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Venue Choice: Where the Action Is

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This symposium presents papers first delivered at a conference held at Wisconsin Law School on September 9, 2005. The conference was generously supported by the George H. Young Chair, held by Dean Kenneth B. Davis, Jr., and the Institute for Legal Studies at Wisconsin Law School. The biggest contributions were the time and expertise of the participants, whose revised contributions to the conference follow.

The conference was organized at my initiative. Lynn LoPucki's work on the large case Chapter 11 reorganizations began during his time here at Wisconsin. We were collaborators in the initial work. When my work took me to other issues, LoPucki continued and expanded the work extensively, as is well known by anybody who works in the field. *Courting Failure*[1] collects together much of this work and deals with very important issues. It seemed appropriate that at this time Wisconsin stimulated the assessment of LoPucki's overall contributions in this part of his work.

I was also motivated to convene the conference for another reason. Much of the controversy that ensued immediately upon publication of *Courting Failure* concerned LoPucki's choice of the word "corruption" to describe the ju-

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

dicial behavior he is describing. Corruption is a highly pejorative word. It is predictable and appropriate that people question whether LoPucki was justified in his choice of terms. That debate continues in many of the papers of this symposium. However, this debate should not divert attention entirely away from other important issues raised by LoPucki. These issues concern whether our extensive venue choice for large Chapter 11 cases has allowed behavior by parties in bankruptcy cases (the "case placers," to use LoPucki's phrase) that effectively dictates what law applies in these cases. LoPucki's story suggests that only courts that rule in particular ways get large Chapter 11 cases. For the most part the papers in this symposium agree with that conclusion. Given the data that LoPucki has amassed, it is difficult not to.

Wisconsin Law School has long been identified with the phrase "law in action." If LoPucki's account is correct, then venue choice is by far the most important issue in large corporate bankruptcy cases. Scholars can, and have, debated many other issues—the standards for cram down against non-consenting interests, the terms on which to allow trades of creditor claims in bankruptcy, the tests for appointment of a trustee or examiner, to name but a few—but it is the venue choice provisions that are likely to determine how these issues are resolved.

One cannot conclude, *a priori*, that the extensive venue choice incorporated into the Bankruptcy Code is bad. Like everything in the world, forum shopping and court competition have their good effects and their bad effects. It is sometimes asked whether this is a race to the top or a race to the bottom. It is both. The benefits of forum shopping led LoPucki and me to endorse the current venue choice provisions when we first explored this issue in the 1980s.[2] But the law in action can change without any change in the law in the books. Both LoPucki and I, independently and at different times, have now concluded that because of changes in the way bankruptcy law is practiced, by both courts and

2. Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 33-51.

lawyers, for some time the harm has come to outweigh the benefits.[3]

One of the most disturbing parts of the story that LoPucki tells is his account of the congressional reaction to these changes in the law in action. Congress seems to react in a very parochial way, without any serious consideration of the public policy issues raised by the behavior described in *Courting Failure*. One might lament the usefulness of a symposium of this nature. What reason is there to believe that the decision-makers that most matter, the members of the Congress, will pay any attention to the debates that follow? The answer is that we must do what we can. And what academics can do is to debate important issues, attempt to narrow the differences about what should be done that could be supported by any reasonable publicly spirited person, help keep the debates and conclusions in the public eye, and hope for the best. This symposium is in that spirit.

3. My own conversion to this position was stated publicly at a panel presentation at the American Bankruptcy Institute's symposium entitled "The Biased Business of Venue Shopping," held on July 21, 1995 in North Falmouth, MA.