September 27, 2021

CHAPTER 11'S DESCENT INTO LAWLESSNESS

Lynn M. LoPucki[*]

The bankruptcy courts that compete for big cases frequently ignore the Bankruptcy Code and Rules. This Article documents that lawlessness through a detailed examination of the court file in the Belk one-day Chapter 11 and a series of empirical studies.

Chapter 11's lawlessness reached a new extreme in Belk. Belk filed in Houston on the evening of February 23, 2021. The court confirmed the plan at ten o'clock the next morning, and the parties consummated the plan that same afternoon. Almost none of Chapter 11's procedural requirements were complied with. The court did not give the creditors notice of the disclosure statement or plan confirmation hearings until after those hearings were held. Belk filed no list of creditors' names and addresses, no schedules, no statement of financial affairs, and no monthly operating reports. No creditors' committee was appointed, no meeting of creditors was held, and none of the professionals filed fee applications. The ad hoc groups that negotiated the plan failed to file Rule 2019 disclosures. Because no schedules were filed, no proofs of claim were deemed filed. Only eighteen of Belk's ninety-thousand creditors filed proofs of claim, and Belk apparently just made distributions to whomever Belk considered worthy.

The procedural failures in Belk are just the tip of the iceberg. The competing courts are looking the other way on retention bonuses, refusing to appoint mandatory examiners, failing to monitor venue or transfer cases, granting every request to reject collective bargaining agreements, and providing debtors with critical-vendor slush funds.

I. COURT COMPETITION FOR BIG BANKRUPTCIES 7
II. BELK'S RESTRUCTURING: SUBSTANCE..11
A. Belk's Route to Failure..11
B. The Upside-Down Restructuring Plan 13
D. The Right-Side-Up Restructuring Plan..14
III. BELK'S RESTRUCTURING: PROCEDURE 16
A. Belk's Five-Stage Restructuring Process 17
1. The Choice of Lien Holder Representatives.............................17
2. The Negotiations...19
3. The Restructuring Support Agreement Solicitation..................20
4. The Prepackaged Plan Acceptance Solicitation........................21
5. The Bankruptcy Case 24
B. Pre-petition Notice 25
1. Notice of Disclosure Statement Hearing..................................25

[*] Security Pacific Bank Distinguished Professor of Law, UCLA School of Law. I thank Christopher G. Bradley, Daniel Bussel, Jared Ellias, Douglas Irion, Adam Levitin, Jonathan Lipson, Christopher Mirick, and Joseph Zujkowski for comments on earlier drafts and Weston James Barker and Douglas Irion for assistance with research.

2. Notice of Plan Confirmation Hearing 25
3. Notice Period Reduction 26
C. Bankruptcy Fee Control....................................*27*
D. Schedules and Claims *30*
E. Meetings of Creditors....................................*33*
F. Creditors' Committees....................................*35*
H. Independent Bankruptcy Directors *37*
G. Third-Party Releases....................................*39*
I. Inadequate Information *41*
IV. THE OVERVALUING OF PLAN ACCEPTANCE 42
A. Choice and the Situation. *42*
B. Restructuring's Effect on Other Stakeholders....................................*44*
V. OTHER ILLEGAL OR ABUSIVE PRACTICES....................................45
A. Manager Bonuses *46*
B. Examiners....................................*47*
C. Case Transfer *48*
D. Section 363 Sales *49*
E. Collective Bargaining Agreement Rejection *51*
F. Critical Vendor Orders....................................*52*
VI. CONCLUSIONS....................................53

On the evening of February 23, 2021 Belk, a Charlotte, North Carolina-based department-store chain with $3.7 billion in annual revenues, filed a Chapter 11 petition in the Houston division of the United States Bankruptcy Court for the Southern District of Texas. Belk had no grounds for Houston venue, but it did not need any. Houston was the hot new destination for big-bankruptcy forum shopping with just under a fifty-percent market share. The Houston court was actively seeking to attract big cases.[1]

At 8:00 a.m. the next morning, Bankruptcy Judge Marvin Isgur began the hearing on approval of Belk's 267-page Disclosure Statement and Prepackaged Plan of Reorganization. Near the end of the two-hour hearing, one of Belk's lawyers pointed out to the court that "emerging this afternoon will put Belk in a position to set a record for the quickest prepackaged case from filing to emergence . . . any Bankruptcy Court has seen." [2] A few minutes after 10:00 a.m., the court entered an order approving the disclosure statement and confirming Belk's plan.[3]

---

[1] Adam Levitin, Judge Shopping and the Corruption of Chapter 11, at 22-24 (manuscript 2021) (describing the Houston court's efforts to attract cases); Letter from Jonathan C. Lipson, Harold E. Kohn Professor of Law to United States House of Representatives Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law (July 28, 2021) (on file with the author) [hereinafter Lipson letter] ("[Excessive venue flexibility] has led to competition for high-profile cases among a small number of courts.").
[2] Transcript of First Day and Confirmation Hearing at 62, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 57. [hereinafter Confirmation Hearing Transcript].
[3] *Id.* at 66 (concluding the hearing at 10:08 with the statement that "The confirmation order will be entered . . . . I'm sure very shortly.").

The court did not stay its confirmation order. The parties consummated the plan that same afternoon. That is, they exchanged securities, money, and documents as required to implement the plan. They also established their reliance on consummation by trading and transacting with third parties. After reliance, the equitable mootness doctrine made meaningful appeal impossible.[4]

On the evening Belk filed, the United States trustee—a division of the Department of Justice—had filed an objection to confirmation.[5] The objection made the obvious point that a judicial decision finally determining the rights of Belk's 90,000 creditors before the court notified them of the proceeding violated due process.[6] The court responded by first irrevocably confirming the plan and then entering a "Due Process Preservation Order" giving parties in interest thirty-five days in which to object to the plan.[7]

The thirty-five-day objection period was illusory. Once the court entered the confirmation order, it could revoke the order "if and only if such order was procured by fraud."[8] If, during the 35-day period, an objector had proven Belk's Disclosure Statement inadequate, Belk's plan not feasible, or some other condition of confirmation lacking, the court lacked the power—legally or practically—to do anything about those objections. Even if they wanted to, the parties and the court could not unscramble the eggs.[9] Minor adjustments to satisfy complaining creditors aside, the Belk case was over upon plan consummation.

Belk's one-day Chapter 11 was the culmination of four decades of competition among the bankruptcy courts for big cases. A liberal venue law adopted in the 1970s, pushed to its limits by aggressive strategists, enables big companies to file bankruptcy in any court they choose.[10]

Rampant judge-shopping quickly led to competition among some bankruptcy courts to attract the big cases. Those cases offered prestige to the judges who attracted them, a billion-dollar-a-year restructuring industry to the jurisdiction that attracted them, and

[4] *In re* Pac. Lumber Co., 584 F.3d 229, 243 (5th Cir. 2009) (''[P]lan consummation may often be dispositive of the question of equitable mootness.").
[5] Objection of United States Trustee to Debtors' Emergency Scheduling Motion and Joint Prepackaged Plan of Reorganization at 7, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 44 [hereinafter U.S. Trustee Objection].
[6] *Reliable Elec. Co. v. Olson Const. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) ("[W]e hold that notwithstanding the language of section 1141, the discharge of a claim without reasonable notice of the confirmation hearing is violative of the fifth amendment to the United States Constitution. . . . Olson's claim cannot be bound to the Plan and, thus, it is not dischargeable").
[7] Due Process Preservation Order, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 62 [hereinafter Due Process Preservation Order] ("Any person or governmental unit alleging that it had inadequate due process notice and opportunity to object to the Plan or Confirmation order may file an objection to the Plan or Confirmation Order not later than March 31, 2021.").
[8] 11 U.S.C. §1144.
[9] *In re Castaic Partners II, LLC*, 823 F.3d 966, 968 (9th Cir. 2016) ("Equitable mootness concerns whether changes to the status quo following the order being appealed make it impractical or inequitable to 'unscramble the eggs.'").
[10] *Infra*, Part I.

prosperity to the bankruptcy lawyers in those jurisdictions.[11] The result was a long descent into lawlessness as the competing courts waived one procedural requirement after another in their effort to attract cases.[12]

Of the approximately two-hundred bankruptcy court panels in the United States[13] only five currently compete. But those five—Houston, Delaware, White Plains, Richmond, and New York—attract more than ninety percent of the big cases nationally.[14] They compete by favoring, in their practices and decisions, the parties who can bring them more cases. Those parties are the debtors' managers,[15] the debtors' attorneys, and the DIP lenders who finance the cases. For convenience, I refer to them as the "case placers."[16] To attract cases, the competing courts routinely bend and break the law in the case placers' favor.[17]

Belk, and a handful of other one-day Chapter 11s, have achieved a high degree of lawlessness. To complete the reorganization of a big company in a single day requires that the court violate many, if not most, of the statutes and rules governing Chapter 11 procedure. This Article identifies numerous violations in Belk through a detailed review of the court file and hearing transcripts. The Article also demonstrates the general lawlessness of the big-case Chapter 11 process as it currently operates.

Several leading bankruptcy scholars have recently sounded the alarm about the accelerating disintegration of big-case Chapter 11 practices. Professors Jared Ellias and Robert Stark observed that "clever debtors and their lawyers . . . have developed procedural strategies that effectively disable the formal machinery of creditor protection, including related doctrines like the law governing fraudulent transfers."[18] Professor David Skeel charges that "[t]wo of the most important developments in recent bankruptcy practice [restructuring support agreements and deathtraps] are intended to distort, and clearly do distort, the voting process."[19] Professor Lindsey Simon complains that "[o]ver the past decade, bankruptcy grifters . . . have commandeered a process designed to equitably address failures, and instead used it to impose a binding universal settlement on claimants."[20] Professors Jared

---

[11] LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 19-24 (2005) (describing the advantages).

[12] *Id.* at 137-81.

[13] Most districts are divided geographically into divisions. Each division has a panel consisting of one or more judges. Cases are filed in a division and nearly always assigned randomly among the panel judges if there are more than one. Forum shoppers choose among panels, so it is panels—not judges or districts—that compete for cases. To illustrate, a case filed in the Manhattan Division of the Southern District of New York Bankruptcy Court will be randomly assigned among the seven judges of the Manhattan panel. But a case filed in the White Plains Division of the Southern District of New York Bankruptcy Court will be assigned to Judge Drain, the only member of that panel. White Plains attracts more large public company bankruptcies than Manhattan.

[14] *See* Figure 1, *infra*.

[15] Nominally, the debtors' "managers" are the board of directors. They decide where to file. If the corporation is closely held, the shareholder may tell the directors' where to file. In that circumstance, the shareholder is the manager.

[16] Levitin, *supra* note 1, at 37 (manuscript 2021) (defining "case placers" as "debtor's counsel, but also the debtor and the DIP financier"); LOPUCKI, *supra* note 11, at 138-39 (explaining the term "case placers").

[17] *Infra*, Parts III and V.

[18] Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 Cal. L. Rev. 745, 751 (2020).

[19] David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366, 369 (2020).

[20] Lindsey Simon, Bankruptcy Grifters, 131 YALE L. J. – (2022).

Ellias, Ehud Kamar, and Kobi Kastiel report a sharp increase in the use of "independent bankruptcy directors" who "often seek to bypass the procedure Congress created . . . by claiming to replace the unsecured creditors' committee."[21] Several scholars have expressed alarm over DIP lenders' steadily increasing contractual control over the Chapter 11 process.[22]

None of those scholars seemed to notice, however, that each of the changes they documented favored the interests of the case placers over other parties[23] and could easily have been prevented by the bankruptcy judge presiding over the case if that judge were so inclined. Nor did the scholars make the connection between the changes and the force that drove them: the bankruptcy court competition for big cases. Ironically, all of the scholars proposed to rely on the bankruptcy judges to implement their proposals.[24]

What those leading scholars failed to realize is that as long as any court is willing to allow a practice, the other courts' refusals to allow it do not matter. The case placers will take their cases to the courts that allow the practice, thus insuring that the practice will continue.[25] So long as some courts continue to compete, other courts cannot fix any illegality or dysfunction that benefits the case placers.

Defenders of Chapter 11's increasing lawlessness argue that (1) courts have to violate the law to process cases efficiently, (2) no one is injured by the procedures employed, and (3) the affected creditors' acceptances of the plans proves the plans to be in the creditors' interests. Belk, for example, solicited and received acceptances from more than ninety-nine percent of the creditors who were impaired under its plan.

The short answers to these responses are first, that the bankrupt courts have no authority to ignore the law and no competency to decide what is efficient. Routine disregard for the law creates a gangster-like atmosphere in which the case placers not only appear to be, but actually are, above the law. Second, the acceptance of a Chapter 11 plan signals approval of the plan no more than turning over one's wallet signals approval of an armed

---

[21] Jared A. Ellias, Ehud Kamar, & Kobe Kastiel, The Rise of Bankruptcy Directors, Jul. 1, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3866669.
[22] *E.g.*, Kenneth Ayotte & Jared A. Ellias, Bankruptcy Process for Sale (2021) ("[O]ver the past three decades, DIP lenders have steadily increased their contractual control of Chapter 11."); Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 YALE J. ON REG. 651, 705 (2020) ("The distortive effects of roll-ups on plan negotiation make [the banned practice of] cross-collateralization seem mild.").
[23] Restructuring support agreements lock in the plan preferred by the debtor's managers. Those managers insert they deathtraps, third party releases, and channeling injunctions. The contracts by which DIP lenders take control of the cases are contracts negotiated by the debtors' managers and the DIP lenders—both of whom are case placers.
[24] Ellias & Stark, *supra* note 18 ("Fortunately, judges can help fix the problem with more rigorous application of existing legal doctrines."); Skeel, *supra* note 19, at 426 ("[T]he new distortive techniques should be policed rather than banned."); Ayotte & Ellias, *supra* note 22, at 56 ([J]udges should apply extra scrutiny to the debtor's proposals and consider whether they are truly in the best interests of the creditors as a whole."); Ellias, et al., *supra* note 21, at 39 ("”Judges should change how they weigh bankruptcy director opinions.").
[25] Levitin, *supra* note 1, at 18 ("If a judge fails to deliver . . . cases will flow to other courts.").

robbery. Creditors can only choose among the alternatives available to them in the particular situation.[26] In the competing courts, the case placers are in control and none of the creditors' alternatives are good. Third, Chapter 11's procedures are intended not just to satisfy impaired creditors, but to save companies and jobs for the benefit of all stakeholders. In Belk, for example, there were fewer than three hundred creditors entitled to vote on the plan but more than 90,000 creditors whose interests were at stake.[27]

The Houston court's most important task was to determine the feasibility of Belk's plan. The court ignored that task almost entirely.[28] When the Delaware court elbowed its way to dominance in the early 1990s, it too ignored plan feasibility. For Delaware, the result was a plan failure rate ten times that of other courts during the same five-year period,[29] leading to several unnecessary liquidations of large public companies.[30] Houston may be generating the same legacy.

The structure of the bankruptcy community has largely prevented recognition and condemnation of the competition. Bankruptcy practitioners cannot speak out because they or members of their firms must appear before the competing judges. To avoid conflict with their colleagues, bankruptcy judges have adopted a see-no-evil policy—a stilted denial of the possibility that any judge acts with improper motives.[31] Bankruptcy academics in significant numbers are only now starting to recognize and condemn the competition.[32]

Part I of this Article explains how a rule-drafting committee's miscalculation triggered the bankruptcy court competition. It describes the competition's evolution to date, ending with the Houston bankruptcy court's quick rise to dominance. Part II explains the substance of Belk's questionable debt restructuring and the alternative to it. Part III describes the array of illegal or abusive practices Belk employed to win approval of its plan. Part IV responds in more detail to the argument that creditors' votes in favor of plans prove the plans to be in the creditors' interests. Part V documents six additional illegal or abusive practices that are routine in big Chapter 11 cases.

Part VI concludes that one-day cases necessarily violate the Bankruptcy Code and Rules, and that big-case Chapter 11 practice has descended into lawlessness. It recommends that Congress require big companies to file their bankruptcies where the companies are actually located, thus making it impossible for competing courts to attract significant numbers of cases.

---

[26] *Infra* part IV.A.
[27] *Infra* part IV.B.
[28] *Infra* part IV.B.
[29] Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1939 (2002) ([F]irms emerging from Delaware reorganization were more than ten times as likely to refile (42%) during [the five-year period after confirmation] than were firms emerging from reorganization in Other Courts (4%) and more than twice as likely to refile as firms emerging from New York reorganization (19%).
[30] *E.g.*, Lynn M. LoPucki, *Delaware Bankruptcy: Failure in the Ascendency*, 73 U. CHI. L. REV. 1387 (2006) (table showing eight of ten large, public company refilers liquidated within 5.5 years of refiling).
[31] *E.g.*, NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases, Nov. 27, 2018, at 54 ("The NCBJ strongly disagrees with any suggestions by Professor LoPucki that any bankruptcy judges make rulings that are not justified by the facts and law")..
[32] *E.g.*, Levitin, *supra* note 1; Lipson letter, *supra* note 1.

I. Court Competition for Big Bankruptcies

The statute governing bankruptcy venue—28 U.S.C. §1408(a)—gives big companies a wide choice of options on where to file. They can file in the district

> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or
>
> (2) in which there is pending a [bankruptcy] case . . . concerning such person's affiliate . . .

The effect of this statute is to allow a big company that acts strategically to file virtually anywhere it pleases.[33] For example, Belk was eligible to file at its principal place of business in Charlotte, North Carolina[34] or at its domicile—its place of incorporation—in Delaware.[35] If Belk had wanted to file in White Plains, New York, where competing Judge Robert D. Drain is the only bankruptcy judge, it could have done so, even though neither Belk nor its subsidiaries had any connection to New York. Belk would have formed a New York corporation, and issued the stock to itself. That would have made the New York corporation Belk's affiliate.[36] The subsidiary would have guaranteed Belk's debt, immediately rendering it insolvent.[37] As a New York corporation, the affiliate would be eligible to file in the Southern District of New York and would do so. Belk could then file in that district because a case concerning Belk's affiliate was pending there.

Under the Southern District's local rule, Belk would have had to take an addition step to get its case assigned to Judge Drain. Westchester County would have to be the subsidiary's principal place of business in the Southern District.[38] To satisfy that requirement, the subsidiary would have rented the right to use an office in Westchester County. Because the office would be the subsidiary's *only* place of business in the Southern District, it would

---

[33] *E.g.*, Levitin, *supra* note 1, at 9-14 (providing details).

[34] Voluntary Petition for Non-Individuals Filing for Bankruptcy, at 1, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 1 [hereinafter Belk Petition] (stating Belk's principal place of business).

[35] Disclosure Statement Relating to the Joint Prepackaged Plan of Reorganization of Belk, Inc., and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, Exhibit A, 3, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 9 [hereinafter Disclosure Statement] ("'Belk' means Belk, Inc., a Delaware corporation."). *E.g., In re* Crosby Nat'l Golf Club, LLC, 534 B.R. 888, 890 (Bankr. N.D. Tex. 2015) ("In the case of a business entity, the state where it was organized is generally its domicile or residence.").

[36] See 11 U.S.C. § 101(2) (defining "affiliate").

[37] *In re* Patriot Coal Corp., 482 B.R. 718, 727 (Bankr. S.D.N.Y. 2012) ("Pursuant to an assumption agreement, effective [thirteen days earlier, PCX, Patriot's newly formed subsidiary] became a guarantor of Patriot's obligations under the Credit Facility.").

[38] Local Bankruptcy Rules for the Southern District of New York, Rule 1073-1 ("Where the principal place of business in the District of the debtor set forth on the petition is in . . . (ii) Rockland County or Westchester County, the Clerk shall assign the case to a Judge sitting in Westchester County.").

be the subsidiary's *principal* place of business in the Southern District.[39] Silly as this strategy may sound, it is how the Sackler family got Purdue Pharma—a Connecticut-based company—to Judge Drain.[40] Judge Drain has since engineered a highly controversial plan that releases the Sackler family—Purdue's case placers—from all liability for the family's role in the opioid crisis.[41]

Instead, Belk chose to file in the Houston bankruptcy court. In its petition, Belk claimed the right to file in the Southern District of Texas on the ground that a "bankruptcy case concerning debtor's affiliate . . . is pending in this district." Indeed, five Belk subsidiaries had filed in Houston, just minutes before Belk.[42] Four, like Belk, claimed affiliate venue. The first Belk entity to file was Belk Department Stores, LP (Belk Stores).[43] Belk Stores was the "venue hook"—the filing that established the group's right to file in Houston.[44]

Oddly, even Belk's venue hook had no apparent right to file in the Houston court.[45] Belk Stores checked the box on its sworn petition claiming that it "had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district."[46] But it apparently had none of the three. Belk Stores' domicile was in North Carolina.[47] On its petition, Belk Stores listed its "principal place of business" as in North Carolina.[48] Then it left blank the lines for stating the location of its principal assets "if different from principal place of business."[49] Nor is it likely Belk Stores' principal assets were actually in the Southern District of Texas. Belk had eighteen stores in Texas and none were in the Southern District. Belk's attorneys, Kirkland & Ellis L.P. (hereinafter Kirkland) probably didn't even bother to create a venue hook. Competing courts rarely enforce the venue rules.[50]

The committee that adopted these byzantine rules in 1974 knew that they would give big companies a choice among numerous bankruptcy courts. The committee members thought that debtors would use that freedom to place the cases of big debtors and their

---

[39] Jonathan Randles, *Companies Lease Offices in New York Suburb to Pick Bankruptcy Judge*, WALL ST. J., Aug. 13, 2020

[40] Adam J. Levitin, Purdue's Poison Pill: The Breakdown of Chapter 11s Checks and Balances, 100 Tex. L. Rev. --, at 70-73, Aug. 7, 2021, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3851339.

[41] *Id.*

[42] Case numbers are assigned sequentially. Belk's number shows it to be the fifth filed. Debtors' Emergency Motion for Entry of an Order Directing Joint Administration of Related Chapter 11 Cases 1-2, *In re Belk Department Stores, L.P.* (Bankr. S.D. Tex., No. 21-30625 (MI)), ECF No. 2

[43] Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Belk Department Stores, L.P.* (Bankr. S.D. Tex., No. 21-30625 (MI)), ECF No. 1 [hereinafter Belk Stores Petition].

[44] LoPucki, *supra* note 11, at 37 (describing the use and derivation of "venue hook").

[45] Levitin, *supra* note 1 at 57 ("In short, Belk had no venue basis whatsoever for filing in Houston.").

[46] Belk Stores Petition, *supra* note 43, at 3.

[47] Belk Department Stores LP, opencorporates, May 19, 2021 https://opencorporates.com/companies/us_nc/0653770 (showing Belk Department Stores LP to be a North Carolina domestic limited partnership); Belk Department Stores, LP, opencorporates, Jun. 2021, https://opencorporates.com/companies/us_tx/0800148208, (showing Belk Department Stores LP to be registered as a foreign limited partnership in Texas).

[48] Belk Stores Petition, *supra* note 36, at 1.

[49] *Id.*

[50] *Infra* part VC.

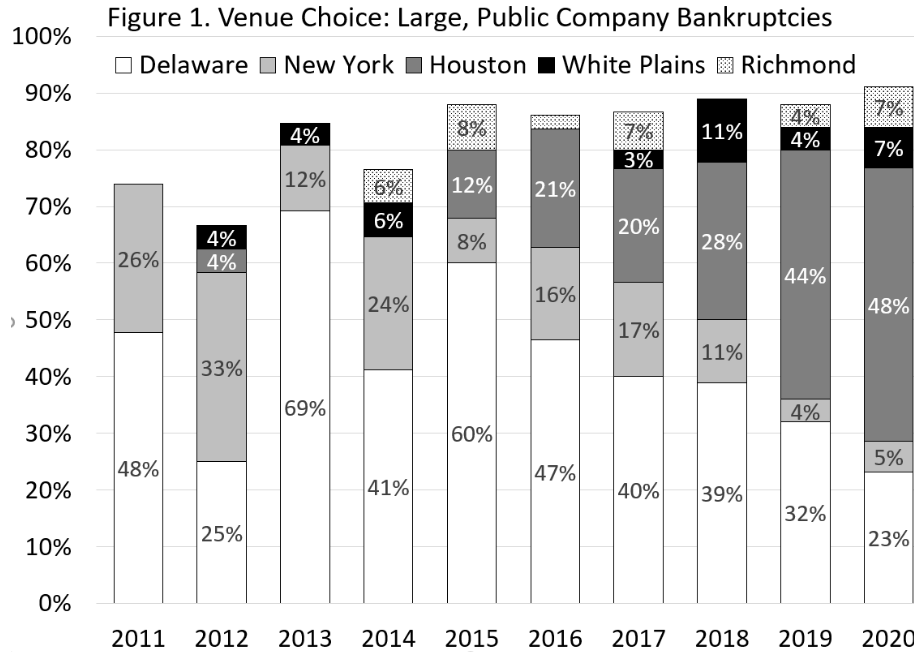
affiliates in the most appropriate court.[51] If debtors did not, the courts where the cases were filed would exercise their discretion under 28 U.S.C. §1412 to transfer the cases to the most appropriate courts "in the interests of justice and for the convenience of the parties."

The committee overestimated the system's integrity. Some judges wanted the big cases and were willing to ignore the transfer statute to keep them. The cases were glamorous and interesting. They also generated substantial fees for the judges' constituents—the local bankruptcy professionals.[52] The alternative was an embarrassing *outflow* of cases from the judge's district. From among the judges who wanted the cases, the debtors' lawyers sought out those whose policies and practices were most favorable to the case placers and delivered the cases to them.

In public company bankruptcy, forum shopping is generally defined as filing a case in a bankruptcy court other than the one serving the location of the debtors' principal executive offices.[53] By that measure, the forum shopping rate rose steadily from about twenty percent in the early 1980s to over ninety percent in recent years.[54] The forum shopping destinations shifted over time. In the 1980s, Judge Burton Lifland in the Southern District of New York was the primary destination.[55] Delaware attracted its first large public company bankruptcy from out of state in 1990. By 1996, Delaware was able to attract thirteen of the fifteen large, public company bankruptcies filed nationally (86%).[56]

Delaware and New York shared the limelight from the early 1990s until 2012, when the New York Court made an unforced error. Two years after her appointment to the New York court, Judge Shelly Chapman transferred the case of Patriot Coal, a $4 billion company that New York should have regarded as a prize, to Patriot's headquarters city, St. Louis, Missouri.[57] The transfer shocked the bankruptcy community. As shown in Figure 1, New York's market share began to fall, reaching just 5% in 2020. New York has attracted none of the seven large, public company bankruptcies filed in 2021 as of August 31.

[51] LoPucki, *supra* note 11, at 38.
[52] *Id*., at 19-24 (explaining the judges' motivations).
[53] *See, e.g*., Lynn M. LoPucki, Protocols for the UCLA-LoPucki Bankruptcy Research Database at 26, available at https://lopucki.law.ucla.edu/protocols.php (defining HeadCAtFiling).
[54] UCLA-LoPucki Bankruptcy Research Database, *supra* note 14 (One-click studies, Forum Shopping by year, first table of results).
[55] LoPucki, *supra* note 11, at 45-47.
[56] *Id.* at 49.
[57] *In re* Patriot Coal Corp., 482 B.R. 718 (Bankr. S.D.N.Y. 2012) (transferring the case).



In 2012, the year of the Patriot Coal transfer, two new courts—Houston and White Plains—attracted large, public company cases. In 2010, Judge Drain had moved from New York City to White Plains. That guaranteed shoppers that Judge Drain would preside over their cases if they rented a White Plains office and filed in the Southern District of New York. As shown in Figure 1, another two-judge court, Richmond, Virginia, got its first big case in 2014. The following year, Richmond got two.[58] In 2016, the Southern District of Texas began assigning "complex cases" to a panel consisting of just two judges, David R. Jones and Marvin S. Isgur.[59] That guaranteed shoppers that one of those two judges would preside over their cases if they filed in the Southern District of Texas. The three new courts quickly dominated the competition.

By 2020, the three new courts had 62% of the market, leaving Delaware and New York with a total of only 28%. Of the 292 large public company cases filed during the years from 2011 to 2021, Kirkland filed 64 (22%).[60] Of the 85 large public company cases filed in the three new courts during those years, Kirkland filed 39 (46%).[61] Kirkland made those new courts and Kirkland could break them. That positioned Kirkland to control them.

---

[58] *Supra* Figure 1.
[59] Houston Judge Assignment Study.xlsx (on file with the author).
[60] UCLA-LoPucki Bankruptcy Research Database, *supra* note 14. Choose One-variable studies. At Step 1 choose Debtor's attorneys. At Step 2 choose filing years 2011-2012, and Run study.
[61] *Id.*

II. BELK'S RESTRUCTURING: SUBSTANCE

A. Belk's Route to Failure

In December 2015, the Belk family sold Belk to Sycamore Partners Management, L.P. (Sycamore) for $3 billion in a leveraged buyout. Sycamore paid $658 million of the price in cash. Belk raised the rest of its own purchase price by selling bonds—the First Lien Term Loans (the First Liens) and the Second Lien Term Loans (the Second Liens)—to an undisclosed number of investors. Sycamore acquired all of Belk's shares, and Belk terminated its SEC registration on December 10, 2015.[62] Sycamore appointed Lisa Harper to be Belk's CEO. Before that appointment, Harper had run Hot Top, a small specialty chain, for Sycamore.[63]

The leveraged buyout had greatly increased Belk's interest expense, but financial projections in Belk's 2015 proxy statement showed revenues continuing to rise from fiscal year 2016 through 2020 in amounts sufficient to pay it.[64] Ten months after the sale, in September 2016, Belk returned $135 million of the purchase price to Sycamore in the form of a dividend. The dividend reduced Sycamore's investment from $658 million to $523 million.[65]

As shown in Figure 2, Belk's revenues declined after the leveraged buyout.[66] Belk, which had been profitable before the leverage buyout, suffered losses in each of the fiscal years 2016 to 2020. By 2019, Belk was having difficulty making payments. Belk's secured lenders gave Belk a series of extensions.[67] Nevertheless, "in fiscal year 2020 [which ended January 31, 2020], Belk generated approximately $3.7 billion in revenue."[68]

---

[62] Belk, Inc., Annual Report (Form 10-K), at (Dec. 10, 2015), available at https://www.sec.gov/Archives/edgar/data/1051771/000119312515400074/0001193125-15-400074-index.htm [hereinafter Belk 10-K].

[63] Keith A. Larsen, *From running Hot Topic to running Belk: Is Harper well-prepared?* CHARLOTTE OBSERVER, Jul. 5, 2016.

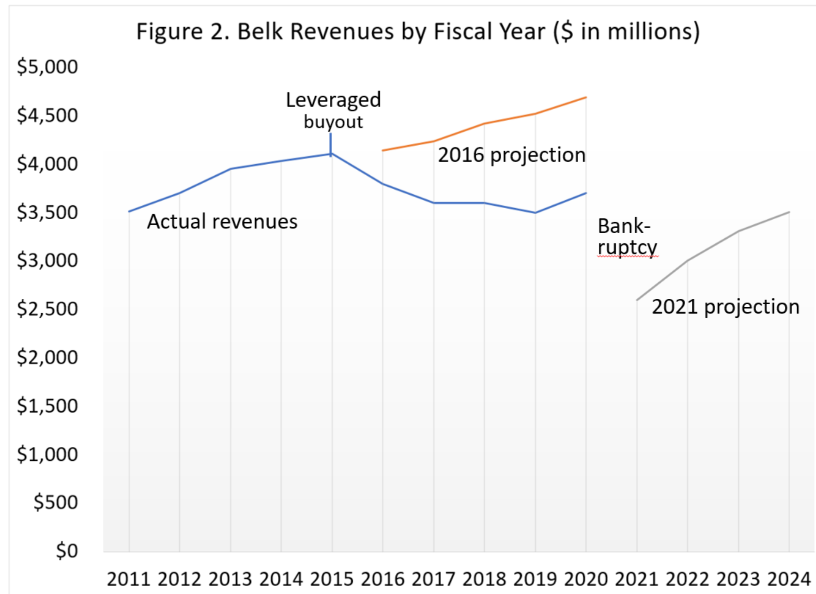
[64] Belk, Inc., Proxy Statement (Schedule 14A) at 43 (Oct. 2, 2015), available at https://www.sec.gov/Archives/edgar/data/1051771/000119312515335982/d74172ddefm14a.htm#toc.

[65] Declaration of William Langley, Chief Financial Officer of Belk, Inc., in Support of Chapter 11 Petitions and First Day Motions at 19, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 8 [hereinafter Langley Declaration].

[66] Email from Michael Oppenheim, Business Research and Collections Librarian, UCLA, to Linda Carr O'Connor, Director Scholarly Support and Research Assistant Program, UCLA School of Law (June 15, 2021 1:50 p.m. PST) (on file with the author) (screenshot from PrivCo showing Belk's revenues declining from $3.8 billion in 2016, to $3.6 billion in 2017, to $3.6 billion in 2018, to $3.5 billion in 2019).

[67] Disclosure Statement, *supra* note 35, at 2.

[68] Debtors' Emergency Application for Entry of an Order Authorizing the Employment and Retention of Prime Clerk LLC as Claims, Noticing, and Solicitation Agent at 3, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 37 [Prime Clerk Retention Application].



The Covid pandemic began in the early months of 2020. Belk closed all of its stores in March 2020 and slowly began reopening them in May 2020.[69] Foot-traffic and demand were reduced.[70] Belk later stated that "[w]hile COVID-19 is not the sole cause of Belk's current liquidity crisis, the pandemic has undoubtedly been a catalyst for Belk's declining liquidity position and its current inability to satisfy upcoming debt service obligations."[71]

Based on the "fair values" that funds investing in the First and Second Liens placed on those securities in their own filings with the SEC, Belk was deeply insolvent both before and after its February 23-24, 2021 bankruptcy. The First and Second Liens fell together in value from about eighty cents on the dollar in mid-2019 to between seventy and eighty cents on the dollar at the end of 2019.[72] Thus, Belk was insolvent, or nearly so, even before the pandemic. At the end of 2020, after the restructuring negotiations but before publication of the restructuring plan, the funds valued the First Liens at about 35 cents on the dollar and the Second Liens at about 14 cents on the dollar.[73]

[69] Disclosure Statement, *supra* note 35, at 2.
[70] *Id.*
[71] *Id.* at 23.
[72] Lien Holdings Study (on file with the author). The conclusions in this paragraph regarding valuations of the First and Second Liens are based on "fair values" reported by public company investment funds. Weston James Barker, my research assistant, discovered these values by searching for public reports by investment funds listed as class 4 or class 5 creditors in Affidavit of Service of Solicitation Materials at Exhibit G, 1-6 and Exhibit H, 1, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 43. The searches discovered hundreds of affiliates, some of whom held First of Second Liens in their portfolios and disclosed fair values in public filings. We found sixty-five valuations made by six groups of funds (City National Rochdale, FS KKR Capital, Guggenheim, Mainstay, and Nuveen). Lien Holdings Study (on file with the author).
[73] Lien Holdings Study, *supra* note 72.

B. The Upside-Down Restructuring Plan

The absolute priority rule applies to Chapter 11 plans. Creditors are entitled to a credible promise of payment in full under the plan as a condition of the shareholders being promised anything at all.[74] Secured creditors are entitled to retain their liens, in amounts equal to the full value of their collateral.[75] Belk's restructuring was "upside-down" in that the highest priority creditors—the First and Second Liens—contributed all the debt reduction, while the lowest priority creditors—the unsecured creditors—contributed none.

Table 1 shows the amounts Belk owed to each creditor class before the restructuring (Column 2), the reductions in those amounts through bankruptcy discharge (Column 3), the increases in those amounts as a result of new loans made to Belk (Column 4), the amounts Belk owed after the restructuring (Column 5), and the net reductions in debt achieved in the restructuring (Column 6). The Lien holders agreed to forgive $807.2 million of the debt owing to them, and some participated in making the $225 million loan.[76]

Table 1. The Upside-Down (Actual) Restructuring (in millions of dollars)

(1) Class and type of claims	(2) Prefiling debt	(3) Reduction	(4) New loans	(5) Debt after bankruptcy	(6) Net reduction
1 Secured Claims	$83.8			$83.8	
2 Bankruptcy priority claims	$14.8			0	
3 ABL Facility (secured)	$383.0			$383.0	
4 First Lien Term Loans	$999.4	$449.7	$225	$774.7	$224.7
5 Second Lien Term Loans	$550.0	$357.5		$192.5	$357.5
6 Unsecured creditors	$443.0			$443.0	
Total	$2,474.0	$807.2	$225	$1,877.0	$582.2

Sycamore, Belk's 88% shareholder immediately before bankruptcy, was the plan's primary beneficiary. Because Belk could not credibly promise its creditors full payment, Sycamore was entitled to nothing. Yet Sycamore retained 50.1% of Reorganized Belk's shares[77] and, with them, complete control of Reorganized Belk.

[74] 11 U.S.C. § 1129(a)(7), (b)(2)(B).
[75] 11 U.S.C. § 1129(a)(7), (b)(2)(A).
[76] The record is unclear as to the source of the new lending. *E.g.*, Confirmation Hearing Transcript, *supra* note 2, at 53 ("[W]e've got a host of parties putting up $225 million of new capital.").
[77] The remaining 49.9 percent were allocated 34.9% to the Second lienholders, Disclosure Statement, *supra* note 35, at second page 6, and 15% to the "New Money Investors." Id., at Exhibit B, 6.

Under the restructuring plan, the First Lien holders exchanged their First Liens for "Second Out First Liens"[78] in a principal amount equal to 55% of their First Liens.[79] A month after plan confirmation, the funds valued the Second Out First Liens at about 65% of their face amounts,[80] indicating that (1) Belk remained insolvent after the restructuring and (2) the First Lien holders, who voted overwhelmingly for the plan, did not believe they benefitted significantly from the plan's adoption.[81]

The restructuring reduced Belk's debt by $582.2 million. It did not reduce Belk's interest expense proportionately, because the $225 million in new loans carried a higher interest rate. That rate was LIBOR plus 7.5% with a LIBOR minimum of 1%.[82] Thus, Belk initially would be paying 8.5%, as compared with an average interest rate of about 4% to 5% on junk bonds at that time.[83] Belk's rate can go up, but not down. After bankruptcy, the funds valued the new loans at about one hundred cents on the dollar, indicating that the risk warranted the high interest rate.[84] Belk's heavy debt load emerging from Chapter 11 put Belk at high risk of a relapse.

D. The Right-Side-Up Restructuring Plan

Had Sycamore not been able to use one-day Chapter 11 to control Belk's restructuring, Belk might have adopted a plan that distributed Belk's value to those entitled to it, and that maximized Belk's chance of survival This section describes one example of such a plan.

Because Belk was insolvent, Sycamore had no right to share in the plan distribution. Belk could have cancelled Sycamore's shares, issued new shares, and distributed the new shares to Belk's unsecured creditors in satisfaction of their unsecured claims. The claims thus satisfied could have included the unsecured portions of the First and Second Liens. The First and Second Lien holders valued their collateral at $349.8 million and $77 million respectively.[85] To that extent, they were entitled to retain their liens. If the court agreed with those values, the resulting distributions to the Lien holders could have been as shown in Table 2.

[78] "Second Out First Liens" appears to be a euphemism to deflect from the fact that the First Liens had become second liens, subordinate to the $225 million in new loans.
[79] Disclosure Statement, *supra* note 35, at 6.
[80] Lien Holdings Study, *supra* note 72.
[81] The funds received securities with a face value of 55% of the amount owed and they valued them at 65% of their face value, which is 36% of the amount owed—about equal to the First Lien holders' 35% pre-bankruptcy valuation.
[82] Disclosure Statement, *supra* note 35, at 2 ("New FLFO Loans: LIBOR + 7.50%, paid at least quarterly in cash (with a 1.00% LIBOR floor, LIBOR may be one, two or three months)").
[83] Current Market Valuation, Junk Bond Yields, March 2021.
[84] Lien Holdings Study, *supra* note 72 (showing valuations of 99.26%, 100.51%, and 99.75%).
[85] By valuing their Liens at 35 cents on the dollar, the First Lien holders implicitly valued their collateral at no more than 35% of their lien obligations ($349.8 million). By valuing their Liens at 14 cents on the dollar, the Second Lien holders implicitly valued their collateral at no more than 14% of the lien obligations ($77 million).

Table 2. The Right-Side Up Restructuring (in millions of dollars)

(1) Class and type of claims	(2) Prefiling debt	(3) Reduction	(4) New loans	(5) Debt after bankruptcy
1 Secured Claims	$83.8			$83.8
2 Bankruptcy priority claims	$14.8			0
3 ABL Facility (secured)	$383.0			$383.0
4 First Liens, Secured portion	$349.8			$349.8
Unsecured portion	$649.6	$649.6		Shares
5 Second Lien, Secured portion	$77.0			77.0
Unsecured portion	$473.0	$473.0		Shares
6 Unsecured creditors	$344.1	$344.1		Shares
Administrative priority claims	$98.9			$98.9
Total	$2,474.0	$1,465.6	0	$993.6

Unsecured creditors who delivered goods to Belk in the 20-day period prior to filing would have qualified for an administrative expense priority.[86] Belk would have had to pay those priority claims in cash on the effective date of its plan.[87] The estimate of the administrative priority claims shown on Table 2 is twenty times Belk's average cost of goods sold per day as projected by Belk for fiscal year 2021.[88]

Under the Right-Side-Up plan, each class would have received its entitlement under the absolute priority rule. Belk would have shed 59% of its debt instead of 24% under the Upside-Down-Restructuring. Sycamore would have received nothing.

Under the plan shown in Table 2, Belk would have been more likely to survive. Belk would not have had to pay the $1.5 billion reduction, and interest would no longer have accrued on it. Belk's interest savings from the plan would have been about $117.2 million

[86] 11 U.S.C. §503(b)(9) provides that

> there shall be allowed administrative expenses . . . the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

[87] Under 11 U.S.C. §§507(a)(2) and 1129(a)(9)(A), those administrative expenses must be paid in cash on the effective date of the plan.

[88] Belk's cost of goods sold for the fiscal year 2021were estimated in Belk's projections at $1,713,000. Disclosure Statement, *supra* note 35, at ECF 252. Prorated over 365 days, that would be $98.9 million for 20 days. The actual amount so payable would have been lower because the case would have been filed in January, a relatively slow time of the year for retailers and some suppliers entitled to an administrative expense priority would not claim it.

each year.[89] Because Sycamore left Belk short of cash, Belk would probably have needed a DIP loan to complete the restructuring.

Right-side-up plans are not only possible, but common—even in competing courts. JC Penny, Nieman-Marcus, J Crew, and Ascena Retail were retailers in Bankruptcy at about the same time as Belk. The first three adopted right-side-up plans, cancelled their existing equity, issued new equity, and used it to reduce their debt through debt-for-equity exchanges.[90] The fourth, Ascena Retail, sold most of its business to Sycamore for $540 million.[91] Ironically, that sale closed on December 23, 2020, the same time Belk's board—whose members were all chosen by Sycamore—was enabling Sycamore to retain control of Belk without paying anything at all. Under a right-side-up plan, Belk's board could have sold control of Belk to Sycamore or someone else instead of giving it to Sycamore. The market for companies was hot. Deal values and volumes were increasing during the third and fourth quarters of 2020 and reached record levels in the first quarter of 2021.[92]

To enable Sycamore to remain Belk's owner, Belk saddled itself with debt Belk may not be able to pay.[93] That debt falls due in 2025. If Belk cannot refinance by then and returns to bankruptcy, Belk will probably be liquidated soon thereafter.[94]

Part III explains what prevented Belk's creditors from adopting a right-side-up restructuring plan. Belk's Sycamore-controlled managers employed a restructuring procedure designed to isolate the creditors from each other, deny them information, and prevent them from considering other plans.

III. BELK'S RESTRUCTURING: PROCEDURE

The Belk-Sycamore alliance employed a five-stage restructuring process to bind the Lien holders to Belk's plan. Even though that plan was not in the Lien holders' interests, it received their almost unanimous consent. Belk manufactured that consent by controlling the situations in which the Lien holders made their choices.

---

[89] My estimate assumes an average annual interest rate of 8%.

[90] *E.g.*, Proposed Disclosure Statement for Joint Prearranged Chapter 11 Plan of Reorganization of Chinos Holdings, Inc. and Its Affiliated Debtors (with Technical Changes) at 5-7, *In re Chinos Holdings, Inc.* (No. 20-32181 (KLP)), ECF No. 541; Disclosure Statement for the Debtors' First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code at Exhibit A 9, *In re Neiman Marcus Group Ltd. LLC* (Bankr. S.D. Tex., No. 20-32519 (DRJ)), ECF No. 1390.

[91] David Moin, *Done Deal: Ascena Divisions Sold to Sycamore*, WWD, Dec. 23, 2020, https://wwd.com/business-news/mergers-acquisitions/ascena-sycamore-deal-1234686269/.

[92] PwC Global, Global M&A Industry Trends: 2021 Mid-year Update, Jul. 24, 2021, https://www.pwc.com/gx/en/services/deals/trends.html ("The record levels of deal-making, both in terms of deal volumes and values, continued from late 2020 into the first six months of 2021.").

[93] *See supra*, Figure 2 (showing projected revenues not exceeding the levels that put Belk in bankruptcy).

[94] *E.g.*, LoPucki, *supra* note 30, at 1405 (table showing eight of ten large, public company refilers liquidated within 5.5 years of refiling).

A. Belk's Five-Stage Restructuring Process

At the first stage of the restructuring process, Belk chose the Lien holder representatives with whom it would negotiate. At the second, those representatives held secret negotiations with Belk and Sycamore. They accepted a term sheet for the upside-down restructuring and a restructuring support agreement (RSA) that, when accepted by Lien holders, would bind the Lien holders to accept the plan. At the third stage, Belk solicited Lien holders to sign the RSA. Most signed, even though the plan and disclosure statement had not yet been drafted. At the fourth stage, Belk furnished the Lien holders with ballots and copies of the plan and disclosure statement and told them seventy-five percent of the First Lien holders and one-hundred percent of the Second Lien holders had already agreed to accept. Ninety-nine percent of the First Lien holders accepted. The fifth stage was the one-day bankruptcy. Based on the Lien holders' votes and some conclusory affidavits signed by Belk officers,[95] the court entered orders confirming the plan and releasing the participants in the case from liability for their actions in connection with the case. At stages three, four, and five, the Lien holders were already bound, but Belk sought to bind more of them more tightly.

1. The Choice of Lien Holder Representatives

The debt restructuring process began with the formation of two ad hoc groups. The groups' names, the "Ad Hoc Crossover Lender Group" and the "Ad Hoc First Lien Term Lender Group," suggested they were formed to represent the Lien holders. Wilkie Farr & Gallagher LLP represented the Ad Hoc Crossover Lender Group and O'Melveny & Myers LLP represented the Ad Hoc First Lien Term Lender Group. The groups each retained investment bankers.[96]

The record does not reveal who organized the ad hoc groups, who was in the groups, how much of the Liens the members held, or what conflicts of interest they had. The RSA stated that Belk would pay the ad hoc groups' attorneys' fees and expenses.[97] That suggests Belk may have initiated the groups' formation.

The formation of ad hoc committees or groups in connection with bankruptcy cases has been controversial.[98] The fear is that groups or individuals who do not share the interests of a claimant type will adopt names implying that they do, misleading claimants of the

---

[95] *E.g.*, Declaration of Tyler W. Cowan in Support of Confirming of the Joint Prepackaged Plan of Reorganization of Belk, Inc. and Its Debtor Affiliations Pursuant to Chapter 11 of the Bankruptcy Code at 5, *In re Belk, Inc.* (No. 21-30630 (MI)), ECF No. 24 [hereinafter Cowan Declaration] (stating that termination of the Restructuring Support Agreement "would lead to significant disruption and uncertainty, and could potentially result in the liquidation of the Debtors."); Confirmation Hearing Transcript, *supra* note 2, at 9 ("[N]obody wanted to see a liquidation here. So the parties here signed up for this process.").

[96] *See infra*, text accompanying note 113.

[97] Disclosure Statement, *supra* note 35, at Exhibit B, 16 ("The company parties agree to . . . pay the Consenting Lender Fees and Expenses.").

[98] Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. Rev. 1609, 1639-45 (2009) (explaining the controversy).

type.[99] That may have happened in Belk,[100] because the interests of the probable group members differed from the interests of other First lienholders.[101] Bankruptcy Rule 2019 addresses the problem by requiring that "[i]n a Chapter . . . 11 case, a verified statement . . . shall be filed by every group . . . that consists of or represents . . . multiple creditors . . . acting in concert to advance their common interests."[102]

Rule 2019 applied to the ad hoc groups in Belk. In context, the groups' names meant that the groups consisted of or represented multiple creditors, and Belk claimed that by negotiating with them, it negotiated with the Consenting Lenders[103]—a term defined in the Disclosure Statement to include all consenting lien holders, not just members of the groups.[104] The members of each group "act[ed] in concert to advance their common interests"[105] by retaining counsel, negotiating with Belk and Sycamore,[106] by making "commercially reasonable efforts to . . . assist [Belk] in obtaining additional support for the Restructuring Transactions" as required by the restructuring support agreement,[107] and by each group having three lawyers present at the confirmation hearing.[108]

The Rule required that the disclosure include:

> (1) the pertinent facts and circumstances concerning . . . the formation of the group . . . including the name of each entity at whose instance the group . . . was formed.
>
> (2) with respect to each member of a group . . . (A) name and address; (B) the nature and amount of each disclosable economic interest held . . . as of the date the . . . group . . . was formed . . .
>
> (4) a copy of the instrument, if any, authorizing the . . . group . . . to act on behalf of . . . creditors.[109]

Neither group disclosed. No one objected, but Rule 2019 provides that "on its own motion, the court may determine whether there has been a failure to comply with any

---

[99] *In re Nw. Airlines Corp.*, 363 B.R. 704, 709 (Bankr. S.D.N.Y. 2007) ("Rule 2019 is based on the premise that the other shareholders have a right to information as to Committee member purchases and sales so that they make an informed decision whether this Committee will represent their interests or whether they should consider forming a more broadly-based committee of their own."); Edward J. Janger & Adam J. Levitin, *One Dollar, One Vote: Mark-to-Market Governance in Bankruptcy*, 104 Iowa L. Rev. 1857, 1918 (2019) (discussing Bankruptcy Rule 2019 as a response to false signaling).

[100] *But see* Letter from Joseph Zujkowski, Partner, O'Melveny & Meyers LLP to Lynn M. LoPucki, Security Pacific Bank Distinguished Professor of Law, UCLA School of Law, dated September 21, 2021 ("[I]t is difficult to imagine how any of the sophisticated financial institutions that held Belk's First Lien Term Loan that were not part of the Ad Hoc First Lien Term Lender Group could have thought O'Melveny represented their interests if they had not signed an engagement letter with O'Melveny or been part of the extensive prepetition restructuring negotiations summarized in the Disclosure Statement.").

[101] *Infra* notes 117, 118, and accompanying text.

[102] Bankruptcy Rule 2019(b)(1).

[103] *Infra*, text accompanying note 113.

[104] Disclosure Statement, *supra* note 35, at Exhibit A, 4.

[105] *Id.*

[106] Disclosure Statement, *supra* note 35, at 2.

[107] *Id.* at Exhibit B, 12.

[108] Appearance Sheet for Hearing Before Judge Isgur Wednesday, February 24, 2021 (unnumbered docket entry after number 63 and before number 64).

[109] Bankruptcy Rule 2019(c).

provision of this rule."[110] "If the court finds such a failure to comply" the court could "hold invalid an authority [or] acceptance, . . . given, procured, or received by the . . . group."[111] In theory, the court could have invalidated all of the consents to the RSA and acceptances of Belk's plan.

The court did nothing. As a result, Lien holders who signed the RSA or accepted Belk's Prepackaged Plan may not have known who initiated formation of the groups, who or how many creditors were members of the groups, or who instructed the lawyers who represented the groups. That information has never been made public. Nevertheless, in promoting the plan and disclosure statement to the court, Belk boasted that they were "subject to extensive review and comment by the Ad Hoc Groups."[112]

2. The Negotiations

Belk, Sycamore, and the two ad hoc groups negotiated in secrecy and reached agreement on a plan term sheet and restructuring support agreement in early January 2021. The two paragraphs that follow are the only description of the plan negotiations disclosed. The "Sponsor" referred to is Sycamore.

> In November 2020, the Debtors began negotiations with the Sponsor, the Ad Hoc Crossover Lender Group, and the Ad Hoc First Lien Term Lender Group. In order to facilitate due diligence and restructuring negotiations, the Sponsor engaged Latham & Watkins, LLP, as legal advisor, the Ad Hoc Crossover Lender Group engaged Willkie Farr & Gallagher LLP, as legal advisor, and PJT Partners LP, as investment banker, and the Ad Hoc First Lien Term Lender Group engaged O'Melveny & Myers LLP, as legal advisors, and Evercore LLC, as investment banker.
>
> After extensive, arm's-length negotiations, the Consenting Lenders, the Sponsor, and the Debtors arrived at the transactions embodied in the RSA, a copy of which is attached hereto as **Exhibit B**. The RSA and Chapter 11 plan term sheet attached as Exhibit B to the RSA (the "Restructuring Term Sheet") contemplate a swift restructuring that is supported by the Sponsor, holders of more than 75 percent of the outstanding principal amount under the First Lien Term Loan Facility, and 100 percent of the outstanding principal amount under the Second Lien Term Loan Facility. [113]

The claim of "extensive, arm's length negotiations" in this passage implies without stating that the negotiations were with the "Consenting Lenders"—a group defined to include all

[110] Rule 2019(e).
[111] Rule 2019(e)(2)(B).
[112] Debtors' Emergency Motion for Entry of an Order (I) Scheduling A Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Establishing Plan and Disclosure Statement Objection Deadlines and Related Procedures, (III) Approving the Solicitation Procedures, (IV) Approving the Confirmation Hearing Notice, and (V) Waiving the Requirements That the U.S. Trustee Convene a Meeting of Creditors and the Debtors File Schedules and Sofas at 27, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 14 [hereinafter Emergency Scheduling Motion].
[113] Disclosure Statement, *supra* note 35, at 2.

"Holders of First Lien Term Loan Claims that are or become parties to the RSA."[114] But in fact, the negotiations were only with the Ad Hoc First Lien Term Lender Group.[115] The size and representativeness of that group has never been publicly disclosed.

Some news reports described Blackstone Credit and KKR, not the ad hoc groups, as the parties to the negotiations.[116] Blackstone's and KKR's interests differed from those of the Lien holders in at least two respects. First, Blackstone and KKR appear to have been equity holders in Belk at the time they led negotiations with Sycamore and Belk.[117] Second, the Shareholder Agreement entered into as part of the restructuring gave three named "Blackstone Investors" two seats and three named "KKR Investors" one seat on Belk's board of directors.[118] The other First and Second Lien holders, on whose behalf Blackstone and KKR purported to have been negotiating, received no seats on the board and the Shareholder Agreement—revealed to them only after they had agreed to sign it—denied them even the default information rights provided shareholders under Delaware law.[119]

Of course, some of the Lien holders who supported the plan may have known much more about Blackstone Credit, KKR, Belk, and the ad hoc groups than was made public. But the court that confirmed the plan and approved the releases could not have. That information appears nowhere in the record, and its *ex parte* communication to the court would have violated Judge Isgur's procedures.[120]

3. The Restructuring Support Agreement Solicitation

The RSA is an agreement among Belk, Sycamore, and nearly all of the Lien holders to propose, advocate, support, and vote in favor of bankruptcy court confirmation of a not-

---

[114] Disclosure Statement, *supra* note 35, Exhibit A at 4 (defining "Consenting Lenders" and "Consenting First Lien Term Lenders").

[115] See *supra* note 100 (letter acknowledging that O'Melveny represented only the ad hoc committee members).

[116] *E.g.*, Soma Biswas & Adriano Marchese, *Belk to File for Bankruptcy but Remain Sycamore-Owned*, WALL ST. J., Jan. 26, 2021 ("KKR, Blackstone and other lenders had held negotiations with the company and Sycamore to work out a restructuring in hopes of avoiding a costly and protracted bankruptcy process.").

[117] FS KKR bought Belk equity for $7.8 million in 2018. FS KKR 10-K 2018, at 84 (listing the units as having a fair value of $6.7 million). By the time of the negotiations, FS KKR listed the equity as having no value and KKR agreed to its cancellation as part of the restructuring plan. Blackstone Credit and KKR were equity owners in Fashion Topco LLC, a Delaware LLC formed on August 5, 2015. https://opencorporates.com/companies/us_de/5796822 That was shortly before Sycamore acquired Belk. Blackstone Credit's and KKR's equity interests in Fashion Topco "were cancelled and released without a distribution on account of such [interests]" as part of the Belk restructuring.

[118] First Supplement to Plan Supplement for the Debtors' Joint Prepackaged Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code Exhibit G at 1-2, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 38 (providing for "designation" of directors).

[119] *Id.* at 15 ("Each Stockholder that (together with its Affiliates) holds at least five percent of the Total Common Shares (other than any Management Stockholder) shall have the inspection rights set forth in Section 220 of the General Corporation Law of the State of Delaware.").

[120] Court Procedures Marvin Isgur United States Bankruptcy Judge, Jan. 13, 2021, at 3, https://www.txs.uscourts.gov/sites/txs/files/Court%20Procedures%20October%2022%2C%202020_0.pdf ("Contact with Judge Isgur and his law clerks, other than by pleadings, is strictly prohibited. Letters and telephone calls to chambers concerning cases are prohibited.").

yet-drafted reorganization plan. The RSA (32-pages) was based on a term sheet for the plan (11 pages), a release (5 pages), and a term sheet for the new loans to Belk (49 pages).

By January 26, 2021, when Belk made the RSA public by posting it on the Prime Clerk website, the RSA reportedly had been signed by Belk, Sycamore, and large majorities of the Lien holders:

> The . . . consenting stakeholders that have executed the restructuring support agreement [include] holders of more than 75 percent in principal amount of the first lien term loan claims and holders of 100 percent in principal amount of the second lien term loan claims.[121]

By signing the RSA, the Lien holders agreed to vote in favor of the plan.[122] That obligation was agreed to be specifically enforceable.[123] Thus, the Lien holder classes were irrevocably committed to Belk's plan before Belk showed them a draft of the plan or the disclosure statement. As posted, the RSA did not include the signature pages. That left dissidents with no means of knowing who else had not yet signed.

The only inducement for Lien holders to sign the RSA that appears on the face of that document is that only signers could participate in making the $225 million DIP loan. The inducement was not very valuable,[124] but may have appeared valuable at the time.[125] Belk did not reveal how the signatures were solicited. Some courts allow debtors to pay "sign-ing-fees" to induce creditors to sign restructuring support agreements.[126] Belk may have paid signing fees or offered other inducements that Belk did not reveal to the court.

4. The Prepackaged Plan Acceptance Solicitation

With the Lien holders already legally bound to vote for Belk's plan, Belk's next step was to provide them with adequate information and obtain their votes in favor of it. On January 16, 2021, Belk retained Prime Clerk, a noticing and claims agent, to solicit the acceptances.[127]

Belk had approximately 90,000 creditors.[128] By first class mail on January 26, 2021, Prime Clerk sent each non-voting creditor a 14-page combined plan summary and a 12-page notice of their nonvoting status and opportunity to opt out of the third-party

---

[121] Disclosure Statement, *supra* note 35, at Exhibit B, 1.
[122] *Id.*, at 12.
[123] *Id.*, at 30.
[124] *Supra* note 84 and accompanying text.
[125] Zujkowski Letter, *supra* note 100 ("[O]ver 99% of the First Lien Term Lender Claims also participated in the new $225 million post-petition financing opportunity offered under the Plan, which required such lenders to sign a separate Restructuring Support Agreement and the related financing documentation and fund their pro rata share of the new financing prior to Belk's petition date.").
[126] David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366, 370 (2020).
[127] Prime Clerk Retention Application, *supra* note 68, at Exhibit B.
[128] The creditors are listed by name on Prime Clerk's 2,186 page Affidavit of Service, at Exhibits A, D, E, G-L, N, and O, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 46 [hereinafter Affidavit of Service]. On its bankruptcy petition, Belk, Inc. checked a box indicating that it had 50,001-100,000 creditors. Belk Petition, *supra* note 46, at 3.

releases.[129] Prime Clerk also emailed a copy of the 267-page disclosure statement, the 59-page plan, a 14-page combined plan summary and notice, and a ballot to each of 288 holders of Class 4 First Lien Term Loans and each of eight holders of Class 5 Second Lien Term Loans.[130]

Bankruptcy Code §1126(b) permits debtors to solicit plan acceptances prior to the filing of the petition if the solicitation is after the provision of adequate information.[131] Signatures on the RSA could not count as plan acceptances because Belk had not furnished adequate information prior to the signings.

Belk's later solicitation of acceptances from the same creditors arguably could not cure the defect because the creditors were no longer free to decide whether to accept the plan. They were legally bound to accept the plan whether they thought it was a good plan or not. Despite the doubtful legality of its strategy, Belk plowed ahead, rightly confident that the court would see it Belk's way.

In the period before filing, Belk and Prime Clerk sought to create the impression that they were working together with the court. In fact, the court could not legally have such a relationship. Bankruptcy courts are authorized to "utilize . . . services . . . which pertain to the provision of notices, dockets, calendars, and other administrative information to parties in cases filed under [the Bankruptcy Code]."[132] But at the time of Belk's solicitation, no bankruptcy case had been filed, and the court had made no decision to utilize Prime Clerk's services. Prime Clerk's solicitations were merely private communications between Belk and its creditors.

In their mailings, Belk and Prime Clerk used six tactics to blur the distinction between themselves and the court. First, the style of the case appeared at the top of the first page of the acceptance solicitation. It began "In the United States Bankruptcy Court for the Southern District of Texas Houston Division."[133] Second, all of the solicitation documents were couched in legal language and formatted as legal documents. Third, both Belk and Prime Clerk referred to posting documents on Prime Clerk's website as "filing" them.

Fourth, acting as if it were authorized by the court,[134] Belk set a deadline for objecting to the plan or disclosure statement:

[129] Affidavit of Service, *supra* note 128, at 1.
[130] Belk, Inc. Solicitation, Prime Clerk, https://cases.primeclerk.com/belkballots/ ("On January 26, 2021, the anticipated debtors and debtors in possession . . . commenced the solicitation of votes . . ..from Holders of Claims in Classes 4 and 5, and holders of Interests in Class 9.").
[131] 11 U.S.C. §1125(b).
[132] 28 U.S.C. §156(c).
[133] This is a common tactic used in prepackaged cases.
[134] "Treating themselves as if they were the Bankruptcy Court" is how the United States trustee described this tactic in another case. Objection of the United States Trustee to Debtor's Motion for Entry of an Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Approving the Solicitation Procedures and Dates, Deadlines, and Notices Related Thereto, (III) Directing that a Meeting of Creditors Not Be Convened, (IV) Waiving the Requirement of Filing Statements of Financial Affairs and Schedules of Assets and Liabilities, and (V) Granting Related Relief at 2, (*In re HighPoint Resources Corp*. (Bankr. D. Del. No. 21-10565 (CSS)), ECF No. 48 ("The Debtors' pre-petition conduct in treating themselves as if they were the Bankruptcy Court should not be condoned or sanctioned.").

> **How May an Interested Party Object to the Plan or Disclosure Statement?** Any objections (each, an "Objection") to the Plan or the Disclosure Statement must: (a) be in writing; (b) comply with the Federal Rules of Bankruptcy Procedure and the Bankruptcy Local Rules for the Southern District of Texas; (c) state the name and address of the objecting party and the amount and nature of the Claim or Interest beneficially owned by such entity; (d) state with particularity the legal and factual basis for such Objections, and, if practicable, a proposed modification to the Plan that would resolve such Objections; and (e) served so as to be **actually received** no later than **February 23, 2021, at 4:00 p.m., prevailing Central Time** (the "Objection Deadline") on the below parties.[135]

That deadline expired before the filing of the case.

Belk' deadline was bogus. Notice of the deadline for plan objections can only be given by "the clerk or some other person the court may direct."[136] The court did not direct Belk or Prime Clerk to give the notice, and the court had no authority to so direct.[137] Adding to the confusion, Belk's Disclosure Statement falsely assured creditors that "[t]he Debtors . . . will request that the Bankruptcy Court set a date and time for parties in interest to file objections to Confirmation of the Plan."[138]

The court participated in this blurring by enforcing the bogus deadline. In the confirmation order, the court found that "[t]he Debtors provided due, adequate, and sufficient notice of the deadline to object to the Plan or the Disclosure Statement" and that "no other or further notice is or shall be required."[139] The one-day Chapter 11 thus complete, the court immediately contradicted itself by entering the Due Process Preservation Order giving all parties-in-interest an illusory 35-day period in which to object to plan confirmation.[140]

A fifth way in which Belk and Prime Clerk sought to blur the distinction between themselves and the court was by appearing to set and change the date and time of the confirmation hearing. The Plan Summary notified parties in interest that "[u]pon commencement, the Debtors will request a hearing on confirmation of the Plan . . . on February 24, 2021, at 2:00 p.m." On February 22, two days before the hearing date, Prime Clerk emailed a "Notice of Rescheduled Confirmation Hearing" stating that "upon commencement . . .

---

[135] Affidavit of Service, *supra* note 128, at Exhibit B, 3.
[136] Bankruptcy Rule 2002(b).
[137] *See supra* note 132 and accompanying text.
[138] Disclosure Statement, *supra* note 35, at 52.
[139] Order Approving the Debtors' Disclosure Statement For, and Confirming, the Debtors' Joint Prepackaged Chapter 11 Plan at 6, *In re Belk, Inc*. (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 61 [hereinafter Confirmation Order].
[140] *Due Process Preservation Order, supra* note 7, at 3 ("If any person or government unit demonstrates a deprivation of its due process rights, the Court will issue an appropriate order that fully vindicates those due process rights.); Levitin, *supra* note 1, at 61-62 ("[A] creditor that sought to vindicate its rights would have to first demonstrate that the quick bankruptcy deprived it of due process and then must also prevail on the merits of its claim.").

the Debtors will request a hearing on confirmation of the Plan . . . on February 24, 2021, at 8:00 a.m."[141] In fact, no hearing was scheduled with the court for either time. The Houston court posts its available hearing dates, but does not reserve hearing dates for cases before the cases are filed.[142]

Sixth, Belk predicted what the court would do with respect to the meeting of creditors.

> Debtors will request that the U.S. Trustee **not** be required to convene a meeting of creditors pursuant to section 341 of the Bankruptcy Code. Accordingly, such meeting will not be convened if the Plan is confirmed within sixty (60) days after the Petition Date or such other time as set by the Bankruptcy Court.[143]

The precision and certainty of this prediction creates the impression that Belk had information from the court. Together, these tactics created the impression that Belk was working closely with the court. The implication was that resistance to Belk's plan would be futile.

5. The Bankruptcy Case

Chapter 11's primary purpose is to save companies and jobs.[144] Its procedures are designed to assure that the financial problems that brought the company to bankruptcy have been addressed.

In Belk's one-day case, nearly all of Chapter 11's procedural protections were disabled.[145] The court did not review professional fees.[146] The debtor did not file schedules or statements of financial affairs, the claims process did not operate,[147] and parties in interest had no opportunity to question Belk' CEO about the plan.[148] No official committee was appointed to act on the creditors' behalf[149] and the identities of the ad hoc groups that negotiated the plan were not revealed.[150] No monthly operating report was ever filed.

The case was filed between five and ten p.m. The judge had no access to the documents until they were filed. Before the hearing began the next morning at 8:00 a.m., he read four motions, the plan, the confirmation order, and the United States trustee's objection to the plan.[151] He drafted the Due Process Preservation Order,[152] and at the end of the hearing, he confirmed the plan. That was the entire Chapter 11 legal process.

---

[141] Affidavit of Service, supra note 128 Exhibit P at 1.
[142] https://ecf.txsb.uscourts.gov/BKWebCalendar/#.
[143] Affidavit of Service, *supra* note 128, Exhibit B at 5.
[144] N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.").
[145] *Infra*, subparts B.-L; Part V.
[146] *Infra*, subpart C.
[147] *Infra*, subpart D.
[148] *Infra*, subpart E.
[149] *Infra*, subpart F.
[150] *Infra*, subpart A.1.
[151] Confirmation Hearing Transcript, *supra* note 2 at 23-24 (I did have a chance last night to read the four first day declarations. I've read the plan, 1 and I've read the confirmation order. . . I've read the objection filed by the United States Trustee.").
[152] *Id.* at 24.

B. Pre-petition Notice

Bankruptcy Rules 2002 and 3017 require 28 days' notice of the disclosure statement hearing and 28 days' notice of the plan confirmation hearing. Those notices cannot be given before the case is filed.[153] The court can shorten the notice periods "for cause." But the notice must be given by mail, so the period cannot be shortened to less than about four days.[154]

1. Notice of Disclosure Statement Hearing

Bankruptcy Rule 3017(a) provides that "*after a disclosure statement is filed* . . . the court shall hold a hearing on at least 28 days' notice to the debtor, creditors, equity security holders, and other parties in interest . . . . to consider the disclosure statement and any objections or modifications thereto."[155] The disclosure statement cannot be filed until there is a bankruptcy case in which to file it. Nor can the 28 days begin to run before the case is filed. Under Bankruptcy Rule 2002(b), notice of the hearing "to consider approval of the disclosure statement" must be given by "the clerk, or such person as the court may direct." The courts have not directed anyone to give notice in cases before the cases have been filed, and it is doubtful that they can.[156] Thus, Rules 3017(a) and 2002(b) together require that 28 days' notice of the disclosure statement hearing be given after the petition is filed.[157]

2. Notice of Plan Confirmation Hearing

Bankruptcy Rule 3017(d) requires "notice of the time fixed for filing objections and the hearing on confirmation . . . in accordance with Bankruptcy Rule 2002(b)." The Rule 3017(d) notice must be given "upon approval of a disclosure statement,"[158] an event that can only occur after the bankruptcy case has been filed. The notice mailing must include "the disclosure statement *approved by the court*"[159]—making it impossible that the requirement can be fulfilled by a mailing made before the court approves the disclosure statement.

---

[153] *E.g.*, Levitin, *supra* note 1, at 43-44; id at 44 ("[A] prepackaged plan cannot be confirmed in less than 28 days, unless a court orders a reduction of that timeline for cause under Bankruptcy Rule 9006(c)(1).").
[154] Bankruptcy Rule 9006.
[155] Bankruptcy Rule 3017(a) (emphasis added).
[156] 28 U.S.C. §156(c) provides that

> Any court may utilize facilities or services, either on or off the court's premises, which pertain to the provision of notices, dockets, calendars, and other administrative information to parties in cases filed under the provisions of title 11, United States Code, where the costs of such facilities or services are paid for out of the assets of the estate and are not charged to the United States.

The court, not the debtor, must utilize the services and can only do so "in cases filed."
[157] *But see* Procedural Guidelines for Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York X.D. ("The Official Notice shall be mailed at least twenty (20) days prior to the scheduled hearing date on confirmation of the plan and adequacy of disclosure unless the Court shortens such notice period.").
[158] Bankruptcy Rule 3017(d).
[159] *Id.* (emphasis added).

Rule 3017(d) applies "except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or security holders." But the court has no authority to order otherwise with respect to the impaired classes.

Rule 3017(d)'s requirement that notice of the confirmation hearing be given only after the disclosure statement approval hearing has been held facially conflicts with Bankruptcy Code §105(d)(2)(B)(vi). That section allows the court to combine the disclosure statement approval and confirmation hearings. But §105(d)(2) expressly yields to "inconsistent . . . Federal Rules of Bankruptcy Procedure." Thus, the prevailing practice of combining the disclosure statement and confirmation hearings to shorten prepackaged cases violates the Bankruptcy Code and Rules in most cases.[160]

As with the disclosure statement approval hearing, Rule 2002(b) requires "not less than 28 days' notice by mail of the time fixed . . . for filing objections and the hearing to consider confirmation of a . . . chapter 11 plan." That notice must be given by "the clerk, or some other person as the court may direct." Thus, it is also clear that the 28 day notice of the confirmation hearing must be given after the petition is filed.[161]

3. Notice Period Reduction

Bankruptcy Rule 9006 provides that "when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder . . . the court for cause shown may in its discretion with or without motion or notice order the period reduced."[162] I doubt that a court could reduce the 28-day periods to one day without abusing its discretion. But even if the court could reduce the notice periods to one day, the notices required by Bankruptcy Rule 2002(b) must be given by mail after the petition is filed. The court has no authority to eliminate them.[163]

No reduction of notice can legalize a one-day Chapter 11. Under Rule 9006(f), when a notice is given by mail, three days are added to the prescribed period after the prescribed period would otherwise expire. The prescribed period for objecting to the plan or disclosure statement is 28 days. If the court reduced it to one day, Rule 9006(f) would enlarge that to four. A one-day case would still be unlawful. A court that construed the three day period to itself be reduceable would still be left with the absurdity of concluding that a notice was sufficient even though it reached none of the recipients in time for them to act on it.

---

[160] The prevailing practice is to combine the hearings. Of the sixty-seven large, public company prepackaged cases filed from January 1, 2011 to August 31, 2021, forty-nine (73%) resulted in plan confirmation in less than fifty-six days. Prepack Duration Study (on filed with the author).

[161] *See supra* note 156 and accompanying text.

[162] Bankruptcy Rule 9006(c)(1).

[163] To the contrary, in Law v. Siegel, Justice Scalia wrote:

> It is hornbook law that § 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code. Section 105(a) confers authority to "carry out" the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits. That is simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere.

L. v. Siegel, 571 U.S. 415, 421 (2014).

Whatever the potential strategies for legally achieving extremely short Chapter 11s, the judges competing most aggressively have not bothered to pursue them. Belk did not seek a reduction in the 28-day notice periods. The United States trustee objected quoting rule 3017(a).[164] Belk's attorneys, made no counter argument. [165] The judge—not the debtors–negotiated the trustee's objection away and confirmed the plan on ineffective notice.[166] Thus, the court acted illegally in confirming Belk's plan.[167]

C. Bankruptcy Fee Control

Insolvent companies pay their bankruptcy attorneys and other professionals with their creditors' money.[168] That is, if a debtor spends less on professional fees, the estate will be larger. Because the estate is larger, the creditors are entitled to a correspondingly larger distribution.[169]

Because the debtors lack adequate incentives to control fees, the Bankruptcy Code requires that the bankruptcy courts control fees. Specifically, Bankruptcy Rule 2016 requires that "[a]n entity seeking interim or final compensation for services . . . from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."[170] Bankruptcy Code §330 requires that the court approve all professional fees as reasonable before authorizing the debtor to pay them.[171]

---

[164] U.S. Trustee Objection, *supra* note 5, at 7. ("Federal Rule of Bankruptcy Procedure ('FRBP) 3017 provides that '*after* a disclosure statement is *filed*,' a court shall hold a hearing on 'at least 28 days' notice' to all holders of claims and interests of the hearing on approval of the disclosure statement.").

[165] Kirkland's Memorandum makes no mention of Rule 3017(a). Memorandum of Law of Belk, Inc., et al., in Support of an Order Approving the Disclosure Statement For, and Confirming, the Joint Prepackaged Plan of Reorganization of Belk, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 16 [hereinafter Memorandum]. Nor does the Due Process Order. The Confirmation Order finds compliance with rule "3017" without addressing the language of subsection (a). Confirmation Order, *supra* note 139, at 6.

[166] Findings of Fact, Conclusions of Law, and Order Approving the Debtors' Disclosure Statement Relating to, and Confirming, the Debtors' Joint Prepackaged Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code at 6, (*In re HighPoint Resources Corp*. (Bankr. D. Del. No. 21-10565 (CSS)), ECF No. 110.

[167] Levitin, *supra* note 1, at 62 ("In short, Judge Isgur confirmed a plan through a process that was in direct contravention of Rules 2002 and 3017.").

[168] Cynthia A. Baker, *Other People's Money: The Problem of Professional Fees in Bankruptcy*, 38 ARIZ. L. REV. 35, 37 (1996) ("In chapter 11, decisions about whether to purchase professional services are left in the hands of the debtor-in-possession and official committees of creditors or shareholders, who are permitted to spend other people's money to benefit themselves.").

[169] *Id.* at 46 ("It is often said that the 'debtor' pays professional fees, but that is not accurate. Instead, the absolute priority rule gives the bill to the last class of creditors or shareholders still 'in the money.'").

[170] Barron v. Countryman, 432 F.3d 590, 595 (5th Cir. 2005) ("The [Bankruptcy] Code requires court approval of all attorneys fees sought to be paid from the estate of the debtor.").

[171] 11 U.S.C. §330 ("[T]he court may award to . . . a professional person employed under section 327 . . . reasonable compensation for actual, necessary services rendered.").

Consistent with that requirement, the Belk confirmation order provided that "All requests for payment of Professional Fee Claims for services rendered and reimbursement of expenses incurred prior to the Confirmation Date must be Filed no later than forty-five (45) days after the Effective Date."[172] Kirkland's application for employment filed March 8—twelve days after confirmation—stated Kirkland's intention to file such a request.

> Kirkland intends to apply for compensation for professional services rendered on an hourly basis and reimbursement of expenses incurred in connection with these chapter 11 cases, subject to the Court's approval and in compliance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and Bankruptcy Local Rules, and any other applicable procedures and orders of the Court.[173]

Belk's financial projections indicated that Belk expected to spend $64 million in total on "restructuring professional costs and closing fees related to consummation of the plan."[174] Belk did not say who would get that money or in what amounts. Kirkland's application for employment disclosed that "on December 18, 2020, the Debtors paid Kirkland $500,000 as an "advance payment retainer." "Subsequently, the Debtors paid to Kirkland additional advance payment retainer totaling $2,900,017.92 in the aggregate."[175] Kirkland said in the application that it "will not apply any such amounts to postpetition fees and expense."[176]

On March 31—thirty-five days after plan confirmation—the court entered its order approving Kirkland's employment. The order reiterated the necessity to file an application to be paid fees incurred post-petition:

> Kirkland shall apply for compensation for professional services rendered and reimbursement of expenses incurred in connection with the Debtors' chapter 11 cases in compliance with sections 330 and 331 of the Bankruptcy Code, Bankruptcy Rules, Bankruptcy Local Rules, and any other applicable procedures and order of the Court.[177]

The Bankruptcy Court has since closed the Belk files. Neither Kirkland, nor any other professional, filed a fee application in any of the Belk cases. If Kirkland has been paid for its work during the hours from the filing of the case through plan confirmation, the payment is in violation of Rule 2016 and Code §330.

The payment of fees incurred after plan confirmation presents different legal issues. The Confirmation Order entered on the first day of the case purports to excuse Kirkland from complying with the Bankruptcy Code and Rules with respect to its post-confirmation fees. The order provided that

---

[172] Confirmation Order, *supra* note 139, at 41.
[173] Reorganized Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Reorganized Debtors Effective as of February 23, 2021 at 6, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 153 [hereinafter Application to Employ Kirkland].
[174] Disclosure Statement, *supra* note 35, at Exhibit C, unnumbered page 5.
[175] *Id.* at 8.
[176] *Id.* at 9, n.5.
[177] Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Reorganized Debtors Effective as of February 23, 2021 at 1, 4, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 178.

> From and after the Confirmation Date, any requirement that Professionals comply with sections 327 through 331 and 1103 of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and the Reorganized Debtors may employ and pay any Professional in the ordinary course of business without any further notice to or action, order, or approval of the Court.[178]

Neither the Bankruptcy Code nor the Bankruptcy Rules contain any authority for the Court to excuse compliance with those Code provisions.[179]

Instead, Bankruptcy Code §1129(a)(4) determines what post-confirmation fees require court approval:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> (4) *Any payment* made or *to be made* by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, *for services* or for costs and expenses in or *in connection with the case*, or in connection with the plan and incident to the case, has been approved by, or *is subject to the approval of, the court as reasonable*.[180]

That is, if the debtor will make payments for services in connection with the case after confirmation, the payments must be subject to the approval of the court as reasonable. By its terms, this provision applies to the professionals' work in consummating the plan and completing the administration of the bankruptcy case.[181]

In an apparent attempt to circumvent § 1129(a)(4), the plan required the Reorganized Debtors to fund a "professional fee escrow account" in an amount based on the professionals' estimates delivered to the Debtors, but not filed with the court.[182] The plan instructed the Debtors to pay the professionals' fees.[183] Thus, by confirming the plan, the court mandated payment of post-confirmation fees without the court reviewing and approving them. By confirming a plan containing those provisions, the court violated Bankruptcy Code §1129(a)(2) and (4).[184]

As a result of these machinations, the court exercised no control over the amounts of professional fees incurred before, during, or after Belk's filing. The court file contains no information regarding the amounts, if any, paid to Kirkland or to any other professional,

---

[178] Confirmation Order, *supra* note 139, at 42.

[179] *Supra note* 163 and accompanying text.

[180] 11 U.S.C. §1129(a)(4) (emphasis added).

[181] *In re* Anderson Grain Corp., 212 B.R. 560, 563–64 (Bankr. N.D. Tex. 1997) (applying § 1129(a)(4) to a secured creditor's fees for a post-confirmation financing because the fees were "in connection with the case."); *In re* Sherwood Square Assocs., 107 B.R. 872, 878 (Bankr. D. Md.1989) (holding that "to the extent ... fees are attributable to pre-Effective Date services, Court approval is required before any payment of the fees is made under the plan."); *but see, e.g.*, Stations Holding Co., Inc., 2002 WL 31947022, at *3 (Bankr. D. Del. 2002) (confirming under § 1129(a)(4) plan requiring bankruptcy court approval for fees "to the extent of services provided before the Confirmation Date").

[182] Confirmation Order, *supra* note 139, at Exhibit A, 17.

[183] *Id.* at Exhibit A, 45 (payment of fees a "condition precedent" to plan consummation).

[184] 11 U.S.C. §1129(a)(2) and (4).

for work performed after the filing of the petition.[185] With the Houston court's approval, Kirkland bypassed the bankruptcy fee control system completely.

As the fee-control system currently operates, its circumvention probably makes no difference. If Kirkland had filed fee applications, the Houston court would have authorized payment of the amounts sought. "To succeed in [the bankruptcy court] competition, the bankruptcy courts must abandon the effort to control fees. Bankruptcy professionals will not steer their clients to courts that would control the professionals' fees."[186]

In their study of fee applications, objections, and orders in cases completed from 1998 through 2007, Professors LoPucki and Doherty found that the courts awarded 98.8% of the amounts for which the professionals applied.[187] The payments debtors made to the professionals for preparing and defending their fee applications were 2.7% of the total fees, more than twice the 1.2% cut.[188] The system might still have been effective if it deterred even higher fee applications, but there was no evidence the system did that.

Although the fee control system did not function at all in Belk, it continues to function ineffectively in other big cases. In those cases, courts engage in numerous fee approval practices that violate the Bankruptcy Code and rules. Among other illegalities, the judges routinely excuse the filing of fee applications by ordinary course professionals.[189] The judges routinely fail to require that fee applications disclose all prior fees paid in connection with the case—in particular those paid prior to the filing of the case.[190] The judges routinely authorize the disbursement of 80% of the fees applied for before they review the applications for those fees.[191]

D. Schedules and Claims

Professor David Skeel observed that "the existence of a collectivized insolvency proceeding acts as an information forcing device which enables the parties to detect misbehavior that otherwise might have gone unnoticed."[192] To that end, the Bankruptcy Code and Rules require the filing of lists of creditors, schedules, statements of financial affairs (SOFAs), monthly operating reports and other disclosures.

Bankruptcy Rule 1007(a)(1) requires that the debtor "shall file with the petition a list containing the name and address of each [creditor]." Belk filed a list, but the list included

---

[185] *In re* Jeanes, 2004 WL 1718093, at *3 (Bankr. N.D. Iowa 2004) ("Even if a debtor's attorney does not intend to receive compensation from the bankruptcy estate, the attorney is still required to disclose all compensation amounts and sources.").

[186] LYNN M. LOPUCKI & JOSEPH W. DOHERTY, PROFESSIONAL FEES IN CORPORATE BANKRUPTCIES 215 (2011).

[187] *Id.* at 190 (showing total cuts of $19,881,415 from applications for $1,666,567,271).

[188] *Id.* at 162 ("Fee control costs as a percentage of total costs 2.7%.").

[189] Lynn M. LoPucki, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, 83 AM. BANKR. L.J. 423, 430-43 (2009) (describing the practice and explaining why it is illegal).

[190] *Id.*(describing the practice and explaining why it is illegal).

[191] Bankruptcy Rule 2016; LoPucki *supra* note 189, at 449 ("Nearly all courts processing large, public company bankruptcies authorize the disbursement of 80% of the fees sought by professionals before the court has reviewed the fees or decided their reasonableness.").

[192] David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WIS. L. REV. 465, 507 (1993).

neither a mailing address nor an email address for the key creditors—the approximately three hundred entitled to vote.[193] Belk also redacted the addresses of all individual creditors, purportedly to protect their privacy.[194] In any event, the list came too late to help in detecting misbehavior because it was filed only hours before plan confirmation.

Rule 1007(b)(1) requires that "the debtor, unless the court orders otherwise," file schedules and a SOFA on forms contained in the bankruptcy rules. Those documents must be filed "with the petition or within 14 days thereafter."[195] The court may enlarge that period only for "cause shown."[196]

Without referring to the "court orders otherwise" exception, the Belk confirmation order exercised the court's authority to order otherwise. The order stated that "[a]ny requirement for the Debtors to file schedules for assets and liabilities and statement of financial affairs is permanently waived as of the Confirmation date."[197] The debtors' request cites no authority for "waiver," but states:

> Here, cause exists to further extend the deadline because requiring the Debtors to file Schedules and SOFAs would distract the Debtors' management and advisors from the work of ensuring an expedited confirmation and emergence from these chapter 11 cases. Given the prepackaged nature of these chapter 11 cases, the Schedules and SOFAs would also be of limited utility to most parties in interest—the Debtors have already commenced solicitation and obtained acceptances necessary to confirm the Plan.[198]

That passage reflects the two main fallacies used to promote one-day Chapter 11s. First, the length of the case determines what procedures should be followed rather than the procedures that must be followed determining the length of the case. Second, parties need information only for voting.

The filing of Schedules and SOFAs are essential to the operation of Chapter 11.[199] The content of the schedules and SOFAs is specified by an Official Form contained in the Bankruptcy Rules.[200] The schedules list the debtors' assets individually, with dollar values for each. They list each creditors' name, address, amount owing, time when the debt was incurred, collateral, if any, and other information. They also list the debtors' leases and executory contracts. The SOFA lists prepetition transfers, revenues, income, litigation, bank accounts, places of business, and other information. There is little or no overlap with the information typically contained in a Disclosure Statement.[201] Together, the list of

---

[193] Affidavit of Service of Solicitation Materials at Exhibits G and H, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 43.
[194] Affidavit of Service, at Exhibits A, 1-1753, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 46 [hereinafter Affidavit of Service].
[195] Bankruptcy Rule 1007(c).
[196] Bankruptcy Rule 1007(a)(5).
[197] Confirmation Order, *supra* note 139, at 52.
[198] Emergency Scheduling Motion, *supra* note 112, at 23.
[199] Lipson, *supra* note 98, at 1621 (referring the filing of schedules as a "transparency event" that "must occur in every case")..
[200] Forms B206Sum. through B207.
[201] Compare Forms B206Sum. through B206H with Form B425B.

creditors, the schedules, the SOFA, the disclosure statement, the monthly operating reports, the meeting of creditors, discovery, and other disclosures constitute the full financial disclosure that is the hallmark of Chapter 11.[202]

From 1980 to 1994, large public companies often obtained extensions of time within which to file schedules. But in courts other than Delaware, they filed schedules and SOFAs in substantially all cases,[203] including prepackaged cases.[204]

Table 3. Filing of Schedules, by Court, 1980-94

	Filed schedules	Did not file schedules	Total
Delaware	7 (58%)	5 (42%)	12 (100%)
All other courts	64 (97%)	2 (3%)	66 (100%)
Total	71 (91%)	7 (9%)	78 (100%)

In 1992, the Delaware bankruptcy court began extending the time for filing schedules and SOFAs in prepackaged cases until plan confirmation and then "waiving" their filing. After 1994, New York began doing the same; then other courts did as well.[205] By 2004, the earliest date for which PACER bankruptcy court files are publicly available, orders excusing the filing of schedules were routine.[206]

Excusing the filing of schedules disrupts not only the flow of information to the courts and creditors, but also the system by which creditors prove their claims in Chapter 11 cases. When a bankruptcy is filed, a modern, efficient bankruptcy claims systems replaces antiquated state law procedures under which creditors must file lawsuits to have remedies, and debtors must dispute those lawsuits to obtain delay.[207]

[202] *E.g.*, Jones Day Publications, *Public Right to Full Disclosure in Bankruptcy Extends to Rule 2019 Statements*, JONES DAY, May/June 2013, https://www.jonesday.com/en/insights/2013/05/public-right-to-full-disclosure-in-bankruptcy-extends-to-rule-2019-statements ("One of the hallmarks of the U.S. bankruptcy system is ready access to information concerning any entity that files for bankruptcy protection."); *In re Peak Serum, Inc.*, 623 B.R. 609, 631 (Bankr. D. Colo. 2020) ("Timely and accurate financial disclosure is the life blood of the Chapter 11 process.").
[203] Schedules Study (on file with the author) (study of UCLA-LoPucki Bankruptcy Research Database dockets showing schedules filed in 71 of 78 cases).
[204] For example, debtors filed schedules in these prepackaged cases: Crystal Oil (Shreveport 1986); SPI Holdings (Wilmington 1992); Charter Medical Group (Wilmington 1992); Gaylord Container Corp (E.D. LA 1992); Mayflower Group, Inc. (SD IN 1992); West Point Pepperell, Inc (SDNY 1992). UCLA-LoPucki Bankruptcy Research Database, One-variable study, Prenegotiation by year is "prepackaged," Filings by year is "1980 to 1994."
[205] Schedules Study, *supra* note 203.
[206] *E.g.*, Motion Seeking Entry of an Order (I) Granting the Debtors Additional Time Within Which To File Schedules and Statements and (II) Permanently Waiving the Requirement to File Schedules and Statements upon Confirmation of the Debtors' Plan of Reorganization, at 9, *In re Applied Extrusion Technologies, Inc.*, (Bankr. D. Del., Case No. 04-13388), ECF No. 139 (listing cases excusing the filing of schedules).
[207] Lynn M. LoPucki, *A General Theory of the Dynamics of the State Remedies/bankruptcy System*, 1982 Wis. L. Rev. 311, 348-52 (1982) (explaining the advantages of the bankruptcy claims system over the state remedies system).

Bankruptcy Code §1111(a) is an essential element of the bankruptcy claims system. That section deems a "proof of claim . . . filed under section 501 of this title for any claim or interest that appears in the schedules . . . except a claim or interest that is scheduled as disputed, contingent, or unliquidated."[208] When a debtor files no schedules, however, no claims are deemed filed. In Belk, that would have meant that each of Belk's 90,000 creditors had to file proofs of claim in order to share in the plan distribution. One provision of Belk's carelessly drafted plan seems to say that: "On the Distribution Record Date, the Claims Register shall be closed and any party responsible for making distributions shall instead be authorized and entitled to recognize only those record Holders listed on the Claims Register as of the close of business on the Distribution Record Date."[209] Prime Clerk, the noticing agent employed by Belk, established a website that invited the filing of claims before the case was filed, and 114 creditors "filed" proofs of claims on the website.[210] Only eighteen proofs of claim, totaling $1.1 billion, were filed on the Court's claims register.[211]

Belk's plan compounded the confusion by providing that "[f]or the avoidance of doubt, there is no requirement to File a Proof of Claim or Proof of Interest (or move the Bankruptcy Court for allowance) to be an Allowed Claim or Allowed Interest, as applicable, under the Plan."[212] That plan provision purported to render the claims process provided by law inoperable and entitle the Belk Reorganized Debtors to pay—or not pay—whomever they chose. Creditors not happy with that can sue Belk in the state remedies system.[213] For debtors filing prepackaged cases in the competing courts, the entire bankruptcy claims process is now optional.

E. Meetings of Creditors

Bankruptcy Code §341(a) provides that "[w]ithin a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors."[214] The functions of §341 meetings in Chapter 11 cases are to enable

---

[208] 11 U.S.C. §1111(a).

[209] Disclosure Statement, *supra* note 35, Exhibit A at 35.

[210] Bear Parent Inc. (Belk, Inc.), claims, PRIME CLERK, Jul. 29, 2021, https://cases.primeclerk.com/belk/Home-ClaimInfo (listing the claims).

[211] Claims Register, Summary Report, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)).

[212] Confirmation Order, *supra* note 139, at Exhibit A, 39 ("If the Debtors, or Reorganized Debtors dispute any General Unsecured Claim, such dispute shall be determined, resolved, or adjudicated, as the case may be, in the manner as if the Chapter 11 Cases had not been commenced.").

[213] Due Process Preservation Order, *supra* note 7, at 2:

> Any holder of a claim in Classes 1, 2, 3, 6, or 8, whether or not the claim is an allowed claim, may resolve any dispute with the Debtors about the payment or allowance of its claim in either (i) any court of competent jurisdiction; (ii) any arbitration tribunal to the extent that such claim is arbitrable under applicable non-bankruptcy law; or (iii) this Court.

[214] 11 U.S.C. §341(a)

interested creditors to confer with one another and to enable them to question the debtor about its financial condition, its plans for the case, and any other relevant matter.[215]

In a prepackaged case, §341(e) allows the court to order the 341 meeting not convened "for cause."

> Notwithstanding subsections (a) and (b), the court, on request of a party in interest and after a notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors . . . if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case. [216]

To determine the practice with respect to meetings of creditors, I searched the dockets of all large, public companies that filed bankruptcy after December 31, 2015 and reached disposition before August 1, 2021.[217] The debtors asked the courts to order the meetings of creditors not convened in thirty-seven of the 167 cases (22%) and were apparently successful in all thirty-seven cases. All the non-convenes were in prepackaged cases, and all those cases were in the five competing courts.[218]

Under the dominant approach, the debtor alleged that it solicited acceptances prior to commencing the case, and that it would confirm a plan shortly. The debtor requested that the court direct the United States trustee not to convene a creditors' meeting and that the court waive the creditors' meeting entirely when the plan was confirmed. This is a short, but typical allegation: "The Debtors intend to proceed expeditiously to confirm the Prepackaged Plan and emerge from chapter 11 as quickly as possible. Therefore, parties are not likely to receive any benefit from the Section 341 Meeting."[219] The courts typically

---

[215] Official Form 309F1 states that "[t]he debtor's representative must attend the meeting to be questioned under oath."

[216] 11 U.S.C. §341(a) ("Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors."); 11 U.S.C. §341(e)

> Notwithstanding subsection[] (a) . . . the court, on request of a party in interest and after a notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors . . . if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.

In Belk, no request was made, no notice was given, no hearing was held, no order was entered, and no meeting of creditors was held.

[217] UCLA-LoPucki Bankruptcy Research Database, *supra* note 14. Choose Docket Searcher. Choose "Restrict Search by case types," then choose "filing years 2016-21," choose OK, enter "meeting of creditors" (in quotation marks), Limit documents by types to and then choose "Search" at the bottom of the screen. Through July 31, 2021, the search results show 91 matching entries from 42 cases.

[218] Meeting of Creditors Study (on file with the author).

[219] Motion of Debtors for Order (I) Scheduling Combined Hearing to Consider (A) Approval of Disclosure Statement, (B) Approval of Solicitation Procedures and Forms of Ballots, and (C) Confirmation of Prepackaged Plan; (II) Establishing an Objection Deadline to Object to Disclosure Statement and Plan; (III) Approving the Form and Manner of Notice of Combined Hearing, Objection Deadline, and Notice of Commencement; (IV) Conditionally Waiving Requirement of Filing Statement of Financial Affairs and Schedules of Assets and Liabilities; (V) Conditionally Waiving Requirement to Convene the Section 341 Meeting of Creditors; and (VI) Approving (A) The Rights Offering Procedures, (B) Backstop Agreement, and (C) the Backstop Put Premium, Transaction Expenses and Indemnification Obligations in Connection Therewith Pursuant

heard no evidence and made no findings of fact with respect to their orders not to convene meetings. The practice is illegal because 11 U.S.C. §341(e) requires cause in addition to the debtors having "solicited acceptances prior to the commencement of the case." The debtors made no showings of cause.

The meeting-of-creditors practice is relevant here for two additional reasons. First, the practice relies on the false logic that creditors who have already voted or have no right to vote have no need for information. Second, it illustrates again the sharp division between the competing and noncompeting courts.

F. Creditors' Committees

Since 1979, Chapter 11 has required that an unsecured creditors' committee be appointed in every Chapter 11 case.[220] Until 1986, the bankruptcy judges chose the committee members. In 1986, Congress shifted that administration burden to the United States trustee. But the judges retain the authority to order that appointments be made and so remain responsible for the United States trustees' failures to appoint.[221]

In cases filed in the 1980s, courts substantially complied with the law in large, public company cases. Creditors' committees were appointed in 79 of 81 such cases (98%).[222] When Delaware entered the competition for big cases in 1990, the rate of creditors' committee appointments declined. In cases filed in the 1990s, creditors' committees were appointed in only 212 of 255 large, public company bankruptcies (83%).[223]

---

to Sections 105(A), 363(B), 341, 521(A), 1126, and 1128 of the Bankruptcy Code And Bankruptcy Rules 1007, 3017, 6003, and 6004 at 22 (Bankr. D. Del., In re Basic Energy Services, Inc., No. 16-12320 (KJC)) ECF No. 13.

[220] 11 U.S.C. §1102(a)(1) ("[A]s soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims."). Prior to 1986, the court made the appointment. After that date, the United States trustee makes the appointment under the control of the court. PL 99–554, October 27, 1986, 100 Stat 3088. Kenneth N. Klee & K. John Shaffer, *Creditors' Committees Under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. REV. 995, 1004 (1993) ("The plain language of section 1102(a)(1) suggests that in all cases under Chapter 11, the prompt appointment of at least one creditors' committee is mandatory, and the courts and commentators appear generally to support this view.").

[221] The legislative history states that that the purpose of the change was

> to transfer the authority to appoint the Chapter 11 Committee of Unsecured Creditors from the court to the U.S. Trustee as it is an administrative task. The court still retains the authority to order the appointment of such administrative committees as are necessary, but the U.S. Trustee has the authority to actually appoint these committees once the court has ordered.

H.R. Rep. No. 764, 99th Cong., 2d Sess. 28 (1986), U.S. Code Cong. & Admin. News 1986 p. 5241.).

[222] Creditors' Committee Study (on file with the author) [hereinafter Creditors' Committee Study].

[223] The difference between the appointment rates in the 1980s and the 1990s is statistically significant. p=.0014.

From 2011 to the present—with three new courts competing—committees have been appointed in only 196 of 282 large public company bankruptcies (70%).[224] During that period, United States trustees in the five competing courts were almost five times as likely as those in non-competing courts[225] to fail to appoint a committee to represent the unsecured creditors.[226] Committees were appointed in thirty-eight of forty-one non-competing-court cases (93%), but in only 158 of 241 competing-court cases (66%).[227] On the issue of creditors' committee appointments, lawlessness is increasing rapidly and the increase is almost entirely in the competing courts.

The competing courts' defenders argue that committees can't be appointed in many cases because the companies do not have unsecured creditors or because no unsecured creditors are willing to serve.[228] The fact that committees *are* appointed in non-competing courts proves both those arguments wrong. The defenders also argue that unsecured creditors' committees are unnecessary in prepackaged cases because the creditors have already voted. But, as part IV.B. explains, committees remain necessary to discover wrongdoing and foster objections to unlawful plans.

The competing courts' failures to appoint creditors' committees have cleared the way for others to usurp the creditors' committee's role. For example, no official creditors' committee was appointed in Belk. Instead, Belk paid for two "ad hoc groups"—essentially unsecured creditors' committees appointed by Belk under the influence of Sycamore—that purported to represent the partially unsecured Lien holders.

Belk also appointed independent directors to make two key decisions that would have been the job of an unsecured creditors' committee: (1) deciding whether to challenge as a fraudulent transfer Sycamore's removal of $135 million from Belk in 2016 and (2) whether the upside-down plan was in Belk's interests.[229] Because Belk was insolvent, Belk's unsecured creditors bore most of the risk of its restructuring. An unsecured creditors' committee would have been a more appropriate decider than Belk board members.

---

[224] Committees were appointed in 79 of 82 cases (96%) filed from 1980 through 1989, as compared with 196 of 282 cases (70%) filed since 2010. The difference is statistically significant at the .0001 level. Fisher's exact, two tailed. *Id.*

[225] Of the 282 large, public company bankruptcies filed since December 31, 2010, non-competing courts failed to appoint a committee in three of 41 cases (7%). Competing courts failed to appoint a committee in 83 of 241 cases (34%). The difference is statistically significant at the 0.0002 level. *Id.*

[226] *See* 11 U.S.C. §1102(a)(1) ("[A]s soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims . . .").

[227] Non-competing courts appointed creditors' committees in two prepackaged cases, Capitol Bancorp Ltd. (E.D. Mich. 2012) and Revel AC, Inc. (D. N.J. 2013). UCLA-LoPucki Bankruptcy Research Database, *supra* note 14.

[228] *E.g.*, Stefan Korch, *Chapter 11, Corporate Governance and the Role of Examiners*, 34 Emory Bankr. Dev. J. 411, 430 (2018); ("[C]reditors' committees, although mandatory, are often not appointed because creditors are unwilling to serve as members.").

[229] Ellias, et al., *supra* note 21, at 5 (reporting that independent directors "often seek to bypass the procedure Congress created with the bankruptcy code by claiming to replace the unsecured creditors committee before the bankruptcy court.").

H. Independent Bankruptcy Directors

The most egregious aspect of Belk's restructuring was allowing Sycamore—the failed controlling shareholder of a clearly insolvent company—to remain in control.[230] As Belk's controlling shareholder, Sycamore had fiduciary duties to Belk.[231] So did the Belk directors that Sycamore elected annually. Instead of fulfilling those obligations, Belk's directors proposed a plan that benefited Sycamore at Belk's expense. The plan (1) let Sycamore retain 50.1% of Belk's shares and control of Belk even though Sycamore had no right to retain anything, (2) blocked Belk from suing Sycamore for breach of fiduciary duties, and (3) released Sycamore from liability to Belk and its creditors for the 2015 leveraged buyout transaction and the 2021 upside-down restructuring transaction.

Belk asserted to the bankruptcy court that Sycamore's "retention of majority ownership of reorganized Belk was important to the other parties due to Sycamore's valuable multi-channel retail experience and expertise."[232] It is implausible, however, that it was in Belk's interest to give over half its post-restructuring equity in return for the privilege of having a particular owner.

Sycamore continued Lisa Harper, Belk's fail CEO, in office. Survival in office of a CEO on whose watch a big company failed was a rarity before bankruptcy court competition,[233] but has since become increasingly common.[234]

Belk's board of directors anticipated breach-of-fiduciary-duty lawsuits against themselves for promoting Sycamore's interests over Belk's. To deflect those actions, Belk's board established a special committee of "independent and disinterested directors" during the plan negotiations. Belk hired two new directors, Jill Frizzley and Steve Panagos, to be the members of that committee. Both directors had backgrounds in bankruptcy restructuring, were in the business of serving as "independent board directors,"[235] and had continuing relationships with Kirkland.[236] The board hired them to determine whether the plan was in Belk's interests and whether Belk should take action against Sycamore regarding the $135

---

[230] Although Sycamore received only 50.1 percent of Belk's share, Belk was a Delaware corporation. Sycamore could squeeze the minority shareholders out after the reorganization was complete. *Nixon v. Blackwell*, 626 A.2d 1366, 1379-80 (Del. 1993) (declining to protect minority shareholders who did not bargain for protection).
[231] Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) ("A parent does indeed owe a fiduciary duty to its subsidiary when there are parent-subsidiary dealings.").
[232] Langley Declaration, *supra* note 65, at 2.
[233] Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 723 (1993) ("In the period starting eighteen months before filing and ending six months after confirmation, there was at least one change in CEO in thirty-nine of forty-three cases (91% of the total number of cases).").
[234] Lynn M. LoPucki, *Changes in Chapter 11 Success Levels Since 1980*, 87 TEMP. L. REV. 989, 1008-10 (2015) (reporting declining CEO turnover associated with bankruptcy).
[235] Application to Employ Kirkland, *supra* note 173, at 16 ("Steve Panagos and Jill Frizzley, independent directors and special committee members of Belk, Inc. and Bear Parent Inc., have served, are serving, or may serve from time to time, in various management and/or director capacities of certain Kirkland clients.").
[236] *Id.*

million dividend. Frizzley and Panagos made the decisions Sycamore wanted. They "determined to support the Restructuring Transactions embodied by the RSA and the Plan, including the Debtors' Release,"[237] and they investigated and approved the dividend.[238]

Of course, the two new directors had the same conflicts of interest as the directors who hired them—all owed their jobs to Sycamore, directly or indirectly. Sycamore could remove them at any time.[239] But Delaware corporate law maintains the fiction that the members of a special committee are independent and disinterested despite their hiring by a board on which none of the directors was independent and disinterested.[240] In reality, the expectation when an "independent" director is hired to review a transaction the board and shareholders favor is that the independent director will be strongly biased in favor.

Professors Jared Ellias, Ehud Kamar, and Kobi Kastiel explained the conditions under which such "independent bankruptcy directors" are hired and work.

> [B]ankruptcy directors are not neutral experts. Shareholders appoint them on the advice of their lawyers. They are naturally predisposed to favor those who chose them for this lucrative engagement. Moreover, a bankruptcy directorship is a short-term engagement that creates incentives to treat it as an audition for the next engagements. The dependence on future engagements strengthens bankruptcy directors' desire to be helpful to shareholders and their lawyers.[241]

Put more bluntly, if the "independent" directors do not approve the transactions they are hired to approve in one case, they will not be hired to approve transactions in other cases. Decisions made under these conditions inherently lack credibility. But credibility is not necessary in a competing court, because the judge who determines credibility is biased in the same direction. The bankruptcy judge must find the committee's decisions credible, or the case placers would not bring the judge future cases. Once the biased judge finds the biased directors' decisions credible, the bases for those decisions are findings of fact that cannot be overturned on appeal unless clearly erroneous.[242]

Sycamore understood how it worked. A little over a year before Belk, Sycamore had hired independent directors to prevent creditors from controlling litigation against Sycamore in the Nine West Holdings bankruptcy.[243]

Belk's strategy enabled the "independent directors" to decide, and thus bury, the plan approval and dividend issues.[244] In a Chapter 11 case conducted according to law, both

---

[237] Langley Declaration, *supra* note 65, at 19.
[238] *Id.*
[239] DGCL §228(a) (allowing holders of a majority of the corporation's shares to take any action that could be taken at a meeting by written consent without meeting).
[240] Zapata Corp. v. Maldonado, 430 A.2d 779, 786 (Del. 1981) (The corporate power inquiry then focuses on whether the board, tainted by the self-interest of a majority of its members, can legally delegate its authority to a committee of two disinterested directors. We find our statute clearly requires an affirmative answer to this question.").
[241] Ellias, et al., *supra* note 21, at 5
[242] State v. Enos, 147 HAW. 150, 158, 465 P.3d 597, 605 (2020) ("Findings of fact 'are subject to the clearly erroneous standard of review.'").
[243] Ellias, et al., *supra* note 21, at 1.
[244] Langley Declaration, *supra* note 65, at 18-19 (describing their authority).

issues would have been evaluated by an official creditors' committee.[245] That is, if Belk had given the mandatory 28 days' notice of the hearing on its Disclosure Statement and the United States trustee had appointed a creditors' committee, the committee would have been entitled to investigate those issues.[246]

G. Third-Party Releases

The perpetrators of lawless Chapter 11s use an array of legal devices to insulate themselves against liability for their wrongdoing. They include releases, exculpation, independent directors, indemnification, and directors and officers (D&O) insurance. All but the releases are devices commonly used in corporate law apart from bankruptcy. This section addresses third-party releases and exculpations.

Releases contained in Chapter 11 plans have long been controversial.[247] They are used for a variety of purposes, each of which raises different issues. The discussion of releases here is confined to the use of third-party releases under Fifth Circuit precedent because that was the precedent applicable to Belk.

Fifth Circuit precedent views a release or exculpation contained in the plan as a discharge of debt under Bankruptcy Code §524(e). The discharge is improper because "the law states . . . that 'discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt.' 11 U.S.C. §524(e)."[248] Thus, in the Fifth Circuit, a release is binding only on creditors who actually and individually consent to it.[249]

Bankruptcy Code §1141(a) provides that "[t]he provisions of a confirmed plan bind . . . any creditor . . . whether or not the creditor . . . has accepted the plan."[250] It follows that, in the Fifth Circuit, releases cannot be adopted as plan provisions. Plan provisions bind outvoted minorities, but releases do not.[251] Belk muddled the situation by including the releases in its plan.[252]

---

[245] Ellias, et al., *supra* note 21, at 5 ("Independent bankruptcy directors] often seek to bypass the procedure Congress created with the bankruptcy code by claiming to replace the unsecured creditors committee before the bankruptcy court.").
[246] 11 U.S.C. § 1103(c)(2) (entitling an official creditors' committee "to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor . . . .").
[247] Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959 (opposing non-debtor releases in bankruptcy cases).
[248] *In re Pac. Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009).
[249] *Id.*
[250] 11 U.S.C. § 1141(a).
[251] *In re Pilgrim's Pride Corp.*, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010) ("Because *Pacific Lumber* is binding precedent, the court may not, over objection, approve through confirmation of the Plan third-party protections."); *In re Bigler LP*, 442 B.R. 537, 543-44 (Bankr. S.D. Tex. 2010) ("[R]eleases must satisfy the requirements of a valid settlement of claims under the Code. It would require, *inter alia,* consent and consideration by each participant in the agreement to be valid.").
[252] Disclosure Statement, *supra* note 35, Exhibit A at 39-44 (releases).

Although the releases would not bind the creditors unless the creditors consented to them, Belk did not ask the creditors for that consent. Instead, Belk sought to imply the consent from the creditors' failure to complete and return an Opt-out Form mailed to the creditors as part of a twenty-six page Plan Summary.

In addition, Belk misled the creditors as to the value of the releases to them. Technically, the releases were mutual releases by all of the parties to, and participants in, the Chapter 11 case, including the professionals who worked in the case. But Sycamore, Belk's officers and directors, and the professionals were the only real beneficiaries of the releases, because they were the only ones with potential liability.

Sycamore may have been liable for the mismanagement that landed Belk in bankruptcy and for the $135 million dividend. Sycamore, Belk's officers and directors, and the professionals may also have been liable for imposing the upside-down plan. As attorney for Sycamore in the 2015 leveraged buyout and attorney for Belk in the resulting bankruptcy, Kirkland may have been liable for its handling of the conflict.

The United States trustee objected to the third-party releases because (1) "absent a duty to speak, silence does not constitute consent," (2) the releases were unintelligible, and (3) the Houston court's Complex Case Procedures did not provide for "an opt-out procedure that concludes before the commencement of a case."[253] The court responded by suggesting that the Opt-out Form be revised to emphasize its quid-pro-quo aspect—"If you opt out, you won't get a release."[254]—and requiring Belk to remail the Opt-out Form to all 90,000 creditors.[255]

The court's quid-pro-quo proposition was technically true. But it ignored the fact that the vast majority of creditors from whom the releases were sought had no need to get a release. They did not control Belk's business or its bankruptcy. No one had any plausible right to sue them. By acceding to the releases, the creditors were giving up important rights but getting nothing of value in return.

Aside from appearances, the Houston court had little reason to concern itself with whether the releases and exculpations were valid. Fifth Circuit caselaw deems even illegal releases and exculpations valid if they are contained in a plan confirmed without objection.[256] Because the United States trustee withdrew its objections in return for concessions from the court, and the court chose not to raise the release and exculpation issues *sua sponte*,[257] Belk's plan was confirmed without objection. Regardless of their legality, Belk's releases and exculpations are binding.

[253] U.S. Trustee Objection, *supra* note 5, at 10-11.
[254] Transcript of Hearing Re: Due Process Preservation Order [62] Notice of Opportunity for Holders of Claims to Opt Out of the Third-Party Releases [127] at 6, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 144.
[255] *Id.*
[256] Republic Supply Co. v. Shoaf, 815 F. 2d 1046 (5th Cir. 1987).
[257] 11 U.S.C. § 105(a) provides:

> No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

I. Inadequate Information

Chapter 11 was intended to make the reorganization process transparent.[258] As the bankruptcy court competition was intensifying in the early 1990s, Professor David Skeel astutely summarized the bankruptcy process:

> the progression of a bankruptcy case gives the parties an opportunity to observe and examine the debtor (as well as one another). To facilitate this process, the Bankruptcy Code and rules require the debtor to file various forms of disclosure and provide dramatically liberalized access to the debtor's officers, employees, and files. Stated differently, the existence of a collectivized insolvency proceeding acts as an information forcing device which enables the parties to detect misbehavior that otherwise might have gone unnoticed, thus further reducing both the likelihood and efficacy of strategic behavior. The process also gives every constituency an opportunity to watch the firm during its transition period, and thus to reassess their relationship with the debtor; and it establishes a reckoning point against which future performance can be measured.[259]

Belk shows that after three decades of court competition, little transparency remains. Belk's Lien holders may have had private sources of information that did not appear on the record. But any Belk lienholder who had only the information disclosed on the record had inadequate information to make an informed judgment about the plan.

Belk's disclosure statement contained no actual-performance financial statements. Nor did it provide any explanation of what caused Belk's financial distress. Belk filed no schedules, no SOFA, no list of creditors' names and addresses, and no monthly operating reports. No meeting of creditors was held, no creditors' committee appointed, no discovery conducted, and no Rule 2019 affidavits filed.

Belk's *proforma* financial statements showed declining losses and did not extend for enough years to show whether Belk would ever become profitable.[260] Belk provided not a word of explanation of the numbers on the *proforma* financial statements. Belk's evidence for the feasibility of its plan consisted of two sentences stating that the restructuring transactions would allow the debtor to satisfy its obligations in the ordinary course of business, the stores would stay open, and the employees would remain employed.[261] Although Belk presented the two ad hoc groups as the only parties other than Belk and Sycamore to the plan negotiations, Belk never explained who those groups were.

---

[258] *See, e.g.*, Lipson, *supra* note 98, at 1620-28 (describing Chapter 11's function as an information system).

[259] Skeel, *supra* note 192, at 507.

[260] Disclosure Statement, *supra* note 35, at Exhibit B.

[261] Declaration of Jonathan C. Hickman in Support of Confirmation of the Joint Prepackaged Plan of Reorganization of Belk, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code at 3, *In re Belk, Inc.* (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 21 [hereinafter Hickman Declaration].

IV. The Overvaluing of Plan Acceptance

The standard defense of the illegalities and obfuscation that pervade big case bankruptcy is that "no one was injured."[262] The usual foundation for that no-injury claim is that the impaired creditors voted for the plan—as they did in Belk. As Professors Robert Rasmussen and Randall Thomas put it, "[c]reditors, as a group, are unlikely to agree to being shortchanged."[263] Thus, Belk, amidst the lawlessness, could claim "overwhelming support" for a plan that "benefits all parties:"

> The Debtors are seeking to confirm the Plan at the first-day hearing. Given the overwhelming support for the Plan and the Debtors' extreme cash shortage, the Debtors and their key stakeholders elected to pursue a prepackaged restructuring on a quick but properly-noticed timeline that significantly benefits all parties by minimizing potential uncertainty, impact on the Debtors' business, and implementation costs.[264]

That standard defense is wrong for two reasons. First, in competing-court bankruptcies, creditors' consent is coerced by putting the creditors in situations in which they have no good alternative and so must vote for a bad alternative. Second, the interests of Belk's approximately three-hundred voting creditors are different from the interests of Belk's 90,000 non-voting parties in interest.[265]

A. Choice and the Situation.

Choices, such as the Lien holders' choice to accept Belk's plan, are only among the alternatives available in the existing situation.[266] The existing situation in Belk was that Delaware corporate law gave Sycamore virtually complete control over Belk, and Belk, through Kirkland, had substantial leverage against the Houston court. Sycamore, and the board Sycamore imposed on Belk, wanted Sycamore to remain in control. As a result, the Right-Side-Up Plan was not among the Lien holders' choices. The Lien holders' choice was between Belk's plan and a murky alternative in which creditors voted Belk's plan

---

[262] *E.g.*, Langley Declaration, *supra* note 65, at 3 ("[A] stop in chapter 11 for anything more than 24 hours will serve not one stakeholder's interest."); Martin J. Bienenstock, et al., *Response to "Routine Illegality in Bankruptcy Court, Big-Case Fee Practices"*, 83 AM. BANKR. L.J. 549, 566 (2009) ("The presence or absence of [required] representations from the interim monthly statements is of no consequence, except insofar as it is used by Routine Illegality to establish an "illegality."); Lynn M. LoPucki, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, 83 AM. BANKR. L.J. 423, 428 (2009) ("Because the practices discussed in this Article are legally indefensible, the professionals promote them as practically necessary. Their argument—made only implicitly—is that the courts are justified in ignoring laws that require wasteful, inefficient practices.").

[263] Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1390 (2000).

[264] Memorandum, *supra* note 165, at 2.

[265] The voting creditors predominant interests were to be promised as much as possible under the plan. The non-voting creditors predominant interests were that the voting creditors not be promised so much under the plan that Belk would be unable to pay.

[266] Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 136–37 (2003) ("Our proclivity is to under-estimate the role of situational influences, and to overestimate the influence of individual dispositions in explaining people's behavior. We tend to look for the person in the situation more than we search for the situation that makes the person.").

down, but Sycamore remained in control of Belk and Belk remained in control of the case. In that alternative, Belk might have failed and been liquidated.[267] In that situation, Lien creditors who believed Belk's plan shortchanged them may well have voted in favor of it.

The First Lien holders' initial choice was whether to sign the Restructuring Support Agreement (RSA). The cover letter or other document that posed that choice to them has never been made public and is probably protected from discovery as part of "confidential settlement discussions."[268]

The First Lien holders' situation as they faced that choice was that O'Melveny & Myers LLP appeared to have negotiated the RSA and the term sheet on their behalf. The term sheet promised the First Lien holders new liens in fifty-five percent of the amount of their old liens. The DIP lending primed their new liens, and the only way to buy an interest in the DIP loan was to sign the RSA. The voluminous documentation was unreadable and ultimately did not contain the financial information the First Lien holders needed to make their choice.[269] For all but the largest Lien creditors, hiring counsel to advise them was not cost-justified. They could not share the cost with other Lien holders because they did not know who the other Lien holders were and had no practical means of finding them. The Lien holders could not seek discovery or the appointment of a committee to represent them because no bankruptcy case had been filed.

If the Lien holders had managed to retain a knowledgeable bankruptcy attorney, that attorney would have advised them that bankruptcy law and procedure gave agenda control to the debtor and the debtors' attorneys. The Houston bankruptcy court was competing for big cases, and Kirkland was the court's biggest customer. The Houston court was therefore likely to side with Belk. The lower level of support for the RSA that Lien holders could have achieved by voting against it would not have led to a right-side up restructuring; more likely it would have led to delay and expense. To accept the plan and hope was probably the best way out of that bad situation.

The situation also explains the absence of creditor objections to the plan. As the United States trustee's objection in Belk illustrates, even a legally valid objection cannot change the results of a case in a competing court. Making an objection that the court will deny costs money and accomplishes nothing.

Thus, the Lien holders' awareness that bankruptcy law entitled them to absolute priority over Sycamore and the unsecured creditors, did not provide the Lien holders with an additional choice. The Lien holders "chose" by signing the RSA. But Kirkland, Belk,

---

[267] Langley Declaration, *supra* note 65, at 3 ("[A]bsent confirmation today, the entire enterprise will be at risk, threatening severe damage to the business, the loss of approximately 17,000 jobs, the closing of 291 stores, and the disappearance of a value maximizing –and fully consensual—restructuring.").

[268] Disclosure Statement, *supra* note 35, at Exhibit B, 1 ("This Restructuring Support Agreement is protected by rule 408 of the Federal Rules of Evidence and any other applicable statutes or doctrines protecting the use or disclosure of confidential settlement discussions.").

[269] *Id.* at Exhibit C (financial projections).

Sycamore, and the court controlled the Lien holders' choice by controlling the Lien holders' situation.

If the situation had been one in which the bankruptcy courts enforced the law instead of competing for cases, the Lien holders might have made different decisions. If the court's policy had been to require 28 days' notice—after the case was filed and before the plan was confirmed—of the deadline for filing objections to the plan, the First Lien holders would have had the time and resources to organize an opposition. If the United States trustee had appointed an unsecured creditors' committee as required by law, the committee might have objected to Sycamore's control over Belk. If the United States trustee had held the meeting of creditors required by law, the creditors and their attorneys could have questioned Belk's CEO about the company's poor performance from 2016 through 2020 and its skeletal financial projections.

Had the court required the ad hoc groups to comply with Bankruptcy Rule 2019, the First Lien holders might have learned that O'Melveny and Myers did not represent their interests in the plan negotiations. If the court had required that Belk obtain the creditors' signatures on releases instead of treating failure to opt out as consent, the creditors probably would not have granted the releases. That would have left the Lien holders in position to sue Sycamore and the professionals in the not-unlikely event that the Belk plan fails. The creditors might even have taken control of the case and defined their own choices.

B. Restructuring's Effect on Other Stakeholders

Chapter 11 procedures exist for the benefit of all parties in interest, not merely creditors and equity holders entitled to vote.[270] For that reason, Belk was required to, and did, give notice of its bankruptcy to 90,000 "parties in interest." Although only about three hundred of them were entitled to vote, all were entitled to object to failures to comply with the law.[271]

As the Supreme Court said in *NLRB v. Bildisco & Bildisco*, "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."[272] The Belk court expressly acknowledged that purpose during Belk's confirmation hearing, saying "[t]he goal is to preserve the jobs and the business."[273]

Belk had 24,350 employees when Sycamore took control of it in 2015.[274] That number had fallen to 17,000 by the time of the 2021 debt restructuring. Many of those employees had "invested human capital" by building their lives around their jobs.[275] Belk's suppliers, landlords, creditors, and communities where Belk operates are similarly dependent on

---

[270] 11 U.S.C. §1109(b) (A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.").

[271] 11 U.S.C. § 1128(b) ("A party in interest may object to confirmation of a plan.").

[272] N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984).

[273] Confirmation Hearing Transcript, *supra* note 2, at 62 ("The goal is to preserve the jobs and the business.").

[274] Belk 10-K, *supra* note 62, at 7.

[275] George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TULANE L. REV. 639 (2021).

Belk's future success. Belk's one-day Chapter 11 left claimholders and others with no forum in which they could participate, demand explanations, or otherwise protect their interests. Those parties' investments will be lost if Sycamore fails again.

Bankruptcy Code §1129(a)(11) requires, as a prerequisite to plan confirmation, that the court make a finding that "[c]onfirmation of the plan is not likely to be followed by the liquidation or the need for further financial reorganization of the debtor." The purpose of that "feasibility test" is to make sure the plan is one that will enable the business to survive.

Perhaps because an overwhelming majority of the Lien holders voted for the plan, the court did not take the issue of feasibility seriously. The entire discussion of feasibility in the confirmation hearing transcript is ten lines.[276] Those lines refer to two declarations, neither of which bear significantly on feasibility.[277] The materials that actually address feasibility are three pages of financial projections—balance sheet, income statement, and cash flow statement—in the Disclosure Statement.[278] But the Disclosure Statement does not explain the financial projections. Even if Belk achieves its financial projections, those projections merely show declining losses, not a return to profitability.[279]

If Belk's professionals misjudged how much debt Belk could carry, the likelihood of Belk's liquidation is high. The Houston court is new to the competition and ignored feasibility in Belk. In the years from 1991 through 1996, when Delaware was new to the competition, it too ignored feasibility. As a result, eleven of Delaware's first twenty-six reorganizations (42%) resulted in the reorganized debtors refiling bankruptcy within five years, as compared with only two of fifty-six reorganizations (4%) filed in noncompeting courts in the same period.[280] Of the ten Delaware-reorganized firms that refiled bankruptcy, eight were liquidated within 5.5 years of their refilings.[281] Instead of focusing on how many impaired Lien holders accepted the plan, the Houston court should have been focused on whether Belk would be able to perform its plan.

V. Other Illegal or Abusive Practices

Court competition for big cases has impacted every area of Chapter 11 law and procedure. In some areas, the courts flagrantly violate the law. They include control of professional fees, the appointment of creditors' committees, the appointment of examiners, disclosures by ad hoc committees or groups, the solicitation of plan acceptances, the grant of

[276] Confirmation Hearing Transcript, *supra* note 2, at 52-53 (lines 20-25 and 1-5).
[277] Langley Declaration, *supra* note 65, at 8-9 (discussing changes in the business without reference to when they were made or estimates of their effects on financial performance); Hickman Declaration, *supra* note 261, at 3 (providing no discussion of Belk's past or future financial performance, but opining that the plan would enable Belk to pay its creditors in the ordinary course of business).
[278] Disclosure Statement, *supra* note 35, at 252-54.
[279] *Id.* at 252 (projecting a $36 million loss in fiscal year 2024).
[280] LoPucki & Doherty, *supra* note 29, at 1939. The difference is statistically significant (p=.001).
[281] LoPucki & Doherty, *supra* note 30, at 1405. Delaware's eleven refilings were by ten firms because two of the refilings were by Memorex-Telex, NV. Id. at 1404 n.67.

third party releases, and notice periods for disclosure statement approval and plan confirmation. In other areas, the courts abuse their discretion by ignoring the facts of individual cases to adopt "predictable" procedures that will attract cases. They include the failure to transfer cases when appropriate, waiver of the filing of lists of creditors, schedules, statements of financial affairs, the cancellation of creditors' meetings, the rubber-stamping of collective bargaining agreement rejections, and the approval of critical vendor orders.

What all these illegalities and abuses have in common is that they are in favor of the case placers. No equivalent list of violations or abuses that favor other parties in big cases could be compiled. Only practices that favor the case placers survive because only the courts that follow those practices get cases. Those practices have fundamentally altered the operation of Chapter 11 and, in each case, nullified some aspect of the rule of law. This part discusses six more illegal or abusive practices.

A. Manager Bonuses

After Delaware joined the competition in the 1990s, bankrupt companies began paying multi-million dollar bonuses to their managers.[282] Often, the managers receiving them were the same managers who had piloted the companies into the ground. The bonuses became "a major public issue in the early 2000s."[283] In 2005, Congress responded by prohibiting the payment of retention bonuses to managers unless they had "a bona fide job offer from another business at the same or greater rate of compensation."[284] Few managers of bankrupt companies did.

Before the ink was even dry on the new law, the competing courts were approving "incentive" bonuses and other pay increases without using the word "retention."[285] Later, the pattern shifted to paying "retention" bonuses immediately prior to the bankruptcy filings.[286] In 2005, Congress had sought to block that strategy by amending the fraudulent transfer provisions of the Bankruptcy Code to expressly include prepetition transfers "to or for the benefit of an insider under an employment contract."[287] Prominent bankruptcy lawyers warned their clients that paying prepetition bonuses created "fraudulent conveyance

[282] LoPucki, *supra* note 11, at 152.
[283] Jared A. Ellias, *Regulating Bankruptcy Bonuses*, 92 S. Cal. L. Rev. 653, 654 (2019) ("This unfairness became a major public issue in the early 2000s, as formerly-high-flying titans of corporate America like K-Mart, Enron, and WorldCom filed for headline-grabbing Chapter 11 bankruptcies and subsequently paid millions of dollars in bonuses to senior managers.").
[284] PL 109–8, April 20, 2005, 119 Stat 23.
[285] Ellias, *supra* note 283, at 697-98 (noting that "incentive bonus plans after the reform appear to result in pay-outs just as often as the pre-reform retention plans did," and finding no "evidence that the reform altered the overall level of compensation of the CEOs of Chapter 11 debtors").
[286] *E.g.*, Abha Bhattarai and Daniela Santamariña, *Bonuses before bankruptcy: Companies doled out millions to executives before filing for Chapter 11,* WASH. POST, Oct. 26, 2020 (noting executive bonuses immediately prior to the Hertz Global, J.C. Penny, Neiman Marcus, and fifteen other recent bankruptcies).
[287] 11 U.S.C.A. § 548(a)(1).

risk."[288] But despite the blatancy of the bonuses and their publicity, apparently no action to claw a bonus back has been filed in any bankruptcy court.[289]

Perhaps in an effort to end-run the bankruptcy court competition, some creditors of Toy-R-Us have filed a retention bonus claw-back case in a New York state court.[290] Filing actions in state courts may offer a partial solution to the bankruptcy courts' corruption problem.

There is no evidence that Belk paid retention bonuses. But the bonuses paid in other cases probably came to light because the debtors had to disclose them in their SOFAs. Belk did not file a SOFA.

B. Examiners

An examiner is a disinterested officer of the court, appointed by the United States trustee to investigate the debtor. Courts most commonly order the appointment of examiners to investigate allegations of wrongdoing. Bankruptcy Code §1104(c) provides:

> [A]t any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate . . . if—
>
> . . . .
>
> (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

Nearly all large, public company bankrupts have the required $5 million in unsecured debt,[291] making examiner appointment mandatory in any case in which one is requested.[292] But in a study of 661 large, public company bankruptcies filed in the period 1991 through 2010, Professor Jonathan Lipson and Christopher Fiore Marotta found that examiners were requested in only ninety-three cases (14%) and appointed in only forty-three of those

[288] Ellias, *supra* note 283 at 701 n.81 ("One law firm that represents many large debtors in bankruptcy expressly warned its clients against this strategy, saying that it risked upsetting negotiations with creditors and created fraudulent conveyance risk."). The law firm Ellias referred to was Kirkland.

[289] *See, e.g.*, David Farrell, *Payday before mayday: The increasing use of pre-bankruptcy executive retention bonuses*, JDSUPRA, Jun. 17, 2020 (stating that "instances in which pre-bankruptcy bonuses paid to a Chapter 11 debtor's senior management have been successfully challenged under Bankruptcy Code Section 548(a)(1)(B) appear to be few and far between," but not identifying any challenges).

[290] Complaint, Tru Creditor Litigation Trust v. Bandon, Supreme Court of the State of New York, New York County, Index No. 651637/2020.

[291] Jonathan C. Lipson, *Understanding Failure: Examiners and the Bankruptcy Reorganization of Large Public Companies*, 84 AM. BANKR. L.J. 1, 19 (2010) ([T]he size of these debtors suggests that the appointment of an examiner would be required in all (or almost all) of these cases—if sought.").

[292] In re Revco D.S., Inc., 898 F.2d 498, 500-01(6th Cir. 1990) ("[11 U.S.C. §1104(c)(2)] plainly means that the bankruptcy court "shall" order the appointment of an examiner when the total fixed, liquidated, unsecured debt exceeds $5 million, if the U.S. trustee requests one.").

ninety-three (46%).[293] Thus, in most cases, the bankruptcy courts failed to comply with the law. In a study of the 282 large, public company bankruptcies filed in the period 2011 through July 2021, the author found that examiners were requested in only sixteen cases (6%) and appointed in only three of those sixteen (19%).[294]

Table 4 compares the findings of the two studies. Since 2010, the rate at which examiners are requested has fallen by more than half (from 14% to 6%), and the rate at which examiners are appointed in response to those requests has also fallen by more than half (from 46% to 19%). The most likely reason for the decline in requests is that would-be requesters know their requests are unlikely to be granted. The most likely reason for the decline in examiner appointments is the intensification of the court competition. The investigation authorized by the statute is "of the debtor"—which would rarely be in the case placers' interests.

Table 4. Trend in Examiner Requests and Appointments

	Cases filed 1991-2010	Cases filed 2011-2021
Cases	661	282
Examiner requests	93	16
Requests as a percent of cases	14%	6%
Examiner appointments	43	3
Appointments as a percent of requests	46%	19%

Both studies provide evidence that court competition is driving this decline in the use of examiners. In the period 1991-2010, Lipson and Marotta found that an examiner was "about three times less likely to occur in a case in Delaware."[295] In the period 2011-2021, the competing courts granted two of fourteen requests for examiners (14%), while the non-competing courts granted one of two requests (50%). Courts are increasingly failing to appoint examiners when required by Bankruptcy Code §1104(c)(2).[296]

C. Case Transfer

Defenders of the bankruptcy court competition argue that Congress authorized the rampant forum shopping by enacting a venue statute that allowed it.[297] But, as previously explained, the committee that authorized the broad venue provisions expected the

[293] Jonathan C. Lipson and Christopher Fiore Marotta, *Examining Success*, 90 AM. BANKR. L.J. 1, 32 (2016)
[294] Examiner Study (on file with the author).
[295] Lipson & Marotta, supra note 293, at 4 ("Even in the 661 large cases in the sample—where appointment would likely have been mandatory—they were sought in only 93 (14% of) cases, and appointed less than half the time sought, in 43 (or 6.5% of) large cases.").
[296] *E.g., In re* Loral Space & Commc'ns, Ltd., 2004 WL 2979785, at *4 (S.D.N.Y. 2004) (reversing Judge Drain's refusal to appoint an examiner).
[297] *House Holds Hearing on Proposed Chapter 11 Venue Reform Legislation*, Am. Bankr. Inst. J., October 2011, at 10, 93 (Frank J. Bailey testifies "[t]hose in opposition . . . seem to think that Congress intended to create, through the current venue statute, certain national bankruptcy courts for the disposition of large public company cases. There is nothing in the language ... or, to my knowledge, the legislative history, to support such a reading.").

bankruptcy courts to transfer cases filed in inappropriate venues to appropriate venues.[298] Over 90% of large, public company bankruptcy cases are filed away from companies' headquarters, and competing courts rarely transfer them back. To transfer even a single big case is essentially to withdraw from the competition. Case placers will not take a case to a court that might transfer it back.

To illustrate, the New York bankruptcy court transferred the Patriot Coal case to St. Louis—where Patriot's headquarters were located—in 2012.[299] Following that transfer, the New York court's market share declined so sharply that New York barely remains a significant competitor.[300] Since *Patriot Coal*, one-hundred and ninety-three voluntary Chapter 11 cases have been filed in courts away from the companies' principal executive offices and disposed of by plan confirmation, conversion or dismissal. Not a single one has been transferred back prior to its disposition.[301] In a particular case, it is plausible that a judge would in good faith consider a venue other than the home court to be in the interests of justice and for the convenience of the parties. But it is not plausible that the judges reached that conclusion in good faith in one-hundred and ninety-three consecutive cases. The courts are competing for cases, not exercising their discretion in accord with the law.[302]

D. Section 363 Sales

Bankruptcy Code §1123(b)(4) allows a debtor to sell "all or substantially all" of its property, conditioned on compliance with the Chapter 11 plan process. Bankruptcy Code §363 provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease . . . property of the estate." That section imposes no conditions. Neither the Bankruptcy Code nor its legislative history suggest that Congress intended to give debtors the option to skip the plan process by selling their businesses under §363.[303] Beginning in the mid-1980s, however, a few courts allowed debtors in exigent circumstances to do exactly that.[304]

The competing courts have since made §363 sales a low-procedure alternative to the Chapter 11 plan process. The 363 sale procedure is that the debtor contracts to sell its business to a stalking-horse buyer and requests that the court approve the sale. The court orders

---

298 *Supra* notes 51, 52, and accompanying text.

299 *In re* Patriot Coal Corp., 482 B.R. 718 (Bankr. S.D.N.Y. 2012).

300 *See* Figure 1, *supra*.

301 Transfers Study (on filed with the author). The study is a download from the UCLA-LoPucki Bankruptcy Research Database, showing that 193 voluntary Chapter 11 filings were forum shopped by large, public companies and completed, from the transfer of Patriot Coal on November 27, 2012 to the present.

302 Levitin, *supra* note 1 ("The very fact that certain districts and judges seek to attract megacases and maintain their megacase "franchises" is the assurance to debtors that they will not be disappointed by steering their cases to them."); Lipson letter, *supra* note 1 ("[Excessive venue flexibility] has led to competition for high-profile cases among a small number of courts, including the Southern District of New York, where Purdue Pharma's case is pending before Judge Robert Drain.").

303 *E.g.*, Kathryn A. Coleman & Jonathan M. Landers, *Rounding the Square Peg Clarifying the Jurisprudence of the Sale Model of Chapter 11*, AM. BANKR. INST. J., June 2016, at 22, 43 (Section 363 is being used in ways never contemplated by the drafters of the Bankruptcy Code.").

304 LoPucki, *supra* note 11, at 170-71 ("Table showing the dates and courts of the 363 sales.").

an auction, the debtor conducts the auction, and the court enters an order approving the results. During the sale process, the debtor makes extensive confidential disclosure to potential buyers, but little or no disclosure to the creditors or other parties in interest. The creditors are not entitled to vote on the sale. Debtors typically rush the sales using the metaphor that the companies are "melting ice cubes."[305] In cases where the debtor has announced an intention to sell the business at filing, the sales occur an average of eighty-eight days after filing.[306] The result is that creditors do not receive information in time to oppose abusive or collusive sales.[307]

If the debtor receives sale proceeds, the debtor may distribute them through a plan or a "structured dismissal."[308] The effect has been to open another path for end runs around chapter 11 procedures. As Jacoby and Janger put it, "[§363 sales] short-circuit the safeguards of Chapter 11." [309]

In 2009, the New York bankruptcy court eliminated the last requirement for a §363 end run—the requirement that the debtor actually sell its business. That court allowed General Motors and Chrysler sell their companies to shell corporations while specifying what otherwise would have been the terms of the reorganization plan in the sale documentation. As Professors Ralph Brubaker and Charles Jordan Tabb noted, "there actually is no clean, clear distinction between reorganization by 'plan' and reorganization by 'sale'—through the wonders of sophisticated transaction engineering, each can be the precise functional equivalent of the other."[310] Debtors have not yet made use of the GM and Chrysler precedents, but if court competition is allowed to continue, it is just a matter of time.

From 2011 to the present, sixty-one of 282 large, public company Chapter 11s (22%) have been 363 sale cases. In forty-two of those cases, the debtor intended to sell at the time it filed its petition. For reasons not yet explained, those sale-intended cases are heavily concentrated in Delaware. Since 2010, Delaware has had twenty-five, while no other court has had more than three.[311] Delaware must be offering something to the case placers that other courts cannot.

Section 363 sales usually harm, rather than benefit, the selling debtors. Professors LoPucki and Doherty found that §363 sale cases produced only half the value produced by reorganizations of comparable companies.[312] Professors Anne Anderson and Yung-Yu Ma

---

[305] Melissa B. Jacoby, Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014).
[306] 363 Sale Study (on file with the author).
[307] Jacoby & Janger, *supra* note 305, at 901 ("[T]he debtor can join with a potential purchaser to opportunistically exploit the fear associated with a crisis to capitalize on the informational disadvantage and strong-arm a favored deal.").
[308] *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979, 197 L. Ed. 2d 398 (2017) ("Although the Code does not expressly mention structured dismissals, they 'appear to be increasingly common.'").
[309] Jacoby & Janger, *supra* note 305, at 906.
[310] Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375 (2010).
[311] 363 Sale Study (on file with the author).
[312] Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 4 (2007) ("Even controlling for the differences in the prefiling earnings of the two sets of companies, sale yielded less than half as much value as reorganization.").

found that §363 sales produce significantly less value than sales of comparable companies under reorganization plans.[313] Some evidence indicates that debtors' managers receive side payments from the buyers,[314] but further research is needed to determine how the case placers benefit from section 363 sales.

E. Collective Bargaining Agreement Rejection

In February, 1984, in *N.L.R.B. v. Bildisco and Bildisco*, the Supreme Court permitted a Chapter 11 debtor to reject a collective bargaining agreement.[315] To reverse *Bildisco*, Congress added Bankruptcy Code §1113 in July, 1984.[316] Section 1113 prohibits rejection of a collective bargaining agreement unless the debtor had proposed only "those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor"[317]—in other words, proposed to pay as much as it can while remaining in business. In a study of cases filed after §1113 took effect in 1984 through 1993 Professor Christopher Cameron found that debtors were successful in only twenty-two of thirty-eight efforts to reject collective bargaining agreements (57.9%).[318] The period that study covered was mostly prior to the intense bankruptcy court competition that began at the end of 1990.

In a study of cases filed from 2001 through 2007—a period of intense competition—Professor Andrew Dawson found that debtors were successful, by settlement or in litigation, in 100% of their efforts to reject one-hundred-three collective bargaining agreements in thirty cases.[319] By approving every collective bargaining agreement rejection that came before them, the bankruptcy courts had overruled Congress and restored *Bildisco*.

[313] Anne M. Anderson, Yung-Yu Ma, *Acquisitions in Bankruptcy: 363 Sales Versus Plan Sales and the Existence of Fire Sales*, 22 AM. BANKR. INST. L. REV. 1, 10 (2014) ("In Panel C, however, we find that the acquisition price plus assumed liabilities as a proportion of total assets is significantly greater at the 1% level for plan sales (median 0.44) than for 363 sales (median 0.29).").
[314] LoPucki, supra note 11, at 169-80 (discussing Derby Cycle and Polaroid).
[315] N.L.R.B. v Bildisco and Bildisco, 465 U.S. 513 (1984).
[316] PL 98–353, July 10, 1984, 98 Stat 333.
[317] 11 U.S.C. §1113(b)(1)(A)
[318] Christopher D. Cameron, *How Necessary Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV. 841, 895 (1994).
[319] Dawson explained:

> These thirty debtors that sought to reject a CBA involved a total of 103 different § 1113 motions. The majority of these motions were settled. The debtor and the labor unions reached settled agreements for 62 of these 103 CBAs. For nine other CBAs, the §1113 motions were never ruled on because the debtor failed to reorganize. All of the remaining thirty-two CBAs were rejected.

Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganizations*, 84 AM. BANKR. L.J. 103, 116 (2010).

F. Critical Vendor Orders

As enacted in 1979, the Bankruptcy Code codified the system of creditor priority.[320] Unless otherwise agreed, unsecured creditors who did not qualify for a Bankruptcy Code §507 priority were to share pro-rata.[321]

Suppliers to some Chapter 11 debtors refused to continue supplying them during the case unless the debtors paid all or part of the prepetition debts owing to them. If the supplier is selling something critical to the debtor's business that the debtor could not buy elsewhere, the debtor's business might be unable to survive without the supplier's cooperation. Some courts responded to the threats of critical vendors by holding them in contempt for violating the automatic stay.[322] Others ordered the suppliers to sell to the debtor on ordinary terms.[323] Yet others allowed debtors to pay prepetition debt to suppliers whose cooperation was needed.

In the mid-1990s, competing courts began routinely entering "critical vendor" orders authorizing the debtor to pay some unsecured creditors at the beginning of the case, leaving other creditors with the same legal rights to their fate under the reorganization plan. The orders were popular with debtors' managers and attorneys because (1) they enabled the debtor to avoid confrontation with suppliers and (2) many of the orders let the managers decide who was "critical." That enabled the managers to pay their allies and punish their enemies.

By 2002, the narrow exception for critical vendors had morphed to include virtually anyone the debtor chose to pay. For example, the Chicago court—at that time a formidable competitor for cases—gave debtor Kmart a $200 million to $300 million slush fund that Kmart could use to pay any creditor Kmart deemed "critical."[324]

Today, the competing courts enter orders that allow debtors to classify numerous creditors as "critical vendors" without court approval.[325] While other courts still take a dim

---

[320] *In re Kmart Corp.*, 359 F.3d 866, 871 (7th Cir. 2004) ("Today the Bankruptcy Code of 1978 supplies the rules. Congress did not in terms scuttle old common-law doctrines, because it did not need to; the Act curtailed, and then the Code replaced, the entire apparatus.").

[321] 11U.S.C. §726(a)(2) (timely filed claims share pro rata in Chapter 7); 11 U.S.C. §1129(a)(7) (creditors in Chapter 11 are entitled to at least what they would get in a Chapter 7 liquidation); 11 U.S.C. §1129(b)(1) (classes of unsecured creditors may not be discriminated against unfairly unless they consent to be). Cunningham v. Brown, 265 U.S. 1, 13 (1924) ("[E]quality is equity, and this is the spirit of the bankrupt law.").

[322] Such a threat is "an act to collect . . . a claim against the debtor that arose before the commencement of the case" 11 U.S.C. §363(a)(6).

[323] *E.g., In re* Blackwelder Furniture Company, Inc., 7 B.R. 328 (Bankr. W.D.N.C. 1980) (so ordering).

[324] LoPucki, *supra* note 16, at 165-66.

[325] In re WorldCom, Inc., 2002 WL 1732647, at *1 (S.D.N.Y. July 22, 2002) (authorizing the debtor to pay up to $70 million to "critical vendors" of the debtor's choosing). LoPucki, *supra* note 16 at 163-67.

view of critical vendor orders,[326] the competing courts grant them freely.[327] Their availability attracts big cases to the courts competing most enthusiastically.

VI. CONCLUSIONS

To comply with Chapter 11 procedures in a one-day case is impossible. From that, the proponents of one-day Chapter 11s incorrectly conclude that compliance is not necessary. The correct conclusion is that one-day Chapter 11s are legally impossible.

Logic, however, is not what is producing the steadily increasing number of one-day Chapter 11s. Bankruptcy court competition is. Five panels of bankruptcy judges are trying to outdo one another in what they can offer the case placers. The competitors burned through the legal offerings long ago. Now what they offer is freedom from the law. The one-day Chapter 11 is one of many strategies for achieving that freedom.

With Kirkland's dominance of big-debtor representation and its promotion of three new courts, the competition has entered a new and more embarrassing phase. The quick shift of big cases to Houston, White Plains, and Richmond proves the customary explanations of Delaware' and New York's dominance hollow.[328] The new courts are not commercial centers with big bankruptcy firms and experienced judges. They are not the places

---

[326] *E.g.*, Matter of Oxford Mgmt., Inc., 4 F.3d 1329, 1334 (5th Cir. 1993) ("By commanding payment, the bankruptcy court elevated the status of the appellees above that of the other general unsecured creditors and deviated from the pro rata scheme of distribution envisioned by the Code. . . . This order effectuated an impermissible substantive alteration of the Code's provisions."); *In re Goodrich Quality Theaters, Inc.*, 616 B.R. 514, 517 (Bankr. W.D. Mich. 2020, *supplemented,* No. DG 20-00759, 2020 WL 1180534 (Bankr. W.D. Mich. Mar. 9, 2020) ("One searches the Bankruptcy Code in vain for express statutory authority for payment of prepetition claims in chapter 11, except pursuant to a confirmed plan, yet bankruptcy courts generally, though begrudgingly, authorize such payments under § 105(a) and the "Doctrine of Necessity" or "Necessity of Payment Doctrine."); *In re* Pioneer Health Servs., Inc., 570 B.R. 228, 236 (Bankr. S.D. Miss. 2017) ("The Fifth Circuit, at best, takes a dim view of critical vendor orders."); *In re Fultonville Metal Prod. Co.*, 330 B.R. 305, 313 (Bankr. M.D. Fla. 2005) ("Because the proposed payments involve an exception to such a fundamental bankruptcy principle, it is clear that courts should view requests to pay 'critical vendors' with circumspection.").

[327] *E.g., In re* Windstream Holdings Inc., 614 B.R. 441, 452 (S.D.N.Y. 2020), *appeal dismissed as moot sub nom. In re* Windstream Holdings, Inc., 838 F. App'x 634 (2d Cir. 2021) ("Court supervision of each individual critical-vendor designation is not only impractical in large bankruptcies – indeed, as Judge Drain noted, the company would likely go under before such hearings could occur."); Final Order (I) Authorizing the Debtors to Pay Certain Prepetition Claims of (A) Critical Vendors, (B) Lien Claimants, (C) Customs and Regulatory Claimants, and (D) 503(B)(9) Claimants, (II) Confirming Administrative Expense Priority of Outstanding Orders, and (III) Granting Related Relief at 2, *In re Neiman Marcus Group Ltd LLC* (Bankr. S.D. Tex., No. 20-32519 (DRJ)), ECF No. 732 ("The Debtors are authorized, but not directed, to pay the prepetition Trade Claims in the ordinary course of business and consistent with their prepetition practices in an aggregate amount not to exceed $72.5 million on a final basis as the Debtors deem necessary in their sole discretion.").

[328] *E.g.*, Levitin, *supra* note 1, at 56 ("[S]uper-speed pre-packs make a mockery of the idea of judicial expertise playing any role in judge-picking.").

where the companies are incorporated. All the new courts have in common is judges who want the big cases and are willing to do what is necessary to get them.

This new variant of bankruptcy court competition is more virulent because it is no longer grounded in relationships between the courts and law firms with substantial investments in local offices. It is what Professor Adam Levitin has called "drive-thru" bankruptcy.[329] The debtors' attorneys fly or Zoom to the court city for two or three hearings and the case is over. If they didn't get what they wanted in those hearings, they can easily fly or Zoom to some other city for the next case. In this new variant, the attorneys have all the power, and the courts have none.

Bankruptcy scholarship is now focused on the rapid evolution of big-case bankruptcy into hardball, voting distortion, grifting, DIP lender control, independent bankruptcy directors, and other unlegislated changes. This Article has sought to explain the common cause of these changes—the inability of the bankruptcy courts to push back against anything the case placers demand. Pushback has no effect because the cases can so easily go elsewhere.

The only solution to this problem is to end the competition. Congress could accomplished that by requiring that big companies file their bankruptcy cases in the courts where the companies are located. Bipartisan bills so proposing have been introduced in the House, the Senate, or both, numerous times over several decades.

This year's bipartisan House bill, H.R. 4193, was introduced by Representatives Zoe Lofgren (D-Cal.) and Ken Buck (R-Colo.).[330] Last year's bipartisan Senate bill, S. 5032, was introduced by Senators Elizabeth Warren (D-Mass.) and John Cornyn (R-Tex.).[331] The bills have not passed because bankruptcy court competition has been a low-visibility phenomenon, Delaware's and sometimes New York's Senators and Representatives have blocked the bills, and the bankruptcy community is unwilling to admit that the competition exists. Purdue Pharma, one-day chapter 11s, and bankruptcy scholars' growing unease with the effects of court competition will hopefully change that.

But as long as the competition continues, bankruptcy reform is a fool's errand. Even if Congress adopts reforms, the competing courts won't enforce them.

[329] *Id.* at 6.
[330] H.R. 4193, 117th Cong. (2021), https://lofgren.house.gov/media/press-releases/lofgren-buck-introduce-bipartisan-legislation-end-corporate-bankruptcy-forum.
[331] S. 5032, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/senate-bill/5032/all-info.