THE LAWLESSNESS OF BELK

Lynn M. LoPucki[*]

INTRODUCTION

In *Chapter 11's Descent into Lawlessness*, I argued that "[t]he bankruptcy courts that compete for big cases frequently ignore the Bankruptcy Code and Rules."[1] I documented that lawlessness through a series of empirical studies of big cases and a detailed examination of the court file in *In re Belk, Inc.*—the first one-day Chapter 11. Belk, Inc. ("Belk") filed in Houston on the evening of February 23, 2021, the court confirmed its plan around 10:00 a.m. the following morning, and the parties consummated the plan that same afternoon.[2] In *Chapter 11's Descent*, I showed that the court in *Belk* failed to comply with numerous Bankruptcy Code and Bankruptcy Rule provisions.[3] *Chapter 11's Descent* was awarded the 2022 NCBJ Editor's Prize.[4]

In late 2023, The *American Bankruptcy Law Journal* published a reply to *Chapter 11's Descent* by Professor Robert K. Rasmussen and bankruptcy attorney Roye Zur.[5] In *The Beauty of Belk*, they claim to have shown that "Belk's Chapter 11 case complied with every requirement of the Bankruptcy Code and Bankruptcy Rules"[6] and "[t]he provisions of the Bankruptcy Code were followed."[7]

Rasmussen and Zur do not dispute my reading of any of the rules. Instead, they ascribe a sharply different meaning to "compliance." In their view, a court complies with the Bankruptcy Code and Rules if other

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[1] Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 AM. BANKR. L.J. 247, 247 (2022) [hereinafter LoPucki].

[2] *Id.* at 248-49.

[3] *Id.* at 267-300.

[4] Editor's Prize, The American Bankruptcy Law Journal, https://ablj.org/editors-prize/#:~:text=The%20EDITORS'%20PRIZE%20is%20awarded,The%20American%20Bankruptcy%20Law%20Journal (last visited January 8, 2024).

[5] Robert K. Rasmussen & Roye Zur, *The Beauty of Belk*, 97 AM. BANKR. L.J. 438 (2023).

[6] *Id.* at 478.

[7] *Id.* at 479.

competing courts are doing the same thing,[8] or if adherence to the rules would serve no purpose.[9] In their view, adherence serves no purpose if, as occurred in Belk, a large majority of the creditors accept the plan—whether acceptance was before or after the failure to comply.[10]

That other courts are violating the clear language of a statute or rule does not justify its further violation. Nor does plan acceptance. To be legitimate, plan acceptance must occur within the procedural structure provided for by the Bankruptcy Code and Rules. Neither coerced nor uncoerced acceptance provides an exemption.

This response examines the nine most important of Rasmussen and Zur objections to my claims. To facilitate comparison, I juxtapose each of my claims, as expressed in my article, with their response, as expressed in their reply. To simplify presentation, I omitted the footnotes to those passages, but added them to the text when they were needed. As will be apparent from that comparison, for none of the nine claims did Rasmussen and Zur make a credible argument that the court complied with the language of the Bankruptcy Code and Rules.

Rasmussen and Zur claim that my "main complaint about the 'lawlessness' of the plan of reorganization in Belk is that it was, in his words, 'upside down'."[11] I made no complaint that the upside down nature of the claim was lawless, and Rasmussen and Zur cite nothing in support of their claim that I did.

Part I addresses Rasmussen and Zur's central, and most easily refuted

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[8] *Id.* at 474 ("As Adam Levitin has shown, the process of approving 28-day notice before bankruptcy started well before Belk.").

[9] For example, Rasmussen & Zur write:

> Professor LoPucki is correct that there was no application filed to cover these fees. But he overlooks the reason for the lack of application. At the hearing to close the case, Judge Isgur noted that it would be costly to prepare a set of fee applications for the sixteen hours between filing and plan confirmation.

Id. at 471.

[10] *Id.* ("[T]he votes had been solicited, all voting creditors that voted in favor of the plan, and the remaining creditors were unimpaired. A meeting of creditors would obviously serve no purpose.").

[11] *Id.* at 458.

claims: (1) notice of the hearings on disclosure statement approval and plan confirmation could be given by Belk's attorneys instead of the court, and (2) the court validated Belk's attorneys' notice by reducing the notice periods. Part II examines Rasmussen and Zur's argument that venue was proper in the Southern District of Texas. Part III considers Rasmussen and Zur's claim that the bankruptcy courts can approve bankruptcy professional fees without receiving fee applications and, with respect to post-confirmation bankruptcy professional fees, the bankruptcy courts can delegate to the parties the authority to determine what amounts are reasonable. Part IV addresses Rasmussen and Zur's argument that the *Belk* court complied with the Bankruptcy Code and Rules in waiving the meeting of creditors. Part V examines Rasmussen and Zur's claims that Belk's board did not breach their fiduciary duties by acting for the benefit of Sycamore, Belk's 88 percent shareholder. Part VI concludes the Rasmussen and Zur failed to demonstrate that Belk complied with *any* of the nine sets of rules at issue.

I. The Impossibility of a Lawful One-day Chapter 11

The bankruptcy court did not notify Belk's creditors of the disclosure statement or plan confirmation hearings. Belk's counsel, Kirkland and Ellis, gave 28 days' notice of those hearings.[12] Because notice by a person not authorized to give it is legally insufficient, a lawful one-day Chapter 11 case is impossible.

A. Notice of the Chapter 11 Filing

In *Chapter 11's Descent*, I demonstrated that the court failed to comply with the notice requirements with respect to both the disclosure statement and confirmation hearings. The applicable rules require that the court, not debtor's counsel, provide 28 days' notice. Because the controlling rules are different for the two hearings, I addressed them in separate sections of *Chapter 11's Descent*. As to notice of the disclosure statement hearing, I wrote:

> Bankruptcy Rule 3017(a) provides that "after a disclosure

[12] Affidavit of Service, at 1761, *In re* Belk, Inc. (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 57 [[hereinafter Affidavit of Service]].

> statement is filed … the court shall hold a hearing on at least 28 days' notice to the debtor, creditors, equity security holders, and other parties in interest …. to consider the disclosure statement and any objections or modifications thereto." The disclosure statement cannot be filed until there is a bankruptcy case in which to file it. Nor can the 28 days begin to run before the case is filed. Under Bankruptcy Rule 2002(b), notice of the hearing "to consider approval of the disclosure statement" must be given by "the clerk, or such person as the court may direct." The courts have not directed anyone to give notice in cases before the cases have been filed, and it is doubtful that they can. Thus, Rules 3017(a) and 2002(b) together require that 28 days' notice of the disclosure statement hearing be given after the petition is filed.[13]

As to notice of the confirmation hearing, I wrote:

> Bankruptcy Rule 3017(d) requires "notice of the time fixed for filing objections and the hearing on confirmation … in accordance with Bankruptcy Rule 2002(b)." The Rule 3017(d) notice must be given "upon approval of a disclosure statement," an event that can only occur after the bankruptcy case has been filed. The notice mailing must include "the disclosure statement approved by the court"—making it impossible that the requirement can be fulfilled by a mailing made before the court approves the disclosure statement.
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> Rule 3017(d) applies "except to the extent that the court orders otherwise with respect to one or more unimpaired classes of creditors or security holders." By negative implication, the court has no authority to order otherwise with respect to the impaired classes.
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> ….
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> As with the disclosure statement approval hearing, Rule 2002(b) requires "not less than 28 days' notice by mail of the time fixed … for filing objections and the hearing to consider

[13] LoPucki, *supra* note 1, at 276–77.

> confirmation of a ... chapter 11 plan." That notice must be given by "the clerk, or some other person as the court may direct." Thus, it is also clear that the 28-day notice of the confirmation hearing must be given after the petition is filed.[14]

Rasmussen and Zur make no attempt to argue the language of these rules. This is their entire response:

> Here, the creditors received notice on January 26, 2021, and the bankruptcy case was filed February 22, 2021, 28 days later. The problem, according to Professor LoPucki, is not the lack of notice, rather, it is that the notice was given before the case was filed rather than after the case was filed.
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> As Adam Levitin has shown, the process of approving 28-day notice before bankruptcy started well before Belk.[15]

In their first paragraph, Rasmussen and Zur mischaracterized my argument by reasserting it in a form that omitted its essence: the court, not debtor's counsel, must give the notices. Then, without addressing the part of my argument they left on the table, they changed the subject to whether other courts had done the same in other cases. They make no attempt to explain why that would be relevant. Rasmussen and Zur then turn immediately to their argument that the court "shortened the 28-day notice period."[16] I respond to that argument in the next section.

B. Shortening Time for Notice of the Case

In *Chapter 11's Descent*, I explained why the courts cannot legitimize a one-day Chapter 11 case using their powers under Bankruptcy Rule 9006 to reduce the notice periods.

> Bankruptcy Rule 9006 provides that "when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder ... the court for cause shown may in its discretion with or without motion or notice

[14] *Id.* at 277.
[15] Rasmussen & Zur, *supra* note 6.
[16] *Id.*

> order the period reduced." I doubt that a court could reduce the 28-day periods to one day without abusing its discretion. But even if the court could reduce the notice periods to one day, the notices required by Bankruptcy Rule 2002(b) must be given by mail after the petition is filed. The court has no authority to eliminate them.
>
> No reduction of notice can legalize a one-day Chapter 11. Under Rule 9006(f), when a notice is given by mail, three days are added to the prescribed period after the prescribed period would otherwise expire. The prescribed period for objecting to the plan or disclosure statement is 28 days. If the court reduced it to one day, Rule 9006(f) would enlarge that to four. A one-day case would still be unlawful. A court that construed the three-day period to itself be reduceable would still be left with the absurdity of concluding that a notice was sufficient even though it reached none of the recipients in time for them to act on it.[17]

This is Rasmussen and Zur's entire response:

> As Professor Levitin also points out, Bankruptcy Rule 9006(c) does allow a court to shorten the 28-day time period. In Belk, the motion setting forth the timeline for the case cited to this provision and to cases in both the Southern District of Texas and the Southern District of New York that approved this type of procedure. Moreover, the Court made explicit findings on the record as to why it was shortening time under Rule 9006: "⟦T⟧he bankruptcy rules say that we need to handle things on an expedited matter on an emergency basis if needed, given the circumstances. My circumstances are 17,000 jobs are at risk. The stores are at risk. The landlords are at risk. I have a really, really good reason, and the declarations that are there, assuming they come into evidence, to act promptly. But none of that can impair somebody's due process rights, so my purpose in this order is to be certain that all those due process rights are fully

[17] LoPucki, *supra* note 1, at 277–78.

> preserved." Thus, the Belk proceeding once again complied with the applicable bankruptcy rules.[18]

Rasmussen and Zur's claim in this passage that "the Court made explicit findings . . . as to why it was shortening time under Rule 9006" is pure invention. Belk's attorneys stated at the confirmation hearing that "[t]here's over 28 days in accordance with the bankruptcy rules. We believe we've complied with the best in class notice procedures. We don't really need any relief with respect to the notice."[19]

The confirmation hearing transcript shows no motion to shorten the time for anything.[20] Rule 9006 was not mentioned, and the court did not consider shortening the 28-day notice periods.[21] The court's statement that Rasmussen and Zur claim is an explicit finding about shortening time under Rule 9006 is in fact the court's justification for entering its *sua sponte* Due Process Preservation Order without any notice at all.[22]

Nor could the reduction of the notice periods for the disclosure and confirmation hearings have made the notice given timely. The debtor's counsel did give 28 days-notice; the court gave no notice at all until after confirmation. Either way, a reduction in time would have been irrelevant.

II. Lack of Venue in the Southern District of Texas

Since prior to the adoption of the Bankruptcy Code in 1978, the bankruptcy venue statutes have allowed strategies that enabled big bankrupts to file in nearly any bankruptcy court they chose.[23] A common strategy is to place a subsidiary entitled to file in the chosen venue in bankruptcy there, and then file the remainder of the group in that venue on the ground that the case of an affiliate is pending there.[24] The drafters thought the courts would transfer cases filed in inappropriate venues to appropriate ones.[25]

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[18] Rasmussen & Zur, *supra* note 6, at 474.

[19] Transcript of First Day and Confirmation Hearing, *In re* Belk, Inc. (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 98 at 21-22 [hereinafter Confirmation Hearing Transcript].

[20] *See generally id.*

[21] *Id.*

[22] *Id.* at 30-35 (discussing the due process protection order).

[23] LoPucki, *supra* note 1, at 254-55.

[24] *Id.*

[25] LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS

Some courts, however, wanted big cases and failed to transfer them. At the time Belk filed, five United States Bankruptcy Courts were competing to attract big bankruptcy cases. Those courts were Delaware, Houston, Richmond, White Plains, and perhaps Manhattan.[26] They have since shrunk to just two: Delaware and Houston.[27]

In *Chapter 11's Descent*, I showed that despite the laxity of the venue statute, Belk did not qualify under it to file in the Southern District of Texas. Rassmussen, Zur, and I agree that the Belk group claimed affiliate venue based on the filing of its venue hook, Belk Department Stores, LP. I wrote:

> Oddly, Belk's venue hook had no apparent right to file in the Houston court. Belk Stores checked the box on its sworn petition claiming that it "had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district." But it apparently satisfied none of these three factors. Belk Stores' domicile—its state of incorporation--was in North Carolina. Its "principal place of business"—as shown on its petition—was in North Carolina. Then it left blank the lines for stating the location of its principal assets "if different from principal place of business." Nor is it likely Belk Stores' principal assets were actually in the Southern District of Texas. Belk had eighteen stores in Texas, and none were in the Southern District.[28]

Rasmussen and Zur made no mention of my argument that the actual facts conflicted with checked box, and simply asserted that venue was proper because the box was checked.

> The petition for Belk Department Stores, LP, on the other hand, lists the basis of venue as being that the "Debtor has had its domicile, principal place of business, or principal

CORRUPTING THE BANKRUPTCY COURTS 38 (2005).

[26] LoPucki, *supra* note 1, at 250.

[27] *Id.* at 258-59 (discussing the withdrawal of White Plains, New York, and Richmond from the competition).

[28] *Id.* at 255–56.

> assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district." The petition was signed under penalty of perjury. Venue was appropriate in the Southern District of Texas under current law proper for Belk Department Stores, LP, and thus the other 16 companies legitimately filed in the Southern District as affiliates of this entity.[29]

Rasmussen and Zur's argument that, regardless of the underlying facts, venue is proper whenever debtor's counsel checks the box, proves too much. Venue would be proper in every bankruptcy case.

III. Lack of Fee Applications

Belk's financial projections indicated that Belk expected to spend $64 million on "restructuring professional costs and closing fees related to consummation of the plan."[30] Just under $3 million of that was disclosed as paid to Kirkland for prepetition work.[31] Approximately another $8 million was paid to five professional firms as indicated below. Fee applications were filed for none of that money. The remaining $53 million is entirely unaccounted for.

A. Fee Applications for Pre-Confirmation Work

In *Chapter 11's Descent*, I wrote:

> [T]he Bankruptcy Code requires that the bankruptcy courts control fees. Specifically, Bankruptcy Rule 2016 requires that "[a]n entity seeking interim or final compensation for services ... from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." Bankruptcy Code § 330 requires that the court approve all professional fees as reasonable before authorizing

[29] Rasmussen & Zur, *supra* note 6, at 477.

[30] Disclosure Statement Relating to the Joint Prepackaged Plan of Reorganization of Belk, Inc., and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, Exhibit C, 5, *In re* Belk, Inc. (Bankr. S.D. Tex., No. 21-30630 (MI)), ECF No. 9.

[31] LoPucki, *supra* note 1, at 280.

> the debtor to pay them.
>
> Consistent with that requirement, the Belk confirmation order provided that "All requests for payment of Professional Fee Claims for services rendered and reimbursement of expenses incurred prior to the Confirmation Date must be filed no later than forty-five (45) days after the Effective Date."[32]

Rasmussen and Zur do not dispute the existence of the requirement to file fee applications, and they acknowledge that no fee applications were filed.

> Professor LoPucki is correct that there was no application filed to cover these fees. But he overlooks the reason for the lack of application. At the hearing to close the case, Judge Isgur noted that it would be costly to prepare a set of fee applications for the sixteen hours between filing and plan confirmation. Four different groups of professionals were approved to work during these 16 hours. He suggested that he would be willing to waive the requirement of multiple fee applications so long as the confirmation order put a limit on the amount of fees that could be charged to the estate. The lawyers consulted with their clients, and the clients agreed to this proposal. The final decree thus authorizes the payment of fees for the period in bankruptcy up to an aggregate of $380,000 for all four professionals, without the filing of fee applications.[33]

In explaining the court's decision, Rasmussen and Zur were as blasé as the court about the fact that the failure to require and to file fee applications violated Bankruptcy Code and Rule provisions. Nor was Rasmussen and Zur's assertion that the final decree authorized payment of only up to $380,000 correct. In the same sentence that authorized the $380,000, the court authorized the payment of Lazard Frères' restructuring fee, also

[32] *Id.* at 279.

[33] Rasmussen & Zur, *supra* note 5, at 471.

without application.[34] The amount of that fee was $7,729,032.[35]

B. Fee Applications for Post-Confirmation Work

In Belk, the court also violated the Bankruptcy Code and Rules by excusing the professionals from filing fee applications and seeking court approval for the payment of their fees for post-confirmation work. In *Chapter 11's Descent*, I wrote:

> The confirmation order entered on the first day of the case purports to excuse Kirkland from complying with the Bankruptcy Code and Rules with respect to its post-confirmation fees. The order provided that:
>
> > From and after the Confirmation Date, any requirement that Professionals comply with sections 327 through 331 and 1103 of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and the Reorganized Debtors may employ and pay any Professional in the ordinary course of business without any further notice to or action, order, or approval of the Court.
>
> Neither the Bankruptcy Code nor the Bankruptcy Rules contain any authority for the Court to excuse compliance with those Code provisions.
>
> Instead, Bankruptcy Code § 1129(a)(4) determines what post-confirmation fees require court approval:

[34] Final Decree Closing Certain of the Chapter 11 Cases at ¶ 9, *In re* Belk, Inc., No. 21-30630, ECF No. 171 (Bankr. S.D. Tex. Mar. 31, 2021).

[35] Order (I) Authorizing the Reorganized Debtors to Employ and Retain Lazard Frères & Co. LLC as Investment Banker, Effective as of the Petition Date, (II) Modifying Certain Time-Keeping Requirements, and (III) Granting Related Relief, Engagement Letter at 2, *In re* Belk, Inc., No. 21-30630, ECF No. 176 (Bankr. S.D. Tex. Mar. 31, 2021) ("As consideration for the services to be provided, the Company shall pay Lazard the following fees: …. (b) A fee, payable upon the consummation of a Restructuring, equal to $7,729,032 (the "Restructuring Fee").

> (a) The court shall confirm a plan only if all the following requirements are met:
>
> (4) *Any payment* made or *to be made* by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or *in connection with the case*, or in connection with the plan and incident to the case, has been approved by, or *is subject to the approval of, the court as reasonable*.

> Thus, if the debtor makes payments for services in connection with the case after confirmation, the payments must be subject to the approval of the court as reasonable. By its terms, this provision applies to the professionals' work in consummating the plan and completing the administration of the bankruptcy case.
>
> In an apparent attempt to circumvent § 1129(a)(4), the plan required the Reorganized Debtors to fund a "professional fee escrow account" in an amount based on the professionals' estimates delivered to the Debtors, but not filed with the court. The plan instructed the Debtors to pay the professionals' fees. Thus, by confirming the plan, the court mandated payment of post-confirmation fees without the court reviewing and approving them. By confirming a plan containing those provisions, the court violated Bankruptcy Code § 1129(a)(2) and (4).[36]

Here too, Rasmussen and Zur misstate my objection, claiming that "Professor LoPucki acknowledges that the bankruptcy court did approve these fees, but objects to the fact that the court did not expressly review the actual fees themselves." I did not acknowledge that the bankruptcy court approved the fees. To the contrary, the court's order, which is quoted at the beginning of this section, states that "the Reorganized Debtors may employ and pay any Professional . . . *without . . . approval of the court*.[37]

[36] LoPucki, *supra* note 1, at 280-81.
[37] *See* text accompanying note 366 (emphasis added).

This is the remainder of Rasmussen and Zur's response:

> The confirmation order, which was approved the day after the plan was filed, provided that after confirmation the professionals did not have seek court permission to retain and pay the professionals.
>
> Thus, the court expressly approved the fees incurred up to the filing of the petition, and the fees incurred after confirmation.[38]

Their claim seems to be that if a court enters an order excusing professionals from the fee approval process, the relevant provisions of the Bankruptcy Code and Rules no longer apply. That is not compliance with the Bankruptcy Code and Rules.

IV. Breaches of Fiduciary Duties

Belk's liabilities exceeded its assets by approximately $500 million at the time Belk filed. That entitled the creditors, had they chosen to do so, to extinguish Belk's equity by cramdown.[39] Belk did not do that because Sycamore, which held 88 percent of Belk's shares, controlled Belk. In *Chapter 11's Descent*, I argued that Belk's legal strategies—including the use of a one-day Chapter 11—were principally designed to enable Sycamore to retain control. Had Belk dumped Sycamore and proposed a stock-for-debt plan, Belk could have emerged with $987.5 million in debt instead $1,877 million in debt.[40]

A. Belk's Board

In *Chapter 11's Descent*, I argued:

> The most egregious aspect of Belk's restructuring was allowing Sycamore—the failed controlling shareholder of a clearly insolvent company—to remain in control. As Belk's controlling shareholder, Sycamore had fiduciary duties to Belk. So did the Belk directors that Sycamore elected

[38] Rasmussen & Zur, *supra* note 5, at 470.
[39] 11 U.S.C. § 1129(b)(2)(C).
[40] LoPucki, *supra* note 1, at 263, 265 (tables showing those amounts).

> annually. Instead of fulfilling those obligations, Belk's directors proposed a plan that benefited Sycamore at Belk's expense.[41]

Rasmussen and Zur replied "[t]hat Sycamore had a substantial degree of control in the negotiations leading up to the plan of reorganization is not an example of lawlessness; it is rather a manifestation of the law."[42] Ignoring my assertion that Sycamore, as a controlling shareholder, had fiduciary duties to Belk, Rasmussen and Zur asserted that Belk's directors had fiduciary duties to Sycamore:

> Nor can it be a complaint that Sycamore controlled Belk. Sycamore's control of Belk was due to the fact that it owned 88 percent of the Belk's stock. Delaware law (Belk is incorporated in Delaware) flirted for years with the idea that perhaps the fiduciary duty of a company's board of directors should switch from the shareholders to the entire company when a company approached the "zone of insolvency." Subsequent case law, however, made it clear that boards owe no fiduciary duties to creditors or other constituencies. With the Bankruptcy Code granting Belk control over which plan could be considered, and *Delaware Law allowing Belk to advance the interests of its shareholders (Sycamore)*, it is implausible to assume that a plan that eliminated the old equity interests was going to be on the table.[43]

For their claim, Rasmussen and Zur cite *North American Catholic Education Program Foundation, Inc. v. Gheewalla*.[44] I agree that *Gheewalla* is the controlling authority, but Rasmussen and Zur misinterpret it. That case does not allow the board of an insolvent corporation to sacrifice the interests of the corporation "to advance the interests of its shareholders." *Gheewalla* requires the directors of an insolvent corporation to act in the interests of *the corporation*:

> Recognizing that directors of an insolvent corporation owe

[41] *Id.* at 290.
[42] Rasmussen & Zur, *supra* note 5, at 461.
[43] *Id.* at 462 (emphasis added).
[44] 930 A.2d 92 (Del. 2007).

> direct fiduciary duties to creditors, would create uncertainty for directors who have a fiduciary duty to exercise their business judgment *in the best interest of the insolvent corporation*. To recognize a new right for creditors to bring direct fiduciary claims against those directors would create a conflict between those *directors' duty to maximize the value of the insolvent corporation for the benefit of all those having an interest in it*, and the newly recognized direct fiduciary duty to individual creditors. Directors of insolvent corporations must retain the freedom to engage in vigorous, good faith negotiations with individual creditors *for the benefit of the corporation*. Accordingly, we hold that individual creditors of an insolvent corporation have no right to assert direct claims for breach of fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation or any other direct nonfiduciary claim, as discussed earlier in this opinion, that may be available for individual creditors.[45]

Nor does bankruptcy law entitle the shareholders of an insolvent corporation to exercise control over it. Because Belk was deeply insolvent, Sycamore was, under bankruptcy law, no longer a "real part[y] in interest."[46] Belk's directors owed fiduciary duties to the creditors and the estate,[47] and "the court ha[d] considerable authority to interfere with the

[45] N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 103 (Del. 2007) (emphasis added).

[46] *In re* Johns-Manville Corp., 801 F.2d 60, 65 (2d Cir. 1986) ("We note that if Manville were determined to be insolvent, so that the shareholders lacked equity in the corporation, denial of the right to call a meeting would likely be proper, because the shareholders would no longer be real parties in interest.").

[47] *See, e.g.*, *In re* USA Gymnastics, 624 B.R. 443, 453 (Bankr. S.D. Ind. 2021):

> As the debtor in possession of the bankruptcy estate, the debtor owes a fiduciary obligation to creditors and necessarily cannot act only in its own interest. *See, e.g.*, *In re* Scott, 172 F.3d 959, 967 (7th Cir. 1999) ("[t]he debtor-in-possession owes a fiduciary duty to his creditors"); *In re* Mack Industries, 606 B.R. 313, 320 (Bankr. N.D. Ill. 2019); 11 U.S.C. § 1107(a). This includes, in appropriate circumstances, duties of care and to maximize estate assets and distributions to creditors—the same persons

management of a debtor corporation in order to protect the creditors' interests."[48]

With respect to plan negotiations, Belk's directors had no fiduciary duties to act in the interests of creditors or shareholders. But they did have fiduciary duties to act in the interests of Belk.[49]

B. The Independent Directors

In *Chapter 11's Descent*, I argued:

> Belk's board of directors anticipated breach-of-fiduciary-duty lawsuits against themselves for promoting Sycamore's interests over Belk's. To deflect those actions, Belk's board established a special committee of "independent and disinterested directors" during the plan negotiations. Belk hired two new directors, Jill Frizzley and Steve Panagos, to be the members of that committee. Both directors had backgrounds in bankruptcy restructuring, were in the business of serving as "independent board directors," and had continuing relationships with Kirkland. The board hired them to determine whether the plan was in Belk's interests and whether Belk should take action against Sycamore regarding the $135 million dividend. Frizzley and Panagos made the decisions Sycamore wanted. They "determined to support the Restructuring Transactions embodied by the RSA and the Plan, including the Debtors' Release," and they investigated and approved the dividend.[50]

Rasumssen and Zur effectively conceded that Frizzley and Panagos were not independent.

Professor LoPucki's objections continue with the decision by

that held opposing interests prior to the petition.

[48] *In re* Gaslight Club, Inc., 782 F.2d 767, 770 (7th Cir. 1986).

[49] *In re* Water's Edge Ltd. P'ship, 251 B.R. 1, 8 (Bankr. D. Mass. 2000) ("A debtor in possession is therefore permitted to place its own interests above those of the unsecured creditors with respect to what it proposes to pay under its plan.").

[50] LoPucki, *supra* note 1, at 290–91 (2022).

> the special committee of independent directors to settle the potential fraudulent conveyance claim relating to the 2016 dividend. He notes that some have questioned how "independent" these directors are a real-world matter, given that some appear repeatedly in various cases, often with Kirkland representing the debtor. Whatever one thinks about the general point, it takes little to see the reasonableness the directors' decision here. [51]

Perhaps not realizing that they had conceded lawlessness, they go on to argue that the dividend wasn't a fraudulent transfer and, if it were, "the sophisticated parties representing the first lien holders and the second lien holders" would have taken it into account in allocating "the value of reorganized Belk among the various investors."[52] Here, their argument unravels. First, the sophisticated parties may not have been representing the lien holders.[53] Second, the lienholders' negotiators could not have protected the lienholders against the fraudulent transfer to Sycamore by demanding a better deal from Sycamore. The fraudulent transfer, combined with Belk's ratification of it, reduced the lienholders' entitlement and with it the lienholders' negotiating power.

V. Lack of Information

From the time Sycamore acquired control of Belk in 2015, Belk was highly secretive. It released no financial statements from 2015 through plan confirmation—not even to the lienholders who had to decide whether to sign the RSA or accept the plan. Belk combined that secrecy with coercive voting procedures to compel creditors to accept an unfair plan.

A. The Lack of Rule 2019 Affidavits

Rassmussen and Zur's defense of Belk is based heavily on their premise that "the plan was the product of negotiations between Belk and Sycamore on the one hand and an ad hoc group of first lien lenders and an hoc group

[51] Rasmussen & Zur, *supra* note 5, at 472.
[52] *Id.* at 472-73.
[53] *Infra*, Part V. A.

of crossover lenders on the other."[54] But as I point out in *Chapter 11's Descent*:

> Some news reports described Blackstone Credit and KKR, not the ad hoc groups, as the parties to the negotiations. Blackstone's and KKR's interests differed from those of the Lien holders in at least two respects. First, Blackstone and KKR appear to have been equity holders in Belk at the time they led negotiations with Sycamore and Belk. Second, the Shareholder Agreement entered into as part of the restructuring gave three named "Blackstone Investors" two seats and three named "KKR Investors" one seat on Belk's seven-member board of directors. The other First and Second Lien holders, on whose behalf Blackstone and KKR purported to have been negotiating, received no seats on the board and the Shareholder Agreement—in a provision revealed to them only after they had agreed to sign it—denied them even the default information rights provided shareholders under Delaware law.[55]

At the confirmation hearing, one of Sycamore's attorneys seemed to confirm that Blackstone Credit and KKR played a dominant role in negotiating for the ad hoc groups: "Sycamore is very pleased that we were able to work cooperatively with Belk's other institutional lenders and stakeholders, including KKR Blackstone, Hyde Park, and others as well as their advisors to bring about a consensual resolution and successful restructuring for Belk."[56] One of Belk's attorneys told the court: "The second lien indebtedness is closely held; 100 percent of it is held by KKR and GSO." These accounts are at odds with the official vote tally, which show ten Second Lien Term Loan Claims accepting the plan.[57] Rasmussen and Zur made no response to my assertion regarding Blackstone Credit and

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[54] Rasmussen & Zur, *supra* note 5, at 462.

[55] LoPucki, *supra* note 1, at 270-71.

[56] Confirmation Hearing Transcript, *supra* note 199, at 25-26.

[57] Declaration of Craig E. Johnson of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Joint Prepackaged Plan of Reorganization of Belk, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, at 7, *In re* Belk, Inc., No. 21-30630, ECF No. 33 (Bankr. S.D. Tex. Feb. 23, 2021).

KKR's conflicts of interest with the lienholders they purported to represent in the negotiations.

In *Chapter 11's Descent*, I also noted that Belk was paying the ad hoc groups' professional fees,[58] may have chosen the members of the ad hoc groups, and had kept the identities of the ad hoc groups secret in violation of Bankruptcy Rule 2019.

> The formation of ad hoc committees or groups in connection with bankruptcy cases has been controversial. The fear is that groups or individuals who do not share the interests of a claimant type will adopt names implying that they do, which can mislead claimants. That may have happened in Belk, because the interests and recoveries of the probable group members differed from the interests and recoveries of other First Lien holders. Bankruptcy Rule 2019 addresses the problem by requiring that "⟦i⟧n a Chapter ... 11 case, a verified statement ... shall be filed by every group ... that consists of or represents ... multiple creditors ... acting in concert to advance their common interests." The Rule requires a disclosure that includes:
>
>> (1) the pertinent facts and circumstances concerning ... the formation of the group ... including the name of each entity at whose instance the group ... was formed.
>>
>> (2) with respect to each member of a group ... (A) name and address; (B) the nature and amount of each disclosable economic interest held ... as of the date the ... group ... was formed
>>
>> ...
>>
>> (4) a copy of the instrument, if any, authorizing the ... group ... to act on behalf of ... creditors.
>
> Rule 2019 applied to the ad hoc groups in Belk. In context, the groups' names meant that the groups consisted of or represented multiple creditors, and Belk claimed that by

[58] LoPucki, *supra* note 1, at 268 ("The RSA stated that Belk would pay the ad hoc groups' attorneys' fees and expenses.").

> negotiating with them, it negotiated with the Consenting Lenders—a term defined in the Disclosure Statement to include all consenting lien holders, not just members of the groups. The members of each group "act[ed] in concert to advance their common interests" by retaining counsel, negotiating with Belk and Sycamore, by making "commercially reasonable efforts to ... assist [Belk] in obtaining additional support for the Restructuring Transactions" as required by the restructuring support agreement, and by each group having three lawyers present at the confirmation hearing.[59]

Despite Rasmussen and Zur's claim to have shown "Belk's Chapter 11 case complied with every requirement of the Bankruptcy Code and Bankruptcy Rules" they made no response at all to my assertion that the ad hoc groups' failures to file affidavits violated Rule 2019.

B. Other Information

Belk employed a three-pronged strategy to win nearly unanimous approval of its unfair plan. The first prong was to create the appearance that two leading law firms had represented the impaired lienholder classes in plan negotiations. As discussed in the preceding section, that may have been nothing more than appearance.

The second was to solicit support for a restructuring support agreement (RSA) that offered the signers the right to provide DIP financing to Belk on apparently lucrative terms—at the expense of the non-signers. Professor David Skeel explained how this technique distorts the voting process.

> The RSA commits its signatories to support a future reorganization plan that conforms to the terms of the RSA, including the proposed payout to each creditor class. A creditor that signs the RSA relinquishes its ability to decide independently whether to support a reorganization plan subsequently proposed by the debtor. It does this before—

[59] *Id.* at 268–69.

> often long before—a disclosure statement is approved and the proposed reorganization is submitted to creditors for a vote.
> . . . .
> [T]he RSA may provide a benefit to signatories, such as the right to provide debtor-in-possession financing during the case.... These inducements, which are available only to those who sign the RSA, look like a form of vote buying, since they compensate signatories who commit to supporting an upcoming plan.[60]

Belk forced its impaired creditors to decide whether to sign the RSA based on only a plan summary. Seventy-four percent of the first lien holders signed the RSA before Belk disclosed the plan and began soliciting plan acceptance. With no chance of defeating the plan, another twenty-five percent of the first lien holders preserved their rights by signing the RSA and voting for the plan.

Rasmussen and Zur mistake Belk's stick for a carrot, and state that this "situation is not a cause for concern:"[61]

> Had this opportunity been limited only to those hammering out the transaction, one would be worried that those not at the table were being exploited. In fact, however, the opportunity to make a new loan was not limited; all first lien holders were offered the opportunity to make the investment. The economics of the loan were incredibly attractive.[62]

The "incredibly attractive" loan terms shifted the value of reorganized Belk from the lienholders to the RSA signers. To share in the value, lienholders had to sign the RSA.

The third prong of Belk's strategy was the one-day Chapter 11. Its effect was to eliminate every way the creditors might obtain information or organize an opposition. Until the case was filed, the creditors had no court in which to enforce their rights. Once the plan was confirmed—seventeen hours later—it was too late to enforce their rights. As I showed in *Chapter*

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[60] David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366, 370 (2020).

[61] Rasmussen & Zur, *supra* note 5, at 465.

[62] *Id.* at 464.

11's Descent:

> Belk's disclosure statement contained no actual-performance financial statements. Nor did it provide any explanation of what caused Belk's financial distress. Belk filed no schedules, no SOFA, no list of creditors' names and addresses, and no monthly operating reports. No meeting of creditors was held, no creditors' committee appointed, no discovery conducted, and no Rule 2019 affidavits filed.
>
> Belk's pro forma financial statements showed declining losses and did not extend for enough years to show whether Belk would ever become profitable. Belk provided not a word of explanation of the numbers on the pro forma financial statements. Belk's evidence for the feasibility of its plan consisted of two sentences stating that the restructuring transactions would allow the debtor to satisfy its obligations in the ordinary course of business, the stores would stay open, and the employees would remain employed.[63]

Rasmussen and Zur responded to only one of those assertions of lawlessness—the assertion that the standard practice of cancelling the meeting of creditors "is illegal because 11 U.S.C. § 341(e) requires cause in addition to the debtors having 'solicited acceptances prior to the commencement of the case.'"[64]

Rasmussen and Zur ignore my point and misread Section 341 to say that a successful prepetition solicitation is cause to cancel the meeting:

> Professor LoPucki faults the general practice of courts in granting these motions without an express finding of "cause." Yet cause is readily apparent, at least in the case of Belk – the votes had been solicited, all voting creditors that voted in favor of the plan, and the remaining creditors were unimpaired. A meeting of creditors would obviously serve no purpose. Indeed, Belk's motion to waive the Section 341 hearing expressly mentions these reasons as providing the

[63] LoPucki, *supra* note 1, at 295.
[64] *Id.* at 288.

necessary cause to dispense with the meeting.[65]

But the language of § 341 imposes two prerequisites to the court cancelling the meeting of creditors: (1) that the debtor solicited acceptances prior to the commencement of the case and (2) cause. Rasmussen and Zur's view reads the cause requirement out of the statute. Cause to cancel the meeting of creditors would be present in every prepackaged case.

Despite plan confirmation, a meeting of creditors in Belk would have served several purposes. The court had entered a Due Process Preservation Order and invited objections to confirmation. The debtor was incurring professional fees in unknown amounts and paying them through a secret procedure. The court was struggling with the opt-out procedure for releases. Belk had not disclosed a financial statement in the six years since Sycamore acquired it. Belk's 90,000 stakeholders may have had legitimate questions for Belk's management about these and other issues.

VI. Conclusions

In arguing their thesis that "Belk's Chapter 11 case complied with every requirement of the Bankruptcy Code and Bankruptcy Rules," Rasmussen and Zur exhibited surprisingly little interest in the language of those rules. In no instance did they challenge my interpretation of the language in the provisions on which I relied. Instead, they argued that the court was justified in ignoring the Code and Rules because no one was injured, enforcement would serve no purpose, and other courts were doing it too. None of those arguments prove compliance with the Bankruptcy Code and Rules. They are attempts to justify ignoring the Bankruptcy Code and Rules.

The Bankruptcy Code and Rules provide a procedural structure intended to protect the interests of all parties. Rassmussen and Zur would dispense with that structure once the principal parties to the case have accepted the plan. But that is lawlessness, and, as Belk demonstrates, lawlessness can itself generate plan acceptance.

[65] Rasmussen & Zur, *supra* note 6, at 471.