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Fast, Cheap, and Creditor Controlled: Is Corporate Reorganization Failing?

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Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?

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INTRODUCTION

Academic support for American-style corporate reorganization has been at an all-time high, or, at least, calls for the repeal of Chapter 11 have been at an all-time low. Critics of Chapter 11 now say, approvingly, that the process has become faster, cheaper, more creditor-controlled, and more integrated with market forces.¹ World-renowned economists have looked to modern Chapter 11 as the foundation of proposals to improve sovereign debt restructuring internationally.²

Endorsement of the modern Chapter 11 is by no means universal, however. In *Courting Failure*,³ Professor Lynn LoPucki, a well-known academic with deep expertise in bankruptcy, portrays the bankruptcy system in a state of

[†] Professor of Law, University of North Carolina at Chapel Hill. This Review benefited substantially from comments on prior drafts from Douglas Baird, Scott Baker, Adam Feibelman, Elizabeth Gibson, Mitu Gulati, David Klein, Steve Lubben, David Skeel, Fred Tung, Elizabeth Warren, Bill Whitford, and the students in my Spring 2006 Corporate Reorganization seminar, although of course any errors are my own. Special thanks to Lynn LoPucki for his feedback, many helpful conversations, and patience. I also thank Lisa Stifler for research assistance, Nick Sexton for library assistance, and the University of North Carolina School of Law for financial support.

1. *See infra* Part III.

2. *See, e.g.*, JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS, 130-32 (2002); Jeffrey Sachs, *Do We Need An International Lender of Last Resort?* (Apr. 1995), <http://www.earthinstitute.columbia.edu/about/director/pubs/intllr.pdf>. *See generally* Kenneth Rogoff & Jeromin Zettelmeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001*, 49 IMF STAFF PAPERS 470, 471 (2002).

3. LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005).

crisis. In this book, we learn that nearly half of the largest firms emerging from Chapter 11 as publicly held companies are filing another bankruptcy petition in just a few years.⁴ LoPucki attributes the high repeat filing rate to the judges who compete for cases by appeasing “case placers,” the parties who guide a firm’s decision regarding venue selection.⁵ A high repeat filing rate first afflicted two “magnet” venues, the District of Delaware and the Southern District of New York,⁶ then spread nationwide as other judges have tried to attract cases to their own courts.⁷ *Courting Failure*’s policy prescription is to eliminate inter-venue competition by restricting firms’ venue choice. Since the release of *Courting Failure*, LoPucki has convinced a prominent senator to introduce legislation accomplishing exactly that.⁸

Courting Failure is rich with systematic empirical data, anecdotes, law, theories, allegations, and controversies, as would be expected from a researcher who has made critical contributions to our understanding of corporate reorganization for over two decades. Plenty of academics, lawyers, and judges are examining myriad aspects of *Courting Failure*, including whether LoPucki oversteps by characterizing the bankruptcy system as “corrupted,” whether a significant repeat filing rate is per se undesirable, whether LoPucki uses the ideal parameters to measure repeat filings and failure in bankruptcy, and how all of this affects the international market for judicial services.

4. See *id.* at 120 tbl.7. By “largest,” he means firms with at least \$100 million in assets in 1980 dollars. *Id.* at xi.

5. See *id.* at 17-18. “Case placers” are professionals, the managers of bankrupt firms, and lenders that finance a firm’s operations through bankruptcy (known as debtor-in-possession or “DIP” lenders). See *id.* at 17.

6. See, e.g., *id.* at 121-22; Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 979 fig.2 (1998-1999). For the term “magnet” district, see GORDON BERMANT ET AL., FED. JUDICIAL CTR., CHAPTER 11 VENUE CHOICE BY LARGE PUBLIC COMPANIES: REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM 4 (1997).

7. See LOPUCKI, *supra* note 3, at 120 tbl.7, 123-35. See generally *infra* Part II.

8. See The Fairness in Bankruptcy Litigation Act, S. 314, 109th Cong. (2005).

By contrast, I highlight other aspects of *Courting Failure*'s ambitious thesis that ultimately cannot be sustained. First, *Courting Failure* cannot tell us enough about the pathways through which competition contributes to failed reorganizations for us to rely on the competition thesis to fuel policy change. LoPucki's repeat filing data and his examples of competitive practices do not match up temporally or substantively, particularly with respect to the striking increase in repeat filings among firms emerging in 1997 and thereafter.⁹

Second, *Courting Failure* implicitly relies on an account of the drivers of court practices that does not square with the growing body of theoretical and empirical interdisciplinary research on the determinants of judicial politics and behavior.¹⁰ Others in the legal academy share LoPucki's assumption of judicial competition for large bankruptcy cases, although they have different views of its merits. Even if some judges do compete for large bankruptcy cases, the broader literature casts doubt that competition or the lack thereof is the dominant shaper of judicial practices in the way that LoPucki suggests. In particular, he takes insufficient account of the rise of the transactional model of Chapter 11 and how the increasing recognition of this model might affect the evolution of judges' practices.¹¹

Part I of this Review puts *Courting Failure* into a broader context. Part II scrutinizes *Courting Failure*'s evidence that competition is the principal determinant of the increased repeat filing rates. Part III considers the disconnect between *Courting Failure*'s story and the judicial politics and behavior literature.

I. *COURTING FAILURE* IN CONTEXT: A BRIEF INTELLECTUAL HISTORY

Big corporate Chapter 11 cases have a special place in America's bankruptcy system even though they comprise a

9. See *infra* Part II.

10. See *generally infra* Part III.

11. See *infra* Part III.A.

tiny fraction of bankruptcy filings.¹² The current venue laws in Title 28 of the United States Code give large corporate groups a choice of where to file.¹³ A debtor may file in its domicile, residence, principal place of business, or principal place of assets.¹⁴ The Delaware court has interpreted “domicile” to include place of incorporation, which substantially increases the possibility that Delaware will be among the list of venue options.¹⁵

The choices proliferate further under the affiliate venue rule. A bankruptcy case may be commenced anywhere that an affiliate has a case pending, regardless of whether that entity independently would have had proper venue.¹⁶ This dramatically expands the lawful venue options for large corporate groups.¹⁷

12. Of the 1.6 million petitions filed in the year ending March 31, 2005, fewer than 8,000 were Chapter 11 cases. *See* News Release, Administrative Office of the U.S. Courts, Bankruptcy Filings Fell in March 2005 12-Month Period (June 10, 2005), *available at* http://www.uscourts.gov/Press_Releases/news61005.html. Most Chapter 11 cases are very small. *See, e.g.,* Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 500 (1999) (reporting that more than 90% of current Chapter 11 cases would be classified as small business cases using definition in then-pending bankruptcy legislation).

13. *See* 28 U.S.C. §§ 1408-1412 (2000). Venue rules used to be more restrictive. *See generally* NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 771-73 (1997) [hereinafter COMMISSION REPORT], *available at* <http://govinfo.library.unt.edu/nbrcreport/17bjuris.pdf> (describing venue under the Bankruptcy Act of 1898 and the 1973 Bankruptcy Rule change).

14. *See* 28 U.S.C. § 1408(1) (2000).

15. *See In re Ocean Properties of Del., Inc.*, 95 B.R. 304 (Bankr. D. Del. 1988). *See generally* LOPUCKI, *supra* note 3, at 56-57. Empirical research in corporate law reveals the prevalence of Delaware as the state of incorporation. *See* Lucian Ayre Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 383-85 (2003) (reporting on incorporation and reincorporation decisions). Eisenberg and LoPucki have studied the state of incorporation for large firms in bankruptcy. *See* Eisenberg & LoPucki, *supra* note 6, at 985 (“Eighty-nine percent of the large, public companies that filed for bankruptcy reorganization from 1980 to 1997 were incorporated or had a subsidiary that was incorporated in Delaware.”).

16. *See* 28 U.S.C. § 1408(2) (2000). “Affiliate” is defined broadly in the Bankruptcy Code. *See* 11 U.S.C. § 101(2) (2005).

17. The choice of venue is not unfettered. A party may challenge a venue choice, *see* 28 U.S.C. § 1412 (2000), and a court may transfer the case “in the interest of justice or for the convenience of the parties.” *Id.*; *see also* FED. R. BANKR. P. 1014(a) (providing procedure for the transfer of cases to different

Since 1978, judges in the District of Delaware and the Southern District of New York have presided over a disproportionate share of large bankruptcy cases.¹⁸ LoPucki and Professor William Whitford first reported, based on systematic data analysis, that the Southern District of New York became the magnet court in the 1980s.¹⁹ Later,

venues). Judges hardly ever transfer the largest cases, however. *See, e.g.,* LOPUCKI, *supra* note 3, at 38; Eisenberg & LoPucki, *supra* note 6, at 1000; Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 24; Lynn M. LoPucki, *Bankruptcy Bingo*, FORBES, July 4, 2005, at 44 (“Of the 160 largest cases filed since 1989, courts have surrendered only one (Winn-Dixie), and that was at the request of the managers who filed it.”). Key creditors often support the debtor’s venue choice, and those that oppose it may be reluctant to spend the money to litigate the issue. *See* LoPucki & Whitford, *supra*, at 25; COMMISSION REPORT, *supra* note 13, at 778. Apart from challenging venue once a case is filed, creditors can preempt a debtor’s venue choice by filing an involuntary bankruptcy petition. *See* 11 U.S.C. § 303 (2000) (setting forth requirements). This is relatively rare and can fail; a court might dismiss the involuntary case and permit the debtor to file in its chosen venue, *see, e.g.,* *In re NRG Energy, Inc.*, 294 B.R. 71 (Bankr. D. Minn. 2003), or transfer the case away from the venue chosen by the petitioning creditors. *See* Eisenberg & LoPucki, *supra* note 6, at 1000 n.113; *see also* LOPUCKI, *supra* note 3, at 9 (reporting New York’s 2001 big case filings).

18. Commentators do not dispute that the Southern District of New York was the leading venue in the 1980s, followed by Delaware in the 1990s. *See, e.g.,* Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 1991 (2002) (“During the 1980s . . . the Southern District of New York . . . was the leading venue for large, publicly owned corporations to commence reorganizations.”); *id.* at 2016 (“During the 1990s, Delaware became the corporate reorganization capital of the nation.”); Robert K. Rasmussen & Randall S. Thomas, *Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations*, 54 VAND. L. REV. 283, 283-84 (2001) (noting that the reorganization of a large public company today “will more likely take place in the Delaware Bankruptcy Court than in any other jurisdiction.”). For a graph showing Delaware’s increasing market share of big public filings during the 1990s, *see* LOPUCKI, *supra* note 3, at 50 fig.2.

19. *See* LoPucki & Whitford, *supra* note 17, at 27-29 (“When forum shopping occurred, the destination of choice was usually New York City.”). Based on interviews with lawyers, LoPucki and Whitford explored reasons for New York’s popularity, including top lawyers’ location, judicial experience with large cases, predictability, willingness to grant extensions of the “exclusive” period to file a plan of reorganization, and approval of attorneys’ fees. *See id.* at 29-33. Recognizing the “push” of unattractive home venues as well as the “pull” of attractive ones, LoPucki and Whitford also noted that debtors avoided courts unlikely to lengthen the exclusivity period. *See id.*; Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 WIS. L. REV. 729, 754 (noting that debtors’ venue choices relate in part to exclusivity).

LoPucki and Professor Theodore Eisenberg documented how the District of Delaware became the magnet court in the 1990s after having no big cases in the mid-to-late 1980s.²⁰

The concentration of the largest cases in the tiny Delaware court fueled critics and criticisms. A venue restriction was one of the few proposals supported by eight out of nine members of the National Bankruptcy Review Commission. According to the Commission Report, "when a debtor with thousands of small local unsecured creditors is able to file for bankruptcy at the other end of the country, it is impossible for these parties to represent their interests in the debtor's case. Such strategies can affect the outcome of cases."²¹ Judges opined in a Federal Judicial Center survey that large cases were being filed in inappropriate venues and the venue laws should be changed.²² More recently, twenty-six state attorneys general complained to Congress that bankrupt firms choose magnet venues far away from their corporate headquarters to avoid financial responsibility.²³

Although LoPucki and Whitford recognized the possibility that case placers forum shop in the pursuit of self interest,²⁴ they were hopeful that case placers would

20. See Eisenberg & LoPucki, *supra* note 6; see also LOPUCKI, *supra* note 3, at 75-76. See generally David A. Skeel, Jr., *Lockups and Delaware Venue in Corporate Law and Bankruptcy*, 68 U. CIN. L. REV. 1243, 1274 (2000) ("Then everything changed. In the absence of a more attractive venue option, Continental Airlines filed for bankruptcy in 1990. The Delaware Bankruptcy Court's successful handling of Continental put Delaware on the bankruptcy map, and Delaware quickly displaced New York as the venue of choice for large scale reorganization.").

21. See COMMISSION REPORT, *supra* note 13, at 777; see also *id.* at 779 ("The National Bankruptcy Review Commission received numerous letters on the problem of the disenfranchisement of creditors due to forum shopping.").

22. See BERMANT ET AL., *supra* note 6, at 18-25 (reporting judges' opinions that cases were being filed in inappropriate venues and venue laws should be changed).

23. See Letter from the Attorneys General of [26 states] to Senator John Cornyn (Mar. 2, 2005) (on file with the Buffalo Law Review).

24. According to LoPucki and Whitford:

In a system that permits venue choice and forum shopping, competition among courts will not confine itself to issues of court quality. Maintenance of healthy competition will require an ongoing effort. Forum shoppers will discover and encourage other court policies and

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forum shop for the highest quality judicial services.²⁵ Other corporate bankruptcy scholars were likewise receptive to the possibility that a court's increased popularity signified its superior abilities.²⁶ In Professor David Skeel's view, Delaware deserved its growing business in the 1990s because it processed cases with greater speed and efficiency than Other Courts.²⁷ Skeel and Professor Kenneth Ayotte

practices that favor management or their attorneys without maximizing the value of the company. When such differences in particular policies and practices among the various bankruptcy courts reach such a level of visibility that they actually affect the flow of cases, some response will be necessary. Unless that response is forthcoming, the policies and practices of the competing courts in large reorganization cases will continue to shift in favor of the interests of management and their attorneys.

LoPucki & Whitford, *supra* note 17, at 49-50; *see also* Skeel, *supra* note 20, at 1277 ("The real question is whether the differences among districts are likely to be desirable or malignant."); William C. Whitford, *What's Right About Chapter 11*, 72 WASH. U. L.Q. 1379, 1403-04 (1994).

25. *See* LoPucki & Whitford, *supra* note 17, at 33, 40-41, 50-51 (discussing benefits of competition, and favoring retaining current venue system and addressing adverse consequences by making specific substantive changes); Lynn M. LoPucki & Sarah D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 VAND. L. REV. 231, 271 (2001) ("Some may use our study to argue for venue amendments designed to end the competition. But competitions among bankruptcy courts have beneficial effects as well. They include the development of more effective procedures and techniques for reorganization and liquidation, the ability of parties to route around ineffective courts and judges, and better representation of the United States in the developing global competition for cases.").

26. *See, e.g.,* David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309, 310 (2001) ("The problem with all the hostility is that Delaware's skeptics have never developed a particularly convincing rationale for their claim that the shift to Delaware is pernicious."); Skeel, *supra* note 20, at 1276 (noting that "speed and administrative efficiency, as well as sophistication" are characteristics that distinguish Delaware's handling of bankruptcy cases); *see also* Hugh M. Ray et al., *An Out of Town Lawyer's Guide to Wilmington Bankruptcies*, in BANKRUPTCY IN DELAWARE-WHETHER TO FILE AND WHAT IF IT HAPPENS, ABA Section of Business Law Spring Meeting 5-7 (Mar. 22-25, 2001) (on file with the Buffalo Law Review) (touting Delaware's predictability, speed, "better judges," a convenient geographical location, and receptiveness to approval of "aggressive" first-day orders). *See generally* FED. JUDICIAL CTR., JUDICIAL CONFERENCE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM, CONFERENCE ON LARGE CHAPTER 11 CASES, (2004) [hereinafter CONFERENCE ON LARGE CHAPTER 11 CASES] (reporting on conference at which participants discussed substantive factors affecting venue choice).

27. *See* David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 20, 27-28 (1998); Skeel, *supra*

also observed through their own empirical study that major creditor interests often supported or even drove the choice of the Delaware court.²⁸ Professors Robert Rasmussen and Randall Thomas did not offer an unqualified defense of the Delaware venue or forum shopping at the time of the bankruptcy filing, but posited that handling prepackaged bankruptcy cases in a single court like Delaware could be efficient.²⁹ For the most part, these scholars readily assumed not only that case placers were forum shopping, but that judges were competing for the cases.

Discussions of Delaware bankruptcy case venue evoke the now standard debate over interstate competition for corporate charters and the puzzle of Delaware's popularity as a place of incorporation.³⁰ Briefly, many scholars believe that states compete to attract corporate charters, but do not agree on the extent to which market forces (e.g., capital, labor, product, corporate control) constrain managers' pursuit of self-interest.³¹ Even staunch supporters of

note 20, at 1278 (discussing Delaware judges' reputation for sophistication, speed and administrative efficiency).

28. See Kenneth M. Ayotte & David A. Skeel, Jr., *Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy* 3 (U. Penn Inst. for Law & Econ., Working Paper No. 03-29, 2004) (evaluating sample of Chapter 11 filers and finding that Delaware choice was largely creditor driven); *id.* at 5 ("Because prepacks are agreed to in advance by all of the relevant parties, the parties are likely to choose the most efficient district when they file their cases."); *id.* at 8 ("[I]t may be the case that the prepackaged plan is shaped with a particular court in mind, or more likely, the threat of filing a regular case in a particular court will affect the terms of the prepack."); *id.* at 9 (interpreting data to suggest that venue choices may be more creditor-driven than manager-driven.); Marcus Cole, "Delaware is Not a State": *Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1868 (2002) ("[T]here is undisputable evidence of some creditor preference for Delaware.").

29. See Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping By Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1388 (2000).

30. See, e.g., LOPUCKI, *supra* note 3, at 240.

31. For example, some research examines whether states with laws benefiting managers but adversely affecting shareholders by certain measures do well in the competition for corporate charters. See Bebchuk & Cohen, *supra* note 15; Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795 (2001-02). Similarly, researchers have studied whether the comparative value of firms (measured by share value) incorporated in the reigning jurisdiction—Delaware—are worth more than

interstate competition recognize that some undesirable law results, but believe competition is preferable to an increase in national corporate law or other alternatives.³² The assumption that interstate competition produces corporate law leaves many things unexplained,³³ leading some scholars to declare interstate charter competition a “myth” or to tell a story of corporate law development with a greater focus on interest group politics.³⁴ Whether or not states compete, some prominent scholars periodically propose more nationalization of corporate law or other restrictions to counter management self-interest in ways that markets allegedly have failed to do.³⁵

The analogy between a state corporate charter competition and a federal bankruptcy venue competition is

firms incorporated elsewhere. Compare Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525 (2001), with Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32 (2004). For alleged limitations of the reliance on share value in the methodology of many of these studies, see LoPucki, *supra* note 3, at 238-39; Lynn A. Stout, *Share Price as a Poor Criterion for Good Corporate Law* (UCLA L. & Econ. Research Paper Series No. 05-7, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=660622.

32. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 221-22 (1991) (“[C]ompetition does not eliminate the possibility of opportunistic behavior by corporate managers.”); ROBERTA ROMANO, *THE GENIUS OF CORPORATE LAW* (1993).

33. See Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (reviewing literature and arguing that Delaware’s distinct court system and judicial lawmaking process give Delaware advantage); see also Mark J. Roe, *Delaware’s Politics*, 118 HARV. L. REV. 2491 (2005) (discussing the role of state-federal relations in shaping state corporate law).

34. See, e.g., Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 555 (2002); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 748 (2002); see also Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 486 (1987). Even scholars who adhere to the competition thesis acknowledge that Delaware has a special interest in competing for charters. See ROMANO, *supra* note 32, at 39, 42 (noting Delaware’s “hostage-like” dependence on franchise taxes).

35. See, e.g., Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111 (2001); Subramanian, *supra* note 31, at 1869. For arguments against such changes, see, e.g., ROMANO, *supra* note 32, at 9.

a rough one at best.³⁶ Nonetheless, in *Courting Failure*, LoPucki pursues it vigorously. Whereas LoPucki once hoped that a market for judicial services for corporate reorganization could produce a race to the top, in *Courting Failure* he concludes the market for judicial services instead has produced a race to the bottom. As he and Whitford feared earlier, LoPucki now believes that bankruptcy courts compete for large cases by indulging case placers' self-interest, with adverse effects.³⁷

LoPucki describes adverse effects in terms of post-reorganization outcomes, particularly repeat Chapter 11 filings. Like forum shopping, repeat filings are another of LoPucki's long-term scholarly interests.³⁸ Yet, only recently

36. For explanations of why alleged competition for large bankruptcy filings and alleged interstate corporate charter competition differ in material respects, see, e.g., Barry E. Adler & Henry N. Butler, *On the "Delawarization of Bankruptcy" Debate*, 52 EMORY L.J. 1309 (2003); Cole, *supra* note 28, at 1886; Rasmussen & Thomas, *supra* note 29, at 1362. LoPucki recognizes that intervenue competition in bankruptcy has the potential to produce worse results than the competition for initial corporate charters due to the timing of the decision. See LOPUCKI, *supra* note 3, at 241.

37. It is possible that heavy concessions to case placers indicate the absence, not presence, of competition for cases. Although some commentators associate Delaware's less than 100% share of the charters of publicly held corporations with the existence of competition, see William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 726 (1998), others persuasively contend that no state other than Delaware is actively competing for these charters. See Kahan & Kamar, *supra* note 34. The absence of more rigorous competition allows state corporate law to favor managers more than it should, see *id.* at 686-87, and to cater to the corporate bar. See generally William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEG. STUD. 303, 327-28 (1997); Macey & Miller, *supra* note 34, at 473, 486 (referring to corporate lawyers as "most influential advisors" on incorporation decision). If nothing else, this suggests that a market for law may not work well if it is more of a mini-mart than a superstore. For a response to the myth of competition argument, see Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?* 12 (Yale U. Int'l Ctr. for Fin. Working Paper No. 05-02, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=693484.

38. Among large companies that went bankrupt in the 1980s, LoPucki and Whitford found that twelve of thirty-eight (32%) repeat filed. See Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597, 608 (1993). LoPucki and Whitford characterized this repeat filing rate as "strikingly high," and stated that "[t]he rate of refiling suggests that some courts are not taking [the obligation to review plans' feasibility] as seriously as they should." *Id.* at 608-09.

has he so explicitly connected forum shopping and repeat filing by comparing the repeat filing rates of various venues. LoPucki and Sara Kalin first found that the most popular court in the 1990s—Delaware—had a much higher repeat filing rate among firms emerging between 1980 and 1996 than did most other courts.³⁹ To address the challenges to and follow-up questions about these findings,⁴⁰ LoPucki and Joseph Doherty studied firms that emerged as publicly held companies, and found Delaware's post-reorganization failure rate to again be much greater than most other courts.⁴¹

39. See LoPUCKI, *supra* note 3, at 100 tbl.4. Among firms emerging from Chapter 11 between 1980 and 1996, LoPucki and Kalin found a 32% repeat filing rate for Delaware (10 of 31), 28% for New York (10 of 36), and 10% for Other Courts (12 of 121). See *id.* LoPucki and Kalin speculated that “a part of Delaware’s appeal was its willingness to confirm no-questions-asked reorganizations.” Although Delaware confirmed plans of a smaller percentage of firms in Chapter 11 than did Other Courts, LoPucki and Kalin nonetheless speculated that Delaware (and previously New York) competed by rubber-stamping plans. See *id.* at 256 (showing percentage reorganized); *id.* at 271 (making competition argument); see, e.g., Peter Aronson, *Study Faults Delaware Court*, NAT’L L.J., Sept. 18, 2000, at B1; Jef Feeley, *Companies Are Not Getting Proper Bankruptcy Help, Study Says*, BLOOMBERG NEWS, July 31, 2000.

40. See, e.g., Rasmussen & Thomas, *supra* note 18 (arguing, among other things, that Delaware prepacks may be efficient even with high repeat filing rate); Skeel, *supra* note 26 (positing that firm characteristics may explain repeat filing differential); see also Miller, *supra* note 18 (attributing repeat filings to deals between private parties); Ayotte & Skeel, *supra* note 28, at 5 (suggesting courts do not have direct influence over post-bankruptcy firm performance, and thus considering other factors to evaluate venue choice and its consequences).

41. See Lynn M. LoPucki & Joseph W. Doherty, *Why are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933 (2002). Among large firms emerging as public companies between 1991 and 1996, Delaware had a 42% repeat filing rate (11 of 26), as compared to New York’s 19% (3 of 16), and Other Courts’ 4% (2 of 56). See *id.* at 1939. Studying other post-bankruptcy events, LoPucki and Doherty concluded that Delaware was the “failure” leader by these measures as well. See *id.* at 1939; *id.* at 1945 (“Delaware-reorganized firms were . . . significantly more likely to go out of business as result of their financial distress, and significantly less likely to perform successfully under their plans of reorganization. They also had significantly lower post-bankruptcy earnings.”). LoPucki and Doherty concluded that the inter-venue differential was attributable to Delaware, not characteristics of the firms. See *id.* at 1947; *id.* at 1957 (“Taken together, these data suggest that prefiling characteristics of the firms filing in Delaware cannot explain Delaware’s high failure rates.”); *id.* at 1982-83. They rejected suggestions that Delaware’s speed of processing cases overcame the costs of repeat filings. See *id.* at 1963-1967 (evaluating and rejecting argument of

In addition to reviewing these previously reported data, in chapter 4 of *Courting Failure*, LoPucki presents updated findings that are particularly relevant to the concerns of this Review: unlike the first part of the 1990s,⁴² when Delaware's repeat filing rate was ten times higher than that of Other Courts, repeat filing rates in Delaware and nationwide among firms emerging between 1997 and 2000 converged and reached new highs.⁴³ For firms emerging in this period, both Delaware and Other Courts had a repeat filing rate of 46%.⁴⁴ A relatively small number of cases fit the study's parameters, so one must interpret this finding with caution.⁴⁵ Nonetheless, I leave the scrutiny of LoPucki's methodology to others, and instead examine his explanation for this abrupt jump.

LoPucki theorizes that court competition explains the repeat filing trends.⁴⁶ He therefore proposes amending the venue statute.⁴⁷ A rendition of LoPucki's proposal, now

Delaware offset). *Cf.* Ayotte & Skeel, *supra* note 28, at 14 (using a larger sample of cases with a lower asset cut-off, finding "the estimated Delaware speed effect is a sizeable 190 days and significant at the 5% level.").

42. *See* LoPucki & Doherty, *supra* note 41, at 1959 ("The fact that Other Court-reorganized firms refiled at one-tenth the rate for Delaware-reorganized firms suggests that the bulk of those losses were avoidable.").

43. The difference in Other Courts' refiling rates for the two periods is "significant at the .001 level." *See* LOPUCKI, *supra* note 3, at 120.

44. Eleven out of twenty-four of Delaware's cases refiled and six out of thirteen of the Other Courts' cases refiled. In the Southern District of New York, four of the six large firms that emerged between 1997 and 2000 refiled. *See id.* at 120 tbl.7; *id.* at 122 ("Beginning abruptly with firms emerging in 1997, refiling rates in the rest of the country jumped to roughly the same level as refiling rates in Delaware."). New York's repeat filing rate during this period was 67%. *See id.* at 120 tbl.7.

45. *See id.* at 120 tbl.7.

46. *Id.* at 121-22.

47. *See* LOPUCKI, *supra* note 3, at 251-54; *see also* Lynn M. LoPucki, *Court Shopping Bankrupts U.S. System*, S.F. CHRON., Feb. 20, 2005, <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/02/20/ING31BD3C01.DTL> (advocating assigning cases to particular courts rather than letting firms choose). LoPucki does not endorse other venue changes, such as permitting firms to commit to bankruptcy venue in initial corporate charters when managers' interests arguably are more aligned with owners' interests, or requiring that firms file in their place of incorporation. *See* Rasmussen & Thomas, *supra* note 29, at 1364, 1399-1403; Rasmussen & Thomas, *supra* note 18, at 307; Skeel, *supra* note 27, at 37-38; Skeel, *supra* note 20, at 1276.

pending in Congress, makes three big changes.⁴⁸ First, it eliminates place of incorporation as a stand-alone source of venue by expressly defining domicile as the location of the debtor's principal place of business.⁴⁹ Second, it sharply restricts affiliate venue.⁵⁰ Third, in the event of improper venue, it *requires* that bankruptcy courts dismiss or transfer a case.⁵¹ As a practical matter, this bill would eliminate in many instances the venue options of the District of Delaware and the Southern District of New York unless businesses moved their headquarters there.

Is such a change justified? Although critics of the current system would support this venue restriction on other grounds, I explore in Part II how *Courting Failure* stops short of demonstrating a link between repeat filings, judicial competition, and disadvantageous court practices.

II. HOW DO COURT PRACTICES AFFECT REPEAT FILINGS?

In chapter 4 of *Courting Failure*, LoPucki tells us that Delaware was by far the repeat filing leader among firms emerging in the 1991-1996 period, but Other Courts quickly caught up with respect to firms emerging from bankruptcy between 1997 and 2000.⁵² In a short segment at the end of chapter 4, LoPucki states:

The refiling pattern . . . is consistent with *court competition as the principal cause of high refiling rates*. Delaware was an active competitor for cases from 1991 through 1996. During those years Delaware had high refiling rates. New York and other courts barely participated in the competition from 1991 through 1996. They had relatively low refiling rates during those years. The competition for big cases became the center of the bankruptcy world's attention in late 1996 and early 1997 with the coincidence of four major events. . . . That attention resulted in increased

48. See Fairness in Bankruptcy Litigation Act, S. 314 109th Cong. (2005).

49. See *id.* § 2 (amending 28 U.S.C. § 1408 (2000)).

50. See *id.*

51. See *id.* § 3 (amending 28 U.S.C. § 1406 (2000)). Cf. 28 U.S.C. § 1412 (2000) (permitting, but not requiring, venue transfer).

52. See LOPUCKI, *supra* note 3, at 120.

pressure on other courts to adopt Delaware's methods in order to match Delaware's attractiveness.⁵³

The four events in late 1996 and early 1997 to which LoPucki refers are the National Bankruptcy Review Commission proposal to end forum shopping,⁵⁴ growing awareness of Delaware's near monopoly on large case filings, a Federal Judicial Center report on venue,⁵⁵ and the District Court's revocation of the reference to the Delaware bankruptcy court shortly after the release of the Federal Judicial Center report.⁵⁶

It is not difficult to believe that courts became much more aware of Delaware's dominance in late 1996 and early 1997. But LoPucki's thesis depends on courts changing what they were doing in time to substantially affect the repeat filing rates among firms emerging as early as 1997. Could courts have reacted so quickly to be responsible for a repeat filing rate skyrocketing from 4% to 46% practically overnight?⁵⁷ In the following sub-parts, I scour the subsequent chapters of *Courting Failure* for evidence of an abrupt shift in other court practices that would be consistent with this explanation.

A. "Complex Chapter 11" General Orders and Protocols

In chapter 5, "The Competition Goes National," LoPucki documents the adoption of "complex Chapter 11" protocols and local rules.⁵⁸ He reports that bankruptcy lawyers approached their local judges to request changes in court

53. *Id.* at 121-22 (emphasis added).

54. See COMMISSION REPORT, *supra* note 13.

55. See BERMANT ET AL., *supra* note 6.

56. See LOPUCKI, *supra* note 3, at 121-22.

57. Again, I leave to others the task of questioning the robustness of LoPucki's statistical reporting and assume that the jump that he reports is valid. For sake of context, however, it is important to recognize that the mid-to-late 1990s were relatively lean in terms of the absolute number of large cases fitting LoPucki's parameters. 1990: 30 cases; 1991: 39 cases; 1992: 32 cases; 1993: 26 cases; 1994: 11 cases; 1995: 20 cases; 1996: 15 cases; 1997: 17 cases; 1998: 31 cases; 1999: 44 cases; 2000: 79 cases; 2001: 97 cases; 2002: 81 cases; 2003: 57 cases. See LOPUCKI, *supra* note 3, at 90 fig.3.

58. See *id.* at 123-35.

practices.⁵⁹ For example, in Houston, lawyers “wanted quicker hearings, at more predictable times” and “wanted the local judges to award professional fees at rates comparable to those in Delaware and New York.”⁶⁰ Overall, the requested changes would ensure that judges were immediately available at the beginning of a case and were prepared to grant motions right away to enable a smooth transition into bankruptcy.⁶¹ According to LoPucki, this process repeated itself in large cities throughout the country, with some courts adopting complex Chapter 11 protocols by general order or local rules facilitating the approval of first-day orders.⁶²

Even if courts adopted protocols they suspected to be bad simply to attract more big cases—an assumption more closely evaluated in Part III of this Review—the adoption of these protocols would be no more than consistent with LoPucki’s theory. This is because the formal procedural changes that LoPucki highlights take place in early 2000 and thereafter, and thus too late to affect the outcomes of most firms that emerged from Chapter 11 in the 1997-2000 time period.⁶³

LoPucki surely is correct that many judges were aware of Delaware’s dominance as early as 1997.⁶⁴ Some of them

59. *See id.* at 124.

60. *Id.* at 125.

61. *See infra* note 122.

62. *See* LOPUCKI, *supra* note 3, at 126.

63. The Houston court’s adoption of a complex Chapter 11 designation, which LoPucki describes as the first explicit adoption of competing practices, was put into place in January 2000, although of course they were developing the practices well before then. *See* Bankruptcy Court General Order 2000-2 (Bankr. S.D. Tex. Jan. 11, 2000); LOPUCKI, *supra* note 3, at 125-26; *see also* *Houston, We Know We Have A Problem (But We’re Working On It!)*, BCD NEWS & COMMENT, Feb. 8, 2000, at 1. The Houston attorneys’ report, which led to the Southern District rules, was dated late December 1999. *See* Bankruptcy Court General Order 2000-2 (Bankr. S.D. Tex. Jan. 11, 2000).

64. In 1996, 221 bankruptcy judges completed a Federal Judicial Center survey about forum shopping and venue transfer. *See* BERMANT ET AL., *supra* note 6, at vii (reporting response rate). In 1998, LoPucki was featured in a widely-circulated bankruptcy publication in a story on how Other Courts could try to compete with Delaware. *See Keeping the Megacase In Your Home District*, BCD NEWS & COMMENT, Dec. 15, 1998, at 1 (“LoPucki says, whatever your preference, what you do now could decide the future of megacases in your district”); *id.* (“if courts start paying New York rates for attorneys’ fees, the

may have hoped to attract cases away from Delaware. Yet, they would be relatively powerless to take such action on their own if they were in courts with multiple judges. Multi-judge courts that randomly assign cases would have had to get agreement among all the judges on changes in practices and communicate them to case placers. It is hard to imagine that courts could implement changes quickly and completely enough to be responsible for such a steep rise in repeat filing rates among firms emerging in 1997-2000. It also seems unlikely that this could happen without any evidence of such agreement and implementation that LoPucki could find and cite in his book.

Thus, chapter 5 tells an interesting story about the evolution of large corporate reorganization practices in urban bankruptcy courts. But the chapter does not adequately or obviously connect this evolution to the puzzling repeat filing trends of the 1990s.

B. *Courts' Actual Practices*

Another way to evaluate whether court practices contributed to higher repeat filing rates is to look at how courts actually handled large Chapter 11 cases in the relevant time periods. In chapter 6, "Corruption," LoPucki describes practices that allegedly stem from court competition.⁶⁵ LoPucki does not frame this chapter as providing documentation of the contributors to repeat filings. Yet, given LoPucki's thesis, it is fair for a reviewer to use this chapter as potential evidence of the proposition that competition, as manifested through court practices, explains the repeat filing trends in the 1990s.

This is LoPucki's list of damaging changes to court practices:

1. The courts lost control over professional fees.
2. Failed managers tightened their grips on their jobs and companies.
3. Corporate debtors had more difficulty recovering money taken by failed managers.

word will get out"); *id.* ("Says LoPucki: 'Unless you are willing to cede the large cases to Delaware—or other attractive cities—lawyers and courts will have to make themselves competitive'").

65. See LOPUCKI, *supra* note 3, at 137-81.

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4. Failed managers began paying themselves huge retention bonuses.
5. The courts began rubber stamping prepackaged plans.
6. So-called critical vendors began grabbing the shares of other unsecured creditors.
7. Managers began selling their companies at inadequate prices for personal benefit instead of reorganizing them.⁶⁶

Courting Failure's discussion of these changes includes a variety of anecdotes and allegations, but, as explored below, almost never is helpful to explain the repeat filing trends among firms emerging from bankruptcy in the 1990s in general, and the jump in repeat filings in 1997 in particular.

In his explanation of change #1, professional fees, LoPucki contends that the "evidence that fee practices affect the placement of cases is overwhelming."⁶⁷ He goes on to describe various studies that involved interviews and discussions with lawyers as well as announcements by several judges that they would not scrutinize fees.⁶⁸ Yet, the discussion includes no data or arguments relevant to connecting fees to repeat filings.⁶⁹

66. *Id.* at 139.

67. *See id.* at 141. *But see* Ayotte & Skeel, *supra* note 28, at 17 (suggesting, based on an analysis of a broader sample of Chapter 11 cases, that attorneys' fees are "likely to be, at most, a small part of a much larger picture" of venue drivers and Delaware's "success").

68. *See* LOPUCKI, *supra* note 3, at 141-43.

69. It is generally recognized that Congress attempted to encourage market rates of payment to bankruptcy professionals, and to discourage heavy judicial review and caps, through the Bankruptcy Code of 1978. *See, e.g.*, George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 26, 40-45 (2004). The United States Trustee is now the government representative charged with a supervisory role regarding fee applications. *See* 28 U.S.C. § 586(a)(3)(A) (2000). Although courts surely have some role to play, particularly if the U.S. Trustee is not fulfilling its duties, *Courting Failure* does not specify what courts *should* do when other parties do not object; LoPucki acknowledges it is "hopeless" for a court to review voluminous fee applications in detail and that court-imposed caps on fees are "somewhat arbitrary." LOPUCKI, *supra* note 3, at 142; *id.* at 42. To the extent it is determined that professionals are over-billing the bankruptcy estate, a broader structural solution may be required. *See, e.g.*, CONFERENCE ON LARGE CHAPTER 11 CASES, *supra* note 26, at 30-32 (discussing other approaches to fee review, such as budget committees).

With respect to the retention of failed managers, change #2, *Courting Failure* contains only a short paragraph that asserts the existence of a weak statistical relationship between shedding failed managers and successfully reorganizing.⁷⁰ In addition, according to LoPucki and Whitford's research on 1980s cases, trustee appointment was very rare even before the advent of alleged Delaware-driven competition and when repeat filing rates were much lower.⁷¹

Change #3, the discussion of recovering pre-bankruptcy transfers to failed managers, focuses on Enron, a corporate group that filed too late to have any relation to the repeat filing trends in the 1990s.⁷² Readers are shown no trends in pre-bankruptcy transfer recovery that might have relevance during this period.

When discussing retention bonuses, change #4, LoPucki notes briefly that companies probably would have fared better with a new management team, but his discussion is otherwise not focused on post-reorganization outcomes.⁷³ Incidentally, Congress agrees with LoPucki that retention bonuses are problematic and just restricted the conditions under which they can be approved.⁷⁴ Post-reorganization failure did not play an explicit role in that debate, however.

70. See LOPUCKI, *supra* note 3, at 145.

71. See Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 699 (1993). The threat of trustee appointment could encourage managers to make concessions to creditors, however. See *id.* at 701. LoPucki and Whitford also found a high rate of management turnover. *Id.*

72. See LOPUCKI, *supra* note 3, at 145-51. Enron filed in 2001.

73. See *id.* at 151-56. The utility of increases in executive compensation more generally—well beyond the boundaries of bankruptcy—is discussed in LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION* 9 (2004). As Professor Stephen Bainbridge observes, courts outside of bankruptcy also are reluctant to intrude on the executive compensation decision. See Stephen M. Bainbridge, *Executive Compensation: Who Decides?*, 83 TEX. L. REV. 1615, 1658 (2005) (reviewing BEBCHUK & FRIED, *supra*). LoPucki nonetheless hopes that bankruptcy courts will be the “last line of defense.” LOPUCKI, *supra* note 3, at 152.

74. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) [hereinafter BAPCPA] (codified in scattered sections of 11 U.S.C.).

LoPucki's change #5, the "rubberstamping of prepackaged bankruptcies," has the potential to relate more directly to repeat filings, but the link remains elusive. LoPucki can demonstrate that Delaware became the prevalent venue for prepacks in the 1990s, and that Delaware prepacks that emerged between 1991 and 1996 were more likely to fail than non-Delaware prepacks.⁷⁵ Yet, he has no evidence that Other Courts evaluated prepacks more carefully than Delaware during this period, other than trying to use the repeat filing rate differential itself. In addition, besides generally recognizing that judges were aware of Delaware's rising market share and suspecting an interest in competing, LoPucki offers us nothing (other than the repeat filing rate itself) to suggest that Other Courts became *less* careful with respect to prepacks that emerged from 1997 through 2000 in a way that would have led to increased repeat filings. Indeed, even if they had, Other Courts presided over virtually no prepacks that would have emerged in this time period.⁷⁶ Although the migration of prepacks to Delaware could itself bolster LoPucki's case that Delaware was competing, this does not help explain the jump in repeat filing rates overall in 1997.

LoPucki's example #6 of a damaging practice that results from court competition for large cases is "Critical vendor" orders.⁷⁷ According to *Courting Failure*, the Delaware bankruptcy court started approving such orders in the mid-1990s.⁷⁸ Although he refers to no authority and presents no data, LoPucki states both that the "increasing cash demands became a significant burden on the reorganization process" and that "[b]y the late 1990s, the

75. See LOPUCKI, *supra* note 3, at 160; LoPucki & Doherty, *supra* note 41, at 1974.

76. Only one prepack (Grand Union) was filed in the Other Courts that would have emerged during this period. See LOPUCKI, *supra* note 3, at 161 tbl.10. New York had only one as well. *Id.*

77. See *id.* at 163. Right after filing for bankruptcy, large businesses often seek a number of immediate orders (so-called first-day orders) from the court. Some debtors request permission based on the "doctrine of necessity" to pay the prepetition claims of vendors who threaten to cease doing business with them otherwise, but a liberal granting of critical vendor orders is inconsistent with the Bankruptcy Code. See generally *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004).

78. See LOPUCKI, *supra* note 3, at 164-65.

competing bankruptcy courts were all following Delaware in approving long lists of 'critical' vendors."⁷⁹ The reader might infer that an increase in critical vendor orders corresponded to the repeat filing trends in the 1990s, but the relationship is not articulated. In addition, although the Delaware bankruptcy court may not have approved critical vendor orders in large cases prior to the 1990s (perhaps in part because it did not have the opportunity), surely parties requested and received such orders in other jurisdictions.

Courting Failure's example #7 of a damaging practice is the approval of significant sales of assets outside of a plan of reorganization through what is known as a "363 sale."⁸⁰ LoPucki lists nearly seventy major Chapter 11 cases in which the debtor sold the company in a 363 sale between 1980 and 2003.⁸¹ LoPucki finds that Delaware conducted all eight of the quickest 363 sales between 1992 and 2000,⁸² and also presided over a seemingly troubling sale in the Polaroid case in 2002.⁸³ He observes that, starting in late 2000 and 2001, non-Delaware courts have been approving quick 363 sales.⁸⁴ Even if the rise in 363 sales in Other Courts at the end of 2000 indicates competition, this rise comes too late to explain the quick surge in repeat filings among firms that emerged from Other Courts between 1997 and 2000. More significantly, LoPucki's repeat filing sample

79. *See id.* at 165. In a list of adverse effects of critical vendor orders, LoPucki mentions that they threaten "the survival of debtor companies." *Id.*

80. The Bankruptcy Code permits debtors to sell property out of the ordinary course of business with court approval. *See* 11 U.S.C. § 363 (2000). If the debtor seeks to sell substantially all assets, it should be able to do so through a 363 sale only if the court can find a sound business justification. *See, e.g., In re Lionel Corp.*, 722 F.2d 1063 (1983). Otherwise, the debtor is supposed to sell the business through a plan on which the creditors vote. *See* LOPUCKI, *supra* note 3, at 167-80. The details of court procedures for the bidding and sale under § 363 can affect whether the assets are sold for a market price. *See, e.g., Douglas G. Baird, The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 72 (2004) (noting that in modern Chapter 11, "the judge ensures that sale is conducted in a way that brings the highest price."); Ayotte & Skeel, *supra* note 28, at 13 ("a quick sale may result in a fire-sale price and/or a misallocation of the firm's assets to uses other than their most valuable. For cases like these, allocating more time to finding buyers for the assets may be beneficial.").

81. *See* LOPUCKI, *supra* note 3, at 170-71, tbl.11.

82. *See id.* at 169.

83. *See id.* at 175.

84. *See id.* at 169.

excludes cases involving major 363 sales if they did not get a plan confirmed and result in the emergence of a publicly held company.⁸⁵ Rising sales generally could be a sign of rising competition—or a sign of something else, as discussed in Part III—but the data on sales do little to bolster LoPucki's theory on repeat filings.

C. *Plan Feasibility?*

Although LoPucki only rarely mentions this argument in *Courting Failure*,⁸⁶ he has suggested in other work that competition drives the repeat filing rate through changes in judges' diligence in evaluating the feasibility of plans of reorganization.⁸⁷ Other commentators did not find it credible to blame courts for the repeat filings of major corporations, in part because their plans had been scrutinized by sophisticated financial professionals with significantly more expertise than most bankruptcy judges.⁸⁸

85. LoPucki's repeat filing data are limited to companies emerging as operating public companies and exclude complete or partial liquidation cases. See LoPucki & Doherty, *supra* note 41, at 1937, 1966. See generally Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673 (2003) [hereinafter Baird & Rasmussen, *Chapter 11 at Twilight*]; Rasmussen & Thomas, *supra* note 18, at 294; Skeel, *supra* note 26, at 318; Ayotte & Skeel, *supra* note 28, at 11 ("It is not necessarily true that a successful reorganization is the most desirable outcome from an efficiency perspective.").

86. See LOPUCKI, *supra* note 3, at 106, 160 (prepack discussion).

87. See, e.g., LoPucki & Kalin, *supra* note 25. The Bankruptcy Code technically sets up the feasibility requirement as an affirmative obligation of the court. See 11 U.S.C. § 1129(a)(11), *amended by* Pub. L. No. 109-8, 119 Stat. 113, 216 (2005); *United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990) ("The Code, moreover, requires a bankruptcy court to assure itself that a reorganization will succeed . . ."). Cf. Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153 (2004).

88. See Miller & Waisman, *supra* note 87, at 138. Others suggest that the retention of a third-party financial expert might be necessary. Bankruptcy courts could use Rule 706 of the Federal Rules of Evidence to appoint an expert to assist with feasibility analysis. See Karen M. Gebbia-Pinetti, *First Report of the Select Advisory Committee on Business Reorganization*, 57 BUS. LAW. 163, 203-04, 208-09 (2001) (suggesting that it may be necessary to appoint experts for issues such as feasibility). Bankruptcy courts have occasionally mentioned the possibility of using court-appointed experts for other issues. See *In re Chateaugay Corp.*, 154 B.R. 29, 35 (Bankr. S.D.N.Y. 1993); *Solow v. American Airlines, Inc. (In re Midway Airlines, Inc.)*, 221 B.R. 411, 417 (Bankr. N.D. Ill. 1998). Federal courts rarely use this power. See Thomas E. Willging, *Court-Appointed Experts* 3-4 (Fed. Judicial Ctr., Staff Paper, 1986).

Putting this issue aside, there is no evidence of a link between repeat filings and judicial scrutiny of feasibility other than the repeat filing rate itself. LoPucki does not collect and record for his database whether creditors objected to confirmation of a plan on the basis of feasibility, nor does he record how a court handles the confirmation hearing.

Where does this leave us? *Courting Failure* includes updated and important findings on repeat filings, documents trends in Chapter 11 that at least some readers will find troubling, and recommends a controversial and high-profile change to the venue laws. Many reviewers have focused on a single strand of the book. For example, they might scrutinize the repeat filing data in chapter 4 and/or disagree with LoPucki that repeat filings are inherently bad outcomes. Or, they might quibble with LoPucki's characterizations of the trends in practices presented in chapter 6, arguing that prepacks and sales are improvements to Chapter 11, rather than derogations. These evaluations of the book make important contributions, but only by looking at the three strands of the book together, as has been done in this Review, can we determine whether the central premise of *Courting Failure* has been fulfilled. I conclude that the mechanism by which judicial competition might manifest itself in terms of repeat filings remains very much a mystery.

III. BEYOND COMPETITION: WHAT DRIVES JUDICIAL PRACTICES?

From his analysis in *Courting Failure*, LoPucki concludes that Congress should limit the ability of judges to compete by restricting the venue options of corporate bankruptcy filers. He hopes that the inability to compete for large cases will improve the ways in which judges and courts deal with big cases such that they are less likely to result in a repeat filing. Part II dealt with the first problem with this proposal and its justification, namely that we do not have a good sense of what, if anything, judges do to make cases generally more prone to post-confirmation failure. This Part addresses the second problem, namely that LoPucki's proposal rests on an unfounded assumption

that competing (or not) for large cases is a major determinant of judicial practices in bankruptcy.⁸⁹

We know little about patterns of judicial behavior in the bankruptcy context. Although a variety of projects in the bankruptcy field have focused on judicial decision-making in particular doctrinal contexts, just a few have focused on the perceptions, behaviors, and motivations of bankruptcy judges. From a 1995 survey, lawyers Stacy Kleiner Humphries and Robert Munden report that most judges expressed preferences for small cases, not large ones.⁹⁰ From a 1993 survey, then Bankruptcy Judge Stephen Stripp reported on his colleagues' time-saving techniques due to their vastly expanding workloads.⁹¹ Based on an American Bankruptcy Institute survey from the early 1990s, Professor Theodore Eisenberg reported that judges perceived themselves to be much more efficient handlers of professional fee applications than lawyers believed them to

89. Cf. Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 23 (Stephen B. Burbank & Barry Friedman eds., 2002) ("[I]f we are to be successful in designing judicial systems to achieve our instrumental goals, it is necessary to take account of what motivates judges and allow for—or attempt to control—these motivations.").

90. See Stacy Kleiner Humphries & Robert L.R. Munden, *Painting a Self-Portrait: A Look at the Composition and Style of the Bankruptcy Bench*, 14 BANKR. DEV. J. 73, 91 (1998). In the survey, thirty-eight of the 208 judges reported a preference for large cases over small cases, and, of those thirty-eight, only seven reported strongly favoring large cases. See *id.* at 91. Humphries and Munden also reported that "the consensus of those responding was the clearest of all our questions: judges view their chief duty as handling the mass of small cases, with 71.6% of judges favoring handling the mass of small cases over large reorganizations." *Id.* This is not as contradictory to LoPucki's thesis as it might appear, for LoPucki believes that only a small number of judges need to be competing for cases to corrupt the bankruptcy system. Nonetheless, it does diverge from other non-bankruptcy studies in which researchers have found some judicial preference for more significant cases. See generally Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1941 n.128 (1998) (reviewing literature in analysis of Delaware chancery court and its use of indeterminate standards).

91. See Hon. Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1329 (1993). These techniques included having case trustees preside over hearings on confirmation of individuals' Chapter 13 repayment plans and by declining to review the content of motions if no party in interest objected to it. See *id.* at 1334-35, 1347-48, 1392. Stripp noted early in the article that the time between the filing of a complaint and the trial had more than doubled in four years, and that he was working a third more hours than he had four years earlier. See *id.* at 1333.

be.⁹² More recently, from oral interviews with about two dozen judges, Professor Marcus Cole noted that almost all the judges associated big cases with prestige and satisfaction, but some thought the benefits of big cases were overrated and that commentators made too much of the motivations of Delaware bankruptcy judges, who were just doing their jobs.⁹³

Three out of four of these projects were completed prior to the awareness of Delaware's rising market share in large corporate reorganizations, and all four were completed prior to the release of data in *Courting Failure* showing the sharp increase in repeat filings nationwide, suggesting that conversations with judges might proceed differently today.⁹⁴ In any event, however, these studies do not tell us much about the relationship between venue flexibility and court practices.

Without a clear direction arising from the limited studies of bankruptcy judges' motivations, it helps to canvas the literature more broadly. Although of no special concern to legal scholars, judicial behavior has been of much interest to political scientists, economists, and psychologists.⁹⁵ A large proportion of the research examines

92. See Theodore Eisenberg, *Differing Perceptions of Attorneys' Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 983-84 (1994).

93. See Cole, *supra* note 28, at 1875-76.

94. For a critical discussion of whether reliable insights on judicial motivations and attitudes can be derived from judges themselves, see Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decisionmaking*, 26 LAW & SOC. INQUIRY 465, 476 (2001) (reporting on exchange between political scientists). See also Eisenberg, *supra* note 92, at 995 ("For at least some studies, the findings will depend on who is asked about the system.").

95. The field is newer and less developed than the study of legislative behavior. See Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749, 750 (1994). Scholars have employed a variety of approaches over time, from behavioralism, to attitudinalism, to rational choice and other types of new institutionalism. See, e.g., HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* (1999) (attitudinalist); Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625 (2000) (strategic/rational choice); Keith E. Whittington, *Once More Unto the Breach: Postbehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 608-16 (2000) (evaluating historical/interpretive new institutionalism and rational choice new institutionalism, and describing new institutionalism as reaction to attitudinalist model). See generally Michael

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voting patterns or undertakes case citation/precedent analysis with respect to the United State Supreme Court.⁹⁶ This sheds indirect light at best on a non-life tenure trial court that presides over bankruptcy cases. However, the enterprise of studying judicial behavior has not been entirely confined to the high court and occasionally has been extended to the United States Courts of Appeals,⁹⁷ United States district judges,⁹⁸ state supreme courts,⁹⁹ other trial-level judges,¹⁰⁰ and courts with narrower subject matter jurisdiction.¹⁰¹ Some of the theoretical and empirical

Heise, *The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 833-45 (describing and collecting studies on behavioralism, attitudinalism, a revised legal model, public choice, and various types of institutionalism); Gillman, *supra* note 94 (reviewing attitudinalist and behavioralist work from the perspective of an institutionalist).

96. See generally DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURT OF APPEALS 7 (2004) ("Political scientists interested in judicial decisionmaking have overwhelmingly tended to concentrate on individual judges' votes on case outcomes."); Frank Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1479 (2003) (referring to research on political decisionmaking and strategic decisionmaking); David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 829 (2005) ("Judicial researchers have long been preoccupied with the Supreme Court, to the neglect of other courts that are equally deserving of study but lack the same cachet."); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 621 (2000) (making this observation from literature review).

97. See, e.g., KLEIN, *supra* note 96; Cross, *supra* note 96; Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998); David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371 (1999).

98. See, e.g., C. K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS (1996); Andrew P. Morris, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63 (2005); see also WILLIAM I. KITCHIN, FEDERAL DISTRICT JUDGES: AN ANALYSIS OF JUDICIAL PERCEPTIONS (1978).

99. See, e.g., GLENDON SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); Schauer, *supra* note 96, at 621 n.36 (collecting examples).

100. See, e.g., MILTON NEUMANN, PLEA BARGAINING (1978) (studying Connecticut courts).

101. See Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 LAW & SOC'Y REV. 823 (1977) [hereinafter *Judicial Specialization*]; Lawrence Baum, *Specialization and Authority Acceptance: The Supreme Court and Lower Federal Courts*, 47 POL. RES. Q. 693, 701 (1994); Lawrence Baum, *Specializing*

studies may help us untangle the question of why judges change their practices and how it might relate to Chapter 11 repeat filings.

For purposes of examining LoPucki's assumption about the driver of judicial practices, perhaps the most important insight from this body of work is that judges' actions are likely to be shaped by more than one goal.¹⁰² Political scientist Lawrence Baum offers the following partial typology of goals:

1. Content of legal policy (including accurate interpretation of existing law, clear and consistent interpretation, and the judge's own policy preferences);
2. Personal standing with court audiences (including popularity and respect in the legal community, in the community as a whole, and power outside the court);
3. Career (including continued tenure in judicial position, promotion to higher court, and securing an attractive nonjudicial position);
4. Life on the court (including good relations with other judges and non-judge participants in the courts, power

the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?, 74 JUDICATURE 217 (1991). In the legal academy, Professor Daniel Schneider has done a series of studies on the impact of judges' social background on outcomes in the tax context. See, e.g., Daniel M. Schneider, *Assessing and Predicting Who Wins Federal Tax Trial Decisions*, 37 WAKE FOREST L. REV. 473 (2002).

102. See, e.g., LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 16-17, 134 (1997) (noting that rational choice scholars recognize wide range of other motivations for judicial behavior and activity even as they assume that judges seek to pursue policy goals); KLEIN, *supra* note 96, at 10-11 (assuming that all circuit judges wish to accomplish at least one or more of four goals); Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 106 (2002); Gregory A. Caldeira, Book Review, 88 AM. POL. SCI. REV. 485, 485 (1994) (reviewing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993)) (noting that the attitudinal model is extreme—at least initially—and that Segal and Spaeth fail to set up a “realistic competitor”); see also Russell Smyth, *Do Judges Behave as Homo Economicus, and, If So, Can We Measure Their Performance? An Antipodean Perspective on a Tournament of Judges*, 32 FLA. ST. U. L. REV. 1299, 1302-07 (reviewing literature and identifying at least four areas that may be relevant to judicial behavior beyond interpreting and applying the law, including financial considerations, promotion, respect of colleagues, and influence); Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 123 (2004) (“Like Lawrence Baum and other scholars, I believe that these emphases on single goals are incomplete, and that judges are motivated by a wider array of goals. Judges wish to make good law, to advance policy, and more.”).

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- within the court, limited workloads, and court resources);
and
5. Standard of living (including personal income and personal comfort).¹⁰³

Again, Baum and other political scientists study why courts handle their work in the way that they do, and thus their research is relevant to LoPucki's central claim that court competition drove the changes to court practices, and that in the event of a venue restriction, court practices would evolve again to promote more successful Chapter 11 cases.

With these ideas in mind, let us consider how Baum's partial typology of motivations might relate to the court practices explored in Part II.¹⁰⁴ For economy's sake, I deal most extensively with the first goal on Baum's list and give more limited attention to the subsequent issues, recognizing that each set of goals could be the subject of a stand-alone analysis.

A. *Content of Legal Policy: The Transactional Model of Chapter 11*

The first item on Baum's list, content of legal policy, includes a variety of related sub-goals, such as accurate interpretation of existing law, clear and consistent interpretation, and the judge's own policy preferences.¹⁰⁵ In

103. BAUM, *supra* note 102, at 17 tbl.1.1. Baum does not contend these goals share equal priority, are ranked in a strict hierarchy, or are even operative in any given situation. *See id.* at 24 (from research on state trial court sentencing activity, observing that judges differ in their hierarchies of operative goals and incentives); *id.* at 28 (research on mid-level courts recognizing that judges act on multiplicity of goals, unlike most of research on Supreme Court justices that proceeds from different assumptions); *id.* at 85 (reporting on studies).

104. *See supra* Part II.

105. *See* BAUM, *supra* note 102, at 17 tbl.1.1; KLEIN, *supra* note 96, at 7 (collecting studies finding that lower courts tend to act consistently with policies announced by higher courts); *id.* at 13 (exploring claim that "judges act as they do in part because they wish to make legally sound decisions, not simply that considerations of legal correctness enter into their decisions."). Based on a systematic case law analysis, Klein finds that U.S. Court of Appeals judges prefer to adopt policies they happen to agree with, *see id.* at 81, but concludes that consistency between courts of appeals decisions and Supreme Court preference is "probably best explained by something other than the strategic

this section, I consider the possibility that the changes and trends in court practices discussed in Part II are consistent with a particular world view of large-firm bankruptcy. The essence of this view is that corporate reorganization is akin to a transaction in which a court plays only a limited role.¹⁰⁶

A bankruptcy case, especially a large Chapter 11, is not now, and never was, a typical case in the federal judicial system.¹⁰⁷ Chapter 11 and its predecessors always have straddled the worlds of judicial processes, administrative processes, and negotiated business deals to some extent.¹⁰⁸ In enacting Chapter 11 in 1978, Congress limited judges' active oversight of cases and thus set Chapter 11 down the path to an even less judicially-oriented process.¹⁰⁹ This likely contributed to the development of court practices that LoPucki characterizes as favorable to or lenient with case placers.

One sees signs of Chapter 11's transactional nature in the 1980s, notwithstanding the prevailing conceptions of

pursuit of policy preferences," *id.* at 130, and "the goal of making legally sound decisions offers the best explanation" of certain other findings. *Id.* at 141.

106. This is essentially an extension of Professor William Rubenstein's transactional model of adjudication as originally applied to class actions. See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001). Rubenstein opined that class actions did not fit either an adjudicative or managerial model of judging, leading him to posit a transactional model of adjudication for such cases. The three main attributes of Rubenstein's model are that litigation activities functionally amount to the structuring of a large financial transaction ("to trade, not to try"), that a lawyer's work is as a dealmaker rather than as a trial attorney, and that the adjudicative markers are of secondary import in the development of the facts and the resolution. See *id.* at 419-24.

107. See, e.g., James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 719 (2004) (discussing role of bankruptcy "commissioners"); Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 573 (1998) ("The original adjudication of bankruptcy matters by bankruptcy commissioners was not considered a 'case' in law or equity."). See generally Douglas G. Baird & Robert K. Rasmussen, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921, 926-30 (2001) (discussing railroad equity receiverships).

108. See generally Baird & Rasmussen, *supra* note 107.

109. See LoPucki, *supra* note 19, at 746 ("One of the key concepts behind Chapter 11 was to remove bankruptcy judges from the administration of bankruptcy cases and permit them to act solely in a judicial capacity."). See generally Kuney, *supra* note 69, at 34-39; Miller, *supra* note 18, at 2006, 2009.

that decade of bankruptcy. During the 1980s, many perceived the bankruptcy system as overly debtor-friendly and cumbersome, evidenced in part by the fact that courts allowed debtors an extended period during which they had the exclusive right to file a plan.¹¹⁰ In addition, courts, professionals, and parties were learning the 1978 Bankruptcy Code and resolving open issues through litigation, which may have added to a conception of a judicially-oriented system.¹¹¹ LoPucki and Whitford's earlier research suggests, however, that characterizations of bankruptcy as debtor-friendly and cumbersome were overstated. For example, they found that creditors formally initiated a higher percentage of large Chapter 11 cases than of bankruptcy cases overall, suggesting that creditors saw control opportunities and value in Chapter 11.¹¹² And, even in the 1980s, courts preferred negotiated resolutions to adjudicated resolutions.¹¹³ LoPucki and Whitford found

110. LoPucki and Whitford documented that the majority of debtors in large Chapter 11 cases in the 1980s retained the exclusive right to file a plan throughout their cases. *See* LoPucki & Whitford, *supra* note 71, at 693, 716 n.175. The perception developed that courts allowed debtors to linger in Chapter 11, perhaps hoping to use the time to hoard cash, wait for a market recovery, or simply to wield leverage over creditors whose interests were more adversely affected by the wait. *See* LoPucki, *supra* note 19, at 731 (arguing major problems in Chapter 11 stem from courts permitting cases to run excessively long). *See generally* William C. Whitford, *What's Right About Chapter 11*, 72 WASH. U. L.Q. 1379, 1381-82 (1994) (commentators thought Chapter 11 was a disaster in the 1980s but data suggest that "many of these deficiencies are not as serious as once supposed."); *id.* at 1383 (questioning assumption of rampant self-interested management activity).

111. LoPucki and Whitford have observed that corporate reorganization practice was evolving and dynamic, and hypothesized "this evolution reflects a process of experimentation and learning on [the] part of lawyers, judges, and the participants in the cases." *See* LoPucki & Whitford, *supra* note 71, at 723 n.186.

112. *See* LoPucki & Whitford, *supra* note 71, at 756 n.277. In large cases, creditors initiated six of forty-three cases, or 14%, as compared to less than one half of one percent overall. *Id.*

113. *See* LoPucki, *supra* note 19, at 755. Firms in the 1980s also had considerable management turnover and relatively few "management 'grabs.'" Whitford, *supra* note 110, at 1383 (reporting on empirical evidence in 1980s on management turnover, and management compensation). *See generally* LoPucki & Whitford, *supra* note 71, at 713 ("[C]reditors often exert considerable control over a reorganizing company."); *id.* at 715, n.171 ("[I]t is beyond dispute that creditors frequently are consulted about management turnover decisions, and boards of directors are frequently careful to hire someone that potential future lenders will find acceptable."); *id.* at 739-40 (finding management "grabs" in a

that, beyond granting extensions of the debtor's exclusive period, judges rarely played a significant role: "Judicial restraint seems to be a norm in large reorganization cases. The implicit understanding is that the appropriate judicial role involves deciding issues brought before the court by parties in interest."¹¹⁴ In addition, sales of assets in bankruptcy may have been more common in large cases in the 1980s than is recalled by some commentators.¹¹⁵

By the late 1990s, the prevailing conception of Chapter 11 and the role of the judge had evolved further to a transactional model in the largest cases. A broader range of Chapter 11 commentators perceived Chapter 11 as being used to implement prearranged restructurings—negotiated and resolved before the debtor was even under the protection of the bankruptcy court—and to implement sales in the absence of any expectation of a standalone corporate reorganization.¹¹⁶ Chapter 11 not only presented a forum for negotiations among the existing players, but presented a market opportunity for others.¹¹⁷ Critics of Chapter 11 no

very small number of cases); *id.* at 750 (finding managers have "fragile tenure" in large publicly held companies in Chapter 11).

114. See LoPucki & Whitford, *supra* note 71, at 717, 719.

115. See Whitford, *supra* note 110, at 1392; LoPucki & Whitford, *supra* note 71, at 747 (finding extensive liquidation of assets in 30 of 43 cases, although some liquidations were contemplated in and took place after plan confirmation).

116. See Baird & Rasmussen, *Chapter 11 at Twilight*, *supra* note 85, at 675-76 (using LoPucki's database, finding fifty-two of ninety-three firms that completed Chapter 11 in 2002 involved sales, and seven other cases were sales in substance); *id.* at 678 (finding twenty-six cases "merely implemented a deal that was already reached among the principal players at the time the petition was filed."); *id.* at 679 ("Combined, sales and preexisting deals account for 84% of the large Chapter 11s from 2002."); Baird, *supra* note 80, at 73 (eight of ten largest Chapter 11 cases in 2002 used bankruptcy to sell assets either piecemeal or going concern). See generally Douglas Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002).

117. According to Professor David Skeel,

The endless negotiations and mind-numbingly bureaucratic process that seemed to characterize bankruptcy in the 1980s have been replaced by transactions that look more like the market for corporate control. Whereas the debtor and its managers seemed to dominate bankruptcy only a few years ago, Chapter 11 now has a distinctively creditor-oriented cast. Chapter 11 no longer functions like an anti-takeover device for managers; it has become, instead, the most important new frontier in the market for corporate control, complete with asset sales and faster cases.

longer needed to argue forcefully for proposals to replace Chapter 11 with a market oriented approach because the existing bankruptcy structure was accommodating the market.¹¹⁸

Like other actors in the system, judges gradually and inevitably formed perceptions throughout this period about their role in large corporate reorganizations. Characterizations of a judge's approach in large bankruptcy case as too lenient (as LoPucki might express), or too intrusive, depend in part on expectations and characterizations of Chapter 11.¹¹⁹ Whereas LoPucki believes courts adopted overly lenient practices to attract large cases, others might see the trends in court practices as a growing recognition of the transactional model. As many as six of LoPucki's seven-item list of damaging changes in court practices, from chapter 6 of *Courting Failure*, arguably reflect a transactional view of large Chapter 11 cases.¹²⁰ Limiting independent scrutiny of plan feasibility in large cases is certainly consistent with the transactional model, as expressed even by those who have concerns about the recent direction of Chapter 11.¹²¹

The transactional model also is clearly reflected in the "complex Chapter 11" designation among courts that

David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 918 (2003) [hereinafter Skeel, *Creditors' Ball*]; see also Baird, *supra* note 80, at 99 (discussing ways in which large Chapter 11s are subsumed into corporate law); Ayotte & Skeel, *supra* note 28, at 9 (observing that venue choices seemed more creditor-driven than debtor-driven). Elsewhere, Skeel characterizes the rise of the use of debtor-in-possession financing as corporate control as a return to railroad equity receiverships. See David A. Skeel, Jr., *The Past, Present, and Future of Debtor-In-Possession Financing*, 25 CARDOZO L. REV. 1905, 1905 (2004).

118. See, e.g., Douglas G. Baird & Edward R. Morrison, *Bankruptcy Decision Making*, 17 J.L. ECON. & ORG. 356, 357 (2001); Skeel, *Creditors' Ball*, *supra* note 117, at 918 (explaining why complaints about Chapter 11 have subsided due to changes in Chapter 11).

119. See, e.g., Melissa B. Jacoby, *Prepacks and the Deal-Litigation Tension*, AM. BANKR. INST. J., March 2004, at 34-35. These factors, of course, are in addition to the many non-bankruptcy-specific views of the role of judges in lawmaking.

120. See *supra* Part II. The exception is critical vendor orders.

121. See, e.g., Miller & Waisman, *supra* note 87.

adopted new procedures in the early 2000s.¹²² Contrary to expectations that might arise due to the use of the word “complex,” the complex case designation produces a more expedited process and fewer procedural hurdles.¹²³

For those who embrace the transactional model, courts that limit their involvement to overseeing sales and approving parties’ prearranged deals are fulfilling their objectives.¹²⁴ Judges labeled as “competent”¹²⁵ and “sophisticated”¹²⁶ in this model are those who make themselves accessible for quick decision-making and approval of consensual deals but otherwise leave the parties

122. In future research on judicial behavior in bankruptcy, it may be important to distinguish between the practices and decisionmaking of individual bankruptcy judges and those of a court as an institution. For purposes of this small portion of this review, however, I do not separately develop these points.

123. Consider the general order of the United States Bankruptcy Court for the Southern District of Texas, containing protocols for cases with a complex Chapter 11 designation. *See* Bankruptcy Court General Order 2000-2 (Bankr. S.D. Tex. Jan. 11, 2000). The order defines a complex case functionally, as a case that:

requires special scheduling and other procedures because of a combination of one or more of the following factors: (a) *The need for “first day” emergency hearings for consideration of the use of cash collateral, debtor-in-possession financing, and other matters vital to the survival of the business*; (b) The size of the case (usually total debt of more than \$5 million or more than \$2 million in unsecured non-priority debt); (c) *The large number of parties in interest* in the case; (d) The fact that claims against the debtor and/or equity interests in the debtor are publicly traded (with some creditors possibly being represented by indenture trustees); (e) *The need for simplification of noticing and hearing procedures to reduce delays and expense*; or (f) Other similar factors.

Id. at 1 (emphasis added). A judge presiding over a complex Chapter 11 case must arrange her schedule such that she can accommodate emergency “first day” hearings not more than two business days after the hearing request. *Id.*

124. Baird and Rasmussen have observed that “[b]ankruptcy judges no longer pretend to possess the wisdom to chart the destiny of great corporations,” Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons From Enron*, 55 VAND. L. REV. 1787, 1811 (2002), and that “[m]odern bankruptcy judges oversee auctions of going concerns and implement prenegotiated plans of reorganization” Baird & Rasmussen, *Chapter 11 at Twilight*, *supra* note 85, at 699.

125. *See, e.g.*, Ray et al., *supra* note 26.

126. *See* Skeel, *supra* note 26, at 328 (referring to the sophistication of Delaware judges).

alone to do their business in the largest cases. This is to be contrasted with the more managerial role many judges have adopted with respect to very small business cases.¹²⁷ I respectfully disagree with LoPucki that additions to § 105 of the Bankruptcy Code can be characterized as a command, or even an invitation, to judges to become extensively involved in large Chapter 11 cases.¹²⁸

The adherence to policy positions may connect to other goals and motivations, of course. Thus, the next several sub-parts briefly connect the other items on Baum's typology with the judicial behavior issues raised by *Courting Failure*.

B. *Relevant Court Audiences*

Baum's second set of goals relates to personal standing with court audiences.¹²⁹ In other work, Baum offers an explanation that should resonate with those familiar with the bankruptcy court:

Direct influence over a court also is facilitated by concentration of business. A group whose members come before a court frequently obtains a relatively good opportunity to shape judges' perceptions and values. Continual interaction between regulatory officials and their clienteles helps to produce agency sympathy toward the problems and needs of the clientele groups. A similar process seems to occur in some courts whose judges deal continually with certain litigant groups, such as the criminal trial court and the small claims court.¹³⁰

127. For a general characterization of the managerial model, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). For how judges in the Northern District of Illinois handle small business cases, see generally Baird & Morrison, *supra* note 118, at 356. One can interpret recent amendments to the Bankruptcy Code as endorsing a distinction between the oversight of small business and large business cases, with small business cases being kept under more stringent managerial control. See BAPCPA, *supra* note 74.

128. See Lynn M. LoPucki, *Where Do You Get Off?: A Response to Courting Failure's Critics*, 54 BUFF. L. REV. 511, 531-32 (2006).

129. See BAUM, *supra* note 102, at 17 tbl.1.1.

130. Baum, *Judicial Specialization*, *supra* note 101, at 827-28 (internal citations omitted); see also BAUM, *supra* note 102, at 7 (referring to workgroups or courthouse communities for trial judges); Baum, *supra* note 95, at 751; Burbank & Friedman, *supra* note 89, at 29 (noting that "[l]ittle research exists . . . on the question of how much lawyers or parties affect judicial independence"

In addition to some convergence between judges' views and repeat players, judges, being human, understandably want to be well-regarded by these audiences.¹³¹

If a relevant court audience suggests to judges that they consider adjustments to their practices that allegedly have worked well in other courts, we cannot be surprised when courts take such requests seriously. Indeed, we might be suspicious of a judge who rebuffs seemingly constructive suggestions for improvement of the court.¹³² Relevant court audiences' general desire for speed also may contribute to judges' receptiveness to practice changes that expedite cases or to judges' incentives to approve party requests quickly.¹³³

C. Career

Baum's third set of goals relate to a judge's career, including continued tenure in a judicial position and securing an attractive nonjudicial position.¹³⁴ Baum recognizes that the duration of a court appointment

as compared to the developed concept of capture in administrative law literature, but that "[s]ome sorts of litigation draw lawyers as repeat players, and courts of limited jurisdiction are particularly likely to see the same lawyers over and over."); Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995); Donald R. Songer et al., *Do the "Haves" Come Out Ahead Over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, 33 LAW & SOC'Y REV. 811 (1999) ("[F]indings suggest that repeat player litigants with substantial organizational strength ('haves') are much more likely to win in the federal courts of appeals than one-shot litigants with fewer resources. The 'haves' win more frequently in published decisions, even after controls are introduced for the ideological makeup of the panel. The advantage in appellate litigation enjoyed by repeat player 'haves' is remarkably consistent over time.").

131. See, e.g., Cole, *supra* note 28, at 1887 (citing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 190 (1999)); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 14 (1993) (discussing the popularity of judges among lawyers as part of judicial utility).

132. Whether the suggested changes turned out to be constructive is an issue raised but not resolved by *Courting Failure*. The relevant inquiry for this analysis relates to the time the changes were proposed.

133. Cf. KLEIN, *supra* note 96, at 25-26 (reporting on judge interviews regarding importance of producing decisions quickly).

134. See BAUM, *supra* note 102, at 17 tbl.1.1.

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inevitably affects how a judge fulfills her obligations.¹³⁵ This is a highly relevant consideration to the bankruptcy judiciary.

Bankruptcy judges are judicial officers of the United States district court and lack life tenure.¹³⁶ Although reappointment to a second fourteen-year term has been granted to most who seek it, this portion of the court system is just over twenty years old and the process of reappointment is uncertain. There currently is no presumption of reappointment and much of the process is determined by United States Judicial Conference regulations and the evolving procedures of each circuit.

One would expect that the lack of life tenure would affect court practices. Indeed, it seems central to arguments that judges compete for cases.¹³⁷ For instance, lack of life

135. See *id.* at 17 (“If a four-year term is converted into a life term, the judge’s decisions might no longer reflect public opinion. If the judge perceives a good opportunity to achieve a higher-paying position in corporate law, the judge’s decisions might now be aimed at pleasing the business community rather than the general public. In such circumstances, analysis that focused only on the interest in community approval would be incomplete.”); *id.* at 145 (noting that scholars with economic and psychological perspectives agree that details of court appointments may have impact on judges’ choices).

136. See 28 U.S.C. § 152(a)(1) (2000); S. Elizabeth Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967, 1054 (1988). See generally Judith Resnik, “Uncle Sam Modernizes His Justice”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 670, 675 (2002).

137. LoPucki is well aware of the possibility that job security may affect judicial behavior and receptiveness to court audiences. See LoPucki & Whitford, *supra* note 17, at 38 (explaining that local lawyers “may have occasion to evaluate them in connection with their reappointment for an additional term, newspaper or television stories about the quality of the judiciary, professional honors and awards, or employment after they leave the bench.”). Yet, when a member of Congress asked LoPucki if he supported giving life tenure for bankruptcy judges as a solution to the problems he identified, LoPucki did not strongly advocate for it. See *Administration of Large Business Bankruptcy Reorganizations: Has Competition for Big Cases Corrupted the Bankruptcy System? Hearing Before the Subcomm. on Commercial and Administrative Law, H. Comm. on the Judiciary*, 108th Cong. 92 (2004), available at <http://judiciary.house.gov/media/pdfs/printers/108th/94939.pdf> (verbal response of Lynn LoPucki) (“Life-time tenure would probably be a positive change. But at this stage of this competition, I think it’s too late for that to solve the problem. We have the court in Delaware, which has created a large industry, many people have moved to Delaware in reliance upon this industry being there.”).

tenure may increase judicial receptiveness to the views of an important court audience that could affect reappointment and future employment prospects.¹³⁸ Judging by the literature on corporate law and the Delaware chancery court, receptiveness and adaptation help justify the decision to refrain from giving judges life tenure.¹³⁹

Even if judges do not wish to be reappointed to the bench, many desire other employment because they are not ready to retire. Whether due to the desire for new challenges, higher monetary compensation, or other factors, some judges who might easily have been reappointed have gone onto lucrative careers in private practice at prestigious law firms. Commentators sometimes worry that even life tenured judges are affected in their decision-making by prospects of future employment.¹⁴⁰

D. *Life on the Court and Standard of Living*

The last two sets of goals on Baum's partial typology relate to life on the court, including good relations with other judges, power within the court, limited workloads, court resources, personal income, and personal comfort.¹⁴¹

138. See, e.g., Burbank & Friedman, *supra* note 89, at 26 ("Once on the bench, judges are more likely to respond to the influences that determine if they keep their jobs tomorrow than to those responsible for giving them the job yesterday."); Resnik, *supra* note 135, at 676-77 (discussing the role of "[s]ophisticated repeat-player litigants," and noting that "[a]s constitutional judges evaluate the track records of statutory judges by soliciting information from litigants and by reviewing decisions and reversal rates, they may prompt lower level judges to search for supporters, publish little, and keep low profiles.").

139. Professor Roberta Romano explains that the twelve-year term of the Delaware Chancery Court judge "helps to ensure that members of the chancery court will be sensitive to the state's policy of responsiveness in corporate law, since judges who ignore the political consensus in the state will not be reappointed." ROMANO, *supra* note 32, at 40; *id.* at 123 ("life tenure diminishes the judge's incentive, provided by the need for reappointment, to be responsive to changing business conditions."). Professor Jill Fisch has described the Delaware Chancery Court as having unusual features and processes that make it function somewhat more like a flexible legislature and less like a traditional court. See generally Fisch, *supra* note 33.

140. See, e.g., EMILY FIELD VAN TASSEL, FED. JUDICIAL CTR., WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 to 1992, 16 (1993).

141. See BAUM, *supra* note 102, at 17 tbl.1.1.

When repeat player lawyers repeatedly praise a magnet court's handling of cases, some judges understandably will want to learn about the methods of their colleagues and consider integrating them into their own courts if appropriate.¹⁴² Even if judges have relatively strong notions of how to do their jobs, many are open to learning from each other.¹⁴³

Judges also may have implicit workload management reasons to adopt the practices LoPucki highlighted in chapters 5 and 6 of *Courting Failure*. The practices tend to require immediate judicial responsiveness. Yet, they do not necessarily require heavy independent evaluation of many issues as long as a sufficient number of parties in interest are actively participating and no one objects. The practices also tend to expedite cases and give discretion to the parties to manage their own affairs.¹⁴⁴

What should we take away from this analysis overall? A constellation of factors likely shapes the large-case practices of bankruptcy judges individually, and courts more collectively. At this juncture, we cannot simply assume that a venue restriction will alter the handling of large cases in some fundamental—and fundamentally positive—way. Even if some judges want to preside over large cases, this desire likely has a complex interaction with other goals in shaping their behavior.

CONCLUSION

For over twenty years, Professor Lynn LoPucki's empirical and theoretical contributions have informed and shaped academic and professional discussions of the bankruptcy system. Without LoPucki's work, many of our assumptions about large corporate reorganizations would be constructed through anecdote. *Courting Failure* is a capstone contribution that brings much of LoPucki's in-

142. See, e.g., Skeel, *supra* note 20, at 1278 (noting that "Delaware's success in the 1990s might have prompted other districts to improve their case administration . . .").

143. See, e.g., Stripp, *supra* note 91, at 1334-35.

144. Cf. Burbank & Friedman, *supra* note 89, at 28; Posner, *supra* note 131, at 20; Stripp, *supra* note 91. For example, scholars consider the impact of managing large workloads on the use of law clerks and the drafting of decisions. See, e.g., BAUM, *supra* note 102, at 45; Bainbridge & Gulati, *supra* note 102.

depth academic work into a new framework, into the public discourse, and into Congressional debates.

The central objections of this Review have stemmed from the fact that *Courting Failure's* theories and assumptions go considerably farther than the data or the available literature can support. The existing evidence of changes to court practices neither match up with the trends in the repeat filing rates, nor bear an obvious relationship to post-confirmation failure in many instances. In addition, judges surely respond to a wide range of incentives and goals in formulating their case management plans; the idea that judges would substantially change their case management plans in response to a venue restriction is not well supported, at least not right now.

Would-be readers should not make the mistake of concluding that the book's limitations are a license to ignore it. The book sounds a credible warning that all is not well in our current Chapter 11 system and implicitly presents a host of research questions for LoPucki and other scholars.¹⁴⁵ LoPucki may have hoped that *Courting Failure* contained the answer to a pressing question, but he has done something more important than resolve an old debate. He has initiated many new ones.

145. For example, it would be useful to look more closely at patterns of and trends in court practices in the 1990s, including, but not limited to, the very largest cases in LoPucki's dataset. LoPucki starts this project in chapter 6 of *Courting Failure* but does not finish it. In addition, LoPucki's assertions about the role of court practices suggest that it would be useful to enlist judicial politics and behavior scholars, from political science, economics, and psychology, to study the bankruptcy court.