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The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom"

Lynn M. LoPucki
University of Florida Levin College of Law, lopucki@law.ufl.edu

Sara D. Kalin

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Lynn M. LoPucki
Sara D. Kalin

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Security Pacific Bank Professor of Law, UCLA Law School. He can be contacted at lopucki@law.ucla.edu.

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Commentators sometimes recognize Delaware's preeminence in corporate law, but they almost invariably treat Delaware's recent popularity as a bankruptcy venue choice as raising entirely different issues. In fact, the two are integrally related. Specifically, just as the efforts of Delaware and other states to attract corporations—a process often referred to as "charter competition"—has induced Delaware to regulate corporate law in a generally efficient manner, the same forces will have a beneficial effect on Delaware's bankruptcy judges.

–Professor David Skeel[1]

INTRODUCTION

Since edging out New Jersey in the 1920s, Delaware has been the jurisdiction of choice for the incorporation of large, public companies. For almost half that length of time, legal scholars have debated whether Delaware won its victory in a "race to the top" or a "race to the bottom" among the competing states.[2] Scholars writing from an economic perspective have generally concluded that incorporation in Delaware must benefit society as a whole because all of the interested parties—the various stakeholders in corporations—freely join in webs of contracts that include incorporation in Delaware.[3] The empirical evidence supporting this conclusion, however, is not evidence tending to show that Delaware corporate law is efficient. Rather, it is merely evidence showing that corporate actors

1. David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1, 2-3 (1998).

2. The seminal article is William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974). *See also* Lucian Ayre Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168 (1999) (reaffirming much of Cary's analysis).

3. *See, e.g.*, Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540, 546 (1984) (presenting the argument that if everyone agreed to it, it must be good); *id.* at 549-50 (arguing that charter competition is a race to the top); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913 (1982); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). *But see* Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) (arguing from an economic perspective that the race tends to be to the top with respect to certain identifiable issues and to the bottom with respect to others).

and investors *believe* it to be efficient.[4] This Article presents empirical evidence that during the early 1990s the various stakeholders in distressed, large public companies freely joined in webs of contracts that included bankruptcy reorganization in Delaware, and that their belief was in fact erroneous. During that period, Delaware was not the best jurisdiction in which to reorganize, but one of the worst.

Although large, public companies incorporated in Delaware have been free to choose the Delaware bankruptcy court for their reorganizations at least since 1979,[5] only a single one did so during the decade of the 1980s.[6] That changed abruptly in the early 1990s,[7]

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4. The principal studies are by Daines, Romano, and Dodd & Leftwich. *See generally* Robert Daines, *Does Delaware Law Improve Firm Value?* (Columbia Law School, Working Paper No. 159) (showing that investors pay more for Delaware firms than for non-Delaware firms having the same book value); Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation*, 53 J. BUS. 259 (1980); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

Professor Romano's data are from two sources. The first is a set of questionnaires mailed to corporate actors asking the reasons their corporations did or did not reincorporate in Delaware. Romano, *supra*, at 242-43. The second is an event study of the movements in stock prices around the time of reincorporation. *Id.* at 265-73. Professors Dodd & Leftwich's data is an event study similar to Romano's. Dodd & Leftwhich, *supra*, at 259. The questionnaire data reflect only the perceptions of corporate actors as to whether reincorporation to Delaware would be efficient. The event study data are one step further removed from the issue ultimately to be resolved. Those data rely on the additional inference that movements in stock prices reflect investors' opinions as to the desirability of incorporation in Delaware as a means of proving those opinions exist. Neither set of data bears on the efficiency of Delaware incorporation until one makes one of two additional assumptions. The first is that corporate actors and investors are in fact capable of assessing legal regimes. The second is that the market prices of securities reflect the intrinsic value of those securities.

We do not mean to imply that the secondary nature of the empirical evidence is all that prevents it from proving the efficiency of Delaware incorporation. Professor Lucian Bebchuk lists other reasons why the empirical evidence should not be considered conclusive. Bebchuk, *supra* note 3, at 1449-50.

5. Skeel, *supra* note 1, at 15 (explaining the history and concluding that "bankruptcy lawyers simply did not think to file in Delaware").

6. The single company reorganizing in Delaware was Phoenix Steel—a steel manufacturer whose headquarters and operations were located in Delaware. 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, 59-63 (listing the large, public bankruptcies filed and confirmed from October 1979 to March 1988); Lynn M. LoPucki, Bankruptcy Research Database (2000) (listing all large public bankruptcy cases filed from 1980 to 2000) (on file with Professor LoPucki, in Microsoft Access format).

Professor David Skeel has argued that Delaware dominated state corporate reorganization prior to the bankruptcy legislation of the 1930s, through its "expert handling of equity receivership cases." Skeel, *supra* note 1, at 8 ("Delaware's primacy also extended to corporate reorganizations."). Although equity receiverships were not bankruptcy cases and did not proceed in bankruptcy courts, they were functional equivalents.

7. *See, e.g.*, Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 983-87 (1999) (providing an empirical description of the shift).

when Delaware suddenly replaced New York City[8] as the jurisdiction of choice for the bankruptcy reorganization of large, public companies. Delaware's ascendancy was swift, reaching its peak in 1996, when twelve of the fourteen large public companies that filed for reorganization in the United States (86%) did so in Delaware.[9] Threatened with a political backlash from bankruptcy lawyers and judges throughout the remainder of the United States, the Chief Judge of the Delaware District Court intervened to slow the filings in January, 1997.[10] The National Bankruptcy Review Commission condemned the forum shopping and called for changes in the law to prevent it.[11]

Just as leading corporate scholars writing from an economic perspective proclaimed the efficiency of Delaware incorporation nearly two decades ago, leading bankruptcy scholars writing from that perspective now proclaim the efficiency of Delaware bankruptcy reorganization. Professors Robert Rasmussen and Randall Thomas argue that because prepackaged cases are consensual—that is, the market chooses Delaware—prohibiting debtors from filing prepackaged cases in Delaware would "decrease[ ] social welfare."[12] Professor David Skeel argued that "the characteristics that distinguished Delaware bankruptcy cases" were "speed and efficiency, as well as sophistication."[13]

Congress did nothing, principally because the senior senator from Delaware, Joseph Biden, served on the committee that controlled bankruptcy legislation in the Senate.[14] Today, over 60% of

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8. When large, public companies filed for bankruptcy reorganization during the 1980s, about thirty percent of them did so in the Manhattan Division Bankruptcy Court for the Southern District of New York. LoPucki & Whitford, *supra* note 6, at 29 (reporting that thirteen of forty-three cases proceeded in the New York City bankruptcy court). The remainder of the cases were spread throughout the United States. *Id.* at 59-63 (listing cases).

9. Eisenberg & LoPucki, *supra* note 7, at 985.

10. The intervention is described in Eisenberg & LoPucki, *supra* note 7, at 986, and discussed in Skeel, *supra* note 1, at 33-35 (suggesting that the intervention was a response to the threat of venue legislation, but also describing other possible motives).

11. *See* NAT'L. BANKR. REVIEW COMM'N., BANKRUPTCY: THE NEXT TWENTY YEARS 770-87 (1997).

12. *See* Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1391 (2000).

13. *See* David A. Skeel, Jr., *Lockups and Delaware Venue in Corporate Law and Bankruptcy*, 68 U. CIN. L. REV. 1243, 1276 (2000).

14. *See, e.g.*, Skeel, *supra* note 1, at 44 ("So long as Senator Biden stays on the committee, even as a member of the minority, he can probably quell venue reform."); *see also* Rasmussen & Thomas, *supra* note 12, at 1362 (describing Congressional maneuvering with regard to Delaware bankruptcy venue).

the bankruptcy reorganizations of large public companies filed in the United States are filed in the Delaware bankruptcy court.[15]

This Article reports on an empirical study of the outcomes of the bankruptcy reorganizations that took place before and during this historic shift. In this study, we tracked the 188 public companies that emerged from large bankruptcy reorganizations in the United States from 1983 through 1996 and determined the frequency with which they refiled for bankruptcy. Our study included the first thirty-one companies to emerge from large, public company bankruptcies in Delaware. By February 20, 2000—the close of data collection for the empirical study reported in this Article—ten of those thirty-one companies had filed a second bankruptcy case. That refiling rate is similar to New York's refiling rate, but six to seven times as high as the refiling rate for companies reorganizing in all other United States bankruptcy courts.

Refiling constitutes a failure of the bankruptcy process.[16] First, the Bankruptcy Code condemns the necessity for refiling. Specifically, it provides that, as a condition of confirming the plan in the first case, the court must find that "confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor."[17] Second, bankruptcy reor-

15. *See* LoPucki, Bankruptcy Research Database, *supra* note 6 (data showing 62% of large, public company bankruptcies filed in Wilmington). For this purpose, a company is considered "large" if it has assets in excess of $100 million in 1980 dollars (a little over $200 million in current dollars) and "public" if it is required to file annual reports with the Securities and Exchange Commission.

16. A number of writers have noted and commented critically on the high rates of bankruptcy refiling. In a study of large, public company reorganizations in the 1980s, Professors Lynn M. LoPucki and William C. Whitford found that twelve of the thirty-eight companies that emerged from bankruptcy in their study (32%) had filed bankruptcy again by 1992. Lynn M. LoPucki and William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597, 608 (1993). In another study published two years later, Professor Edith Hotchkiss found a refailure rate of 32%. Edith Shwalb Hotchkiss, *Post-bankruptcy Performance and Management Turnover*, 50 J. FIN. 3, 4, 7 (1995) (finding that 32% of a sample of 197 public companies that emerged from bankruptcy reorganization filed between October, 1979 and September, 1988 "are involved in a second bankruptcy or distressed restructuring"). In a study of reorganizations and out-of-court restructurings occurring between 1979 and 1989, Professor Stuart Gilson found that the recidivism rate for firms that restructure out of court (35%) was higher than the recidivism rate for firms that reorganize under Chapter 11 (16%). Stuart C. Gilson, *Transactions Costs and Capital Structure Choice: Evidence from Financially Distressed Firms*, 52 J. FIN. 161, 167-68 (1997). Other commentators have also noted and criticized these high rates of refiling. *See, e.g.*, Edward I. Altman, *Evaluating the Chapter 11 Bankruptcy-Reorganization Process*, 1993 COLUM. BUS. L. REV. 1; Susan F. Balaschak, *Rehabilitation or Quick Fix: "Chapter 22s"*, 1996 A.B.I. J. LEXIS 649 (Dec. 1996 / Jan. 1997); Allen Michel et al., *Post-bankruptcy Operating Performance: Two-time Filers vs. One-time Filers*, 2000 A.B.I. J. LEXIS 36 (Mar. 2000).

17. 11 U.S.C. § 1129(a)(11) (1994).

ganization is an expensive and disruptive process. For a large, public company, the direct cost is probably about 1.5% to 6% of the company's assets.[18] Those direct costs are typically several million dollars for the companies studied and may run into the hundreds of millions of dollars for the largest of them.[19] The indirect costs—damage to the reputation of the company, distraction of management, the loss of key employees, and the necessity to sell or abandon promising projects—are generally assumed to be much higher. When bankruptcy is repeated, these costs are incurred a second time.

Paradoxically, large public companies in need of bankruptcy reorganizations seem to be flocking to the courts least likely to reorganize them successfully. The explanation cannot be simply that management takes cases to Delaware to benefit shareholders at the expense of creditors, because approximately half of the filings were prepackaged cases in which the debtor sought and obtained the creditors' consent to the filing, and several of the others were cases in which shareholders stood to recover nothing anywhere. As we argue below, at least part of the explanation seems to be that the parties who stood to lose in a failed Delaware reorganization simply underestimated the likelihood of failure. The "market" is not as good at assessing legal regimes as theorists suppose.

Part I of this Article describes the methodology we employed to calculate refiling rates. Part II sets forth our findings in more detail. In addition to our findings of elevated Delaware and New York refiling rates, we made a number of other findings. Companies that had previously filed bankruptcy were more than four times as likely to refile as were public companies to file initially. Refiling rates were high for companies that emerged in the period before about 1988, dipped for emergences during the period from 1988 to 1993, and reached record-high levels for the companies that emerged in 1994 through 1996. The rate at which companies refiled during their first year after confirmation was double the back-

18. Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J. FIN. 1067, 1078 (1984) (finding direct costs of 6.2% of asset value); Tashjian et al., *Prepaks: An Empirical Analysis of Prepackaged Bankruptcies*, 40 J. FIN. ECON. 135, 144 tbl.2 (1996) (finding that the mean cost of prepackaged bankruptcy reorganization is 1.85% of the total book value of assets); Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 J. FIN. ECON. 285 (1990) (finding mean direct cost of bankruptcy reorganization was 2.8% to total book value of assets).

19. *See, e.g.*, Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 713 n.87 (1999) (noting fee of $200 million paid to the English liquidators of BCCI).

ground rate at which all public companies filed bankruptcy. The refiling rate increased to about six times the background rate in the third year after emergence, and then declined to about three times the background rate. The refiling rate remained elevated for at least eleven years after confirmation.

Part III discusses the implications of these findings for the debates over Delaware reorganization, Delaware incorporation, and bankruptcy forum shopping generally. The Article concludes that the excessive rate of bankruptcy refiling by emerging companies appears to be the product of a wasteful competition among courts. Competing courts attract filings by applying lax standards for plan confirmation that lead to the excessive refiling rates.

I. METHODOLOGY

A. The Companies Studied

The companies studied are all of the principal operating companies emerging from bankruptcy reorganizations of large, public companies filed after October, 1979 in United States bankruptcy courts and in which plans were confirmed by December 31, 1996. The set of all large public companies that reorganized during that period was identified from the Bankruptcy Research Database ("BRD") maintained by one of the authors.[20] The BRD included 271 cases filed during the period of the study. The disposition of seven of those cases is unknown,[21] and twenty-four remained pending at the end of the period. Of the 240 cases that reached a known disposition by December 31, 1996, eight (3.3%) converted to Chapter 7 without confirmation of a plan, seven (2.9%) liquidated under Bankruptcy Code § 363 without confirmation of a plan,[22] one (0.4%) was dismissed, and thirty-six (15%) were liquidated pursuant to a confirmed plan without the emergence of an operating company. In the remaining 188 cases (78.3%), at least one operating company emerged from the reorganization. In a few of those cases, more than

20. For a description of the database, see Eisenberg & LoPucki, *supra* note 7, at 973-74. A version is available online at http://teddy.law.cornell.edu:8090/lopucki.htm.

21. These are generally older cases not followed by the press. They probably include a disproportionate number of liquidations.

22. That section provides that a company in bankruptcy reorganization may, after notice and a hearing, sell its property outside the ordinary course of business. The section has been held to authorize the sale of all or substantially all of a debtor's assets outside the ordinary course of business when there exists an "articulated business justification" for such a sale. Comm. of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel Corp.), 722 F.2d 1063, 1070 (2d Cir. 1983).

one operating company emerged. In those few, we included the largest emerging company in our study and excluded the others. The result was a set of 188 emerging companies on which we calculated all of the refiling rates described in this Article.

B. Calculation of the Refiling Rate

Comparing bankruptcy refiling rates across time, courts, and other variables presents difficult methodological problems. "Ideally," all emerging companies would be followed for the same length of time, the number of bankruptcies in various subgroups divided by the number of emerging companies in those subgroups, and the quotients compared. Such a methodology, however, would suffer from three debilitating problems. First, the necessity to wait for the cases to resolve would limit the researchers to critiquing the bankruptcy process as it existed many years earlier. Second, because only relatively small numbers of large, public companies in any particular category emerge from reorganization each year, the "ideal" methodology would also suffer from populations too small to reach statistical significance. Third, emerging companies often cease their separate existence without filing bankruptcy, making it impossible to follow them for the chosen time period. The companies may be acquired by, or merged with, other companies. They may cease business and liquidate, or simply shrink in size until they become untrackable.

Our strategy for dealing with the first two of these problems was to include all reorganized companies in our study, regardless of the length of time since they emerged from bankruptcy, and to draw from the experience of each what value we could. Our strategy for dealing with the third was to define a set of conditions for continuing inclusion of cases in our study. We designed the conditions to insure that the companies studied remained comparable to the much larger population of public companies whose bankruptcy filing rate (the "background rate") provided our principal standard for comparison. We "included" emerged companies in our study during the period of time they met the conditions for comparability, and permanently excluded them from the study after the first time they ceased to meet the conditions. For ease of reference, we referred to a company as "followed" during the time it qualified for inclusion in the study, and as "dropped" at the time it ceased to meet the conditions for comparability and we therefore ceased to include it. We followed the companies not dropped to February 20, 2000, the date on which we began our final data collection. Thus, for each of the

188 companies, our conditions established a finite period of following, which began at confirmation of the plan in the first bankruptcy case. Those periods ranged from a minimum of nine days to a maximum of seventeen years.

We defined the "refiling rate" for a given year as the number of followed companies filing bankruptcy during the year, divided by the number of companies followed during that year. Thus, if four companies refiled during a year in which we followed one hundred companies, the refiling rate for that year was 4%. If we followed a company for only a portion of the year, it was included in the denominator for only that portion.[23]

C. Conditions of Comparability

We calculated "background" bankruptcy filing rates, which are discussed in more detail in the next subpart, for the population of all public companies, regardless of size. To assure comparability between the companies followed and the companies used to calculate the background rate, we dropped an emerging company from the study if the company failed to file an annual report (Form 10-K) with the Securities and Exchange Commission ("SEC") for a period of three consecutive years after emerging. Thus, for example, an emerging company that filed its first and only annual report for a year ending twenty months after confirmation was followed for fifty-six months after confirmation. If that company filed bankruptcy during its fifty-fifth month after confirmation, we included its refiling in the refiling rates we report. If the company filed bankruptcy during its fifty-seventh month after confirmation, we did not include its refiling in the refiling rates we report. An emerging company that never filed an annual report with the SEC was followed for three years and dropped at the end of that period.

We applied the three-year grace period for several reasons. First, the application of some grace period was necessary, because the SEC sometimes exempts public companies from filing annual

23. To illustrate, we began following 188 companies as of the date each emerged from its bankruptcy reorganization. During their first year after confirmation, two of these companies (Vista Properties and SpectraVision) were acquired and three (Cook United, Value Merchants, and Jamesway) refiled, leaving 183 companies in the study at the end of that year. To determine the number of companies followed during the first year after confirmation, we added to the 183 companies that completed the entire year, the fractions of the year during which the other five companies continued to qualify for inclusion—a total of 2.3 years. The sum, 185.3, was the number of companies followed during the first year after confirmation. *See infra* Table 3.

reports in connection with bankruptcy.[24] Second, application of a one- or two-year grace period might have understated the rate of refiling as the result of adverse selection. Public companies often cease filing annual reports during the period of financial distress that precedes bankruptcy *because* they plan to file bankruptcy. Third, application of the three-year grace period increased the total company-years of following, which increased the reliability of our study. We believe that it did so without sacrificing validity because the emerging companies that did file 10-Ks refiled at substantially the same rate as the emerging companies that did not file 10-Ks.[25]

Because we were interested in the propensity to refile of only self-reliant emerging companies, we dropped companies from the study when they lost their separate identity through merger or acquisition or when they ceased doing business and liquidated without refiling. Because many of the mergers or acquisitions, and probably all of the cessations of business, served as alternatives to bankruptcy refiling for emerging companies with failing businesses, the *failure rates* for emerging companies were undoubtedly much higher than the *refiling rates* for those companies.

We did not drop emerging companies that engaged in two kinds of acquisitions that did not deprive them of their separate identities. In the first, the emerging company was acquired by another company and then maintained as a separate subsidiary that continued to file its own annual reports—that is, reports that did not cover the acquirer—with the SEC. In the second, the emerging company acquired another company in a transaction in which the emerging company did not appear to us to lose its identity (that is, a true acquisition).[26]

We dropped emerging companies from the study when they refiled bankruptcy because, so long as they remained in bank-

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24. *See* Sea Galley Stores, Inc., SEC No-Action Letter, 1995 SEC No-Act. LEXIS 415 (Mar. 24, 1995) (authorizing company to cease filing annual reports during its bankruptcy proceedings and to resume filings only for periods commencing after the company's release from bankruptcy).

25. To test this proposition, we compared the filing rate during the first three years after emergence for the companies that did file at least one 10-K with those that did not. We found that twenty-eight of the 163 companies that did file a 10-K during those three years (17.1%) refiled during those three years, while four of the twenty-five companies that did not file a 10-K during those three years (16.0%) refiled during those three years. Applying Fisher's exact test, the difference is not statistically significant.

26. When a company is acquired in exchange for stock of the acquirer and then merged into the acquirer, the effect may be the same regardless of which company is designated the acquirer and which the target. By contrast, an acquirer that purchases the stock of a target for cash and maintains the target as a subsidiary remains essentially the same company it was before the acquisition. Between these two extremes lies a wide range of transactions with varying effects.

ruptcy, they could not, as a practical matter, file again.[27] Some refilings were cases that qualified for inclusion in the BRD and concluded in the emergence of an operating company. The companies emerging from those refilings were included in the study on the same terms as any other emerging company. For example, AM International emerged from the bankruptcy of a company with the same name on September 11, 1984. We followed the emerged company for 8.7 years until it refiled on May 17, 1993, and dropped it as of that date. AM International emerged from the second reorganization on September 29, 1993. We followed the emerged company for 6.4 years until the uniform cut-off date for our study, which was February 20, 2000. Thus, AM International counted as two of the 188 companies studied, as one refiling, and as a total of 15.1 years of following.

D. Calculation of the Background Rate

To determine whether a rate of refiling is "high" or "low" requires some benchmark for comparison. We chose to compare the annual filing rates for the emerged companies we studied with the annual filing rates for all public companies (the "background rate").

27. Technically, it might be possible for two cases regarding the same debtor to be pending at the same time. *See, e.g., In re* Strause, 97 B.R. 22 (Bankr. S.D. Cal. 1989). This sometimes occurs when creditors file a voluntary petition in one court and the debtor responds by filing a voluntary petition in another. Such multiple refilings, if they occurred, were counted as single refilings for purposes of this study.

Table 1

Background Rate by Year

Year	Public companies filing bankruptcy	Number of public companies existing	Rate of public Company filing
1983	89	9,047	0.98%
1984	121	10,717	1.13%
1985	149	11,121	1.34%
1986	149	12,450	1.20%
1987	112	14,620	0.77%
1988	122	16,355[28]	0.75%
1989	135	18,090	0.75%
1990	115	16,123	0.71%
1991	125	13,424	0.93%
1992	91	12,114	0.75%
1993	86	12,764	0.67%
1994	70	13,019	0.54%
1995	84	12,753	0.66%
1996	84	12,977	0.65%
1997	82	13,173	0.62%
1998	122	12,442	0.98%
1999	145	11,998	1.21%
All years	1881	223,187	0.84%

To obtain the background rate for each year from 1983 to 1999, we divided the number of public companies reported by New Generation Research, Inc. to have filed bankruptcy in that year[29] by the number of public companies reported in existence that year by the SEC.[30] As shown in Table 1, that background rate varies significantly from year to year. It declined from a high of 1.34% in 1985 to

28. The DIRECTORY OF COMPANIES REQUIRED TO FILE ANNUAL REPORTS WITH THE SECURITIES EXCHANGE COMMISSION (Sept. 30, 1988) erroneously contained the Introduction for the September 30, 1987 edition. As a result, no number of public companies in existence in September 30, 1988 was published. The number included here is an arithmetic interpolation between the numbers published for 1987 and 1989.

29. NEW GENERATION RESEARCH, INC., THE BANKRUPTCY YEARBOOK & ALMANAC 44 (1998).

30. The number of companies was reported for each year from 1983 through 1999, with the exception of 1988. *E.g.*, DIRECTORY OF COMPANIES REQUIRED TO FILE ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION (Sept. 30, 1999) at 1 ("This report makes available a listing of 11,998 companies required to file annual reports with the Securities and Exchange Commission according to currently available information."). In 1988, a misprint occurred. *See supra* note 28.

a low of 0.54% in 1994, and then rose to its second highest level, 1.21%, in 1999. For filings in all years the combined the rate was 0.84%.[31]

When we calculated refiling rates based on years since confirmation rather than calendar years, the refilings may have occurred in different years, against different background rates. Because the number of companies followed were generally small in the early years of our study and larger in the later years, ignoring the years in which refilings occurred might overstate some rates and understate others. To derive a background rate appropriate for comparison with non-year-specific rates, we calculated an average background rate for the entire period of the study, in which the background rates for particular years were weighted according to the number of companies followed in each year. That rate was 0.77% for the years 1983 through 1999. The difference between the weighted background rate (0.77%) and the unweighted one (0.84%) reflects the fact that a disproportionate amount of our following occurred in years when the background rate was relatively low.

E. Data Sources and Collection Procedures

All of the data used in this study were gathered in accord with BRD protocols and made part of that database.[32] The data were gathered from a wide variety of public sources. They included the Public Access to Court Electronic Records ("PACER") databases maintained by the various bankruptcy courts, the Bankruptcy DataSource (BKRTCY/BDS on LEXIS), the on-line records of the SEC, and the Newsgroup files on LEXIS. We consulted other sources as necessary.

We tracked each company from the time it emerged from bankruptcy to the end of the following period. Many of the companies changed their names during the periods we followed them and we adjusted our searches accordingly. For each of the companies followed, we were able to determine either (1) a specific event that terminated the following period[33] or (2) that the company remained in business after February 20, 2000.

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31. This number is the total number of public companies filing bankruptcy (1,881) divided by the total number of public companies existing (223,187), as shown in Table 1.

32. Before an item of information is included in the BRD, the source is photocopied or printed in hard copy and reviewed by Lynn M. LoPucki for compliance with the protocols. The hard copy is then included in the file for that case maintained by Lynn M. LoPucki at the UCLA Law School so that the information can-be audited by BRD users.

33. *See supra* notes 24-27 and accompanying text.

II. FINDINGS

The rate at which companies refiled over the entire period of this study was 3.1% per year. That rate is more than four times the weighted background rate of 0.77%.

A. Refiling Rate Over Time

Table 2 shows the refiling rates by year. Data for years in which relatively few companies were followed have been combined so that the number of company-years of following remains approximately the same for each of the periods on which we reported. For example, the years 1983-89 were combined because of the small numbers of companies followed in each of those years.

Table 2 shows that refiling rates were highest in two periods. The first was from 1983 through 1991 and the second was from 1994 through 1996. The background rate of filing for all public companies was high from 1983 through 1991, dipped to its lowest levels in 1993 through 1997, and then rose to record high levels in 1998 to 2000. Column (6) of Table 2 shows that the refiling rate was highest in relation to the background rate in 1994 through 1996, a period when filings were low, but refilings were high.

Table 2

Refiling Rates by Year[34]

(1) Year(s)	(2) No. of refilings	(3) Company-years of following	(4) Refiling rate	(5) Background rate of filing	(6) Refiling rate as a % of background rate
1983-89	5	116.4	4.3%	0.95%	452%
1990-91	4	91.2	4.4%	0.81%	540%
1992	0	72.8	0	0.75%	0%
1993	1	107.6	0.9%	0.67%	138%
1994	5	123.2	4.1%	0.54%	755%
1995	6	125.8	4.8%	0.66%	724%
1996	5	113.5	4.4%	0.65%	681%
1997	3	101.8	2.9%	0.62%	473%
1998	2	88.7	2.3%	0.98%	230%
1999-2000	1	92.0	1.1%	1.21%	90%
TOTAL	32	1033.1	3.1%	0.84%	368%

B. Refiling Rates by Time Elapsed from Emergence

We initially hypothesized that the refiling rate for emerging companies would be low in the companies' first year after confirmation because the companies had just been reorganized and the court had determined, at the time of confirmation, that confirmation was "not likely to be followed by . . . the need for further financial reorganization."[35] We expected that rate to increase over a period of years as the effects of inadequacies in the reorganizations worked themselves to the surface. Later, we expected the rate to decline to near the background rate as subsequent events resolved the financial problems that had not been resolved in the bankruptcy, and as the bankruptcy filing became a matter of distant history.

To test our hypothesis, we calculated the rate of refiling for each of the first sixteen years after confirmation. (No emerging company was available for following for a period longer than seventeen years.) That is, to calculate the rate of refiling for the first year after confirmation, we determined how many of the companies followed refiled in their first year after confirmation and we then di-

34. Figures presented are from spreadsheet calculations. Products and quotients are affected by rounding.

35. 11 U.S.C. § 1129(a)(11) (1994).

vided that number by the number of companies that potentially could have filed: the number followed during their first year after confirmation. We then repeated the process for each succeeding year. The results are shown in Table 3.

Table 3

Annual filing rate by years after confirmation

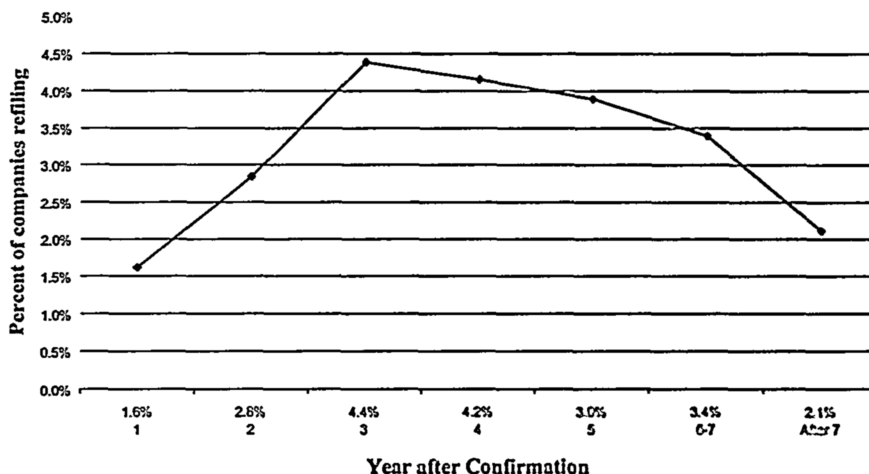
1980-1996 cases

Year after confirmation	Number of companies refiling	Company-years of following	% of companies refiling
1	3	185.3	1.6%
2	5	177.5	2.8%
3	7	159.6	4.4%
4	5	120.3	4.2%
5	4	102.8	3.9%
6	2	83.2	2.4%
7	3	64.1	4.7%
8	0	42.5	0%
9	1	30.8	3.2%
10	0	23.7	0%
11	2	17.1	11.7%
12	0	10.7	0%
13	0	7.3	0%
14	0	3.5	0%
15	0	3.0	0%
16	0	2.4	0%
17	0	1.2	0%
Total	32	1035[36]	3.1%

Because of the relatively low numbers of filings and exposures in years after the fifth, we combined the sixth and seventh years in a single data point and all years beyond the seventh in a single data point. The effect was to smooth the graph and bring out what we believe to be the pattern of refiling rates. That pattern is shown in Figure 1.

36. Differs from total years of following due to rounding.

Figure 1.
Refiling rate by year after confirmation



The pattern is essentially as we hypothesized. The rate began low in the period after confirmation. The first refiling occurred in the eighth month after confirmation. The rate steadily increased through the third year and then steadily declined.

In two respects, however, the pattern of refilings differed from what we hypothesized. First, refilings began earlier than we expected. The rate of refiling in the first year after confirmation was more than double the weighted background rate of 0.77%. Second, the refiling rate did not recede to near the background rate during the period of the study. For the period beyond the seventh year, considered as a whole, the refiling rate was 2.6%, more than three times the weighted background rate.[37]

C. Refiling Rates by Court

1. All Cases

Rampant forum shopping occurred during the period covered by this study. During the 1980s, New York was the principal desti-

37. The fact that none refiled after the eleventh year is not a strong indication that the rate declines to zero, or even to the background rate, during those years because the number of companies followed is so small. If the filing rate remained at 2.1% per year after the eleventh year, the expected number of filings during that period would be only 0.6.

nation for that shopping.[38] In 1990, companies began filing in Delaware and by 1993 Delaware had replaced New York as the forum of choice for large bankruptcy reorganization cases.[39] Of the 188 cases in our study, thirty-one (16%) emerged from Delaware court reorganizations, thirty-six (19%) emerged from New York court reorganizations, and 121 (64%) emerged from reorganizations in all other courts combined.[40] The next most active city was Los Angeles with twelve (6%).

Companies emerging from reorganization in Delaware or New York were considerably more likely to refile than companies emerging from reorganization in other courts,[41] whether the rate of refiling is measured by the number of refilings or the number of refilings per year of following. Table 4 shows that ten of the thirty-one companies emerging from Delaware reorganizations (32%) have refiled and ten of the thirty-six companies emerging from New York reorganizations (28%) have refiled, while only twelve of the 121 companies emerging from reorganization in all other courts (10%) have refiled. The difference between Delaware, on the one hand, and New York and all other courts on the other, is greater when measured in refilings per year followed because the Delaware cases occurred in recent years and therefore have been followed for shorter times. Delaware's ten refilings occurred in 116 years of following, a refiling rate of 8.6% per year. New York's ten refilings occurred in 192.6 years of following, a refiling rate of 5.2% per year. The twelve refilings from all other courts occurred in 726.4 years of following, a refiling rate of only 1.7% per year. Thus measured, Delaware's rate of refiling is more than five times the rate for all other courts.

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38. *See* LoPucki & Whitford, *supra* note 6, at 29.

39. *See* Eisenberg & LoPucki, *supra* note 7, at 979 (graph showing relative numbers of shops to New York, Delaware, and all other districts from 1980 to 1997).

40. In this study, we have focused on courts rather than districts because the greatest differences are between courts. For this purpose a "court" is defined as the judge or panel of judges in a particular city. Focusing on districts shows less pronounced differences. For example, White Plains is part of the Southern District of New York, but does not share the Manhattan panel's high refiling rate.

41. Aside from Delaware and New York, only the Houston court produced more than one refiler; it produced two.

Table 4

Refiling Rates by Court, 1983-96

(1) Court	(2) Companies emerging	(3) No. of refilings	(4) % refiling	(5) Company-years of following	(6) Years followed per case	(7) Refilings per year followed
Delaware	31	10	32%	116.0	3.7	8.6%
New York City	36	10	28%	192.6	5.4	5.2%
All other	121	12	10%	726.4	6.0	1.7%
Total / Average	188	32	17%	1035.0	5.5	3.1%

The difference in the proportion of companies refiling between Delaware and all other courts was significant at the 0.01 level.[42] The difference in the proportion of companies refiling between New York City and all other courts was significant at the 0.05 level. The difference in the proportion of companies refiling between Delaware and New York was not significant. The precise results of these tests are shown in Table 4a.[43]

Because the Delaware court only began reorganizing significant numbers of large public companies after 1990,[44] the Delaware companies in our study have been followed for shorter periods of time than the companies emerging from other courts. Because the proportion of companies refiling can increase with time, but by definition cannot decrease, the percentage of companies refiling will tend to be higher when companies are followed for a longer period

42. That is, the probability that so large a difference in percent refiling would occur by chance in this size population of cases is less than one in one hundred.

43.

Table 4a
Tests of Statistical Significance
Refiling Rates by Court, 1983-96

Data Sets Compared		Two-tailed p on Fisher exact test
Delaware: 10 refiled, 22 did not	All others: 12 refiled, 109 did not	0.0072
New York: 10 refiled, 26 did not	All others: 12 refiled, 109 did not	0.0203
Delaware: 10 refiled, 22 did not	New York: 10 refiled, 26 did not	0.8932

44. *See supra* note 7 and accompanying text.

of time. Thus, the shorter following period for Delaware cases causes the figures in column (4) of Table 4 to tend to understate the rate of refiling from Delaware reorganizations as compared with other courts' reorganizations. On the other hand, because the rate of refiling per year of following is highest in the early years after emergence, the figures in column (7) of Table 4 tend to overstate the rate of refiling from Delaware reorganizations as compared with other courts' reorganizations.

To reduce the possible distortions in our data resulting from these opposing tendencies, we made the same calculations as in Table 4, but included only companies that emerged from reorganization after 1990—the period when Delaware was in full operation. The results of these calculations are shown in Table 5.

Table 5

Refiling Rates by Court, 1991-96

(1) Court	(2) Companies emerging	(3) No. of refilings	(4) % refiling	(5) Company-years of following	(6) Years followed per case	(7) Refilings per year followed
Delaware	30	9	30%	114.3	3.8	7.9%
New York City	22	5	23%	104.9	4.7	4.8%
All other	75	4	5%	358.5	4.8	1.1%
Total / Average	127	18	14%	577.7	4.5	3.1%

Based on this more recent segment of the data, the difference between Delaware and all other courts is greater while the difference between New York and all other courts is reduced. The percent refiling from Delaware is six times the percent refiling from reorganizations in all other courts. Calculated in refilings per year, Delaware's 7.9% rate is more than seven times as high as the aggregate rate for other courts (excluding New York).

The difference in percent refiling between Delaware and other courts (excluding New York) as shown in column (4) of Table 5 was significant at the 0.01 level. The difference in refiling rates between New York City and all other courts was significant only at the 0.10 level, and the difference in refiling rates between Delaware

and New York was not significant. The precise results of these tests are shown in Table 5a.[45]

2. Prepackaged Cases

A "prepackaged" bankruptcy is one in which the debtor proposes its plan to creditors and obtains sufficient votes in favor of it to warrant consensual confirmation before filing a bankruptcy case with the court. Prepackaged bankruptcies are confirmed relatively quickly after filing, and the direct costs of these bankruptcy cases are relatively low.[46] Some scholars have lauded prepackaged bankruptcies as the product of efficient contracting,[47] while others criticize them as potential means of avoiding scrutiny of unfair or inadequate plans.[48]

Debtors commonly use prepackaged bankruptcies to reduce the amounts owing to bondholders. The debtor begins by making an exchange offer—stock and/or new bonds in smaller face amounts, in exchange for existing bonds on which the debtor has defaulted. Accepting creditors return a ballot voting in favor of the plan. If the vote in favor of the plan is sufficiently high (90% or 95% in favor), the debtor may choose to restructure out of court while paying the dissenting bondholders in full. If the vote in favor of the plan is not that high, but is sufficiently high to win consensual confirmation of the plan (a majority in number of the existing bondholders, holding at least two thirds in amount of the bonds), the debtor files for

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45.

Table 5a
Tests of Statistical Significance
Refiling Rates by Court, 1991-96

Data Sets Compared		Two-tailed p on Fisher exact test
Delaware: 9 refiled, 21 did not	All others: 4 refiled, 71 did not	0.0028
New York: 5 refiled, 17 did not	All others: 4 refiled, 71 did not	0.0525
Delaware: 9 refiled, 21 did not	New York: 5 refiled, 17 did not	0.7953

46. *See* Tashjian et al., *supra* note 18, at 144 (finding mean direct costs in prepackaged cases of 1.85% of total assets in contrast with Weiss's finding direct costs in nonprepackaged cases of 2.8% of total assets).

47. *See* Rasmussen & Thomas, *supra* note 12, at 1374-76.

48. *See* Eisenberg & LoPucki, *supra* note 7, at 994-95.

bankruptcy. The bankruptcy court then has the power to impose the exchange on all bondholders, including the dissenters.[49]

Although prepackaged bankruptcies constitute a minority of the cases filed in Delaware, the Delaware court has attracted a greater proportion of prepackaged cases than have other courts. In a study of filings from 1990 to 1997, Eisenberg and LoPucki found that 39% of Delaware cases were prepackaged while only 14% of cases in other districts were prepackaged.[50]

We found that companies emerging from prepackaged bankruptcies after 1990 were more likely to refile than were companies emerging from non-prepackaged cases during the same period. As noted in Table 5, the refiling rate for all companies emerging during that period was only 14% (eighteen of 127 companies). The corresponding rate for companies emerging from prepackaged cases was 22% (seven of thirty-two companies). Although large, the difference was not statistically significant; so, the difference may have occurred simply by chance.

As shown in Table 6, the percent refiling during our study was nearly five times as high for companies emerging from Delaware and New York City prepackaged bankruptcies (33%) as for companies emerging from prepackaged cases in all other courts (7%). When the refiling rate is measured as an annual percentage rate for the period the companies were followed, the New York refiling rate (6.4% per year) remains nearly five times the rate for other cities excluding Delaware (1.4% per year). The Delaware rate of refiling is 9.2% per year, over six times the rate for all other cities (excluding New York). The differences in refiling rates shown on Table 6 were not, however, statistically significant.

49. In the absence of bankruptcy, provisions of the Trust Indenture Act prevent any majority of bondholders from imposing a plan reducing principal or interest or extending maturity dates on any minority through voting. *See* 15 U.S.C. § 77ppp (1994 & Supp. 2000); *see, e.g.*, Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 YALE L.J. 232 (1987).

50. Eisenberg & LoPucki, *supra* note 7, at 992-93 (reporting the results of an empirical study). The difference in filing rates for prepackaged cases was significant at the 0.001 level. *Id.*

Table 6

Refiling Rates by Court, 1983-96

Prepackaged Cases Only

(1) Court	(2) Companies emerging	(3) No. of refilings	(4) % refiling	(5) Company-years of following	(6) Years followed per case	(7) Refilings per year followed
Delaware	15	5	33%	54.4	3.6	9.2%
New York City	3	1	33%	15.7	5.2	6.4%
All other	14	1	7%	73.2	5.2	1.4%
Total / Average	32	7	22%	143.2	4.5	4.9%

The rates reported in Table 6 are subject to the same distortions discussed in the preceding Section.[51] To eliminate them, we recalculated the table, including only companies that emerged from prepackaged reorganizations after 1990. The results are displayed in Table 7.

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51. *See supra* note 45 and accompanying text.

Table 7

Refiling Rates by Court, 1991-96

Prepackaged Cases Only

(1) Court	(2) Companies emerging	(3) No. of refilings	(4) % refiling	(5) Company-years of following	(6) Years followed per case	(7) Refilings per year followed
Delaware	15	5	33%	54.4	3.6[52]	9.2%
New York City	3	1	33%	15.7	4.6	6.4%
All other	12	0	0	56.0	4.7	0.0%
Total / Average	30	6	20%	126.0	4.2	4.8%

The statistics in Table 7 are very similar to those in Table 6 because all but two of the companies emerging from prepackaged bankruptcy cases did so after 1990. Those two companies emerged from courts other than Delaware or New York. One refiled; the other did not. Table 7 shows even more clearly that companies emerging from prepackaged bankruptcy cases in Delaware and New York are more likely to refile than companies emerging from other courts. The difference in refiling rates between those two courts combined and all other courts was statistically significant at the 0.10 level.[53] The difference in refiling rates between Delaware and all other courts (excluding New York) was also significant at the 0.10 level,[54] but (excluding Delaware) the difference in refiling rate

52. The Delaware cases are followed for a shorter time principally because so many of them refiled so quickly. When the average number of years followed is calculated only for emerging companies that did not refile, the numbers are as follows:

Table 8

Years Followed

Prepackaged cases, 1991-96

Non-refiling companies only

Court	Years
Delaware	4.4
New York	4.6
All other courts	4.7

53. On Fisher's exact test, the two-tailed p was 0.0625. In other words, if Delaware and New York cases were in fact no more likely to lead to refiling than cases filed in other courts, there is a 6.25% chance that this great a difference in numbers of refilings would occur by chance.

54. On Fisher's exact test, the two-tailed p was 0.0744.

between New York and all other courts was not statistically significant.

III. IMPLICATIONS

While the data we present do not disprove the arguments for the efficiency of Delaware reorganization, they do cast doubt on those arguments, and, less directly, on the efficiency of Delaware incorporation. The data we present also suggest that, for both the Delaware and New York courts, competing for cases led to higher refiling rates.

A. Delaware Bankruptcy Reorganization

The sharply higher refiling rates for companies emerging from Delaware bankruptcy reorganizations do not alone prove that Delaware's refiling rates are higher than optimal. Relatively high refiling rates are theoretically defensible. The story would go something like this. Bankruptcy reorganizations are expensive, both in costs of administration and assets expended in the reorganization effort. Failed bankruptcy reorganizations are even more so, because the costs are incurred twice. The risk of confirming a plan in the first case that might result in the necessity for a second case, however, may be more than offset by the potential for huge gains when a company that could not propose a safe plan in the first case is permitted to reorganize and succeeds in doing so. In reorganizations, as in business generally, risk taking is good.[55]

Several factors suggest that this story does not fit the pattern of Delaware reorganizations. First, with 32% of the emerging companies in bankruptcy after an average of 3.7 years of following,[56] the failure rate for Delaware reorganizations is so high that it sharply limits the pool of cases from which the offsetting gains would have to have been realized. Yet there do not appear to be any dramatic successes to provide the offset.[57] Second, as shown in Table 9, courts grant confirmation in nearly all cases to large, public companies, making it unlikely that the debtors' home courts would have refused to confirm their plans on any terms. Delaware's

55. *See, e.g.*, THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 369-70 (Anchor Books rev. ed. 2000) (contrasting attitudes toward failure in Silicon Valley and Germany).

56. *See supra* Table 4.

57. This evaluation is based only on casual examination of the list of companies that reorganized successfully in Delaware.

offsetting gains would have to be from something more subtle than threatened refusals of confirmation at home. Third, if Delaware were a jurisdiction that embraced risky reorganizations, it would tend to reorganize a greater portion of its filing companies than other districts did of theirs. Yet, as shown in Table 9, Delaware actually reorganized a slightly lower portion of its filing companies than did other courts.[58]

Table 9

Emerging companies by court

Cases filed after 1989 and disposed of before 1997

	Delaware	Other courts
Number of cases	38	117
Conversions	0	4
Dismissals	0	1
363 Sales	1	1
Confirmations	37	111
Emerging company	30	99
% of cases with emerging companies	30/38 = 79%	99/117 = 85%

These data are not, however, inconsistent with a "clientele effect"—a possible tendency on the part of debtors and their lawyers to bring Delaware the kinds of reorganizations most likely to fail.[59] By this explanation, Delaware has the worst refiling record because it handles the most difficult cases, cases that would have produced even higher refiling rates at home. For such a clientele effect to exist, however, companies or their advisors would have to be aware of it and it almost certainly would have been noted in the extensive debates over Delaware reorganization. It has not been.[60]

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58. The difference was not statistically significant on Fisher's exact test.

59. Professor David Skeel has argued that venue shopping in bankruptcy cases has produced a clientele effect, but he asserted that the selection was for firms that sought to reorganize more quickly rather than for firms that sought approval of high risk plans. *See* Skeel, *supra* note 1, at 27 ("Venue shopping in bankruptcy has thus produced a clientele effect, with Delaware attracting firms that seek to reorganize quickly."). To date, we know of no one who has suggested that Delaware has been attracting high risk reorganizations.

60. For example, no such claim was advanced by the Delaware State Bar Association in its report to the National Bankruptcy Review Commission attempting to justify the forum shopping to Delaware. *See* DELAWARE STATE BAR ASS'N, REPORT OF THE DELAWARE STATE BAR ASSOCIATION TO THE NATIONAL BANKRUPTCY REVIEW COMMISSION IN SUPPORT OF MAINTAINING EXISTING VENUE CHOICES 19-22 (1996) (on file with author) (discussing the reasons for the forum shopping to Delaware).

To explore the possibility that Delaware's high refiling rate results from Delaware receiving a disproportionate share of the most difficult cases, we determined the types of businesses most likely to refile.[61] We found that eight of thirty-one retail trade firms (26%) and fifteen of fifty-nine manufacturing firms (25%) emerging from bankruptcy refiled, while only nine of ninety-three firms in other kinds of businesses (10%) refiled. The difference was statistically significant for manufacturing firms alone at the 0.10 level, and for manufacturing firms and retail trade firms together at the 0.01 level.[62] Manufacturing and retail trade firms are more likely to refile than firms in other businesses.

Sixteen of thirty-one firms filing in the Delaware bankruptcy court (52%) were manufacturing or retail trade firms. Seventy-four of 152 firms filing in other bankruptcy courts (49%) were manufacturing or retail trade firms. The difference is not statistically significant.[63] If Delaware receives a disproportionate share of the most difficult cases, the pattern is not visible on a simple analysis of business type.

We also attempted to determine whether a difference in the sizes of the firms reorganizing in Delaware might account for Delaware's higher refiling rates. The first step was to determine whether, within the population of large companies studied, size was related to the propensity to refile. When size was measured by

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61. For this purpose, we used the categorization of firms by primary Standard Industrial Classification Code ("SIC Code"), in Lynn M. LoPucki's Bankruptcy Research Database, using only the first level, SIC Division. For an explanation of the SIC Code system generally, see EXECUTIVE OFFICE OF THE PRESIDENT OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 11-18 (1987). Professor LoPucki obtained the bulk of the SIC code data from Standard and Poor's, Corporations volume (1980-97). The first code listed for a company in that volume is the primary code. (This fact does not appear in the books, but was confirmed with Standard and Poor's.) S & P codes were verified by comparing them with codes listed in other publications, including the Bankruptcy DataSource and Access. If the S & P code matched the code from another source, Professor LoPucki accepted the S & P code. If it did not, he obtained a description of the business from the 10-K before and checked the code for plausibility. All judgments were made by Lynn M. LoPucki. In a few cases no source was available for verification and he accepted the S & P code. If the SIC Code was assigned under the 1977 SIC system, he converted to the 1987 system using the official conversion table and a description of the business. *See* Lynn M. LoPucki, Protocols for Bankruptcy Research Database (May 22, 2000).

62. On Fisher's exact test, the two-tailed p was 0.0859 for manufacturing firms, 0.2820 for retail trade firms, and 0.0079 for manufacturing and retail trade firms combined.

63. On Fisher's exact test, the two-tailed p was 0.9198. We also tested manufacturing and retail firms separately. Twelve of thirty-one firms emerging in Delaware (39%) were manufacturing firms; forty-seven of 152 firms emerging in other courts (31%) were manufacturing firms. The difference was not statistically significant. Four of thirty-one firms emerging in Delaware (13%) were retail trade; twenty-seven of 152 firms emerging in other courts (18%) were retail trade. The difference was not statistically significant.

mean sales or numbers of employees, or by median sales or numbers of employees, or by book value of assets, we found no statistically significant relationship between size of the initially filing company and refiling.[64] When size was measured by the book value of assets prior to the initial filing, the difference in means between the refiling companies ($837 million) and nonrefiling companies ($1,626 million) was significant at the 0.05 level.[65] The reorganization of smaller companies appeared more likely to lead to refiling than the reorganizations of larger companies.

When only cases filed after 1990—the period of Delaware's operation—were considered, however, the difference in means for refiling companies ($1,021 million) and nonrefiling companies ($1,269 million) was smaller and not statistically significant.[66] When the New York cases were removed from that population, the relationship between size and propensity to file reversed. The mean size of the refiling companies ($889 million) was greater than the mean size of the nonrefiling companies ($746 million).[67] Thus, for the period after 1990, it is no longer clear that the reorganization of smaller companies was more likely to lead to refiling than the reorganization of larger companies.

Even if it were true that smaller companies were more likely to refile than larger ones, that could not explain why Delaware had higher refiling rates. After 1990, the mean size of the Delaware cases ($889 million) was slightly larger than the mean size of cases

64. When measured by sales or numbers of employees, larger companies were slightly more likely to refile than smaller companies. But when measured by book value of assets, smaller companies were slightly more likely to refile than larger companies.

Table 10

	Refilings by firms larger than the median size	Refiling by firms smaller than the median size
Sales	17 (57%)	13 (43%)
Assets	14 (45%)	17 (55%)
Employees	19 (59%)	13 (41%)

65. The means were $1,626 million for 150 nonrefiling companies and $837 million for thirty-one refiling companies. The standard deviations for the nonrefiling companies was $4,481 million while the standard deviation for refiling companies was $822 million. The difference was significant at the 0.047 level on a t-test for equality of means with equal variances not assumed.

66. (T=0.813, p=0.42). During this period, the number of refiling companies was eighteen and the number of nonrefiling companies was 104.

67. Removal of the New York cases is appropriate because the purpose of the comparison in means is to explain the difference in filing rates between Delaware and courts other than Delaware and New York. Excluding the New York cases, there were thirteen refilers and eighty-three nonrefilers.

in courts other than Delaware and New York ($745 million). Thus, with respect to both type of business and size, the companies filing in Delaware appear to be no different than those filing in other courts.[68]

The fourth reason for believing that Delaware's refiling rate is higher than optimal is that, during the period covered by the study, the Delaware court did not appear to be making informed decisions on which risks to undertake.[69] Rather, the court was simply confirming whatever the parties presented. At least in retrospect, it appears that, if the court had taken a more active approach, it would not have confirmed some of the plans that ultimately failed. For example, Memorex Telex, N.V. solicited and won acceptance of a prepackaged plan of reorganization in December, 1991,[70] on the basis of projections showing that the company would return to profitability in its next fiscal year.[71] On January 6, 1992, the company filed its prepackaged bankruptcy in Delaware. The court confirmed the plan a month later, on February 7, 1992—a re-

68. Another possible clientele would be subordinated bondholders, who might bring cases to Delaware because they prefer higher risk reorganizations. Although we do not have the data to respond directly to that theory, we do have data that suggest it is not the explanation for Delaware's higher filing rates. First, subordinated bondholders are most prominent in prepackaged cases. If subordinated bondholders brought cases to Delaware to take higher risks, then Delaware prepackaged cases should fail more often than Delaware nonprepackaged cases. They do not. *See infra*, note 108. Second, the high refiling rates that accompanied New York's dominance of bankruptcy reorganization in the 1980s did not involve such a clientele effect. The data gathered by LoPucki and Whitford indicate that while seven of the thirteen large public reorganizations that proceeded in New York in the early to mid-1980s had subdebt, in all seven of those cases the debtor needed the agreement of substantial senior or general classes of impaired creditors. *See* Lynn M. LoPucki & William C. Whitford, Data Sheets (on file with Lynn M. LoPucki).

69. One might argue that Delaware reorganization is efficient because the court permits managers to act without constraint from the court or creditors. At the time of bankruptcy, however, the incentives of managers are sufficiently different from those of their companies to render such an argument implausible. *See* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 710-16 (1993) (discussing employment contract incentives and employment market incentives). Absent controls, managers would pursue their own interest. Bebchuk has shown that market incentives do not work well even as means of controlling incorporation decisions. *See* Bebchuk, *supra* note 3, at 1461-70.

70. *See Memorex Telex N.V. Announces Support for Restructuring Plan*, BUS. WIRE, Nov. 27, 1991 ("Memorex Telex announced Wednesday it has obtained broad based support and will commence solicitation for acceptances for its previously announced prepackaged reorganization plan."); Kathie O'Donnell, *New Debt Offerings Approach $2 Billion But Fear of Higher Rates Isn't the Reason*, BOND BUYER, Feb. 20, 1992, at 3 (commenting that the "b" rating assigned to Memorex's senior guaranteed notes "reflects Memorex's still onerous debt burden . . . .").

71. *See* MEMOREX TELEX, N.V. AND MEMOREX TELEX CORPORATION, PROXY STATEMENT—PROSPECTUS AND SOLICITATION OF ACCEPTANCES FOR A JOINT PREPACKAGED PLAN OF REORGANIZATION, Nov. 27, 1991, at 65 (showing projected "Net income (loss)" for the "Post-Restructuring Year Ending Mar. 31, 1993" of $15.5 million).

cord short time for the bankruptcy reorganization of a large, public company. Memorex shed $550 million in debt through confirmation of the plan, but that amount only slightly more than offset Memorex's $429 million operating loss for the year prior to confirmation.[72] Memorex was regarded as a "highly leveraged company" even as it emerged from the first bankruptcy.[73] Instead of the $15 million in profits projected just before the year began, Memorex posted a loss of $382 million for the year ended March 31, 1993.[74]

In June of 1992, just four months after confirmation, Memorex acknowledged the failure of its March reorganization by reopening negotiations with its creditors.[75] The bargain eventually struck in those renegotiations was the basis for a second Delaware bankruptcy filing that was concluded in March, 1994.[76] In this second reorganization, the company did what it should have done in the first—slashed its debt from $700 million to $100 million.[77] But by then it was too late. The second reorganization was followed by a third filed in October, 1996. During that third Memorex bankruptcy, the company ceased doing business and was liquidated, with pieces going to several different buyers.

Memorex had entered the Delaware reorganization process in January 1992 with about $1.5 billion in assets.[78] In the ensuing four years—through its three Delaware bankruptcies—the company posted losses totaling $1.23 billion for continuing operations,[79] leaving insufficient funds in the end even to pay the priority claims of employees.[80]

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72. *See* MEMOREX TELEX, N.V. FORM 10-K FOR THE YEAR ENDED MAR. 31, 1992, at 12 (showing losses of $429 million for the year ended Mar. 31, 1992).

73. *Memorex Telex Impresses Analysts*, 2 JUNK BOND REP., Mar. 23, 1992, at 1 ("Despite the restructuring, Memorex Telex is still regarded as a highly leveraged company.").

74. *See* MEMOREX TELEX, N.V. FORM 10-K FOR THE YEAR ENDED MAR. 31, 1996, at 8.

75. *See* Jim Barnett, *Memorex Money Woes Grow Computer Company Is Negotiating Again*, NEWS & OBSERVER (Raleigh, N.C.), June 2, 1993, at C9 ("A year and a half after getting out of bankruptcy court, Memorex Telex N.V. again is negotiating with creditors to make ends meet.").

76. *See, e.g.*, David Mok, *Memorex Telex: Out of the Woods, Finally?*, BUS. TIMES (Singapore) Aug. 22, 1994, at 13 (stating that the company came out of chapter 11 reorganization in March).

77. *See Memorex Corporate Milestones*, COMPUTER BUS. REV., Nov. 1, 1996. Cutting the debt earlier may not have assured success, but not cutting it may have assured failure.

78. *See* MEMOREX TELEX, N.V. FORM 10-K FOR THE YEAR ENDED MAR. 31, 1996, at 12 (showing total assets of $1.452 billion at the end of fiscal year 1992).

79. *See id.* at 11, 33 (showing "loss[es] before income taxes," before crediting the "extraordinary items" in 1992 and 1994 resulting from discharge of indebtedness in the company's bankruptcies, of $382.6 million in 1993, $491.8 million in 1994, $103.9 million in 1995, and $246.7 million in 1996, for a total of $1.23 billion).

80. *See* Dan Rutherford, *Flood of Changes Drowned Memorex Telex*, TULSA WORLD, Nov. 10, 1996, at E1 (quoting a corporate officer's statements that the $40 million from the sale of Memorex Telex's operations "will likely be used to pay off the debtor-in-possession financing" and ex-

The unrealistic projections that enabled Memorex to win approval of its first reorganization—later referred to as a "joke" by one securities analyst[81]—also accomplished something else. They enabled Giorgio Ronchi, who had been chief executive officer of Memorex since its founding in 1986, to become one of the few CEOs of a major public company to remain in office throughout the company's failure and bankruptcy reorganization.[82]

In another Delaware case, Cherokee, Inc. projected that its operating income for the year after bankruptcy would be more than five times what it was for the year prior to bankruptcy.[83] On the basis of that projection, the bondholders voted in favor of the plan.[84] Three days after Cherokee filed the bankruptcy case, a leading analyst was quoted in the *Wall Street Journal* as saying that, "[i]f the company stabilizes at the current level or worsens, this reorganization could be just a band-aid."[85] Nevertheless, the Delaware bankruptcy court confirmed the plan on June 1, 1993, just thirty-two days after the case was filed.

As a result of the overly optimistic projections, Cherokee emerged with more debt than it could pay.[86] Three months after confirmation, Cherokee revised its income statement for the quarter

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pressing doubt "there's going to be enough money left over to satisfy unsecured creditors . . . namely employees who may have claims against the company").

81. *See* Cecile Gutscher, *Future Uncertain for Prepackaged Memorex Telex Plan*, HIGH YIELD REPORT, Feb. 21, 1994, at 6 (quoting an unnamed analyst as saying, "[the revenue projections] were a joke. They missed by a humongous amount by a factor of four.").

82. Ronchi was replaced in November of 1992, while the company was negotiating with creditors for its second reorganization. In their study of similar reorganizations in the 1980s, LoPucki and Whitford found that 95% of the CEOs in office when the companies' financial problems first became public had been replaced by confirmation of the plan of reorganization. *See* LoPucki & Whitford, *supra* note 69, at 729. Of the two CEOs that remained in office in that earlier study, one was in the single Delaware case included in the study. The other was in a New York case.

83. *See* CHEROKEE INC., THE CHEROKEE GROUP, SOLICITATIONS OF CONSENTS AND PREPACKAGED PLAN ACCEPTANCES DATED MAR. 24, 1993, at 47 (Forecast Consolidated Income Statements showing projected operating income for the fiscal years ending May 1993 and May 1994 to be $2,644,000 and $14,555,000 respectively).

84. *Id.*

85. *Cherokee, Unit Seek Chapter 11 Protection in Bankruptcy Court*, WALL ST. J., Apr. 26, 1993, at C8 (quoting Paul Davner, an analyst with B.D.S. Securities Corp. in New York).

86. *See* Deborah Adamson, *Cherokee Plans to File Chapter 11 Clothing Maker Struggling With Debt From 1989 Buyout*, L.A. DAILY NEWS, Sept. 17, 1994, at B1 (quoting securities analyst Davner as saying that, "[i]n large part, [the second bankruptcy] stems from the fact that they came out of the last bankruptcy with too much debt" and "[t]he first bankruptcy problem did not correct the leverage problem . . . .").

nearly completed before confirmation to show a $2.4 million loss instead of the $0.5 million loss initially reported.[87]

In Cherokee, as in Memorex, the prepackaged filing in Delaware enabled a tainted[88] CEO to accomplish the rare feat of remaining in office through reorganization.[89] But it accomplished little else. On September 16, 1994—less than sixteen months after confirmation of its plan—Cherokee announced that it would refile for bankruptcy.[90] The company did so on November 7, 1994, seventeen months after confirmation in the first case. Analysts attributed the second filing to Cherokee's failure to discharge sufficient debt in the first.[91]

TWA provides a third example of the texture of Delaware's failures. TWA filed a non-prepackaged bankruptcy in Delaware, in January of 1992, and emerged nineteen months later, in August of 1993. As the case approached confirmation, analysts said that TWA's financial projections were overly optimistic,[92] and that TWA was attempting to emerge with too high a ratio of debt to equity[93] and too little cash.[94] Experts were, however, doubtful that the Delaware bankruptcy court would refuse to confirm,[95] and the experts were right.[96]

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87. *See Operating Loss Deepens in Quarter at Cherokee*, DAILY NEWS REC., Aug. 31, 1993, at 10.

88. LoPucki and Whitford originated use of the word "tainted" to refer to a CEO who was in office during the period the company developed the financial problems that eventually resulted in bankruptcy. *See* LoPucki & Whitford, *supra* note 69, at 729.

89. Five months after confirmation, that CEO resigned. *See Cherokee's Chairman, CEO Margolis, Resigns After Reorganization*, WALL ST. J., Nov. 2, 1993, at B8.

90. *See, e.g.*, Adamson, *supra* note 86.

91. *See, e.g.*, *id.* (quoting analyst Paul Davner as saying "[i]n large part, [the second bankruptcy] stems from the fact that they came out of the last bankruptcy with too much debt").

92. *See, e.g.*, Adam Bryant, *T.W.A.'s Bumpy Flight Back*, N.Y. TIMES, May 16, 1993, at C7 (noting that "many analysts doubt that T.W.A. will survive another year . . . [and they] consider T.W.A.'s projections through 1997, which assume a 5 percent annual growth rate, optimistic").

93. *See, e.g.*, Robert L. Rose, *New TWA Chairman Hopes To Match Piedmont Success*, WALL ST. J. EUROPE, July 15, 1993, at 7 (noting analyst's criticism of TWA's plan to emerge with $1 billion in long term debt and just $81 million in equity).

94. *See, e.g.*, Bloomberg Business News, *Will Beleaguered TWA's Financing Plans Fly?*, L.A. TIMES, Aug. 10, 1993, at D1 (criticizing TWA's plan to emerge with only $200 million in cash).

95. *See, e.g.*, *id.* ("Most of those close to the case say it is highly unlikely that [the Delaware bankruptcy judge] would turn down TWA's plan if it appears at all reasonable. Analysts, however, have questioned TWA's viability if it does not raise significant amounts of cash to carry it forward after bankruptcy.").

96. *See* Adam Bryant, *T.W.A. Gets Court Approval To End Time in Bankruptcy*, N.Y. TIMES, Aug. 12, 1993, at D1 (noting that "[t]he analysts consider the financial projections T.W.A. has made to be overly optimistic" but "[n]evertheless [the Delaware bankruptcy judge] said T.W.A.'s projections were realistic and conservative").

In November, 1993, just a few months after confirmation of its plan—and just days after the plan's effective date—TWA made two announcements. First, it revealed lower-than-expected earnings for the first nine months of 1993.[97] Second, it had not yet assembled the $200 million in cash that it had acknowledged before confirmation was the minimum necessary to get it through the winter.[98] In January, 1994, William Howard, the CEO installed at the end of the bankruptcy case in July, 1993,[99] unexpectedly resigned after six months in office.[100] In the year after TWA emerged from its Delaware reorganization, it suffered an additional $500 million in operating losses—about 20% of its total assets.[101]

Howard's successor, Jeffrey Erickson, was named CEO at the end of March, 1994. Over the next few months, TWA took "a number of steps to reverse the course it set for itself when coming out of Chapter 11."[102] In August, 1994, just twelve months after the Delaware bankruptcy judge approved its plan, TWA announced that the plan had been " 'overoptimistic' or 'unattainable' " and that TWA had engaged Salomon Brothers "to assist in developing a financial restructuring plan that will be presented to the current holders of the company's debt."[103] On December 21, 1994, TWA unveiled a new plan of restructuring that would cut its debt load in half.[104] TWA refiled in the St. Louis bankruptcy court in June, 1995.

97. *See* Anthony L. Velocci, Jr., *Losses Shake Faith in TWA*, AVIATION WK. & SPACE TECH., Nov. 22, 1993, at 26 ("Trans World Airlines, Inc., last week reported a worse-than-expected $159-million operating loss for the first nine months of 1993, eroding confidence in the carrier's viability among industry observers.").

98. *See id.* ("To help carry it through the winter, TWA had hoped to have available close to $200 million in cash when it emerged from bankruptcy, but a TWA official said the total turns out to be substantially less.").

99. *See* Rhonda Richards, *Howard Takes the Helm at TWA*, USA TODAY, Jul. 14, 1993, at 2B ("Howard takes the job just as TWA is expected to emerge from Chapter 11 bankruptcy-court protection.").

100. *See* Harry Berkowitz, *In the TWA Cockpit, There's a New Pilot*, NEWSDAY, Jan. 5, 1994, at 27 ("In an unexpected shakeup, Trans World Airlines said late yesterday that its chairman and a vice chairman quit . . . .").

101. *See TWA's Net Loss Grows, Operating Loss Shrinks*, AVIATION DAILY, Aug. 17, 1994, at 273 (reporting net losses of $355.9 million for the last six months of 1993 and $182.6 million for the first six months of 1994) [hereinafter *TWA's Net Loss Grows*]; James F. Peltz, *TWA Plans 2nd Filing for Bankruptcy; Profitability: Carrier Proposes that Creditors and Note Holders Forgive $500 Million in Debt in Exchange for Stock*, L.A. TIMES, Jun. 28, 1995, at D2 ("TWA never regained solid footing after it emerged from Chapter 11 in November, 1993, and in 1994 it lost $433.8 million on revenue of $3.4 billion.").

102. *TWA's Net Loss Grows*, *supra* note 101, at 273.

103. *TWA Announces Increases in Second-quarter Revenues and Passenger Volume; Operating Losses Slashed 44%*, BUS. WIRE, Aug. 15, 1994.

104. *See* Christopher Carey, *TWA Unveils Plan to Halve Its Debt; Improved Terms Offered to Creditor Groups*, ST. LOUIS POST-DISPATCH, Dec. 21, 1994, at 1C.

These are not stories of calculated risk-taking by the Delaware bankruptcy court. With only a month between filing and confirmation, the Memorex and Cherokee reorganizations occurred too quickly for there to have been any reasoned consideration of the risks involved. In all three cases, confirmation was followed almost immediately by announcements of adverse information regarding the financial performance of the companies—information that, in a better process, might have been ferreted out before confirmation. In all three cases, the failure of the reorganization was evident so soon after confirmation that it suggests a mistake rather than a gamble.

In Memorex and Cherokee, CEOs—who were in a position to know of the adverse information and who controlled the speed of the reorganization—benefited from unusually speedy reorganizations that precluded consideration of the adverse information. The Memorex and Cherokee stories illustrate the weakness of prepackaged reorganizations generally and Delaware prepackaged reorganizations in particular: the court abdicates its statutory obligation to determine whether the proposed reorganization is feasible.

Of course, it is easy to criticize any confirmation that ultimately results in a refiling, but we think it would be hard to match these stories with equivalents from bankruptcy courts other than those of Delaware and New York.[105] Nothing in these Delaware reorganization cases suggests that the Delaware court had any special expertise in reorganizing large, public companies. Much suggests that a part of Delaware's appeal was its willingness to confirm no-questions-asked reorganizations. The extraordinary high failure rate that resulted from these reorganizations suggests a lack of "efficiency" in the Delaware process at that time—the very time in which the Delaware court was establishing its dominance of the market for large, public company reorganizations.

Professor Stuart Gilson's comparison of refiling rates for out-of-court restructuring with those for bankruptcy reorganizations may shed additional light on the reasons for Delaware's poor performance. Gilson found that, "once firms encounter financial distress and become highly leveraged, they typically stay highly lever-

105. Probably the most notorious failure in bankruptcy reorganization was Eastern Airlines. *See, e.g.*, James J. White, *Harvey's Silence*, 69 AM. BANKR. L.J. 467, 469-70 (1995) ("A leader of the parade of horribles is Eastern Airlines. When Eastern Airlines filed its petition, it was thought that the unsecured creditors would receive payment in full had it liquidated at once. When the company liquidated twenty-two months later, the unsecured creditors received a pittance."). Consistent with our thesis, that case proceeded in the New York City bankruptcy court under Judge Burton Lifland. *See* LoPucki, Bankruptcy Research Database, *supra* note 6.

aged even after they negotiate new payment terms with their creditors. Leverage ratios are most sticky when debt is restructured out of court; they are least sticky when debt is restructured in Chapter 11."[106] The result, Gilson found, was that firms restructuring out of court refailed at more than twice the rate of firms that reorganized under Chapter 11 did.[107] Extrapolating from Gilson's findings, it appears that the Delaware bankruptcy court's laissez-faire approach to confirmation may not provide sufficient encouragement for firms to reduce their leverage ratios.

Defenders of Delaware may attempt to excuse Delaware's high refiling rates with the observation that Delaware has a higher proportion of prepackaged cases and that prepackaged cases, being similar to out-of-court reorganizations, are inherently more likely to fail. That excuse, however, is in conflict with the data. Delaware's failure rate for nonprepackaged cases is substantially the same as its failure rate on prepackaged cases,[108] and all other (excluding New York) courts' failure rate for nonprepackaged cases is substantially the same as their failure rate for prepackaged cases.[109] It thus appears that prepacks are not giving Delaware a bad name, but Delaware is giving prepacks a bad name.

B. New York Bankruptcy Reorganization

New York has never shared the cachet that Delaware enjoys among economically-oriented legal scholars. When a study by LoPucki and Whitford revealed the prominence of the New York bankruptcy court in large, public company reorganizations in the 1980s, no legal scholar stepped forward to proclaim the New York court's efficiency. The lawyers LoPucki and Whitford interviewed painted a mixed picture. Among the attractions to New York, they listed convenience of the courthouse for debtors' executives (many of whom

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106. Gilson, *supra* note 16, at 168.

107. *Id.* at 167-68.

108. Five of fifteen Delaware prepackaged cases (33%) led to refilings, *see supra* Table 6, while five of sixteen Delaware nonprepackaged cases (31%) led to refilings. *See supra* Table 4. Of the nine firms emerging from Delaware reorganizations in 1997—the year after the period covered by our study—two of the seven that filed nonprepackaged cases refiled, while neither of the two that filed prepackaged cases refiled. If this data is added to the data from our study, Delaware's rate of refiling from nonprepackaged cases (30%) is actually higher than its rate of refiling from prepackaged cases (29%).

109. One of fourteen other court prepackaged cases (7%) led to a refiling, *see supra* Table 6, while eleven of 107 other court nonprepackaged cases (10%) led to refilings. *See supra* Table 4. During the period 1991-96, all four of the refilings in other court cases were in nonprepackaged cases.

had offices in New York), the location of the leading bankruptcy professionals there, the expertise of the New York bankruptcy court in large, public company bankruptcies, the inclination of that bankruptcy court to grant delays to debtors, and the court's willingness to approve relatively high attorneys' fees.[110]

As previously noted, the refiling rate for companies emerging from New York reorganizations during the period of this study was only slightly lower than the rate for those emerging from Delaware reorganizations.[111] Three aspects of the pattern of inter-court competition and refiling rates suggest that the competition itself caused the higher refiling rates.

First, New York generated high refiling rates during its period of dominance—the 1980s. During that decade, companies emerging in New York had a greater tendency to refile than companies emerging from other courts. Five of thirteen companies emerging in New York during the 1980s (38%) refiled during the period of this study; only eight of thirty-three emerging from other courts during that period (24%) refiled.[112] This higher proportion of refilers mirrors Delaware's higher proportion during Delaware's period of dominance.

Second, New York's refiling rate declined as Delaware came to dominance. That is, the refiling rate for companies emerging in New York during the 1990s is lower than the refiling rate for companies emerging in New York during the 1980s.[113] Five of thirteen companies that emerged from New York reorganizations during the 1980s (38%) refiled during the period of this study; only five of twenty-three that emerged from New York reorganizations during the 1990s (22%) refiled during the period of this study.[114] This drop in refiling rates is consistent with the hypothesis that the Delaware court attracted cases by exhibiting a willingness to confirm shaky plans while the New York court failed to respond in kind.

Third, the rise of New York as a center for big case bankruptcy reorganization was largely the accomplishment of a single bankruptcy judge, Burton R. Lifland.[115] Seven of the thirteen companies emerging from New York reorganizations during the period

110. *See* LoPucki & Whitford, *supra* note 6, at 29-31.

111. *See supra* Tables 4 and 5.

112. The difference in refiling rates was not significant on Fisher's exact test.

113. No allowance has been made for the fact that the companies emerging in the 1980s have been followed for a longer period than those emerging in the 1990s, so the figures given overstate the difference in filing rates.

114. The difference in refiling rates was not significant on Fisher's exact test.

115. *See* Eisenberg & LoPucki, *supra* note 7, at 983-84.

of LoPucki and Whitford's study (54%) emerged under confirmation orders signed by Judge Lifland.[116] Consistent with the hypothesis that the courts have attracted cases by exhibiting a willingness to confirm shaky plans, Judge Lifland's cases exhibit a refiling rate double that of his colleagues on the New York bankruptcy court. Five of twelve companies emerging from Lifland reorganizations (42%) refiled while only five of twenty-four emerging from other New York judges' reorganizations (21%) refiled.[117] Considering only the period of New York's dominance, the difference in filing rates between Lifland and the other New York judges is even greater. Four of seven Lifland cases emerging during the 1980s (57%) refiled, while only one of five cases emerging from other New York judges during that period (20%) refiled.[118]

The New York data are consistent with the hypothesis that, during the period of this study, courts attracted cases by exhibiting a willingness to confirm high-risk plans. Judge Lifland apparently did so in the 1980s, and the Delaware judges (principally Judge Helen Balick during the period of this study) did so in the 1990s.

C. Delaware Incorporation

1. The False Issue of Federalism

Since its inception, the debate over Delaware incorporation has been framed as one over "federalism."[119] By "federalism," the debaters meant the desirability of having a single, federal law governing incorporation nationwide instead of a competition among states, each free to make its own law on the subject.[120] Implicit in

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116. *See* LoPucki & Whitford, *supra* note 6, at n.66.

117. The difference in refiling rates was not significant on Fisher's exact test.

118. The difference in refiling rates was not significant on Fisher's exact test.

119. *See* Bebchuk, *supra* note 3 (article titled, "Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law"); Cary, *supra* note 2 (article titled, "Federalism and Corporate Law: Reflections Upon Delaware"); Romano, *supra* note 4, at 230-31 (presenting the choice as one between state and federal chartering).

120. *See, e.g.*, Bebchuk, *supra* note 3, at 1457 ("To start with, a regime of state corporate law is characterized by competitive pressure to produce the legal rules most attractive to those making incorporation decisions. By contrast, federal law officials are not subject to the discipline of such competitive pressure."); Cary, *supra* note 2, at 663 (advocating "reconsider[ation of] the federal role"); Romano, *supra* note 4 at 225 (characterizing the debate as between scholars who "believe the current federal system of regulation is preferable" and those who "call for preemptive national laws"). David Skeel was the first to link bankruptcy to the federalism debate in corporate law. *See* David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994).

the framing of this debate has been the assumption that federal law is capable of imposing uniformity.[121] With respect to bankruptcy reorganization, that assumption seems not to have held. Despite the existence of a federal law implemented by federal courts, local interests have engaged in a competition for the bankruptcy reorganization business as lively and textured as the competition for corporate charters. Two implications are evident. First, law does not matter as much as legal scholars think it does.[122] Second, "states" are not the only local interests that compete for legal business; the same kind of competition is evident in other areas of the legal economy.[123] Competition among legal regimes is a subject in need of broader investigation.

2. The Plausibility of Market Failure from Lack of Information

Prior to this study, the evidence supporting the efficiency of Delaware reorganization was of much the same nature as the evidence supporting the efficiency of Delaware incorporation. Put another way, Delaware reorganization was thought to be efficient because the "market" chose it—debtors and their creditors, acting in

121. *See, e.g.*, Romano, *supra* note 4, at 231 ("Moreover, even under national chartering there will still be some competition: firms can exit from national jurisdiction by operating in unincorporated form or by migrating to another country."). Implicit in Romano's statement is the assumption that, if a federal chartering law were passed, states could no longer compete for the corporate charter business. By analogy, one should then also assume that, with a federal bankruptcy law and federal bankruptcy courts, Delaware could no longer compete for bankruptcy reorganization cases—an obvious fallacy. *See* Eisenberg & LoPucki, *supra* note 7, at 972 (arguing that the bankruptcy competition is by judges, not law).

122. Skeel seeks to maximize the significance of law by emphasizing the role of discretion and state law in bankruptcy cases. *See* Skeel, *supra* note 1, at 26 ("[T]he bankruptcy laws leave sufficient flexibility for the judges to develop a Delaware-specific approach . . . ."); Skeel, *supra* note 13 (arguing that bankruptcy courts apply state law to determine the fiduciary duties of managers). But the fact that huge differences in outcomes would exist even after the "federalization" of an area of law bolsters, rather than refutes, our argument. For a response to Skeel, see Eisenberg & LoPucki, *supra* note 7, at 972 n.18.

123. For example, non-uniformity among the federal circuits drove Congress to create a Federal Circuit to hear patent appeals. *See, e.g.*, Emmette F. Hale, *The "Arising Under" Jurisdiction of the Federal Circuit: An Opportunity for Uniformity in Patent Law*, 14 FLA. ST. U. L. REV. 229, 239 (1986) (explaining Congress's decision to take federal patent jurisdiction from the various federal circuits and combine them in a single court in Washington because "Congress determined that by removing the incentive to shop for a hospitable forum, litigation costs would decrease . . . . Attorneys would be in a better position to predict the outcome of litigation and, therefore, business planning would be facilitated"). Particular federal courts—or judges—have attracted particular kinds of cases. *See, e.g.*, Bob Van Voris, *N.Y.'s Judge-shopping Channel*, NAT. L.J., July 26, 1999, at 4 (asserting that tobacco and gun plaintiffs are flocking to the Eastern District of New York to seek related-to assignments to Judge Jack B. Weinstein).

concert—brought the cases to Delaware.[124] Delaware incorporation was also thought to be efficient because the market chose it—investors were willing to pay more for a company because it was incorporated in Delaware. In both cases, the evidence for efficiency was secondary. That is, it was not evidence showing that Delaware performed better than other jurisdictions;[125] rather, it was evidence showing that market participants sincerely believed that it did.

If it can be shown that the market simply misassessed the efficiency of Delaware reorganization because it lacked information, then it would also seem possible that it misassessed the efficiency of Delaware incorporation. What that would mean, in both cases, is that the market is not capable of assessing the efficiency of a legal regime. The immediate cause of this incapacity would have to be that investors systematically overestimate the efficiency of the regime selected by management. Assuming that managers are not themselves mystified, that would in turn mean that investors were underestimating the agency problem[126] with respect to managers.

There is some reason to believe that the agency problem is greater at the time of bankruptcy than at the time of incorporation.[127] As LoPucki and Whitford described in greater detail, the constraints that impel managers to serve the interests of investors are reduced considerably on the approach to bankruptcy.[128] For that reason, we conclude that our evidence merely suggests, but does not prove, a market failure with regard to Delaware incorporation.[129]

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124. This characterization is more true of prepackaged cases than nonprepackaged cases. But even in nonprepackaged cases, creditors often have influence over the debtor's choice of a place of filing.

125. In both bankruptcy and incorporation, Delaware has gained a reputation for "customer" service. This does not, however, answer the question of whether the race is to the top or the bottom because in both cases the service is provided to corporate agents. Those claiming the race is to the top argue that the agents serve shareholders. Those claiming the race is to the bottom argue that the agents serve their own, different interests.

126. "Agency problem" is a term of art used in the finance literature to refer to the problem investors have in assuring that managers will act in the shareholders' interests rather than in the managers' own interests.

127. *See* Rasmussen & Thomas, *supra* note 12, at 50-51.

128. *See* LoPucki & Whitford, *supra* note 69, at 694-716.

129. Several of the factors cited as responsible for Delaware "getting it right" with regard to incorporation are also present with regard to reorganization. Delaware state judges are under pressure from the bar because they must be reappointed at ten-year intervals. Bankruptcy judges are under roughly the same pressure because they must be re-appointed at fourteen-year intervals. The state's income from franchise fees and taxes is at stake when Delaware competes for incorporations, but so is a burgeoning community of bankruptcy professionals when Delaware competes for reorganizations. But in both competitions, getting it right is attracting corporations, not maximizing welfare. Bebchuk has argued that even at the time of incorporation, the conflict

CONCLUSION

Companies that have filed for bankruptcy reorganization before are more likely to file again. The rate of refiling climbs to its highest level in the third year after confirmation, when it reaches about six times the background rate of filing for all public companies. The refiling rate remains elevated for at least eleven years after confirmation. Because of the small number of companies that could be studied for periods in excess of eleven years, we were unable to determine when—or whether—the refiling rate ultimately declines to the background rate.

Refiling rates for companies reorganized in the Delaware bankruptcy court, and to a lesser extent, the New York bankruptcy court, were much higher than the refiling rates for companies reorganized in other bankruptcy courts. We conclude, based on four sets of findings, that these higher refiling rates were a product of intercourt competition. First, Delaware produced high rates of refiling during its period of competitive success in the 1990s. Second, New York produced high rates of refiling during its period of competitive success in the 1980s. Third, the New York refiling rates declined after New York's period of competitive success. Fourth, the judge that made New York competitive in the 1980s had higher refiling rates than his colleagues on the New York court.[130]

Elevated refiling rates do not, in and of themselves, indicate a malfunctioning of the reorganization process. Efficient reorganizations may, and probably would, produce companies that have a higher probability of refiling than do public companies generally. But the percentage of refilings in Delaware, the magnitude of the difference between the rate of refiling in Delaware and other districts, and the nature of Delaware's ten failures suggest that the rate in Delaware during the period of this study was probably well above the efficient rate.

During the period covered by this study, Delaware established itself as the bankruptcy reorganization capital of the United States and positioned itself to become the bankruptcy reorganiza-

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between creditors and shareholders is great enough to cause a market failure because small creditors and tort creditors cannot protect themselves. *See* Bebchuk, *supra* note 3, at 1489-90.

130. The fact that New York lawyers made many of the Delaware filings during the period of the study may provide an alternative explanation. For example, seven of the ten Delaware cases that resulted in refilings during the period of this study were initially filed by New York lawyers. LoPucki, Bankruptcy Research Database, *supra* note 6. In five of the seven cases, the New York lawyers were lead counsel; in the other two, they were co-leads. All ten debtors also had local counsel in Delaware, as required by local rules. *See id.*

tion capital of the world. The results of this study suggest that competition may have been economically wasteful as well as politically embarrassing.

Experience tells us that once such a legal monopoly is established, it has tremendous inertia and thus can be exploited by the monopolist without risking its destruction.[131] In addition, the monopolist may be able to retain its monopoly even after abandoning the practices necessary to create it. Thus, we would not be surprised if Delaware, having captured the reorganization business by inefficient practices, were now to retain it by abandoning the most egregious of them. If Delaware can accomplish that, its success would mean that jurisdictions can succeed in competitions by opportunistically offering inefficient, yet superficially appealing, alternatives and then adjusting as critics bring the inefficiencies to light—a classic race to the bottom.

This Article has focused on a single, deleterious effect of competition among courts for cases—high refiling rates. Some may use our study to argue for venue amendments designed to end the competition. But competitions among bankruptcy courts have beneficial effects as well. They include the development of more effective procedures and techniques for reorganization and liquidation,[132] the ability of parties to route around ineffective courts and judges,[133] and better representation of the United States in the developing global competition for cases.[134] The best solution would be one that distinguishes the kinds of shopping producing positive results from those producing negative results and permits only the former to continue. Such an ideal solution, however, would require better, faster, and more extensive flows of information than are presently available in the bankruptcy court system.

To expand access to information about both the venue choices that bankruptcy filers make and the reasons for those

131. *See, e.g.*, Bebchuk, *supra* note 3 (arguing that market forces do not eliminate states' incentive to favor managers rather than shareholders); *accord* Rasmussen & Thomas, *supra* note 12, at 41 (noting that risk aversion will lead attorneys to shy away from untested courts).

132. *See* LoPucki & Whitford, *supra* note 6, at 58 ("The primary benefit to be realized from the continuation of forum shopping is competition among districts leading to the development of more effective procedures and techniques for reorganization and liquidation.").

133. *See* Eisenberg & LoPucki, *supra* note 7, at 1003 ("To the extent that forum shopping responds to problems with home fora, reducing the level of shopping may exacerbate those problems.").

134. *See* LoPucki & Whitford, *supra* note 6, at 58 ("Our view is influenced by the fact that forum shopping can occur across international borders and, to that extent, is beyond the control of any one nation.").

choices,[135] an obvious first step would be to enact into law the recommendation of the National Bankruptcy Review Commission that would make the public record data in the computers of the bankruptcy courts conveniently available to the public.[136] The Southern District of New York's bankruptcy court website—containing all documents filed in all bankruptcy cases before the court—is perhaps an even more important step forward.[137]

Markets need information to operate effectively, and the market for reorganizations is no exception. If the legal process becomes sufficiently transparent, the parties to cases will make better choices, and policymakers will be able to distinguish beneficial from deleterious forum shopping and address the latter without interfering with the former. If, on the other hand, parties and policymakers continue to grope blindly, they should expect to trigger additional races to the bottom.

135. The potential for an informational "feedback" system to inform public policy has been noted in the incorporation debate as well. *See, e.g.*, Bebchuk, *supra* note 3, at 1457 ("Incorporation decisions serve as an automatic feedback mechanism that supplies information about the relative attractiveness of various sets of rules.").

136. That recommendation was incorporated into the bankruptcy bills enacted by the House and the Senate that now await conference. H.R. 833, 106th Cong. § 702 (1999); S. 625, 106th Cong. § 604 (1999). However, the recommendation was emasculated by an amendment requested by the Judicial Conference. That amendment makes the policy "subject to such appropriate privacy concerns and safeguards as the Judicial Conference of the United States may determine." S. 625, 106th Cong. (1999). The Conference has announced no progress on that front since the amendment and none seems likely in the near future.

137. http://www.nysb.uscourts.gov/. Delaware's web site is not as helpful, but is considerably better than those of other courts. http://www.deb.uscourts.gov/.

APPENDIX

Data regarding the 188 emerging companies studied[138]

Initial bankruptcy filer	Bankruptcy court of initial filing	Date plan confirmed	Name of Emerging company	Date followed to	Years followed	Refiling date
Revco	Akron	3/13/92	Revco D.S.	5/29/97	5.2	
NVR	Alexandria	7/23/93	NVR	2/20/00	6.6	
Southmark	Atlanta	7/23/90	Southmark	6/30/99	8.9	
Tracor Holdings	Austin	12/27/91	Tracor, Inc.	4/30/98	6.3	
El Paso Electric	Austin	1/9/96	El Paso Electric Company	2/20/00	4.1	
MMR Holding	Baton Rouge	11/8/92	MMR Holding	11/8/95	3	
Wang Laboratories	Boston	9/21/93	Wang Laboratories	2/20/00	6.4	
Servam/Service America	Bridgeport	6/30/93	Servam/Service America	6/30/94	1	
Resorts International (1989)	Camden	8/17/90	Resorts International	3/21/94	3.6	3/21/94
Trump Plaza	Camden	5/1/92	Trump Plaza	2/20/00	7.8	
Trump Castle	Camden	5/5/92	Trump Castle	5/5/95	3	
Heck's	Charleston	5/31/89	Hallwood Industries	2/20/00	10.7	
AM International (1982)	Chicago	9/11/84	AM International, Inc.	5/17/93	8.7	5/17/93
Envirodyne Industries	Chicago	12/17/93	Envirodyne Industries	2/20/00	6.2	
UNR Industries	Chicago	6/2/89	UNR Industries Inc.	2/20/00	10.7	
Eagle-Picher	Cincinnati	11/18/96	Eagle-Picher Industries	2/20/00	3.3	
Baldwin United	Cincinnati	3/18/86	PHL Corp	1/31/93	6.9	

138. Data is from Lynn M. LoPucki's Bankruptcy Research Database, *supra* note 6.

Great American Communications	Cincinnati	12/7/93	Great American Communications	2/12/96	2.2	
Allied Stores/ Federated Department Stores	Cincinnati	1/10/92	Federated Stores	2/20/00	8.1	
Cook United (1984)	Cleveland	9/30/86	Cook United Inc.	4/22/87	0.6	4/22/87
Sudbury	Cleveland	8/18/92	Sudbury, Inc.	1/2/97	4.4	
White Motor	Cleveland	11/18/83	Northeast Ohio Axle, Inc.	2/20/00	16.3	
Edgell Communications / New Century	Cleveland	1/23/92	Advanstar Communications, Inc.	1/23/95	3	
Gulf USA	Coeur d'Alene	6/29/95	Gulf USA Corp.	6/29/98	3	
Greyhound	Corpus Christi	8/30/91	Greyhound Lines, Inc.	11/2/94	3.2	11/2/94
Michigan General (1987)	Dallas	4/1/88	Michigan General Corp.	8/20/90	2.4	8/22/90
Zale's	Dallas	5/20/93	Zale Corp.	2/20/00	6.8	
Southland	Dallas	2/21/91	Southland	2/20/00	9	
National Gypsum	Dallas	3/9/93	National Gypsum Co.	5/15/95	2.2	
REPH Acquistion (Republic Health Corp.)	Dallas	4/16/90	OrNda Healthcorp	1/30/97	6.8	
Forum Group	Dallas	4/2/92	Forum Group, Inc.	6/30/97	5.2	
First City Bancorporation	Dallas	5/16/95	First City Financial Corp.	2/20/00	4.8	
Pantera's	Dallas	8/6/90	Pizza Inn, Inc.	2/20/00	9.5	
NACO Finance	Dallas	12/13/91	USTrails	2/20/00	8.2	
First Republic Bank	Dallas	10/30/90	First Republic BankCorp	10/30/93	3	
American Healthcare Management	Dallas	10/6/89	American Healthcare	4/19/94	4.5	
Gillett Holdings	Denver	8/3/92	Gillett Holdings	2/20/00	7.6	
Kaiser Steel	Denver	9/23/88	Kaiser Steel Resources, Inc.	2/20/00	11.4	

Storage Technology	Denver	6/18/87	Storage Technology	2/20/00	12.7	
Amdura	Denver	9/19/91	Amdura Corp.	4/30/95	3.6	
McLouth Steel	Detroit	12/11/84	MLX Corp.	9/29/95	10.8	9/29/95
Braniff International (1982)	Fort Worth	9/1/83	Dalfort Corp.	1/31/89	5.4	
Western Co. of North America	Fort Worth	3/27/89	Western Company of North America	4/13/95	6	
Oxoco	Houston	12/18/86	Ironstone Group	1/18/91	4.1	1/18/91
Continental Airlines (1983)	Houston	9/2/86	Continental Airlines	12/3/90	4.3	12/3/90
National Convenience Stores	Houston	2/24/93	National Convenience Stores, Inc.	12/14/95	2.8	
Buttes Gas & Oil Company	Houston	12/20/88	Buttes Gas & Oil Company	12/31/98	10	
AppleTree Markets	Houston	9/29/92	AppleTree Markets	9/29/95	3	
General Homes	Houston	10/30/91	General Homes	10/30/94	3	
Global Marine	Houston	2/2/89	Global Marine, Inc.	2/20/00	11.1	
Dreco Energy Services	Houston	6/13/85	Dreco Energy Services, Ltd.	9/25/97	12.3	
MG Holdings	Indianapolis	3/12/92	Mayflower Group	3/31/95	3.1	
Charter Co.	Jacksonville	12/19/86	Charter Co.	2/20/00	13.2	
Fairfield Communities	Little Rock	8/14/92	Fairfield Communities Inc.	2/20/00	7.5	
Standard Brands Paint	Los Angeles	5/14/93	Standard Brands Paint	12/27/95	2.6	12/27/95
Angeles Corp.	Los Angeles	3/31/95	unknown	3/31/98	3	
Leisure Technology	Los Angeles	2/8/93	Leisure Technology	2/8/96	3	
House of Fabrics	Los Angeles	7/10/96	House of Fabrics	4/30/98	1.8	

Care Enterprises	Los Angeles	3/29/90	Care Enterprises, Inc.	4/30/94	4.1	
Commonwealth Equity Trust	Los Angeles	8/8/94	The Peregrine Real Estate Trust	2/20/00	5.5	
First Executive	Los Angeles	8/17/92	First Lincoln Holdings, Inc.	8/17/95	3	
Carter Hawley Hale	Los Angeles	9/14/92	Carter Hawley Hale	10/11/95	3.1	
Smith International	Los Angeles	11/12/87	Smith International	2/20/00	12.3	
Wickes	Los Angeles	9/21/84	Wickes Cos Inc.	2/20/00	15.4	
Cardis	Los Angeles	11/27/89	Cardis Corp.	7/31/93	3.7	
Mission Insurance Group	Los Angeles	5/9/90	Danielson Holding Corp.	2/20/00	9.8	
Public Service New Hampshire	Manchester	4/20/90	Public Service Co. of New Hampshire	2/20/00	9.8	
EUA Power	Manchester	5/23/94	Great Bay Power Corp.	12/31/96	2.6	
Evans Products	Miami	7/2/86	Grossman's Inc.	4/7/97	10.8	4/7/97
Air Florida	Miami	8/7/86	Jet Florida, Inc.	7/18/88	1.9	
Prime Motor Inns	Miami	4/3/92	Prime Hospitality Corp.	2/20/00	7.9	
Radice	Miami	4/14/89	The Major Group, Inc.	9/29/92	3.5	
General Development	Miami	3/27/92	Atlantic Gulf Communities Corp.	2/20/00	7.9	
Insilco	Midland	11/23/92	Insilco	2/20/00	7.2	
MGF Oil	Midland	12/2/87	MGF Oil Corp.	3/31/90	2.3	
Value Merchants/ Everything's A Dollar/ Toy Liquidators	Milwaukee	6/15/95	Value Merchants	3/21/96	0.8	3/21/96

B-E Holdings / Bucyrus-Erie	Milwaukee	12/1/94	B-E Holdings / Bucyrus-Erie	2/20/00	5.2	
Ladish	Milwaukee	4/6/93	Ladish Co.	4/6/96	3	
Enstar Group/Enstar Specialty Retail	Montgomery	2/24/92	Enstar Group Inc.	2/24/95	3	
Kinder Care	Montgomery	3/16/93	Kinder-Care Learning Centers, Inc.	2/20/00	6.9	
Gaylord Container	New Orleans	10/16/92	Gaylord Container Corp.	2/20/00	7.4	
Salant (1990)	New York	7/30/93	Salant Corp.	12/29/98	5.4	12/29/98
JPS Textile Group	New York	3/21/91	JPS Textile Group	8/1/97	6.4	8/1/97
Best Products (1991)	New York	5/31/94	Best Products	9/24/96	2.3	9/24/96
Jamesway Corp. (1993)	New York	12/12/94	Jamesway Corp.	10/18/95	0.8	10/18/95
Lomas Financial (1989)	New York	12/30/91	Lomas Financial Corp.	10/10/95	3.8	10/10/95
Tacoma Boatbuilding (1985)	New York	8/17/87	Tacoma Boatbuilding	2/24/94	6.5	2/24/94
Lionel Corp. (1982)	New York	9/12/85	Lionel Corp.	6/14/91	5.8	6/14/91
Towle Manufacturing Co. (1986)	New York	9/30/87	Towle Mfg. Co.	8/25/89	1.9	8/25/89
Anglo Energy (1983)	New York	3/18/86	Anglo Energy, Inc.	2/22/88	1.9	2/22/88
Penn-Dixie Industries (1980)	New York	3/4/82	Continental Steel Corp.	11/25/85	3.7	11/25/85
E-II Holdings	New York	5/24/93	Astrum International Corp.	2/20/00	6.7	
Oxford Energy	New York	8/17/93	Oxford Tire Recycling	8/17/96	3	

FSC Corp.	New York	12/18/85	Trilos Corp.	12/31/96	11
JWP	New York	9/30/94	EMCOR Group, Inc.	9/30/97	3
West Point Acquisition	New York	9/4/92	Valley Fashion Corp.	2/20/00	7.5
Ames Department Stores	New York	12/18/92	Ames Department Stores	2/20/00	7.2
Vestron	New York	7/3/91	Inovision	12/31/97	6.5
Seatrain Lines	New York	3/30/87	Seatrain	6/30/92	5.3
Eastern Airlines	New York	12/22/94	Eastern Airlines	12/22/97	3
McLean Industries	New York	5/16/89	Lancer Industries	12/31/96	7.6
Allis-Chalmers	New York	10/31/88	Allis-Chalmers Corp.	2/20/00	11.3
Integrated Resources	New York	8/8/94	Presidio Capital Corp.	12/31/99	5.4
Continental Information Systems	New York	11/30/94	Continental Information Systems	2/20/00	5.2
Basix Corp.	New York	10/20/89	Basix Corp	1/30/91	1.3
Gilbert/ Robinson	New York	9/15/92	Gilbert/Robinson	12/27/93	1.3
Orion Pictures	New York	10/20/92	Orion Pictures	11/1/95	3
LTV	New York	5/27/93	LTV Corp.	2/20/00	6.7
Seaman Furniture Co.	New York	10/1/92	Seaman Furniture Co.	2/20/00	7.4
Coleco Industries	New York	1/31/90	Ranger Industries, Inc.	2/20/00	10.1
Hills Department Stores	New York	9/13/93	Hills Stores Co.	11/12/98	5.2
Manville	New York	12/18/86	Schuller Corp.	2/20/00	13.2
Revere Copper & Brass	New York	7/29/85	Revere Copper & Brass	11/19/86	1.3

U.S. Home	New York	5/24/93	U.S. Home Corp.	2/20/00	6.7
Beker Industries	New York	10/6/88	Nu-West Industries, Inc.	8/10/95	6.8
Petrolane	New York	6/25/93	Petrolane, Inc.	4/19/95	1.8
Alexander's Inc.	New York	9/21/93	Alexander's Inc.	2/20/00	6.4
New Valley (Western Union)	Newark	11/1/94	New Valley Corp.	2/20/00	5.3
Emerson Radio	Newark	3/31/94	Emerson Radio Corp.	2/20/00	5.9
Todd Shipyards	Newark	12/14/90	Todd Shipyards	2/20/00	9.2
O'Brien Environmental Energy	Newark	1/18/96	NRG Generating (US) Inc.	2/20/00	4.1
International American Homes	Newark	8/12/92	International American Homes	2/20/00	7.5
Hexcel	Oakland	1/11/95	Hexcel	2/20/00	5.1
Spreckels Industries	Oakland	8/4/93	Spreckels Industries/ Yale International Inc.	8/24/96	3.1
Texas International	Oklahoma City	1/4/90	Phoenix Resource Companies, Inc.	3/27/96	6.2
Wilson Foods (1983)	Oklahoma City	3/28/84	Wilson Foods	10/17/88	4.6
Hadson	Oklahoma City	11/30/92	Hadson	12/31/95	3.1
Circle K	Phoenix	6/16/93	Circle K	5/30/96	3
Residential Resources	Phoenix	5/31/90	The Mortgage Trust Corp.	12/31/93	3.6
America West Airlines	Phoenix	8/10/94	America West Airlines	2/20/00	5.5
Allegheny International	Pittsburgh	7/12/90	Sunbeam-Oster Co.	2/20/00	9.6

Wheeling-Pittsburgh Steel	Pitts-burgh	12/18/90	Wheeling Pittsburgh Corp.	2/20/00	9.2	
Americold	Portland	6/19/95	Americold Corp.	7/31/98	3.1	
Rose's Stores	Raleigh	4/25/95	Rose's Stores	2/20/00	4.8	
A.H. Robins	Richmond	7/26/88	A.H. Robins	12/15/89	1.4	
Al Copeland Enterprises	San Antonio	10/22/92	America's Favorite Chicken	10/22/95	3	
Intermark	San Diego	6/4/93	Triton Group Ltd.	4/15/97	3.9	
Nucorp Energy	San Diego	12/20/85	Nucorp Energy	12/31/90	5	
Itel Corp.	San Francisco	3/22/83	Itel Corp.	2/20/00	16.9	
Maxicare	Santa Ana	8/31/90	Maxicare Health Plans	2/20/00	9.5	
Centennial Group	Santa Ana	3/4/94	Centennial Group Inc.	3/4/97	3	
WTD Industries	Seattle	11/23/92	WTD Industries, changed to TreeSource Indus-tries	9/27/99	6.8	9/27/99
TGX	Shreve-port	1/7/92	TGX Corp.	2/20/00	8.1	
Crystal Oil	Shreve-port	12/31/86	Crystal Oil Co.	2/20/00	13.1	
Jesup Group, The	South Bend	8/10/92	Uniroyal Technology Corp.	2/20/00	7.5	
Interco	St. Louis	6/25/92	Interco Inc.	2/20/00	7.7	
TWA (1995)	St. Louis	8/4/95	Trans World Airlines	2/20/00	4.6	
Bicoastal Corp.	Tampa	9/14/92	Bicoastal Corp.	9/14/95	3	
Koger Properties	Tampa	12/8/93	Koger Equity, Inc.	2/20/00	6.2	
Hillsborough Holdings	Tampa	3/2/95	Walter Industries	2/20/00	5	
Doskocil	Topeka	9/26/91	Doskocil Companies	3/25/97	5.5	
American Car-riers	Topeka	6/10/91	Anuhco, Inc.	2/20/00	8.7	
Calton	Trenton	5/6/93	Calton, Inc.	2/20/00	6.8	

Lone Star Industries	White Plains	2/17/94	Lone Star Industries	2/20/00	6	
Leaseway Transportation	White Plains	7/29/93	Leaseway Transportation	4/30/95	1.8	
Texaco	White Plains	3/23/88	Texaco	2/20/00	11.9	
Grand Union Company (1995)	Wilming-ton	5/31/95	Grand Union Co.	6/24/98	3.1	6/24/98
Harvard Indus-tries	Wilming-ton	8/10/92	Harvard Industries	5/8/97	4.7	5/8/97
Westmoreland Coal (1994)	Wilming-ton	12/16/94	Westmoreland Coal Co.	12/23/96	2	12/23/96
Memorex Telex (1994)	Wilming-ton	3/14/94	Memorex Telex	10/15/96	2.6	10/15/96
United Merchants & Manufacturers	Wilming-ton	8/15/91	United Merchants & Manufacturers	2/22/96	4.5	2/22/96
TWA (1992)	Wilming-ton	8/11/93	Trans World Airlines	6/30/95	1.9	6/30/95
SPI Holding, Inc. (Spectradyne)	Wilming-ton	10/29/92	Spectravison Inc.	6/8/95	2.6	6/8/95
Cherokee Inc. (1993)	Wilming-ton	6/1/93	Cherokee Inc.	11/7/94	1.4	11/7/94
Memorex Telex (1992)	Wilming-ton	2/7/92	Memorex Telex	2/11/94	2	2/11/94
Phoenix Steel	Wilming-ton	7/31/85	Phoenix Steel	4/20/87	1.7	4/20/87
Wherehouse Entertainment	Wilming-ton	12/16/96	Wherehouse Entertainment, Inc.	2/20/00	3.2	
Vista Properties	Wilming-ton	9/19/95	Vista Properties	9/28/95	0	
Lomas Finan-cial (1995)	Wilming-ton	10/4/96	Siena Holdings, Inc.	2/20/00	3.4	
Rexene	Wilming-ton	7/7/92	Rexene Products	8/27/97	5.1	
Continental Airlines (1990)	Wilming-ton	4/16/93	Continental Airlines Holdings, Inc.	2/20/00	6.9	
Morrison Knud-sen	Wilming-ton	8/26/96	Morrison Knudson	2/20/00	3.5	

Days Inns of America	Wilmington	12/18/92	Buckhead America Corp.	2/20/00	7.2
Columbia Gas System	Wilmington	11/15/95	Columbia Gas System, Inc.	2/20/00	4.3
Bibb Company, The	Wilmington	9/12/96	Bibb Company	10/31/98	2.1
Anacomp, Inc.	Wilmington	5/20/96	Anacomp, Inc.	2/20/00	3.8
Ithaca Industries	Wilmington	11/22/96	Ithaca Industries	2/20/00	3.2
UDC Homes	Wilmington	10/3/95	UDC Homes	7/10/98	2.8
Restaurant Enterprises Group	Wilmington	1/7/94	Family Restaurants, Inc.	2/20/00	6.1
Kash N' Karry Food Stores	Wilmington	12/12/94	Kash N' Karry Food Stores	12/18/96	2
Charter Medical	Wilmington	7/8/92	Charter Medical Corp.	2/20/00	7.6
Resorts International (1994)	Wilmington	4/22/94	Griffin Gaming & Entertainment	2/20/00	5.8
DR Holdings/ Prime Computers	Wilmington	6/24/93	DR Holdings/ Computervision	1/31/98	4.6
Edisto Resources	Wilmington	5/27/93	Edisto Resources	10/22/97	4.4
USG Corp.	Wilmington	4/23/93	USG Corp.	2/20/00	6.8
AM International (1993)	Wilmington	9/29/93	AM International	2/20/00	6.4
SpectraVision	Wilmington	9/13/96	SpectraVision (liquidating)	10/31/96	0.1
Monarch Capital	Worcester	6/25/92	Regal Reinsurance Co. and Sovereign Realty Co.	6/25/95	3