STRATEGIES FOR LEGAL EDUCATION: CREATIVE PRESENTATIONS IN BANKRUPTCY

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Lynn M. LoPucki. *Player's Manual for the Debtor-Creditor Game*. (St. Paul, MN: West, 1985). vi + 123 pp. Illustrations, appendix.

Lynn M. LoPucki. *Strategies for Creditors in Bankruptcy Proceedings*. (Boston: Little, Brown, 1985). xxxi + 709 pp. Notes, index. 1986 Supplement: 111 pp.

First—a disclaimer: This is not a review of the merits of these volumes in terms of the law of bankruptcy. Not that I doubt their significance to that body of law, but rather because I do not possess the expertise necessary to comment critically on that body of substantive law. Then what is my interest, and why should you read this review? My interest concerns the way law is presented, taught, and applied; the way in which lawyers should think about the whole scope of lawyering in society. In short, these volumes by Lynn LoPucki are a splendid example of all of these issues. I will consider in turn the four major points suggested by their titles: (1) strategies, (2) creditors, (3) bankruptcy proceedings, and (4) games.[1]

I. STRATEGIES

In my lawyering world, strategies (if one chooses to use that word) are of two kinds, each arising under different sets of circumstances.

A. Litigation

In law school education, strategies are the litigation tactics, the appellate court arguments, and the theories that are available when starting a lawsuit or other court process. In short, after a

[1] In recent years, my policy in doing book reviews has been to send a prepublication draft to the author. Doing so helps me avoid any clear errors. This time I carried the idea much further. After preliminary reading of the books to be reviewed, I began a correspondence with the author, which has been enlightening to both of us. This essay reflects only some of our exchange of ideas. In addition, with the author's permission, I contacted others mentioned in the review who had used the books. The organization of this review, its arguments, and its weaknesses are mine.

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bankruptcy proceeding has begun, the issues are: What are the alternatives, the choices, and the remedies available to a creditor? Where does each possible course of action lead? What criteria should be employed in selecting a course of action? For lawyering, it is best to describe these strategies in terms of the way they are likely to arise in practice and in the lawyer's mind. You should expect this of the LoPucki treatment of strategies, and your expectations are delightfully met.

B. Nonlitigation and Prelitigation Fact Strategies

The lawyer, if met by the client soon enough, has a whole array of strategies that might be considered before a proceeding is commenced. I tend to differentiate between nonadversarial or predispute (preventive law)[2] strategies (which I call "fact strategies") and those that arise after litigation sets in (which I call "litigation strategies"). In preventive lawyering, legal choices exist at the very onset of the creditor-debtor relationship. For example: What language should be used in documents? If security for the debt is available, what form should it take?

But, rightly, LoPucki's *Strategies* is not a text of the whole creditor-debtor relationship. The author does not begin that early in the transactional world. He starts at a point where bankruptcy may be a real possibility but before it has been decided upon. At that point, strategies do not necessarily arise by a study of "cases" decided by appellate courts—or any courts. Yet there are alternative approaches to assist a creditor before resorting to a court proceeding. In my experience, law school education generally neglects such strategies; they are simply not the essence of appellate court argument. But they come within the scope of "thinking like a lawyer." Yes, in both books LoPucki gives this vast area of strategies equal space and time.

C. Comment

Strategies is not expressly organized in terms of these two kinds of strategies. In fact, the word "strategies" does not appear in the index. I wondered whether LoPucki would agree with this division, so I wrote and asked him. His answer came through clearly: He had both in mind. And maybe, just maybe, when he writes his next edition, he might try to label the strategies. If so, this is no easy task, because there may be some gray areas. But I believe that the effort will be worth the try. It is also worth the try for law school education because it will be a splendid exercise in the type of thinking lawyers must do, the knowledge they must

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[2] The writings on preventive law, which first appeared in 1950, continue to expand. Perhaps the best short treatment of the subject is Brown and Dauer (1982).

have, and the criteria they must use in helping clients evaluate their choices within a larger social context.

"Strategies" is a good word but perhaps a bit misleading. The dictionary relates it to "stratagem," which is an artifice or trick. Because LoPucki's options or choices are more nearly pure and moral, they are more like the dictionary definition of "tactics."

II. CREDITORS

Law education usually considers law conceptually by general subjects such as contracts, torts, property, constitutional law, and bankruptcy. However, when considered from the perspective of the practice of law, the client (and the client's relative social interests) rather than legal concepts should become the focal point of reasoning. LoPucki does the practical, important, and often difficult task of looking at the subject as practicing lawyers do: from the point of view of a client who is one of the parties in the bankruptcy complex—the creditor. In this sense, the books are not limited to the law of bankruptcy. Rather they are broader and include the professional representation of a creditor.

LoPucki is thus examining applied law, which is more complicated than the traditional study of law. It may be hard to convince law teachers of the complexities, because applied law sounds like a practical—learn by doing—subject. It does not sound like the thinking process that legal education espouses. Law education, beginning with Langdell,[3] thinks in terms of how the judge thinks and decides. This kind of education does not teach students to think like a lawyer. Applied law is both law and application. Hence, it is more complex than law itself. It must consider not only the law of bankruptcy but also the client and the social concept in that process. LoPucki's work is a first-rate example of teaching the lawyering process. What he is really teaching is how to think like a lawyer.

III. BANKRUPTCY PROCEEDINGS

Of course, book titles, like headlines, must be short and catchy. The scope of *Strategies* is broader than proceedings in bankruptcy. A look at its chapter headings discloses its interest in the lawyer's role in representing a creditor when the debtor is "in the shadow of bankruptcy" (Chapters 2–4). Even if the debtor never goes into a proceeding, there is fact strategy that the book considers.

When does a debtor reach the stage of being "in the shadow of bankruptcy?" In general, a creditor can become aware that this

[3] Christopher Columbus Langdell (c. 1870) is attributed with the use of appellate opinions as the basic teaching materials in law school education. See, Brown (1956) and Spiegel (1987).

circumstance exists when the debtor defaults in payment to the creditor. But certainly there must be other criteria that give a clue to impending insolvency. There seems to be little information on this subject. In my correspondence with LoPucki, I inquired about this. There seems, indeed, to be scant material on this area. Maybe this is a client's concern that bothers the lawyer only when the creditor walks into the lawyer's office and asserts that a debtor is "in the shadow of bankruptcy." Lawyers, as well as their clients, would wish for warning signals that precede the "shadow of bankruptcy." In a conversation many years ago with George Treister,[4] he told me, "When the cash flow of a debtor becomes tight you have a warning signal."

The LoPucki text considers various types of creditors (unsecured, secured, and lessors) from the "shadow of bankruptcy" through the various types of Chapter proceedings. One of the interesting aspects of bankruptcy is that the court process is more involved and dynamic than a "typical" judicial proceeding. In bankruptcy, the judicial process may be as concerned with the future "going concern" events as with past events. Thus creditor strategies may be affected by the ongoing dynamics of the evolving bankruptcy proceedings. The court may be involved in the running operations of the debtor's business.

IV. GAMES

Strategies stands on its own. *The Debtor-Creditor Game* is a computer teaching tool to be used in conjunction with *Strategies*. The pre- as well as postbankruptcy choices of action are displayed. The game requires students to exercise choices among those presented. In the game, two students represent a creditor who seeks the highest dollar amount attainable, taking into account the financial condition of the debtor, the costs of lawyering services, other costs, the value of money (the longer the delay in receiving payment, the greater the interest accumulation), and the like. The role of the client, when needed, is played by the instructor. The team of students obtaining the greatest net amount wins. I have not played the game as either student or teacher. But my correspondence and conversation with United States Bankruptcy Judge, Robert D. Martin, Madison, Wisconsin; Professor Elizabeth Warren, University of Texas Law School, Austin; and Professor Richard Rykoff, University of Santa Clara School of Law confirm its viability as a teaching tool. In fact, students show great enthusiasm for it.[5]

There is, however, one significant point about the game that

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[4] Treister is a well-known bankruptcy lawyer in Los Angeles.

[5] "Metaxis, Want to Learn Bankruptcy Law? A Computer Is Ready to Help You" (*National Law Journal*, March 2, 1987: 4) reports that the game is currently being played at about 30 schools.

might be an inherent drawback to the use of the computer in teaching the entire lawyer-client relationship. The game is capable of considering quantitative factors (money). It falls short of giving weight to the qualitative factors involved in lawyer-client relationships. Money is important but not everything. There are human values that are not quantifiable in money terms. There are even business determinations for which exact dollar figures cannot be assessed, such as the precise value of the good will of a particular customer and the moral promise of a debtor that future purchases will be made from a creditor. As lawyers, we must often take these factors into account, and students should be exposed to this aspect of lawyering. An example of law school exposure in so-called quality of life factors is the Client Counselling Competition[6] that is administered by the American Bar Association and, in the United Kingdom, by a committee of law professors and solicitors. There is also now an international competition. This competition is played with an actual person as the client (see *Creighton Law Review*, 1984).

A comparison of the LoPucki game with the Client Counselling Competition reveals an important similarity. Both activities are structured so that each may involve two students as a "team," or a lawyer partnership. The life of lawyering often requires lawyers to work cooperatively. Group law practice is the way of life. Even solo practitioners are often drawn into group practice arrangements for particular matters. Law school education does little to expose students to such joint work. In fact, law schools do just the opposite. Each student is judged as an individual standing alone in competition with others. The team aspect of LoPucki's game is thus another commendable aspect of his efforts.

V. CONCLUSION

In *The Debtor-Creditor Game*, a knowledgeable and experienced person in the field lays bare much of bankruptcy law and practice. Not everything in this area (or other areas) in law is free from some unfairness, warped procedures, undue social costs, delayed procedures, or the like. One would hope that such intense discussion as LoPucki provides in these books would also include suggestions for improvements of policies and practices, but there are none. Correspondence with the author reveals that it is his view that when one reveals the weaknesses that exist, the cures will be forthcoming. I would be more confident that the cures will be more quickly and aptly considered if they are first suggested by someone like LoPucki.

In this era of legal education, when some law schools are be-

[6] Information concerning this competition can be obtained from American Bar Association, Law Student Division, 750 North Lake Shore Drive, Chicago, IL 60611.

ginning to become lawyering schools, the bankruptcy (insolvency) field offers one fine opportunity for study that, so far as I know, no school has adopted. I am reliably informed that the process of a creditors' meeting[7] still continues in our commercial society. Such a meeting is not confidential. In my early practice, I attended a few. There are many legal and practical and human aspects displayed in such a meeting. In my opinion they could be brought to the law school. Law schools pride themselves whenever an appellate court hears an actual argument at their schools. I believe that a law school should be equally grateful by the presence of one or more creditors' meetings. The professor could obtain advance information, give the students some preeducation, and have them observe the process. The professor and the students should then conduct a post-mortem.

Although this essay looks at *Strategies* as law school teaching material, do not be misled into believing that its usefulness is thus limited. Quite the contrary. It comes across to me, and to some lawyers who have used it on my recommendation, as a fine source of guidance that deserves attention whenever a client is a creditor in the debtor's "shadow of bankruptcy" and beyond.

LoPucki has expanded the scope of what is perceived to be law—not just the law in the books and the law in action, but the law as the lawyer in action. That is what the term 'strategies' implies.

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[7] In order to avoid a bankruptcy proceeding, insolvent debtors may transfer assets to a trustee for the benefit of creditors. The trustee ordinarily arranges a meeting at which creditors are invited in order to determine whether creditors will voluntarily agree to the arrangement. If agreed to, the debtors business can continue without court intervention. In the Chapter 11 proceedings under bankruptcy, there is court intervention (see Chapter 9, p. 297f).