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CORPORATE BANKRUPTCY PANEL

THE FRAUDULENT CONVEYANCE ORIGINS OF CHAPTER 11: AN ESSAY ON THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS

Douglas Baird[*]
Sarah R. Borders[**]
Richard Levin[***]
Bruce Markell[****]
David Skeel[*****]

MR. CONNOR EDWARDS: Before we get started on the Corporate Panel, I want to say a quick thank you to Chief Judge Hagenau. That was such an inspiring speech, and really put in perspective of just how large the scope of bankruptcy is. Many consider it to be a niche practice, but all of us in this room realize that now it's not so niche; it's actually global and it is very impactful throughout the world.

Now, without further ado, I'd like to bring to the stage our Corporate Panel. Please make your way up here. I would like to quickly introduce the moderator for this panel, Sarah Borders. She is a partner at King & Spalding. She is a true champion of the corporate bankruptcy world, not only just in Atlanta but throughout the country. We are very honored to have her here today, and to moderate this excellent panel who we believe are some of the best minds in the field. Thank you all again and enjoy the Corporate Panel.

MS. BORDERS: Thank you so much. We'll get started. In preparing the very brief introductions, I thought to myself, I could take up the full hour and 20 minutes simply introducing the panel, but I will keep it short. Immediately to my left is Professor Bruce Markell. Professor Markell is a professor of bankruptcy law at Northwestern where he has been since 2015. Prior to his tenure there, he has been, among other things, Judge Markell who was a United States Bankruptcy Judge for the District of Nevada. He's been a practicing lawyer. He practiced for more than ten years and was a partner at Sidley & Austin in L.A. and was a law professor at a number of additional universities.

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To Professor Markell's left is Rich Levin. Rich Levin literally wrote the United States Bankruptcy Code in the late 1970s. As the Assistant Counsel to the House Judiciary Committee, he was a driving force behind the Code as we know it today. He's had a lifetime commitment to bankruptcy legislation, to the process and its application. He's currently the Co-Chair of Jenner & Block's Restructuring and Bankruptcy Department where he advises clients in their most complex restructuring matters.

To Rich's left is Professor David Skeel. David is the S. Samuel Arsht Professor of Corporate Law at the University of Pennsylvania Law School. After a brief stint in private practice, Professor Skeel taught at Temple University before joining the faculty at Penn. His book, *Debt's Dominion, a History of Bankruptcy Law in America*, is one of the best explanations available of how we got where we are today with debt and bankruptcy. I recommended it to my daughter who is a law student, and I recommend it to you. Among other things, in 2016, Professor Skeel was appointed by President Obama to the Financial Oversight and Management Board for the Commonwealth of Puerto Rico and is one of seven members responsible for the financial reorganization of the commonwealth.

Finally, Professor Doug Baird. Professor Doug Baird is perhaps the leading author, speaker and thinker in the field of bankruptcy. If Wikipedia is correct, he's written more than 13 books and 71 articles. His textbooks on bankruptcy are used in law schools around the country and have provided an introduction to and foundation for bankruptcy law for generations of young lawyers. Professor Baird currently is the Harry A. Bigelow Distinguished Service Professor at the University of Chicago Law School, where he also formerly served as the Dean of the Law School. Among other things, he's the recipient of the 2008 *Emory Bankruptcy Developments Journal* Distinguished Service Award.

That is our panel. My moderating duties might be almost over if this goes as I expect it will, so I'm going to pivot to Professor Baird to lay out the premise for our discussion today.

PROFESSOR BAIRD: Thank you very much. It's really awe-inspiring to be on a panel like this. What I've been asked to do is to say a few words about the essay that I wrote for the *Journal* which grows out of a larger project I've done that tries to follow in the steps of David Skeel and retrace the evolution of corporate reorganizations.

What I've done in reexamining this arc is looked at more closely at the way in which fraudulent conveyance law has really influenced the shape of

reorganization law. It's not that surprising, fraudulent conveyance law really has given shape to much of modern commercial law, and *Twyne's Case* is still the focal point. It's one of the few cases from the early 17th century that lawyers still talk about. Before I continue, something I should say is there is a new piece out by Emily Kadens which is absolutely brilliant. She's probably our best commercial legal historian, in which she has gone back and looked at the record of *Twyne's Case*. This was done in the Star Chamber. All the records still exist, if you can read the handwriting which I can't. And she's gone through all the depositions and everything. And it turns out that the case is actually quite different than the common account. Among other things, in my essay I got the year wrong. It was 1602. It turns out, the riot started when the sheriff was seizing cattle, not sheep. But there are a lot of other things that just make this required reading for everyone.

PROFESSOR MARKELL: Let me just interject at one point, it's not out yet. I actually have intimate knowledge of the article. I won't say about the author, but she is my wife. It's currently in editing. It probably won't be out until mid-year. But when you do, printed it was 94 pages and 604 footnotes, so have fun. But it reads like a novel. It really does. It'll be in the *American Bankruptcy Law Journal*.

PROFESSOR BAIRD: It's, again, required reading. At any rate, where is modern fraudulent conveyance law today? Two things we know about is, we're used to § 548 and its equivalents and the evolution of this idea of hinder, delay and defraud, and how that now affects all sorts of activities because the test has morphed into constructive fraudulent conveyances, and we look at insolvency and transfers for less than reasonably equivalent value, and again that's old, familiar stuff to all of us.

Also, it decisively shaped the way in which preference law emerged. Preference law emerged in the late 18th century out of fraudulent conveyance law. Originally it was called a fraudulent preference, and then preferences took on a life of their own. Less noted, though I should say Bruce has an article in the early '90s where he does talk about this, but not commonly noted is that fraudulent conveyance law in the late 18th, early 19th century, also gave rise to a number of judicial opinions in which judges reviewed things like assignments for the benefit of creditors, or foreclosures, or virtually any transaction where you had an interaction between a debtor and some creditors that potentially put other creditors at a disadvantage. Not because bankruptcy is on the horizon. This is an era when by and large there wasn't bankruptcy law. Not because there was a preference, but simply judges would look at the process. Unlike modern

fraudulent conveyance law, they weren't looking at discrete transfers; they were simply looking at the transaction as a whole, and saying, wait a second. Is this a transaction that has badges of fraud? Is this a transaction that is defeating the rights of creditors in a way that's inappropriate?

And this led by the middle of the 19th century to judicial review of railroad foreclosures and reorganizations, and the iconic case here which should be a lot better known than it is, is a case called *Howard.* The essential dynamic here which we've seen a lot of times before is we have a railroad that's hopelessly, hopelessly insolvent. We have a senior creditor. The senior creditor wants to get the railroad, and the people in control of the railroad say, well, you can do this the hard way or the easy way. The hard way is you can pursue American justice. The easy way is I'll cave in and just give everything to you. Provided, of course, you leave a little bit for me on the side. You give me a little sweetener. And the Supreme Court had very little difficulty striking that down and saying, no, that's not good. This kind of deal in which the senior creditors do fine, the old shareholders get something, and the general creditors are wiped out. That's not something that's acceptable. That violates fraudulent conveyance principles. These transactions have badges of fraud. Not that surprising, given what came before.

The problem that this created is what about your ordinary railroad equity receivership which has much the same characteristic? In form you have a secured creditor bidding at a foreclosure sale. And then there's a set of negotiations. And the people who are sitting at the bargaining table will figure out how to divide up the company, and part of the value of the company is going to go to the old shareholders. The question is, is this okay? Does this transaction have fraudulent conveyance problems? One of the principal lawyers involved during this period was Rich's partner.

Rich's partner, his attitude was, badges? There are no stinking badges. There's no fraudulent conveyance here. Move on. Everything is just fine. And he and other lawyers of the era pushed back against this characterization. His attitude was, as long –

MR. LEVIN: Wisely and successfully, I might add.

PROFESSOR BAIRD: Mostly unsuccessfully. He retired early, but that's a different story. Basically, what happened was that there was pushback against this idea in the Supreme Court, and ultimately the Supreme Court came down with cases like *Boyd*, in which *Boyd* said that you can't exclude people. There has to be a fair process. Everyone has to be able to come to the bargaining table.

Everyone's entitled to a seat at the table. And that was what emerged out of this dynamic. The claim I would make is, that dynamic is still very much with us.

Now again, there were changes. In the 1930s, there was an aggressive intrusion of the judge into the bankruptcy process, and the idea of the New Deal reformers is judges really need to be very heavily involved. That was pushed back as we've discussed in the earlier panel in 1970. So quite properly the judge is no longer someone who's actively involved in administration of the case.

Nevertheless, the judge still has oversight. The judge is still supposed to look out for the integrity of the process. The question that I want to focus on and direct the other people to, and the claim I basically want to make is that the takeaway from this is that when we look at new cutting-edge problems in corporate reorganizations, whether it's critical vendor orders or rights offerings, or backstops or rollups or these other types of issues, you shouldn't necessarily gravitate immediately towards some particular statutory hook, because Rich is really, really smart but he didn't foresee roll-ups, rights offerings, backstops and things like that, critical vendors, in 1970. Again, I don't want to go on too long, Rich, but still.

MR. LEVIN: The only thing we foresaw was that in 40 years the world would change; we didn't know how.

PROFESSOR BAIRD: I think the takeaway is, you don't look for specific statutory hooks in the first instance. You don't sort of go back to old saws like, well, absolute priority and pro rata distribution. But you remember that the bankruptcy judge has this ability to oversee and police the process. And a question at least that I would urge people to start with is to ask, is there an abuse of process here? So, let me just give two quick examples and then open it up to people.

When it comes to critical vendor orders, I would resist the instinct to say, oh, we can't do that. We can't do that because all of a sudden, we're paying off a prepetition creditor, and the decisive thing is always whether it's a prepetition creditor, and if it is, it's bad. Or at least we should feel embarrassed about it or something like that. I would suggest that critical vendor orders come in at least two different flavors. One flavor is it's just good business. You're spending money to get something you don't otherwise have the right to. For example, honoring frequent flyer miles, honoring warranties. Those are situations where you are basically honoring prepetition obligations in full and you're doing it because it's good business, and what's decisive about that is, these scattered holders of warranties, they're not strategic players in the bankruptcy process.

They're not trying to game the system. They're not trying to pay strategically. There's no gaming of the system.

My favorite example here is, in the Marvel Entertainment bankruptcy there was a question of whether to ship goods to customers who had prepaid for the goods. The decision was made that they're going to continue to ship product to prepaying customers. Now these prepaying customers, they were just general creditors, and they said, we think in this case it's good business. Why is it good business? Well, this is Marvel comics. You don't want 200,000 12-year-olds noticed up in your courtroom demanding to be paid. It wouldn't make sense. But again, it was just good business. That kind of critical vendor order is quite different because of these process concerns than large amounts of money going to players who are active in the case.

Let me give another example. This emphasizes the lack of statutory hooks.

MR. LEVIN: Excuse me, Douglas. You say critical vendors, but it turns out that all the examples you're giving are critical customers, not vendors. But we use the chart as critical vendors.

PROFESSOR BAIRD: Yes, right. They are still prepetition creditors.

MR. LEVIN: Yes.

PROFESSOR BAIRD: And you agree you wouldn't require the 12-year-olds to come in.

MR. LEVIN: Well, I don't know.

PROFESSOR MARKELL: Maybe you just snap your fingers, if you saw the movie.

PROFESSOR BAIRD: Let me give another example of where we lack statutory hooks because we didn't foresee going concern sales. Let me give the following situation. We have a business, and we decide to reorganize it, and the business doesn't have enough value to pay the secured creditors in full. There's a plan of reorganization, and under the plan of reorganization, the secured creditors get the company, the general creditors get nothing, and something goes to the old owner-manager CEO. We all understand the way we think through that problem is § 1129(b), the fair and equitable test, the gifting rule, and also to stuff like this. But you don't want to say that's the only thing that matters. § 1129(b) should have the same kind of problem arise when, let's say we have a sale and it's going to be a sale and the secured creditor is going to credit bid, and

the secured creditor discloses that if it does in fact become the high bidder for the firm, it has already entered into a contract with the existing CEO who in this variation is not an old shareholder, and is going to continue to employ that CEO in the business. So again, it's a § 363(b) sale. What we have is a secured creditor who's going to credit bid, and the secured creditor has separately signed a contract with the CEO who was never part of the capital structure, never a shareholder. How do we think about that?

We can't sort of talk about fair and equitable and § 1129(b) and all this other stuff because none of that is happening, or there's no reorganization. We can't talk about class skipping because the CEO is never a shareholder in the first place. How do we start thinking about that? I don't think you can get into talk about distributions from the estate and so forth. I think the more straightforward way to talk about this is just to actually ask, what's going on here? Let me give you door number one and door number two. Door number one is what we have is a CEO who actually may not be very good at managing the business but he knows the secret sauce. He knows the technology. I don't want to run this business unless I have this guy in place, and this guy ain't going to be here unless he has a piece of the action, and that's why I'm doing this. That's one kind of story. No abuse of process.

Second kind of story is, what I really want to have the CEO do is to be a strategic advisor. I want him to think profoundly and deeply about strategic advice for the firm going forward. The way in which I want him to do this is to move to Florida, throw away his cell phone, play golf, think strategically, and if I need this advice, I'll call him up. That strikes me as a different type of problem. The way to think about that problem is to think about this from this fraudulent conveyance perspective, this emphasis on process rather than looking for statutory hooks that might not be there.

PROFESSOR MARKELL: Douglas, just one question. The title of your piece has the words unwritten law of corporation.

PROFESSOR BAIRD: Right.

PROFESSOR MARKELL: What's unwritten?

PROFESSOR BAIRD: I think here we can get into a metaphysical discussion of to what extent are these lessons embedded in the common law.

PROFESSOR MARKELL: I ask it just because I'm a jerk sometimes, but I'm also asking because I think it's important to your process and to your position in terms of these, and you kind of said it then. Don't just look to the statute. There

are other norms, there are other expectations, there are other understandings that need to be consulted. I'm just trying to understand how you work that into the structure that you've got.

PROFESSOR BAIRD: I think the common understanding emerges from, among other things, judicial opinions. But as we know, we can have some appellate court opinions that sometimes aren't terribly helpful, and sometimes appear to say the opposite of what we think they are.

A case like *Lionel* is a case that turns down the going concern sale, but everyone cites that case to say it's a sale going forward. We have some cases where we look at them and everyone knows they just aren't right. We have other situations where people will refer to things as opinions when, in fact, they're just observations a court made from a bench. For example, for years in talking about restructuring support agreements, everyone worried about Judge Walrath's opinion in *Station Holders*. Well, there's no opinion. There's just a comment from the bench that everybody happened to know about. All these things are part of this background. Again, it's not necessarily a healthy thing that a lot of this is wisdom that we share, that if you are simply someone from Mars or a law student, is not going to have ready access to.

PROFESSOR SKEEL: I'll ask a question that is saying something. Let me start it as a comment. In many respects this is a paper about judges and the role of judges, at least as one of the purveyors of these unwritten rules. And it seems to me that the idea you have about the role judges play today would have been appalling to the New Deal reformers. My understanding of the New Deal reformers from the research I've done is they wanted judges to pierce through these unwritten rules and to get rid of them; whereas, you seem to have an idea that from the beginning the judges were part of this and they are effectuating the unwritten rules. Could you say something about that?

MR. LEVIN: Could you explain and unpack what you mean about pierce through the unwritten rule? What did the New Dealers want the judges to do?

PROFESSOR SKEEL: In the early 20th Century, equity receivership ran very much, and large-scale corporate reorganization worked very much the way Douglas describes. It was Wall Street bankers and lawyers –

MR. LEVIN: And my partner.

PROFESSOR SKEEL: —and your partners, your former partners were the key players in this. When a railroad failed, they would put together committees. The committees would negotiate with each other. They would pretend to do a

foreclosure sale of the railroad. The foreclosure sale was actually a sham sale. It was a reorganization of a—

PROFESSOR BAIRD: You say sham in such a—

PROFESSOR SKEEL: It's a virtual sale.

PROFESSOR MARKELL: It was a put-up to go for fairness. The idea was you set a price, an opening price that nobody but those with good credit could meet. But because it was open to all it was fair. In that sense it was a sham.

MR. LEVIN: In that sense it was fair.

PROFESSOR SKEEL: It was or wasn't. The first few decades of the 20th Century, that's the way large scale reorganization was done. In the New Deal, it was codified finally after decades of just being common law, it was codified in 1933 and 1934. New Dealers like William Douglas and Jerome Frank came in. They were appalled by the system. They thought it was insiders helping themselves, that Rich's former partners were making themselves and they were buying houses, cottages at Newport.

MR. LEVIN: In Long Island.

PROFESSOR SKEEL: In Long Island and places like that, and this needed to be brought to an end, and the way it would be brought to an end is bankruptcy would be reformed as it was in 1938, and a judge would come in who in the large scale cases was not the bankruptcy judge then called a referee. It tended to be a District Court judge and would see through all of this.

One way of telling this story would be the New Deal ended the unwritten rules, and the unwritten rules have crept back in. Is that consistent with your story?

PROFESSOR BAIRD: I think it's more complicated. Again, the New Deal did catastrophic damage to the old, traditional practice. The crevasse this world left the reorganization world, they were excluded because if you represented an investment bank that was involved with raising capital for the company, you couldn't also be involved in its reorganization. The glue that made these things work was not the kindness of these investment bankers or their lawyers, but rather the fact that they had to repeatedly go back to the creditor markets and the norms they established among themselves were norms that were observed. So I think that the story that happened is that the Chandler Act was an alliance between the New Deal reformers on the one hand, and the National Association

of Credit Managers, the lawyers who at that time constituted a national bankruptcy conference. The lawyers who did the small reorganizations and restructurings of, let's say, retailers whose credit largely came from their suppliers. That was old Chapter XI. And there we do see this continuation of these norms and practices and so forth.

PROFESSOR SKEEL: From the same mouth that you hear the word sham, you might also hear the word bankruptcy ring.

PROFESSOR BAIRD: One of the things the Chandler Act was trying to do is to clamp down on the bankruptcy rings that emerged in the 1920s, but the people behind the Chandler Act were parties who were quite hostile to these bankruptcy rings. Again, there were a lot of unattractive features of bankruptcy practice before 1970, and there were a number of jurisdictions, not least of which was Chicago where there really were bankruptcy rings, and the bankruptcy practice wasn't right.

Nevertheless, there were other parts of the country, and I think of the West Coast in this connection, where you did have effective processes and effective norms among people, lawyers, and referees that did allow this process to continue, and you did have successful reorganizations of these smaller firms.

PROFESSOR MARKELL: Right. And you had, from the West Coast which is not the greatest *Case v. Los Angeles Lumber*. That case says that the fair and equitable language meant, and incorporated kind of what it meant in equity receiverships.

PROFESSOR BAIRD: I'm not sure we want to talk about *Los Angeles*, no, but that was a 77(b) case, and that was a William Douglas opinion that put us on the wrong track.

MR. LEVIN: No pun intended.

PROFESSOR MARKELL: But if you look at the statutory evolution, before you get to 77(b), fair and equitable didn't appear in the statute together. It appeared first as fair and then two years later they added the words "and equitable." Although *Case* can be looked at a lot of different ways, it does kind of say, listen, those words mean what absolute priority meant before we tinkered with it.

PROFESSOR BAIRD: The words absolute priority had never appeared in any judicial opinion before *Case v. Los Angeles Lumber Products*.

MR. LEVIN: And they don't appear either in the Chandler Act or in the Bankruptcy Code.

PROFESSOR BAIRD: And so the question is, what were the practices that Justice Douglas is invoking? And in fact, the opinion certainly says there is this pre-established practice, but I think that the history there is much more controversial. Again, you can read a number of the opinions that Justice Douglas cites as embodying absolute priority, and they just don't. And he also knew better. He was a professor.

MR. LEVIN: He actually started the crevasse.

PROFESSOR BAIRD: I know. He washed out. He taught corporate reorganizations at Yale and he's citing these cases and he really should know better. I think there's a very complicated story there. But when I'm tracing the arc of small companies, I'm not talking about *Los Angeles Lumber*, which was a very substantial shipyard during this period.

PROFESSOR MARKELL: They actually returned a lot of money to people because of the war effort.

PROFESSOR BAIRD: It actually failed during the war because remember it couldn't successfully reorganize because of Douglas' opinion. Douglas' opinion remember under old Chapter X, any individual senior creditor could gum up the works by saying, I'm not being paid in full. So *Los Angeles Lumber*, there were exactly two guys who weren't paid in full, and they gummed up the entire works, and indeed it was so bad the workers at the shipyard passed around the hat to get the money to pay these creditors off in full. And they fell a little bit short and the creditors refused to take it. And ultimately, this is a shipyard during the middle of the Second World War that couldn't make a go of it and was on the Todd Ship List.

PROFESSOR MARKELL: I can drop *Case* and go to a larger point and maybe take a little bit different divergence if you'll allow me. Obviously, just for the panel, we all know each other very well. I think we all kind of go back at least twenty or thirty years, so a lot of what you see here are debates, and these are debates we've had before. One thing that I think Douglas has right, I'm not sure he pushes it in the right direction, is this notion that when new things come up, look beyond the statute. I'm not sure that the word statute there is really, were I to write this and I'm not, what I would put there.

Fraudulent transfer law or fraudulent conveyance law, however we want to call it, are avoidable transactions as they butchered it in the latest iteration. Has

always been not really statutory law but the law of doing things right. If you go back and you take a look at it historically, *Twyne's Case* may have crystallized and refocused it, but people were talking about badges of fraud and people were talking about transactions that harmed creditors long before 1600 and before that. And even if you look at the modern versions of it, our current law with respect to restrictions on corporate dividends, the model to the extent it still exists on bulk sales, were also offshoots of how courts viewed fraudulent conveyance law. I think one of the things that happened is, people say that water conforms to the shape of its vessel. In one sense, fraudulent conveyance law is just kind of a proxy for strangely enough and unhelpfully I think doing things right.

MR. LEVIN: Based on the standards of the day, what commercial morality is at any given time.

PROFESSOR MARKELL: And that becomes a really troublesome issue when you say, okay, look beyond the statute that we have and go back to what fraudulent transfer law is. I'm not sure that that was a stable target throughout the time period that you're talking about and before. So I'm not sure that it tells us how to react to some of these new devices, the new constellations of power, the new incentives that we see. I think you could use fraudulent conveyance law to do that, but I don't think you'd be looking at it the way in which lawyers and judges were looking at it in the '20s, the '30s, the '40s, or even the '50s.

MR. LEVIN: Although I like your jumping-off point of fraudulent transfer law as the basis for the limitations in railroad reorganization cases, *Howard* and then up through *Boyd*, the hypothetical you gave really has nothing to do with fraudulent transfer law.

PROFESSOR MARKELL: Which hypothetical?

MR. LEVIN: Paying off the CEO. Because neither involves a debtor making payments to a relative, a creditor, or anybody else that it owes any obligation to. It really has expanded the concept of fraudulent transfer law to go one step further, to pick up on Bruce's point and say, does it violate some other commercial norm, which is you don't pay bribes to get this kind of stuff done.

PROFESSOR BAIRD: Again, I understand that traditional fraudulent conveyance law requires discrete transfers and so forth. The larger point I'm making is—

MR. LEVIN: That's what I was going at.

PROFESSOR BAIRD: But I'm saying if you go back to the late 18th, early 19th century, you see courts specifically invoking the statute of 13 Elizabeth. They're specifically invoking fraudulent conveyance doctrine, and they're doing it in transactions where they're not looking at a specific bad transfer by a debtor, but rather they're looking at a particular process such as a foreclosure or some other judicially supervised action, and they're using the language for fraudulent conveyance law as the entry point into asking whether or not these transactions were regular.

MR. LEVIN: I would argue in those railroad reorganization cases, they actually were looking at transfers from the property of the railroad to the old shareholders, and that fraudulent transfer rubric fits that kind of a transaction. And I agree with you that they said this might just smell bad, but I think they were technical, enough lawyers and judges, to frame it in those terms and it fit.

PROFESSOR MARKELL: I agree with almost everything Douglas says, except I'm not sure it's the judges who invoked the fraudulent transfer law. I think, if anything, you may give too little credit to the lawyers and investment bankers. To the extent I think there are unwritten laws or that there are practices, I think they get developed from the lawyers' side and presented to the judges. Because sometimes, truth be known, and I say this in the paper, sometimes lawyers look at judges as roadblocks rather than as entities that will facilitate the process. I've tried never to underestimate the creativity and the cleverness of lawyers in taking existing doctrine and molding it to their needs.

And I think what we see in the 19th century or at least what I see is the rise of limited liability and the rise of large enterprises that limited liability permitted. You don't really have the corporate forum until the middle of the 19th century. The rise of the large forum, the rise of large financial eras, I think something like half of all railroads had gone through some form of restructuring by 1915. What you have when you have all of that are new problems. And what lawyers do and what lawyers can do is to try and go to a judge and say, well, here's this theory, Your Honor, that I think makes my client win. And I think rather than, and then activist judges may kind of take that and go beyond that in opinions. I'm certainly not going to discount that. But the word I would change is "invoke." I think the judges may have passed on what lawyers put before them, and maybe developed it more, but the progenitor of this is not some type of union between the lawyers and the judges, but the cleverness of lawyers or the desperation of lawyers to try and get a ruling from a judge that their client prevails.

MR. LEVIN: I want to give you two thoughts on that. I'm going to give one of them to somebody who was a former judge so he might well disagree with me on this. From my perspective of observing judges first, the first point not related to judges is that creativity of the lawyers, taking existing principles and molding them to current realities is what has kept the Bankruptcy Code alive for forty years, alive and relevant, sorry to the consumer guys. At least on the business side it's still very relevant to corporate reorganizations, despite the dramatic changes in the financial markets and the economy that's occurred since the Code was enacted against a very different economic and financial world than we have today, and yet it still works. So that creativity is actually a good thing. It makes the whole system function, and in my view is one of the strengths of the common law versus the civil law jurisdictions.

PROFESSOR MARKELL: I agree actually on that.

MR. LEVIN: On the judging point, yeah, it's the lawyers who came up with these ideas, but my view of judging, and it's probably because I went to a law school where they used to teach legal realism. My view of judging, when I summarize, is what the judge had for breakfast. Judges have an inherent perspective on the world formed by the statute and the caselaw and the common law, but also formed by the culture that they have live in, and they grew up in and they were trained in. And when a case comes before a judge and they hear the facts, they're going to mold the statute and the interpretation of the law to fit the facts that they hear and their reaction to the facts. And what I read in those cases that you're talking about fraudulent transfers, yeah, the lawyers brought the judges stuff. It wasn't my former partners, sorry. Victor Morowitz who, he was successful, but the ones where he wasn't successful was the judge's saying this just doesn't sit right with me. I know you, like technically you got this, but it doesn't sit right with me, and that's what happened with Douglas in the *Los Angeles Lumber* case. I don't agree with it as a matter of principle, and I'm going to mold it.

I had the good fortune on my way here last night to read an article that I plucked out some years ago and just sitting on my desk written by Jerome Frank, one of these New Dealers, in 1948 in the Columbia Law Review. I just sent a copy to Douglas, I committed it to him and I'll commit it to all of you, it's not very long. It's called Words and Music, a Note on Interpretation of Statutes. And he makes the point that as a conductor interprets a composer's music and does not play it literally, it's based on what the conductor understands and feels and so judges are with respect to statutes. And I think that's what explains what was

happening in the late 19th, early 20th century in these matters and in the New Deal as well.

PROFESSOR BAIRD: I should also say that if we look at the dynamics, the investment bankers and the lawyers that David in his book gives so much credit to shaping the law of corporate reorganizations, they're the people who are pushing back against the fraudulent conveyance characterization, and the people who put forward the characterization are the lawyers representing, let's say, Boyd, who was just a dinky trade creditor. He wasn't –

MR. LEVIN: He was more than dinky. I mean he took twenty years to pursue his claim.

PROFESSOR MARKELL: He was a persistent dinky creditor.

Audience laughter

PROFESSOR BAIRD: I should also say that judging like anything else can be done well or done poorly, and I would say one characteristic I would note of what able bankruptcy judges do is not simply ruling correctly on the law, but also just having a feel for when they should rule, when they shouldn't rule, when they should delay, when parties if they're sent out into the hall are going to reach a deal, and when in order for the parties to reach a deal the judge needs to make a decision on the merit.

MR. LEVIN: It's a great jumping off to *Jevic*. *Jevic* was decided at the bankruptcy level by one of the best bankruptcy judges out there, top notch. Brendan Shannon. A secured creditor who is also the equity owner of the debtor advanced a lot of money, and there was a second secured debtor. There were some unsecureds, and there were employees who had been fired and not given their 60-day WARN Act notice. They had a claim, an allowed claim against the company which would have been priority under § 507(a) for their WARN Act severance priority claim.

They were also suing the secured creditor in its capacity as shareholder, claiming he was control person and therefore was liable directly to the employees under the WARN Act.

There was an argument that the secured creditor was liable for a fraudulent transfer in connection with the LDO in which this creditor, equity holder, private equity company, blocked this transportation, Jevic Transportation. The fraudulent transfer claim was [inaudible] but it could be brought and there was a chance of success—

PROFESSOR MARKELL: It had settlement value.

MR. LEVIN: It had settlement value. The secured creditor was willing to settle the dispute but didn't want to pay the money to the estate because going down the waterfall it would pay administrative claims and then it would've paid the WARN Act creditors, the union, and it would have helped the union fund its action against the secured creditor for the WARN Act liability.

PROFESSOR BAIRD: And something I should say here. This isn't Rich speculating about motivations. The secured creditor said this in open court on the record. The reason I'm doing this, Your Honor, is I don't want to fund litigation against me. I'm only going to settle if the money doesn't go to them. I'm not going to do it otherwise.

PROFESSOR MARKELL: Not unreasonable. I don't want to pay people who are going to sue me with it.

MR. LEVIN: The creditors committee and the secured lender and the other secured lender get together and they make a deal. The secured lender kicks in 2 million bucks, and settled on the fraudulent transfer litigation, get four releases, and the administrative claims get paid, and the unsecureds get paid and we skip over the medium priority class, the WARN Act creditors.

Judge Shannon, being a very practical and thoughtful judge, says, boy, this is a tough case. If I don't approve this settlement, nobody gets nothing. If I do approve it, at least the administrative claims get paid and the unsecureds get something, and I'm sorry the WARN Act creditors don't get anything, but $2 million is better than nothing.

PROFESSOR BAIRD: And the WARN Act claimants aren't any worse off.

MR. LEVIN: They're no worse off. So reluctantly I will approve this. Goes up to the Third Circuit. The Third Circuit says, really bad case. Hard cases make bad law, and we don't expect to approve this kind of thing very often. It's really bad, and this is a really unusual situation. It's unique. We'll approve it this time, but don't get in the habit of doing this kind of stuff. And there's a dissent that says, in effect, the judge could've insisted on more bargaining so that the WARN Act guys would've gotten something. They could've been at the table and given them something and settled this whole thing. Not a good deal. Skips over the priority, disregards the Code's priority, should not be approved.

Goes up to the Supreme Court. The Supreme Court pretty much agrees with the dissent. Priority is the most important thing. There are certain circumstances

where you will pay off outside of priorities because it enhances the overall value of the estate and cites critical vendor orders as an example of that. And says, but this one's bad and –

PROFESSOR BAIRD: Even though it does enhance the overall value of the estate.

MR. LEVIN: No, it does enhance, not the value of the estate, the recoveries to various creditor groups, and the WARN Act claimants are no worse off. And by this time, by the way, this might have influenced the decision, the WARN Act creditors had lost, final order in their lawsuit against the private equity sponsor. They were out. But the Supreme Court says they should have a seat at the bargaining table, and therefore this settlement should not have been approved, and overruled the Third Circuit.

PROFESSOR BAIRD: I think it's interesting that Judge Shannon's reaction after the case was decided, after he got reversed unanimously by the Supreme Court is, he actually didn't feel bad because he actually likes the idea that his hands are tied going forward.

MR. LEVIN: So, bankruptcy judges try to be practical and apply these kinds of unwritten rules, but lo and behold, the written rules come back to haunt them. Then the Third Circuit decides the *ICL* case, which was actually before *Jevic*. Before the Supreme Court case, after the Third Circuit.

There, similar fact, they skipped over the administrative priority tax creditor for the capital gains upon the sale, and the Third Circuit approves that transaction. And the reason they approved it is really weird. The secured creditor credit bid his claim for all the assets of the estate including the cash in the estate, and then took its own cash, not the cash from the estate, because you can really distinguish which is which, right?

Took its own cash and funded an escrow to pay the administrative claimants except for the government's tax claim and some unsecured creditors.

PROFESSOR MARKELL: With its own money.

MR. LEVIN: With its own money. Third Circuit said, well, it wasn't the cash of the estate it used. It used its own cash and therefore it was okay.

PROFESSOR BAIRD: What I think is bad about that opinion, though Rich doesn't see it this way, is that getting your hands tied about whether it is or is not money of the estate is neither here nor there. Here we have a secured creditor

who's paying off the creditors committee and other people to look the other way, and that's something that the judge should police against.

Again, you can defend the case I suppose weakly by saying, the bankruptcy judge in looking at the overall transaction didn't abuse its discretion. But it's a case that I should think makes everyone uneasy. The reason it makes me uneasy is that there is a process failure that isn't being policed, not that there happened to be money come in from the estate or not.

PROFESSOR MARKELL: They're the estate metaphor as the proxy for what you're concerned about which is whether that's a good fit.

PROFESSOR BAIRD: They failed to do that.

MR. LEVIN: But the process point was in effect the government should've been given a seat at the table for those negotiations. Fine. What happens if they couldn't make a deal?

PROFESSOR MARKELL: If they're given a seat at the table and they're ignored, it's the same thing.

MS. BORDERS: Let's take it back around for just a minute and assume for purposes of our discussion—

MR. LEVIN: The point from *Boyd* is, if the creditor is made a fair offer and he refuses it, too bad.

MS. BORDERS: We had a little debate earlier about whether there really are any unwritten rules. But let's assume for this portion that there are a set of unwritten rules about bankruptcy, and let's assume they're bounded only by the creativity of the lawyers involved. Address a couple of things, each of you. One is, the obvious upside is we could get the results that we want bounded only by our own creativity. But what do you think the downside of having unwritten rules are? And also, for the aspiring young lawyers in the audience, how is it that we're supposed to figure out what the unwritten rules are? How do you learn bankruptcy if it's not going to the Code and going to the cases? How do you equip yourself to participate in a process where the rules are unknown?

PROFESSOR BAIRD: I think it's hardest with respect to things like restructuring support agreements. I was asked to write an article on restructuring support agreements. The first thing I did was go to Westlaw and do a search for Law Review articles that talk about restructuring support agreements. This is

like in 2015 and it came up with zero hits. If they're new practices, it's hard to know what rules govern them unless you're something of an insider.

I think the big dangers and the big downsides are the way in which people who get used to practices that really are rather suspect. My current poster child for very suspect reasoning is *Peabody Energy*, where this is a case—it's a decision from the Eighth Circuit in which a small group of hedge funds negotiate with the debtor at the start of the case, and the bargaining is limited to this particular group. Now there's another hedge fund that could petition the court, and if they did agree not to sell their shares, if they did agree to a non-disclosure agreement, if they did agree to other conditions that aren't specified, they might have been able to participate as well. But they're frozen out of these negotiations, and there are a set of negotiations and in these negotiations the large hedge fund agrees to support a plan, but at the same time they get equity at a huge discount to value. They signed this agreement, this plan goes forward, and the question ultimately is, does it violate the equal distribution rule? And also is it otherwise something the bankruptcy judge can approve when you have one group of a particular class of creditors getting an opportunity to get equity at a discounted price? They all wanted equity for a variety of different reasons.

You have one group, this is metallurgical coal rather than thermal coal, and this is at a time when actually the value of the firm had gone suddenly up, so it was actually attractive to want to be into this firm. And this hedge fund got a special deal, and the question is, should you be able to get a special deal because you sign onboard to a plan early when other people didn't?

Now, again, one of the things Rich will say is that the hedge fund that was excluded, well, they could've signed on, they could've done it. At any rate, they were grown-ups anyway and everything was fully disclosed and so forth. But still, I think this has to make you feel somewhat uneasy, and I think there's a range of things you can say here. I think that it's possible to say, no, we're just not going to allow these kinds of deals. I think some judges that I've talked to take that position.

Other judges take the position and say, look, if these are sophisticated guys, if it's fully disclosed to the court, if it really helped move the plan forward, I'll let this kind of thing happen as long as I'm made aware of everything and everything is disclosed. And that's contestable. I think what's not contestable is that if instead of a small hedge fund, we had disbursed small investors who weren't active in the case and they were the people who were shut out, I think we would all say that's not good.

MR. LEVIN: That actually happens a lot because these rights offerings that you're talking about, are sometimes available only to qualified institutional investors/buyers, QIBs. And so the small guys who own bonds can't share.

PROFESSOR BAIRD: Which is exactly the opposite of what Douglas wanted under the Trust Indenture Act.

MR. LEVIN: And we argued in '78, we argued with the SEC. The SEC still had this 1938 mindset, the guy who was the head of that division of the SEC at the time was actually a New Dealer and had been there in the '30s when the Chandler Act was written. Aaron Levy, yeah. And he had that mindset of protecting the small investors, and we said to him, you don't understand. The small investor and bonds that were there in the 20s and 30s they're now stockholders. And if you want to enforce the absolute priority rule, you're going to give it to the big investors who are in the bonds and you're going to wipe out the small guys who are all stockholders. He never accepted that and still held to the absolute priority rule.

PROFESSOR SKEEL: I have a couple of questions coming out of this for Douglas, related questions. One is, how do you draw the line between *Peabody* which is a case that I think all of us are uncomfortable with, and the run of the mill RSA that has some sort of fee for the signatories. What is not okay and what's okay?

The second question that is related to it is, do you think that judges have the tools they need to be making these distinctions? Or is there something more judges need to be playing the kind of role? You have this argument that judges really are going to be able to sort out the good eggs from the bad eggs. Do they need anything else to do it?

PROFESSOR BAIRD: Again, I think the law on RSAs is still evolving. One of the embarrassments we have is that the question here is post-petition, to what extent can you solicit someone to support a plan before there's been a plan and a disclosure statement that's been approved by a judge? To what extent can I solicit your vote and get a binding commitment from you to support a particular plan if the particular plan in question hasn't been presented to a court and a disclosure statement hasn't been approved?

What modern bankruptcy judges wrestle with are the conditions under which this can happen. Part of the problem is that we already have a statutory answer at § 1125, and § 1125 appears to say you just can't do it. And so, all of us feel a little bit dirty because we know that's what happens anyway. I think one of the

practices that's emerged that I suppose I feel somewhat better about, though again, I feel uneasy given we have § 1125, is what courts seem to bless especially—these RSAs that emerge from mediation, and very often it's mediation supervised by another judge.

MR. LEVIN: Let me go back to something you just said a moment ago at the beginning of that. What you feel uneasy about or what you feel comfortable about, I think underscores my point about how we all approach these things, judges included. We have a kind of worldview of what's fair and what's not fair, and then we interpret the statute and the written rules and the case law and the principles to confirm our worldviews.

PROFESSOR BAIRD: Well, why'd you put § 1125 in there in the first place?

PROFESSOR MARKELL: To answer Sarah's question, what's the downside of unwritten rules? The downside is, I would say, you have to rethink how you select bankruptcy judges. You have to rethink your venue rules. There are 346 authorized judgeships. There's maybe 7,500 chapter 11s a year. They don't get distributed evenly. About twenty or twenty-five percent wind up either in New York, Delaware, or Texas. And if in fact you have judges who are not inculcated in these unwritten rules, you are going to get disparate results. Moreover, there is from the other side, if you will, and I won't name names for obvious reasons, but there are a lot of judges who are known to be result-oriented. I will tell you from discussions I had when I sat on the Bankruptcy Appellate Panel, sometimes when I would come out with a draft opinion, someone would call up and say, well, that's not right. And I'd say, okay, well, me where the analysis goes wrong. He says, I don't care about the analysis. It's just not the right result. And as long as you have that kind of viewpoint.

PROFESSOR BAIRD: That's throughout the judiciary; it's not just bankruptcy.

PROFESSOR MARKELL: But if you want to talk about unwritten rules in bankruptcy and making and facilitating the way people work and sorting the good from the bad, the fair from the unfair, and doing that against a background of what you know and what you've seen as a judge, one, you've got to ask, do you want or do you not want a judge who doesn't take into account these unwritten rules? Or do you want someone who understands them? Again, go back to the point made in the keynote. You're going to lessen the diversity of the judges because most of the people in the reorganization world don't fit that. Again, the reorganization, that's where all the money is but that's not where all the cases are. You really start talking about if you want to do it efficiently, maybe

it's not a court-based system, because as Douglas pointed out before we all cut him off, if you've got other mediators kind of coming in who are bankruptcy judges themselves, you have a very recursive system in which we all chase our tail trying to impose the kind of notions that we had. I was very conscious as a judge. When I became a judge, I was fourteen or fifteen years out of practice. I was very conscious that the way in which I thought about things when I was in practice would probably be different the way I was on the bench because time had passed. That was not a view that was universally shared.

MR. LEVIN: By the way, the RSAs that get approved, I think a very small portion of them are negotiated with mediators. Many, many are just negotiated among the parties. They know the deal. They all take their assigned positions and they argue about them and they cut a deal.

MR. LEVIN: It's also interesting that they actually say the reason you should go with the plan judge is we have this RSA. But an RSA is usually done prepetition so there's no mediator. PSA, plan support agreement is what's done post-petition and sometimes with mediation.

PROFESSOR MARKELL: But it's the whole point of having the parties telling the judge, we've all decided stuff and because we've decided it, you should go along with what we say. I have this in the paper. I've heard law firm partners say something like, why should we be bound by someone who gets paid less than our worst associate? Because that's the way the system works, and who went to an inferior law school?

MR. LEVIN: Judges are underpaid. That's why.

PROFESSOR MARKELL: Well, I'm not going to disagree with that, or that went to a lesser law school? I mean there are lots of judges who just don't have the chapter 11 background sitting on the bench. Some of them turn into great judges. Gene Wedoff is a good example.

PROFESSOR BAIRD: He went to a great law school.

PROFESSOR MARKELL: Yeah, he did, but he was not a bankruptcy practitioner when he was appointed. That's my point. He may not have known the unwritten rules when he took—he may have had all the capacity to learn them because he went to a great law school, but he didn't have the experience. My point is, there's a disconnect between the notion of unwritten rules and the notion of a judiciary that understands those rules the way it is currently set up. And no surprise that you find people gravitating towards certain districts where judges are perceived to at least know and adhere to some of those unwritten

rules. But I think most people think that unless they obviously often appear in those jurisdictions, don't like those venues.

I always worry when I say something, and no one says anything in response. It's like how do we get on from that stupid point and go say something that makes sense?

Audience laughter

MS. BORDERS: One more question, though, sort of as you kind of think about the bedrock principles of bankruptcy in the discussion of fraudulent conveyance law, you really talked about equitable conduct and fairness to the parties. I can remember being a young bankruptcy lawyer and really having it impressed upon me how, and you hit on this as well, transparency, the living in a fishbowl, the ability to participate. Judge Hagenau talked about it in her remarks, how bankruptcy really does the one sort of forum experience that so greatly affects almost everybody. How do you marry up sort of the bedrocks of transparency and participation and those unwritten rules? It seems to me that those appear to be somewhat inconsistent. Should we acknowledge that or deal with it?

PROFESSOR BAIRD: I think that's part of the awkwardness of this world—that especially because of the rules governing bankruptcy appeals, it's very often what any particular bankruptcy judge says is going to be effectively unappealable in a case. Now again, there's a new automatic stay thing and it might change things, but essentially in a world where refusing to confirm a plan of reorganization is not itself appealable, there is much less appellate oversight than you might think.

I should say, though, in defense of these unwritten rules, one of the biggest unwritten rules is even though there are various provisions in the Bankruptcy Code that require disclosure, as a lawyer you are flirting with danger if you don't make full disclosure of stuff, and it's hardly a defense to say, well, gee, Your Honor, there's no specific rule that says I had to say this. I think it's asking for a lot of trouble.

MR. LEVIN: Before we go to the audience, I want to ask you a question. These unwritten rules, are you for having unwritten rules or against it?

PROFESSOR BAIRD: Like most academics, it's complicated.

PROFESSOR SKEEL: And one last follow-on question if I can before we go to the audience questions. That is, the subject of mediation came up, and mediation has become much, much more central to many big cases. The Puerto

Rico case I'm involved in mediation has been a very, very big part of the bankruptcy process. Does that facilitate your unwritten rules, or does it undermine your unwritten rules? Does it facilitate transparency or undermine it? Because in many ways, mediation is enormously non-transparent. The Detroit bankruptcy was completely non-transparent.

PROFESSOR BAIRD: The Detroit bankruptcy mediation was problematic.

MR. LEVIN: In Puerto Rico, mediation is entirely confidential.

PROFESSOR BAIRD: Again, the mediation is another instantiation of this idea that parties have to find their own future, and it's not the judge's job to do that. One of the effects of these mediations is because judges are themselves participating in these mediations to some extent, they can tell the parties, look, this is what the lay of the land looks like. This is how the world looks to a bankruptcy judge. This is what's going on. So at least in that—

MR. LEVIN: And sometimes they're right.

PROFESSOR BAIRD: Again, it's the usual type of mediation in the sense you have Barbara Houser who's an extraordinary bankruptcy judge who's supervising it. And among the mediators includes Tom Ambro who is a Third Circuit judge. So you have a bankruptcy judge supervising the mediation and one of the people she's supervising is a Third Circuit Judge.

PROFESSOR MARKELL: Just one small comment about mediation. I don't like mediation. I don't like mediation. The reason why I don't like mediation is my experience, and I've been asked to be a mediator in various cases, my experience is that most lawyers who participate in mediation will take me aside and say, I know my client's got a losing case, but I don't want to tell them because I don't want to lose them as a client. I want you as a mediator to tell them. And if that's the role of mediation, I don't think that's a good thing. If that's the unwritten rule of mediation is that you can avoid responsibility of telling your client bad news, I don't like that I'm involved.

MS. BORDERS: That should at least give us one element of professionalism hour. How about from the audience? Any questions?

[Inaudible question or comment from audience]

PROFESSOR BAIRD: I'm probably an outlier on this panel. First, I don't think simply saying principal place of business is actually going to serve the world's problems. We have the experience in Europe of trying to figure out where the

center of main interest is, but take for example Boeing Aircraft. I'm not saying you should fly on it. But where is it supposed to file?

MR. LEVIN: Seattle.

PROFESSOR BAIRD: Or in California. A lot of its defense business is located in Southern California. It has huge manufacturing facilities. Its whole defense business is in Southern California. It does manufacturing in Seattle. Its corporate headquarters—

MR. LEVIN: St. Louis because [inaudible]

PROFESSOR BAIRD: And its corporate headquarters are technically in Chicago. I mean does it somehow all of a sudden make the world a fairer place if all the Boeing employees in Seattle have to fly to Chicago? It's complicated. Also, I think there are trade-offs. I think one of the things about the concentration of bankruptcy judges in Delaware and New York is they're experienced and they're predictable. And those things are inherently valuable. And simply saying, okay, we're just going to have chapter 11's everywhere, you still have to ask the question, how is a judge going to be able to handle first day motions and to know what can be done and what can't be done and what works and doesn't work?

MR. LEVIN: An example about experience, something I was involved in some years ago now, probably close to twenty years ago. I filed a case in a non-New York, Delaware jurisdiction, and I filed the necessary first day papers to make sure the employees got paid, and asked for a first day hearing, and the judge said, I'll see you in two weeks, and I had to call back the clerk and say, well, you mean the employees have to go without paychecks for the next two weeks? Oh. Okay, we'll see you next Tuesday. An experienced judge would not have had that gap.

PROFESSOR MARKELL: It's an unwritten rule.

PROFESSOR BAIRD: You always pay employees on the first day.

PROFESSOR MARKELL: I mean, surprise, Douglas. I actually mostly agree with his position. I think the underlying general basis, although I like Elizabeth Warren a lot, I think the underlying basis of the venue proposal was to get people access to courts, and I think the train's left on that. With modern technology, if you do it right, people can participate from anywhere. Anyone who's done a Skype or a Facetime call, there is a certain marginal benefit to being present there, but there's also a negative benefit when you've got a courtroom packed

with a lot of people who don't understand court procedure. One unwritten rule is that the judge can interrupt but people can't interrupt the judge.

MR. LEVIN: And you know, City Council meetings, you pack the room because they're politicians and they're supposed to respond. That doesn't work so well with judges.

PROFESSOR BAIRD: I should also say that in jurisdictions like Southern District of New York and Delaware, they actually do grant lots of change of venue motions.

MR. LEVIN: Oh, yeah. It's about a seventy or seventy-five percent grant rate.

When the change of venue motions are made, and I remembered one of my colleagues asking Judge Drain, who sits in Southern District, why are there so few changes of venues? He says, most people don't file motions to change venue. But when they're filed, we usually grant them.

PROFESSOR BAIRD: In EFH for example, which is an energy company in Texas, they file in Delaware, and they filed in Delaware only after they've already talked to the Texas regulators, already after the Texas regulator said, yes, we understand these are adults playing in a sandbox. It's not going to affect us. Delaware filing is okay. There was a change of venue motion, but it was from the indentured trustee in Wilmington who changed the venue.

PROFESSOR SKEEL: Let me throw why I'm on the same side as everybody. I'm really surprised that Bruce is on this side, too. But how about one of the bases for your filing decision is if any connected company at all has filed int hat district, you can file. So the way I think General Motors—it's either General Motors or Chrysler. General Motors filed in New York City is because they had a dealership in Harlem. They had no real presence in New York City, but basically you can file anywhere you want to file. Is that okay?

MR. LEVIN: It actually turns out that General Motors had still, when it moved its headquarters from New York to Detroit twenty or thirty years ago, it left most of its finance function in New York.

PROFESSOR SKEEL: That wasn't the basis for—

MR. LEVIN: Well, but finance function is what chapter 11 is about.

PROFESSOR MARKELL: You have to get some agreement as to why something should be in a particular place. If it's because of access to courts, I don't think it's much of a reason. If it's because of access to particular judges

with particular experience, that we got to talk about because I have real problems with the notion of, if you will, an elite corps or viewed as elite corps of judges without any Congressional authorization having the right to determine the way in which law goes. I mean, that becomes an echo chamber. Because if you only look at Second Circuit opinions if you're in the Southern District, if you want to look at Third District opinions, if you're in Delaware, who cares about what the Ninth Circuit says about chapter 11? That may be a case. I mean you may not want to look. The Ninth Circuit is not particularly good, but it's a uniform federal law and you have some real dislocations if in fact you want to say, well, there are going to be pockets of people who know what they're doing. Maybe you want to have, as some have said, and I don't necessarily support it, a national appellate panel of judges however you want to make them, Article III or not, much like the BAPs are where you have kind of a specialized appeal court. I don't know. But before you start talking about venue, start talking about why you want to put venue in a particular place. Bankruptcy venue is different than litigation venue.

MR. LEVIN: And to answer your specific question about not wanting to live in New York, I was only partly joking when I said do you want to commute to New York. I spent most of my years practicing in Los Angeles not in New York. And what I found starting in the '90s is that it didn't matter what court the case was being heard in, all of the negotiations which is eighty or ninety percent of what the case is about, took place in New York. The investment bankers are there. The law firms are there. That's where everything happens.

PROFESSOR MARKELL: Just to put an underscore on that. I'm also now serving as the fee examiner in the *Pacific Gas & Electric* case, something I wish I'd never taken. One of the issues we had early on was whether lawyers could bill for non-working travel. For the first three months of the case that turned out to be a multi-million-dollar issue. That is to say, lawyers were billing time travelling, and the worth of the time that they billed in the first three months exceeded $2 million. From just sitting on airplanes.

MR. LEVIN: And by the way, for those of us who, at least at one point in my career, travelled an awful lot, the phrase non-working travel is an oxymoron.

MS. BORDERS: I was about to say, I think we can close with the rule that the unwritten rule or written rule, there is no nonworking travel. There is only working travel. It just depends on what client you're working for. Thank you so much to the audience. We appreciate it. To the panel, fabulous job.

MR. EDWARDS: All right, everyone. That concludes this year's Symposium. Thank you again for coming. We'll see you next year.