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THE VALUE OF OBVIOUS EMPIRICAL RESULTS AND THE OMNISCIENT MR. PALANS: RESPONSE TO MR. PALANS' COMMENTS

THEODORE EISENBERG*

Mr. Palans' comment raises one worthwhile question. Most of the rest of his rant is either off the subject or too shallow to warrant extended discussion.

The useful question Mr. Palans raises is whether this research is of value. The article did not defend this mode of work; perhaps I am too immersed in it to always keep in mind the merits of discussing the question. So let me spell out its benefits here.

I. THE BENEFITS OF FINDING THE OBVIOUS

I will begin with what I take Mr. Palans to view as the worst case for this research: all the results are obvious, everyone knew what the outcome would be. In Mr. Palans' words: "The conclusion that judges' and lawyers' views of a fee system are 'self-serving' and 'overstate the merits of professional performance' is merely a statement of the obvious."¹

Unless systems always behave the way we believe, there is value in monitoring the way systems operate, even if they turn out to operate the way we thought they did. A thoughtful bankruptcy practitioner should be especially attuned to the need to check impressions against reality, because so much recent bankruptcy work has shown widespread impressions to be false.

Consider LoPucki and Whitford's findings about reorganizations of large, publicly held corporations. They find, to my surprise, that most large corporations successfully reorganize and that violations of absolute priority are frequent but small.² They and others find that managers and directors

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1. Lloyd A. Palans, *Comments on Eisenberg, Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 997 (1994).

2. Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 137-41 (1990). See also Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority Claims*, 27 J. FIN.

of firms have short tenures in office.³ Since much of the concern about Chapter 11 focuses on entrenched managers misbehaving, this last finding is particularly important. Others find bankruptcy fees to be a surprisingly low percentage of assets.⁴ Or consider the finding by Tagashira and me (yes, Mr. Palans, I am citing myself again), that success rates well below fifty percent could nevertheless yield a gain to creditors in reorganization cases.⁵

In the consumer area, Sullivan, Warren, and Westbrook find that medical debt is a surprisingly minor influence in consumer bankruptcy.⁶ Almost half of the debtors reported no medical debt. Of those who reported medical debt, the median debt was \$616. Also surprising is the relatively modest unemployment rate of bankruptcy filers. Between seven and seventeen percent of filers were unemployed, and one could not reject the hypothesis that unemployment among bankruptcy filers is no different than unemployment in the population at large.⁷

The instant article is not on the same scale as the above works. The other authors spent many years gathering and analyzing the empirical data underlying their findings. But the spate of empirical surprises about bankruptcy counsels humility about what we believe to be true. And if a study simply confirms what we believe, it can serve a useful function. Negative empirical results can be as important as positive ones.

This is not to say that we should all think up obvious studies to conduct to confirm what we likely already know. Not all impressions are worth confirming or refuting. This is a matter of judgment, not logic. The American Bankruptcy Institute (ABI) conducted a useful study which asked many appropriate, interesting questions about the bankruptcy fee system.⁸ Analyzing lawyer and judge responses separately, as the ABI did, is

ECON. 285, 286, 294 (1990).

3. Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 723-42 (1993); Stuart C. Gilson, *Bankruptcy, Boards, Banks, and Blockholders*, 27 J. FIN. 355 (1990); Stuart C. Gilson, *Management Turnover and Financial Stress*, 25 J. FIN. ECON. 241 (1989).

4. Theodore Eisenberg, *Baseline Problems in Assessing Chapter 11*, 43 U. TORONTO L.J. 633, 649 (1993).

5. Theodore Eisenberg & Shoichi Tagashira, *Should We Abolish Chapter 11? The Evidence from Japan*, 23 J. LEGAL STUD. 111, 141-46, 152 (1994).

6. TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 169 (1989).

7. *Id.* at 85-86.

8. AM. BANKR. INST., *AMERICAN BANKRUPTCY INSTITUTE NATIONAL REPORT ON PROFESSIONAL COMPENSATION IN BANKRUPTCY CASES* (G.R. Warner rep. 1991).

obviously worthwhile in ascertaining how the system is functioning. Surely there is also value in comparing their responses for the same purpose, as well as for the purpose of enhancing our knowledge of the effect of human self-perception on the litigation system.

II. THE OBVIOUS AND THE NOT-SO-OBVIOUS

Being human, I am of course not prepared to concede that the worst case applies here. To Mr. Palans, the results were obvious because, to be paid, lawyers must seek payment. He seems to be saying that lawyers systematically overstate their performance because they must affirmatively move for compensation and others stand ready to oppose them. That may well explain why a study of fee petitions filed in court would reveal inflated claims, however troublesome that might be. But the ABI study did not look at fee petitions. It asked lawyers how they behaved in a survey setting that was nonadversarial. In responding to an anonymous survey, the lawyers might be expected to be less advocates and more neutrally factual in their responses. Many of our better lawyers can step back from an advocate's stance.

Despite the nonlitigation setting, lawyers and judges differed in their perceptions of mutually experienced events. How can it be that almost three-quarters of the judges view themselves as usually ruling at the fee hearing when less than half of the lawyers report that experience?⁹ Could Mr. Palans really have known this before the study? I would have guessed that perceptions of such mechanical aspects of the system would be less divergent. Could Mr. Palans really have known of the widely divergent judge and lawyer views about reimbursement of oversecured creditors, or about their divergent views with respect to compliance with fee guidelines? Could he really have known that these were national effects? His experience would have to be unusually vast, because data like these, of national scope, are beyond the experience of most individuals or firms.

Mr. Palans' reaction illustrates the need for the very kind of academic research he disdains. Once aware of the outcome of a study, humans have biased recollections about what they predicted before the study. This bias leads people to report that they "knew it all along" when hindsight is what

9. Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979 (1994).

really is at work.¹⁰ I suspect that Mr. Palans' sweeping categorization of the results as obvious is a classic example of "hindsight bias."

III. CONCLUSION

Mr. Palans' other comments suggest that he did not pay attention to my talk or focus on the issues raised by the paper. I prefaced my remarks at the Conference by stating that surveys of law professors or other academics likely would reveal egocentric biases. Mr. Palans' ascription to me of a holier-than-thou attitude (lawyers and judges have egocentric biases but we wonderful professors do not) is a cheap shot.

In places, Mr. Palans' writes as if responding to a paper challenging the level of bankruptcy fees. That was not my theme. The paper takes no position on the proper level of fees. In fact, in other work I have been rather protective of Chapter 11 and its costs.¹¹ Mr. Palans might have learned this had he read some of the sources he derides me for citing.

Mr. Palans' other comments are a combination of further irrelevancies (How is the failure to cite cases in such an article a flaw? Does the three-year-old status of the data really undermine my discussion?), inaccuracies (I do not label anything a "negative perception" of the legal system; I do not attack the system as inefficient), and poorly linked thoughts. I am sorry that we could not have joined issue at a more worthwhile level.

10. See, e.g., Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION AND PERFORMANCE 288 (1975); Gordon Wood, *The Knew-It-All-Along Effect*, 4 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION AND PERFORMANCE 345 (1978); Mark R. Leary, *Hindsight Bias and the 1980 Presidential Election*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 257, 257-63 (1982).

11. Eisenberg, *supra* note 4 (citing other studies); Eisenberg & Tagashira, *supra* note 5.