Michigan Law Review

Volume 90 | Issue 6

1992

Down Bankruptcy Lane

John D. Ayer
University of California at Davis

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Bankruptcy Law Commons, and the Business Organizations Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol90/iss6/30

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
"Were a cook to cook a fly, he would save the breast for himself."
— Polish proverb

Reading my way through a stack of books on the financial mess of the 1980s, I found my thoughts dwelling, not on retirees stripped of their pensions, not on women doubled up with pain from uterine damage, not on aging shipyard workers with asbestosis gasping for breath, but on the two-handled cup that Hephaestus, the Master Craftsman, passes to Hera, his mother, at the end of Book I of Homer's *Iliad.*

You may remember. Hera has been quarreling with Zeus, her husband. Indeed, all the gods quarrel with each other, and their quarrels mirror the quarrels that so lacerate the peace among mortal men and women below. But with a difference. Mortals suffer in their quarrels, and sometimes die, and the dark earth closes over them. The gods may suffer from time to time, but it is a three-o'clock-in-the-afternoon suffering, like the misfortune that overcomes you when your favorite outfielder misses an easy pop-up in the first game of a doubleheader. It is all over by supper time. So here: Hephaestus offers the cup to Hera, to bring peace among the Olympians. Smiling she takes it. And then:

Then dipping sweet nectar up from the mixing bowl he poured it round to all the immortals, left to right.
And uncontrollable laughter broke from the happy gods as they watched the god of fire breathing hard and bustling through the halls.

*That hour then*
and all day long till the sun went down they feasted
and no god's hunger lacked a share of the handsome banquet
or the gorgeous lyre Apollo struck or the Muses singing
voice to voice in choirs, their vibrant music rising.

At last, when the sun's fiery light had set,
each immortal went to rest in his own house . . . . 1

Passages like this are enough to convince you that Homer, whatever
his skills as a theologian, could function pretty well as a social critic in
our own time. It is as if there were two worlds out there: a world
of light and a world of shade, a world of laughter and a world of tears.
The world of shade is not necessarily populated by the pure in heart —
quite the contrary, its denizens take second place to no one in refrac­
tory meanness. But their aspirations are dignity itself compared to the
frivolity of the gods.

That, certainly, is how you feel after a steady diet of recent finan­
cial history. You get the feeling that there are two worlds out there
still. There is one for the poor devils who suck little pieces of carcino­
genic fiber into their lungs or shove little threads of deadly plastic into
their reproductive systems. There's another for the folks who manage
the dispute-resolution system.

Do not misunderstand. This is a Homeric, not a twentieth-century
populist, world I am describing. It is an us-and-them world, but not
necessarily a world of good guys and bad guys. Better call it a world
of finishers and also-rans. The mortal victims are, well, victims, which
is to say they have no special lock on purity or vision. They whine,
they wallow in self-justification, and they are just as likely as not to
make their own grab at the cookie jar whenever they get the chance.

On the other hand, these Olympians, being Homeric, are not in the
least way remote. Quite the contrary, they are all too familiar. You
cannot blame it all on the big-time stock villains of the piece — the
Charles Keatings, Ivan Boeskeys, Claiborne Robines, the guys you
love to hate, like the fellow in the silk hat and the pinstripes in the
Monopoly game. No: this Olympus turns out to be peopled by whole
tribes of string-pullers — or perhaps more precisely, symbol-manipu­
lators: the drifters and dreamers and Washington schemers who put it
all together. Like their Homeric forebears, they tend to forget that
they are gods sometimes. But at the end of the day, they are the ones
who always seem to have a share at the banquet and a warm place to
sleep.

1. HOMER, ILIAD 98 (Robert Fagles trans., Viking 1990).
2. I take the metaphors from CLYDE PHARR, HOMERIC GREEK: A BOOK FOR BEGINNERS
Lawrence H. Kallen and Kevin J. Delaney,3 each the author of a new book that attempts to come to terms with this new age of bankruptcy, are neither of them Homer, neither in theology nor in rhetorical skill. Unlike as they may be to the Greek poet, they are equally unlike one another. Kallen is a practicing lawyer and bankruptcy trustee; Delaney is an academic sociologist.5 In terms of coverage, Kallen paints with a broad if somewhat spattery brush while Delaney is a pointillist, zeroing in on just three cases.

The differences are even more apparent in style. Kallen's is what you might call postmodernist goodfella; his muse would be someone on the order of the late Lee Atwater. Delaney does not write like a sociologist, exactly (for which thank heaven), but every sentence makes it clear that he is the man on the outside, with his notepad, his tape recorder, and a mind that is uncluttered, perhaps to a fault. Kallen's "explanations" run pretty much to the nudge-nudge-wink-wink variety, while everything seems problematic to Delaney. On the other hand, neither seems to have had the benefit of Lynn LoPucki's and William Whitford's splendid new academic study of megacases.6 This is a pity, because the three taken together form a marvelous complement; taking their various strengths and weaknesses, you could pretty well triangulate the landscape.

But be that as it may. Kallen, for his part, has given us a book that is fun to read7 and, for the lack of anything better, useful as a stimulant for thinking about business failure in the past decade. Still, granting its virtues, it is a slack, lazy, casual sort of book that makes almost no effort to come to grips with issues that the author raises and ban­dies about. The central difficulty, I think, is Kallen's maddening im-

3. I saw Delaney's work in draft and, at the publisher's request, wrote a blurb that I assume I will see staring back at me from the jacket of the published version. I intend no inconsistency between the blurb and this review, but to any reader who thinks he sees one, I offer two responses: (1) I liked the book, I really did; and (2) Samuel Johnson tells us that in lapidary inscriptions, a man is not upon oath.

4. Laurence H. Kallen is Of Counsel with the firm Arnstein & Lehr, Chicago office.

5. Kevin J. Delaney is Assistant Professor of Sociology, Temple University.

6. See in particular Lynn M. LoPucki & William C. Whitford, Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies, 139 U. PA. L. REV. 125 (1990). This is perhaps understandable in the case of Kallen, whose book was probably in press before their work was published (although it was informally circulated for some months previously). It is less clear why Delaney does not cite it.

7. Clearly, Kallen is striving for a place in that genre of business reporting that has produced so much instructive entertainment in the past decade. I am thinking of things like CONNIE BRUCKE, THE PREDATOR'S BALL (1988), and BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE RISE AND FALL OF RJR NABISCO (1990), and so forth — a species virtually unknown a decade ago. Has anyone noticed how much this new strain of business writing owes to our highly developed culture of sports journalism — and, come to think of it, how much the sports page has come to read like the business pages? Have we a new chapter in what Clifford Geertz has described as the blurring of genres? See CLIFFORD GEERTZ, LOCAL KNOWLEDGE 19-35 (1983).
precision with the "them" in his us-and-them. Oh, he names the villain clearly enough; it is the "megacorporations" that have learned how to dominate the bankruptcy process at the expense of more or less everyone else — which is to say the (credulous?) reader, growing ever more indignant at each successive Kallen exposure. As a matter of fact, I think there is probably a fairly large kernel of truth in what he says. But as presented, it is so poorly formulated that it is almost impossible to make any consistent sense out of it. The difficulty is that "the megacorporation" turns out to be a far more elusive target than you might at first expect. It is a bit like the trickster in some fabulous folk tale who can take any shape, any time, and still maintain his identity.

In fairness to Kallen, it is remarkable just how protean his topic turns out to be — how easy it would be to write a comprehensive history of the 1980s from the standpoint of corporate disaster. Anyone trying to tame this structural monster should be prepared to make some ruthless editorial exclusions. But Kallen's choices are particularly odd. On the one hand, he wisely excludes almost everything about the "financial" bankruptcies8 — banks, savings and loans, and real estate — restricting himself to the more old-fashioned "value-added" cases — blivets and widgets and the like. But in other ways, instead of trying to limit his job, he seems to expand it. You would think he had enough on his plate, what with Johns Manville (pp. 225-302) and A.H. Robins (pp. 303-83), with Wickes (pp. 165-202) and Texaco (pp. 394-405). No. Kallen tempers his restraint so as to include an account of a great nonbankruptcy, the Chrysler bailout (pp. 73-101). This may be justifiable on the grounds of size (but then again, why skip all the other great near-misses of the decade?). Less easy to justify are his own mini-histories of the oil cartels (pp. 17-30, 420-22) and the great Federal Reserve money crunch (pp. 111-20).

His coverage of the bankruptcy cases themselves is also haphazard. LoPucki and Whitford count forty-three cases with assets of more than $100 million that had come to confirmation by March 31, 1988; of these Kallen mentions only seventeen,9 and many of these seventeen get only perfunctory treatment. Indeed, if you take his treatment of A.H. Robins (80 pages10); Manville (77), Wickes (37), and the nonbankruptcy of Chrysler (28), you have something close to half the book (222 out of 475 pages). Concededly, if you had to pick four cases with which to tell the story of the 1980s, these certainly would be candidates. But you probably would not pick both Manville and Rob-

---

8. Technically not "bankruptcies," most of them, because financial institutions are nominally excluded from the toils or protections of the "bankruptcy" process. See Bankruptcy Code, 11 U.S.C. § 109 (1988). But you know what I mean.
10. That is the principal treatment; there are other, scattered references as well.
ins for such a short selection: different as they are, they both stand or fall on their handling of the "mass-tort" issue, and by treating both of these at length, you necessarily shortchange other cases with distinctive issues. So the selection leaves some enormous gaps, full of potentially intriguing material.

But when taken on his own terms, Kallen does seem to be right that the giant cases, at least by the end of the decade, had come to dominate the bankruptcy scene. Skeptics might crowd the data, of course: the total number of all chapter 11s filed actually declined toward the end of the decade.¹¹ And some number of cases — who can say what number? — avoid chapter 11 by out-of-court workout.¹² You can equally well crowd the data the other way, of course: think of all those bank and insurance company restructurings that would be chapter 11s but for an accident of jurisdictional turfing.¹³ Even setting all that aside, you still have the bald datum that the value of assets of public companies filing for bankruptcy relief had increased by approximately 4800 percent from 1980 to 1990.¹⁴

Second, one is struck by the sheer pervasiveness of it all. Who among us, if we have (luckily) escaped asbestosis, pension collapse, or structural unemployment, has not — sometime in the decade — at least been stiffed on an airline ticket? At least from the end of the 1930s to the end of the 1970s, bankruptcy seemed to be a subspecialty, a side show — a niche market, as the business school guys would call it. Lately, it has been wrapped into the fabric of the economy.

A related point is how many of these cases seem to involve an attempt — successful or otherwise — to cadge some federal aid. This should not be surprising, when you stop to think about it. But you tend to forget that it is not just the S&L depositors who look to the Feds as their guarantor of last resort. Back at the beginning of the decade, Chrysler found solace in the warm embrace of the Treasury.

¹¹. It is not clear why this is so, but two possibilities seem worth exploring. One is the more aggressive attitude of the courts toward so-called "bad-faith" filing — roughly, cases filed with no hope of reorganization. See Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.), 749 F.2d 670, 674 (11th Cir. 1984); Sewanee Land, Coal & Cattle, Inc. v. Lamb (In re Sewanee Land, Coal & Cattle, Inc.), 735 F.2d 1294 (11th Cir. 1984). The other is the imposition of quarterly "maintenance" fees on chapter 11 estates. The maintenance fees may be small change to a Texaco or a Manville. But a typical chapter 11 case is Moe's Backhoe, where the assets are Moe and the backhoe. Quarterly fees may be enough to keep a case like that out of court altogether.

¹². Out-of-court workouts still occur, of course, but one might venture very tentatively that they are actually less common today than they might have been at other times. This is because of the absence of any dominant presence in the financial market to crack heads and bring the parties into line — a role played so effectively by J.P. Morgan in the nineteenth century, see generally RON CHERNOW, THE HOUSE OF MORGAN 46-161 (1990), and to a limited extent in the 1980s by Michael Milken. See Roger Lowenstein & George Anders, No Picnic: Firms That Default Find Their Troubles May Have Just Begun, WALL ST. J. (Eastern ed.), Apr. 17, 1991, at A3.


¹⁴. From $1.7 billion to $84.6 billion. Bankruptcy Explosion, USA TODAY, Dec. 17, 1990, at 1B.
Manville sought and failed to receive federal assistance — and so, if you can believe it, did A.H. Robins. The great pension cases, like LTV, are all about shifting social losses from the firm to the public fisc. And so it goes.

A third point is somewhat more tentative and controversial. It is remarkable how many of the megabankruptcies seem to be tied together with one or another of two great social facts in our time. One — rather more specialized, but painfully important — is the explosion of product-related injuries, together with the attendant revolution in product liability law. I will come back to this later. The other — far more pervasive — is the disintegration of the old network of oligopolies that sustained the American economy through so many comfortable decades.

Note that I did not presume to tag the Wall Street funny-money carousel — the takeover boom, or whatever you care to call it. The paper circus certainly is part of the story, and there is no doubt that an awful lot of investment bankers and their lackeys got pig rich while working stiffs were going broke (I will have more about the lackeys later). But to focus on the greed lobby seems to me, for analytical purposes, to miss the point. An ecological metaphor is in order here. Sure, the wolf killed the deer, but the one he killed was the slowest and least able to outrun him — in short, the sickliest. One reason there were so many sickly deer around is that they had spent so many generations isolated on the island, with no natural predator.

I do not want to get carried away into a kind of vulgar Darwinism here. If I were a deer, I would take no comfort from the knowledge that I was playing a role in a great natural cycle, and there is absolutely no chance that you would find me contributing to the Cervido-Lupine Friendship Society. If a predator were about to take me out, I would do my best to plant a few hoofmarks somewhere near the base of his abdomen, and if I found him trying to gnaw his way out of a trap, the likelihood is dim that I would rush for the pliers.

Still, if you can set aside your anti-Lupinism for a moment, you will be struck by how much of the bankruptcy boom can be traced to the decartelization of the older American economy. Steel is perhaps the most obvious example. Kallen gives more than passing attention

16. It does not stop with megabankruptcies, of course. A friend who does a lot of farm bankruptcies was telling me lately about how they do farm workouts. The typical case involves one (or more) federal lenders on one side of the table, with the agent for the receiver of a failed bank on the other. The farmer's job is to sit in the middle and see how many crumbs he can grab as they go by.
to the big steel cases like LTV and Wheeling-Pittsburgh; he could easily have mentioned others. But it is not just coincidence that led so many steel companies to the door of the bankruptcy court. Rather, it is the result of structural changes in an industry no longer able to sell on terms that had held so favorably for so long.

Among steel companies Wheeling-Pitt is, in many ways, the instructive case. By all accounts, Wheeling-Pitt fell victim to a fatal, but intelligible, management gamble. Crippled by an ancient plant, management took a flier on a first-class modern facility — and wound up without enough cash to service the debt. LTV's story is somewhat more complicated, but it carries the same general tenor (pp. 388-92).

The two cases are alike in another important respect. That is, in each case the company had to come to terms with interests of its employees, both present (via their unions) and past (via the pension claims). In each case, the management strategy was the same: to cut the wage bill via concessions from the unions (if not otherwise) and to shift the pension liability to the public fisc.

One could apply a similar analysis to a lot of other great bankruptcies of the 1980s — certainly in transport, which would include not

---


18. Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074 (3d Cir. 1986). For Kallen’s treatment, see especially pp. 386-89.


20. Pp. 384-88. See generally Tim Peek, Why Wheeling-Pitt Strategy Failed, PITT. BUS. TIMES & J., Oct. 7, 1985, § 1, at 1. Less charitable appraisers may argue that management let itself get carried away by the chrome and lustre of all that fancy new hardware. This approach is consistent with the theory that the surviving farmers are not those with the fancy new equipment, but those who hang onto their 1949 tractors, together with a good supply of bobby pins and glue.

21. See, e.g., Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074 (3d Cir. 1986). Kallen observes that the LTV unions proved more compliant, actuated by the Wheeling-Pitt example. P. 391.

22. Wheeling-Pitt seems to have been more successful at this than LTV, probably because it came along earlier and its claim was smaller. See pp. 388, 390-91; cf. Pension Benefit Guar. Corp. v. LTV Corp., 110 S.Ct. 2668 (1990). LTV's ultimate liability remains unclear at this writing.
only the airlines but also bus and trucking companies. The same could be said about the great shakeout in financial services, although this is mostly beyond the scope of either Kallen’s or Delaney’s book. Both Kallen and Delaney tell part of the story of this decartelization — Kallen interstitially and throughout, Delaney through a case study of the Continental Airlines failure, which may be the pivotal labor-driven reorganization case. Here I think Delaney is much more helpful. Continental is certainly the most notorious and possibly the most successful of the great union-busting bankruptcies, full of all the passions and recriminations you would expect in such a life-or-death battle. And I think Delaney does a useful job of laying out the landscape, giving you the information you need to understand the constraints.

Thus, Delaney recounts how Continental filed while still cash-flow positive, in the midst of a bitter campaign to scale down union wages, and how, at the end of the day, the unions lay broken while Continental was still flying (pp. 105-12). But while both Delaney and Kallen give you the material to develop a perspective on the case, neither really comes to grips with the central issue. In Continental, as in so many of these cases, the firm simply did not have the cash flow sufficient to cope with present and prospective claims. You can see this easily enough with some simple numerical examples. Suppose a firm earns $2 per year. Suppose it needs $1.50 a year for current operating costs and $1.50 a year to pay debt service. You run into the first rule of bankruptcy economics: three into two won’t go. This equation is, it seems to me, basic. It does not follow, of course, that this is the end of all analysis over pro rata shares. Quite the contrary: it seems it is the beginning. But it is a beginning at which Kallen and Delaney, for whatever reasons, never quite arrive.

23. See Kallen’s discussion of the Eastern Air Lines (pp. 405-12) and Continental Air Lines (pp. 214-24). Delaney treats the Continental failure at pp. 82-125. The history of regulated international air transport is told in ANTHONY Sampson, EMPIRES OF THE SKY (1984).

24. Kallen gives only passing mention to Greyhound, where, to be fair, most of the action has taken place since his publication cutoff date. Pp. 432, 441, 446.

25. Trucking, which has involved a lot of small carriers, is excusably beyond the scope of Kallen’s book. It would be interesting to trace the relationship between the transport bankruptcies of the 1980s and the classic railroad reorganizations that underlay American economic development from the end of the Civil War until the beginning of World War II.


27. Come to think of it, you could write a fairly good economic history of the 1980s by focusing on the disintegration of traditional organized labor. From this perspective, the critical case probably is not Continental but the battle between the federal government and the Professional Air Traffic Controllers (PATCO). The government, of course, did not have to go into bankruptcy to accomplish its objective — but in the end, the union did. See United States v. Professional Air Traffic Controllers Org., 653 F.2d 1134 (7th Cir. 1981).
That is why it has always seemed so pointless to talk about the labor bankruptcies in terms of whether the entity is "really" bankrupt, whatever that may mean. Similarly, it seems to me equally irrelevant to talk about the question of whether the statute "permits," or does not permit, the company to repudiate its labor contract(s) in bankruptcy. In one sense, rejection is always "permitted": the company can always reject its contract the way any firm can always reject any contract — by simply going out of business. Moreover, quite apart from bankruptcy, the company may repudiate its contract — but it must bear the penalty for breach. The point is that a firm that repudiates its contract in bankruptcy is likewise liable to sanction — indeed, to the same sanctions that it would bear outside of bankruptcy. In this respect, the labor contract is no different from any other executory contract.

We could, of course, write a statute that prohibited repudiation in bankruptcy (or outside bankruptcy, for that matter). But such a statute wouldn’t really be a contract statute at all; it would be a priority statute, mandating that all the cash flow of the firm go first to satisfy labor claims, until the cupboard was bare. For the moment, I am not taking a position on the wisdom of such a statute, but I do think it is essential that we call it what it is. We have plenty of priority statutes on the books, inside bankruptcy and out — sometimes even for wage claimants. Or we could do what in fact was done: we could provide for a kind of institutionalized bumper cars, in which the parties get to contend under certain rules, with the sovereign seeking not to take a position as to the proper result. This is a standard way of doing social business — particularly, of course, in labor law — and again, it is not my purpose to say that it is a good or bad one. It does seem to me to have the virtue of addressing the right issue.


29. It is ancient history now, but I cannot resist the impulse to hearken back to what seems to me a crucial wrong turn in the history of labor contract law. I am speaking of the basic premise that a labor contract is within the class of contracts envisioned by Bankruptcy Code § 365. The unions contested this one in the early labor cases; they lost and gave up. I wonder if they gave up too easily. I suspect that part of their problem arose from an imperialist tendency in contracts scholarship in the 1960s and 1970s that tended to insist on the similarities (and obscure the differences) between agreements of different sorts. See, chiefly, Clyde W. Summers, Collective Agreements and the Law of Contracts, 78 YALE L.J. 525 (1969). I concede that this is a bit like asking what would have happened if the women's movement, instead of choosing to campaign for an Equal Rights Amendment to the Constitution, had concentrated its energy on persuading the courts that its provisions were already in there.


31. See generally Robert A. Gorman, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING (1976).
There are other industries afflicted by bankruptcy where the "rent-seeking" model may not appear to fit so well. Meatpacking is one example; another, more important, is retailing. And of course, the one that has so far escaped major bankruptcy: the auto industry. But the similarities may outweigh the differences. Neither meatpacking nor retail ever enjoyed the kind of protection that propped up the steel industry or the transport firms. But both fell victim to long-term changes in consumer taste and in product distribution that undercut the cash-flow potential from long-established patterns of behavior. And for both, as for the auto industry, their long-term advantage may have depended more on artificial barriers to competition than a first glance would tell.

The consequences of oligopolistic behavior also appear in less obvious places. For example, it has been a long time since Texas oilmen enjoyed the privileges of a closed market. But no one can doubt that the Texas oil boom of the late 1970s and early 1980s was a free ride on the OPEC cartel — and that the cartel's disintegration brought about their fall.

This is no more than a sketch, of course: ours is a vast economy with an almost infinite variety of misfortunes, and parts of the bankruptcy story do not fit this model well at all. Computer start-ups, for example. Or Atlantic City real estate. But one class of cases that does deserve special attention is cases involving product liability, or "mass tort."

Unlike the "oligopoly/downsizing" cases, the mass tort cases are

---

33. For Kallen's discussion of Wilson Foods, see pp. 212-14.
34. The crest of the retail bankruptcy tide did not hit until after Kallen's publication date, but he does devote a long and useful chapter to the Wickes Companies — including a plug for his own walk-on role. Pp. 165-202. On the agonies of adjustment in retail generally, see Isadore Barmash, Macy's For Sale (1989), and Donald R. Katz, The Big Store: Inside the Crisis and Revolution at Sears (1987).
36. Although there certainly was a time. See Daniel Yergin, The Prize (1991).
37. Kallen gives brief attention to the death and attempted resurrection of Osborne Computer Corporation, but he fails to develop the moral: computer companies do not reorganize. Pp. 160-62. In a developing, dynamic market, where products depend on strong warranty support, a single misstep will put you out of the race. Moreover, most of the dramatic success stories here depend on creative flair. If there is any talent left after the first strike, the lucky repositories of that spark can pretty well walk away and try their luck elsewhere, mostly unencumbered by the prior failure. Cf. Paul H. Lang, George Frideric Handel 541 (1966) (recounting composer's artistic and financial successes and failures, but reporting "no evidence that he was ever close to 'bankruptcy'.")
few in number, concentrated mostly in the asbestos industry, with the addition of the A.H. Robins case involving the intrauterine contraceptive device, the Dalkon Shield. Both Kallen and Delaney discuss Manville at length (Delaney, pp. 60-81; Kallen, pp. 225-302). Kallen also gives an extensive account of Robins (pp. 303-83). For more detail on Robins, Ronald Bacigal has given us a chronology that is useful and precise, if almost entirely opaque.

For all their differences, these "mass tort" cases together take their provenance from two social facts. The first is the creation of a technical or economic structure to produce and distribute products with the capacity to do grievous harm. The other is the development of a system of liability rules that seeks to transfer the cost of the misfortune from the ultimate victim to someone further up the technostructural chain. The strictly "bankruptcy" wrinkle is, at best, an incidental stage and, as we shall see, by no means a necessary one.

One is hard put to think of any species of litigation more driven by undeserved human suffering. Too, both the Manville and Robins cases brimmed over with anger and frustration and no small sense of moral outrage. How could it have been otherwise? In both cases, legions of victims suffered real pain and many died wretched and agonizing deaths, often leaving dependent survivors in penury.

Yet here even more than in the labor cases, almost all discussion founders on analytical confusion. As with the oligopoly cases, this is easy enough to see if you start with a simple example. Suppose the debtor has assets that would be worth $6 if they are kept together in a going concern, or $5 if they were broken up and sold for scrap. Suppose there are "present" (liquidated, noncontingent) claims of $10, and "future" (unliquidated, contingent) claims of $3. How shall we

38. Asbestos bankruptcies include Manville, UNR, and Amatex. On Manville, see infra text accompanying note 51. On UNR, see In re UNR Indus., 725 F.2d 1111 (7th Cir. 1984). On Amatex, see In re Amatex Corp., 755 F.2d 1034 (3d Cir. 1985).

39. See infra text accompanying notes 49-61.


41. As has often been pointed out, this structure accounts for the growth of the modern tort law system taken as a whole, possibly together with other modern social institutions — such as the limited liability corporation.

42. George Priest has remarked that the two great judicial revolutions of our time have been in tort law and public school desegregation. George L. Priest, Commentary, in Fred R. Shapiro, The Most-Cited Articles from The Yale Law Journal, 100 YALE L.J. 1449, 1470 (1991).

43. The discussion in this paragraph draws heavily on David Gray Carlson's important article, David G. Carlson, Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability, and Toxic-Waste Cleanup, LAW & CONTEMP. PROBS., Spring 1987, at 119.

44. In both cases, I am assuming that the number represents the market's best guess as to the present value of all prospective future income streams. Cf. Richard A. Brealey & Stewart L. Myers, Principles of Corporate Finance 62-66 (3d ed. 1988).

45. I adopt the standard jargon here, although it is premised on an analytical confusion all its
distribute the assets? In particular, how shall we treat these "future" claims? I think there are powerful arguments that the drafters of the 1978 Code intended to include "future" claims within the definition of "claim" for bankruptcy purposes. But many courts have been unwilling to construe it that way. Strictly as a pragmatic matter, one can hardly blame them. The practical problems of definition and administration are enough to inhibit even the most self-confident judge.

But forget about the judges for the moment. What are the implications of the decision on this issue? Put it this way: if you represented the "present" claimants, what would be your strategy for "reorganizing" this estate? Your first impulse is to try to exclude the "future" claimants from the case, and to save the going concern values, giving each "present" claimant 60¢ on the dollar. On second thought, however, it becomes clear that this will not work, because no one will pay the going concern value of $6 for assets with a gross value of $6 if they are still encumbered by "future" claims of $3. It might seem sensible to let the "future" claimants into the pool, preserving the going concern values; then everyone would get 46¢ on the dollar (6/13 — rounded off). But remember, we are considering all this from the standpoint of the "present" claimants. From their standpoint, it is still desirable to keep the future claimants out of the pool, even if it means defeating any prospect of a going concern sale, because they are worse off including the future claimants to get the going concern sale than they would be excluding the future claimants and sharing in the "liquidation" pot — from which they would get 50¢ on the dollar (5/10).

It is a fair inference that these numbers present an accurate characterization of the underlying dynamics in both the Manville and Robins bankruptcies. Under these circumstances, you had to have some sort of collective proceeding for orchestrating the competing claims — otherwise, the early claimants would have simply gobbled up the estate before the later claimants got anything. This is a simple matter of

---


48. The logic behind this example is elegantly developed in Carlson, supra note 43.
arithmetic, and no amount of fulmination about corporate malfeasance and attorney greed will make it go away.

The difficulty (as events have amply proved) was that nobody had any idea how to do the valuation. Both Judge Lifland (in *Manville*) and Judge Merhige (in *Robins*) did everything they could to avoid addressing the problem.\(^49\) Merhige ultimately picked a number; whether he did right or not probably depends more on your view of his handling of the case in toto than it does on your appraisal of how he weighed the valuation evidence.\(^50\) Lifland, who had an even harder job, bought a solution that pretended to sidestep the problem altogether.\(^51\)

As we know now, it did not work. The Manville settlement trust unravelled completely, and the Robins trust is showing signs of strain.\(^52\) Difficult times invite daring solutions; in *Manville*, the case careened around a sharp new turn when District Judge Jack Weinstein from the Eastern District of New York took control to try to do the deal anew.\(^53\) By any conventional measure, there really is not the slightest basis for Weinstein to be in the case. But no one was ready to tolerate the cratering of the original Manville trust, and Weinstein had a reputation as a head-cracking pusher for settlement.\(^54\)

\(^49\) It is worth noting that Judge Posner of the Seventh Circuit, who is nobody's idea of a patsy, wrote the opinion dismissing the appeal in *UNR*, even as he felt impelled to unburden himself with an essay on how he felt the matter ought to be handled. See *In re UNR*, Inc., 725 F.2d 1111, 1118-20 (7th Cir. 1984). Ronald Bacigal shows how in *A.H. Robins* Judge Merhige, surely as intrusive as any judge on the bench, nearly bent himself double in an unsuccessful effort to promote settlement on this issue. See *Bacigal*, supra note 15, at 98-110. Amy Singer shows Judge Lifland adopting a similar strategy in *Manville*. See *Amy Singer, Leon Silverman $4.5m, His Clients $???,* AM. LAW., Oct. 1990, at 58.

\(^50\) That is, a reader of Bacigal's account comes away with the sense that Merhige thought it was time for the case to end, and that he picked a number that he felt would end it — or at least not obstruct its conclusion. See *Bacigal*, supra note 15, at 107-10. One assumes that Merhige believed he was implementing sound public policy, but a world of tort victims (and their lawyers) would take a different view.

\(^51\) Lifland's job was harder in the respect that the dimensions of "unknown" were greater. In *Robins*, one could get at least some fix on who the claimants were; the real issue was how badly they had suffered, or would suffer. In *Manville* the participants had to cope not only with the problem of unknown claims, but also of unknown claimants — the statistical certainty that persons in a defined group would someday show symptoms of asbestosis, even though no one knew which ones yet. See *In re Johns-Manville Corp.*, 68 B.R. 618, 628-29 (Bankr. S.D.N.Y. 1986).


\(^53\) Early stages of the Weinstein takeover are described in *Singer*, supra note 49, at 66-67.

\(^54\) Weinstein's reputation was based in large part on his work in the Agent Orange case — another mass tort case (though not a bankruptcy case) where the settlement may not have achieved everyone's aspirations. See generally *Agent Orange Prods. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), modified 818 F.2d 145 (2d Cir. 1987).
At this writing, it is not clear whether even Judge Weinstein's Article III firepower will be sufficient to put the problem behind us. What do become clear, however, are the management problems that, if they exist in the bankruptcy system, at least transcend the bankruptcy system, and are troublesome enough to tax the wits of the cleverest and most resourceful district judges. Thus, Judge Weinstein's solution to the Manville problem is, in effect, a national, limited resource class action. The irony is that this is just what bankruptcy is — a national limited resource class action.55

Aside from the problem of claims management, both these cases raise issues of culpability. There is a lot of human suffering in each case, and in both there are plenty of recriminations — plenty of demand from the victims and their advocates that the wrongdoers be identified and punished. This is particularly important in Robins; in Manville, responsibility may have been diluted over generations and across the industry. Robins seems rather different. In addition to Kallen's work there are a number of accounts of various phases of the Dalkon imbroglio. Some of them are driven by old-fashioned populist rage.56 Others are relatively dispassionate.57 But even in the blandest of the accounts, there is so much evidence of callousness, of sheer bloody-mindedness both in the events that led up to the shield's release and the ensuing litigation, that it's hard not to sympathize with those who wanted the Robins family tucked into a sack with a monkey and a snake and tossed into the Bosphorous.

Most of those presentations do, however, lack another feature essential to a real work of art: dramatic unity. Judge Miles Lord, who presided over the immediate prebankruptcy phase of the Dalkon Shield case, offers a model of recriminatory adjudication. He functioned more like a Roman tribune, protecting the plebs from the patricians. Clearly, when Robins filed for bankruptcy relief at Richmond, the dominant motive must have been to escape Lord's anti-Robins grudge match.

Whether the Robins family got what it wanted out of the bankruptcy filing is an interesting question. The record reveals instances of...
what sound like almost shameless partisanship on the part of Judge Merhige for his friends and good neighbors.\(^{58}\) Clearly Merhige refused every invitation to turn the case into anything like a criminal proceeding. In the end the Robins family is still enjoying the good life, with its country club dues paid, while many of the victims go uncompensated and even untreated.

But I remember hearing in my youth about the judge who was "nonpartisan — he hates everybody — and even-tempered — he's always mad." I do not suppose Merhige deserves quite so dismissive an epithet, but it does seem that Merhige's "injudiciousness" (if you can call it that) was a good deal more — shall we say even-handed? — than Lord's; or, put differently, at one time or another he seems to have stepped on just about everyone's feet.\(^{59}\) He's an Article III judge, remember, and those guys do not have to listen to anybody. If Merhige showed consistent favoritism to the views of any one person, that person was Merhige himself. From early on he seems to have had a fairly well-articulated view of how the case should go, and he was not going to let anyone distract him from getting there.\(^{60}\)

What, exactly, was that view? One has to do some guessing here, but I think perhaps the record (as summarized by Kallen) does suggest a coherent story. That is, I suspect that Merhige had a genuine interest in seeing that this litigational pig moved through the judicial python in the quickest, most economical manner. He did want to see valid claims were paid.\(^{61}\) On the other hand, he undoubtedly had a good deal of skepticism about the justice of large personal injury awards, plus a bit of impatience with the plaintiff's bar. As to the Robins family, his attitude is harder to peg. Perhaps — though it is hard to imagine how — he thought they were just good people caught in an unfortunate net. Perhaps he figured that any attempt at recrimination would be a counterproductive distraction and that the Bankruptcy Code did not provide for it anyway.

"Closure" is a goal for any judge in any case. But it seems a not entirely unworthy goal for judges like Merhige and Lifland for any number of reasons. For one, there clearly were victims, and a primary goal was to get them paid — a goal that always stood in jeopardy as

\(^{58}\) But see In re Diana R. Beard, 811 F.2d 818, 828 (4th Cir. 1987) (concluding that Merhige’s referring to E.C. Robins as "a neighbor" and a "fine man" did not constitute a reasonable basis for questioning Merhige’s impartiality).


\(^{60}\) I remember an instructive conversation with an unusually able newspaper reporter who was a careful student of the Dalkon Shield case and had also covered Judge Merhige’s campaign to integrate the Richmond Schools. See Bradley v. School Bd., 317 F. Supp. 555 (E.D. Va. 1970). He said he remembered having no problem with Merhige’s aggressive case management as long as the victims were the old Southern segregationists, but that he had begun to have doubts once he saw how that kind of power could cut both ways.

\(^{61}\) Up to a point. One class of potential claimants who seem to have taken nothing from the case are the users (past and, unfortunately, present) outside the United States.
long as the parties kept wrangling. And of course the meter is always running in these cases — the lawyers and the accountants, the investment bankers, and heaven knows who else want to get paid. Delay always means more money in the pockets of the professionals.

But closure takes on a special significance in a case like this because the litigation raises all sorts of public issues in our society that are important, divisive, and, as a matter of public policy, unresolved. I have mentioned a couple along the way, but a detailed recitation is warranted here. Consider, for example, the whole question of propriety of the personal injury tort system, the propriety of contingent fees, of punitive damages, of lawyer advertising, of the proper role of the judge in managing litigation. The issues are urgent enough, and in the nature of things, when we get an issue too tough for anything approaching general consensus, we tend to dump it in the lap of a judge. Under the circumstances, we should thank our lucky stars for anyone who handles these issues with any finesse at all, without expecting more.

It would be useful if Kallen, Delaney, or any of the other writers in this field offered any real help in sorting these problems out. On the other hand, just to identify them suggests how difficult they must be. And inventoring the Aegean stable seems to be a worthwhile accomplishment, even if you cannot cleanse it.

III

The breakup of the oligopolies and the “mass torts” appear to be the two most obvious themes to find in the megabankruptcies of the 1980s. The other cases that figure in Kallen’s account—call them the “routine” megabankruptcies — are at once more simple and more complex. They are more simple in that none presents an issue quite as pervasive or intractable as the matter of “unknown claims” liability in the context of an absolutely insolvent debtor. They are more complex in the sense that they raise too many other issues for anything like simple generalization, much less resolution. Kallen tends to dismiss them all with conclusory fulmination about the evils of “the corporation,” without ever explaining just what that sort of reference might mean.

Take the Wickes affair, for example (pp. 165-202). I have no quarrel with Kallen’s general outline: here was a massive conglomerate

62. Merhige did get shot down on his one effort to provide some sort of succor here. Under entreaty from the plaintiff’s bar, he ordered “preliminary payment” of some claims as kind of a triage damage scheme. Alas for pragmatism, the Fourth Circuit overturned his scheme, holding that the statute did not give him the power to do what he had done. In re A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989).

63. See Myres S. McDougal, Fuller v. The American Legal Realists: An Intervention, 50 YALE L.J. 827 (1941).

64. Or that belong there, even if he happened to overlook them.
(mostly in retailing) with enormous debt problems (apparently in large part from one big ill-chosen acquisition). It got "reorganized" thanks to some smoke-and-mirror financing, together with maximum deployment of its tax losses. Kallen dismisses it all as "corporate welfare," with a couple of snarly asides about the tax advantage (p. 201). Now, it may well be that the tax treatment of business losses is improper. But it is not obviously the case; the issue is a fairly complex question of tax policy on which, per custom, Kallen does not trouble to enlighten us.

Meanwhile, Kallen fails to come to grips with the fact that the driving force behind the Wickes chapter 11 was the body of unpaid creditors, who brought in Sanford Sigiloff as the turnaround angel to put the plan together. LoPucki and Whitford report that Wickes had no fewer than sixteen impaired classes, making it one of the most complex cases, in terms of debt structure, of the 1980s or any other decade. They estimate that unsecureds got better than 80¢ on the dollar and that, taking equity and unsecured debt together, equity got only 5.7% of the payout. You could say that equity was a winner here in the sense that it didn't deserve anything at all. But as all the evidence suggests, this is fairly standard stuff. Meanwhile it seems abundantly clear that the creditors were happy with Sigiloff and his result. If he was overpaid, they were hardly in a position to complain, nor were they interested.

Kallen gives little or no attention to other megabankruptcies that seem to complicate any thesis that he may be trying to articulate here. Thus, he gives only perfunctory attention to what is surely one of the most interesting bankruptcies of the decade, not only in substance but in execution — that of Baldwin-United, the onetime piano company that prefigured the rash of bank and insurance failures that have overtaken us more recently (pp. 157-60). The importance of Baldwin may lie precisely in how easily we have forgotten it — a case of immense complexity and considerable public consequence that was in and out of court with relative speed and efficiency.

Perhaps even more surprisingly, Kallen only mentions incidentally

---

65. LoPucki & Whitford, supra note 6, at 140 (Table II).
66. Actually, 81.6%, making it the best payout to unsecureds of all "insolvent" cases in their analysis. See id. at 142 (Table III).
67. Id.
68. For more on the "equity slice" in insolvent cases, see infra notes 71-80 and accompanying text.
69. LoPucki and Whitford report that the only dissenting class in Wickes was the class of creditors holding securities fraud claims. LoPucki & Whitford, supra note 6, at 140 (Table II). Indeed, they identify securities fraud claimants as dissenters in six of their major cases — a fascinating datum that I hope they discuss more as they continue to analyze their data.
what may be the most interesting case of the decade — *In re Evans Products*,71 the only major case of the 1980s where the court actually took control away from an active equity interest and imposed a creditor cramdown plan that wiped out shareholders altogether. *Evans* has passed into the folklore as “a watershed case,” 72 though I suspect it may be rather more of a sport, combining an unusually unsympathetic judge with a corporate raider whom more or less everyone loved to hate.73 But if Kallen were really interested in the possibility of crisp (brutal?) administration, presumably he would want at least to inquire into what happened there.74

Baldwin and *Evans* are important to Kallen’s inquiry because they both suggest a lot about a theme dear to his heart — the role of the judge. Randall J. Newsome, as presiding judge in the Baldwin affair, was thirty-three years old with less than a year’s experience when he took over Baldwin. Yet he receives credit from nearly all the participants for having maintained the kind of discipline necessary to move the case to a quick conclusion.75 In *Evans*, the determining factor was an act of the late Judge Thomas C. Britton that was almost unprecedented in major bankruptcy cases: he terminated the debtor’s exclusivity period and let creditors file their own plan. 76 Britton was also famous for cutting fees.77 The contrast between Britton’s tight-fisted procreditor stance and Lifland’s more tolerant posture seems to have resulted in some extraordinary venue-shopping when Eastern Air Lines leveraged itself into Lifland’s Manhattan court rather than Britton’s in Miami.78

*Evans* was not the only debtor wipeout among major bankruptcies in the 1980s. Victor Posner, the Miami-based investor who controlled Evans, did almost equally badly with another of his investment ideas,

---


73. The judge is Thomas Britton, now deceased. The raider is Victor Posner, who owned a controlling stake in the equity of Evans, and who contested the plan until the end. Posner seems also to have taken a beating on his equity stake in the bankruptcy of Sharon Steel.

74. Suggesting that the 1990s will not be the decade of the debtor, one commentator points to the role of the new arbitrageur-creditors who traffic in distressed debt. They are, this observer says, “far less image conscious — they do not have the white-shoe, gentlemanly workout orientation of commercial banks, previously the biggest creditors in bankruptcies.” See *Shareholder Recoveries Get Squeezed in Chapter 11*, supra note 72, at 1 (quoting John Mueller, vice president of Whitman Heffernan Rhein & Co.).

75. See Nelson, supra note 70, at 1.


77. *Id.*

Sharon Steel, after he took it into bankruptcy in Pennsylvania. The Davis brothers of Texas lost everything in a creditor plan for their oil field supply empire, Kendavis Industries. Kallen mentions Sharon only in passing (p. 57), and the Davis brothers not at all.

Cases like Wickes, Evans, and Baldwin-United, whatever their other features, do have in common that they deployed the bankruptcy process in a fairly conventional manner. Others have questioned whether the mass tort or the labor cases deserve the same characterization. I have tried to show that they do. On the other hand, all this discussion helps to clarify the focus on what seems to me to be the strangest of all the megabankruptcies: the case of Texaco. Kallen gives a quick summary of Texaco (pp. 394-405), and Delaney gives it one of his three major chapters. The outline is easy to recall. Pennzoil got a judgment against Texaco in a Texas state court, to the tune of $10.5 billion. The verdict was monstrous by any measure and almost certainly far more than Pennzoil ever expected to win. After a good deal of chaffering, Texaco filed for chapter 11 relief. After still more give-and-take, the parties settled the case for $3 billion.

Seemingly every business writer has something to say about Texaco, and no wonder: it is a monster case. Plenty of people, including Kallen and Delaney, treat it as somehow a novelty. But no one, so far as I am concerned, comes down on the point hard enough. For if ever there was a case that did not belong in bankruptcy, at least by any conventional standard, it is this one. Exact measures are slippery, but think of it this way: Pennzoil's $10.5 billion verdict almost certainly exceeded everyone's expectations; in any event, Pennzoil never acted like it expected to collect it in full. Meanwhile, Texaco's stock market capitalization at the time of the verdict was something in excess of $10 billion, falling to $8.5 billion before the case began.

Suppose the parties settled on a sum of $5 billion — a little under half the original verdict, and more than half again as much as the final payoff in fact. The point is that even on these numbers, Texaco would have remained solvent before, during, and after the deal. In other

79. See In re Sharon Steel Corp., 871 F.2d 1217 (3d Cir. 1989); Sharon Steel Pact Reached, N.Y. TIMES, July 30, 1990, at D4; Sharon Steel Trustee, Creditors Reach Accord, UPI, Nov. 15, 1990 (available in LEXIS, Nexis Library, UPI File).


81. In fairness, Kendavis was only a "mini-mega" bankruptcy, with liabilities of only $500 million.

82. Comparisons are always inexact, but I suspect the only modern-day case that deserves comparison is the Penn Central bankruptcy of the early 1970s. See generally Walter H. Brown, Jr., Introduction: A Review of the Penn Central Reorganization Proceeding, 36 Bus. Law. 1903 (1981).

83. The figures are summarized in Lawrence Summers & David Cutler, Texaco and Pennzoil Both Lost Big, N.Y. TIMES, Feb. 14, 1988, § 3, at 3.
words, the company was never "bankrupt" in any conventional sense of the term. What is perhaps even more interesting, however, is that Pennzoil never even seriously contested the filing. They made some noises about impropriety, but when the time came, they never pressed the issue. It is interesting to speculate on why not. One possibility is that the lawyers decided the issue was a loser and that their energies were better deployed elsewhere — though this begs the question, because it offers no explanation as to just why the issue was such a loser in such a novel case. From informal conversations, I gather that Pennzoil lawyers also took note of Texaco’s deteriorating cash flow (even though its ultimate solvency was still indisputable) and that this gave color to the proposition that Texaco should be treated as bankrupt in an old-fashioned “unable-to-pay-debts-as-they-mature” sense.84 On the facts, this was probably a stretch, and in any event, there is no suggestion of any such requirement for a voluntary petition in the Bankruptcy Code.

Another possible inference is that the Texas case was going forward in — well, Texas. The bankruptcy case went forward in New Rochelle. From Texaco’s standpoint, the advantage was obvious: it had taken a pounding in the Texas courts, and any alternative was bound to look good. But from Pennzoil’s point of view there also may have been an advantage. The New Rochelle bankruptcy court was home — home in the sense that it was just a hop, skip, and jump from the caverns of Wall Street, which the investment bankers and lawyers on both sides claimed as their natural turf. But it is not just mileage at issue here: plane fare to Houston is pocket change in a megacase, and the chances are you can bill portal to portal. This is home in the chicken soup sense — home with the picket fence and the clinging ivy and the freckle-faced kid next door. Everybody knew there was going to be a deal somewhere. But the deal makers on both sides felt comfortable working out of the bankruptcy court in New Rochelle.

In other words, the Texaco situation was distinctive, but no one troubled to raise the issue because it suited everyone’s convenience to treat it as an ordinary case. For reasons like this I would stress, even more strongly than Delaney does, that bankruptcy seems to be passing out of its historic place and into the armory of general litigation tactics. To lump it with labor cases and mass tort cases seems to me only to obscure the issue. If Texaco is the wave of the future, then we are in a different world indeed.

This helps to shift the focus onto another issue that is manifest but not really delineated in all the works I have discussed before: the role of the professionals — particularly the lawyers. One who does articulate this point with a vengeance is Sol Stein, in his account of his own encounter with the practice (and the personnel) of bankruptcy law.

---

I would like to make Stein’s little book required reading for all of my law students — at least all my bankruptcy students — but not necessarily for the reasons Stein would want. Stein’s core narrative is an account of the collapse of the firm he controlled, the publishing house of Stein & Day, Inc. His more general purpose is to expose the wickedness and knavery of almost every professional in the bankruptcy system. Through it all, Stein pictures himself — and thinks he is presenting himself — as a poor victimized lamb taken out for the slaughter. To my taste, he is mostly pompous. He recalls with relish how he answered a question he did not like on deposition by saying, “Mr. Borri, when you’ve been in Who’s Who for thirty years you can talk to me that way and not until then” (p. 168). It is a measure of his lack of self-insight that he repeats this story with pleasure and pride.

From one perspective, then, Stein could serve as a useful reminder to my (fairly well-cosseted) students of just what they will be up against when they go out and undertake to make money by solving other people’s problems. The devil of it is, of course, that even people like Stein deserve justice. Or more precisely, they need adequate representation, a decent day’s pay for a decent day’s work. And even taking account of the breathtaking skew that he gives to his story, the evidence seems pretty strong that he did not get it.

My best guess — it is only that — is that Stein’s business never should have gone into chapter 11 in the first place. Or at any rate, he should not have gone in there without a decent shot at an out-of-court workout (which does not seem to have taken place) or with some sense of what his possibilities and limitations might have been (which he does not seem to have had). That kind of realism, it seems to me, would have been an essential prerequisite to anything like a successful rebound, and Stein, so full of self-delighting certainty of his own position and the knavery and foolishness of his enemies, seems clearly not to have had it.

Some people do go forward armed with that kind of good luck and good planning. The chief irony of all this is that Stein seems to know it and even, at one level, to understand it. In addition to giving you his own account, Stein tells you the stories of others who negotiated chapter 11 with far more success than he — Sam Metzger, for example, of Chipwich (a kind of ice cream sandwich) (pp. 125-27 passim) or Thomas Towey of Neptune World Wide Moving and Storage (passim). Stein tells their stories well, and they are happy stories about a couple of guys with the resiliency and realism to carry themselves through troubled times.

But Stein, who seems to have a certain amount of creative or entrepreneurial flair, does not appear to recognize that these essentials of survival simply elude him. But if he did not know, one reason he did
not is that plenty of people around him were ready to take his money without telling him. And more than that. Through it all, you can see that plenty of people make money off this system. Sometimes, perhaps, they do their jobs well, sometimes badly; often enough it is hard to tell which. But they never seem to go to bed hungry. It is a small episode, of course — pathetic, although probably not as portentous as Stein makes it. But it gets under your skin. You go beyond Stein. You pick up the Wall Street Journal and read about the Revco case, where the professionals have been knocking down some $2 million a month. You find even Judge Merhige in Robins, that most aggressive and refractory of reorganization judges, speaking almost with despair about his capacity to cap fees.

And you cannot avoid a twinge of bad conscience. It is complicated, of course. I have had my own taste of bankruptcy practice and I must say it is, in its own way, damn hard work — very high pressure, with a lot of sheer foolishness and sheer tedium. I have been stiffed by clients; I have given the little lecture that says if this case is a success I will probably ask for more money, and if it is a failure, I will probably take a loss. I have no principled objection to making money off other people's misfortune: otherwise what would we do for oncologists? I know that bankruptcy lawyers deserve competitive wages and that if you do not attract good people to the field blah blah blah.

The devil of it is, I suspect, that you are never quite sure whether the system is working well or not. My Uncle Perley used to carry buckeyes to ward off arthritis. He would say that he never knew how bad the arthritis would be if he did not carry the buckeyes. Bankruptcy judges, in my experience, feel a bit the same way. Insofar as

86. BACIGAL, supra note 15, at 63.
87. From the standpoint of the bankruptcy bar, the most valuable pieces of paper in recent history must be pages 329 and 330 of the House Report on the Bankruptcy Reform Act, H.R. REP. No. 595, 95th Cong., 1st Sess. 329-30 (1977), where the scrivener undertakes to defend a principle of "comparable worth" for bankruptcy lawyers, and in particular, to denounce the remarkable old case of In re Beverly Crest Convalescent Hosp., Inc., 548 F.2d 817 (9th Cir. 1976). In Beverly Crest, the judge did not see why a bankruptcy lawyer should earn any more than — well, any more than a judge. 548 F.2d at 821 (holding fees averaging $85 per hour grossly excessive). The imagination seizes up on trying to picture what life would look like if that standard obtained today.
88. Or you read the interesting and useful fee survey produced by the American Bankruptcy Institute. See AMERICAN BANKR. INST., NATIONAL REPORT ON PROFESSIONAL COMPENSATION IN BANKRUPTCY CASES (G.R. Warner rep. 1991) [hereinafter ABI REPORT]. The report offers 13 recommendations. Id. at xii-xix. The first recommendation was that courts limit the frequency with which trustees represent themselves. See Bankruptcy Code, 11 U.S.C. § 327(d) (1988). The next two sought to limit the role of the U.S. Trustee in policing fee requests. ABI REPORT at xiii-xiv. Nowhere is there any suggestion that the authors — or anyone else, for that matter — believe fees are in any general sense excessive.
they are obliged to police fee requests, they know they ought to do something to get control of things; but they often find great difficulty identifying just how, or what. Lawyer Snerd asks the court to approve compensation of $1 million for 20 minutes work. He says that without him, creditors would have lost an extra $20 million. And he just might be right. Stuck without any really compelling standard, many judges probably feel, in their heart of hearts, that they let too much get by. There is a wonderful story in Los Angeles about the judge from Hell. In one case, he hauled everyone into court and threw a tantrum about excessive compensation; then he chopped the photocopy charges and left the hourly billings intact.

Not everyone is so misguided, of course. Some judges evidently are getting more aggressive in fee-policing. For whatever reason, my intuition tells me they are more willing to take a stand on what is permissible or impermissible in bankruptcy cases, and to fix fees accordingly. They are giving more thought to the issue, trying to develop defensible principles for consistent administration of the bar from the bench. In a sense, this is good news. When I was a beginning judge, I went to baby judges' school. I remember Lloyd George, now on the federal trial bench in Las Vegas, insisting "they're only as good as you make them be" — meaning that any conscientious judge has an obligation to police the bar. But this presents a difficulty. The more a judge asserts herself in fee matters, the more she becomes an adversary to the lawyers before her — the more, that is, she loses the quality of detachment and impartiality that most distinctively qualifies her to be a judge.

Who will help her avoid this peril? Not the attorneys and professionals who practice before her. They have far too much at stake in the system as it stands. Ideally, she might get some support from the U.S. Trustee, with his broad obligation to supervise bankruptcy cases. And I suspect the U.S. Trustee system, on balance, does more to help her than to get in her way. But I would not expect much of it. The appointments to the critical U.S. trusteeships seem to me too closely linked to cronyism, too little linked to anything remotely resembling merit. At the staff level, matters are perhaps a bit better. But unfortu-


90. In a small body of case law, courts have cut fees on a finding of excessive or wasteful work. See, e.g., Pope v. Knostman (In re Lee), 884 F.2d 897 (5th Cir. 1989); In re Dalton, 95 B.R. 857 (Bankr. M.D. Ga. 1989), aff'd, 101 B.R. 820 (M.D. Ga. 1989); In re Easter, 105 Bankr. 724 (Bankr. S.D. Fla. 1989). Just as an impressionistic matter, most cases of this sort seem to involve relatively small numbers and relatively small estates. Of course, the level of incompetence might be highest here, as well.

91. Word of mouth.

92. See, e.g., Michele Galen & Tim Smart, Kiss Those Three-Star Lunches Goodbye, BUS. WK., Sept. 30, 1991, at 60 (discussing the increasing willingness of judges to limit attorney fees in bankruptcy cases).
nately the staff lawyer, even if competent and well-intentioned, is likely to be a relative beginner with little or no experience in private practice, lacking the gravitas and the sheer wile he might need to do his job well.

And an extra source of concern emerges that is not fully articulated in any of this material — that is, as bankruptcy becomes more "strategic," as Delaney calls it, more and more a matter of every day, we approach more of an institutionalized revolution. In the old days, they used to talk about the "bankruptcy ring." These days, it is much more like a fully articulated culture with, as Nietzsche says, its own feast days and its own days of mourning. It has folk heroes galore, not only in the bar,93 but also judges,94 investment bankers,95 liquidators,96 "turnaround specialists,"97 and others.98 Thus it is fast taking on the character of a regularized process — an institutionalized revolution. Some will regret this. Some find this process fun only when it is "exceptional," outside the rules, the class that does not contain itself. The very regularity of it all will tempt them to move on, like Daniel Boone at the sound of his neighbor's axe. But you can assuage your nostalgia with a consolation: society needs its "exceptional" category. If bankruptcy does become regularized, then we will have to invent something else to fill its void. Where (for example) is the chapter 11 for chapter 11 debtors — that is, how to handle a rash of insolvent chapter 11 estates? For present purposes, though, I am adverting to another kind of problem: the thing about any self-perpetuating social institution is that it will continue if there is a need for it, and will continue anyway, even if there is not.


94. It is impossible to read the Conference News, the house organ of the National Conference of Bankruptcy Judges, without being struck by the sense of elan and conviviality that marks pride of craft in any endeavor.


97. A few years ago, the very name would have been enough to conjure up Ben Hecht's definition of a "starlet" — any woman in Hollywood under 50, not permanently employed in a brothel. Today, there is a Turnaround Management Association, complete with its own Code of Ethics. See Jim Mayer, Ethical Considerations in Turnaround Management, FAULKNER & GRAY'S BANKR. L. REV., Winter 1991, at 57.

98. The trade's major interest group, the American Bankruptcy Institute, is less than a dozen years old, but it is already a dominant force in setting the agenda on bankruptcy issues. An older group, the National Bankruptcy Conference (NBC), an invitation-only limited-membership group, functions as the "American Law Institute" of the bankruptcy bar. For a generation prior to the 1978 Code, the NBC functioned as virtually the sole purveyor of establishment professional wisdom on bankruptcy matters. Its influence today is less clear.
"Tell me why you are weeping and groaning in your heart," the poet asks, and then, as poets do, he answers his own question: "It was the gods who brought it about: they spun destruction for those people, so that future generations might have a song."99 Can that be right? It is a good story, yes, but is that all? All?100 Are Kellman and Delaney and Stein just the bards of our time, warming us around the campfire with tales of the heroes of not-so-long ago, until we disintegrate in a chemical stupor or brain them with a rock? Well, one hopes not. One hopes that there are lessons to be drawn, reforms to be fashioned and carried through. But one hesitates to place too much hope in all this. Rather, one suspects that if there are lessons to be drawn, they are something like this: first, it is a system that does not work terribly well; and second, it is one in which the people who run the system do very well indeed. This, I suspect, is a point that underlies Stein's bitterness, Kallen's sardonic good cheer, and Delaney's fascinated revulsion.

Were a cook to cook a fly, they say, he would save the breast for himself. But he would not settle for mere fly qua fly. No, he would tuck a little dried tomato under the skin; he would top it off with a bit of basil and maybe a dash of Dijon mustard, and serve it with some nice baby red potatoes and a side of baked eggplant. And if you, with your nose pressed against the window, complained that he was eating while you were hungry he would tell you how hard he had to work for it, how he did not get one often and how, after all, it was only a fly. Well, yes, even in flies, context is everything: time flies like an arrow, they say. Fruit flies like a banana. I once saw a headline that read: "Flies to receive Nobel Prize." The bankruptcy lawyers live very well off this system. The judges and professors don't live quite so well, usually. They do not get the big bucks and the perks, but they do have their pensions and their dental plans. They are not necessarily rapacious at heart. Quite the contrary. They (we?) are quick to tell you they work hard for their money and perhaps they do. Does the system need a change? The point is, in a fundamental sense, they would never know it: the refulgent glow of their own comfort is bound to blind them to the light of any real reform. Or if they did get a glimpse of it every now and then, they would lose sight of it again when their eyes got weary and their stomachs began to whine. Better to leave all that for another day — it is too much work, and it is too complex, and it is not at all clear that one knows what to do. Better to kick back and turn up the stereo and tuck into a generous portion of fly. Yum!


100. Cf. STANLEY ELKIN, THE LIVING END 144 (1979) (quoting God's explanation of why he did it: "Because it makes better story is why.").