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Lynn LoPucki

Professor Lynn LoPucki is a leading scholar in the areas of Bankruptcy, Information Law, Business Associations, and Commercial Law. His book, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2004) has ignited national debate on the issue of bankruptcy courts and has led to the introduction of a bill to correct this problem. Professor LoPucki is also co-author of two widely used casebooks: *SECURED CREDIT: A SYSTEMS APPROACH* (4th edition, with Elizabeth Warren, 2003) and *COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH* (with Warren, Keating, and Mann, 2nd edition, 2003). He has done extensive empirical research (with Whitford, Eisenberg, Kalin, and Doherty) on the bankruptcy reorganization of large, public companies and he maintains an extensive database on the subject. LoPucki's articles have stirred debates in the Yale, Stanford, Vanderbilt, and Michigan law reviews as well as in the popular press and professional publications.

Courting Failure:†

How Competition for Big Cases is Corrupting the Bankruptcy Courts

Excerpt from:

Lynn M. LoPucki*

In late 2001, the Enron Corporation was preparing to file what remains to this day the biggest bankruptcy case in history.¹ At the time, a half dozen or more United States Bankruptcy Courts were competing to attract big cases. For those courts, Enron was the ultimate prize. The court that got Enron would be the focus of the bankruptcy world's attention for years and distribute a billion dollars in professional fees.

Introduction

The stakes were especially high because big-case bankruptcy was booming. The number of large, public companies² filing bankruptcy in the United States had increased steadily from 15 in 1996 to 97 in 2001—a sixfold increase in just five years. The court that got Enron—and handled it to the satisfaction of the Enron lawyers and executives who chose the court—would get many more. The judge who presided would win national attention for him- or herself and, possibly, a billion-dollar-a-year or more bankruptcy reorganization industry for his or her city. It would be like winning the competition to host the Olympic Games—not just for a year, but every year—for as long as the court continued to please the lawyers and executives who could supply the cases.

The United States Bankruptcy Court for the District of Delaware was a major contender for the Enron case. Delaware had 41 new big-case filings in 2001, compared with runner-up New York's 15. But Delaware lacked the judges it needed to process the cases it had attracted already and the bankruptcy legislation that would have provided them was stalled in Congress. Delaware's lead in the competition for big cases remained vulnerable. Other courts, including Chicago, Houston, and Dallas, had—like New York—copied Delaware's practices and procedures and publicly declared themselves in competition with Delaware. But at the end of 2001, they remained minor players. Only Delaware and New York had more than five big cases that year.

This competition among the bankruptcy courts for big cases put Kenneth Lay, the founder and chairman of the board of the Enron Corporation, in the catbird seat. Lay would have his choice of courts for the Enron bankruptcy. If he chose wisely, the grateful court would protect him from cresting public outrage and, by so doing, make itself attractive to the corrupt or incompetent executives of future bankrupt firms.

Ken Lay was not a man who deserved protection. In 1999 and 2000, he had approved the Rhythms and Raptor transactions that resulted in gross misstatements of Enron's financial position.³ From 1998 to the day Enron filed bankruptcy in December 2001, Lay sold over \$200 million of his Enron stock.⁴ In the final year before bankruptcy, Lay was selling the stock to Enron itself, even though Enron's Board of Directors had not given the approval required by law for the corporation to make such purchases.⁵ As the evidence of Enron's impending failure mounted in the spring and early summer of 2001, Lay accelerated his stock "sales," taking \$24 million from the company for worthless stock in June and another \$16 million in August. In mid-August, 2001, as the end neared and he dumped his own stock at the rate of \$4 million a week, Lay issued his famous memo to Enron employees assuring them that "I have never felt better about the prospects for the company . . . Our performance has never been stronger; our business model has never been more robust; our growth has never been more certain . . ." ⁶ On October 17, 2001, the day after the Securities and Exchange Commission began the investigation that put the final nail in Enron's coffin, Enron "locked down" its retirement plan.⁷ The effect was to prevent the company's employees from selling the Enron stock in their 401(k) pension accounts.⁸ The stock was trading at \$32 when Enron imposed the lockdown; it was trading at \$9 when the lockdown ended 30 days later.⁹ During the lockdown, Lay sold an additional \$6 million of his own stock to Enron.¹⁰ Lay continued dumping the worthless stock on Enron to the very end, grabbing his last \$1 million on November 27, 2001¹¹—five days before Enron filed bankruptcy. Shareholders who kept their shares until the bankruptcy filing got nothing for them. Conveniently, Enron's auditors, Arthur Andersen, shredded many of the records that prosecutors would need to investigate Lay and Enron.¹² Lay refused to testify about any of what he had done, invoking his Fifth Amendment privilege against self incrimination.¹³

Ken Lay was a personal friend of the President of the United States and the President's largest campaign contributor. Until recently, the President had called him Kenny-Boy and sought his advice on energy policy. But as Kenny-Boy prepared to choose a bankruptcy court, the President was pretending not to know him. Employees who had lost their pensions were crowding the evening news, and Congress was gearing up to do something about the abuses in corporate America. In December 2001, the shareholders, the creditors, and the press were all at Enron's door. The investigators would be there soon. Kenny-Boy needed protection. He would find it in a bankruptcy court.

From Lay's perspective, the key was to retain control of Enron, if not personally, through others who owed their jobs—and so their allegiance—to him. As long as Lay, or others beholden to him, retained control of the company the investigators would deal with Enron from across the table.

What Lay probably feared more than anything else was that the bankruptcy court would appoint a trustee. A Chapter 11 trustee is a genuinely independent individual chosen by a division of the United States Department of Justice to take complete, direct control over the bankrupt company. If that happened, the trustee would employ the investigators, and the investigators would be inside. They would not be demanding documents in discovery and fighting about their right to access in court.¹⁴ They would control Enron's employees, attorneys, and accountants and have the full, free run of the files. Enron's lawyers would be required to divulge to the trustee everything Lay had told them—before and after the bankruptcy filing. The attorney-client privilege would no longer apply.¹⁵ Everything would come out.

Absent the bankruptcy court competition, a trustee probably would have been appointed in the opening days of the Enron bankruptcy. Bankruptcy law required the court to appoint a trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement by current management, either before or after the commencement of the case."¹⁶ If Enron didn't fit that bill, it was hard to imagine a company that would. Nor does a bankruptcy judge have to wait for someone to request the appointment of a trustee; the only federal appeals court to address the question ruled that if case warranted appointment of a trustee, the court could order that appointment even if no creditor requested it.¹⁷ Once Enron filed, all that would stand between Ken Lay and justice would be a judge of the bankruptcy court Lay had chosen.

Enron was a Houston, Texas company. The company's headquarters were a gleaming 50-story glass tower in downtown Houston known simply as the "Enron Building." That building was the center of the company's national and international operations, the office space for thousands of the company's employees, and the most widely recognized symbol of the company. The offices of Enron's top managers were on the fiftieth floor. Ken Lay's was among them.

The United States Bankruptcy Court for the Southern District of Texas, Houston, Texas Division was just seven blocks away. In an earlier time—before the rampant forum shopping of the 1980s—the Houston bankruptcy court would have owned the Enron case by virtue of geography. But in 2001, the Houston bankruptcy court was merely the most conveniently located of a half-dozen competitors for Enron's business.

The Houston bankruptcy court had joined the competition for big bankruptcy cases just two years earlier. It did so by copying the rules and procedures of the Delaware bankruptcy court and publicly announcing the judges' willingness to approve higher fees for bankruptcy lawyers who brought cases to the court.¹⁸ The Houston court's move had been only a modest success. The court had attracted no bankrupt companies from other cities in 2000 or 2001, but it had hung on to the bankruptcies of eight of the ten big Houston companies that filed bankruptcy

during that period. Considering that Delaware got almost half the big cases filed in the United States during those two years, Houston's 80 percent retention rate was not bad.

Enron spoiled the Houston court's record by choosing the United States Bankruptcy Court for the Southern District of New York, Manhattan Division. The New York court was more than 1,600 miles from Enron's headquarters, in a city where the company had almost no physical presence (57 employees worked for an Enron subsidiary in New York).¹⁹ But New York had other advantages.

One was that the New York bankruptcy court had more to gain—or lose—from Enron than did other courts. New York was home to many, if not most, of the country's leading bankruptcy professionals, which gave it an edge in attracting cases. Despite that natural advantage, the New York court had stumbled in the mid-1990s, allowing Delaware to take center stage. Only in 2000, after several years with almost no big cases, had the New York bankruptcy court's effort to attract cases begun to pay off. Although New York joined the competition at about the same time as Houston, New York had greater success. Enron was the fifteenth big case the New York court had attracted from other cities in 2000 and 2001. With Delaware short of judges and unable to manage its caseload, New York was positioned to once again become the bankruptcy capital of the United States.

Another reason Delaware was not a good choice for Enron was that one of the district judges there had recently appointed a trustee in a big case merely because the relationships among the parties had been acrimonious. The Third Circuit Court of Appeals had upheld the appointment, thus imposing on the Delaware bankruptcy court perhaps the most liberal standard for appointment of a trustee applicable anywhere in the United States.²⁰

New York bankruptcy judge Arthur J. Gonzalez drew the Enron case. From Ken Lay's perspective, Gonzalez performed splendidly. The creditors moved to transfer the case to Houston. Judge Gonzalez denied the motion.²¹ Several major creditors requested the appointment of a trustee.²² Gonzalez delayed a hearing until he brokered a deal that left most of Enron's management in place.²³ During the delay Ken Lay was able to choose Stephen Cooper as Enron's new CEO.²⁴ Because Cooper was a respected turnaround manager, the prospects for appointment of a trustee dimmed. The creditors soon gave up the fight. That meant that directors chosen by Ken Lay and in office long before the scandal broke remained in control of the company through the crucial stages of the bankruptcy case. They resigned only after they too had chosen their own successors.

As a result, the investigators remained on the outside for the duration of the Enron case. For a management engaged in massive fraud, it was the best bankruptcy result for which one could hope. The government took almost three years putting together a case sufficient to indict Lay. Lay has still not been sued for

his mismanagement of Enron, and it seems likely he never will be. The New York bankruptcy court had proven itself a trustworthy protector of managements accused of fraud.

The market reacted swiftly. By mid-2002 managements accused of fraud delivered three more corporate giants—Global Crossing, a supposedly Bermudan company actually run from Los Angeles; Adelphia Communications, a Coudersport, Pennsylvania company; and Worldcom, a Clinton, Mississippi company—to the New York bankruptcy court. The managers of all three were able to remain in control through the crucial stages of the cases and choose their own successors. By its deft handling of the four cases, the New York bankruptcy court surpassed Delaware in 2002 to become the nation's most attractive bankruptcy court.

The competition that broke out among the U.S. bankruptcy courts in the 1990s was the product of a complex set of laws, practices, and institutions. One must understand those laws, practices, and institutions to understand the competition, and so it is with them we begin.

*The Structure
of Bankruptcy
Court
Competition*

The U.S. government operates bankruptcy courts at about 200 locations throughout the United States. Each court consists of a "panel" of one or more bankruptcy judges and serves a specifically designated geographical area called a "district" or "division." Generally speaking, when a bankruptcy case is filed by or against a debtor located in the court's district or division, a judge from the panel hears the case.

Determining where a debtor is located can sometimes be difficult. This is particularly true for large, public companies that have operations throughout the United States. Such companies can be incorporated in one state, have their headquarters in another, and conduct the bulk of their operations in a third. A truly national company can be everywhere and thus nowhere in particular. To address the problem, Congress enacted a "venue" statute that specifies the appropriate court or courts based on characteristics of the debtor. ("Venue" is legal jargon for "place." A venue statute prescribes the places where cases should be heard.)

The venue statute that allowed the bankruptcy court competition to develop was initially written and adopted as a bankruptcy rule by the recently formed Bankruptcy Rules Committee in 1974. From 1974 to 1978, Congress comprehensively revised and codified the bankruptcy laws of the United States. In so doing, Congress incorporated the bankruptcy venue rule into the statute. The provisions so adopted would have surprising, unintended consequences in the 1980s and 1990s, as large public companies began filing bankruptcy cases in significant numbers and bankruptcy judgeships gained stature and became viable career paths. The bottom line, however, was that by the 1980s, large public companies were free to file their bankruptcies pretty much anywhere they chose.

For the law to offer a litigant a choice among courts is not particularly unusual. For many kinds of cases, the law gives the person filing the case a choice between filing in a state or federal court or a choice between filing in the court where the defendant resides or the court where the events in litigation occurred. The exercise of such choices is referred to as "forum shopping." The choice offered large companies under the 1974 rule and 1978 code revisions were, however, of an entirely different magnitude. These choices typically would be among dozens of courts, not just two or three. The revisions became part of the Bankruptcy Code enacted in 1978 and went into effect on October 1, 1979.

Through the 1980s, big bankrupt companies and their lawyers exercised their new powers of choice to pick courts that offered various advantages. About a third of the cases were filed in a court located somewhere other than where the company was headquartered. That forum shopping was not particularly alarming to those who managed the bankruptcy system. The bankruptcy courts, laws, and rules of procedure are all federal. Theoretically, at least, they are the same throughout the United States. Forum shoppers certainly could gain some advantage by their choices, the system managers thought, but not much.

*The Competition
Emerges*

Beginning in 1990, the bankruptcy forum shopping produced an unexpected dynamic. That year, the single-judge backwater bankruptcy court in Wilmington, Delaware began attracting corporate giants. Within six years, nearly 90 percent of all large public companies filing bankruptcy in the United States filed in Delaware. The sudden change surprised and alarmed bankruptcy lawyers and judges throughout the United States—and federal policymakers.

In 1997, the National Bankruptcy Review Commission recommended elimination of the venue provision the big companies were relying on to get to Delaware. Delaware's two determined senators, however, prevented the Commission's venue recommendation from coming to a vote in Congress. By the end of 1998, it was clear that Congress would take no action on bankruptcy venue. The bankruptcy system had accepted Delaware as its new leader.

Delaware's new bankruptcy industry came at the expense of bankruptcy lawyers practicing in major cities throughout the rest of the country. Those lawyers began pressing their local bankruptcy judges to respond to Delaware's competitive threat. Courts in several major cities modified their local rules and practices to compete for large public company bankruptcies.

This response to Delaware was possibly unprecedented. In other circumstances, courts have sometimes expressed views or made rulings that attracted cases. In the 1980s, for example, the liberal Texas state courts attracted the cases of workers

injured on North Sea Oil rigs. In the early 1990s, U.S. district judge Jack Weinstein attracted gun and tobacco plaintiffs from all over the United States to his court in Brooklyn. But those were merely situations in which judges expressed views that attracted cases. Judges were not changing their views in order to compete with other courts for cases.

Some of the changes that resulted from the bankruptcy court competition were for the better. Judges who had thought of themselves as emperors presiding over federally allotted domains suddenly found that they had to treat lawyers and litigants with courtesy and respect. If the judges didn't, the "customers" would go elsewhere. The judges became more responsive and accessible. They scheduled hearings for the convenience of the lawyers and litigants, not merely for their own. They published rules and guidelines explaining what they wanted from the lawyers, and they committed to what they would do in response. One effect was to make the bankruptcy reorganization process more predictable, generally to the benefit of everyone involved.

The pressures of competition did not, however, stop at the boundaries of propriety. The lawyers, corporate executives, banks, and investment bankers who chose the courts for their cases—the "case placers"—had the power to make winners or losers of the courts. The case placers wanted more money for themselves and freedom from the restrictions of bankruptcy law and procedure. In cities across the United States, they pressed the judges to see how much each judge was willing to give them.

Slowly, but surely, the entire bankruptcy system began shifting in response to the case placers' wishes. Professional fees, which had fallen sharply since the 1980s, began to increase. The courts relaxed conflict of interest standards and granted lawyers and financial advisers unprecedented releases and indemnification from liability for their own wrongdoing. The jobs of executives—including those who led their companies into financial disaster—became more secure, and the courts allowed their companies to pay their executives huge bonuses, supposedly to retain the failed executives' valuable services. Deals made among the case placers were sacrosanct, even if they violated the rights of other parties. Procedures designed to protect small investors and the public were abandoned.

Even before the nation's bankruptcy courts began emulating Delaware's reorganization methods, evidence of those methods' failure had begun to accumulate. Delaware-reorganized firms failed at rates substantially exceeding those for firms reorganized in other courts. The failures of individual firms were of course noticed, and efforts were made to explain them. But in the complex, sprawling world of big case bankruptcy, the pattern of failure—and in particular, Delaware's role—went unnoticed. When it finally came to light in the spring of 2000, the reaction was one of disbelief and denial. By then, the competition was so

far along in altering the practices of the bankruptcy courts and the attitudes of bankruptcy lawyers, judges, and academics, that it seemed impossible to turn back. As the evidence accumulated, however, it became increasingly evident that turning back was the only viable alternative.

*International
Bankruptcy
Court
Competition*

In the 1990s, the frequency and size of multinational bankruptcies also increased, with cases such as Bank of Credit and Commerce International (BCCI) and Maxwell Communications. The newly bankrupt giants discovered that the competing U.S. bankruptcy courts welcomed the cases of companies from anywhere on earth. Those in a position to place the cases of multinational companies generally preferred the U.S. courts because U.S. bankruptcy law permitted the debtor's executives to remain in control during bankruptcy. The laws of most other countries put creditors in control. From a Brazilian cable television company to a Greek shipping concern, multinational companies—and some foreign companies with virtually no connection to the United States—began filing their bankruptcies in the United States.

International forum shopping was, however, subject to a limitation not present in domestic shopping within the United States. Courts anywhere in the United States were bound by decisions of the Delaware bankruptcy court, but courts outside the United States were not. A Delaware bankruptcy court decision had only as much authority outside the United States as the courts of other countries were willing to give it. This sharply limited what the competing courts could accomplish for those who brought them the cases.

Coincidentally, an international reform movement that sought to remove that limitation was already well under way. "Universalists" were seeking to bind the nations of the world by treaty or model law to honor the decisions of the courts of a multinational debtor's "home country." In a universalist world, a multinational debtor's home country court would apply home country law to people and events all over the world. Other countries would pre-commit to honor the home country's decisions.

The universalists could not explain what they meant by a multinational's "home country," and it was apparent that, however the universalists defined that attribute, multinationals could easily change it. As a result, the growing universalist movement threatened to replicate the problems of domestic forum shopping and court competition on a global scale in a far less controlled environment.

*Why Do the
Judges
Compete?*

Most people are surprised to hear that bankruptcy judges want big cases. Bankruptcy judges are appointed for 14-year terms. The federal government pays each an annual salary of \$142,324 and, if they leave office after even a single 14-year term, a full federal pension. Attracting big cases changes neither the salary nor

the pension. The judges who attract the cases generally end up with heavier caseloads than those who do not. Big cases mean more work.

Not all judges do want the cases. Those who do, want them for any of four reasons. The most obvious are personal. A judge who presides over the reorganizations of large, public companies has the opportunity to work with the leading professionals in the fields of bankruptcy and finance. When the judge does so, the judge is the most powerful person in the room. Millions and sometimes even billions of dollars turn on his or her decision. The status that power confers extends beyond the courtroom.

Celebrity comes along with the power. The judges' decisions are reported in the media. Judges in the biggest cases have standing invitations from professional organizations to travel to resort cities at the organizations' expense to give speeches and be honored. If they return to law practice, which many do, clients with big cases will seek them out. When a bankruptcy judge dies, the obituary will likely mention the big cases over which the judge presided—assuming, of course, there were any.

The most important reasons that the judges want the big cases, however, are somewhat more subtle. Each bankruptcy judge is a member of a community. In any large city in the United States, there are 100 or more lawyers and other professionals specializing in bankruptcy practice. Those professionals interact daily as they resolve cases in the local bankruptcy court. The professionals in a city typically form an association that meets regularly for lunch and occasionally for multiday conferences. Many of the members become close friends.

When a bankruptcy judgeship becomes available, the community seeks to install one of its own. More often than not, the effort succeeds. As with any position of leadership, the one chosen incurs a debt to his or her supports. Those supporters expect a certain amount of loyalty. If a judge forgets how he or she got the job, the judge will be reminded if and when the judge seeks a second term. The committee that passes on reappointments will probably survey the members of the local bankruptcy bar regarding the quality of the judge's prior service.²⁵ A recent study found that more than 8 percent of the bankruptcy judges who applied for reappointment during the period 1998 to 2002 were not reappointed.²⁶ Others won reappointment, but only after their competence had been challenged and they had been "put through the wringer."²⁷

For bankruptcy professionals, bankruptcy venue is a bread-and-butter issue. If a big St. Louis company—such as TWA, Purina Mills, or Solutia—files in St. Louis, leading St. Louis bankruptcy lawyers are likely to get the key roles in the case and the big fees that come with them. If the case is big enough, virtually every bankruptcy lawyer in St. Louis will have a client. If instead the company files in some

other city, bankruptcy lawyers in that city will get most of the work and the money. If most of the cases from a city go elsewhere, the career prospects in that city may be limited. And if the lawyers in a city view their judges as the cause of that problem, things can get ugly...

The process by which pressure to compete is brought to bear on the judges is brutal and intimidating. The lawyers who place cases are among the most powerful and prestigious of the bankruptcy bar. They publicly laud the judges who give them what they want and harshly criticize those who do not. Some of the latter become pariahs of the national bankruptcy bar—judges considered so bad they drive the cases away. Lawyers—and other judges—malign them as "toxic judges."

Forced to a simple choice between popularity and integrity, most judges would choose integrity, even under these conditions. But the choice is seldom presented so starkly. A judge can easily suppose him- or herself clever enough to achieve popularity and maintain integrity simultaneously. But the game is played over a long period of time and the pressure of competition is relentless. As the judges are put to choice after choice, the changes occur in increments, each too small to be recognized for the erosion of integrity it is. To corrupt the bankruptcy system, it was not necessary to corrupt all of the bankruptcy judges. Once a few judges succumbed, the cases flowed to them, rendering the remaining judges irrelevant. ❖

[†] Excerpt from *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS*, University of Michigan Press (2005).

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1. Court-approved professional fees in the Enron bankruptcy are expected to exceed \$1 billion, substantially more than those in Worldcom and any other case. *Enron fees to exceed \$1 billion*, UNITED PRESS INTERNATIONAL, November 14, 2003.

2. For explanations of "large" and "public" see A Note on the Statistics in *Courting Failure*.

3. Final Report of Neal Batson, Court-Appointed Examiner, Appendix D, filed Nov. 24, 2003, Docket No. 14455, at 51-52, In re Enron Corp., Case No. 01-16034 in the United States Bankruptcy Court for the Southern District of New York [hereafter "Final Report of Neal Batson, Appendix D"] ("The Board heard a presentation about the Rhythms transaction, and approved necessary components relating to the use of Enron stock, on June 28, 1999 at a specially called meeting. The board also ratified a determination by Enron's Office of the Chairman (meaning Lay and Skilling) under the company's Code of Ethics that Fastow's role as general partner of LJM1 would 'not adversely affect the interests of the company'"); *id.* at 68-69, ("The Finance Committee and full Board reviewed and approved the formation of Raptor I in May 2000. The Executive Committee approved the formation of Raptor II in June 2000, and the Finance Committee and the full Board approved the formation of Raptor IV in August 2000. . . . Lay and Skilling were present at each meeting and participated in explaining the transactions and they voted in favor the transactions").

4. Final Report of Neal Batson, Appendix D, *supra* note 3, at 28 ("During the four year period 1998 through 2001, Lay had gross proceeds of over \$209 million from Enron stock sales.").

5. Final Report of Neal Batson, Court-Appointed Examiner, Annex 1 to Appendix D, filed Nov. 24, 2003, Docket No. 14455, at 13, In re Enron Corp., Case No. 01-16034, in the United States Bankruptcy Court for the Southern District of New York [hereafter "Final Report of Neal Batson, Annex 1 to Appendix D"] ("Oregon law was clear at the time of these transactions: committees of the Board were not permitted to approve repurchases of company stock without specific authority from the Board. In this instance, that authority was apparently never granted to the Compensation Committee [that approved the repurchases].").

6. Peter C. Fusaro & Ross M. Miller, *WHAT WENT WRONG AT ENRON 207* (2002) (reproducing memo in full).

7. Theo Francis & Ellen Schultz, *Enron Faces Suits by 401(k) Plan Participants*, WALL STREET JOURNAL, Nov. 23, 2001 ("Amid growing disclosures of financial problems in recent weeks, the company 'locked down' the retirement plan from October 17 to Nov. 19 . . . which prevented employees from selling Enron shares as the share price collapsed.").

8. *Id.*

9. *New York Stock Exchange Composite Transactions*, WALL STREET JOURNAL, Oct. 18, 2001 (Enron Corp. [ENE] Closing Price of \$32.20 for October 17, 2001); *New York Stock Exchange Composite Transactions*, WALL STREET JOURNAL, Nov. 20, 2001 (Enron Corp. [ENE] Closing Price of \$9.06 for November 19, 2001).

10. Final Report of Neal Batson, Annex 1 to Appendix D, *supra* note 5, at 7.

11. Complaint to Avoid Certain Pre-Petition Loan and Annuity Transactions as Fraudulent Transfers, Docket No. 1, dated Jan. 31, 2003, In re Enron Corp. (The Official Committee of Unsecured Creditors of Enron Corp. v. Kenneth L. Lay and Linda P. Lay), Case No. 01-16034, Adversary No. 03-02075 in the United States Bankruptcy Court for the Southern District of New York.

12. Indictment, filed Mar. 7, 2002, Docket No. 1 at para. 13, United States v. Arthur Andersen, Case No. 02-121, in the United States District Court for the Southern District of Texas.

13. Final Report of Neal Batson, Appendix D, *supra* note 3 at 3-4.

14. Order Pursuant to 11 U.S.C. §§ 1104(c) and 1106(b) Directing Appointment of Enron Corp. Examiner, dated April 8, 2002, Docket No. 2838, In re Enron Corp., Case No. 01-16034, in the United States Bankruptcy Court for the Southern District of New York (reflecting compromise that gave examiner some information privileges, but left examiner an outsider in other respects).

15. *Commodities Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985) (holding trustee in bankruptcy to be the owner of the debtor's attorney-client privilege).

16. 11 U.S.C. § 1104(a)(1).

17. In re Bibo, Inc., 76 F.3d 256 (9th Cir. 1996) ("The statute plainly gives the bankruptcy judge authority to appoint a trustee in Chapter 11 proceedings [when no party has made a request].").

18. *Houston, We Know We Have a Problem (But We're Working on It!)*, BANKRUPTCY COURT DECISIONS NEWS AND COMMENT, February 8, 2000.

19. In re Enron Corp., 274 B.R. 327, 337 (Bankr. S.D.N.Y. 2002).

20. See also *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 469 (3rd Cir. 1998) ("The district court appointed Gibbons as trustee on December 22, 1997 . . ."); Transcript of Omnibus Hearing Before Honorable Mary F. Walrath United States Bankruptcy Judge, dated Feb. 12, 2002, Docket No. 1457, at 41, *In re Coram Healthcare*, Case No. 00-3299, in the United States Bankruptcy Court for the District of Delaware (later case in which a Delaware bankruptcy judge appointed a trustee pursuant to the *Marvel* standard).

21. *In re Enron Corp.*, *supra* note 19.

22. *E.g.*, Motion of Absolute Recovery Hedge Fund LP and Regents of the University of California for Order (i) Directing the Appointment of a Chapter 11 Trustee, (ii) Pending the Appointment of a Permanent Chapter 11 Trustee, Directing the Appointment of an Emergency "Gap" Trustee, and (iii) Directing the Debtors to Cooperate with the Trustee, dated Jan. 25, 2002, Docket No. 1125, *In re Enron Corporation*, Case No. 01-16034, in the United States Bankruptcy Court for the Southern District of New York; Motion of the Florida State Board of Administration for Order Appointing a Chapter 11 Trustee Pursuant to Section 1104 of the Bankruptcy Code, dated Feb. 14, 2002, Docket No. 1472, *In re Enron Corp.*, Case No. 01-16034, in the United States Bankruptcy Court for the Southern District of New York.

23. Memorandum from Entwistle & Cappucci LLP, to Our Institution Clients 2 (April 10, 2002) available at <http://www.entwistlelaw.com/news/institutional/enron/enrong.htm> (last visited August 8, 2004) ("After the FSBA filed its Trustee Motion, presiding Judge Arthur J. Gonzalez convened a conference call to facilitate discussions between the [parties]. At Judge Gonzalez' request, we pursued a course of negotiations with the Debtors' counsel to resolve the trustee issue.").

24. See Chapter 6.

25. See, *e.g.*, Regulations of the Judicial Conference of the United States for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges, Sec. 5.02, March 1997, available at <http://www.ncbj.org/faq1bktcylaw/bankrupt.htm> (providing for public notice and the solicitation of comments on an application for reappointment).

26. Stan Bernstein, THE REAPPOINTMENT OF BANKRUPTCY JUDGES: A PRELIMINARY ANALYSIS OF THE PRESENT PROCESS (October 15, 2001) (unpublished manuscript on file with the author).

27. *Id.* at 2 ("[Q]uite a significant number of applicants for reappointment were put through the wringer.")