involuntary case has been commenced by a few recalcitrant creditors to provide a basis for future threats to extract full payment. The less expensive out-of-court workout may better serve the interests in the case ...[213]

Indeed, the practice of abstaining from hearing out-of-court workouts under section 305 helps to safeguard prepetition practice. Otherwise, the prepack plan would identify holders of undisputed debts and admit that the debtor cannot pay its debts as they come due, two elements that must be met to file an involuntary case and that have proven devilishly hard to satisfy.[214] Circulating a prepack, then, would give creditors exactly what they need to cut

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Analysis of Corporate Bankruptcy Law, 3 AM. BANKR. INST. L. REV. 85, 97 n.54 (1995) ("Congress explicitly contemplated that some debtors would use this strategy.").

[212] *See* 11 U.S.C. § 1102(b)(1).

[213] H. Rep. No. 595, 95th Cong. 1st Sess. 325; S. Rep. No. 989, 95th Cong.2d Sess. 35, U.S. Code Cong. & Admin. News. 1978, pp. 5963, 6281, 5787, 5822. Indeed, *Collier on Bankruptcy* calls it the "prototypical fact pattern" for section 305(a)(1) abstention. 2 COLLIER ON BANKRUPTCY ¶ 305.02 (16th ed. 2025).

[214] *See* 11 U.S.C. § 303(b), (h). The difficulty lies in the requirement that the unsecured claim be not "the subject of a bona fide dispute as to liability or amount." Many courts have interpreted this requirement liberally, such that even if a creditor wins a final judgment on the merits, a notice of appeal can stop the creditor using that judgment to file an involuntary bankruptcy. Other courts have noted that even a dispute about *amount* (such as whether attorneys' fees are recoverable) knocks out a claim from counting toward the statutory requirements. *See, e.g.*, Donald L. Swanson, *BAPCPA Amendment to § 303(b) Needs to be Revoked*, AM. BANKR. INST. J. 12 (Sept. 2025).

the process short and file an involuntary case in the forum of their choice.[215]

That is precisely what happened in the bankruptcy of Caesars Entertainment. Caesars is a Nevada-based casino-entertainment company, one of the largest in the world, that began to face financial distress after the Great Recession. After trying various out-of-court workouts, in late 2014, Caesars began to negotiate a prepackaged bankruptcy with its first-lien bank lenders and first-lien noteholders, some information about which it publicly disclosed.[216] Caesars signed a restructuring support agreement ("RSA") that committed it to file for bankruptcy between January 15 and January 20, 2015, but did not select a forum.[217] When news outlets reported that Caesars planned to file in the Northern District of Illinois, three second-lien noteholders filed an involuntary case against Caesars in the District of Delaware.[218] In support of their involuntary petition, the creditors filed copies of the draft restructuring and forbearance agreement, along with a slide deck laying out the terms of the proposed prepack deal.[219]

Three days later, Caesars filed its voluntary case in the Northern District of Illinois.[220] Caesars and the participating, first-lien creditors (who stood atop the capital structure and were projected to recover north of 90%) asked the Delaware court to transfer venue to Illinois under Rule 1014(b) and 28 U.S.C. § 1412. The second-lien creditors and others lower in the capital structure (10–12%) responded that the case should remain in Delaware.[221]

Judge Gross ruled that the bankruptcy case should proceed in Illinois, in an opinion that has attracted practitioner and scholarly attention. But despite it being a venue transfer decision, *In re Caesars* also contains key insights for bankruptcy abstention.

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[215] *See, e.g.*, Sathy *et al.*, *supra* note 41, at 24 (noting the risks of an involuntary petition disrupting the development of a prepackaged or consensual plan).

[216] *See In re* Caesars Entertainment Operating Co., Inc., No. 15-10047, 2015 WL 495259, at *2 (Bankr. D. Del. 2015).

[217] *Id.*

[218] *Id.*

[219] *See* Declaration of Joshua M. Meister in Support of Statement of Petitioning Creditors in Support of Involuntary Chapter 11 Petition Against Caesars Entertainment Operating Company, Inc., *In re Caesars*, Exs. 9–15 (Bankr. D. Del. Jan. 12, 2015), Dkt. No. 9.

[220] *In re Caesars*, 2015 WL 495259, at *3.

[221] *Id.*

When the involuntary petitioners argued that the bankruptcy should be heard in Delaware under the "first-filed" rule, the court noted that the involuntary petition was clearly an anticipatory filing, made "in anticipation of the opposing party's imminent suit in another, less favorable, forum."[222] Had Caesars not been prepared to file its voluntary bankruptcy, it might well have asked the bankruptcy court to abstain. And the court's warning about discouraging out-of-court workouts would have come into even sharper focus.

This Part will start by assessing involuntary petitions, brought by a "few recalcitrant creditors," then turn to voluntary petitions, brought by the debtor.

A. A Few Recalcitrant Creditors

First, involuntary petitions. Numerous bankruptcy courts have abstained from hearing involuntary cases when "a few recalcitrant creditors" — language straight from the 1977 House Report — decide to pull the plug on a workout or an informal liquidation.[223]

In making this determination, bankruptcy courts assess whether an out-of-court workout would be more effective at paying creditors than an in-court proceeding. That turns both on the possibility of a turnaround and the good faith of the participants. In *General Aero. Corp.*,[224] the debtor was close to putting a gyroplane to market, had secured new investment funding, and had indicated an "amenability to settlement."[225] The court suspended proceedings for sixty days and indicated that it would abstain permanently if the debtor followed through on its commitment to repay creditors.[226] Within that sixty-day period,

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[222] *Id.* at *8 (quoting E.E.O.C. v. Univ. of Pennsylvania, 850 F.2d 969, 976 (3rd Cir. 1988). Indeed, in both *Caesars* and in *NRG Energy*, the bankruptcy court signaled that it did not see the imminent filing of a voluntary petition as a reason, of itself, to file an involuntary petition. *See In re* NRG Energy, 294 B.R. 71 (Bankr. D. Minn. 2003).

[223] *See, e.g.*, *In re* Rimpull Corp., 26 B.R. 267 (Bankr. W.D. Mo. 1982); *In re* Bioline Laboratories, Inc., 9 B.R. 1013 (Bankr. E.D.N.Y. 1981); *In re* Luftek, Inc., 6 B.R. 539 (Bankr. E.D.N.Y. 1980).

[224] *In re* General Aero. Corp., 594 B.R. 442 (Bankr. D. Utah 2018).

[225] *Id.* at 451, 456, 481–82.

[226] The court added that "odds are low that creditors would receive a substantial dividend" in a liquidation and "the best chance to creditors to be paid a meaningful return is outside of bankruptcy." *Id.* at 482.

the debtor settled with its petitioning creditors, confirmed its new financing, and provided strong reports about its research and development.[227] The debtor and the petitioning creditors asked the bankruptcy court to dismiss the involuntary case, and the court agreed.[228]

Bankruptcy courts also assess whether the workout treats creditors equitably. When a debtor tries to design equitable or *pro rata* treatment to all creditors in the same class, as would happen in a chapter 7 or 11 bankruptcy case, courts are more likely to bless the workout by abstaining. In *Rimpull Corp.*,[229] a manufacturer of mining vehicles and parts suffered financial distress when the mining industry began to decline.[230] The debtor worked out a restructuring of its secured debt with the bank, then sent a letter to its unsecured trade creditors, offering them the choice between 100% of the principal over five years or 40% over four months.[231] While most of the trade creditors accepted the deal (67% by number and 76% by amount), some of the trade creditors commenced an involuntary proceeding.[232] The court abstained, calling it a "paradigm case" for doing so.[233]

Similar principles govern out-of-court liquidations. For example, Arnolt Corp. made aircraft tailhooks for the U.S. Navy that fell into financial distress.[234] The debtor and its secured creditor agreed to liquidate "in an orderly fashion outside of bankruptcy," since an orderly liquidation would generate more

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[227] *See* Petitioning Creditors' Motion to Approve Settlement and Payments, *In re* Gen. Aero. Corp., 594 B.R. 442 (Bankr. D. Utah Dec. 10, 2018), Dkt. No. 179; Supplement to Status Report Regarding Alleged Debtor's Progress on Operations and Claims, *id.* (Dec. 14, 2018), Dkt. No. 190; Order Dismissing Involuntary Petition and Case with Prejudice, *id.* (Jan. 22, 2019), Dkt. No. 221.

[228] *See* sources cited *supra* note 227.

[229] *In re* Rimpull Corp., 26 B.R. 267 (Bankr. W.D. Mo. 1982).

[230] *Id.* at 268.

[231] *Id.* at 271. The debtor added, "I wish we had more money to be able to pay you more. All I can say is that we intend to be in business for a long time, and I hope that the benefits of our future business with you will help offset some of this problem. We feel that this plan is the best we can offer." *Id.*

[232] *Id.* at 271–72.

[233] *Id.* at 272 ("An arrangement has been worked out by the debtor with its creditors; it has been accepted by a vast majority of the creditors; the money is in place to fund a major part of the arrangement; and only a minority of creditors have dissented from the arrangement ….").

[234] *In re* Arnolt Corp., No. 93-30093, 1993 WL 580765 (N.D. Ind. 1993)

cash — all of which would go to the secured creditor anyway.[235] Arnolt Corp. contracted with an auctioneer company to sell its equipment.[236] By the time the unsecured creditors filed an involuntary case, the liquidation was largely consummated.[237] The court noted that the out-of-court liquidation was value-maximizing, the debtor was distributing proceeds in the correct order (*i.e.*, to the secured creditor), and no special tools like clawback actions were required.[238]

The court applied similar principles in *Bioline Laboratories, Inc.*[239] The debtor, a distributor of pharmaceutical drugs, was in financial distress and arranged for a bulk transfer under Article 6 of the Uniform Commercial Code, one which would give the unsecured creditors a 50% recovery.[240] Three of its trade creditors then filed an involuntary petition and insisted that another buyer would pay the same amount over a faster timeframe.[241] When the court gave them an opportunity to post a $500,000 bond, they missed the deadline, and the court allowed the bulk transfer to proceed and then abstained from hearing the case entirely.[242]

In applying this doctrine, bankruptcy courts consistently ask whether the involuntary petition has been filed by "a few

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[235] *Id.*

[236] *Id.* at *2.

[237] *Id.* at *7; *see also In re* Wine and Spirit Specialties of Kansas City, Inc., 142 B.R. 345, 347 (Bankr. W.D. Mo. 1992) (abstaining from presiding over "a largely accomplished liquidation").

[238] *See Arnolt Corp.*, 1993 WL 580765 at *9. By contrast, in *In re McCullough and Co.*, 199 B.R. 179 (Bankr. W.D. Mo. 1996), the debtor company had executed a note and security interest in favor of the CEO, transferred all its assets to him, and filed articles of dissolution with the Missouri Secretary of State's Office. *Id.* Declining to abstain, the court noted that none of the creditors had "expressed satisfaction with the current liquidation proceedings" or "expressed their confidence in the debtor's good faith and ability to conduct a self liquidation." *Id.* at 185. The looming avoidance claim against the CEO also meant that the bankruptcy process could possibly enrich the estate, yielding a greater recovery for creditors than the Missouri dissolution process. *Id.*

[239] *In re* Bioline Laboratories, Inc., 9 B.R. 1013 (Bankr. E.D.N.Y. 1981).

[240] *Id.* at 1014–15.

[241] *Id.* at 1015.

[242] *Id.* at 1022 (noting that debtor had "diligently, faithfully and meticulously carried out the terms of the Asset Purchase Agreement so that the escrow agent now has sufficient funds to pay a substantial dividend to unsecured creditors").

recalcitrant creditors."[243] That is because section 305 asks whether abstention would be in the best interests of the debtor and the creditors as a whole. Conversely, some courts have refused to abstain when the creditors who wish to proceed in bankruptcy, though small in number, represent almost all the float.[244]

Strikingly, abstention law creates some tension with the express provisions of the Bankruptcy Code. For the Code allows a small number of creditors to file an involuntary petition: at least three in most cases, at least one in others.[245] But that is logically consistent with the abstention statute; in many cases, more

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[243] Under this widely cited framework, abstention is appropriate only if (1) the involuntary petition was filed by a few recalcitrant creditors and most creditors oppose bankruptcy, (2) there is a pending state insolvency or out-of-court arrangement, and (3) dismissal is in the best interests of the debtor and all creditors. Numerous decisions recite and apply this test. *See, e.g.*, *In re* Spade, 255 B.R. 329, 332 (D. Colo. 2000) (holding abstention is warranted only when the petition is filed by "a few recalcitrant creditors" and most creditors oppose bankruptcy, a state insolvency or out-of-court arrangement is pending, and dismissal is in the best interest of the debtor and all creditors); Matter of Rimpull Corp., 26 B.R. 267, 268–71 (Bankr. W.D. Mo. 1982) (abstaining only where an out-of-court arrangement was accepted by an overwhelming majority of creditors and "a few recalcitrant creditors" filed the involuntary petition); *In re* Kilberger, No. 95-01616, slip op. at 3 (Bankr. N.D. Iowa Feb. 3 1995) (articulating the same three-factor test); *In re* Navient Solutions, LLC, 2021 WL 2565970, at *18–19 (Bankr. S.D.N.Y. June 22 2021) (describing the prototypical § 305(a)(1) case as one where a few recalcitrant creditors file an involuntary petition to gain leverage in a workout and quoting Collier to that effect); and *In re* Monitor Single Lift I, Ltd., 381 B.R. 455, 462–63 (Bankr. S.D.N.Y. 2008) (relying on legislative history that, if a workout is being arranged and "an involuntary case has been commenced by a few recalcitrant creditors," abstention may be appropriate).

[244] *See, e.g. In re* Kenval Marketing Corp., 38 B.R. 241, 245 (Bankr. E.D. Pa. 1984) (declining to abstain when involuntary petitioners represented 72% of the float); *In re* Wayne's Sport Haus, Ltd., 27 B.R. 521, 523 (Bankr. E.D. Mich. 1983) (declining to abstain when involuntary petitioners asked the court to dismiss their own petition, but they represented only 44% of the float and had collusively settled with the debtor); *In re Bioline Laboratories, Inc.*, 9 B.R. 1013, 1019 (declining to abstain when over 60% of the float wanted to stay in bankruptcy); *Grigoli*, 151 B.R. at 322 (rejecting dismissal where two creditors held the majority of claims but "there is no pending out-of-court arrangement" and the majority of creditors by number had not indicated opposition to bankruptcy); *Sherwood Enters.*, 112 B.R.165 at 170–72 (declining to abstain despite the movant's large claim because he failed to show that abstention would benefit the debtor and other creditors).

[245] *See* 11 U.S.C. § 303(b).

creditors than the statutory minimum will be needed to convince the court to preside over an involuntary case. Abstention doctrine thus becomes one final hurdle for involuntary petitioners, something that makes involuntary cases even harder to bring than they already are.

In any event, bankruptcy courts do not assess numerical support alone. Where petitioners can show that they need the special tools of the bankruptcy court (like clawback actions), bankruptcy courts are more receptive to presiding over the case.[246] After all, while the participants in a workout can monetize assets and distribute funds, they cannot easily claw back funds from preferential or fraudulent transfers. Similarly, when creditors try to put a debtor into an involuntary liquidation, but the debtor has a go-forward plan with creditor support, the court might well abstain rather than convert the case to chapter 11.[247]

B. The Debtor Gets Cold Feet

Second, voluntary petitions. While extraordinarily rare, bankruptcy courts sometimes abstain from hearing voluntary petitions on the basis that the debtor and its creditors were engaged in an out-of-court workout. And there is some statutory basis for doing so: the abstention statute facially applies to both voluntary and involuntary cases, suggesting that Congress

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[246] *See, e.g.*, *In re* Stillwater Asset Backed Offshore Fund Ltd., 485 B.R. 498, 509–10 (Bankr. S.D.N.Y. 2013) (refusing to abstain when "it would be very useful for the [debtor] to be armed with the avoidance and related powers of a U.S. bankruptcy trustee"). *But see In re* Rimpull Corp., 26 B.R. 267, 272 (Bankr. W.D. Mo. 1982) (abstaining despite potential preference payment when petitioning creditors would be paid 100% of their principal under the out-of-court workout).

[247] *See, e.g.*, *In re* Luftek, Inc., 6 B.R. 539, 548 (abstaining when administrative expenses would "consume the meager assets of this debtor," the debtor's president was willing to guarantee a new loan, the debtor was party to several valuable executory contracts, and the debtor's plan enjoyed significant trade creditor support). While a debtor can voluntarily convert a case to chapter 11, 11 U.S.C. § 706(a), the court can only do so upon request of a party in interest, *id.* § 706(b). But in cases like *Luftek*, no party might have made such a request, giving the court only the option of abstaining (or not).

believed bankruptcy courts should sometimes abstain from voluntary proceedings.[248]

In re Colonial Ford,[249] a 1982 case from Utah, is the leading example. The debtor, an automobile dealership, had been locked in litigation for years with Ford, the United States Small Business Administration, and its other creditors.[250] It ceased operations and, a few years later, agreed with its creditors to sell or refinance the dealership within nine months, in exchange for a reduction in claims. When it couldn't find a buyer or lender, it filed for bankruptcy. The bankruptcy court opined that workouts are "expeditious," "economic," and "sensible,"[251] described the arrangement as a common-law composition,[252] and declined to exercise jurisdiction over the case.[253] Abstention was appropriate because "the workout is comprehensive, and designed to end, not perpetuate, the creditor-company relations." The court concluded: "One 'reorganization,' under these circumstances, is enough."[254]

The more recent *Red River Talc*[255] case also has an element of workout dismissal. *Red River Talc* is the third attempt by a Johnson & Johnson subsidiary to manage its talc liability. After *LTL Management* was dismissed (twice) under the Third Circuit's futility doctrine, Johnson & Johnson undertook negotiations over a prepackaged case, eventually undergoing a new divisional merger under Texas law and filing Red River Talc for bankruptcy in the Southern District of Texas.

The court dismissed for cause for multiple, interrelated reasons. While the opinion also analyzed problems with voting and

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[248] The court in *Colonial Ford* recounted the history of the provision, noting that a Committee proposal would have allowed for abstention of involuntary cases only but was revised to accommodate abstention of both voluntary and involuntary cases. *See In re* Colonial Ford, Inc., 24 B.R. 1014, 1018 (Bankr. D. Utah 1982).

[249] *In re* Colonial Ford, Inc., 24 B.R. 1014 (Bankr. D. Utah. 1982).

[250] *Id.* at 1014.

[251] *Id.* at 1016.

[252] *Id.* at 1021.

[253] *Id.* at 1023.

[254] *Id.*; *see also In re* Seff Enters. & Holdings, LLC, 2009 BNH 022 (Bankr. D. N.H. 2009) (emphasizing § 305's requirement to consider the interests of all creditors and the debtor).

[255] *In re* Red River Talc LLC, 670 B.R. 251 (Bankr. S.D. Texas 2025).

nonconsensual third-party releases,[256] one driving factor was that the circulated prepackaged plan stated that the debtor would not undergo a new divisional merger or file for bankruptcy unless it could obtain 75% approval from the asbestos claimants.[257] As Judge Christopher Lopez put it:

> The Court must weigh that LLT and J&J started the divisional merger and corporate restructuring to create Red River before it reached 75% voter support as they promised claimants in the Disclosure Statement. … Some claimants could have voted relying on the fact that J&J and LLT would only file a third bankruptcy if they had enough support to confirm a plan, not wanting to go through the motions of another bankruptcy case.[258]

That 75% figure was not arbitrary: it derives from the Code's requirement for a bankruptcy court to create an asbestos trust and issue an injunction channeling all asbestos claims to the trust.[259] And after *Purdue Pharma*, Red River Talc needed to reach that figure to put nonconsensual third-party releases into the plan. So another way of assessing the opinion is through the lens of feasibility. Having designed the prepack around that figure, failing to reach it left the debtors without enough flexibility to confirm a plan, and the judge became convinced that the rethinking needed to design a new plan should happen outside of bankruptcy, allowing the tort cases to proceed without the automatic stay.[260]

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To be fair, the practice of abstaining from hearing bankruptcy cases that are otherwise appropriate — financial distress, no futility, not a two-party dispute, no forum shopping and no pending

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[256] *See id.* at 259. Nonconsensual third-party releases are no longer permissible as part of a chapter 11 plan under *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024).

[257] *See Red River Talc*, 670 B.R. at 278.

[258] *Id.* at 306.

[259] *See* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (authorizing the bankruptcy court to issue a channeling injunction in asbestos cases under stringent requirements, including that 75% of the asbestos claimants vote in favor of the plan).

[260] *See Red River Talc*, 670 B.R. at 307 ("The entire construct of the Plan requires re-thinking from a post-*Purdue* perspective.").

insolvency case elsewhere — is the hardest to justify for a federal court. The cousins of the bankruptcy courts, the federal district courts, might enlarge deadlines or adjourn hearings to allow settlement negotiations to take place, but they would not (and likely could not) give up jurisdiction in the first place.

Nothing about this practice is written in stone. When should bankruptcy courts abstain from presiding over out-of-court workouts? Encouraging creditors and debtors to negotiate their way through financial distress seems both formative and efficient: both honesty and forbearance are virtues, and the costs of an out-of-court workout should be much lower than proceeding in bankruptcy court. The tougher concern to address, though, is whether such a process is fair.

That concern is strongest for unsecured creditors. After all, without the automatic stay, secured creditors can foreclose and repossess. This is why involuntary bankruptcy is largely an unsecured creditors' remedy.[261] Unsecured creditors, though, have fewer pathways to a remedy: suing in state court or commencing an involuntary case, a course full of hurdles, are two of them. If bankruptcy courts abstain from hearing the involuntary case despite the unsecured creditors' having met all the statutory requirements, that forecloses one of the few remaining paths to relief for unsecured creditors. Indeed, as numerous commentators have made clear, there's ample reason to think that current business bankruptcy law provides too narrow a pathway to involuntary relief.[262]

Bankruptcy courts should apply clear and consistent principles to "recognize" out-of-court workouts, akin to chapter 15 recognition, asking whether the informal workout is truly *collective* and truly a *process*. This should mean, at a minimum, that the debtor or its creditors (whoever is leading the negotiations) has brought all impaired, in-the-money creditors to the table, and the group has agreed to embark upon an out-of-court process that will end after a reasonable time.

A debtor should not be able to forestall an involuntary bankruptcy forever by keeping an out-of-court workout in perpetual negotiation, nor should a debtor and negotiating creditors be able to stop an involuntary petition by qualifying

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[261] *See* 11 U.S.C. § 303.

[262] *See, e.g.*, Swanson, *supra* note 214.

creditors who are arguably in the money and were not invited to the negotiating table. The *Caesars* prepack met the first criteria (it bound the debtor to file bankruptcy between January 15 and January 20, 2015) but not the second. Under this proposed rule, the second-lien noteholders who filed the *Caesars* involuntary were entitled to do so, because they were impaired, in-the-money, and sidelined by the prepackaged negotiations. *Rimpull Corp.*, by contrast, is a good example of appropriate abstention.

Another way to think about this type of abstention is through the lens of waiver. Under the common law of contracts, parties can agree to continue negotiating with each other in good faith, even though they have not yet reached mutual assent on the underlying contract itself.[263] To be sure, consent requires an affirmative act, but here, creditor participation in the out-of-court workout is something like consenting to waive the right to file an involuntary bankruptcy, so long as the parties continue to negotiate in good faith — and only for a reasonable time. That would mean, for instance, that if a creditor agreed not to foreclose on a key asset but then surreptitiously tried to seize it, the deal is off, and the bankruptcy is on.

Indeed, while that waiver operates in the background as a default, the negotiating parties might wish to formalize it through a forbearance agreement that forestalls the filing of an involuntary proceeding through a date certain. Such agreements, like restructuring support agreements, would be upheld by the bankruptcy courts and would give further certainty to the background, common law principles.[264]

What if the *debtor* becomes dissatisfied with the negotiations and runs to the bankruptcy court? Should bankruptcy courts ever

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[263] *See, e.g.*, Quake Constr., Inc. v. Am. Airlines, Inc., 565 N.E.2d 990 (Ill. 1990) (Stamos, J., concurring).

[264] Unlike debtors, creditors can waive their right to file an involuntary case against a debtor without offending bankruptcy policy. In addition, courts may have authority to restrict creditor filings in collateral, nonbankruptcy litigation. In *S.E.C. v. Byers*, 609 F.3d 87 (2d Cir. 2010), the Second Circuit upheld a district court's anti-litigation injunction that protected an SEC receivership from, among other things, involuntary bankruptcy proceedings. *Id.* at 89; *see also* Mark G. Douglas, *No Unwaivable Right to File an Involuntary Bankruptcy Petition*, 9 BUS. RESTRUCTURING REV. No. 5, at 20–23 (Sept./Oct. 2010), https://www.jonesday.com/-/media/files/publications/2010/10/business-restructuring-review/files/brr-septemberoctober-2010/fileattachment/brr_sept_oct_10.pdf.

dismiss or abstain from hearing voluntary petitions because an out-of-court workout is proceeding? To my mind, the answer is never — at least, never for that reason alone.[265]

While creditors can race each other to the courthouse, debtors can find complete relief only at the bankruptcy courthouse. Indeed, the Bankruptcy Code renders unenforceable contract terms that attempt to prevent the debtor's property from passing into the estate[266] or that make filing for bankruptcy a default.[267] Since a waiver of filing for bankruptcy altogether offends the same policy, and to a much greater degree, bankruptcy courts have struck down, time and again, any debtor agreement that looks like or functions as a waiver of the right to file for bankruptcy.[268]

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[265] Of course, all the grounds for abstention discussed above still apply, like lack of financial distress, futility, two-party disputes, and forum-shopping. *See supra* Parts I, II, and III. Similarly, the dismissal in *Colonial Ford* is better justified on the grounds that the debtor had no chance of reorganizing. Colonial Ford had no ongoing operations and couldn't sell or refinance the key property within the agreed timeframe; the appropriate remedy was not abstention under section 305, but conversion to chapter 7 under section 1112. *Accord* Judge Conrad Duberstein, *Out-of-Court Workouts*, 1 AM. BANKR. INST. L. REV. 347, 349 (1993).

One narrow situation where it makes sense for the court to abstain from or dismiss a debtor's voluntary petition is when, as in *Red River Talc*, the debtor circulates a prepackaged plan that establishes express conditions precedent for attempting to confirm the prepackaged plan, those conditions are not met, and the debtor plows forward with the prepackaged case anyway. *See* Voluntary Petition at 2, *Red River Talc*, 670 B.R. 251 (Bankr. S.D. Texas. Sept. 20, 2025) (No. 24-90505), Dkt. No. 1 (noting that acceptances of the plan were solicited prepetition and the plan was filed with the petition); Debtor's Statement Regarding Filing of Chapter 11 Case, 670 B.R. 251 (Bankr. S.D. Texas. Sept. 20, 2024) (No. 24-90505) (describing "overwhelming support" for the prepackaged plan), Dkt. No. 3. But even there, the debtor would retain the right to scrap the prepackaged plan and file a freefall bankruptcy. The basis for dismissing or abstaining, then, is either (a) the bad faith act of pretending that the conditions for the prepackaged plan were met when they were not or (b) something more like futility, as in *Red River Talc*.

[266] *See* 11 U.S.C. § 541(c).

[267] *See id.* § 365(b)(2).

[268] Courts split over whether prepetition agreements not to contest a creditor's motion to lift the stay are enforceable. For a discussion of the issue, see *In re* DB Capital Holdings, LLC, 454 B.R. 804 (Bankr. D. Colo. 2011); *In re* Pease, 195 B.R. 431 (Bankr. D. Neb. 1996) (holding that prepetition waivers of automatic stay are *per se* unenforceable, since the debtor cannot bind itself in its capacity as debtor-in-possession prior to filing the case); *In re* Jenkins Ct. Assoc.

It is also hard to see how a bankruptcy court could properly abstain under section 305 from a voluntary case when the statute requires the judge to find that abstention is in the best interests of creditors *and the debtor*,[269] and the debtor has determined that the out-of-court workout is not going to plan and wishes to invoke bankruptcy protection.[270]

Setting aside the text of the statute, one might worry that such a rule might undercut out-of-court workouts. After all, this proposal means that while the workout is underway, the creditors cannot declare an impasse and run to bankruptcy court, but the debtor can. Viewed differently, while creditors can credibly bind themselves to an out-of-court workout, the debtor cannot. The *Colonial Ford* court expressed the concern nicely:

> It would be anomalous to protect workouts from involuntary petitions while leaving them vulnerable to voluntary petitions. Creditors would be protected from the renegades in their number who sought involuntarily to commit a debtor to bankruptcy, but they would have no similar check against debtors who compose their debts with the promise that matters will be left out of court and then stage an ambush in Chapter 11.[271]

Ltd. Partnership, 181 B.R. 33 (Bankr. E.D. Pa. 1995) (noting that a waiver of the stay can be so disruptive to the reorganization process that it is functionally equivalent to a waiver of bankruptcy relief altogether).

[269] That inclusion is particularly meaningful in light of section 1112(b), which requires a court to dismiss a case for cause when in "the best interests of creditors *and the estate*." *See* 11 U.S.C. § 1112(b); *In re* Sapphire Dev., LLC, 523 B.R. 1, 7 (D. Conn. 2014) (reversing abstention decision when bankruptcy court did not consider the interests of all parties, including the debtor, in abstention decision); *see also, e.g.*, Hartigan v. Pine Lake Village Apartment Co. (*In re* Pine Lake Village Apartment Co.), 16 B.R. 750, 753 (Bankr. S.D.N.Y. 1982) ("It defies credulity to say that the debtor's interest would be better served by a dismissal when the debtor voluntarily sought the mechanics of Chapter 11 for the purpose of rehabilitation and a fresh start."); *In re* 82 Milbar Blvd. Inc., 91 B.R. 213, 215 (Bankr. E.D.N.Y. 1988) ("Section 305 is not limited to involuntary cases but '… it certainly will have limited applicability … to voluntary cases'" (quoting *In re* G-N Partners, 48 B.R. 459, 461 (Bankr. D. Minn. 1985)).

[270] The court in *In re Colonial Ford* resisted this logic, arguing that the corporation is a web of overlapping interests, and the judgment of the corporation's decisionmakers to file for bankruptcy was not dispositive of the question whether doing so was truly in the corporation's best interests. *In re* Colonial Ford, Inc., 24 B.R. 1014, 1021–22 (Bankr. D. Utah 1982).

[271] *Id.* at 1020.

If, by contrast, we empowered debtors to commit themselves to an out-of-court workout, that might create more pressure for debtors to continue negotiating.

This concern is easy to overstate, however. First, the abstention doctrine for creditors, as laid out above, is very narrow, both in terms of the workouts that would qualify (collective, proceeding) and in terms of its duration (time-limited, while parties are negotiating in good faith). And second, the moral hazard effect on debtors is limited. A workout is unlikely to succeed without the cooperation of the debtor anyway, and so once the debtor's commitment to the process vanishes, the deal is off — whether a bankruptcy petition is filed or not.

IV. THE INSTITUTIONAL VIRTUES OF THE BANKRUPTCY COURTS

As we have seen, the bankruptcy courts abstain in a dizzying array of circumstances, invoking equitable and pragmatic justifications for doing so. While the bankruptcy courts may not be putting a unified theory into practice, we can discern common themes and organizing principles behind this area of law. While Parts I through III discussed doctrinal refinements in specific contexts, Part IV steps back to analyze three theoretical insights we can derive from this study, connecting bankruptcy abstention to federalism, equity, private ordering, and institutionalism.

A. Bankruptcy Courts Are Federal Courts

Bankruptcy courts are keenly attuned to their role within the American federalist system and use abstention doctrine to guard against mission creep. While bankruptcy is handled by administrative agencies in many other countries, the United States has long maintained an adjudicative approach to corporate (and individual) insolvency, rather than a bureaucratic one. That is especially true after the Bankruptcy Code of 1978, which reduced the role of the Securities and Exchange Commission ("SEC") and allowed debtors in chapter 11 to remain in possession of the property of the estate. That policy choice still leaves bankruptcy judges with some management discretion over the trajectory of the case, but it does bring them a half-step closer to the "balls-and-strikes" view of judicial dispute resolution, since the day-to-day

operation of the estate is in the hands of the debtor in possession or a trustee.

Bankruptcy courts frequently deploy abstention doctrine to ensure that they do not become federal courts of general jurisdiction. Such measures might be unnecessary for other Article I tribunals, whose jurisdictional grant is more tightly constrained to a single doctrinal area. The Courts-Martial, for example, preside over violations of the Uniform Code of Military Justice.[272] The Patent Trial and Appeal Board,[273] the Court of Federal Claims,[274] the International Trade Commission,[275] and the Tax Court[276] are similarly restricted to their own subject-matter specific areas.[277] Such limitations cannot be imposed upon bankruptcy, which requires an assessment of the assets and liabilities of the debtor, triggering analyses of common law rights in property, tort, and contract — along with any statutory and regulatory regimes under which the debtor operates. Bankruptcy's remit is constitutionally ominous.[278] Absent a limiting principle, the Bankruptcy Clause could provide a constitutional font for federal courts of general jurisdiction. In theory, that would leave only inability or unwillingness to pay as the triggering circumstances for a bankruptcy case. But once that threshold has been crossed, bankruptcy jurisdiction can become all-consuming in a way that threatens the American federalist system.

And so, we see the bankruptcy courts, both by design and by discretion, pulling back from adjudicating areas that would annex too much jurisdiction to the bankruptcy courts. Federalism concerns drive threshold decisions of financial distress and

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[272] 10 U.S.C. §§ 817–818.

[273] 35 U.S.C. § 2.

[274] 28 U.S.C. § 1491(a).

[275] 28 U.S.C. § 1581.

[276] 26 U.S.C. § 7442.

[277] It is not quite true to say that there are *no* federal courts of general jurisdiction. The federal government has sweeping authority over Washington, D.C., and the territories, and the superior courts in those jurisdictions have the same authority as state courts. *See, e.g.*, D.C. CODE § 11-921.

[278] Indeed, many bankruptcy disputes could not be heard in Article III courts under their diversity jurisdiction and so could only be heard in those courts under federal question jurisdiction, which in turn could be supplied by Congress under either the Commerce Clause or the Bankruptcy Clause. But while some of this common-law adjudication might count as interstate commerce, some of it is surely *intra*state.

feasibility, ensuring that the bankruptcy courts are presiding only over disputes well within the core of their authority.[279] Federalism concerns motivate the bankruptcy courts to abstain from hearing two-party disputes as well.[280] As the Fourth Circuit said, "[i]f these sorts of suits are deemed proper subjects for bankruptcy, then those courts (to their own dismay) would be well on their way to becoming courts of general jurisdiction."[281]

Similarly, the federal courts also punish debtors or creditors who are fleeing regulators or unfavorable forums and pull back from presiding over disputes that are already being handled by other courts, whether state or federal.[282] Federalism justifies that practice, too: after all, the bankruptcy courts can help maintain the federal-state balance by declining to intervene when a matter is being handled appropriately at the state level, whether they cite the Code, principles of comity, or both.

Federalism concerns, however, do not readily explain why bankruptcy courts abstain from exercising jurisdiction over out-of-court workouts.[283] Compositions, extensions, forbearance, and prepackaged bankruptcy plans lie deep within bankruptcy terrain, and these transactions have not seen the inside of a courtroom either at the state or federal level. If some principle or tradition justifies that activity, it must be something else.

B. Bankruptcy Courts Are Courts of Equity

That something else might be supplied by a second organizing principle: bankruptcy courts remain courts of equity, and bankruptcy abstention stands as the prime example of their equitable nature. Despite the Supreme Court's having removed several "tools" from the insolvency toolkit in recent years, the ability of bankruptcy courts to dismiss, abstain, lift stay, or excuse turnover is proof that equity lives on in the bankruptcy courts.[284]

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[279] *See supra* Part I.A and I.B.

[280] *See supra* note 108 and accompanying text.

[281] Maryland Port Administration v. Premier Automotive Servs., Inc. (*In re* Premier Automotive Servs., Inc.), 492 F.3d 274, 285 (4th Cir. 2007).

[282] *See supra* Part II.

[283] *See supra* Part III.

[284] Nor does it undercut this point to say that these equitable powers are now codified, whether in section 305 or elsewhere in the Bankruptcy Code or the

As Professor Henry Smith sees it, equity is a "meta-law" that responds to "complex and uncertain problems by going to a new level of law."[285] Those sorts of problems, for Smith, arise from polycentric disputes, conflicting rights, and opportunism, including "[m]ultiple parties with conflicting customary rights and potential third-party effects."[286] These features, of course, are the bread and butter of bankruptcy practice, even though Smith does not discuss bankruptcy law expressly.[287] Because insolvency means that the debtor cannot pay all of its creditors in full, the creditors are arrayed not only against the debtor but also against each other. Their legal fights involve not only liability fights with the debtor, but also bankruptcy-specific concepts like priority and dischargeability, in which varying classes of creditors end up jockeying with each other for position. For the same reason, rights in bankruptcy always conflict. And insolvency seems to tempt opportunism at every turn, whether through stigma or rapaciousness.

Equity lives on in bankruptcy abstention. As Smith quotes the old equitable maxims, consider the following: (a) *Between equal equities the first in order of time shall prevail*; (b) *She who seeks equity must do equity*; (c) *He who comes into equity must come with clean hands*; and (d) *Equity aids the vigilant and diligent*.[288] Together, these four maxims help explain why bankruptcy courts have developed doctrines to withhold bankruptcy relief from debtors and creditors who are seeking to use the bankruptcy courts to unequitable ends. When a solvent debtor seeks to use the bankruptcy system for litigation or business advantage, bankruptcy courts pull back. When an equitable insolvency proceeding or out-of-court workout is already underway, bankruptcy courts defer to the first-in-time proceeding. When a

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Judicial Code. When Congress endorses a court's equitable authority through a broad grant of discretionary power, as in section 305, it reinforces that power, rather than replaces it.

[285] Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021).

[286] *See id.* at 1056.

[287] *Id.* at 1072–73. It is therefore unsurprising that many of the maxims of equity have serious bite in bankruptcy court, like *equity regards substance rather than form* (which lives on in bankruptcy doctrines like recharacterization and substantive consolidation) and *equity will not allow a wrongdoer to profit from his own wrong* (equitable subordination). *Id.* at 1122–24.

[288] *Id.* at 1126–27.

bankruptcy petition looks like improper forum-shopping, bankruptcy courts decline to grant relief to petitioners with unclean hands.

The tradition of equity can help us understand the bankruptcy doctrine of "equitable mootness" too. Unique to bankruptcy, equitable mootness is a prudential doctrine under which courts pull back from "unscrambling" bankruptcy plans after they have been consummated, typically on appeal.[289]

One way to think of equitable mootness, of course, is that it is another form of prudential mootness[290] — in much the same way that the federal courts sometimes distinguish between Article III standing and "prudential" standing.[291] But we can also think of

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[289] A bankruptcy court might invoke equitable mootness on a motion to reconsider or motion for relief from judgment, but in that context equitable mootness may seem more like protecting the judge's prior handiwork, rather than deferring to another legal decisionmaker. Some commentators trace the doctrine back to *Roberts Farms*, a 1981 case from the Ninth Circuit. *See* Trone v. Roberts Farms, Inc. (*In re* Roberts Farms, Inc.), 652 F.2d 793, 797 ("Are we not quite patently faced with a situation where the plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned? Certainly, reversal of the order confirming the plan of arrangement, which would knock the props out from under the authorization for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court."). The two leading tests are as follows: The Seventh Circuit asks whether it is "prudent to upset the plan of reorganization" at a late date. *In re* UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir. 1994) (Easterbrook, J.). The Fifth Circuit asks "(1) whether a stay has been obtained; (2) whether the plan has been substantially consummated; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *See* Ronit, Inc. v. Stemson Corp. (*In re* Block Shim Dev. Company-Irving), 939 F.2d 289, 291 (5th Cir. 1991).

[290] Professor Matthew Hall distinguishes between issue mootness and personal stake mootness, arguing that courts deploy more prudential considerations in the latter form of mootness. Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 600–09 (2009). Equitable mootness, in that typology, is more like personal stake mootness: it is not that the issue has gone away but that the stakes of the various parties are too intertwined to disentangle easily.

[291] That said, the Supreme Court has recently signaled some discomfort with the term and suggested that it stands in "some tension" with the federal courts' "virtually unflagging" obligation to "hear and decide cases within its jurisdiction. *See* Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014) (internal quotation marks and citations omitted); *see also* June Med.

equitable mootness as another form of bankruptcy abstention.[292] After all, if a bankruptcy court can abstain "at any time" from exercising jurisdiction when a state proceeding or an out-of-court workout is underway, surely it seems less strange that an appellate court might pull back from "unscrambling" a confirmed bankruptcy plan for similar reasons. That approach leaves open the need to refine equitable mootness, such that important questions of law can be adjudicated on appeal,[293] without jettisoning the doctrine completely.

Servs. L.L.C. v. Russo, 591 U.S. 299 (2020) (Thomas, J., dissenting) (arguing that the rule against third-party standing is constitutional, not prudential).

[292] *See, e.g.*, Bank of New York Trust Co., NA v. Official Unsecured Creditors' Committee (*In re* Pac. Lumber Co.), 584 F.3d 229, 240 (5th Cir. 2009) ("Equitable mootness is a kind of appellate abstention that favors the finality of reorganizations and protects the interrelated multi-party expectations on which they rest."). This view would imply, of course, that equitable mootness is not jurisdictional and thus need not be assessed prior to the merits. *See, e.g.*, Texxon Petrochemicals, L.L.C. v. Getty Leasing, Inc. (*In re* Texxon Petrochemicals, L.L.C.), 67 F.4th 259, 262 (5th Cir. 2023) (noting that court could decide the case on the merits without reaching equitable mootness). Of course, the Bankruptcy Code includes two statutory bases for not attempting "to unscramble an egg," section 363(m) and section 1127(b), both of which counsel against sweeping appellate relief when bankruptcy sales or plans have been consummated. *See, e.g.*, *UNR Indus.*, 20 F.3d at 769 (citing 11 U.S.C. §§ 363(m), 1127(b)).

[293] The Supreme Court has signaled a desire to regularize review of bankruptcy decisionmaking on appeal. In *MOAC Mall Holdings LLC v. Transform HoldCo LLC*, In *MOAC Mall Holdings LLC v. Transform HoldCo LLC*, the petitioner argued that the appeal was moot and that section 363(m) was jurisdictional, meaning that its opponent's late filing could not be excused. *See* Br. for Respondent, *MOAC Mall Holdings LLC v. Transform HoldCo LLC*, 2022 WL 14004058 (Oct. 19, 2022). The Supreme Court unanimously disagreed on both counts, and while it did not mention the doctrine of equitable mootness, its rejection of jurisdictional mootness reflects a broader skepticism toward outcome-determinative abstention doctrines. Justice Samuel Alito, when he sat on the Third Circuit, expressed some skepticism about equitable mootness in *In re Continental Airlines*, 91 F.3d 553, 571–72 (3d Cir. 1996) (*en banc*) (Alito, J., dissenting). See, e.g., Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26 (2014) (internal quotation marks and citations omitted); see also June Med. Servs. L.L.C. v. Russo, 591 U.S. 299 (2020) (Thomas, J., dissenting) (arguing that the rule against third-party standing is constitutional, not prudential).

A few appellate courts have sent strong signals that they wish to reconsider the doctrine of equitable mootness, whether by collapsing it into regular mootness or sharply curtailing its use. In *Serta Simmons*, a 2024 case in which the Fifth Circuit performed surgery on a bankruptcy plan to provide a limited

Indeed, the tradition of equity is related to prudential doctrines in the federal courts. We might think of the bankruptcy courts as nurturing the same "passive virtues" that Bickel attributed to the Supreme Court in his 1961 *Harvard Law Review* Foreword.[294] Bickel pointed out that a series of Supreme Court cases from that term were "significant for having brought into focus the uses and nonuses of techniques of withholding ultimate constitutional adjudication"[295] — techniques like standing, ripeness, mootness, and the political question doctrine. Bickel described this practice as sounding in prudence, not principle.[296] And while the merits of these virtues are furiously debated, no one can deny that the federal courts still cultivate Bickel's "passive virtues" today.

The same is true of the bankruptcy courts, even if we have not described it in those terms. For example, no scholar has yet described a doctrine called "bankruptcy ripeness" and I have found no published legal opinion using that phrase.[297] And yet when a bankruptcy court declines to exercise jurisdiction over a debtor who is not suffering financial distress that is "immediate enough to justify a filing," as in *LTL Management*,[298] what better way to

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remedy to certain creditors, Judge Oldham quoted Judge Easterbrook's famous quip that "real mootness" is the "*inability* to alter the outcome" and equitable mootness is the "*unwillingness* to alter the outcome." Excluded Lenders v. Serta Simmons Bedding, L.L.C. (*In re* Serta Simmons Bedding, L.L.C.), 125 F.4th 555, 585 (5th Cir. 2024) (quoting *In re* UNR Indus., Inc., 20 F.3d 766, 769 (7th Cir. 1994) (Easterbrook, J.)). In the end, the Fifth Circuit decided that equitable mootness did not bar the appeal, because (they said) they could grant the relief of rescission without disturbing other parties' rights. *Id.* at 586. *Serta Simmons* is one of the starkest limits on equitable mootness, from a court of appeals, within the past several years.

[294] *See* Bickel, *supra* note 15.

[295] *Id.* at 40.

[296] *Id.* at 46.

[297] A recent search for "bankruptcy ripeness" on Westlaw, Lexis, HeinOnline, Google Scholar, SSRN, and JSTOR yielded zero results. When the bankruptcy courts publish opinions discussing ripeness (which they have done only a couple hundred times), they are assessing whether specific proceedings (or disputes) within the bankruptcy are ripe for adjudication, not the case as a whole. *See, e.g.*, Cassim v. Educ. Credit Mgmt. Corp. (*In re* Cassim), 395 B.R. 907 (B.A.P. 6th Cir. 2008) (assessing the ripeness of a nondischargeability determination); *In re* Caesars Entertainment Op. Co., Inc., 562 B.R. 168 (Bankr. N.D. Ill. 2016) (assessing the ripeness of a dispute over the allowability of unsecured deficiency claims).

[298] *In re* LTL Mgmt., LLC, 64 F.4th 84, 102 (3d Cir. 2023) (Ambro, J.).

think of its decision as a form of prudential, bankruptcy ripeness? Indeed, the controversy over the financial distress requirement in bankruptcy mirrors the furor over ripeness in the Article III courts. Bankruptcy scholars and practitioners can gain purchase on these debates by drawing from the developed federal courts literature on ripeness for the bankruptcy context.

Of course, a bankruptcy court is not a "roving commission to do equity."[299] The Supreme Court has said in a series of modern cases that the creativity of bankruptcy practitioners and the problem-solving of bankruptcy judges cannot justify maneuvers that conflict with the express terms of the statute, and it has cut back on the permissive use of section 105(a).[300] Yet the equitable authority of the bankruptcy courts to *avoid* taking action does not run afoul of that basic rule, and the Supreme Court has not yet tried to intervene. The dialectic process between the "law" system and the "equity" system should not trouble us: as Smith points out, it has long been understood that *equity follows the law*, meaning that equity will both try to advance the spirit of the law by foreclosing clever workarounds and comply with the letter of the law by implementing statutory regimes when the lawmaker has anticipated and addressed opportunism.[301] Indeed, we can see this process at play in the mass tort context. Bankruptcy courts have wielded their equitable authority to pull back from exercising jurisdiction over some of the worst offenders,[302] while at the same

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[299] *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986).

[300] The federal courts used to intone that bankruptcy courts are courts of equity with more enthusiasm than they do today. *See, e.g.*, Young v. Higbee Co., 325 U.S. 204, 214 (1945); *In re* Purdue Pharma, L.P., 69 F.4th 45, 90 (2d Cir. 2023) (Wesley, J., concurring), *rev'd*, 144 S. Ct. 2017 (2024).

[301] *See* Smith, *supra* note 285.

[302] The bankruptcy courts, to date, have pulled back from some of the most egregious misuses of the system, whether blatant forum shopping around the MDL (*3M*/*Aearo*) or the synthetic insolvency of the controversial Texas Two-Step maneuver (*LTL Management*, *Red River Talc*). Indeed, as of 2025, no Texas Two-Step plan has survived both bankruptcy court and appellate review. *See, e.g.*, Mike Lee, *Don't Mess With Texas (?): Analyzing the Texas Two-Step Bankruptcies*, Comment, 60 WAKE FOREST L. REV. 195, 202 (2025) (noting that *Aldrich Pump* and *DBMP* are still pending and are under a cloud of similar constitutional challenges). At the same time, solutions to other problems — like the silencing of victims during the bankruptcy process — remain elusive. *See* Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261 (2023).

time scholars and policymakers are actively proposing statutory regimes to address the issue.[303]

Whether Congress updates the legal regimes or not, bankruptcy abstention can help give us purchase on the longstanding debate over whether bankruptcy is, or should be, "exceptional." The scholarly debate traces back to 2002 and 2003, when Professor Ralph Brubaker analyzed whether bankruptcy is an "exceptional" area when it comes to sovereign immunity.[304] A few years later, Professor Jonathan Lipson deployed the concept of "bankruptcy exceptionalism" to explore the constitutional and structural consequences of the Bankruptcy Power in the U.S. Constitution[305] and Professors Rafael Pardo and Kathryn Watts explored the exceptionalism underneath bankruptcy administration.[306] In the last couple of years, Professors Jonathan Seymour and Jared Mayer have resurrected the debate, taking the "against" and "for" positions, respectively.[307] Earlier this year, Professors Lipson and

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[303] Some bankruptcy and civil procedure theorists have advocated for removing mass torts from the ambit of the bankruptcy courts altogether. *See, e.g.*, MELISSA JACOBY, UNJUST DEBTS (2024) (arguing for a revision to the Bankruptcy Code's definition of "claim" to include only funded debt); Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J. FORUM 525 (2024); Simon, *Bankruptcy Grifters*, *supra* note 85. Other scholars have argued that specialized insolvency courts are well situated to handle mass tort bankruptcy cases efficiently. *See, e.g.*, Anthony J. Casey & Joshua C. Macey, Essay, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973 (2023). Still other scholars have proposed new statutory regimes. *See, e.g.*, Michael A. Francus, *Designing Designer Bankruptcy*, 102 TEX. L. REV. 1206 (2024); Lindsey D. Simon, *Mass Tort Designation* (unpublished manuscript on file with author).

[304] *See* Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory Ex Parte Young Relief*, 76 AM. BANKR. L.J. 461, 468 (2002); Ralph Brubaker, *Abrogation of State Sovereign Immunity Through Congress's Bankruptcy Power: Considering the Framers' Intent with Respect to the Attributes of Sovereignty, Uniformity, and Bankruptcy Exceptionalism*, 23 No. 3 Bankr. L. Letter 1 (Mar. 2003).

[305] *See* Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605 (2008).

[306] *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384 (2012).

[307] Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1942–43 (2022); Jared I. Mayer, *For Bankruptcy Exceptionalism*, U. CHI. L. REV. ONLINE, June 27, 2023, at 1, 8. Seymour defines "bankruptcy

Pamela Foohey argued that the Supreme Court's *Purdue Pharma* opinion ended "statutory exceptionalism" but left open "structural exceptionalism."[308] Yet none of these recent pieces have grappled with bankruptcy abstention.

As I've argued above, bankruptcy abstention is better thought of as in keeping with the ancient tradition of equity or the "passive virtues" of the federal courts, not as a freewheeling exemption from legal rules. If "exceptionalism" is meant to convey a judiciary unbound from rules, standards, principles, or tradition, then the bankruptcy courts are not exceptional, nor should they be. But if we mean to capture the reality that the bankruptcy courts are the most jurisdictionally complex tribunals in the American legal system, whose authority is mediated, both internally and externally, by both statutory rules and ancient principles of equity and modern notions of pragmatism, then the bankruptcy courts are exceptional indeed.

C. Public Values & Private (Re)ordering

Finally, bankruptcy abstention provides a new battlefield for old debates about bankruptcy theory. The 1980s saw a scholarly debate between bankruptcy theorists of two main camps. The "traditionalist" view, championed by Vern Countryman, Senator Elizabeth Warren, and others, advanced a vision for bankruptcy law that saw bankruptcy as an appropriate domain for national policymaking.[309] The nomenclature of traditionalist is a bit dated; the "tradition" was the progressive wave of bankruptcy scholarship tracing back to the New Deal.[310] But the approach draws from

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exceptionalism" to mean a "special approach to judging," *see* Seymour, *supra* at 1928, 1939, although as uncovered above, the use of the term antedates the scholarly debates of recent years.

[308] *See* Jonathan C. Lipson & Pamela Foohey, *The End(s) of Bankruptcy Exceptionalism:* Purdue Pharma *and the Problem of Social Debt*, 46 CARDOZO L. REV. 861, 867 (2025).

[309] *See, e.g.*, Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 827 (1985); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 788 (1987); Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 340 (1993).

[310] *See, e.g.*, Brook E. Gotberg, *Beyond Claims in Corporate Reorganization* (unpublished manuscript on file with author); *See* David A. Skeel Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1078 (2000).

deontological visions of substantive fairness, pointing out that bankruptcy law must decide which constituencies receive value, and how much, from any restructuring surplus or liquidating distribution.

By contrast, the "proceduralist," view, championed by Thomas Jackson, Douglas Baird, and others, see bankruptcy as a forum for adjudicating disputes, one whose federal utility is driven mainly by the need to prevent holdout problems and to apply a consistent, nation-wide procedure.[311] Tightly associated with the Chicago School of law and economics, proceduralists as a general matter think that a debtor's rights and liabilities are set by nonbankruptcy law, and that bankruptcy's value lies in creating space for negotiation. But the substantive terms of the deal should be set not by Congress as part of its policymaking agenda, but rather by what we imagine the creditors would have decided *ex ante*: the "Creditors' Bargain," as Jackson and Baird termed it. This framework is inspired by teleological or utilitarian visions of incentives: what rules will best promote an efficient negotiation, whether inside bankruptcy court or outside it.

Bankruptcy scholarship does not neatly fit into one or the other camp, of course. Some scholars have built off the proceduralist view to suggest that private contracting should play an even more prominent role in bankruptcy reorganizations.[312] Tony Casey argued that bankruptcy does not implement a Rawlsian "Creditors' Bargain" from behind some mythical veil of ignorance, but rather sets the terms for a real-life, *ex post* negotiation to take place — a perspective that seems inspired by, but orthogonal to, the proceduralist perspective.[313] Plus, of course, bankruptcy law is not wholly one or the other, and top scholars frequently do not lock into one way of seeing the landscape.

Whatever its merits (or demerits), bankruptcy abstention seems to provide strong evidence in favor of the proceduralist view of the bankruptcy courts. If bankruptcy is meant to induce or

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[311] *See, e.g.*, Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982).

[312] For example, Bob Rasmussen advanced a "menu theory" of bankruptcy. Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992); *see* Susan Block-Lieb, *the Logic and Limits of Contract Bankruptcy,* 2001 U. ILL. L. REV. 503.

[313] Anthony J. Casey, *The New Bargaining Theory of Corporate Bankruptcy and Chapter 11's Renegotiation Framework.* 120 COLUM. L. REV. 1709 (2020).

implement a bargain between the debtor and its creditors, then when an out-of-court workout has already been consummated — apart from concerns about coercion or extortion[314] — the mission has already been accomplished, and nothing remains for the bankruptcy court to do. An analogous point holds for prepackaged bankruptcies, which the Code expressly authorizes.[315] Bankruptcy abstention, then, provides a way for the courts to recognize and implement out-of-court workouts that accomplish the core goal of the bankruptcy case itself.

Yet bankruptcy abstention can also help us see that the traditionalist-proceduralist binary does not supply an exhaustive way of looking at bankruptcy law. There is (at least) a third way. If the traditionalist framework draws from deontological notions of fairness and the proceduralist framework draws from teleological notions of efficiency, then a third framework — which we might call "institutionalist" — can draw from aretaic notions of virtue. The bankruptcy courts are not just distributive or dispute-resolving machines: they are institutions. And as institutions, they cultivate habits and practices that make them more adept at solving certain kinds of problems than others. Sometimes, the key to understanding creditor-debtor law is not by reference to the fairness of rules or the efficiency of incentives, but by the character of the institutions we have formed to address financial distress.

When parties seek solutions from the bankruptcy courts that they are not well-formed to provide, we get what Professor Laura Coordes terms "bankruptcy overload."[316] Bankruptcy abstention is part of how a healthy bankruptcy system responds to bankruptcy overload — though Coordes rightly points out that it can, as in *NRA* and *LTL Management*, take too long to reach a sensible result.[317] Organizing and cultivating the doctrines that lie under the umbrella term of bankruptcy abstention, as this Article has attempted to do, can not only help bankruptcy judges manage their caseload but also suggest pathways for legal reform.

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[314] *See* LOPUCKI, *supra* note 47 (analyzing corruption in venue decisions in the bankruptcy courts).

[315] *See supra* note 210 and accompanying text.

[316] *See* Laura N. Coordes, *Bankruptcy Overload*, 57 GA. L. REV. 1133, 1141–43 (2023).

[317] *Id.* at 1178–79, 1181.

CONCLUSION

In case after case, bankruptcy courts have developed a tradition of pulling back from exercising the expansive jurisdiction given to them by the Bankruptcy Code and the Judicial Code. They do this in a variety of ways: dismissing cases or abstaining from hearing them, lifting the stay, or excusing noncompliance with the turnover order. This Article has brought all these areas of law under the label of bankruptcy abstention. Some of the reasons for bankruptcy abstention are well understood and quite unsurprising, like refusing to entertain forum-shopping. Other reasons are far more striking, like abstaining from hearing a bankruptcy matter because the parties to the case were engaged in an out-of-court workout before someone lost patience and ran to the courthouse.

Bankruptcy's "negative spaces" are curious, much like the dog that "did nothing in the night-time" in the old Sherlock Holmes story.[318] Yet by appreciating when bankruptcy courts do not act, we can gain a deeper appreciation for the contours of adjudication in a complex and fascinating area of law — a lesson that applies not only to insolvency law, but also beyond bankruptcy.

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[318] *See, e.g.*, Sir Arthur Conan Doyle, "The Adventure of Silver Blaze," *in* THE MEMOIRS OF SHERLOCK HOLMES (1892) (renowned detective Sherlock Holmes pointing out that the "curious incident of the dog in the night-time" was that the dog did not bark when an intruder entered).