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Comments

Robert D. Martin
United States Bankruptcy Court, Western District of Wisconsin

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HON. ROBERT D. MARTIN†

We are assembled in large part because we are friends and admirers of Professor LoPucki.

I assume that my place on this august panel is due to my unusual occupation. So, I will speak from the point of view that it affords me. I hope I will be excused for sounding a little defensive.

I have been a bankruptcy judge for twenty-seven years and have known some three hundred bankruptcy judges well enough to believe that I have some knowledge of their personality and character. There have probably been another two- to three-hundred bankruptcy judges during that time whom I did not know as well. Of all the judges I have known, some—three or four—were corrupt. They were corrupt because they accepted bribes or kickbacks in exchange for the appointment of particular trustees and appraisers, or for otherwise skewing the outcome in cases before them. Each of those corrupt judges was either denied reappointment or removed from office. I have also known the judges identified specifically or referred to generally in Professor

† Chief Judge, United States Bankruptcy Court, Western District of Wisconsin.

LoPucki's book,[1] and I have known them well enough to form an opinion as to their personality and character. I do not believe any of them to be or to have been corrupt.

Nor are they venal. Assigning venal motives to the judges who have made decisions or adopted procedures which are at odds with the scheme set out in the Bankruptcy Code is to do so without any evidence. I have never known a judge to decide matters in favor of the debtor for the specific reasons that it will get her name in the *Wall Street Journal* or the *New York Times*, or that it will increase the probability of his reappointment, or more specifically, that it will earn her the opportunity to get a job with a high paying law firm like the one which she may have left to go on the bankruptcy bench. To suggest that those are the motives for bankruptcy judges' decisions[2] and to suggest it over and over again throughout the book is one of the weakest parts of Professor LoPucki's study. It is at best a bad guess as to what motivates judges to make decisions. It is in any case an unnecessary and vicious attack on people whose service is undertaken with dedication and sacrifice, and not for personal aggrandizement.

The second major area in which I take issue with Professor LoPucki's study is his willingness to place all the blame for the corrupting decisions on the bankruptcy judges.[3] Certainly he is correct that decisions have been made which are not well founded in law and which are beneficial to debtors or, as he calls them, "case placers." But to suggest that the cause of all these bad decisions is the judges, whether they are self-interested or not, fails to recognize the complexity of judicial decision-making. While different decisions might have slowed or even stopped some erosion of what LoPucki perceives to be the correct route for bankruptcy law to have taken, it is unfair to suggest that the judges made this up on their own. Responsibility should be borne by the lawyers who raise arguments without any valid legal support, who fail to accept settled law as settled, and who advocate on behalf of a client not based on the law

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

2. *See id.* at 20.

3. *See id.* at 24.

or the intention of the law, but upon the inability of opponents to afford to counter the aggressive thrust. What role do the lenders have who, rather than recognizing the contracts into which they entered and the rights they were given in terms of the existing law, seek advantages based solely on their economic power? And what of the vulture funds, claims traders, investment bankers, and turnaround managers who circle the debtors pre- and post-bankruptcy? The changes in the economic and professional landscape since 1979 have arisen for many reasons, one of the least of which is the judicial interpretation of the Bankruptcy Code.

To say that the bankruptcy judges could have stopped all of the abuses is like saying that the current tragedy in New Orleans is due to the failure of the levees. Certainly the bankruptcy judges represent—in some instances—the last clear chance to defend the scheme that Congress created. However, just as the levees broke only when there was a Category Five hurricane, the bankruptcy courts have demonstrated their weakness only in the face of an enormous onslaught. I agree with Professor LoPucki that the bankruptcy law now practiced in large Chapter 11 cases bears little relationship to the statutory text,[4] but to say that that is because the bankruptcy judges—for self-interested reasons—failed to protect the law[5] is to assign far too much blame to one of the most innocent, but highly stressed, components of the structure.

4. *See id.* at 139.

5. *See id.* at 20, 137.