

# WHAT SHOULD JUDGES DO IN CHAPTER 11?

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*In this symposium dedicated to the American Bankruptcy Institute's Commission on Chapter 11 Reform, whose proposals remain a secret at the time of this writing, Professor Jacoby argues that doctrinal reforms to corporate bankruptcy are incomplete without considering the role of institutional actors, particularly judges and courts. The judge's role tends to receive too-limited attention. First, chapter 11 is often characterized as an extension of corporate transacting rather than as complex federal court litigation. In addition to overemphasizing the corporate law elements of chapter 11 to the exclusion of other intersections, this view overlooks the fact that many civil and even criminal actions before the district court have strong transactional elements. Second, the 1978 Bankruptcy Code drafters exhorted judges to be no more or less than umpires of discrete disputes, perhaps leading some reformers to believe the question to be already asked and answered. Yet, the modern bankruptcy system, as evolved, encourages bankruptcy judges to accomplish divergent objectives: promote quick resolution of disputes through party settlement, and exercise independent duties even in the absence of party objection—issues with which the federal district court also continues to wrestle.*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	572
II.	THE LIMITS OF THE LOOMING CONSTITUTIONAL QUESTIONS: <i>STERN</i> , <i>ARKISON</i> , AND <i>WELLNESS</i> <i>INTERNATIONAL</i> .....	573
III.	THE CASE MANAGEMENT IMPERATIVE.....	574
	A. <i>U.S. District Courts</i> .....	575
	B. <i>The Rise and Fall of the Umpire-Only Bankruptcy Judge</i> ....	576

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IV. THE INDEPENDENT DUTY QUESTION IN BANKRUPTCY (AND BEYOND).....	581
V. IMPLICATIONS FOR CHAPTER 11 REFORM.....	588

## I. INTRODUCTION

By the time this piece is published, the American Bankruptcy Institute's ("ABI") Commission to Study the Reform of Chapter 11 will have released proposals to improve the bankruptcy system.<sup>1</sup> It has held field hearings around the country, deliberated continuously, and hosted a conference in spring 2014 to gather academic perspectives.<sup>2</sup> Rather than offering my views on necessary substantive reforms,<sup>3</sup> I sought to remind conference-goers that philosophies of judges and judging will profoundly affect any doctrinal changes they propose. For this written contribution, I again seek to emphasize that substantive amendments must be accompanied with realistic expectations of, as well as guidance to, judges and courts.<sup>4</sup> Today, the guidance in chapter 11 is too often underdeveloped, unrealistic, or pointing in conflicting directions.

My commentary proceeds as follows. Part II acknowledges the elephant in the room looming over any discussion of what bankruptcy judges do: the scope of their constitutional authority. Part III suggests that the federal judiciary preference for settlement and trial avoidance often sidesteps the constitutional question in the bankruptcy context. This Part also aims to deexceptionalize, to some extent, the nonadjudicative techniques that bankruptcy judges often employ. Tensions over the role of the judge go far beyond the dichotomy between trial or case management. I could have selected among many examples to make this point, but chose the following for Part IV: to what extent is the judge meant to be a gatekeeper independent of party objection? Other multi-party litigation, like class actions, potently provokes similar independent duty questions, suggesting the possibility of cross-context comparison. Part V concludes with a plea to consider questions of judicial role and procedure as part and parcel of substantive reform.

1. The American Bankruptcy Institute's Commission on Chapter 11 has working groups organized by doctrinal topic. See *Study Topics/Advisory Committee*, AM. BANKR. INST., <http://commission.abi.org/study-topicsadvisory-committee> (last visited Oct. 26, 2014).

2. See *ABI Illinois Symposium on Chapter 11 Reform*, AM. BANKR. INST., <http://www.abiworld.org/IS14/index.htm> (last visited Oct. 23, 2014) ("Members of the Commission will join these scholars in a critique of the papers and a lively debate over the consequences of the increased importance of secured credit to modern restructuring law.")

3. See, e.g., Edward J. Janger, *The Logic and Limits of Liens*, 2015 U. ILL. L. REV. \_\_\_ which takes as a point of departure Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014).

4. John D. Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, in 1985 ANN. SURV. BANKR. L. 307, 329 (William L. Norton ed., 1985) ("To what extent, if at all, should the bankruptcy judge have the power or the duty to do something that no party wants him to do? On this important issue, the [1978] drafters gave little, if any, guidance.")

## II. THE LIMITS OF THE LOOMING CONSTITUTIONAL QUESTIONS: *STERN*, *ARKISON*, AND *WELLNESS INTERNATIONAL*

Any commentary on a judge's role must begin with the recognition that the constitutional authority of bankruptcy judges is in a seemingly-continual state of flux. In *Stern v. Marshall*, a majority of the U.S. Supreme Court held that a non-Article III bankruptcy judge lacked the constitutional authority to hear and decide a subset of core claims.<sup>5</sup> *Stern* left open several questions. First, what are the boundaries on a so-called *Stern* claim? Second, do bankruptcy courts at least have the power to issue proposed findings of fact and conclusions of law on *Stern* claims?<sup>6</sup> Third, does party consent cure the constitutional defect such that bankruptcy courts can hear and decide *Stern* claims?<sup>7</sup>

In *Executive Benefits Insurance Agency v. Arkison*, a unanimous Supreme Court resolved the second question.<sup>8</sup> The Court held that a bankruptcy judge may treat *Stern* claims as she would a noncore claim: hear the matter and produce proposed findings of fact and conclusions of law for the district court.<sup>9</sup> The Court assumed, without deciding, that the fraudulent transfer action at issue in this case fit this category; the Ninth Circuit had so held and neither party contested it.<sup>10</sup> Because the claim had received *de novo* review by an Article III court, the Supreme Court could skip the consent question for the time being.<sup>11</sup>

The *Arkison* opinion stubbornly did not emerge, week in and week out, until late in the Supreme Court's 2013 term. When the Court released the decision, the unanimity and narrowness were a surprise. Perhaps the Justices were split in their views about consent, or aware of the ramifications of a broad ruling for the magistrate system as well as for bankruptcy. Pending the release of the *Arkison* decision, bankruptcy professionals worried about the problems that would arise if the Supreme Court limited judges' authority even further (or, perhaps worse, left the matter ambiguous). Like in the pre-Bankruptcy Code days, litigation central to the function of the bankruptcy system could have been spread amongst far-flung courts—including backlogged and underfunded state courts that might get to the matter in a year, ten years, or never.

That worry was renewed when the Supreme Court granted a writ of certiorari in the *Wellness International* case shortly after deciding

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5. 131 S. Ct. 2594, 2620 (2011).

6. S. ELIZABETH GIBSON & JONATHAN M. LANDERS, NAT'L BANKR. CONFERENCE, EXECUTIVE BENEFITS INSURANCE AGENCY V. ARKISON: DOES PARTY CONSENT RENDER BANKRUPTCY COURT ADJUDICATION CONSTITUTIONALLY VALID? 2 (2013).

7. *Id.* at 4, 9–10 (giving history and describing split in the circuit courts on impact of consent since *Stern*).

8. 134 S. Ct. 2165 (2014).

9. *Id.* at 2173.

10. *Id.* at 2172–75.

11. *Id.* at 2170 n.4; *see id.* at 2175 (“At bottom, EBIA argues that it was entitled to have an Article III court review *de novo* and enter judgment on the fraudulent conveyance claims asserted by the trustee. In effect, EBIA received exactly that. . . . [T]he District Court's *de novo* review and entry of its own valid final judgment cured any error.”).

*Arkison*.<sup>12</sup> *Wellness International* raises, once again, expectations that the Supreme Court will tell us the scope of claims that are beyond the constitutional authority of bankruptcy judges and whether Article III permits bankruptcy judges to hear and decide such claims with litigant consent.

These weighty questions notwithstanding, judges in the modern federal court system do far more than adjudicate disputes. To be sure, mismanagement of a trial or a badly reasoned decision can harm a judge's reputation, as well as skew the case's outcome, subject to correction through the appellate process.<sup>13</sup> But, competence in trial tasks does not guarantee a top reputation. As the next Parts will explore, Congress, the judiciary, and parties in interest often expect more.

The breadth of bankruptcy judging is not merely a byproduct of the idiosyncrasy of bankruptcy law. The tribunals we call courts have never been "All Trials, All The Time."<sup>14</sup> Judges' tasks have long been varied: appointing public officials, administering decedents' estates, presiding over marriage ceremonies, and the like.<sup>15</sup> The history and diversity of potential judicial responsibilities in all types of courts, including federal courts of limited jurisdiction, makes the role-of-the-judge question especially important in law reform.

### III. THE CASE MANAGEMENT IMPERATIVE

An orientation away from trials to the extent we see today reflects a policy decision of the federal judiciary: judges will be evaluated on how well they *avoid* adjudication.<sup>16</sup> Chapter 11 goes further by expressing a normative preference for resolution by compromise over resolution by trial.<sup>17</sup> Fairly or not, some observers will take highly contested confirma-

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12. *Wellness Int'l Network Ltd. v. Sharif*, 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2901 (2014).

13. For the limited amount of appellate review and thus oversight of bankruptcy decisions, see Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 777–78 (2010).

14. Lawrence M. Friedman, *Courts Over Time: A Survey of Theories and Research*, in EMPIRICAL THEORIES ABOUT COURTS 9 (Keith O. Boyum & Lynn Mather eds., 1983); Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 268 (1976); Murray L. Schwartz, *The Other Things That Courts Do*, 28 UCLA L. REV. 438, 439 (1981).

15. Schwartz, *supra* note 14, at 450.

16. D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 455 (2007); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 495 (1986) (discussing how reduction in the need for public trials was perceived as a success); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1002 (2000) (observing and questioning impact of "shift in the role of a judge from adjudicator to manager to settler to dealmaker."). In 1983, Rule 16 of the Federal Rules of Civil Procedure was amended to explicitly authorize district judges to facilitate settlement. See Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1968 (2007) (discussing the broad discretion given to judges in facilitating settlement through Rule 16 of the Federal Rules of Civil Procedure); Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 57–58 ("1983 amendments have encouraged [judges] to articulate their role as case 'settlers' and to pursue that function with vigor.").

17. The Bankruptcy Code's drafters baked the preference for settlement into the design of the plan confirmation requirements, to avoid cost and delay associated with a full-blown, hotly litigated

tion hearings as a sign either of an unusually aggressive litigant, or weak case management by the judge—even if the hearing itself is suitable for filming and an Academy Award.<sup>18</sup> And remember: if a matter resolves consensually through court-ordered mediation or otherwise, questions of the bankruptcy judge’s constitutional authority to adjudicate fade into the background.<sup>19</sup>

As a brief comparative tour suggests, district and bankruptcy courts were given divergent instructions about their jobs around 1978. Ultimately, they converged.

### A. U.S. District Courts

The history of the drift, and then push, toward active case management in U.S. district courts began before 1978.<sup>20</sup> But the message to district courts favoring case management and trial avoidance around 1978 was particularly strong.<sup>21</sup> At a program for newly-appointed judges, Judge Hubert Will of Chicago told his colleagues not to think of themselves as “skilled referees who . . . step into the ring when the lawyer combatants said they were ready to fight,” for that will not “produce the highest quality of justice in the shortest possible time at the lowest cost.”<sup>22</sup> As Judge James Lawrence King put it, “[t]he philosophy of case-flow management presented here is one of *active judicial control*.”<sup>23</sup> Judge William Schwarzer “urge[d] that judges intervene in civil litigation and take an appropriately active part in its management from the beginning.”<sup>24</sup> “[J]ustice is not better served,” Judge Schwarzer emphasized, “by the passive judge who by inaction permits litigation to blunder along its costly way toward exhaustion of the litigants, when it might have long been settled or at least controlled to everyone’s benefit.”<sup>25</sup> Dean Edward

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plan confirmation process. Richard F. Broude, *Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative*, 39 BUS. LAW. 441, 442–43 (1984).

18. See Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 608 (2001) (discussing a judge’s duty to identify inefficient behavior).

19. Decision avoidance also averts, at least facially, questions about whether bankruptcy courts have too much policy discretion relative to, say, regulatory agencies. See Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 388 (2012).

20. Resolutions Adopted at the Seminar on Protracted Cases, 23 F.R.D. 614, 614–15 (1958) (judges should “at the earliest moment take *actual control* of the case and rigorously exercise such *control* throughout the proceedings in such case”).

21. See Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 261 (1986) (discussing judicial ethos in 1970s and 1980s).

22. Hubert L. Will, *Judicial Responsibility for the Disposition of Litigation*, 75 F.R.D. 89, 121 (1976); *id.* at 124–25 (1976) (“You don’t run a deep freeze locker. You run a court of justice, and you should not have any cases that are in the deep freeze.”).

23. James Lawrence King, *Management of Civil Case Flow from Filing to Disposition*, 75 F.R.D. 89, 166 (1976) (emphasis added).

24. William W. Schwarzer, *Managing Civil Litigation: The Trial Judge’s Role*, 61 JUDICATURE 400, 402 (1978).

25. *Id.* at 404; see also Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770 (1981) (deeming early intervention as “pretrial manager” indispensable to staying on top of case volume); Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Deter-*

Levi summarized the 1979 Pound Conference as reflecting a shift in the judiciary from dispute resolution to problem solving.<sup>26</sup> Chief Justice Burger, sitting atop the judicial hierarchy, promoted active management to keep apace of the “litigation explosion.”<sup>27</sup>

Article III judges were not uniformly enthusiastic about active case management and departures from adjudicative responsibilities.<sup>28</sup> Case management skeptics abound in the legal academy.<sup>29</sup> Whatever the merits, the managerial revolution is a framework for understanding bankruptcy judging.<sup>30</sup> If you doubt this account, visit district courts and watch their motion calendars in civil actions. The lawyers likely will be expected to explain where things stand in resolving the dispute without a trial. The judges’ responses likely will be calibrated to trial avoidance as a goal.

### B. *The Rise and Fall of the Umpire-Only Bankruptcy Judge*

As I explain below, Congress told bankruptcy judges in 1978 to limit themselves to adjudication of disputes. Today, bankruptcy judges hold more evidentiary hearings than district or magistrate judges.<sup>31</sup> If one includes senior judges and magistrates in the district court head count, bankruptcy judges log, on average, more time in courtrooms than district judges.<sup>32</sup> Does that mean that bankruptcy judges are predominantly umpires, subject to the limits of cases like *Stern*, *Arkison*, *Wellness International*, and whatever challenges come next? No.

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*mination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 136, 136 (1978) (“The judicial role is not a passive one.”), cited in COMM. ON COURT ADMIN. & CASE MGMT., JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 5–6 (2d ed. 2010)).

26. Edward H. Levi, *The Business of Courts: A Summary and a Sense of Perspective*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 269, 270–71 (A. Leo Levin & Russell R. Wheeler eds., 1979).

27. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275–76 (1982) (noting litigation explosion and the “plaintive cry of many frustrated litigants,” and availability of “tools and techniques ready and waiting” to be used to lessen the burden of litigation). See generally Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 901 n.72 (1999).

28. See, e.g., Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 264–70 (1980).

29. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 414–26 (1982) (providing foundational critique of movement favoring case management).

30. Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 657–58 (2008) (characterizing bankruptcy judges as “exemplars” of managerial judging).

31. Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, *The Norman Shachoy Lecture*, 53 VILL. L. REV. 771, 798 fig.25 (2008).

32. REBECCA N. EYRE ET AL., FED. JUDICIAL CTR., THE USE OF COURTROOMS IN U.S. BANKRUPTCY COURTS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION & CASE MANAGEMENT viii (2010); FED. JUDICIAL CTR., THE USE OF COURTROOMS IN U.S. DISTRICT COURTS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION & CASE MANAGEMENT 2 (2008). For an older study of bankruptcy judge time allocation, see Gordon Bermant et al., *A Day in the Life: The Federal Judicial Center's 1988-1989 Bankruptcy Court Time Study*, 65 AM. BANKR. L. J. 491 (1991).

The shorthand bankruptcy court oversight history is usually told along the following lines. As the middle link in a chain of patronage, bankruptcy referees were appointees of friendly district court judges,<sup>33</sup> and appointers of case trustees who also were parties in litigation.<sup>34</sup> Descriptions like “bankruptcy ring” and “patronage” shaded the reputation of the bankruptcy system and the practice of bankruptcy law.<sup>35</sup> Referees’ nonadversarial activities exposed them to unfiltered information.<sup>36</sup> Referees helped debtors negotiate contracts, and even gave them business advice.<sup>37</sup>

Federal court scholars have seen district courts’ own flexible oversight of equity receiverships and bankruptcies as a precursor to the roles judges play in structural reform litigation (school desegregation, prison reform).<sup>38</sup> Bankruptcy scholarship occasionally has commented on the connection as well.<sup>39</sup> Thus, the nature of bankruptcy plus the structure of the former court system have contributed to the perception that bankruptcy entails considerable nonadjudicative work.

In 1973, the Federal Rules of Bankruptcy Procedure conferred on referees the title of “judge,” and relieved them of some duties.<sup>40</sup> In 1978,

33. DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 160 (1971).

34. H.R. REP. NO. 95-595, at 89-90 (1977).

35. *Id.* at 93-95.

36. Frank R. Kennedy, *Restructuring Bankruptcy Administration: The Proposals of the Commission on Bankruptcy Laws*, 30 *BUS. LAW.* 399, 400-01 (1975); George M. Treister, *Bankruptcy Jurisdiction: Is it Too Summary?*, 39 *S. CAL. L. REV.* 78, 86-88 (1966).

37. H.R. REP. NO. 95-595, *supra* note 34, at 90.

38. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 9-10 (1978) (“Antecedents of these [structural injunction] decrees might be found in the railroad reorganizations at the turn of the century . . . [b]ut it was school desegregation, I maintain, that gave these types of injunctions their contemporary saliency and legitimacy . . .”) (footnote omitted); A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, in *THE POUND CONFERENCE*, *supra* note 26, at 87, 107 (linking judicial techniques in railroad receiverships and prison restructuring); Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 *LAW & SOC’Y REV.* 371, 404, 406 (1980) (identifying railroad and corporate restructurings as predecessors to structural decrees); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 *HARV. L. REV.* 465, 485-86 (1980) (“Bankruptcy administration requires the courts to play two roles. . . . It is worth stressing that courts routinely handle such difficult reorganization cases, passing on aspects of financial structure that are unlikely to be second nature to most judges. They struggle through with a little help from the briefs, but at least since the 1930’s there have not been many suggestions that judicial supervision of these complex financial transactions is illegitimate.”); *see also* DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 46 (1977) (discussing similarities in challenges in determining social facts among corporate bankruptcy cases and institutional reform litigation); Jeb Barnes, *In Defense of Asbestos Tort Litigation: Rethinking Legal Process Analysis in a World of Uncertainty, Second Bests, and Shared Policy-Making Responsibility*, 34 *LAW & SOC. INQUIRY* 5, 9 (2009) (comparing judge’s role in structural injunction to role in bankruptcy); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 *GEO. L.J.* 1355, 1377-78, 1384 n.146, 1432 n.402, 1414, 1432, 1443 (1991) (building on common attributes of prison reform and contemporary corporate bankruptcy cases).

39. Christopher W. Frost, *Bankruptcy Redistributive Policies and the Limits of the Judicial Process*, 74 *N.C. L. REV.* 75, 129, 133 (1995) (arguing bankruptcy judges should not weigh social and policy factors, comparing bankruptcies to institutional reform litigation); Janger, *supra* note 18, at 580-81 (analogizing critiques of nonadversarial judging in bankruptcy to debates over institutional reform litigation).

40. Douglas R. Rendleman, *Bankruptcy Revision: Procedure and Process*, 53 *N.C. L. REV.* 1197, 1214 (1975).

Congress more substantially offloaded referees' administrative tasks to a pilot program in the U.S. Department of Justice.<sup>41</sup> The goal was to reduce judicial involvement in the nuts and bolts of restructuring and their stakes in the success of the case:

As the . . . individual responsible for the supervision of the trustee or debtor in possession, it is an easy matter for a bankruptcy judge to feel personally responsible for the success or failure of a case. Bankruptcy judges frequently view a case as "my case." The institutional bias thus generated magnifies the likelihood of unfair decisions in the bankruptcy court, and has caused at least one occasional bankruptcy practitioner to suggest that "the bankruptcy court is the only court I appear in in which the judge is an interested party". . . . It is in these [business reorganization] cases in which the judge's personal responsibility for the success or failure of a case is intense, with the consequent appearance of bias in the judge's consideration of disputes that arise in the case.<sup>42</sup>

The legislative history is full of such references to the umpire-only bankruptcy judging aspiration.<sup>43</sup> Lawyer J. Ronald Trost captured the theme with these remarks:

Until an appropriate pleading is filed the court's only function with respect to the operation of the business should be to change the composition of the creditors' committee if it is not representative. The bankruptcy judge should not worry about "how's the business doing?" The judge's job is to decide disputes. Although this may

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41. DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA*, 132 (2001).

42. H.R. REP. NO. 95-595, *supra* note 34, at 91.

43. ROBERT M. UJEVICH, CONG. RESEARCH SERV., REPORT NO. 80-225A, SECTIONAL ANALYSIS OF THE MAJOR PROVISIONS AND PRINCIPAL OPERATIVE CHAPTERS OF THE BANKRUPTCY REFORM ACT OF 1978 (Pub. L. No. 95-598, 92 Stat. 2549, codified as 11 U.S.C.) 4 (1980) ("Some of the reasons [for an overhaul] included . . . 2) bankruptcy judges, under the act, have to take an active role in supervising and administering a bankruptcy case. No matter how fair a bankruptcy judge is, his statutory duties give him a certain bias in a case, and the bankruptcy court as a result has been viewed by many as an unfair forum."); H.R. REP. NO. 95-595, *supra* note 34, at 4 ("The bill removes many of the supervisory functions from the judge in the first instance . . . and involves the judge only when a dispute arises."); *Bankruptcy Court Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. of the Judiciary on H.R. 8200 Supplementary Hearings on Courts and Administrative Structure for Bankruptcy Cases*, 95th Cong. 115 (1977) (Statement of Judge Wesley E. Brown, Chairman, Judicial Conference Ad Hoc Comm. on Bankruptcy Legislation) ("The bankruptcy judge would then be free, as a judicial officer, to concentrate on the resolution of controversies . . ."); *Markup Session, H.R. 8200, the Bankruptcy Reform Act of 1978, Before the H. Comm. on the Judiciary*, 95th Cong. 20 (1977); *Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary on H.R. 31 and H.R. 32*, 94th Cong. 401 (1976) (reprinting Peter F. Coogan et. al., *Comments on Some Reorganization Provisions of the Pending Bankruptcy Bills*, 30 Bus. Law. 1149, 1151 (1975)) ("Nearly all bankruptcy students agree that the present combination in the bankruptcy judge of dispute-deciding and 'administrative,' 'ministerial,' or 'nondispute-deciding' functions is unhealthy."); *Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional rights of the H. Comm. on the Judiciary on H.R. 31 and H.R. 32*, 94th Cong. 1023 (1976) (Statement of Walter W. Vaughan on Behalf of Am. Bankers Ass'n and the Consumer Bankers Ass'n) ("The Commission has been highly critical of the present involvement of Bankruptcy Judges in the administrative detail of bankruptcy proceedings in which they may be expected to from time to time adjudicate the rights of litigants. At best, such a dual function creates an impression of impropriety as well as suspicion that parties will not receive a fair hearing.").



mean that assets will be dissipated in some operating cases because of the lack of interest or experience of the administrative personnel, the social costs of preventing such occurrences—the *ex parte* involvement of the bankruptcy judge in the administrative details of the case—is simply too great.<sup>44</sup>

Again, this message came at a time when the judiciary told district courts the opposite: to be more active, more hands-on.<sup>45</sup>

The pressures prompting the managerial judging revolution in district courts would apply in spades to chapter 11. Cases were not going to move along at an acceptable clip without oversight, especially given the significant control conferred on debtor management by the 1978 Code.<sup>46</sup> Commentators in the legal academy complained about the length and cost of chapter 11, and questioned whether a mandatory corporate reorganization regime should exist at all.<sup>47</sup> Rigorous case management would have offered at least a partial response, as large chapter 11 cases bear similarities to many complex district court cases.<sup>48</sup> As Judge Samuel Bufford later wrote, “Chapter 11 bankruptcy cases will drag on interminably if we judges let them.”<sup>49</sup> The writings of legal academics in the 1980s and 1990s generally did not draw a connection between protracted chapter 11 cases and managerial techniques.<sup>50</sup> But judges did in real life.<sup>51</sup>

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44. J. Ronald Trost, *Business Reorganizations Under Chapter 11 of the New Bankruptcy Code*, 34 BUS. LAW. 1309, 1316 (1979).

45. See *supra* Part III.A.

46. Lynn M. LoPucki, *The Debtor in Full Control — Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 AM. BANKR. L.J. 247, 249 n.83 (1983) [hereinafter LoPucki, *Debtor in Full Control*] (discussing lack of certainty among judges as to oversight authority absent specific requests); *id.* at 272 (concluding from one-district study that chapter 11 debtors not constrained by creditors); Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 WIS. L. REV. 729, 745 (duration of case more than doubled for smaller companies under 1978 law); Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 693, 705 (1993) (discussing deference to debtor management). Seeing chapter 11 practice differently from LoPucki, Rich Levin worried that bankruptcy judges still felt responsible for the overall case notwithstanding the cleavage of responsibilities in 1978. See Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 968 (1993). Levin did not cite examples of this assumption of responsibility, however, and he also recognized that the Bankruptcy Code continued to give judges tasks that were not purely adversarial. *Id.* The uncertainty between the U.S. Supreme Court’s *Northern Pipeline* decision and Judicial Code amendments in 1984 also could have affected judges’ styles. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

47. E.g., Barry E. Adler, *Bankruptcy and Risk Allocation*, 77 CORNELL L. REV. 439, 489 (1992); Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 127–28 (1986).

48. See *supra* notes 38–39 and accompanying text.

49. Samuel L. Bufford, *Chapter 11 Case Management and Delay Reduction: An Empirical Study*, 4 AM. BANKR. INST. L. REV. 85, 85 (1996).

50. A notable exception is Ayer, *supra* note 4, at 331–32 (“Judges, as a matter of practice, if not necessity, are universally involved in the management of court dockets which imposes attendant responsibilities for administration. The difficulties facing the bankruptcy system in this regard may be more complicated because of the nature of the system, but it is not at all obvious that they are differences, in kind.”) (footnote omitted); see also John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 395–98 (1986).

51. Judge Lisa Hill Fenning was perhaps the most forceful in her published writings about the power of judges to respond to the problems that prompted some academics to propose repeal of chapter 11. Lisa Hill Fenning, *The Future of Chapter 11: One View from the Bench*, in 1993 ANN. SURV. BANKR. L. 113, 114–15 (William L. Norton, Jr. ed., 1993) (predicting convergence of bankruptcy and

For example, Judge A. Thomas Small of North Carolina initiated a fast track for small business restructurings in 1987, inspiring other judges to experiment with and publish articles about active case control.<sup>52</sup> Bankruptcy courts issued opinions grappling with levels of oversight, seeking to avoid being too passive but also too interventionist.<sup>53</sup> By the mid-1990s, a survey of bankruptcy judges “indicated clear and significant support for managerial judging” and they “appear to have accepted that managerial judging can improve the bankruptcy process.”<sup>54</sup>

In 1994, Congress expressly endorsed the use of status conferences and scheduling orders—stock fare for case management—in bankruptcy cases.<sup>55</sup> But statutory change should not capture all the credit for judges’ re-embrace of nonumpireal responsibilities.<sup>56</sup> Attitudes changed more than statutes.<sup>57</sup>

The chorus of earlier academic complaints about chapter 11’s inefficiencies largely subsided by the 2000s.<sup>58</sup> Updated empirical studies re-

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district court case management methods in the twenty-first century); Lisa Hill Fenning, *Judicial Case Management Is No Hostile Takeover*, 15 AM. BANKR. INST. J., 35, 35 (1996) [hereinafter Fenning, *Judicial Case Management*]; Lisa Hill Fenning, *Business Management: The Heart of Chapter 11*, 15 AM. BANKR. INST. J., 35, 38 (1996). Although Fenning’s definition of case management is broad, she made the connection in real time between the managerial judging movement in the federal district court and the law and economics corporate bankruptcy scholarship.

52. Bufford, *supra* note 49, at 85 (finding from a systematic study that modest case management significantly shortened the time between filing to confirmation for viable cases, and to dismissal or conversion for nonviable cases); Fenning, *Judicial Case Management*, *supra* note 51, at 35 (employing a broad definition of case management and advocating its use); Randall J. Newsome, *Vanishing Trials—What’s the Fuss All About?*, 79 AM. BANKR. L.J. 973, 977 (2005); A. Thomas Small, *Small Business Bankruptcy Cases*, 1 AM. BANKR. INST. L. REV. 305, 307–11 (1993) (discussing fast-track management-intensive chapter 11).

53. *In re Great Am. Pyramid Joint Venture*, 144 B.R. 780, 790 (Bankr. W.D. Tenn. 1992) (“[A] bankruptcy judge still has the responsibility and inherent duty and power to control its dockets to see to the efficient and effective administration of the bankruptcy system . . . .”); *In re UNR Indus., Inc.*, 72 B.R. 789, 794 (Bankr. N.D. Ill. 1987) (“Although Congress intended to remove case administration away from the bankruptcy judge this does not mean, however, that the bankruptcy judge should bury his head in the sand when confronted with a case which does not appear to be making any significant movement. The bankruptcy judge still has the responsibility to manage his cases and to move them toward a point of resolution in such a way as to promote fairness to all parties.”).

54. Stacy Kleiner Humphries & Robert L. R. Munden, *Painting a Self-Portrait: A Look at the Composition and Style of the Bankruptcy Bench*, 14 BANKR. DEV. J. 73, 105 (1997); *id.* at 96 (“[A] substantial majority of respondents engage in some form of active case management.”). The authors found that judges used hearings on specific matters to get progress reports on the case as a whole. *Id.* at 87.

55. 11 U.S.C. § 105(d) (2012) (stating that judges should hold status conferences as necessary in bankruptcy cases; listing illustrative examples for which chapter 11 scheduling orders would be appropriate).

56. See Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401 (2006) [hereinafter Jacoby, *Fast, Cheap*]; Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169 (2005) [hereinafter Jacoby, *Ripple*].

57. Many substantive oversight tools on which judges would draw were present since at least 1978. See, e.g., Henry T. C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1373 (2007) (reviewing court and creditor governance tools embedded in structure of modern chapter 11).

58. Jacoby, *Fast, Cheap*, *supra* note 56, at 401.

vealed efficient processing of chapter 11.<sup>59</sup> Originally skeptical about the role of judges in restructuring, law and economics scholars lauded judges' ability to sort viable and nonviable cases and track them accordingly.<sup>60</sup> Case management techniques that might have contributed to those findings were "old hat" to district judges by the time the bankruptcy courts adopted them.<sup>61</sup>

ABI Commission proposals likely will assume the continuation of active case management in Chapter 11. Yet, lawyers know very well that judges vary in their enthusiasm for the techniques. In addition, the non-adversarial methods judges might use to oversee cases go beyond case management and sometimes are in tension with the goals of case management. For example, bankruptcy judges face conflicting messages on whether to conduct an independent evaluation of some issues even in the absence of party objection.

#### IV. THE INDEPENDENT DUTY QUESTION IN BANKRUPTCY (AND BEYOND)

One of the most important problems in the material on bankruptcy procedure is the issue of the independent responsibility of the bankruptcy judge. How far should the judge be permitted to act "on his own?" To what extent, if at all, should the bankruptcy judge have the power or the duty to do something that no party wants him to do? On this important issue, the drafters gave little, if any, guidance. Such a failure reflects more than a mere drafting error. It indicates that the drafters did not wish to commit themselves.<sup>62</sup>

Professor Ayer published this quote nearly thirty years ago. Congress has nibbled on the edges of the problem, but the basic tension remains alive. Consider the following example.

At least when it was not shut down for mechanical difficulties, the Las Vegas Monorail ("LMVC") ran across a portion of its namesake city starting in 2004.<sup>63</sup> The not-for-profit corporation that built and owned it, LMVC, filed for chapter 11 in 2010.<sup>64</sup> The parties clashed for months, in-

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59. Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J.L. & ECON. 381, 411 (2007); Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 627-30 (2009).

60. Douglas G. Baird & Anthony J. Casey, *No Exit? Withdrawal Rights and the Law of Corporate Reorganizations*, 113 COLUM. L. REV. 1, 8 n.29 (2013) (citing Morrison, *supra* note 59, at 411). Cf. Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 126-27 (1984) (criticizing judges' bias against secured creditors and judges' belief that firms can be rehabilitated and that markets systematically undervalue bankrupt firms, opining that judicial valuations of firms turn out to be "wildly inflated").

61. Newsome, *supra* note 52, at 977.

62. Ayer, *supra* note 4, at 329.

63. *Route Map*, LAS VEGAS MONORAIL, available at [http://www.lvmonorail.com/wp-content/themes/twentythirteen-child/images/MonorailMap\\_2014.pdf](http://www.lvmonorail.com/wp-content/themes/twentythirteen-child/images/MonorailMap_2014.pdf) (last visited Oct. 27, 2014).

64. *In re Las Vegas Monorail Co.*, 429 B.R. 770, 774 (Bankr. D. Nev. 2010).

cluding over whether LVMC was eligible for chapter 11 at all.<sup>65</sup> Yet, ultimately, a restructuring plan emerged with substantial creditor support.<sup>66</sup> As the bankruptcy court reported, “[m]ore than 97% of the bondholders voting, who collectively hold over 92% of the principal amount of LVMC’s bonds, voted in favor of the plan.”<sup>67</sup> Other objections were resolved or settled.<sup>68</sup>

In some courtrooms, and in some cases, that level of support following earlier acrimony would itself have prompted smooth sailing toward confirmation. A judge would have waved the restructuring onward, mission accomplished, handshakes, and congratulations all around. But not here.

Taking a step back to review the law, bankruptcy plans require a judicial confirmation order to be legally enforceable.<sup>69</sup> The order must include a finding related to the feasibility of the plan, with the precise standard varying depending on the type of bankruptcy.<sup>70</sup> In chapters 12 and 13, for family farmers and individuals with regular income, the statutory standard reads as a one hundred percent guarantee: “the debtor *will* be able to make all payments under the plan.”<sup>71</sup> Chapter 9, for municipalities, actually uses the word “feasible.”<sup>72</sup> Under the 1978 Bankruptcy Code, it is the only chapter to do so. The standard in chapter 11, and thus at issue in LVMC, is a matter of probability: “[c]onfirmation of the plan is not *likely* to be followed” by another bankruptcy or piecemeal liquidation.<sup>73</sup> The judge in LVMC saw a high likelihood of failure. He had asked for more information prior to the confirmation hearing about how a \$38 million shortfall would be addressed, but no one could explain.<sup>74</sup>

The court denied confirmation of the LVMC plan.<sup>75</sup> Citing many sources and Bankruptcy Code language, the decision explains that creditor consent does not override the statutory requirements; in particular, creditors cannot negotiate away the issue of whether confirmation is likely to be followed by the need for further restructuring.<sup>76</sup> The testimony

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65. The court held that it was not a municipality and thus could be in chapter 11. *Id.* at 800 (rejecting Ambac challenge).

66. *In re Las Vegas Monorail Co.*, 462 B.R. 795, 798 (Bankr. D. Nev. 2011).

67. *Id.*

68. *Id.*

69. 11 U.S.C. §§ 1129, 1225(b)(2)(c), 1325 (2012).

70. *Id.* §§ 1129, 1225, 1325.

71. *Id.* §§ 1225(a)(6), 1325(a)(6) (emphasis added).

72. *Id.* § 943(b)(7) (“The court shall confirm the plan if . . . (7) the plan is in the best interests of creditors and is feasible.”).

73. *Id.* § 1129(a)(11) (emphasis added). *United States v. Energy Resources Co., Inc.*, a 1990 chapter 11 case best known for its tax implications, misdescribed the standard, saying that “the [Bankruptcy] Code . . . requires a bankruptcy court to *assure itself* that reorganization *will* succeed . . . .” *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990) (emphasis added). The language came from then-Judge Stephen Breyer’s First Circuit decision. *I.R.S. v. Energy Res. Co., Inc.* (*In re Energy Res. Co., Inc.*), 871 F.2d 223, 231 (1st Cir. 1989), *aff’d sub nom. Energy Res. Co.*, 495 U.S. at 545.

74. *In re Las Vegas Monorail Co.*, 462 B.R. 795, 798 n.3 (Bankr. D. Nev. 2011).

75. *Id.* at 804.

76. *Id.* at 798, 803.

offered to support the plan's feasibility was too highly conditional, so speculative that it could not even be built into the projections.<sup>77</sup>

Viewed *ex post*, the judge's rejection of the plan absent party objection to feasibility appears to have strengthened the viability of the restructuring. After denial of confirmation, LVMC and creditors renegotiated and presented an amended plan with far more manageable debt service.<sup>78</sup> The court confirmed it.<sup>79</sup> *Ex ante*, though, that result is not assured. Negotiations crumble, lines of financing run cold, cases fall apart.

The court's approach was consistent with the message in the Supreme Court's *Espinosa* decision that judges should right wrongs in plans even if no parties object.<sup>80</sup> Appellate courts have long urged that judges presiding over restructurings have independent duties.<sup>81</sup> Why, then, might other judges—perhaps many other judges—have approved a chapter 11 plan under similar circumstances? Some possible explanations:

\*The aforementioned case management imperative: the court has enough other cases without prolonging this one. Move the docket! Look ahead, not back!

\*The federal judiciary values consensus and compromise. The Bankruptcy Code does too. Parties with money on the line considered the dispute resolved, or at least were willing to kick the proverbial can down the road. Why not defer?<sup>82</sup>

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77. *Id.* at 804 n.14.

78. *In re Las Vegas Monorail Co.*, No. BK-S-10-10464-BAM, slip op. at 1–2 (Bankr. D. Nev. May 9, 2012). Among other changes, the ultimate plan lowered by nearly two-thirds the amount of debt, and reduced by half the interest rate on that debt. *Id.* at 2–3.

79. *In re Las Vegas Monorail Co.*, No. BK-S-10-10464-BAM slip op. at 2 (Bankr. D. Nev. May 21, 2012).

80. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 277, n.14 (2010) (explaining that the law “requires bankruptcy courts to address and correct a defect in a debtor’s proposed plan even if no creditor raises the issue”). Bankruptcy judges have cited *Espinosa*, a chapter 13 case, in chapter 11 cases as well. *In re Randi’s, Inc.*, 474 B.R. 783, 784 n.1 (Bankr. S.D. Ga. 2012); *In re Bridgeport Redevelopment, Inc.*, 465 B.R. 1, 4 (Bankr. D. Conn. 2012); *In re Donson*, 434 B.R. 471, 474 (Bankr. S.D. Tex. 2010).

81. *Williams v. Hibernia Nat’l Bank (In re Williams)*, 850 F.2d 250, 253 (5th Cir. 1988) (upholding bankruptcy court’s denial of plan confirmation); *In re Bos. & Providence R.R. Corp.*, 673 F.2d 11, 12 (1st Cir. 1982) (per curiam) (stating that in pre-Code railroad restructuring, that “supervising court must play a quasi-inquisitorial role, ensuring that all aspects of the reorganization are ‘fair and equitable.’ Before approving the compromise in this case, the court had a duty to apprise itself of all facts necessary for an intelligent and objective opinion of [the issues]. . . . It had the obligation to form an independent judgment of the complexity, expense, and likely duration of litigation, as well as any other factors relevant to a full and fair assessment of the wisdom of the compromise. Moreover, *Anderson* requires this analysis to be set forth on the record in sufficient detail that a reviewing court could distinguish it from ‘mere boilerplate approval’ of the trustee’s suggestions”) (citations omitted).

82. At a conference roundtable published in 2002, a bankruptcy judge explained:

I’m not sure I agree that the court in the United States has the “proper job” of deciding in advance that a company’s plan should not be confirmed if the creditors of an insolvent company want to give that company the opportunity to keep going forward. . . . [I]f they want to give the debtor the opportunity to stay in business and keep people employed, and keep paying into the tax base, then is it really my role to say “no, I don’t think you should have that opportunity?” Although I’d like to be omniscient, I’m not, and although I think I’ve confirmed some plans that are what I call the “wing and a prayer” theory, and a couple of them have tanked after the case, nonetheless, it has kept the economy going for a brief period. It hasn’t probably paid the pre-petition debts but it had been paying its post-petition debts.

\*Judges do not know all that transpires in negotiations behind closed doors. Perhaps the parties made significant concessions for not challenging the plan's feasibility? Without adversarial presentations, judges do not necessarily have the resources and infrastructure to challenge or explore it. Maybe the flaw in this particular plan was glaring.<sup>83</sup> Sometimes it is not.

\*The LVMC plan had a liquidation contingency option.<sup>84</sup> If the restructuring failed, the plan specified how to dismantle the debtor and distribute the proceeds. This backstop to an otherwise risky restructuring is acceptable to some judges.

\*A practical problem: if the debtor and creditors together appeal a court's ruling, who will represent the bankruptcy court's position in that appeal?<sup>85</sup> Outside of bankruptcy law, when Citigroup and the Securities and Exchange Commission appealed a district court rejection of their proposed consent decree, the Second Circuit appointed counsel to represent the district court.<sup>86</sup> Would district

*The Judge's Role in Insolvency Proceedings: The View from the Bench; The View from the Bar*, 10 AM. BANKR. INST. L. REV. 511, 559–60 (2002). When asked to characterize her function in plan confirmation in light of this description, the judge responded that she's "essentially rubber-stamping the fact that the creditors have decided that this is the means by which they want to deal with the debtor." *Id.* at 562.

83. Sometimes the judge does consider the plan's flaws to be obvious. In an earlier case, a district court affirmed the denial of confirmation of a plan about which the bankruptcy court said:

It's completely obvious to me, you don't have to talk about burden of proof, you don't have to talk about other evidence, you don't have to talk about anything. It's completely evident to me that this debtor would be incapable of paying [proposed amounts] in a reasonable time. That plan is so far out from being feasible, it is so unfeasible that there is no possible way that the Court can look at it and say, well, maybe they can do it, and therefore I shouldn't submit. I don't see any way in God's green Earth that this debtor can possible pay [proposed amount], make enough to live off and succeed in the plan. It just can't be done.

*Coones v. Mut. Life Ins. Co. of N.Y.*, 168 B.R. 247, 251 (D. Wyo. 1994).

84. *In re Las Vegas Monorail Co.*, 462 B.R. 795, 802–03 (Bankr. D. Nev. 2011).

85. Let us put aside questions of whether any particular appeal is interlocutory and focus on the practical problem. Another bankruptcy judge used verse to convey his reluctance to exercise the power to dismiss the chapter 7 case of an individual under section 707(b) of the Bankruptcy Code:

Could I? Should I? Sua sponte, grant my motion to dismiss?  
While it seemed the thing to do, suddenly I thought of this.  
Looking, looking towards the future and to what there was to see  
If my motion, it was granted and an appeal came to be,  
Who would be the appellee?  
Surely, it would not be me.  
Who would file, but pray tell me,  
a learned brief for the appellee  
The District Judge would not do so  
At least this much I do know.

*In re Love*, 61 B.R. 558, 559 (Bankr. S.D. Fla. 1986). Another judge incorrectly predicted that the mechanics of using section 707(b) *sua sponte* would be clarified in the Federal Rules of Bankruptcy Procedure. *In re Grant*, 51 B.R. 385, 393 (Bankr. N.D. Ohio 1985) ("The court is cast in a dual role, as the adducer of evidence, as well as the arbiter. The court trusts that the Supreme Court will soon prescribe rules which will address this problem, and provide the bankruptcy courts with sufficient guidance in the performance of this unique role.")

86. Judge Rakoff rejected the settlement and ordered a trial in *Securities & Exchange Commission v. Citigroup Global Markets, Inc.*, 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011). A motions panel of the Second Circuit stayed Judge Rakoff's order at the request of both of the parties, and assigned pro bono counsel to represent Judge Rakoff in the merits panel of the Second Circuit. *SEC v. Citigroup Global Mkts. Inc.*, 673 F.3d 158, 169 (2d Cir. 2012) (per curiam). Judge Rakoff's assigned counsel de-

courts and bankruptcy appellate panels do the same for a bankruptcy judge? Will lawyers represent the court pro bono?

\*Even if a *sua sponte* rejection seems sensible in the facts of a particular case, does this kind of involvement reduce the incentives of creditors to defend their own entitlements?<sup>87</sup> What is the effect on waiver and standing arguments? Two circuit courts have held that even if a creditor had received proper notice and failed to object to chapter 11 plan confirmation (and specifically regarding the absolute priority rule), the court's alleged independent duty to scrutinize the issue preserved the creditor's right on appeal to raise it.<sup>88</sup> If accepted more widely, such a conception could distort the process greatly. Reformers would do a great service by clarifying that any such duty does not preserve such issues on appeal.

Again, bankruptcy courts are neither unique in straddling the worlds of deals and litigation, nor alone in being foisted into the delicate position of policing a negotiated outcome under conflicting expectations. For example, Federal Rule of Civil Procedure 23 requires court approval for settlement of a class action.<sup>89</sup> District courts must closely scrutinize these settlements even if no one is objecting—and usually no one does.<sup>90</sup> In 1991, Professors Macey and Miller referred to fairness hearings as “pep rallies jointly orchestrated by plaintiffs’ counsel and defense counsel.”<sup>91</sup> Surely some chapter 11 confirmation hearings fit this description.

The U.S. Supreme Court has emphasized the importance of independent judicial oversight in limited-fund class actions. In *Ortiz*, the Supreme Court reversed a judge's approval of a mass tort settlement.<sup>92</sup> Resolution of the appeal had fractured the Fifth Circuit, with five judges outnumbered in their quest for en banc review.<sup>93</sup> The main concerns about the *Ortiz* settlement transcend the scope of this project, but the majority complained that the district court did not undertake an independent evaluation and too readily relied on the settlement estimate of potential insurance funds.<sup>94</sup> The Supreme Court justices worried about agency problems and conflicts of interest between subsets of class members and between class members and lawyers.<sup>95</sup>

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fended his position before the Second Circuit panel on February 8, 2013, and the Second Circuit recently held in favor of the parties. *SEC v. Citigroup Global Mkt. Inc.*, 752 F.3d 285, 298 (2d Cir. 2014).

87. Robert Martin, *Mediation-Schmediation—Let's Play Ball*, 16 AM. BANKR. INST. J. 34, 35 (1997).

88. Ala. Dep't of Econ. & Cmty. Affairs v. Lett (*In re Lett*), 632 F.3d 1216, 1227–28 (11th Cir. 2011); *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994).

89. FED. R. CIV. P. 23(e).

90. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, *FED. JUDICIAL CTR, MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 8* (2005).

91. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46 (1991).

92. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

93. *Id.* at 830 n.11.; *see In re Asbestos Litig.*, 101 F.3d 368, 369 (5th Cir. 1996) (Smith, J., dissenting in denial of rehearing en banc).

94. *Ortiz*, 527 U.S. at 851.

95. *Id.* at 852–53.

Appellate courts commonly label class action settling judges as “fiduciaries,” if not “guardians,” or agents,” for absent class members.<sup>96</sup> To justify ascribing such a label, Professor Sale has reasoned:

These cases are unique. They have specific procedural provisions for federal securities claims and derivatives claims. These features were designed to help curb agency problems and to increase the judicial role in combating them. In addition, the injuries in these cases, unlike mass torts, for example, are financial, and, therefore, sometimes receive less attention than they ought.<sup>97</sup>

Whether or not they are unique, the *Reynolds* case, a consumer finance class action, is instructive.<sup>98</sup> The defendant in *Reynolds* provided refund anticipation loans.<sup>99</sup> The parties reached a \$25 million settlement.<sup>100</sup> The Seventh Circuit overturned the district court’s approval on an abuse of discretion standard.<sup>101</sup> The Seventh Circuit could not find enough information in the record to determine if \$25 million was a reasonable amount.<sup>102</sup> The judge could have done much more, the Seventh Circuit reasoned, to determine a range of possible outcomes, and translate intuitions about the strength of the case and the range of damages.<sup>103</sup> The Seventh Circuit complained that the district court relied on figures not subject to sufficient scrutiny.<sup>104</sup> The panel identified a conflict of interest between plaintiffs who took out various numbers of refund anticipation loans for which the district court apparently did not account.<sup>105</sup>

The *Reynolds* decision declares that district courts have a “judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class.”<sup>106</sup> The exact language, from Judge Richard Posner:

We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.<sup>107</sup>

The panel recognized that the district judge had legitimate motivations for approving the settlement: “[t]he prospects for the class if the litiga-

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96. See, e.g., *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002); *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1053 (2002); Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 389–90 n.56 (2011).

97. Sale, *supra* note 96, at 380.

98. *Reynolds*, 288 F.3d at 277.

99. *Id.* at 280.

100. *Id.* at 281.

101. *Id.* at 286.

102. *Id.* at 280.

103. *Id.* at 284–85.

104. For example, the Seventh Circuit noted that the district court relied in part on an unsworn report by an accountant who was neither deposed nor subjected to cross-examination, and the judge did not discuss the adequacy of the methodology. *Id.* at 282.

105. *Id.*

106. *Id.* at 279.

107. *Id.* at 279–80.



tion continued were uncertain.”<sup>108</sup> But Judge Posner wanted the judge to have done much more.<sup>109</sup>

Such a class action and the average chapter 11 are hardly identical. Yet, the factors that discourage district judges from gazing deeply into and behind the terms of class action settlements are instructive. As noted in the chapter 11 context, substantive gatekeeping conflicts with system-wide managerial goals.<sup>110</sup> Uncovering problems that lead a court to reject a settlement increases the burden on the judge going forward.

Also, the fiduciary standard expressly instructs judges to deviate from neutrality, a well-conditioned judicial value. As Professors Koniak and Cohen posit, “[w]hat could seem more ‘neutral’ than accepting a settlement agreed to by both sides?”<sup>111</sup>

Moreover, what tools should judges use to undertake the expected independent review of class action settlements? Professor Erichson has discussed how pursuit of an independent inquiry into the merits of a mass tort settlement entails an “inquisitorial justice system” rather than adversarial judging—“by necessity and ad hoc innovation” rather than by explicit intent and architecture.<sup>112</sup>

In any event, the prevailing wisdom is that district court review of class actions generally falls below the circuit case law standard.<sup>113</sup> Herein lies another analogy to chapter 11: appellate courts provide aspirational instruction, while trial judges do what they can in the real world. Anyone seeking to reform either of these fields should give more attention to this dichotomy.

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108. *Id.* at 284.

109. *Id.* at 285 (“Still, much more could have been done here without (what is obviously to be avoided) turning the fairness hearing into a trial of the merits. For example, the judge could have insisted that the parties present evidence that would enable four possible outcomes to be estimated: call them high, medium, low, and zero. High might be in the billions of dollars, medium in the hundreds of millions, low in the tens of millions. Some approximate range of percentages, reflecting the probability of obtaining each of these outcomes in a trial (more likely a series of trials), might be estimated, and so a ballpark valuation derived.”).

110. *See, e.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 566 (1991); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1127 (1996); Leslie, *supra* note 96, at 1061–62; Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 53 (2003).

111. Koniak & Cohen, *supra* note 110, at 1127.

112. Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985 (1999); *see also* Jed S. Rakoff, *Are Settlements Sacrosanct?*, 37 LITIG. 15, 16 (2011) (discussing class action settlements and the expectation to inquire into their fairness without the tools to do so).

113. *See, e.g.*, S. ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 106, 152 (2000); Lisa L. Casey, *Reforming Securities Class Actions from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 BYU L. REV. 1239, 1276; James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497 (1997); Koniak & Cohen, *supra* note 110, at 1124; Leslie, *supra* note 96, at 1070; Sale, *supra* note 96, at 411–13. According to law professor Linda Mullenix, “the judge is involved to the extent of conferring a judicial imprimatur on a negotiated resolution of the mass claims” and in many courts, “the role of the judiciary is quite minimal; it serves as a kind of filing office for grievances, a brokerage house for structuring attorney committees, and a blessings-office for compromised claims.” Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 431 (1999).

## V. IMPLICATIONS FOR CHAPTER 11 REFORM

The ABI's draft proposals have been kept secret. I do not know what they are and thus cannot offer suggestions about the role of the judge in those contexts. The most I can offer is the reminder that reformers must pay close attention to the process and institutions through which those reforms would be filtered.<sup>114</sup> The judge and court are only part of that picture in chapter 11, but a part that cannot be overlooked. Reformers should identify what role they envision for judges in each context, and then equip judges with the tools to perform such tasks with legitimacy and competency.

Parts III and IV raised just two examples of judging that depart from the umpire as most traditionally construed, and also illustrate why one should not conceptualize those departures as deviant in today's federal court system. Some judges embrace nonumpire roles with particular vigor. Along with case management responsibilities and assumption of independent duties as discussed above, they may be particularly likely to employ inquisitorial techniques, engage in activities meant to enhance procedural justice, and build teams to whom they delegate oversight of aspects of the case in a flexible fashion. Others hew more closely to a traditional umpire. We cannot expect judges to handle situations identically. But we also cannot be surprised by variation in the absence of guidance and the presence of conflicting messages.

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114. Jacoby, *Ripple*, *supra* note 56, at 169–70.