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## Courting Controversy

Charles J. Tabb\*

\*University of Illinois College of Law, [ctabb@law.uiuc.edu](mailto:ctabb@law.uiuc.edu)

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# Courting Controversy

Charles J. Tabb

## Abstract

This paper is part of a symposium discussing Lynn LoPucki's provocative book, *Courting Failure*. In that book, Professor LoPucki discusses the systemic problems created by forum shopping in large chapter 11 bankruptcy reorganizations. He explores how and why debtors started selecting first New York and then Delaware's bankruptcy court as a venue and how other bankruptcy courts reacted by competing for large debtors, with what he believes to be corrupting effects. This paper focuses first on what the author describes as an "eye-poking phenomenon," that is, how LoPucki has gone out of his way to incite controversy – and successfully. The heart of the paper explores the manner, means, and motivation of LoPucki's avowedly confrontational style, and asks whether such inflammatory rhetoric was warranted. The proofs of LoPucki's thesis are tested. The latter part of the paper turns to an exploration of alternative solutions to the forum-shopping problem. Ideas examined include: (1) limiting venue choice; (2) direct congressional regulation of questionable practices; (3) limiting and normalizing professional fees; (4) resurrecting the mandatory appointment of a trustee; (5) enacting a threshold feasibility test; and (6) making a number of structural changes to the court system.

This paper is part of a symposium discussing Lynn LoPucki's provocative book, *COURTING FAILURE*. In that book, Professor LoPucki discusses the systemic problems created by forum shopping in large chapter 11 bankruptcy reorganizations. He explores how and why debtors started selecting first New York and then Delaware's bankruptcy court as a venue and how other bankruptcy courts reacted by competing for large debtors, with what he believes to be corrupting effects. This paper focuses first on what the author describes as an "eye-poking phenomenon," that is, how LoPucki has gone out of his way to incite controversy – and successfully. The heart of the paper explores the manner, means, and motivation of LoPucki's avowedly confrontational style, and asks whether such inflammatory rhetoric was warranted. The proofs of LoPucki's thesis are tested. The latter part of the paper turns to an exploration of alternative solutions to the forum-shopping problem. Ideas examined include: (1) limiting venue choice; (2) direct congressional regulation of questionable practices; (3) limiting and normalizing professional fees; (4) resurrecting the mandatory appointment of a trustee; (5) enacting a threshold feasibility test; and (6) making a number of structural changes to the court system.

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**Introduction**

Lynn LoPucki has written a really good book. COURTING FAILURE<sup>1</sup> is about an extremely important problem in bankruptcy reorganization practice – forum shopping by large debtor firms seeking a favorable court. On a broader level, his book raises fundamental questions about the structure and nature of bankruptcy reorganization practice and supervision. Professor LoPucki presents lots of interesting and significant data in the book. He puts forward some excellent ideas and suggestions – I might not agree with all of them, but they are plausible ideas. This book is a work of serious scholarship. Not only that, it is actually fun and easy to read. The book builds on his substantial prior empirical work on issues of bankruptcy venue and forum shopping.<sup>2</sup> Many of the experts in the field – certainly a significant percentage of bankruptcy academicians, with

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\* Alice Curtis Campbell Professor of Law, Associate Dean for Academic Affairs, University of Illinois College of Law. This article would not have been possible without the extraordinary research assistance of Rebecca Tabb, B.A. in Economics with distinction, Stanford 2004, candidate for MSc. Degree in Economics, University College London.

<sup>1</sup> Lynn M. LoPucki, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (University of Michigan Press 2005).

<sup>2</sup> Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WISC. L. REV. 11; Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597 (1993); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999); Lynn M. LoPucki & Sara 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. 232 (2001); Lynn M. LoPucki, *Can the Market Evaluate Legal Regimes? A Response to Professors Rasmussen, Thomas and Skeel*, 54 VAND. L. REV. 331 (2001); Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933 (2002); Lynn M. LoPucki & Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, 1 J. EMP. LEG. STUD. 3 (2004).

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apologies to Skeel<sup>3</sup> and Rasmussen<sup>4</sup>, and many bankruptcy practitioners – agree with his basic premise that the bankruptcy venue statute should be revised (even though we now know that such is likely a vain hope<sup>5</sup>) to eliminate the possibility of forum shopping into Delaware solely because a debtor is incorporated there. Indeed, the National Bankruptcy Review Commission, chaired by Elizabeth Warren, recommended precisely such a venue amendment.<sup>6</sup> All that is on LoPucki’s side – and yet no one cares. The objective merits or demerits of the book are almost never discussed. Instead, when people talk about the book, what they talk about is the controversy LoPucki has provoked. A wise colleague of mine suggests as a useful guide to living “not to poke people in the eye (unless they really need it).” Professor LoPucki has indisputably done some serious eye-poking

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<sup>3</sup> David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1 (1998); David A. Skeel, Jr., *Lockups and Delaware Venue in Corporate Law and Bankruptcy*, 68 U. CIN. L. REV. 1243 (2000); David A. Skeel, Jr., *What’s So Bad About Delaware?*, 54 VAND. L. REV. 309 (2001); Kenneth Ayotte and David A. Skeel, Jr., *Why Do Distressed Companies Choose Delaware? Venue Choice and Court Experience in Bankruptcy*, Working paper 2004.

<sup>4</sup> Robert K. Rasmussen and Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357 (2000); Robert K. Rasmussen and Randall S. Thomas, *Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations*, 54 VAND. L. REV. 283(2001).

Other academics who have weighed in on the recent debate include Marcus Cole, “*Delaware is Not a State*”: *Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845 (2002), and Barry E. Adler & Henry N. Butler, *On the Delawarization of Bankruptcy Debate*, 52 EMORY L.J. 1309 (2002). Prominent reorganization lawyer Harvey R. Miller also contributed *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987 (2002).

Before this all became a *cause célèbre*, Elizabeth Gibson wrote *Home Court, Outpost Court: Reconciling Bankruptcy Case Control With Venue Flexibility in Proceedings*, 62 AM. BANKR. L.J. 379(1988).

<sup>5</sup> S. 256, The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 108<sup>th</sup> Cong., 2d Sess. (2005), signed into law by President Bush on April 20, 2005, omitted any amendments to the bankruptcy venue statute, even though the bill is quite comprehensive (several hundred pages long) and the venue issue was well-known. There is little dispute that Senator Biden of Delaware killed any venue amendment. Senator Cornyn had introduced venue reform legislation as part of BAPCPA, but at Biden’s bidding it was excised, and Sen. Cornyn in February 2005 introduced a stand-alone venue reform bill, S. 314, Fairness in Bankruptcy Litigation Act. That bill is languishing in committee.

<sup>6</sup> Recommendation 3.1.5, at 719, 770, *Bankruptcy: The Next Twenty Years*, NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT (OCT. 20, 1997):

28 U.S.C. § 1408(1) should be amended to prohibit corporate debtors from filing for relief in a district based solely on the debtor’s incorporation in the state where that district is located.

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with his book COURTING FAILURE. I want to look at the eye-poking phenomenon. Then I want to add a few ruminations of my own about the court competition problem. Maybe I will even poke a few eyes myself in the process.

### **Evidence that eyes have been poked**

The first nugget of evidence that Professor LoPucki has triggered a major controversy is the very fact that we are having this conference to talk about his book. But that fact alone is not enough, of course; professors do sometimes schedule academic conferences to discuss books even when people have not called the author “a dangerous man.”

Alas, but the author, Lynn LoPucki, the Security Bank Professor of Law at UCLA Law School, has been called just that. Perhaps his most vocal critic has been Thomas Salerno, a bankruptcy reorganization lawyer, who has said, among other things:

*“Lynn LoPucki is a dangerous man. Without the benefit or filter of experience, he makes rash and irresponsible conclusions about sitting and retired bankruptcy judges, based on faulty data and speculation disguised as academic research. ... [H]e crosses the line from good faith to unfounded and unnecessary character assassination.”*<sup>7</sup>

Want more? How about:

*“LoPucki is not a very smart man.”*<sup>8</sup>

*“These allegations are baseless and offensive to both the bench and the bar.”* LoPucki’s accusations “were obviously preconceived conclusions and the data manipulated to reach the conclusion.”<sup>9</sup>

*“He is just trying to sell books.”*<sup>10</sup>

Those quotes are all from leading members of the bankruptcy reorganization bar, one of the groups

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<sup>7</sup> *Critics punch holes in foundation of court corruption theories*, BCD NEWS AND COMMENT, March 22, 2005 (quote by Thomas J. Salerno).

<sup>8</sup> *Venue Debate*, American Bankruptcy Institute’s 7<sup>th</sup> Annual New York City Bankruptcy Conference, May , 2005 (quote by Robert Rosenberg).

<sup>9</sup> Stephen Taub, *Court Competition: Bad for Bankruptcies?*, at CFO.com, May 4, 2005 (quote by James Sprayregen). Also quoted at Pamela A. MacLean, *Bankruptcy Judges Hawking Their wares? Law professor suggests venues are competing for Chapter 11 bankruptcies*, 426 NEW JERSEY L.J., May 9, 2005.

<sup>10</sup> Maclean, *supra* note 9 (quote by Laura Davis Jones).

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LoPucki finds fault with in his book, so their retort is to some extent predictable. But even a more impartial reviewer of the book observed:

*“LoPucki is a natural muckraker; he seems unwilling to use measured rhetoric when there is a more incendiary alternative. This goes beyond matters of style; Courting Failure suffers from a lack of balance.”*<sup>11</sup>

A sitting bankruptcy judge (and thus a member of another LoPucki target group), said:

*“The bottom line is that this book is an inflammatory attack on the judges in New York and Delaware.”*<sup>12</sup>

A bankruptcy professor found LoPucki’s charges difficult to believe:

*“These are a group of conscientious bankruptcy judges. They don’t sell their rulings.”*<sup>13</sup>

Indeed, even a sympathetic bankruptcy judge, who finds LoPucki’s principal assertions “pretty accurate,” further comments:

*“It was unfortunate that he ‘chose to use incendiary words like corruption.”*<sup>14</sup>

### **The eye poking**

He used “incendiary words like corruption”? That would be an eye poke for sure. Surely not. Did he? Indeed he did. A lot. Over and over. LoPucki devotes an entire chapter of the book to, in his words titling the chapter, “**Corruption**.”<sup>15</sup> Consider as well the inflammatory tone of some of the section headings in the “Corruption” chapter:

*“Helping Corporate Thieves Keep the Money”*<sup>16</sup>

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<sup>11</sup> Nathan Koppel, *Bankruptcy is Broke: A compelling new polemic reveals inherent corruption in the system of financial reorganization*, THE AMERICAN LAWYER, May 2005.

<sup>12</sup> Brent Snively, *Local judge pushes to make firms file on home turf*, CRAIN’S DETROIT BUSINESS, May 16, 2005 (quote by the Hon. Steven Rhodes).

<sup>13</sup> MacLean, *supra* note 9 (quote by Prof. Laura Bartell).

<sup>14</sup> *Id.* (quote by the Hon. Robert Martin).

<sup>15</sup> COURTING FAILURE, *supra* note 1, Chapter 6.

<sup>16</sup> *Id.* at 145.

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*“Helping Failed Managers Keep Their Jobs”*<sup>17</sup>

*“Rubber-Stamping Prepackaged Cases”*<sup>18</sup>

*“The Ideology that Facilitates Corruption”*<sup>19</sup>

And he has not backed down; if anything, he has made it absolutely clear that he really means it, that indeed *“corruption is the right word.”* Recently he wrote the following for a widely circulated bankruptcy news and digest service, and took the added measure of distributing it in advance to a nationwide bankruptcy list-serve<sup>20</sup>; it is a tidy synopsis of the thesis of his book and worth quoting at some length to get the full flavor of the rhetoric involved:<sup>21</sup>

*“I charge that some U.S. bankruptcy judges have been corrupted by the competition for big cases. Some people are upset about the corruption; others more about the charge. Some of the latter think court competition is wrong, but that “corruption” is too strong a word for its effect. In my opinion, they fail to grasp the enormity of what is happening in the courts. Some judges are deciding cases not on their merits, but simply with an eye to attracting more cases. ...*

*“Corrupt” is an accurate description of both the choices and the judges who made them.*

I am not without sympathy for the corrupted judges. ... If they chose to compete, *they sacrificed their integrity.* ...

The judges’ predicament does not excuse their failure to protect the legal rights and financial interests of the thousands of creditors, shareholders, employees and other stakeholders who are reliant on them. The judges’ abdications destroyed companies, cost people jobs, dissipated value, shuffled entitlements, degraded the system, and inevitably, will erode public faith in the bankruptcy courts.

Of the thousands of people at financial risk in a big bankruptcy case, only a handful

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<sup>17</sup> *Id.* at 143.

<sup>18</sup> *Id.* at 157.

<sup>19</sup> *Id.* at 180.

<sup>20</sup> Lynn LoPucki, e-mail on [bankr-unlv-bounces@law.unlv.edu](mailto:bankr-unlv-bounces@law.unlv.edu), July 8, 2005.

<sup>21</sup> Lynn M. LoPucki, *“Corruption” is the right word*, BCD NEWS AND COMMENT, July 19, 2005.

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participate actively. The vast majority rely on the integrity of the bankruptcy process. The bankruptcy judge is supposed to be the neutral guardian of that integrity. As a result of court competition, many no longer fulfill that responsibility. That, to my mind, is corruption.”

The book sounds the same themes. The essential message LoPucki puts forth is simple: bankruptcy judges want big reorganization cases to be filed in their courts; because of the ability of “case placers” to forum shop, for a bankruptcy judge to get any big cases filed in their court, the judge has to “compete” by entering all sorts of orders desirable to the “case placers,” without regard to whether such orders are meritorious. Many bankruptcy judges give in to this temptation and cater to the wishes of the case placers, LoPucki argues. Proof of this lies in the uniformity of decisions by “competing” courts that are favorable to case placers on controversial topics, such as critical vendor orders. Further proof can be found in the high failure rate of cases filed in the prominent forum shop destinations, Delaware and New York. LoPucki emphasizes in the introduction that the actions of these bankruptcy judges must be characterized as “corruption”:

“To corrupt the bankruptcy system, it was not necessary to corrupt all the bankruptcy judges. Once a few judges succumbed, the cases flowed to them, rendering the remaining judges irrelevant.”<sup>22</sup>

This “corruption,” as LoPucki calls it, is distinguishable “from mere forum shopping”:

“[C]ourt competition is an active, deliberate response by the court to forum shopping. When courts compete, they change what they are doing to make themselves more attractive to forum shoppers. ... The court that offers forum shoppers the most may be the only one that gets cases in the end, but *all of the judges who compete are corrupted along the way. Their actions are “corrupt”* in that they are dictated not by an attempt to apply the law to the facts of the case but by the need to remain competitive.”<sup>23</sup>

Furthermore, if a judge does not “play ball,” as it were, then their court loses the big cases thereafter. Such judges are called “toxic judges” by LoPucki.<sup>24</sup> For example, he describes how the Boston judges do not predictably cater to the case placers, with the result being “to turn Boston big-

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<sup>22</sup> LoPucki, *supra* note 1, at 24.

<sup>23</sup> *Id.* at 137.

<sup>24</sup> *Id.* at 23.

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case bankruptcy practice into a desert.”<sup>25</sup>

To give another example, the District Court and Seventh Circuit in *Kmart* gravely harmed the ability of Chicago to attract big cases – which court LoPucki claims had made big strides by aping the pro-case placer rulings of Delaware and New York – by overturning the generous critical vendor payments authorized by Bankruptcy Judge Susan Sonderby.<sup>26</sup> Perhaps so; it is too soon to know for sure. The overarching theme, though, is the competition and the concomitant “corruption”:

“Maybe next time they [the Chicago judges] will give in. Maybe not. . . . But if the Chicago judges do not give in, other judges in other cities will. The cases will go there, Chicago bankruptcy practice will wither, *and the corruption of the bankruptcy courts will continue unabated.*”<sup>27</sup>

Of particular interest here is the way LoPucki characterized Judge Sonderby’s actions after the District Court had reversed her and appeal was taken to the Seventh Circuit: “*Determined to remain in the competition for cases*, Judge Sonderby refused to order the recipients to of the critical vendor payments to return the money pending the outcome of the appeal.”<sup>28</sup> The second clause is factual; the first is not – but LoPucki frames it as if it were. As to the italicized first clause – how could LoPucki know *why* Judge Sonderby did what she did? Maybe he is right, maybe he is wrong. I don’t know. But I would posit that neither does he. If he has proof of illicit motivation, beyond his own inferences, he should state that proof. Lacking same, fair reporting would at the very least dictate that LoPucki in some way signal that the statement is not provably factual, but simply his own opinion or prediction. Thus, for example, he might simply add a qualifying or hedging word, such as “possibly” or the like. Or he might omit the first clause, simply stating the factual second clause, and then add a follow-up sentence such as, “Why would she do that?” Framing it as such is hardly putting Judge Sonderby up for sainthood, but it is not nearly as blatant an “eye poke” as the way he said it.

It is this sort of unequivocal and pious condemnation of judges’ and others’ motivations – which he states as unquestioned facts – that has so angered many. For those with an interest in politics, an apt comparison of his manner and tenor might be made to film-maker Michael Moore’s scathing

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 166.

<sup>27</sup> *Id.* at 134-35.

<sup>28</sup> *Id.*

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attack on the Bush Administration in the movie *Fahrenheit 9-11*. LoPucki's book is replete with examples of this approach. Indeed, he leads off the book with a discussion of the Enron case: after noting that court competition put Enron's board chairman, Kenneth Lay, "in the catbird seat." LoPucki then offered that "If he [Lay] chose wisely, the grateful court would protect him from cresting public outrage and, by so doing, make itself attractive to the corrupt or incompetent executives of future bankrupt firms."<sup>29</sup> On the next page, after calling Lay "Kenny-Boy" (a Moore-like dig at President Bush himself), LoPucki states that Lay "needed protection" and then "He would find it in a bankruptcy court."<sup>30</sup> In case that message was somehow too subtle, the author melodramatically declares that "all that would stand between Ken Lay and justice would be a judge of the bankruptcy court Lay had chosen."<sup>31</sup> Lay's biggest concern, LoPucki suggests, was to avoid the appointment of a trustee. Judge Arthur Gonzalez, the New York bankruptcy judge who drew the case, "performed splendidly" "from Lay's perspective,"<sup>32</sup> LoPucki concludes, since he did not appoint a trustee, and thus "The New York bankruptcy court had proven itself *a trustworthy protector of managements accused of fraud*."<sup>33</sup> The payoff for the New York court was that it soon drew three more "shopped" cases where management was accused of fraud and, according to LoPucki, filed in New York to avoid the appointment of a trustee.

Here again – is LoPucki's character assassination – it is difficult to call it anything else – of Judge Gonzalez fair? The judge *did* appoint an independent examiner, who conducted a massive investigation of the frauds perpetrated. The old management had already been replaced at the time of bankruptcy, and there is no evidence that the new management engaged in any wrongdoing. Is it not plausible that many bankruptcy judges in the same context would have determined that the most prudent tack to take would be to leave undisturbed the ongoing management of the ailing operating company by the new management (whom LoPucki concedes was "a respected turnaround manager")<sup>34</sup> and yet order a thorough investigation of past misdeeds by an examiner? Maybe, maybe not. Maybe on the merits the better call would have been to appoint a trustee. But to make the choice to appoint an examiner instead does not ineluctably mean that Judge Gonzalez was being

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<sup>29</sup> *Id.* At 10.

<sup>30</sup> *Id.* At 11.

<sup>31</sup> *Id.* At 12.

<sup>32</sup> *Id.* At 14.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

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a “trustworthy protector of managements accused of fraud.” More benign explanations for Judge Gonzalez’s motivation exist, but are not even considered by LoPucki. Instead, he states as fact that Judge Gonzalez was, in effect, in Ken Lay’s pocket, inspired by the lure of fame as the Enron judge and by the desire to entice other fraudulent managements to steer their companies to the New York court.

LoPucki may have overestimated the degree of protection Judge Gonzalez afforded Ken Lay. Lay has not yet been convicted for fraud, but he, as well as Jeffrey K. Skilling, Enron’s former chief executive, will be tried for fraud next year. The claim that Lay never would be sued for his mismanagement appears inaccurate.

Other major corporate fraud perpetrators have been convicted for their misdeeds, and harshly so – even though the bankruptcy court “refused” to appoint a trustee (appointing an examiner instead). For example, Bernard Ebbers, former WorldCom CEO, was sentenced to 25 years in prison just over a month ago.<sup>35</sup> A sentence of 15 years was handed down in June 2005 for John J. Rigas, the former CEO of Adelphia Communications.

LoPucki has stated recently that “*Courting Failure* contains no accusation of corruption against any particular judge.”<sup>36</sup> I find it hard to grasp how this statement can be squared with the book’s excoriation of Judge Gonzalez. Judge Sonderby also might find LoPucki’s disavowal a bit unpersuasive. And the Delaware judges, especially Judge Helen Balick, are unquestionably skewered by LoPucki.

LoPucki’s unabashed and bitingly sarcastic condemnations of the bankruptcy judge’s actions sometimes come quite close to, and perhaps cross, the defamation line. Indeed, under tort law, LoPucki’s charges of *corruption* by judicial officers would be per se defamatory, subject only to the possible defenses of truth and of the need to show actual malice in cases involving public figures. The core of defamation law is harm to one’s reputation or good name.<sup>37</sup> According to the Restatement, “a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing

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<sup>35</sup> Jennifer Bayot, *Ebbers Sentenced to 25 Years in Prison for \$11 Billion Fraud*, New York Times Online, July 13, 2005. Accessed August 28, 2005.

<sup>36</sup> LoPucki, *supra* note 21.

<sup>37</sup> Dan B. Dobbs, *THE LAW OF TORTS*, § 400, at 1117 (West 2001).

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with him.”<sup>38</sup> A core form of defamatory communication is one which adversely affects one’s reputation in his business, trade, profession, or office. Thus, it is actionable per se to “ascribe to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or his public office.”<sup>39</sup> This principle applies to judicial officers.<sup>40</sup> Stating that a judge is “corrupt” would suffice. A particular bankruptcy judge could qualify as a plaintiff if “the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member.”<sup>41</sup> For some judges profiled in the book, there is little doubt that they would qualify. Of course, given *New York Times Co. v. Sullivan*,<sup>42</sup> a judge would have to show that LoPucki either knew his charges were false or acted with a reckless disregard for truth or falsity. Whatever the ultimate outcome of a defamation action would be, one is left to ponder – why did LoPucki use such extreme and derogatory statements? More on that question in the next section.

What is intriguing also is how LoPucki’s rhetoric changed. With the change in rhetoric came the change in reaction. He had been writing about venue choice and forum shopping for fourteen years before publishing *COURTING CONTROVERSY*. He wrote numerous law review articles on the subject. In those articles he made many of the substantive points that he makes in the book. For example, in the very first of those articles, in the 1991 *WISCONSIN LAW REVIEW* with his colleague Bill Whitford, he discussed the fundamental problem he has identified, that bankruptcy judges may decide outcomes in ways that will attract big cases, but he did so in such a subtle and non-inflammatory way that no one particularly took offense (or noticed?):

“To the extent that bankruptcy judges seek to attract major reorganization cases, they would tend to exercise their discretion in favor of the positions of the managements of debtors because those managements have primary control over the initial placement of cases.”<sup>43</sup>

The point is essentially the same, but he does not say that the judges are *corrupt* for being

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<sup>38</sup> RESTATEMENT (SECOND) Torts § 559.

<sup>39</sup> *Id.* § 573.

<sup>40</sup> *Id.* Comment b.

<sup>41</sup> *Id.* § 564a.

<sup>42</sup> 376 U.S. 254 (1964).

<sup>43</sup> Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WISC. L. REV. 11, 38.

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susceptible to, and even bowing to, pressure.

By 1999 LoPucki had become even more critical of the shopping phenomenon, and, in an article in the CORNELL LAW REVIEW with Theodore Eisenberg,<sup>44</sup> identified the likely motivating cause to be “shopping for judges.” Even still, though, LoPucki stopped far short of a direct inflammatory indictment of the judges themselves. The primary word used by the authors to describe the impact of such judge shopping was only that it was “embarrassing.”<sup>45</sup> Indeed, they specifically disavow any implication “that bankruptcy judges are less likely to ‘follow the law’ than other judges.”<sup>46</sup>

Even when LoPucki, writing with Sara Kalin in 2001, announced their dramatic empirical findings that the Delaware/New York shopping spree had proved to be an inefficient “race to the bottom,” with much higher refiling rates for large companies reorganized in those courts,<sup>47</sup> LoPucki did not level charges of personal corruption. In this article he did introduce formally the idea of a “wasteful competition” between courts and stated that courts were “applying lax standards for confirmation”<sup>48</sup> and had made “mistakes” and may even have been “opportunistic” as well as “inefficient,” and able to obtain something of a monopoly in the process.<sup>49</sup> But “corrupt”? No. The emphasis is rather on the failings of the market – a much more impersonal criticism. Indeed, even when the authors are most critical, they speak of what the great impersonal “Delaware” did or did not do, rather than speaking to the failings of specific human beings, as he does in the later book.

Nor did LoPucki make the move to personal invective when he wrote a piece in 2002 with Joseph Doherty responding to critics of his 2001 study with Kalin.<sup>50</sup> In this work he admitted that

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<sup>44</sup> Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999).

<sup>45</sup> See, e.g., *id.* at 971.

<sup>46</sup> *Id.* at 972.

<sup>47</sup> Lynn M. LoPucki & Sara 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. 232 (2001).

<sup>48</sup> *Id.* at 237.

<sup>49</sup> *Id.* at 272.

<sup>50</sup> Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Reorganizations Failing?*, 55 VAND. L. REV. 1933 (2002).

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the “data alone are not yet sufficient to tell us what caused Delaware's higher failure rates”<sup>51</sup> and couched his further musings as nothing more than “speculation,” and even as to that “speculation” the worst he could muster was that “Delaware’s bankruptcy court operates on an unabashedly laissez-faire philosophy. If the parties are in agreement on a plan, the court will confirm it.”<sup>52</sup> The villain, then is simply “Delaware's less effective reorganization procedures.”<sup>53</sup> Plainly, the tenor of these remarks falls far short of the “judges compete and therefore are corrupt” mantra trumpeted so emphatically in his book.

### **Did “they really need it”?**

For whatever reason, Professor LoPucki has chosen to abandon the course of temperate critique and has embraced instead the sensational course of charging bankruptcy judges with “corruption.” This is not my interpretation; he himself proclaims clearly, as noted earlier, that “‘corruption’ is the right word.” The new rhetoric marks a dramatic and radical shift from a dozen years of more measured writing on the subject of venue choice and forum shopping. Three logical interrelated questions present themselves: first, *why* did he take this new approach; second, related to the first, is he right; and third, is his strategy effective?

The first question is why LoPucki has moved to the “muckraker” path. Recall that my wise colleague’s maxim is not to poke someone in the eye, “unless they really need it.” This is the “need” assessment.

In trying to identify LoPucki’s motivations, I will try to heed my own cautions about being careful not to overstate when pinpointing as “fact” the answer to such subjective questions. With that caveat, consider several possibilities. As to each, we should take as a starting premise that LoPucki believes adamantly that he is right. On this point I am quite confident that *I* am right. LoPucki has written a lot, on a lot of subjects, and throughout his tone bespeaks a clear sense of personal confidence in the accuracy of his conclusions. Having said that – so do most academics!

But that is just the starting point. Lots of people believe they are right and do not call judges “corrupt.” What is driving him? One possibility is simple frustration. He has been inveighing against forum shopping for years and years with careful, scholarly analyses, and it has not done a bit of good. No one has listened, at least not in any way that makes a difference. When the National

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<sup>51</sup> *Id.* at 1984.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1985.

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Bankruptcy Review Commission recommended venue reform in its 1997 Report, he could have been momentarily encouraged, but then soon it became apparent that nothing would come of that in Congress, with Senator Biden effectively killing off venue reform as early as 1998. Even when LoPucki and Kalin published what they believed to be a convincing exposé of the Delaware “myth” in 2001, with what they took to be strong and credible empirical evidence, they did not change the posture of venue reform in Congress. Indeed, many attorneys and academics attempted to refute their findings.<sup>54</sup> At some point it just feels good to blow off steam when you believe you are right, and yet no one listens; at least you can enjoy the catharsis of a good tantrum.

But I think it is more than that. The whole tenor of the book, and of LoPucki’s continued very public lobbying and debating after the book’s publication, strikes me as much more calculating than a mere temper tantrum. I think he does care passionately about the operation of the bankruptcy system, and it became clear to him that something drastic had to be done to get people’s attention. Dry legal discussion about “forum shopping” is just not that sexy. But calling federal judges *corrupt* – now that is catchy. That will be noticed, as the fallout from his book plainly indicates. In short, sensationalizing a story often is a very effective means of putting an issue in the spotlight and possibly effecting change.

Examples of sensational exposés having a significant impact are legion. Perhaps the most famous in our country’s history is Harriett Beecher Stowe’s publication of *UNCLE TOM’S CABIN* in 1852 in reaction to the Fugitive Slave Act of 1850. That book, the best-selling book of the nineteenth century other than the Bible, played a major role in fomenting public sentiment in ways that led to the abolition of slavery in the United States. More modestly, Upton Sinclair’s publication of *THE JUNGLE*<sup>55</sup> in 1906 helped trigger reforms in the meat-packing industry. In current times, movies often play this role. As noted earlier, Michael Moore has assailed the Iraq War and the Bush Administration in classic muckraking fashion in *Fahrenheit 9/11*, and Morgan Spurlock took aim at McDonald’s and fast food in 2005’s *Super Size Me*. McDonald’s has reformed some of their practices in the wake of that movie.

Who is LoPucki’s target audience? First, of course, is Congress. Admittedly, successfully effecting venue reform is a long shot, given the enactment of a major bankruptcy reform bill this April that omitted any venue reform provisions. But you never know. LoPucki made many of the same criticisms he makes in his book in testimony before Congress. At least Senator Cornyn was

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<sup>54</sup> See sources cited *supra* notes 2 and 3.

<sup>55</sup> Upton Sinclair, *THE JUNGLE* (New York, Doubleday, Page & Company, 1906.).

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impressed, apparently, introducing the Fairness in Bankruptcy Litigation Act, S. 314, in February 2005. Perhaps if LoPucki can keep the waters stirred up enough that bill may eventually take flight. Who knows?

But even if Congress does not act, what about the nation's bankruptcy judges and attorneys as a target audience? LoPucki's strategy of shining the spotlight of exposure on those judges that he believes have sold out may have the effect of "shaming" those supposed offenders – *and* of deterring other bankruptcy judges from going down the same path, for fear of future public embarrassment and humiliation at LoPucki's hands. Forgive the analogy, but the principle is much like that of publishing the names of "johns" in the paper as a means of battling prostitution. For now, it is too early to tell if LoPucki's highly-publicized attack will have any effect on the behavior of the nation's bankruptcy judges.

An exposé is only valuable, though, if there is something to be exposed. Slavery was evil; the conditions in Chicago meat-packing plants were vile; McDonald's super size meals are ... well, I better pass on that one. Whether Michael Moore is right or not about the Bush Administration is, to put it mildly, a debated point. What about LoPucki's exposé? Is "corruption" an accurate assessment? Are the nation's bankruptcy judges selling out to the "case placers" in order to compete for the glory of handling big cases? And, in doing so, are they "destroying companies" and "costing people jobs," as LoPucki charges?

If LoPucki is right, then he effectively has announced to the world that the emperor has no clothes. Everyone knows it, but no one is willing to state it publicly. In essence, everyone has been willing to play along with the tacit conspiracy of silence. Not LoPucki. To use another metaphor, he has been bold enough to call attention to the fact that an elephant is in the room. Many people familiar with the world of high-stakes bankruptcy reorganization practice believe that his accusations have a strong ring of truth, while others, as detailed earlier, vehemently and angrily deny that he is correct. So – is the emperor in fact unclothed, or is the emperor fully clad? Is there an elephant lurking?

What is LoPucki's proof of his thesis? It turns on a few basic points. First is the historical fact that in the 1990s a substantial number of large reorganization cases were shopped into Delaware.<sup>56</sup> Next is the fact that a number of other bankruptcy courts subsequently adopted "Delaware rules" of operating procedures as well as substantive orders that would afford the parties virtually the same

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<sup>56</sup> LoPucki, *supra* note 1, at 16, 50, chapter 23, "The Rise of Delaware."

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benefits in their home court as they could get in Delaware.<sup>57</sup> Third, and related thereto, he points to the convergence of rulings on a number of critical issues in ways uniformly favorable to the “case placers.”<sup>58</sup> This discussion occupies the bulk of his “Corruption” chapter.<sup>59</sup> LoPucki posits that it is incredible to believe that it is by chance that such a convergence has occurred. And, once other courts started competing, the Delaware monopoly started breaking up. Next, he points to the high failure rate of cases filed in Delaware and New York, as evidence that the courts there are being more lax and willing to do what the case placers want.<sup>60</sup> Finally, he has interviewed many players involved in the process and has been told repeatedly that the dynamics of the “game” are as he reports.

So, how persuasive is LoPucki’s proof of court competition? And, to what extent should this be characterized as “corruption”? I believe that his assessment of the first round of the “Delaware shop” in the early 1990s, when Helen Balick was the only Delaware bankruptcy judge, is pretty accurate. The big advantages for “shoppers” were that (I) they knew what they were going to get, because they knew they were going to draw Judge Balick, and (ii) they liked what they were going to get, because many of her rulings were so favorable to them. The compelling attraction of Delaware can hardly be disputed when one sees that by 1996 Delaware had a virtual monopoly on big cases. The withdrawal of the reference in Delaware in 1997 is stark evidence of a systemic embarrassment.

After 1996, though, the evidence gets a bit murkier. I believe that there was indeed some “competition” going on, as LoPucki asserts, but would suggest that it was not as uniform or as monodimensional as he suggests. Certainly a number of local bars were trying to get “Delaware rules” in place, and had some success. And certainly over the next few years, a number of other courts entered orders that favored case placers. First, though, the motivation for many of these changes was not necessarily to shamelessly mimic Delaware just to get cases, but also because there was a widespread belief that Delaware had come up with, in effect, “a better way of building a mousetrap.” The view was widely held in the bankruptcy community that the Delaware approach was more efficient. So, to the extent there was a “race,” it was thought by many to be a race to the *top*, not in the other direction. That is why his 2001 study with Kalin was so shocking to so many.

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<sup>57</sup> *Id.* at 17, 255, chapter 5, “The Competition Goes National.”

<sup>58</sup> *Id.* at 139-40.

<sup>59</sup> *Id.*, chapter 6, “Corruption.”

<sup>60</sup> *Id.*, chapter 4, “Failure.”

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Second, there was not the degree of convergence he asserts. This was true as between districts and within districts. Not all judges entered orders favorable to the case placers. To use the example of critical vendor orders, some courts held that blanket payment of nonpriority unsecured prepetition claims was not authorized under the Bankruptcy Code.<sup>61</sup> Courts that did authorize such payments differed in the degree of proof required, the standards for approval, and the scope and extent of payment authorized. Also, different judges within the same judicial district took different views on the same issues. Case placers faced the problem of non-monolithic courts with multiple judges, and a random draw.

Furthermore, the motivation for many of the judges, even when they entered orders that LoPucki would describe as favorable to the case placers, was not necessarily just to compete. I believe that many if not most of these judges honestly believed that they were making a wise decision, necessary to the prudent administration of reorganization cases. Bankruptcy judges often believe that they “know best,” and utilize their equitable powers under § 105 to enter orders to facilitate reorganization, even if perhaps not squarely in line with the letter of the Code.<sup>62</sup> Again, to use critical vendor orders as an example, many judges believe that making such payments is just a practical business necessity to further the chances of an effective reorganization. I do not doubt that LoPucki is correct in identifying the force of competition as an exacerbating influence, but that is all.

In other ways I think motivations are more complex than the picture LoPucki paints. For cases that were filed in Delaware and in New York, I think the facts of perceived court expertise, experience with large cases, and sophistication are very relevant. Also, as Delaware became the forum of choice, an odd sort of attorney convenience developed, as firms opened Delaware offices, which then could service the big cases filed there. But I do again think that LoPucki is partially correct as well, in that the expectation of favorable decisions was a contributing factor as well.

Once large cases started being scattered around the country, the causal chain becomes much harder to track. The data set is just not large enough to make convincing proofs. Some cases were filed in home courts that were not “safe,” and others were shopped out of districts that had tried hard to be just like Delaware. The bottom line is that lots of factors contribute to any particular debtor’s choice of where to file.

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<sup>61</sup> See, e.g., *In re Equalnet Comm. Corp.*, 258 B.R. 368 (Bankr. S.D. Tex. 2001).

<sup>62</sup> See Charles J. Tabb, *Emergency Preferential Orders in Bankruptcy Reorganizations*, 65 AM. BANKR. L. J. 75 (1991), for a discussion of this phenomenon as it pertains to orders entered in the early days of a reorganization case..

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The evidence from LoPucki's failure data in some ways runs at cross-purposes with his overall argument. He attempts to show that Delaware and New York cases fail at a much higher rate than cases filed elsewhere. But he also posits that other courts had tried to mimic Delaware. Why would those courts do better in making feasibility predictions if they were trying to be just like Delaware?

At the end of the day, my assessment is this. Professor LoPucki is correct that there are competitive forces at work in the bankruptcy system, given the possibility of forum shopping. These forces, though, are but one of many at work in the very complex dynamic of the chapter 11 system. Furthermore, motivations of individual bankruptcy judges are mixed. The nation's bankruptcy judges and bankruptcy practice both are far from monolithic. Perhaps in some sense there is a tinge of "corruption," as LoPucki defines it, but I do not think it is nearly as universal or powerful as he describes. I think just as often bankruptcy judges decide the way that they do because they believe that they are "in the know" about what really is needed on a practical level in the real world of large chapter 11 practice, and decide accordingly. That may be *hubris*, but I am not sure it is *corruption*.

### **Is LoPucki's strategy effective?**

A fascinating question to ask, given the sensational rhetoric adopted by LoPucki, is whether that approach has been effective. Of course, to answer that question, one would have to know with some clarity what exactly he was hoping to accomplish. In the prior section I speculated to some extent on that issue. Preliminarily, it must be said that the ultimate answer to the query posed in this section cannot yet be known; with the book recently published, it is still premature to assess fully his impact. Only time will tell.

The first and most immediate effect of his book, and one as to which I would gauge him to have been a resounding success, is that he has gotten people talking. He has them stirred up. He got their attention. Venue choice, forum shopping, and court competition are all being discussed and debated. Conferences are being held, debates staged. Much of the discussion has been couched as an attack back against LoPucki, but if he has a thick enough skin and can take it, at least he has gotten the issue out in the spotlight.

Related to the first point, LoPucki's book is surely pushing others to pursue research and scholarship to find out exactly what is going on in Delaware and other bankruptcy courts. Even if their main goal is simply to prove LoPucki wrong, they may reveal or unearth new information. More knowledge about the facts can only be a good thing.

Another effect is that he has persuaded Senator Cornyn to introduce the Fairness in Bankruptcy Litigation Act, S. 314, in February 2005, which would effect the venue reforms LoPucki urges. Whether that bill will go anywhere is another question. There seems little doubt, though, that

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LoPucki's previous more tempered approach had no impact on congressional action. Senator Biden carried the day on behalf of his state. By bringing court competition into the glare of public debate, LoPucki has kept the issue alive. Sometimes the race goes to the swift, but other times it is those who persist who win out. If he is successful in exposing a systemic embarrassment, it may become more politically feasible to counter Biden and enact venue reform. If I were to make a prediction, I would be less sanguine, but you never know.

Even if no congressional venue amendments follow from LoPucki's attempted exposé, he may have an impact in affecting the practices and rulings issuing from the bankruptcy judges themselves. Bankruptcy judges may think twice before issuing a ruling that might be seen as favoring case placers, both from a fear of exposure as one who caters to the powerful interest groups and from a personal reassessment of their own motivations. We may well see published court rulings that run directly counter to the interests of case placers as a way for bankruptcy judges to signal that they in fact are *not* succumbing to competition.

Conversely, his book may have the effect of pushing those who are actively engaged in the sort of competition he lambasts to "go underground," as it were, and close ranks. We may see fewer published opinions that grant favors to case placers. There may be a net loss of transparency in the operation of the big reorganization cases.

A the end of the day, the one thing we know for sure is that LoPucki has stirred the pot. Where and how things will settle down can be hard to predict. It surely will be intriguing to watch.

### **Why would judges compete?**

Always present is the question: *why* would federal bankruptcy judges engage in the sort of unseemly competition and catering that LoPucki charges them with. They are, after all, getting the same salary for more work, seemingly not a great deal. He cites several reasons why judges might compete.<sup>63</sup>

First are the personal reasons. Presiding over a large reorganization gives a judge great power, status, and celebrity. That is, he believes they are motivated in part by the desire, if I may borrow from Marlon Brando's famous line in *On the Waterfront*, "to be somebody."<sup>64</sup> Furthermore, the big

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<sup>63</sup> Id. at 19-24.

<sup>64</sup> Brando's character, Terry Malloy tells his brother, played by Rod Steiger, "You don't understand. I could have had class. I could have been a contender. I could have been somebody, instead of (continued...)"

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cases are just a lot more fun, interesting, and exciting. If you were a bankruptcy judge, would you rather decide the fate of a large corporation worth hundreds of millions of dollars and the jobs of tens of thousands of employees, or preside over routine discharge hearings and an endless run of lift stay motions?

There seems little doubt that LoPucki has accurately captured the attitude of some bankruptcy judges. Not all, to be sure, and he frankly admits as much. But with the possibility of forum shopping, he argues, it does not matter: if only a few judges will cater to the case placers, then those judges will get the big cases.

Second is the incestuous nature of bankruptcy practice and the bankruptcy “ring.” The world of significant players in the bankruptcy world is small, and everybody knows everyone else. Often, those who ascend to bankruptcy judgeships are promoted from that inner ring, and they are both sympathetic to and owe a debt to their old friends. The local bankruptcy bar desperately wants the big cases to stay there. Those cases are hugely profitable for the lawyers. Judges who run off big cases by not playing the game incur the wrath of the local bar. They are pressured intensely to “get in the game.”

As to this argument, one problem is that many of the bankruptcy judges do not in fact hail from the bankruptcy ring. Many examples could be given. To name just one, Eugene Wedoff, the Chicago bankruptcy judge who has been presiding over the United Airlines bankruptcy, was a bankruptcy outsider when he ascended to the bankruptcy bench.

A related motivation for bankruptcy judges, LoPucki says, is the desire to keep their job. Bankruptcy judges are only appointed for 14-year terms. The concern LoPucki raises is that non-competing judges who thereby scare off big cases and incur the ire of the local bar will get panned in performance reviews and run a serious risk of not being reappointed. In short, they could lose their job if they don’t compete.

Here a problem with his argument is that the data do not support the speculation. A very small percentage of bankruptcy judges overall are denied reappointment if they seek it. Nor is LoPucki able to point to persuasive case studies where “toxic” judges paid the price for their toxicity with their job. On the flip side, there are plenty of bankruptcy judges who have not played along and who have been reappointed.

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<sup>64</sup>(...continued)  
a bum -- which is what I am.”

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The other side of the job sword is the opportunity or “carrot” side. Bankruptcy judges who compete and thus are allowed to play in the fast track of big cases are positioned nicely to be recruited into extremely lucrative positions with major law firms. But here again, there is no hard evidence of actual judges who issued rulings favorable to case placers and who then capitalized by taking a job with a big bankruptcy firm. And while some judges surely have resigned from the bench and gone into private practice, nothing suggests any causal linkage between “favorable” rulings and the subsequent job.

### **What’s the harm?**

Professor LoPucki posits that “the judges’ abdications destroyed companies, cost people jobs, dissipated value, reshuffled entitlements, degraded the system, and, inevitably, will erode public faith in the bankruptcy courts.”<sup>65</sup> He despairs of the “destruction of lives and dreams, “ and asserts that “Such destructions did occur as a result of the bankruptcy court competition.”<sup>66</sup> Examples he gives include the loss of pensions by Enron employees, and the loss of health care coverage by disabled Polaroid employees.

The problem with this line of argument is that proving a counter-factual is difficult, if not impossible, and linking up the causal relationship is not so tidy. Who knows, maybe he is right. Maybe if Judge Gonzalez had appointed a trustee right away in Enron (the failure of which is what LoPucki seems to feel is one of the most glaring instances of judicial nonfeasance in recent bankruptcy annals), then employees would not have lost their entire pensions. But is that right? Wasn’t the water pretty much over the dam by that point? The company was in financial tatters by the time it filed bankruptcy in the first place. Would it really have enabled Enron employees to save their pensions if Judge Gonzalez had just appointed a trustee?

Or consider his incessant fixation on the evils of the laxity with which Delaware and New York judges implement the feasibility requirement, leading, he claims, to a much higher failure rate than in other jurisdictions. Perhaps if a more stringent review had been made on the issue of feasibility, fewer of those cases would have been confirmed. But then the case still would be a failure and the company still would be “destroyed.” That is, the cause of the failure more likely is the underlying economics of the company’s situation, not the lax feasibility assessment. It seems unlikely that a company that could have been successfully reorganized turned into a failure instead simply because of poor judicial superintendence. If I am wrong, then at least a subset of the case placers are acting

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<sup>65</sup> LoPucki, *supra* note 21.

<sup>66</sup> LoPucki, *supra* note 1, at 257.

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directly contrary to their own economic interests, which is difficult to explain.

If his general claims about competition itself being the destroyer of companies and jobs are hard to sustain, his charges about lost value and reallocation of value ring more true. If a company is not viable, then confirming a case and letting the company fail later is wasteful; an immediate liquidation would preserve more value. So too, most of the sorts of orders he complains of in his “Corruption” chapter do directly line the pockets of those with leverage – management who get lucrative retention bonuses, critical vendors who get their claims paid in full, attorneys who get paid exorbitant professional fees. And they do this pocket-lining at the expense of other parties in interest who lack the same sort of leverage in the case. Furthermore, to the extent that these parties obtain excessive compensation, that represents a net loss in value for all. At the extremes, it could even make a difference in the viability of a reorganization, even though, as noted, such is hard to prove.

Furthermore, a real harm of a more intangible nature is the loss of participatory power in the processing of the chapter 11 case. Legal scholars and jurists have long emphasized the significance and independent value of the right to participate and be heard in judicial matters directly affecting a party’s interests. To the extent that powerful parties “capture” the chapter 11 process, many others are effectively disenfranchised. Their dignity interest is impaired.

The end result may be a degradation of the entire reorganization system, and an erosion of public trust and confidence in the fairness of the operation of the system. There is a real harm when litigants lose faith in the integrity of a judicial process.

Few things are entirely one-sided, however, and even if there are real costs to forum shopping, one must ask whether there are countervailing benefits that are sufficient to outweigh the costs. The possible benefits of allowing the Delaware option has of course been heavily debated in the literature.<sup>67</sup> Advocates argue that the Delaware judges have developed a special expertise in handling mega-cases, and thus can move the cases along more quickly, efficiently, predictably, and competently. The only problem is that, as LoPucki has shown, the facts do not seem to bear out that Delaware reorganizations are significantly faster, cheaper, or more successful; indeed, if anything, the opposite may be true. But this is a fruitful area for further research. These fundamental facts really need to be determined with some degree of certainty before we can evaluate fully the worth of LoPucki’s claims.

### **What (if anything) can be done?**

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<sup>67</sup> See *supra* notes 2-4.

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Assuming that LoPucki is at least to some extent correct in stating that competition has corrupted the reorganization process and that real harm has occurred, without sufficient counterbalancing benefits, the natural follow-up question is, what, if anything, can be done? In this section I turn from eye poking to ruminate on solutions to the forum shopping problem and the court competition, to the extent it does in fact exist.

#### *Limit Venue Choice*

The most obvious solution, of course, is to limit venue choice. Make companies file at the site of their headquarters or principal place of business. Go back to the pre-1978 world. In addition, the affiliate “hook” would need to be eliminated. While some manipulation would still be possible by moving headquarters to a favored forum, that is much harder to do, and is likely to happen considerably less often. With the opportunity to shop largely eliminated, the point of competing falls by the wayside. There would be little to compete for. The only problem – and it is a big one – is that Congress seems unwilling to make that move.

#### *Congress Regulate Questionable Practices*

An entirely different sort of solution would be for Congress to enact rules restricting and regulating specific disfavored practices. In Chapter 6 LoPucki complains of a number of different types of orders favorable to case placers that he argues have flourished and become dominant due to competition. Perhaps Congress could simply enact statutes that limit or ban such orders. The room for the exercise of bankruptcy judicial discretion is limited; a statute on point would control, and the judge could not enter an order that contradicted a statute. If he did, that order would be subject to reversal on appeal. Thus, for example, if Congress passed a law that provided that prepetition unsecured creditors could not be paid on their prepetition claims except pursuant to the terms of a confirmed plan, and had to be paid the same percentage as other members of their class, then critical vendor orders would be plainly illegal.<sup>68</sup> And Congress has in fact done just this on some matters in the 2005 BAPCPA. For example, in that Act Congress imposed strict limits on executive compensation agreements.<sup>69</sup> The abuse of approving wildly lucrative management retention packages thus is now much more difficult to do than when LoPucki wrote the book.

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<sup>68</sup> Yes, I have argued that there is such a statute – the Bankruptcy Code. Tabb, *supra* note 62. Occasionally a court, like the District Court and the Seventh Circuit in *Kmart*, generally agree with my position. But of course other courts believe that the Code does not specifically prohibit such orders. What I am suggesting in the text is a very specific prohibitory statute that leaves no room for doubt as to its purpose and effect.

<sup>69</sup> 11 U.S.C. § 503©.

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This solution is at best only partial, though. First, not every abuse is readily amenable to statutory regulation. Second, it is almost impossible to eradicate all vestiges of judicial discretion, and probably unwise to do so. It would take an exceedingly detailed statute to even come close to accomplishing such a result, and the risks then are, first, that Congress may not be able to foresee all eventualities and thus may do more harm than good; second, the more specific a statute is, the easier it becomes for a judge to skirt it by enacting a *slightly* different order; and third, it can be quite difficult to police whether a bankruptcy court is complying with the letter and spirit of the statute. The whole feasibility and recidivism story makes this point: courts already are required to pass on the feasibility of a plan, but LoPucki's work has cast serious doubt on how well, or how seriously, every court is carrying out that statutory mandate.

The foregoing suggests the most basic problem with trying to regulate by statute all the forms of abusive orders and practices that flow from a corrupted competition, which is that the "bad guys" can always think up some new practice that gives them an untoward advantage. Unless Congress is prescient and omniscient, which is doubtful, any statutes enacted will only bar extant bad practices. Once a statute is passed and a clever new abusive scheme is concocted, then a new statute would have to be passed. And then yet another scheme would be created, and so on.

#### *Limit and Normalize Professional Fees*

A related means of combating the ill effects of competition is to limit professional fees and to normalize them across the country. One of the big bargaining chips in the court competition game is who will give large fees, as requested and without excessive hassle, to attorneys and other professionals. Since the attorneys play a major role as case placers, it is directly linked to their own self-interest to land in a fee-friendly court. Congress could counter this incentive by imposing fee caps of some sort, as well as by imposing greater uniformity in fees allowed across the country. If attorneys knew that by statute they could not do better on fees in Delaware than in the debtor's real home court, that basis for shopping would fall away.

In addition to moving to national uniformity in fees, Congress might consider imposing stricter limits on fee allowances. As I proposed in a previous article:<sup>70</sup>

One means of reducing costs that has been explored in great detail is cutting down on the allowance of professional fees. ...

There is no question that large attorneys' fees create problems, both as a matter of public

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<sup>70</sup> Charles J. Tabb, *The Future of Chapter 11*, 44 S.C.L. REV. 791, 842-45 (1993).

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perception about the integrity of the bankruptcy system and as a burden on the reorganization case itself. ...

I am not confident that adopting more particularized guidelines for fees will accomplish much good. Depending on how the guidelines are interpreted, that approach might result in only a very modest nibbling away at fees allowed -- and at considerable expense in terms of judicial time and effort ...

Two things might make a difference. One would be for Congress to retreat from its basic position rejecting the principle of economy that prevailed under the Act. The other would be for courts to ... shake the "time is money" mentality and look at what is left in the estate, and what the lawyers did to bring that about ....

If lawyers knew that they would ultimately be answerable (in terms of their fees allowed) for the value of the estate, and that their recovery would be based on a percentage of the estate, several positive things might happen . If the case did not look promising, lawyers would not be inclined to pour a lot of time into that case in a probably vain attempt to reorganize. This could lead to quicker termination of doubtful cases. Furthermore, even more promising cases might be concluded more quickly, with less delay in negotiations. The lawyers would know that they would not necessarily be compensated for every hour spent, and thus would have no reason to churn hours. The moral hazard inherent in a pay-by-the-hour system would largely be obviated.

The counterargument is that all that would be accomplished by restricting attorneys' fees is that qualified lawyers would shun the bankruptcy arena and move to more profitable areas of practice. This in turn would hamper the smooth operation of the complex bankruptcy system. Admittedly, there is at least some truth in this line of argument. But, it must be balanced against the inequities prevalent under the currently prevailing system

Limiting and regulating professional fees is not necessarily a congressional pipe dream. It is politically palatable to pick on lawyers. Maybe the best thing for bankruptcy reorganization practice would be for it to cease being so incredibly lucrative for attorneys.

#### *Resurrect Mandatory Appointment of a Trustee*

Another possible reform that might provide a serious counter to forum shopping and the competition game is to require the mandatory appointment of a trustee, returning to the old Chapter X system. Now, though, there would not be the old chapter XI dodge (which did not mandate a trustee) available. If a mandatory trustee statute were passed, if a debtor wanted reorganization

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relief, chapter 11 – with its new mandatory trustee requirement – would be the only game in town. This mandatory appointment rule could be limited to debtors over a certain defined size, measured either by total debt or total assets, or of a certain status, such as a publicly traded company.

If a trustee were always appointed, and if it was known in advance that such an appointment was inevitable, many of the choice benefits provided to insiders as fruits of in the competition described by LoPucki would be eliminated at one stroke. The independent trustee would not have any incentive to seek those benefits on behalf of various parties, and indeed would be charged with a statutory responsibility to ferret out and block unequal and unfair treatment. Nor would those parties have any means of leverage by which to procure those benefits.

I previously have suggested that Congress should at least consider returning to the mandatory trustee appointment rule:<sup>71</sup>

Another reform idea that has been floated is to appoint either a trustee or an examiner in every case. ... [In the 1978 reform,] automatic appointment of a trustee was viewed instead as imposing serious costs. The primary costs contemplated were (1) the direct expense of an independent trustee and (2) the indirect expense stemming from the displacement of existing management and the need for the new trustee to familiarize himself with the debtor's business. A further negative consequence of the mandatory-trustee rule was the fact that debtors would mightily resist filing under Chapter X, here they would be replaced. ...

Interestingly, the determination to ditch the Chapter X approach was not the product of an overwhelming consensus. Indeed, the result reached in the 1978 Code in section 1104 was arrived at almost grudgingly, after several modest interim steps. ...

The 1978 blueprint has not been followed. Under the Code, trustees are almost never appointed. Although section 1104(a) is not a dead letter, it is not far from it. Courts announce and apply a very strong presumption against the appointment of a trustee. The norm is that the debtor continues in possession. This, I submit, is a perversion of what virtually everyone involved in the 1970s reforms intended. Even the mandatory-examiner provision is routinely ignored by courts. It may be that the pendulum has swung too far. The question today is whether to swing it back, and if so, how far.

... [T]here is no doubt that Chapter 11 often is used for somewhat questionable reasons.

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<sup>71</sup> *Id.* at 854-61.

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How questionable depends in part on one's political as well as business philosophy, but most observers concede that many debtors do push Chapter 11 to the limits. It is a fair suggestion that such strategic usage of Chapter 11 would be reduced, at least somewhat, if the debtor's management believed that they would be displaced, or even that they plausibly might be displaced. I believe that the top management of most companies that file for Chapter 11 do not believe that they will be replaced by a trustee. If they did think that would happen, they would perhaps be more reluctant to use Chapter 11.

Critics of the mandatory trustee approach would retort that that is exactly the rub. Not only would the illicit Chapter 11 cases be deterred, but so too would proper candidates for relief. To borrow an old maxim, it would be like "throwing the baby out with the bathwater." A mandatory system thus would "over deter" filings. But, a discretionary system, experience shows, underdeters.

There are other possible reasons why a mandatory trustee might prove beneficial. One would be to speed up the reorganization process. ... An independent trustee would not have a vested interest in delaying the plan to cut a better deal for himself.

Perhaps just as importantly, a disinterested trustee probably could be more objective about the feasibility of the debtor's chances of successfully reorganizing. The current high failure rate of Chapter 11 cases suggests strongly that far too many hopeless debtors give Chapter 11 a whirl. Time and money are lost before these doomed companies are eventually liquidated and put out of their misery. An independent trustee would not have the same predisposition as entrenched management always to try to reorganize the debtor. Such a person could make an objective assessment that many of these cases should be liquidated earlier rather than later. The cost savings derived from earlier termination of these cases very well could offset the cost outlay involved in hiring a trustee.

Those who worry that Chapter 11 permits unwarranted reallocations between different categories of claimants also should have reason to favor a trustee system. The only goal of a trustee should be to maximize the value of the estate. ...

Aside from the cost concern, critics of a mandatory trustee proposal are sure to object that too many debtors, including some who could be saved in the friendly confines of Chapter 11, would be deterred from filing. To some extent that may not be altogether bad; the Chapter 11 failure rate suggests that there are far more hopeless debtors entering Chapter 11 now than there are salvageable companies who foolishly bypass an attempt at Chapter 11. In other words, if a choice has to be made between overdetering and underdetering Chapter

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11 filings, we should adjust the law now in favor of overdetering, because the balance now runs so heavily the other way.

If the deterrence objection is given credence, however, I have a possible compromise to suggest which may in itself have some beneficent aspects. That suggestion is to postpone the trustee appointment for some defined period of time after the Chapter 11 filing. Thus, current management would have a chance to confirm a plan, but if they did not do so expeditiously, they would be replaced. ... [T]hese ideas would be intended (1) to provide the debtor with a real incentive to move quickly and (2) to formalize the system for assessing the feasibility of different options and allow for a termination of the case at an early stage. ...

In sum, then, I think the case can at least be made for taking a hard look at the mandatory trustee/examiner issue again. As I have suggested, many of the objections to such a system could be met by phasing in implementation in various ways and by giving the bankruptcy court a discretionary override power. The benefits, especially in terms of speeding cases up and bringing them to a quicker conclusion, could be quite significant.

#### *Threshold Feasibility Rule*

Another policing mechanism that might be considered that could help counter the negative effects of court competition would be to require a threshold finding of feasibility. If courts were to take this initial step seriously, then debtors and influential case placers again would not have a guarantee of receiving the expected benefits that LoPucki finds flow to them under the current regime. Also, perhaps the high recidivism rate could be lessened. Of course, the preceding “if” is a point for serious concern; if courts have indeed been captured to the degree LoPucki reports, there is little reason to think that they would do anything other than routinely find in favor of threshold feasibility. If so, it might be necessary to modify the following proposal I made to give more decision-making authority to an independent court or administrative body, or to permit immediate appeal of a bankruptcy court decision to the district court on a *de novo* basis. My original idea follows:<sup>72</sup>

Another reform that has been suggested is to require the court to make a threshold finding that the Chapter 11 case is feasible. The projected benefit would be that hopeless cases could be exposed early on and would not be dragged out for extended periods of time. The dismal overall success rate of Chapter 11 cases suggests that a veritable army of candidates for early dismissal exist.

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*Id.* at 835-37.

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The Bankruptcy Code presently permits this form of relief, except that a hearing on feasibility is permissive rather than mandatory. ...

... Many bankruptcy judges have a strong inclination to give the reorganization a try. Again, then, we are back in the realm of the bankruptcy court exercising its discretion in a way that frustrates the operation of the Chapter 11 system. One could argue that forcing the bankruptcy court to make an express feasibility finding will only add time and expense to the Chapter 11 case, without changing the results at all; the court still will routinely let cases proceed.

Yet, maybe we should not be so pessimistic. Judges generally view section 1112 as an extreme remedy, to be utilized only in extraordinary cases. If Congress were to enact a separate provision mandating a feasibility finding and make clear that the court's duty was to make an honest finding, it is possible that bankruptcy judges would honor the congressional directive and dismiss more cases. ...

The feasibility determination would be more substantial if the United States Trustee were required to make a formal recommendation to the court on the issue. ...

The concern about an independent recommendation is, of course, the time and cost of the investigation that would be necessary. The staffs of the U.S. Trustee offices probably are not adequate at this point to take on such a task. An alternative possibility would be to farm out the job. The court could appoint an investigator (examiner?) in each Chapter 11 case to study the debtor and make a formal recommendation on feasibility. This would of course significantly increase costs. The question would be whether the costs expended on the examiner would be outweighed by the savings from the mercy killings of terminal cases.

### *Court System Changes*

Finally, the corrosive force of court competition as depicted by Professor LoPucki could be ameliorated substantially by making some changes in the structure of our court system. In this section I offer a few tentative ideas. These may offer some benefits, but surely have correlative costs as well. I hope to prod further discussion and debate about some of these proposals. In making them I recognize that some are more unlikely to ever see the light of day than others. I have invited myself to think "outside the box," and so while some of these notions may seem a bit fantastic at first blush, I put them forward as a way of promoting broad-ranging dialogue about how we can best improve the bankruptcy court system. I believe that such is the principal goal of Professor LoPucki, and I am a fellow traveler on that road.

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Idea one: allow (mandate?) immediate and ready appealability of decisions on venue transfer (especially those denying such a motion) to Article III courts. The pressures of court competition that LoPucki describes primarily affect the bankruptcy judges. Article III judges, who have life tenure and who hear a broad range of cases, are much more immune to those pressures. Review should be *de novo*. If case placers knew in advance that their venue choice could be overturned by a truly independent Article III judge, their initial decision might be affected. A further benefit of such an appeal is that it might add an imprimatur of legitimacy to decisions not to transfer venue.

Idea two: move initial venue transfer decisions to some decision-maker other than the court where the case was filed. This idea is obviously a close cousin of the first idea, but moves it up one step in the process, by vesting the original decision on a venue transfer motion in an independent body. That body could be part of the Executive branch (an arm of the United States trustee's office?), or even a special court vested with this responsibility. Benefits of moving the initial decision are that it saves a step, and thus time and money; eliminates any impetus for deference by a reviewing court that might occur under idea one; and offers further prospect for promoting the appearance of legitimacy and fairness. If venue was approved by the independent "venue board" or the "venue court," it might carry greater weight in the minds of parties and the public. Also, case placers would be further disadvantaged in being able to exercise effective leverage.

Idea three: make bankruptcy judges Article III judges. This grand old idea, which of course has many other reasons to recommend it (might I mention jurisdiction as one?), would have the beneficent effect of insulating "bankruptcy" judges more from political pressures. Indeed, as an aside I would note that a colleague of mine has argued convincingly that the Constitution probably *requires* Article III status for judges exercising general jurisdiction over bankruptcy cases.<sup>73</sup> Furthermore, if bankruptcy judgeships were given Article III status, the desirability of those positions in the legal world at large would go up dramatically, and the chances of the bankruptcy ring to engineer the elevation of one of their own, who would be beholden to his old cronies, would drop precipitously. This is such a good idea on so many fronts that it is unlikely to ever happen.

Idea four: eliminate the specialized bankruptcy courts. The problem of court competition stems largely from the capture of specialized courts, and the ability of litigants to shop between them. Federal district judges who hear a wide range of matters and who enjoy Article III status would be much less susceptible to this sort of capture. Indeed, the fact that the Delaware District Court withdrew the reference in 1997 at the peak of the public embarrassment over the doings in the

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<sup>73</sup> James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004).

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Delaware bankruptcy court is evidence of this fact. This idea effectively would withdraw the reference everywhere.

Idea five: establish a super-specialized “reorganization court” (or series of regional courts) that would have exclusive jurisdiction to hear mega-cases. LoPucki also suggests something similar to this idea.<sup>74</sup> Defining which debtors would fall within the jurisdiction of this new specialized court would require some line-drawing, whether done by asset values, total debts, status as a public company, or whatever, but any plausible line drawn could readily sweep within its ambit the vast majority of cases where court competition is a significant problem. The benefits of taking this step are twofold. First, it would eliminate the choice of forums, and thus cut off competition at the roots. Second, it would allow those courts to develop special expertise in handling large cases, which has often been trumpeted as one of the big advantages of Delaware.

### Conclusion

I thoroughly enjoyed reading Lynn LoPucki’s book *COURTING FAILURE*. Of course, he was not picking on *me*, so it made my reading a lot more comfortable than for many who play in the high-stakes arena of chapter 11 mega-cases, involving billions of dollars and tens of thousands of employees. The issues that LoPucki brings to the table are of significant public interest. Fundamental questions about the fairness and legitimacy of our court system are at stake. As discussed in this article, he has chosen the path of a “muckraker,” repackaging much of his prior scholarly work on the issues of venue choice and forum shopping in a more sensational form. He has flatly accused many of the nation’s bankruptcy judges of “corruption,” and has repeated the charge when challenged. I describe his approach as akin to poking people in the eye. As usually occurs when people get poked in the eye, many have reacted angrily. I hope that the end result of his eye poking is to bring about beneficial changes to the bankruptcy court system. Professor LoPucki puts on the table fundamental issues about the nature and legitimacy of our bankruptcy reorganization system. We cannot ignore these questions. He has done a service in forcing us to confront them.

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<sup>74</sup> LoPucki, *supra* note 1, at 253.