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## CHAPTER 11 CASE MANAGEMENT AND DELAY REDUCTION:

### AN EMPIRICAL STUDY

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Chapter 11 bankruptcy cases will drag on interminably if we judges let them. The recent nine-month O.J. Simpson trial was short compared to the careers of some chapter 11 bankruptcy cases. The typical duration of chapter 11 cases can be reduced remarkably, however, through moderate judicial case management.

The data in this study show that relatively modest judicial case management can squeeze a substantial amount of delay out of chapter 11 cases within the context of the present bankruptcy law. The case management program in this study, applied to 81.2% of the chapter 11 case load, shortened by 24.1% FN1 the time to confirmation of a chapter 11 plan in a typical case; FN2 it reduced by 44.1% FN3 the time to conversion to a case under another chapter of the Bankruptcy Code; and it shortened by 53.5% FN4 the time to dismissal of a typical nonviable chapter 11 case. The overall time until disposition FN5 of a chapter 11 case diminished by 45.4%. FN6

While these remarkable results were obtained, the impact on the outcome of the cases was rather modest. There was a slight increase in the rate of plan confirmations. FN7 However, there was an 18.5% increase in the number of dismissals, and a corresponding decrease in the conversions to other chapters. **FN8**

It is important to emphasize that these changes in the handling of chapter 11 cases occurred within the confines of the present Bankruptcy Code. The reduction in time to disposition of a chapter 11 case can be accomplished with absolutely no change in the statute or the Federal Rules of Bankruptcy Procedure. FN9 It only requires judges to adopt judicial management techniques authorized by existing law. FN10

This Article does not suggest that the particular model of chapter 11 case management reported in this study, referred to as fast track management, FN11 is the only appropriate type of judicial chapter 11 case management, or even the best. This study reports on this particular fast track model principally because it is the only model for which good data are available, and because it is very effective in reducing delays in the chapter 11 process. Some sort of judicial case management is good for the bankruptcy system, creditors, and perhaps even debtors as well. FN12

In the Bankruptcy Reform Act of 1994 FN13 ( the 1994 Act ), Congress established a National Bankruptcy Review Commission to examine the bankruptcy laws and to make recommendations to Congress for further reform. FN14 Presumably the Commission will analyze chapter 11 to see if revision is necessary. Prior to any recommendation by the Commission to revise chapter 11, it is important that it consider what can be accomplished under the present Bankruptcy Code. This study shows that delay in chapter 11 cases can be substantially reduced through moderate judicial attention under the present Bankruptcy Code.

### I. Background

#### *A. The Limited Empirical Evidence on Chapter 11 Case Management*

In the sixteen years since the effective date of the Bankruptcy Code, FN15 nearly 300,000 cases have been filed under chapter 11. FN16 Table 1 shows the number of chapter 11 cases filed each year, and the total through 1995; it shows that, from 1980 through 1995, 294,295 chapter 11 cases were filed, FN17 an average of 18,393 per year. FN18

Table 1

United States Chapter 11 Bankruptcy Filings 1980–1995

Year	Chapter 11 Filings	Year	Chapter 11 Filings
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1980 6,348 1988 17,684

1981 10,041 1989 18,281

1982 18,821 1990 20,783

1983 20,284 1991 23,989

1984 20,325 1992 22,634

1985 23,376 1993 19,174

1987 20,078 1995 12,931

TOTAL 294,295

As a consequence of chapter 11 filings, billions of dollars in assets and many more billions of dollars of debt have passed through the bankruptcy system during this time period. FN19 However, relatively little is known about the judicial management of chapter 11 cases, and whether it can contribute to the success of the chapter 11 system. The only major study of chapter 11 is a 1989 study by Ed Flynn of the Administrative Office of United States Courts. FN20 This study of 2395 chapter 11 cases with confirmed plans found that the plan confirmation rate, based on a decade of nationwide experience, was 17%, FN21 and that it took a median of 656 days (21.6 months) to reach confirmation after filing a chapter 11 case. FN22

The Flynn study, however, was based on a curious sample in two respects. First, while ten of the fifteen districts included in the study were randomly drawn, the remaining five were those with the largest chapter 11 case load. **FN23** Second, while the study drew on cases filed between October 1, 1979 and December 31, 1986, only those cases still open on October 1, 1988 were included in the study. Cases that had been closed by this date were apparently excluded because they were no longer in the Statistical Analysis and Reports Division (SARD) data base on which the study was based. FN24 While the Flynn study weighted its results FN25 to compensate for the first factor, it is impossible to determine the extent of skewing that may have resulted from the second.

Four smaller studies, each of a single district with a light chapter 11 case load, have reached varying conclusions. In a 48–case study conducted in the Western District of Missouri during the first year after the October 1, 1979 effective date of the Bankruptcy Code, Lynn LoPucki found a confirmation rate of 44% (20 out of 45, with three cases still pending) FN26 and a median time to confirmation of approximately 9 1/2 months. FN27 In a similar study that sampled 48 out of 152 chapter 11 cases filed in 1982 in the Eastern District of Wisconsin, Jerome Kerkman found a confirmation rate of 29% (12 out of 42, with six cases still pending) FN28 and a median time to confirmation of approximately 12 months. FN29 In a study of 260 chapter 11 cases filed in the Poughkeepsie division of the Southern District of New York during the decade following the effective date of the Bankruptcy Code, Susan Jensen–Conklin found a confirmation rate of 17% (45 confirmed plans). FN30 Finally, in a second study in the Eastern District of Wisconsin, Lynn LoPucki found a median time to confirmation of 17 1/2 months for 23 cases. FN31 Considering the small size and scattered results of these studies, the confirmation rate of chapter 11 cases and the time to disposition reported in these studies are inconclusive.

None of these studies addressed the focus of this study, whether judicial case management actually affects the time frames or the results in chapter 11 cases. Thus, relatively little is known about how nearly 300,000 chapter 11 cases filed since the beginning of 1980 have proceeded through the courts. FN32 Nevertheless, policies must be devised and guidelines adopted in order to deal with the existing chapter 11 case load. This study may assist in making some of the decisions by contributing additional empirical information on the results of judicial management of chapter 11 cases.

#### *B. The Benefits of Delay Reduction in Chapter 11 Cases*

The reduction of delay in chapter 11 cases should be a noncontroversial goal. After all, the uncertainty of conducting business while in chapter 11 is a cloud that looms over both creditors and debtors. For example, suppliers are less willing to do business with a debtor in chapter 11, and may require cash on delivery or advance deposits. [FN33](#) Customers may be less willing to buy the debtor's products, for fear that they may not receive service when needed at a later date. [FN34](#) In addition, creditors may eventually want the debtor to pay their professional fees for dealing with the bankruptcy. As competitors sense that a kill is available, they too will get involved by increasing pressure on the market place. To limit these and other problems, a reduction of chapter 11 delays seems to be a beneficial objective for all involved. This is not, however, always the case.

The benefits resulting from early dispositions of chapter 11 cases are not shared equally by debtors, creditors and the courts. Consequently, it is useful to examine who benefits, and to what extent, from reducing chapter 11 delays.

## 1. Benefits to Creditors

Creditors in general are the principal beneficiaries of shorter chapter 11 cases. Creditors suffer the expenses and losses resulting from delay in a chapter 11 case. Their point of view is generally that they are better off if a case reaches disposition sooner, rather than later.

Secured creditors are the clearest beneficiaries of the early disposition of a chapter 11 case. In their view, the sooner they obtain the collateral in which they have a security interest, the better. [FN35](#) Furthermore, they must pay their own expenses for attorneys and other professionals. Therefore, the longer the case, the higher the bills. In their view, dismissal is the best disposition because it terminates the automatic stay, and they can proceed to realize on their collateral pursuant to state law. The second best result is conversion to chapter 7, because the trustee is likely either to abandon the collateral (allowing secured creditors to foreclose) or to liquidate the collateral for the benefit of the secured parties. The least preferred alternative for secured creditors is confirmation of a chapter 11 plan, [FN36](#) especially if they vote against the plan and it is crammed down over their objections. [FN37](#)

The impact of a chapter 11 case is not so clear for undersecured creditors. In part their benefits turn on the extent to which they are undersecured. With respect to payment, the unsecured portion of a secured creditor's claim is in essentially the same position as an unsecured creditor's claim. [FN38](#) This unsecured portion can only be paid from assets remaining after satisfaction of secured creditors and payment of administrative and other priority expenses. An undersecured creditor will frequently, however, prefer to cut its losses by taking collateral as payment on its secured claim. [FN39](#) This is so even if the resulting disruption of the debtor's business makes it impossible to obtain payment of the unsecured portion of the claim.

Unsecured creditors are frequently in better shape if a chapter 11 case is resolved early. The expeditious confirmation of a plan results in an earlier distribution to creditors. If a case is dismissed early, creditors have an expedited opportunity to pursue their remedies outside of bankruptcy at a time when some assets from which they can be paid may still remain. Additionally, if a case is converted earlier to a case under chapter 7, [FN40](#) it is more likely that there will be assets to distribute to creditors than if no conversion occurred.

Although quick disposition of cases may be advantageous, unsecured creditors may sometimes benefit from delay in the disposition of the chapter 11 case. In some cases, selling the business is the best alternative, and finding a suitable buyer may be time consuming. In other instances it may be necessary either to wait for a change in the debtor's market place or to resolve a dispute to the advantage of the debtor before a viable plan can be formulated. If waiting for such a positive development brings more assets into the estate for distribution to creditors, it is advantageous for unsecured creditors to delay the resolution of the case. [FN41](#) There may also be a different reason for unsecured creditors to desire a delay in the resolution of a chapter 11 case. If the secured creditors have a security interest in essentially all assets of the estate, the unsecured creditors are as much out of the money as the shareholders or owners. Such an unsecured creditor risks little in delay since its only chance for payment may turn on propitious developments in the case or the business. [FN42](#) Unsecured creditors increasingly find themselves in this position as secured creditors leave fewer and fewer unencumbered assets from which the unsecured creditors can be paid. [FN43](#)

A benefit created by the early disposition of chapter 11 cases that is enjoyed by both debtors and creditors is that administrative expenses are lower. FN44 These expenses, particularly in the larger cases, tend to be directly proportional to the duration of the case and can often be budgeted on a monthly basis. The total amount of the administrative expenses depends principally on the number of months to case disposition. In cases that last longer, professionals tend to put in more time, and thus generate more fees, even though the results may be essentially the same. FN45

The savings in administrative expenses tend to be shared by debtors and creditors in a chapter 11 plan. In contrast, creditors are the principal beneficiaries of lower administrative expenses for cases that are dismissed or converted to another chapter, because more assets remain to pay creditors' claims.

## 2. Benefits to Debtors

The benefits to debtors from the early resolution of chapter 11 cases are less certain than those to creditors. Setting early deadlines requires a debtor to focus sooner on an exit strategy, and requires the debtor and the creditors to begin earlier to plan for the resolution of the case. These deadlines alone tend to shorten the duration of chapter 11 cases, and may provide the impetus for a debtor's principals to accept the failure of the business and get on with their lives. A pending chapter 11 case often takes a heavy psychological toll on the principals. Early disposition of a chapter 11 case with little hope of a successful reorganization facilitates their ability to turn to more profitable enterprises.

A debtor may not, however, find benefit in early resolution if the debtor is waiting for the market of the debtor's business to change or the debtor wants to make business changes that take time to implement. In addition, a debtor may desire delay on the basis of self-interest if the chapter 11 case is unlikely to lead to a confirmed plan. In such a case, the debtor tries to remain under chapter 11 as long as possible in order to continue to receive ownership benefits such as salaries and expenses. FN46

If the debtor is insolvent at the time of filing, there may be little risk to the debtor in delaying the resolution of the case. FN47 The debtor hopes that the estate will increase in value so that ultimately it is not insolvent. Although that possibility may be remote, waiting for such an increase in value to materialize may be to the advantage of a debtor with no down-side risk. FN48 Thus determining the likelihood of benefit to a debtor from an early resolution of a chapter 11 case requires a balancing of a number of factors. While this balance varies with each individual case, the debtor frequently favors delay.

## 3. Benefits to the Courts

The courts benefit substantially from the quick disposition of chapter 11 cases. While chapter 11 cases constitute only approximately 2 1/2% of the bankruptcy case load, FN49 approximately 50% of a bankruptcy judge's case-related work time is spent resolving these cases and related adversary proceedings. FN50 Reducing the time chapter 11 cases take to disposition reduces the case load of the bankruptcy judge and leaves more time for other cases. Further, there would presumably be a parallel reduction in the work load of the clerk's office, where there would be fewer papers to file and fewer hearings to schedule and track.

## II. The Study

This is an empirical study of the impact of one model of case management on the duration of a typical chapter 11 case as it runs its course to confirmation, dismissal or conversion to another chapter of the Bankruptcy Code. This study is drawn from the data base of all chapter 11 cases assigned to Judge Geraldine Mund, one of the thirteen bankruptcy judges sitting in the Los Angeles Division of the Central District of California. The cases include all chapter 11 cases assigned to Judge Mund, via a computer-generated random assignment process, for the six-year period beginning in 1988 and ending in 1993. FN51

The opportunity for this study results from a fortuity. The data for an empirical study of the impact of judicial case management on chapter 11 cases have never been collected in any systematic fashion. Indeed, it is hard to find a data base containing the information with which to begin such a study. **FN52** However, I learned from Judge Mund, a

colleague and a neighbor of mine in the courthouse, that for the past decade she has kept her own chapter 11 data base. I was also aware that Judge Mund had adopted a case management system for chapter 11 cases several years ago. Upon learning that the data base included pre-management cases, I decided that an analysis of the data would be helpful in studying the results of case management on chapter 11 cases.

#### *A. The Site for the Study*

The Central District of California is an appropriate location for such a study. This district is the largest bankruptcy court in the nation where, as Table 2 shows, approximately 9% of the nation's bankruptcy cases are filed annually. FN53 The second column shows the number of bankruptcy cases filed during each year of this study in the United States, and the third column shows the corresponding number of cases filed in the Central District of California. The final column calculates the percentage for each year, which varied from 7.55% to 10.55%.

Table 2

#### Percentage of Nation's Bankruptcy Cases

#### Filed in Central District of California

#### Year National Total C.D. Cal. as % of National Total

1988 613,606 50,533 8.24

1989 679,980 53,609 7.88

1990 782,960 59,129 7.55

1991 943,987 78,663 8.33

1992 971,517 93,641 9.64

1993 875,202 92,292 10.55

Average 811,209 71,311 8.79

Table 3 shows that the Central District of California receives slightly more than its share of chapter 11 cases. FN54 The second column shows the number of chapter 11 cases filed in the United States between 1988 and 1993, and the third column shows the number filed in the Central District of California. The final column shows the percentage each year, which varied from 7.11% to 12.63%. The bottom row shows that during this six year time period, 20,425 chapter 11 cases were filed in the United States, and 1909 of these (9.35%) were filed in the Central District of California.

Table 3

#### Percentage of Nation's Chapter 11 Cases

#### Filed in the Central District of California

#### Year United States Central District of California Percentage

1988 17,690 1358 7.68%

1989 18,281 1391 7.61%

1990 20,783 1478 7.11%

1991 23,989 2268 9.45%

1992 22,634 2539 11.22%

1993 19,174 2421 12.63%

Average 20,425 1909 9.35%

The Los Angeles Division receives 68.0% of the chapter 11 cases filed in the district. FN55

This study of chapter 11 cases filed in Los Angeles is at least representative of the 6.47% of the nation's chapter 11 cases filed there over a six-year period. It assumes that similar results from the management of chapter 11 cases can be achieved in other districts. In addition, a study of 758 chapter 11 cases is of itself a contribution of substantial importance to a field where empirical data are scanty.

This study does not assume that the chapter 11 case load in Los Angeles is entirely representative of the chapter 11 case load throughout the United States. Indeed, there are reasons to think that the chapter 11 case load in Los Angeles is not representative in many respects. FN56 Aside from the Southern District of New York; and perhaps the District of Delaware, the Central District of California probably receives a greater share of large chapter 11 cases than any other district in the United States. However, it is reasonable to believe that the judicial management of chapter 11 cases, like that adopted by Judge Mund during the 1990–1993 period, will bring a substantial level of benefit to any judicial district.

#### *B. The Data Base*

While Judge Mund's data base now covers a decade, from the beginning of 1986 through the end of 1995, the two years at each end were not included in the study. The first two years were excluded because Judge Mund was assigned a large group of related bankruptcy fraud chapter 11 cases filed during these two years, which appeared to make her chapter 11 case load for these two years unrepresentative. The study also does not include cases filed after the end of 1993, so that virtually all of the cases reached disposition before the December 31, 1995 cutoff date. FN57 In fact, only seven cases (six from 1993 and one from 1991) had not reached disposition as of the end of 1995. FN58

#### *1. Judge Mund's Case Load*

During the time period covered by this study, cases filed in the Los Angeles division of the Central District of California were assigned on a random basis to one of the thirteen judges sitting in Los Angeles. FN59 During this six-year period Judge Mund was assigned a total of 758 chapter 11 cases, which constituted 9.7% of the chapter 11 cases filed in Los Angeles.

Judge Mund began the active management of the chapter 11 cases on her docket at the beginning of 1990. From then to the end of 1993, the fast track system **FN60** was applied to 81.2% (485 of 597) of the cases assigned to Judge Mund during this period. This constituted 64% of the 758 cases in the entire 1988–1993 data base.

This study divides the Judge's data base into two parts. The first part consists of the 161 chapter 11 cases filed in 1988 and 1989, before the fast track program began, and is the base period for assessing the results of the fast track program. The second part consists of the 597 chapter 11 cases filed between the beginning of 1990 and the end of 1993, when the fast track program was in operation. The 1990–1993 cases are further subdivided into two groups: the 485 fast track cases and the 112 non-fast track cases.

This data base is a good subject for a study for several reasons. First, the data base is very large (758 chapter 11 cases), and thus provides sufficient data to make some clear statistical analyses. Second, adoption of the fast track program for the vast majority of chapter 11 cases at the beginning of 1990 provides a clear test of the impact of one model of chapter 11 judicial case management. Third, because Judge Mund handled all of the cases in the study, other possible variables such as varying judicial styles and differing local legal cultures are avoided. Judge Mund made little

or no change in her treatment of chapter 11 cases during the period under study, FN61 except the adoption of the fast track system described in this Article. FN62

One feature of the data base merits comment. LoPucki has complained, at least for large cases, that the routine granting of extensions of the 120-day period in which the debtor has the exclusive right to propose a plan of reorganization FN63 is a source of delay that should be changed. FN64 While the data base does not reflect extensions of the exclusivity period, Judge Mund estimates that it happened less than 15 times during the entire period. Thus, less than 2% of the debtors received such extensions. In consequence, extensions of the exclusivity period were not a significant source of delay in disposition of the cases in this study, either before or after the adoption of the fast track system.

There is one possible source of variation in the data base that was impossible to control and which may have influenced the time that cases in the study spent in chapter 11. Generally, the United States Trustee makes a motion to dismiss a chapter 11 case or convert it to a case under chapter 7 FN65 if the debtor either does not comply with the reporting requirements of that office or does not undertake the initial debtor-in-possession obligations such as closing all old bank accounts and opening new accounts designated debtor-in-possession. Such motions are frequently made early in a case. In April, 1991 a new United States Trustee, Marcy Tiffany, took office in the Central District of California. For several months thereafter, early motions to dismiss or convert chapter 11 cases were less frequent. After this interim period, motions to convert or dismiss cases were pursued more vigorously than under her predecessor. The data, however, do not disclose the extent of the impact of varying United States Trustee enforcement on the results. In the author's opinion, as a judge in the same district who observed this varying enforcement first hand, this factor might account for a minor portion of the dramatic reduction in time to disposition of chapter 11 cases.

## 2. Adjustments to the Data Base

Two principal adjustments were required in the chapter 11 data base. First, 25 chapter 11 cases initially assigned to Judge Mund are not included in the data base because they were transferred, usually early in the case, to other judges. In contrast, 11 chapter 11 cases originally assigned to other judges, including one case initially filed in another district, were subsequently transferred to Judge Mund and are included in the data base. However, a twelfth case is excluded because it was transferred to Judge Mund after confirmation of the chapter 11 plan, and Judge Mund did not handle that case during the portion of the case relevant to this study. FN66 These adjustments do not distort the data because the grounds for the transfers of cases to and from Judge Mund were unrelated to their size or to their treatment as fast track cases.

There are 48 chapter 11 cases initially filed under another chapter of the Bankruptcy Code which were subsequently converted to cases under chapter 11. Of the 48 cases, 10 were initially filed under chapter 7 and 38 cases were initially filed under chapter 13. FN67 In addition, there are two cases for which the reference to the bankruptcy court was withdrawn by the district court. These cases were later referred back to the bankruptcy court (and to Judge Mund) by the district court. These cases are included in this study even though their ventures under another chapter, or in the district court, may have delayed their disposition under chapter 11. The impact on this study of delay in these cases is minor.

## III. Judicial Management of Chapter 11 Cases The Fast Track

### A. The Fast Track Process

The fast track system FN68 was implemented by Judge Mund in January, 1990. Upon examination of the petition and schedules FN69 for each of the randomly assigned chapter 11 cases, Judge Mund determined which cases were likely to be ready for a hearing on a plan and disclosure statement four months after the filing date. These cases were classified as fast track cases. Judge Mund did not apply any specific criteria in making this determination. Fast track classification was based on the knowledge she had gained during her years as a bankruptcy judge and her prior experience as a bankruptcy lawyer. The most complex cases, such as publicly traded companies or businesses with unusually large amounts of assets and various lines of business, tended not to be assigned to the fast track program. However, the actual case size was not a determining factor in this decision. Utilizing this process, Judge Mund

assigned 485 of her 597 chapter 11 cases to the fast track system during the 1990–1993 period.

For fast track cases, Judge Mund immediately issued an order requiring that a plan and disclosure statement be filed on a specified date approximately 120 days after the case was filed, and set a hearing for conditional approval of the disclosure statement for one week after the filing of these documents. The order also gave notice that the case may be dismissed or converted to a case under chapter 7 if the debtor did not appear at the hearing, [FN70](#) either in person or through counsel. [FN71](#) If the debtor did not appear, or the disclosure statement and plan were completely insufficient, Judge Mund usually dismissed the case or converted it to a case under chapter 7, after hearing the recommendation of the United States Trustee. [FN72](#) If, however, the disclosure statement showed that a feasible reorganization was possible, but the statement needed amendment, [FN73](#) Judge Mund continued the fast track hearing to permit the debtor to amend the disclosure statement. If the disclosure statement contained adequate information, or could meet the requirements with minor changes, Judge Mund conditionally approved it, and set a combined disclosure statement and confirmation hearing for at least thirty–six days later upon notice to all interested parties. [FN74](#)

By setting a disclosure statement hearing approximately 120 days after the filing of the case, the court forced the debtor to take an early look at the reorganization possibilities of the case, and to begin prompt negotiations with the creditors for a plan of reorganization. Judge Mund also tended to continue final hearings on motions for relief from the automatic stay, if they were based on the feasibility of a reorganization, to the fast track hearing date. By focusing all the chapter 11 issues at one hearing, the debtor could no longer delay the process with a claim that it had a viable plan, but that the plan was not ready for presentation. The fast track hearing generally coincided with the end of the exclusivity period, [FN75](#) and with the 120 days suggested by the United States Supreme Court as an appropriate point to test the viability of a chapter 11 case. [FN76](#)

#### *B. The Fast Track Results: Time Reduction in Chapter 11 Cases*

To analyze the impact of the fast track system on the chapter 11 case load, it is necessary to examine the length of time until disposition of the cases filed in the 1988–1989 base period, before Judge Mund adopted the fast track system. The base period provides the base line for comparison with the entire chapter 11 case load for 1990–1993, when the fast track was applied to 81.2% of the chapter 11 cases. For our comparison with the 1988–1989 period (the base period ), we focus on the 1990–1993 case load as a whole, including both fast track and non–fast track cases. This analysis shows the impact of the fast track system on the entire chapter 11 case load and provides data that are directly comparable with the base period.

Table 4 [FN77](#) shows that the impact of the fast track system on the length of time to dispose of chapter 11 cases was dramatic. It compares the time that it took to dispose of chapter 11 cases during the 1988–1989 base period with the 1990–1993 period, when the fast track program was in effect. The first section of Table 4 gives the number of days to confirmation; the second section gives the number of days to conversion; the third section gives the number of days to dismissal; and the fourth section combines these figures for an overall picture of the number of days to disposition of the chapter 11 cases. The second column has the data for the 1988–1989 base period; the third column has the data for the 1990–1993 period while the fast track system was in operation; and the final column calculates the percentage reductions in time to disposition.

Table 4

Effect of Case Management –

Reduction of Time in Chapter 11

All 1988–1989 Cases	All 1990–1993 Cases	Percent Reduction
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n 26	100	
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Days to u	924	650	29.7%
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Confirmation m 502 381 24.1%

l 437 278 36.4%

n 68 203

Days to u 534 273 48.9%

Conversion m 272 152 44.1%

l 176 102 42.0%

n 67 294

Days to u 591 300 49.2%

Dismissal m 344 160 53.5%

l 167 103 38.3%

n 161 597

Days in u 631 376 40.4%

Chapter 11 m 348 190 45.4%

l 189 117 38.1%

\* Includes seven cases still pending.

Legend: n – number of cases

m – median (days)

u – upper quartile (days)

l – lower quartile (days)

Each section of the table has four lines. The first line (designated n in the second column) is the number of cases for each time period. The third line gives the number of days in each time period that it took the median case to reach the designated disposition (confirmation, conversion, or dismissal) and the percentage change resulting from the fast track program. The second line gives the same information at the upper quartile, and the fourth line give the same information for the lower quartile. FN78

Overall, the typical time savings in a chapter 11 case was 45.4%. The time reduction varied from 24.1% for cases resulting in confirmed plans to 53.5% for cases that were dismissed.

#### 1. Overall Chapter 11 Time Decrease

Table 4 shows that the overall time spent in chapter 11 for the median case decreased 45.4%, from 348 days (11.5 months) to 190 days (6.2 months). The fast track system thus cut the career of a typical chapter 11 case nearly in half. This is illustrated by the middle columns in Chart A.

It is useful to look at the quartiles, as well as the medians, to see the impact of the fast track system on cases which were not in the middle of the range. The impact of the fast track system was similar at the upper and lower quartiles, although less than at the medians. The time spent in chapter 11 by the cases at the upper quartile dropped 40.4%, from 631 days (20.7 months) to 376 days (12.4 months), while the time in chapter 11 for the cases at the lower quartile decreased 38.1%, from 189 days (6.2 months) to 117 days (3.8 months). The black columns in Chart A show these time reductions for the upper quartiles, and the gray columns show them for the lower quartiles.

Charts A, B, [FN79](#) C, [FN80](#) and D [FN81](#) illustrate another result of the fast track system, the reduction in the length of time elapsed from filing to disposition, whatever the outcome of the chapter 11 process. Cases in all of the ranges, from the longest to the shortest, reached resolution faster with the fast track system in place.

The following sections break these results down into the various kinds of dispositive events for a chapter 11 case.

## Chart A

### Days in Chapter 11

#### 2. Cases Resulting in Confirmed Plans

The traditionally recognized purpose of filing a chapter 11 case is to reorganize the finances of the debtor by means of a chapter 11 plan. [FN82](#) A total of 126 chapter 11 cases in the data base (16.6%) resulted in the confirmation of reorganization plans. [FN83](#) By comparison, this figure is essentially identical with that reported in the nationwide Flynn study for the 1980–1989 decade. [FN84](#) Similarly, in a study of 260 chapter 11 cases reported by Jensen–Conklin for the Poughkeepsie division of the Southern District of New York for the same decade, 17.3% of the plans were confirmed. [FN85](#) This study's 16.6% confirmation rate is, however, somewhat lower than that found in the small samples in the Kerkman study [FN86](#) and the first LoPucki study. [FN87](#)

Table 4 shows that the median time from filing to confirmation decreased by 24.1%, from 502 days [FN88](#) (16.5 months) to 381 days (12.5 months). This is illustrated by the middle columns in Chart B. [FN89](#)

One of the most important results of this study is that the time to confirmation for the lower quartile was reduced by 36.4%, [FN90](#) as shown by the gray columns in Chart B. Thus, the good chapter 11 cases, those headed for confirmation without complications, had their plans confirmed in a substantially shorter period of time under the fast track system. These cases also presumably reached plan confirmation at a lower cost because the shorter time frame reduced administrative expenses. [FN91](#) Additionally, the fast track system conveyed the message to the parties that the bankruptcy court was ready to resolve swiftly the issues brought before it.

## Chart B

### Days to Confirmation

There was also a greater reduction in the time to confirmation at the upper end of the spectrum than at the middle. The upper quartile had a 29.7% reduction in time to confirmation, from 924 days (30.4 months) to 650 days (21.4 months). This is illustrated by the black columns in Chart B.

The amount of time saved from the filing of the chapter 11 petition to the confirmation of the plans as a result of Judge Mund's fast track system is remarkable. However, as explored in the following sections, the amount of time saved before dismissal or conversion is even greater.

#### 3. Conversions

If a debtor is not able to confirm a chapter 11 plan, bankruptcy relief is still available under another chapter of the Bankruptcy Code. Chapter 12 [FN92](#) and chapter 13 [FN93](#) have qualification requirements different from chapter 11 that debtors frequently cannot meet. [FN94](#) However, with minor exceptions, [FN95](#) chapter 7 accommodates all

debtors that would qualify for chapter 11. FN96 Table 4 FN97 shows that conversion to another chapter, usually chapter 7, occurred in 35.8% (271) of Judge Mund's chapter 11 cases.

The reduction in the number of days from filing to conversion was much more dramatic than the decrease in the number of days to plan confirmation. As Table 4 shows, FN98 the median number of days to conversion for the 1990–1993 cases fell from the prior rate by 44.1%, from 272 days (8.9 months) to 152 days (5.0 months). This is illustrated in the middle columns in Chart C. The upper quartile shows a somewhat larger decrease in time in chapter 11, a 48.9% reduction from 534 days (17.6 months) to 273 days (9.0 months). FN99 This is illustrated in the black columns in Chart C. At the lower quartile, the percentage reduction before conversion to chapter 7 was 42.0%, from 176 days (5.8 months) to 102 days (3.4 months). FN100 This is illustrated in the gray columns in Chart C. This means that cases that were destined for conversion to another chapter were meeting their doom much earlier under the fast track system than before. The cases where no reorganization was available and liquidation was in the best interests of creditors were arriving in chapter 7 much faster under the fast track system.

Conversion to chapter 7 is not a panacea for creditors. The automatic stay remains in place, and fees are still incurred in the liquidation process. Creditors may feel more secure, however, because the debtor is no longer in possession after the case is converted: the debtor-in-possession is replaced by a trustee to manage the liquidation for the benefit of the creditors. FN101 Since the final resolution of the case is usually quicker in chapter 7, creditors may also benefit from the lower professional fees that accompany the faster resolution of a case. FN102

#### Chart C

##### Days to Conversion

##### Days

##### 1988–1989 Cases

##### 1990–1993 Cases

#### 4. Dismissals

The dismissal of a chapter 11 case is frequently an indication that the case does not belong in chapter 11. Dismissal frequently results from the failure of the debtor to possess any assets to reorganize at the time of filing or the loss of such assets through foreclosure after the case is filed (after the automatic stay has been lifted for secured creditors). If a chapter 11 case is destined for dismissal, it is clearly in the best interests of creditors for the dismissal to occur earlier rather than later. FN103 It is, therefore, beneficial to have fast track case dismissals come earlier than confirmation of a plan or conversion to chapter 7.

In comparison to other methods of case disposition, the reduction in the number of days to dismissal resulting from the fast track management was the most dramatic. Table 4 shows that 47.6% of the cases (361 cases) were dismissed. FN104 In these cases, the median number of days from filing to dismissal was reduced by 53.5%, from 344 days (11.3 months) to 160 days (5.3 months) when fast track management was implemented. FN105 These results are illustrated by the middle columns in Chart D.

#### Chart D

##### Days to Dismissal

##### Days

##### 1988–1989 Cases

##### 1990–1993 Cases

The distribution of time savings for dismissals at the quartiles shows a different pattern from the other kinds of dispositions: the percentage reduction at the median exceeded that at the quartiles. Table 4 shows that the time savings for dismissals at the upper quartile were 49.2%, a reduction from 591 days (19.4 months) to 300 days (9.9 months). FN106 This is illustrated by the black columns in Chart D. The time savings at the lower quartile were 38.3%, a reduction from 167 days (5.5 months) to 103 days (3.4 months). FN107 This is illustrated by the gray columns in Chart D.

It should be noted that dismissal is not an unambiguous failure for a chapter 11 case. Cases are frequently dismissed after the court has permitted the completion of the sale of the principal assets, usually at a better price than foreclosure would bring. In addition, cases are sometimes dismissed because intervening events, such as success in a disputed lawsuit, settlement with a creditor, a change in the business climate, or the obtaining of financing, make it possible to pay all creditors in full.

### *C. The Cases Excluded from Fast Track Management*

One of the purposes of the fast track system was to permit the judge to devote more time to other cases which appeared to require more attention. It is, therefore, useful to analyze cases that were excluded from fast track management during the 1990–1993 period to see if they benefitted from additional oversight by the judge. Table 5 compares fast track cases with non–fast track cases in the 1990–1993 period. Unlike the prior tables, Table 5 omits six 1993 fast track and one 1991 non–fast track case that were still pending on December 31, 1995, the study cutoff date. FN108

Table 5

#### Disposition of 1990–1993 Chapter 11 Cases

##### Plans Confirmed Cases Converted Cases Dismissed Total

Fast Track n 70 171 238 479

Cases\* % 14.6% 35.7% 49.7% 81.2%

Non–Fast Track n 29 29 53 111

Cases\*\* % 26.1% 26.1% 47.7% 18.8%

Totals n 99 200 291 590

% 16.8% 33.9% 49.3%

\* Omits six cases still pending.

\*\* Omits one case still pending.

The first section of Table 5 shows that 479 chapter 11 cases were assigned to the fast track system during 1990–1993. Seventy of these had plans confirmed (14.6%), 171 were converted to another chapter (35.7%), and 238 were dismissed (49.7%). The second part of Table 5 shows that 111 cases were not assigned to the fast track system during the same time period. Twenty–nine of these had plans confirmed (26.1%), another twenty–nine were converted to another chapter (26.1%), and 53 were dismissed (47.7%). In Chart E the black columns show the cases where plans were confirmed, the middle columns show the cases that were converted to another chapter, and the gray columns show the cases that were dismissed.

The data in Table 5 show that there was a 78.8% higher rate of confirmation of chapter 11 plans for the cases singled out for special treatment (26.1% versus 14.6%) and a corresponding lower rate in conversions to chapter 7 (26.1%

versus 35.7%). The difference in the sizes of the black columns in Chart E shows these changes. The dismissal rates, however, were quite similar, as is shown in the gray columns in Chart E.

#### Chart E

#### Disposition of 1990–1993 Chapter 11 Cases

One could conclude from these results that greater judicial attention to a chapter 11 case results in a higher confirmation rate for chapter 11 plans. However, this would not be an accurate interpretation. Rather, the higher confirmation rate reflects the results of the selection process itself. Since large cases are more likely to have plans confirmed,FN109 any selection process which pools the large cases in one group would affect the confirmation rate of that pool. Thus, Judge Mund's likely exclusion of more complex cases from the fast track process FN110 ensured that the non-fast track case pool had a higher plan confirmation rate.

#### *D. Effect of Case Management on Chapter 11 Results*

The impact of case management on the reduction of time that a case spends in chapter 11 is dramatic. What, however, is the impact of such case management on the outcomes in a chapter 11 case? If the substantially more rapid disposition of chapter 11 cases resulted in the reduction of the confirmation rate for plans in such cases, this might give us pause in recommending such case management. That kind of result would make it necessary to weigh the benefits of expediting chapter 11 cases against the costs of denying some debtors the opportunity to confirm a plan. This study has two important findings on this subject. Table 6 compares disposition of the chapter 11 cases for the 1988–1989 base period with the disposition of chapter 11 cases during the 1990–1993 fast track period. The first section shows the number and percentage of confirmations, conversions, and dismissals for the 1988–1989 base period, and the second shows the same information for the 1990–1993 fast track period. FN111

Table 6 shows that the 758 cases in this study were disposed of in three ways: 16.7% of the cases had chapter 11 plans which were confirmed, 47.7% of the cases were dismissed; and in 35.7% of the cases a conversion was ordered from chapter 11 to a case under another chapter of the Bankruptcy Code. FN112

Table 6

#### Disposition of Chapter 11 Cases

##### Plans Confirmed Cases Converted Cases Dismissed Total

1988–1989 n 26 68 67 161

Cases % 16.1% 42.2% 41.6%

1990–1993 n 99 200 291 590

Cases\* % 16.8% 33.9% 49.3%

Totals n 125 268 358 751

% 16.7% 35.7% 47.7%

\* Omits seven cases still pending.

The first important finding on the impact of the fast track system on chapter 11 case outcomes is that the confirmation rate for chapter 11 plans did not change appreciably. Table 6 shows that 16.1% (26 of 125 cases) had plans confirmed during the base period while 16.8% (99 of 590 cases) had plans confirmed during the fast track period. Thus, no substantial impact on the rate of chapter 11 plan confirmations resulted from the adoption of the fast track model used

in this study. The rate of confirmation of chapter 11 plans is actually slightly higher where case management is applied, but the difference of less than one percent is not consequential. This is illustrated by the black bars in Chart F.

The second important result of the adoption of the fast track system is found in the dismissal rate, which showed an 18.5% increase: 41.6% of the cases (67 of 161) were dismissed in the base period (1988–1989) while 49.3% (291 of 590 cases) were dismissed during the fast track period. This difference is illustrated by the gray columns in Chart F. The rate of conversions to another chapter fell proportionately from 42.2% (68 of 161 cases) in the base period to 33.9% (200 of 590 cases) during the fast track period. The middle bars in Chart F illustrate this difference. Whether there are important consequences associated with the increase in dismissal rates and corresponding decrease in conversion rates is not evident from the data and remains to be studied.

## Chart F

### Disposition of Chapter 11 Cases

### Conclusions

This study shows that there is apparently a large amount of delay in the chapter 11 system that can be squeezed out without losing any reorganization value. While it is possible that the data did not collect all possible chapter 11 values, they do support a fairly strong inference that the reduction in the amount of delay did not adversely impact the reorganization of chapter 11 debtors. The only substantial difference in outcome was the increase in dismissals and reduction in conversions to other chapters.

This study shows that reducing delay in chapter 11 cases can be accomplished without any change in the current Bankruptcy Code. To accomplish this, bankruptcy judges can adopt case management techniques authorized by existing law. For example, the fast track system adopted by Judge Mund in 1990 for 81.2% of her chapter 11 cases was a moderate form of judicial case management. It nevertheless drastically reduced the time it took to dispose of chapter 11 cases. The life of a typical chapter 11 case was reduced by 45.4%. FN113 For cases resulting in confirmed chapter 11 plans, the median time to confirm fell 24.1%. FN114 For cases that were ultimately converted to another chapter, the median time in chapter 11 decreased by 44.1%. FN115 The most noticeable reduction was found for cases that were dismissed, which showed a decrease of 53.5% in time in chapter 11. FN116

The dramatic decrease in the life span of chapter 11 cases was accomplished by a slight increase in the confirmation rate for chapter 11 plans, from 16.1% **FN117** to 16.8%. The cases not selected for fast track treatment had a 78.8% higher confirmation rate, FN118 demonstrating that they were the right cases to excuse from the fast track system. FN119

The main difference in outcome in the fast track system is that the dismissal rate for chapter 11 cases increased by 18.5%, FN120 and the rate of conversion to chapter 7 registered a corresponding decrease. FN121 The importance of this change remains to be investigated. FN122

One of the most important results of the study is that, at the lower quartile, the time from filing to confirmation fell by 36.4%. FN123 Thus, the fast track system helped the chapter 11 cases that were on a smooth course toward confirmation arrive there more quickly and presumably at less expense. FN124

The primary goal of a bankruptcy judge is to do justice, not to move cases along to conclusion. This Article does not recommend that judges return to the management of bankruptcy cases, as they did under the Bankruptcy Act before 1979. The recommended chapter 11 case management is similar to the case management undertaken by the district courts under Rule 16 of the Federal Rules of Civil Procedure. FN125 Under Rule 16, a judge sets a status conference shortly after a case is filed, sets deadlines for discovery and schedules pretrial and trial dates. FN126 This involves management of the process only, to secure the just, speedy, and inexpensive determination of every action. **FN127**

In reducing the delay in chapter 11 cases, a judge must be careful not to impose unreasonable deadlines. If chapter 11 cases are pressed too hard for completion, opportunities for reorganization may be lost, and the rate of plan

confirmation will likely decline. Therefore, the management of chapter 11 cases requires the exercise of judgment. In this study, Judge Mund exercised her judgment, gained from past experience as both a bankruptcy judge and an attorney, to select cases best suited for the fast track system. The experience and knowledge of a judge cannot be matched by most bureaucrats. It is for this reason that bankruptcy cases are decided by judges, and not administrators.

Judge Mund's fast track system described in this study is not the only method of chapter 11 judicial case management, nor does this Article contend that this fast track system is the best method. In fact, Judge Mund herself no longer follows the fast track model for her chapter 11 cases. In 1994 Congress considered adopting the fast track system developed by Judge Small, [FN128](#) a variant of which was adopted by Judge Mund. [FN129](#) However, it decided instead to amend section 105 of the Bankruptcy Code to provide explicit authorization for judges to set status conferences. [FN130](#) As a result, Judge Mund now follows the section 105 procedure, and holds a status conference approximately one month after a chapter 11 case is filed. [FN131](#) At the time of the conference, she sets dates for the filing of disclosure statements and plans, and determines the possible conditional approval of disclosure statements and possible combined hearings on disclosure statements and plan confirmations. As in her prior fast track system, she requires notice to all creditors and reserves the right to dismiss or convert the case to a case under chapter 7 at the status conference if the debtor fails to appear.

Judge Mund's new system is similar to that adopted by a number of other bankruptcy judges in the United States. [FN132](#) I started using a similar system in September, 1992. The effectiveness in reducing delays with this new management process has not yet been studied.

## Technical Appendix

This section reports on certain technical considerations relating to the analysis of the data in this study.

### *Use of Medians Rather Than Means*

It is most common to calculate and to report averages, or means, in analyzing data of the type presented in this study. However, the study relies entirely on medians rather than on means or averages. [FN133](#) This type of analysis is chosen for two reasons. First and most important, it is very useful to know what happens in the typical case under chapter 11. The typical case is one that lies near the median and may not be one that lies near the mean. Furthermore, one very long or very short case will change the calculation of the mean, even though it has no impact on the typical case. In contrast, such a case does not change the calculation of the median at all. In this study, the data base contains a number of very lengthy chapter 11 cases. Therefore, the median is a more reliable indicator of what happened in a typical chapter 11 case in the data base than the mean.

In addition, it is easier to adjust the calculations of the medians and quartiles for the seven open cases. Since each of these cases is more than two years old as of the December 31, 1995 cutoff date for this study, they fall in the top quartile in all categories. The calculations in Table 4 include these cases.

To illustrate the difference, Table 7 shows both the means and the medians for the data involved in this study. Table 7 omits data for the seven open cases, because the estimation of data to add them to the calculation of means is complicated, and likely to be wide of the mark.

The greater informative value of the medians than the means is illustrated in the data for dismissed cases in Table 7. The decrease in the mean resulting from the adoption of the fast track program is much less than the reduction in the median, because of several cases that were dismissed more than 1500 days after they were filed. While these data do not alter the median, they do raise the mean substantially. They also have a substantial, yet lesser impact on the figures for the average time in chapter 11. This is because nearly half of the cases that were dismissed were cases impacted by the late-dismissed cases. A standard adjustment to the data would eliminate these cases because they are outliers, which means that they lie more than three standard deviations above the mean. However, they are legitimate data points in the study. The median recognizes this without distorting the data, while the mean does not.

## Number of Days in Chapter 11 –Comparison of Means and Medians

1988–1989 Cases 1990–1993 Cases\* Percentage Change

n 26 99

Days to n 678 507 25.2%

Confirmation sd 362 341

md 502 377 24.9%

n 68 200

Days to mn 409 233 43.0%

Conversion sd 344 231

md 272 150 44.9%

n 67 291

Days to mn 436 304 30.3%

Dismissal sd 391 377

md 344 158 54.1%

n 161 590

Days in mn 464 314 32.3%

Chapter 11 sd 379 341

md 348 189 45.7%

\* Omits seven open cases.

Legend: n – number of cases

mn – mean

sd – standard deviation

md – median

### *Outliers*

It is a well-known statistical analysis tool to adjust a body of data by eliminating outlying data. Because this study relies primarily on medians, an analysis of the data that fell outside the inner fences and outer fences was done. [FN134](#) There were very few data that fell outside the outer fences. In addition, the cases falling into this category were clearly chapter 11 cases and not statistical aberrations. For these reasons, no outliers were eliminated.

### *Statistical Significance of Results*



There is one substantial benefit to using the mean values rather than the median values in reporting a study. The use of the means permits a determination as to whether the differences between the two time periods in question are statistically significant. The differences in the means reported in Table 7 are all statistically significant at the 99% level. The only exception is the difference in plan confirmation levels, which is statistically significant at the 95% level. The z-test results FN135 are as follows:

Confirmations 2.17

Conversions 3.92

Dismissals 2.51

Overall differences 4.53

#### *Dates of Dispositive Events*

In calculating the number of days from the date of filing to the date of confirmation, conversion or dismissal, one factor must be noted. The date of disposition used in the study is the date on which the order was announced from the bench, because this is the date that Judge Mund kept in her data base. In most cases, the written order was signed and entered within a few weeks. It is likely, however, that there were some occasions when the order was delayed for a longer period of time.

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#### Footnotes

**FN1** See discussion *infra* part III.B.

**FN2** This Article principally reports results for the typical case under chapter 11 of the Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1330 (1994)). A typical case for this Article is the median case in this study's statistical analysis. See Technical Appendix, *infra* (explaining why median is used in analysis).

**FN3** See discussion *infra* part III.B.3.

**FN4** See discussion *infra* part III.B.4. The court may, upon motion of a party in interest or the United States trustee, convert a chapter 11 case to a chapter 7 case or dismiss the case outright. 11 U.S.C. § 1112(b) (1994). Either option must, however, be in the best interests of creditors and the estate and be supported by cause. *Id.*

**FN5** Cases remain open for a period of time for other purposes after confirmation of a chapter 11 plan or conversion to chapter 7. This study does not consider the postconfirmation or postconversion life cycle of a chapter 11 case.

**FN6** See discussion *infra* part III.B.1.

**FN7** See discussion *infra* part III.D.

**FN8** See discussion *infra* part III.D.

**FN9** It is possible that Congress does not support the model of case management used in this study. See *infra* text accompanying notes 128–30 (noting recent Congressional approval of status conferences over fast track method).

**FN10** See, e.g., 11 U.S.C. § 105 (1994) (providing explicit authorization for status conferences). In addition, bankruptcy judges have inherent powers to manage their dockets. See *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.* (*In re Timbers of Inwood Forest Assocs.*), 808 F.2d 363, 374 (5th Cir. 1987), *cert. granted*, 481 U.S. 1068, *aff'd*, 484 U.S. 365 (1988) ([W]e think that each bankruptcy judge is called upon to manage the cases in front of him,

fairly and impartially, in such a way as to promote their orderly and prompt disposition. ), *aff'd*, 484 U.S. 365 (1988).

**FN11** The fast track process was originally developed by Judge A. Thomas Small of the Eastern District of North Carolina. George W. Hay, *Lawyers Overwhelmingly Endorse Judge Small's Fast Track 11s*, TURNAROUNDS & WORKOUTS, July 15, 1989, at 1. Judge Small identified cases that were appropriate for expedited process and required those selected to file a plan and disclosure statement with[in] 60 to 90 days from the petition date. *Id.*; see also A. Thomas Small, *Small Business Bankruptcy Cases*, 1 AM. BANKR. INST. L. REV 305, 321 (1993) (explaining fast track process). Judge Small's process was modified by Judge Mund in certain respects. See *infra* note 74 (comparing Small and Mund methods of case expedition).

**FN12** See discussion *infra* part I.B.

**FN13** Pub. L. No. 103–394, 1994 U.S.C.C.A.N. (108 Stat. 4106) 3340.

**FN14** *Id.* at 3368 (Title VI).

**FN15** The Bankruptcy Code, which was enacted as the Bankruptcy Reform Act of 1978, went into effect on October 1, 1979. Pub. L. No. 95–598, 92 Stat. 2549. It repealed the Bankruptcy Act of 1898, as amended from time to time.

**FN16** ADMIN. OFF. OF THE U.S. CTS., FED. JUD. WORKLOAD STAT. (December 31 reports for years 1980–1994) [hereinafter WORKLOAD STAT.] (providing calendar year statistics).

**FN17** For 1980–1994 statistics, see WORKLOAD STAT., *supra* note 16. For 1995 statistics, Memoranda from Steven R. Schlesinger, Chief, Statistics Division, Admin. Office of the U.S. Cts. to L. Ralph Mecham, Director, Admin. Office of the U.S. Cts. (dated Jan. 24, 1996, Dec. 21, 1995, and Nov. 17, 1995) (December 1995, November 1995, and October 1995 figures, respectively) (on file with author); CONSUMER BANKR. NEWS, Dec. 21, 1995, at 2 (fiscal year 1995 figures).

**FN18** The 1994 Act redirected some chapter 11 cases into chapter 13 by increasing the debt ceiling provided in 11 U.S.C. § 109(e) (1994), from \$350,000 in secured debt and \$100,000 in unsecured debt to \$750,000 in secured debt and \$250,000 in unsecured debt. Similarly, the Bankruptcy Judges, United States Trustee and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99–554, 100 Stat. 3088, added chapter 12 to the Bankruptcy Code, and a significant portion of cases previously filed under chapter 11 by family farmers were subsequently filed under chapter 12. See ED FLYNN, ADMIN. OFF. OF U.S. CTS., STATISTICAL ANALYSIS OF CHAPTER 11, at 1–3 (Oct. 1989) (unpublished manuscript on file with author).

**FN19** There are no credible estimates as to the value of the assets or the amount of debt that has passed through the bankruptcy system as a result of chapter 11 cases. Flynn estimated that approximately \$200 billion in assets have passed through the bankruptcy courts by way of chapter 11 case filings during the ten years following the October 1, 1979 effective date of the Bankruptcy Code. FLYNN, *supra* note 18, at 6. However, this estimate was apparently a guess, and in any event, is now outdated.

**FN20** *Id.* at 1. The Flynn study was based on statistics gathered by Ernst & Young in a study of 2395 chapter 11 cases in 15 districts that had resulted in confirmed plans. *Id.* at 9. It also drew on data received from the bankruptcy courts by the Statistical Analysis and Reports Division (SARD) of the Administrative Office of United States Courts. *Id.* at 7.

**FN21** *Id.* at 23–24. Flynn estimated that the chapter 11 confirmation rate was

increasing, but that it would level off at 25–30%. *Id.* at 10–12. Subsequent experience has not supported this estimate. See Table 4, *infra* p. 101 (showing confirmation rate of 16.6% for cases in this study).

**FN22** *Id.* FLYNN, *supra* note 18, at 23–24.

**FN23** *Id.* at Appendix A. The five districts selected for the study due to their potentially unique characteristics include: S.D.N.Y., N.D.Ill., D.N.J., S.D.Tex., and C.D.Ca. The other districts in the study were: N.D.Tex., S.D.Cal., M.D.Fla., N.D.Ga., E.D.La., D.P.R., D.Colo., S.D.Miss., W.D.N.C. and S.D.Iowa.

**FN24** *Id.*

**FN25** *Id.* at Appendix B (discussing weighted projections).

**FN26** This figure is not exactly clear in LoPucki's report. *See* Lynn M. LoPucki, *The Debtor in Full Control Systems Failure Under Chapter 11 of the Bankruptcy Code? (Pt. 1)*, 57 AM. BANKR. L.J. 99, 122–23 (1983). LoPucki's Chart III shows an entry for the number of months to confirmation for 20 of 45 cases (44%), and an additional three cases still pending. *Id.* However, he reported an overall success rate of about 26%. *Id.* at 100.

**FN27** Lynn M. LoPucki, *The Debtor in Full Control Systems Failure Under Chapter 11 of the Bankruptcy Code? (Pt. 2)*, 57 AM. BANKR. L.J. 247, 269 (1983).

**FN28** Jerome R. Kerkman, *The Debtor in Full Control: A Case for Adoption of the Trustee System*, 70 MARQ. L. REV. 159, 205–06 (1987).

**FN29** *Id.* at 206.

**FN30** Susan Jensen–Conklin, *Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law*, 97 COMM. L.J. 297, 318 (1992). The study found that, for 26 of 45 cases with confirmed plans, the plans were either certainly or probably consummated. *Id.* at 324. In contrast, the study found 19 cases where the plans were either certainly or probably not consummated. *Id.* The time from filing to confirmation was not reported in this study.

**FN31** Lynn M. LoPucki, *The Trouble With Chapter 11*, 1993 WIS. L. REV. 729, 741–42. LoPucki did not report the rate of confirmation in this study. Based on these four small studies, the Flynn study, and a 1964 study under the Bankruptcy Act, LoPucki concluded that there has been a dramatic increase in the time that debtors spend in chapter 11. *Id.* at 742. The data, however, appear too thin to support such a sweeping conclusion.

**FN32** A major empirical study of chapter 11 cases largely funded by the Endowment for Education of the National Conference of Bankruptcy Judges is under way. The principal researchers are Vice President Teresa A. Sullivan of the University of Texas, Professor Elizabeth Warren of Harvard Law School, and Professor Jay Lawrence Westbrook of the University of Texas Law School. In addition to answering many questions on how chapter 11 operates, the project may provide answers to some of the issues left open in this study, as well as shed further light on the subject of this Article. *See* Elizabeth Warren & Jay L. Westbrook, *Searching for Reorganizational Realities*, 72 WASH. U. L.Q. 1257 (1994) (explaining scope and methods of study). Publication of the results of the study is not expected for two or three more years, at the earliest.

**FN33** LoPucki, *supra* note 31, at 738.

**FN34** *See id.*

**FN35** Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984–1987*, 22 U. RICH. L. REV. 303, 318 (1988) (explaining that secured creditors are only parties realizing significant benefits from debtors' estates).

**FN36** Confirmation will ensure that secured creditors receive payment later, rather than sooner.

**FN37** The cramdown provision, 11 U.S.C. § 1129(b) (1994), may allow a plan to be confirmed despite the objection of a class of impaired claims or interests. *See generally* Mark E. MacDonald et al., *Confirmation by Cramdown through the New Value Exception in Single Asset Cases*, 1 AM. BANKR. INST. L. REV. 65 (1993).

**FN38** Section 506 of the Bankruptcy Code splits an undersecured claim into two parts, a secured claim and an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. 11 U.S.C. § 506(a) (1994).

**FN39** See Edith H. Jones, *Chapter 11: A Death Penalty for Debtor and Creditor Interests*, 77 CORNELL L. REV. 1088, 1091 (1992) (stating that creditors are better off taking what they can and getting out early because chapter 11 costs frequently exceed potential recovery); Small, *supra* note 11, at 305 ( [U]nsecured creditors are not paid interest and the longer they wait for distribution, the greater is their loss. ).

**FN40** See 11 U.S.C. § 1112 (1994) (allowing for conversion or dismissal of case by motion of debtor, party in interest, or trustee).

**FN41** Curiously, Flynn found that creditors received the highest payments on their debts in plans that were confirmed between four and five years after chapter 11 cases were filed. FLYNN, *supra* note 18, at 28. While Flynn offered some possible explanations for this result, his findings may be flawed because the figure appears to be dominated by large cases from the Southern District of New York. *Id.*

**FN42** See LYNN M. LOPUCKI, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS § 11.7, at 622 (2d ed. 1991) (implying that under circumstances where debtor is gaining strength or is going to gain strength, creditors may profit from delay).

**FN43** See Steve H. Nickles, *Consider Process Before Substance, Commercial Law Consequences of the Bankruptcy System: Urging the Merger of the Article 9 Drafting Committee and the Bankruptcy Commission*, 69 AM. BANKR. L.J. 589 (1995) (describing efforts of commercial law specialists to amend Article 9 of Uniform Commercial Code to make unencumbered assets scarce); see also LOPUCKI, *supra* note 42, § 10.2, at 523 (showing that marketable assets of most companies in bankruptcy are fully encumbered).

**FN44** See *supra* text accompanying notes 38–39.

**FN45** There is one kind of time expenditure that inevitably occurs more often in longer cases. In a longer case each of the professionals must review the file more times to refresh his or her memory as to the status of the case. This fading memory problem is unavoidable in longer cases and it alone generates some of the higher total professional fees.

**FN46** LOPUCKI, *supra* note 42, §§ 11.3.7, 11.11.2 (illustrating how owners can act in self-interest during chapter 11 cases).

**FN47** See *In re Kendavis Indus. Int'l, Inc.*, 91 B.R. 742, 765 (Bankr. N.D. Tex. 1988) ( [T]here is no shareholder equity so we've got nothing to lose. The banks have it all on the line now not us. ).

**FN48** See LoPucki, *supra* note 31, at 733 ( Because [debtors—in –possession] retain the benefits of risk taking without suffering a corresponding share of the losses, it may be in their interests that the company takes risks not justified by the expected returns to the company. ); see also *supra* note 47 (providing example of this type of thinking).

**FN49** For the 1988–1993 period of this study, chapter 11 cases constituted 2.47% (20,045 of 811,209) of bankruptcy filings in the United States and 2.62% (1909 of 72,978) in the Central District of California. WORKLOAD STAT., *supra* note 16. This information is summarized in Tables 2 & 3, *infra* pp. 94–95.

**FN50** 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, 493–94 (1991). Bermant reported that 36.7% of judicial case-related work time is spent on chapter 11 cases and 27.4% on adversary proceedings. *Id.* Since the study did not separate adversary proceedings by chapter, some assumptions must be made. If we assume that half of the adversary proceeding time was spent on adversaries arising in chapter 11 cases (a conservative estimate), judges spend a total of 50.4% (36.7% + (27.4% x .5)) of their case-related work time on chapter 11 cases.

**FN51** In 1988 there were seven new judgeships that were filled in the Central District of California. Some 17,000 pending bankruptcy cases were reassigned to the new judges at that time. All of the transferred cases were originally filed between the middle of January, 1984 (when the Central District went onto the BANS computer maintained for more than a decade in the basement of the Administrative Office of United States Courts) and January 31, 1988. Only the last month of the case transfer data base overlapped with the data base for this study. None of the January, 1988 chapter 11 cases on Judge Mund's calendar were involved in the transfers.

**FN52** It should be noted that the data on which this study is based are not ordinarily kept by any bankruptcy court in the United States. These data exist only because a single bankruptcy judge has kept her own log of chapter 11 cases for more than a decade. Judge Mund gathered this information on her own time while her district carried the heaviest case load per judge of any district in the country. Apart from this private data base, the data reported in this study have never been collected for any sizeable number of chapter 11 cases. Collecting them would require an enormous expenditure of time and effort.

**FN53** The percentage of the nation's bankruptcy cases filed in the Central District of California varied between 1988 and 1993 because the recession, which began in the rest of the nation in 1989, did not arrive in California until 1991. Similarly, while the recession ended in 1992 for the rest of the country, it did not end until 1994 in California. Table 2 shows these trends.

**FN54** Table 3 statistics are compiled from the Administrative Office of the United States reports. *See* WORKLOAD STAT., *supra* note 16. Flynn found that, as of September 30, 1988, the Central District of California had 7.55% of the nation's pending chapter 11 cases. FLYNN, *supra* note 18, at Appendix B. In contrast, the average district in the United States (of which there are 94) receives 1.06% of the nation's bankruptcy cases. *Id.* The Flynn study indicates that the majority of its statistical information was obtained from a study conducted by Ernst & Young on chapter 11 cases and from opening and closing reports on SARD's data base. *Id.*

**FN55** Caseload Statistics 1994, United States Bankruptcy Court Central District of California, May 1995, Exhibit I, at 1 (Central District of California statistics) (on file with the author).

**FN56** My colleague Judge Lisa Hill Fenning and her former law clerk Craig Hart have analyzed 262 chapter 11 cases assigned to Judge Fenning in 1992 and 1993. Lisa Hill Fenning & Craig A. Hart, *Measuring Chapter 11: The Real World of 500 Cases*, 4 AM. BANKR. INST. L. REV. 119 (1996). These cases came to Judge Fenning by random assignment from the same case pool as the Judge Mund cases in the data base in this study. Fenning and Hart found that 56% to 64% of the chapter 11 cases assigned to Judge Fenning during these two years were real estate cases filed primarily to protect real property from impending foreclosure. *Id.* at 122. In an earlier report on the same study, Fenning and another law clerk, Brian Tucker, found that 33% of the cases were single asset real estate cases; 15% were multiple asset real estate cases and 12% were consumer cases filed to save the debtor's residence. Lisa Hill Fenning & Brian Tucker, *Profile of Single Asset Real Estate Cases*, 1994 AM. BANKR. INST. ANN. SPRING MEETING 1 (Apr. 1994), available in WL 709 PLI/COMM. 537, reprinted in COMM. L. & BANKR. SECTION NEWSL. (Los Angeles County Bar Assoc.), Summer 1994, at 4.

**FN57** In addition, Bankruptcy Code changes in late 1986 and late 1994 may have affected the data for 1986 and 1995. *See supra* note 18 (explaining changes).

**FN58** At the beginning of 1995, a new division was split off from the Los Angeles Division of the Central District of California. Three judges from Los Angeles, including Judge Mund, are assigned to this division, and will sit in Woodland Hills, California when the bankruptcy courthouse opens there in the summer of 1996. Thus far, both the number and size of chapter 11 cases filed in that division appear to be similar to the cases filed in Los Angeles.

**FN60** *See supra* part III.A. (explaining Judge Mund's fast track management system).

**FN61** Judge Mund was appointed to the bench in January 1984, four years before the time period involved in this study. Thus she had developed a judicial style that remained constant throughout the study.

**FN62** See *supra* part III.A.

**FN63** 11 U.S.C. § 1121(b) (1994). Section 1121(b) of the Bankruptcy Code provides debtors an exclusive 120-day period in which to file a chapter 11 plan. *Id.* Extensions may be granted by the judge after notice and a hearing, and upon a showing of cause. *Id.* § 1121(d).

**FN64** LoPucki, *supra* note 31, at 753–56.

**FN65** See 11 U.S.C. § 1112(b) (1994) (permitting United States Trustee to recommend that court dismiss or convert case).

**FN66** Flynn found that 16.7% of chapter 11 case files included consolidated related cases. FLYNN, *supra* note 18, at 13–16. The data in this study are incomplete on the subject of consolidation. Therefore, for this study, consolidated cases are treated as if they had not been consolidated.

**FN67** While in principle there could also be conversions to or from chapter 12, the urban character of Los Angeles County, from which the cases came, resulted in no such conversions.

**FN68** See *supra* note 11 (discussing development of fast track system).

**FN69** The standard routine in the Central District of California is for the clerk's office to forward to the assigned judge a copy of each chapter 11 petition, together with any supporting schedules.

**FN70** See 11 U.S.C. § 1112(b)(4) (1994) (providing that court may dismiss case or convert it to case under chapter 7 for failure to propose plan within court appointed time).

**FN71** Unlike many districts where chapter 11 cases filed by debtors *in propria persona* (in one's own proper person or *pro se*) are uncommon, many chapter 11 cases are filed *in propria persona* in the Central District of California. For Judge Mund's 1990–1993 chapter 11 cases, 107 (17.9%) were filed *in propria persona*. The judge's data base does not include such data for the 1988–1989 period; presumably the rate was similar.

**FN72** 11 U.S.C. § 1112(b) (1994).

**FN73** Judge Mund found that statements were frequently in need of amendment.

**FN74** As already noted, the fast track process was originally developed by Judge Thomas Small. See *supra* note 11. Judge Mund's version of the fast track process differed from Judge Small's in certain respects. In Judge Small's version of the system, no disclosure statement hearing is ordinarily set, and the disclosure statement is conditionally approved without a hearing. Small, *supra* note 11, at 309. Creditors may, however, file objections to the disclosure statement which are heard at a combined disclosure statement/confirmation hearing. *Id.* Judge Small sets an early date for the confirmation hearing. Unlike Judge Small, Judge Mund set a disclosure hearing and frequently required revisions before permitting it to go out to creditors. See text this subpart.

**FN75** 11 U.S.C. § 1121(b) (1994) ([O]nly the debtor may file a plan until after 120 days after the date of the order for relief under this chapter. ).

**FN76** United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 376 (1988).

**FN77** There were seven cases from the 1990–1993 period that were still pending at the cutoff date for this study (the end of 1995). See *supra* note 58 (tracing disposition of seven cases). They were distributed pro rata among the categories in Table 4.

**FN78** A note for those who are not technicians. The median is a line that divides the data in half (from top to bottom), and the quartiles are lines that further divide each half in half. Thus the top quarter of the data lie above the upper

quartile line, and the bottom quarter of the data lie below the lower quartile line. The second line in Table 4 thus provides information on the case that was one-quarter of the way down a listing that compiled the cases from those which took longest to dispose of to those that were disposed of quickest. Similarly, the fourth line of Table 4 provides information on the case that sits three-quarters of the way down that list.

**FN79** *See infra* p. 104.

**FN80** *See infra* p. 106.

**FN81** *See infra* p. 107.

**FN82** By the traditional measure, the confirmation of a chapter 11 plan constitutes success under chapter 11. However, more needs to be taken into account in determining the success rate of chapter 11 cases.

**FN83** *See* Table 4, *supra* p. 101.

**FN84** *See supra* note 21 and accompanying text (finding 17% of chapter 11 cases studied resulted in confirmation of plan).

**FN85** *See supra* note 30 and accompanying text.

**FN86** *See supra* note 28 and accompanying text (finding confirmation rate of 29%).

**FN87** *See supra* note 27 and accompanying text (finding confirmation rate of 44%).

**FN88** The 502-day base line from filing to plan confirmation apparently accords with the Jensen–Conklin study. Jensen–Conklin, *supra* note 30. That study did not report the median time from filing to plan confirmation. Instead, it reported an average, or mean, of 22.4 months (670 days) from filing to confirmation. *Id.* at 319. This is essentially the same as the average for the base line period in this study (678 days). *See* Table A–1, *infra* p. 116.

**FN89** The base period (1988–1989) median lies near the high end of the other reported studies, while the fast track median lies in the middle. *See supra* text accompanying notes 20–31 (reporting median confirmation times of 656 days (22.5 months), 9.5 months, 12 months, and 17.5 months).

**FN90** *See* Table 4, *supra* p. 101.

**FN91** *See supra* text accompanying notes 35–36.

**FN92** 11 U.S.C. §§ 1201–1231 (1994).

**FN93** *Id.* §§ 1301–1330.

**FN94** Chapter 12 is limited to family farmer[s] with regular annual income. *Id.* § 109(f). Chapter 13 is only available to debtors with regular income who owe noncontingent, liquidated, unsecured debts not exceeding \$250,000 and similar secured debts not exceeding \$750,000. *Id.* § 109(e).

**FN95** Railroads, stockbrokers and commodity brokers may not be debtors under chapter 7. *Id.* § 109(d).

**FN96** *Id.*

**FN97** *See supra* p. 101.

**FN98** *See supra* p. 101.

**FN99** See Table 4, *supra* p. 101.

**FN100** See Table 4, *supra* p. 101.

**FN101** See 11 U.S.C. § 701(a)(1) (1994), which provides for the appointment of a disinterested person to serve as interim trustee after the order for relief is filed. *Id.* Creditors are then permitted to elect a permanent trustee if they do not like the interim trustee. *Id.* § 702. While a trustee may be appointed in a chapter 11 case, *id.* § 1104(a), such appointments are quite uncommon.

**FN102** See *supra* text accompanying notes 35–36.

**FN103** See *supra* text accompanying notes 35–36.

**FN104** See Table 4, *supra* p. 101.

**FN105** See Table 4, *supra* p. 101.

**FN106** See Table 4, *supra* p. 101.

**FN107** See Table 4, *supra* p. 101.

**FN108** As a result of these omissions, the numbers in Table 5 differ slightly from those in Table 4.

**FN109** Larger cases have higher chapter 11 plan confirmation rates. In the Southern District of New York, for example, Flynn found that the assets and liabilities were much larger than in the other 14 districts that he studied (including the Central District of California), and that the plan confirmation rate was 43%. See FLYNN, *supra* note 18, at 11, 17, & 32.

**FN110** See *supra* text accompanying notes 68–69 (noting that Judge Mund would often exclude more complex cases from fast track management).

**FN111** Table 6, like Table 5, *supra* p. 108, omits seven chapter 11 cases still awaiting disposition. See *supra* note 58 (tracing disposition of seven cases). The numbers in Table 6 are, therefore, slightly different from those in Table 4.

**FN112** While most of these cases were converted to cases under chapter 7, a few were converted to cases under chapter 13.

**FN113** See *supra* part III.B.1.

**FN114** See *supra* part III.B.2.

**FN115** See *supra* part III.B.3.

**FN116** See *supra* part III.B.4.

**FN117** See *supra* part III.D.

**FN118** See *supra* part III.C.

**FN119** These cases were not selected for fast track treatment because of their complexity and because of the need for extra time to consider the resulting complex chapter 11 plans. See *supra* text accompanying notes 68–69.

**FN120** See Table 6, *supra* p. 111 (increase in percentage from 41.6% to 49.3% is 7.7%; dividing 7.7% by 41.6% yields increase of 18.5%).



**FN121** See Table 6, *supra* p. 111 (showing drop in percentage from 42.2% to 33.9%).

**FN122** A study of the rate of no-asset reports by chapter 7 trustees in converted chapter 11 cases might provide some evidence on this issue. Since this data base did not include this information, it could not be studied here. The information was not otherwise available because the dockets in Los Angeles were not computerized until November, 1994.

**FN123** See *supra* part III.B.2.

**FN124** See *supra* part I.B.

**FN125** FED. R. CIV. P. 16.

**FN126** *Id.* 16(b).

**FN127** *Id.*; cf. FED. R. BANKR. P. 1001 ( These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding. ).

**FN128** See *supra* notes 11 and 74.

**FN129** See *supra* part III.A.

**FN130** Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(a), 1994 U.S.C.C.A.N. (108 Stat. 4106) 3340, 3345-46 (amending 11 U.S.C. § 105).

**FN131** 11 U.S.C. § 105(d) (1994).

**FN132** See ADMIN. OFF. OF U.S. CTS., CASE MGMT. MANUAL FOR U.S. BANKR. JUDGES (1995). This manual was prepared by the Administrative Office of the United States Courts under the direction of the Subcommittee on Case Management of the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States. It has a section specifically devoted to the management of chapter 11 cases. *Id.* at 111-23. It contains a specific discussion of the case management technique now used by Judge Mund (and other judges) but not of the fast track system that is the subject of this study. *Id.* at 120-21.

**FN133** As an aid for the nontechnician, a mean or average is calculated by adding up all the numbers (in this study, the number of days from filing to disposition) and dividing by the number of entries. The median, in contrast, is determined by listing a series of numbers from lowest to highest and finding the midpoint in the list.

**FN134** See, e.g., JAMES T. MCCLAVE & TERRY SINCICH, A FIRST COURSE IN STATISTICS 71-73 (5th ed. 1995) (explaining median analysis).

**FN135** A z-test is used to measure the relative position of data with reference to a collection of scores from a reference group. AUDREY HABER & RICHARD R. RUNYON, GENERAL STATISTICS 136-39 (3d ed. 1977).