Judgment Proofing: A Rejoinder

Steven L. Schwarcz*

Professors LoPucki and Mooney have responded to my article, *The Inherent Irrationality of Judgment Proofing*,[1] and I have been granted the opportunity to write a short rejoinder. Given page limitations and the fact that Professor Mooney and I are in agreement on the fundamentals, I discuss only Professor LoPucki's response.[2] Both that response and my rejoinder follow my analytical approach of dividing judgment proof structures into two categories: arm's length and non-arm's length.

My central points are straightforward. I don't claim that judgment proofing never will occur, merely that it is unlikely to cause, in LoPucki's words, the "death of liability." Arm's length judgment proofing transactions are unlikely because they necessarily require the assistance of an independent company. However, the costs to the independent company are apt to exceed any benefits to the judgment proofed company. As a matter of social psychology, the independent company also will be risk averse in assessing those costs.[3] Non-arm's length judgment proofing transactions, on the other hand, are not always subject to the same real or perceived costs, and therefore are more likely to occur. But non-arm's length judgment proofing is not new—the legal system historically has imposed a range of restrictions that tend to discourage it. Empirical data suggest that these restrictions are sufficient; to the extent they become insufficient, the law is likely to evolve additional restrictions as necessary.

The remainder of this rejoinder responds to LoPucki's more detailed comments.

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* Professor of Law, Duke University School of Law, and Faculty Director, Duke University Global Capital Markets Center. E-mail: schwarcz@law.duke.edu. The author thanks Stewart J. Schwab, Daniel B. Schwarcz, and Paul M. Shupack for helpful comments on a draft of this Article and Daniel M. Bronski for research assistance.

1. 52 STAN. L. REV. 1 (1999) [hereinafter *Inherent Irrationality*]. The responses are Lynn M. LoPucki, *The Irrefutable Logic of Judgment Proofing: A Reply to Professor Schwarcz*, 52 STAN. L. REV. 55 (1999) [hereinafter *Irrefutable Logic*] and Charles W. Mooney, Jr., *Judgment Proofing, Bankruptcy Policy, and the Dark Side of Tort Liability*, 52 STAN. L. REV. 73 (1999).

2. LoPucki, by his own admission, responds to only some of my arguments. *See Irrefutable Logic, supra* note 1, at 55 (stating that "[t]he sheer number of [Schwarcz's] arguments makes it impossible for me to respond to all of them"). My rejoinder follows that limited response.

3. Even though the independent company's costs cannot be precisely quantified, that very uncertainty increases its perception of the risk. *See infra* notes 21-23 and accompanying text.

I. ARM'S LENGTH JUDGMENT PROOFING

Professor LoPucki argues that asset securitization is a "dangerous" new judgment proofing technique,[4] comparing it to "the invention of a new tool that makes burglary easier."[5] That argument fails for three reasons. As I pointed out[6] and LoPucki himself admits,[7] securitization itself does not cause judgment proofing. Rather, judgment proofing would require an independent and unrelated disposition of assets to shareholders,[8] which could occur without securitization.[9] Secondly, even if one were to argue that securitization generates cash proceeds which could be paid to shareholders more easily, I have shown that no one will invest in a securitization where the company obligated for repayment makes itself judgment proof by disposing of the invested proceeds.[10] Indeed, the more nefarious that company is, the less likely that investors will trust it to perform its repayment obligation. Finally, LoPucki's comparison fails ab initio because a tool that makes burglary more efficient may have no legitimate uses, whereas securitization has a wide range of beneficial uses. The possible misuse of a beneficial tool should not undermine its legitimacy. Even a computer, for example, might be used as a burglary tool.[11] It makes burglary easier by enabling the burglar to track his successful break-ins and sales to third-party fences. Indeed, LoPucki himself argues that computers are the ultimate engines behind much judgment proofing. Computers, however, have other uses than burglary (or judgment proofing), and burglaries (and judgment proofing) can occur without computers. The possibility that a good tool can be used to make it easier to perform a bad action does not prove that the tool is bad. The key question is whether the dangers of misuse of the tool—whether computers or securitization—outweigh the beneficial uses.

LoPucki also claims, without citing any authority, that the "common consequence" of securitization is "reduction in the operating entity's (*F1*'s) ratio of assets to liability risk."[12] That claim, however, is not only wrong but may be irrelevant. It is wrong because that ratio could not decrease without

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4. *See id.* at 56.

5. *Id.*

6. *See Inherent Irrationality, supra* note 1, at 12-15.

7. *See Irrefutable Logic, supra* note 1, at 56.

8. *See Inherent Irrationality, supra* note 1, at 16 & n.73.

9. *See id.* at 18.

10. *See id.* at 14 & n.61, wherein I conclude that "the likelihood that *F2* would be able to obtain securitization or other financing on the strength of a lease to *F1* is extremely remote. Few investors or bank lenders would be willing to take the risk that future rentals of a judgment proof lessee [*F1*] would be paid." For this very reason, LoPucki's use of an assetless *F2* to argue that judgment proofing will not expose *F2*'s assets to claims of *F1*'s creditors or that *F2* will not subject to reputational costs appears to be unrealistic. *See Irrefutable Logic, supra* note 1, at 64-66.

11. I thank Stewart Schwab for this analogy.

12. *Irrefutable Logic, supra* note 1, at 56.

the disposition of assets to shareholders, a disposition that, if it occurs, would be independent of the securitization transaction.[13] In fact, the common consequence of a securitization is to leave that ratio unchanged.[14] LoPucki's claim also would be irrelevant if, notwithstanding a reduced ratio of assets to liabilities, sufficient assets remain to enable *F1* to pay its liabilities.[15]

LoPucki then focuses away from securitization onto more fundamental issues, questioning first my observation that the company wishing to judgment-proof itself (*F1*) receives equivalent value in return.[16] In that context, he disagrees that a transfer of assets to pay creditors would be the antithesis of judgment proofing. His rationale is that payment of voluntary creditors, such as bank lenders, could prejudice involuntary creditors, such as tort creditors, if the debtor is ultimately insolvent.[17] That may be so, but it is irrelevant. Preferential payment by an insolvent company always could prejudice remaining creditors, which is precisely why bankruptcy law avoids such preferential payments.[18] Finally, he alleges that my core statement—that a

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13. *See* text accompanying notes 6-9 *supra.*

14. *See* STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION 2 (2d ed. 1993) (illustrating balance sheet impact of securitization); if a company sells its receivables, the ratio of assets to liabilities remains unchanged, and if the company also uses the sale proceeds to pay down debt, the ratio would actually improve).

15. In another context, LoPucki has referred to a reduction of a company's ratio of assets to potential liabilities as *"a kind of* soft judgment proofing." Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 YALE L.J. 1413, 1430 (1998) (emphasis added). By his definition and mine, however, such a reduction would not be actual judgment proofing—even "soft" judgment proofing—unless the reduction is sufficient to deny a creditor recovery of a portion of its claim. *See id.* at 1421; *Inherent Irrationality, supra* note 1, at 2 n.2. LoPucki also attempts to find significance in my "dropping the word 'asset' from the phrase 'asset securitization.'" *Irrefutable Logic, supra* note 1, at 56-57. I intended nothing—the phrases are interchangeable. *See, e.g.*, HAL S. SCOTT & PHILIP A. WELLONS, INTERNATIONAL FINANCE: TRANSACTIONS, POLICY, AND REGULATION 751 (5th ed. 1998) (using those phrases interchangeably). Professor LoPucki sums up his argument that securitization is a judgment proofing technique with strong rhetoric: "Even if correct, Schwarcz's argument for the 'legitimacy' of asset securitization in no way refutes my thesis. Liability will be just as dead whether it dies from 'asset securitization' or asset securitization followed by a typical disposition of proceeds." *Irrefutable Logic, supra* note 1, at 57 (footnotes omitted). However, the first conclusion doesn't follow because I have shown, and LoPucki indeed has conceded, that asset securitization itself cannot cause judgment proofing. *See id.* at 56. The second conclusion doesn't follow because it incorrectly assumes that asset securitization is typically followed by a disposition of proceeds. LoPucki attempts to justify that assumption by referring to examples of possible proceeds dispositions. *See id.* at 58 n.17. However, but the fact that a disposition is possible says nothing about whether it is typical.

16. *See* LoPucki, *supra* note 1, at 57-59.

17. *See id.* at 58.

18. See 11 U.S.C. § 547 (1999) (avoiding such transfers, and providing that avoided payments be returned to the debtor's estate for equal and ratable distribution to all creditors). A company's payments to voluntary creditors sometimes might turn out, in retrospect, to precede the pre-bankruptcy preference period. Those payments then would not be avoidable as preferential under existing law. To the extent this becomes problematic, preference law could be amended to extend the preference period. Where there is actual intent to make those payments for the purpose of judgment proofing, the payments also may be able to be avoided as fraudulent transfers under federal and state laws, which have longer statutes of limitation. *See, e.g.*, 11 U.S.C. § 548(a)(1) (1993

transfer of assets to unrelated third parties should not cause judgment proofing because no rational company will give away its assets without demanding equivalent value in return—is "true on its face, but misleading in context."[19] His rationale appears unresponsive to my statement, however, since he refers only to third party creditors and shareholders whereas I refer to third parties "*other than* creditors and owners [shareholders]."[20]

Next, LoPucki claims that I don't quantitatively prove that the costs of judgment proofing necessarily outweigh its benefits.[21] All observers, however, know that the costs and benefits of judgment proofing cannot be precisely quantified, at least with our current data and understanding.[22] Indeed, the uncertainty that results from the inability to quantify these amounts makes it inherently risky for *F2* to assist in *F1*'s judgment proofing. Moreover, in an arm's length context, *F2* will be risk averse and therefore prone to exaggerate these risks.[23] *F2* is therefore unlikely to expose itself to liability by assisting in *F1*'s judgment proofing.

The inability to quantify these amounts also raises the issue of burden of proof. If it seems (based on LoPucki's arguments, intuition, and modeling) that the new financial tools he complains of lead to a major danger of judgment proofing, then the burden is on those promoting those tools to demonstrate that danger is clearly outweighed by benefits. On the other hand, if it seems (based on arguments, modeling, and intuition that I have tried to articulate) that the dangers of those tools are exaggerated and their benefits are large, then the burden should be on those proposing regulation.

Professor LoPucki also suggests that I fail to take into account that different companies have different potential amounts of liability.[24] To the contrary, however, I show that even the possibility of large mass tort claim liability would not necessarily increase the amount of value that judgment

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& Supp. 1999) (authorizing avoidance of payments made, within one year prior to bankruptcy, with "actual intent to hinder, delay, or defraud" any creditor); UNIF. FRAUDULENT TRANSFER ACT §§ 4(a)(1), 9(a) (1984) (authorizing avoidance of payments made within past four years or, if later, within one year after the payment was or could reasonably have been discovered by the complaining creditor, with "actual intent to hinder, delay, or defraud any creditor"). If these longer statutes of limitation are still insufficient, they likewise could be extended, as has occurred in the past when "experience has demonstrated" that an extension is needed to avoid fraudulent activities. 4 COLLIER ON BANKRUPTCY ¶ 548.02[2], at 548-26 (15th ed. 1996).

19. *Irrefutable Logic*, *supra* note 2, at 59.

20. *See Inherent Irrationality*, *supra* note 1, at 16 (emphasis added).

21. *See Irrefutable Logic*, *supra* note 1, at 59-67.

22. LoPucki himself is aware that these costs and benefits cannot be precisely quantified. Letter from Lynn M. LoPucki to Steven L. Schwarcz 5 (Oct. 19, 1998) (on file with the *Stanford Law Review*).

23. *See Inherent Irrationality*, *supra* note 1, at 26-27 (discussing prospect theory and the social psychology of voluntary risk-taking).

24. *See Irrefutable Logic*, *supra* note 1, at 60 (stating that Schwarcz's argument fails to account for the variation among companies "in their liability risks and judgment proofing costs").

proofing is expected to take from creditors.[25] That amount is inherently limited by the amount of the company's assets.[26] Thus, an increase in a company's tort liability actually may deter judgment proofing because the liability of companies assisting in the judgment proofing is not so limited.[27] Additionally, he argues that I omit from my calculation three possible benefits to *F1*, the judgment proofing entity: That the devices used for judgment proofing provide economic benefit even when they are not used for judgment proofing, so judgment proofing is purely a bonus; that judgment proof companies can engage in high tort risk activity with impunity; and that judgment proofing eliminates the cost of risk management.[28] However, his focus on *F1*'s benefits obscures the fact that *F2* will be unlikely to engage in the judgment proofing transaction in the first place.

Moreover, those benefits appear marginal at best. For example, his argument that judgment proofing is purely a bonus suggests that many of the costs referred to in my analysis would be incurred anyway by engaging in an economically beneficial securitization transaction. But that suggestion is misleading because my analysis does not purport to include securitization transaction costs. Also, his argument that judgment proof companies can engage in high tort risk activity with impunity appears unrealistic. He hypothesizes a company that considers a series of business opportunities sequentially, each opportunity having a "a 50% chance of a net gain of 100 and . . . a 50% chance of a net loss of 200."[29] A non-judgment proof company "will decline to pursue the opportunities because [its] expected return from each opportunity [is] a loss of 50."[30] In contrast, he argues, "[i]f the same firm could become judgment proof by shedding its assets and remain judgment proof by distributing any gains to shareholders before undertaking the next opportunity, the firm would pursue all the opportunities" because it then benefits from the chance of gain but, being judgment proof, avoids the risk of loss.[31] Thus, he concludes, the "gains from judgment proofing are not . . . merely the gains from protecting the debtor's finite assets [but] are gains from the externalization of liability."[32] That seems unlikely, however. As soon as the judgment proof company faces a loss, which is the immediately

25. *See Inherent Irrationality, supra* note 1, at 49.

26. *See id.*

27. *See id.* at 50.

28. *See Irrefutable Logic, supra* note 1, at 62.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* (responding to my argument that the gain from judgment proofing a company is limited to the value of the company's assets absent judgment proofing). At another point in his analysis, after admitting in a footnote that my argument would be correct, he conjectures, without basis, that I "apparently contemplate[ ]" an assumption that makes my argument wrong. *Irrefutable Logic, supra* note 1, at 61 n.36. In North Carolina, we would call his conjecture "chutzpah"!

likely scenario in LoPucki's hypothetical, it will be insolvent and unable to pay its debts as they come due, virtually leading to bankruptcy.[33] Bankruptcy judges are unlikely to condone further tortious undertakings, and thus the judgment proof company will not have more than one bite at the externalizing-torts revenue apple. Moreover, parties will not blindly enter into negative present value transactions with judgment proof companies. Survivors in the rough and tumble of business transactions are far too savvy to become the willing victims of externalized liability. To the extent externalization occurs, it therefore will be limited to involuntary parties (such as tort creditors), who are most likely to be protected by the bankruptcy judge.

Finally, LoPucki claims that I overstate the costs of arm's length judgment proofing by assuming that when an otherwise viable company owes debt in excess of its ability to pay, liquidation is likely to result.[34] For "large public company bankruptcies," he counters, the ordinary outcome is for the firm to discharge its tort debt in bankruptcy while continuing its operations.[35] True, but large public companies are least likely to attempt to judgment-proof themselves,[36] whereas small companies ordinarily liquidate in bankruptcy.[37] Indeed, "[t]he most common type of bankruptcy case [for all companies] is a liquidation bankruptcy case."[38] LoPucki responds by arguing that "[d]eliberately judgment-proofed firms are the type least likely to liquidate in bankruptcy" because "[t]ypically their distress will be the result of tort debt that exceeds their assets, that is, financial distress [as opposed to an

33. *See* 11 U.S.C. § 303 (permitting creditors to force a company into involuntary bankruptcy under these conditions). This assumes the judgment proof company engages in the transaction, which itself is questionable because "corporate law should, and indeed under existing law already may, impose on directors of a corporation a fiduciary duty to creditors as well as shareholders when a risky venture is reasonably expected to prejudice creditors." Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 589-90 (1999) (citations omitted).

34. *See Irrefutable Logic, supra* note 1, at 63.

35. *See id.*

36. Large public companies, for example, would have the highest reputational costs. *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 39-40 (1996) (explaining why large companies are much less likely to be judgment proof than small and medium size companies); *id.* at 89 (concluding that "[f]or most large firms, the costs of judgment proofing still exceed the benefits").

37. *See* DAVID G. EPSTEIN, STEVE H. NICKLES & JAMES J. WHITE, BANKRUPTCY § 10-2, at 734-35 (1993) (observing that although the Chapter 11 cases of most small businesses are converted to Chapter 7 liquidations, "[o]n the contrary, the Chapter 11 of a big business [to which a State is closer in analogy] usually leads to some form of reorganization"; and speculating that the distinction might arise from the fact that "[m]any of the small Chapter 11's [sic] belonged in Chapter 7 from the beginning and never had any hope of a successful reorganization," and because of "economies of scale, a large business can bear [the cost of a Chapter 11 case] more readily than a small one"). *See also* Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437, 443 (1992) (observing that "[o]nly about 17% of all Chapter 11 cases manage to confirm a plan of reorganization").

38. CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 2 (1997). Discharge is not available to a liquidating company. *See* 11 U.S.C. §§ 727(a)(1), (a)(2) (1999).

inherently bad business]."[39] Other things being equal, a company with an inherently good business would indeed be a good candidate for reorganization, even though it may have financial distress. But other things are *not* equal if the company has deliberately judgment-proofed itself. A bankruptcy judge then is unlikely to allow the company to reorganize,[40] much less to discharge its tort debt,[41] in bankruptcy.

I do not assert, however, that there never will be industries where liability is so unpredictable and potentially so large and reputation costs so small that one might expect to see judgment proofing efforts. LoPucki himself refers to judgment proofing in the New York City taxicab industry, of which I am aware.[42] Yet the law's evolution recently has limited judgment proofing even in that context, such as by greatly increasing the amount of liability insurance coverage that taxicab owners must maintain[43] and by making taxicab medallion owners responsible for the leased operation of their cabs.[44]

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39. *See LoPucki, supra* note 1, at 64.

40. The Code specifically prohibits confirmation of a reorganization plan that has not been proposed in good faith. 11 U.S.C. § 1129(a)(3) (1993). Furthermore, where a Chapter 11 case has not been filed in good faith, the bankruptcy judge has discretion to convert it to Chapter 7 liquidation. 11 U.S.C. § 1112(b) (1993 & Supp. 1999) (for cause, permitting conversion to Chapter 7 or dismissal of the case, whichever is in the best interests of creditors and of the estate). *See also* MARK S. SCARBERRY, KENNETH N. KLEE, GRANT W. NEWTON & STEVE H. NICKLES, BUSINESS REORGANIZATION IN BANKRUPTCY 944 (1996) (referring to lack of good faith as an "unstated 'cause' for purposes of [§ 1112(b)]").

41. 11 U.S.C. § 1141(d) provides, in relevant part, that confirmation of a plan discharges the debts of a debtor reorganizing under a Chapter 11 plan, except as otherwise provided in the order confirming the plan. The rationale for permitting a discharge, notwithstanding fraudulent acts on the debtor's part, is that "[w]hatever wrongful acts may have been committed by those in charge of the business in the past, it will do the creditors no good to deny the debtor a discharge—after the reorganization they likely will own all or a substantial part of the debtor's business, and a denial of discharge would harm their interests." SCARBERRY ET AL., *supra* note 40, at 957. But if the reorganizing debtor remains, for whatever reason, under the control of the defrauding person(s), a court could decide to disallow discharge. The situation then would be analogous to that of a fraudulent individual debtor who uses Chapter 11 to reorganize. Even though such a debtor, technically under § 1141(d), could receive a discharge, "that is not likely to happen." *Id.* at 958. The judge, instead, is "likely to dismiss the case, to convert it to chapter 7 [liquidation], or to deny confirmation of the debtor's plan." *Id.*

42. *See Irrefutable Logic, supra* note 1, at 61 n.33.

43. NEW YORK, N.Y., Tit. 35, ch. 1, § 1-40 (1998) (stating that taxi owners must maintain coverage in an amount "not less than $200,000 per person").

44. *See* Karlin v. H & L Maintenance, No. 97 CV. 2551, 1997 WL 720769 (E.D.N.Y. Oct 1, 1997) (holding a medallion owner liable for damages to a passenger caused by a lessee operating the cab). LoPucki also suggests that "[c]urrent events in the tobacco industry," such as spinoffs of subsidiaries and divisions, illustrate judgment proofing in that industry. LoPucki, *Virtual Judgment Proofing: A Rejoinder, supra* note 15, at 1430-31. However, spinoffs intended for judgment proofing or that would have the effect of denying creditors recovery of their claims (or a portion thereof) could be voidable under fraudulent conveyance law and might expose directors to liability. *See* Steven L. Schwarcz, *Rethinking A Corporation's Obligation to Creditors*, 17 CARDOZO L. REV. 647, 678 & 679 n.133 (1996). Thus, RJR Nabisco's board of directors recently refused to spin off its non-tobacco business—a result demanded by shareholder Carl Icahn in order to eliminate the legal taint of tobacco on the conglomerate's food assets. Suein L. Hwang & Paul M. Sherer, *RJR*

II. NON-ARM'S LENGTH JUDGMENT PROOFING

Professor LoPucki and I agree that, at least theoretically, this type of judgment proofing is more likely to occur than arm's length judgment proofing. We disagree, however, on whether it is in fact likely to occur.

LoPucki claims that computerization will make the logistics of judgment proofing easier and cheaper by helping to keep track of assets transferred among members of a corporate group and lowering the transaction costs of maintaining elaborate corporate structures.[45] But that claim is irrelevant to my argument. I have shown that non-arm's length strategies are merely examples of the ancient strategy of distributing one's assets to shareholders in preference to creditors.[46] Computerization will not change that strategy. Furthermore, because I assign no costs to the types of logistical factors that computerization can facilitate, my analysis already implicitly assumes computerization. Computerization, on the other hand, cannot reduce the legal liabilities[47] which I argue provide the real deterrent to judgment proofing.

LoPucki also argues that one can conceive of judgment proofing transactions that might not be precisely restricted under existing law. I never claimed otherwise, however.[48] Rather, I have shown that "where existing legal doctrines do not clearly cover judgment proofing, it is but a short step conceptually to apply those doctrines to it."[49] For example, there is a "'lib-

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Nabisco to Shed Tobacco Business, WALL ST. J., Mar. 10, 1999, at A3. The directors apparently were concerned that the spinoff might subject them to personal liability, notwithstanding Icahn's presentation of a legal opinion from the law firm of Stroock & Stroock & Lavan that the proposed spinoff would not constitute a fraudulent conveyance under existing law. *See* Proxy Statement of RJR Nabisco Holdings Corp. 3 (Mar. 25, 1999); Proxy Statement of High River Limited Partnership 4 (Apr. 8, 1999). Instead, the board decided to spin off the domestic tobacco business, a strategy that does not purport to separate potential tobacco liabilities from the non-tobacco business. *See* Nabisco Holdings Corp., Form 8-K Current Report 3 (June 14, 1999).

45. *See Irrefutable Logic, supra* note 1, at 68.

46. *See Inherent Irrationality, supra* note 1, at 50 n.264.

47. Including tax consequences.

48. I do show, however, that the more typical forms of non-arm's length judgment proofing *are* restricted under current law. *See Inherent Irrationality, supra* note 1, at 31 & n.157 (discussing the application of the *Eastgroup Properties* case to "a judgment proofing structure that resembles this article's generic *F1-F2-F3* structure").

49. *Id.* at 47. LoPucki himself acknowledges that "[t]hinking hypothetically and in the abstract, probably most courts would gladly extend Schwarcz's eight theories to strike down" judgment proofing. *Irrefutable Logic, supra* note 1, at 69. But he then asserts that courts ultimately would refuse to extend those theories to sophisticated judgment proofing transactions because to do so would undermine "the very engines of the American economy." *Id.* He does not, however, expand on this rhetoric. In my experience, courts are not at all reluctant to apply their sense of justice to undermine sophisticated business transactions. *See, e.g., In re* Kingston Square Assocs., 214 B.R. 713 (Bankr. S.D.N.Y. 1997) (refusing to dismiss the collusive filing of involuntary bankruptcy petitions intended to stop mortgage foreclosure, in order to preserve value of bankruptcy-remote special purpose entities for limited partners and unsecured creditors; and thereby undermining a sophisticated bankruptcy-remote structure supporting over $277 million of mortgage-

eral' trend toward allowing substantive consolidation to prevent harm caused by 'the widespread use of interrelated corporate structures.'"[50] Tort theories also could be used to impose punitive damages. Moreover, the officers and directors of the companies involved in judgment proofing, as well as those companies themselves, might be subject to RICO, which not only would allow creditors of a judgment proofed company to recover treble damages and the costs of their lawsuits but also would impose criminal liability.[51] Because RICO already has been applied in a wide range of commercial cases, creditors injured in a judgment proofing are likely to claim a RICO violation.[52] And regardless of whether a RICO claim ultimately will be successful, its stigma and the fact that it may be asserted against the individuals involved as well as the companies is likely to have a significant deterrent effect.[53]

III. CONCLUSION

In an arm's length context, the risks inherent in judgment proofing and *F2*'s propensity to exaggerate those risks make it unlikely that *F2* will assist in *F1*'s judgment proofing. Although non-arm's length judgment proofing is theoretically plausible, it has long been restricted by law. Professor LoPucki claims that computerization will facilitate non-arm's length judgment proofing, but computerization cannot reduce the legal restrictions which provide the real deterrent. While LoPucki argues that one can conceive of judgment proofing transactions that might not be precisely restricted under existing law, I show that existing legal doctrines easily could be extended to cover those transactions.

I agree, however, with Professor LoPucki's conclusion that no "structural impediment to judgment proofing exists in law."[54] Indeed, I have argued not only that no such impediment is necessary but that such an impediment would be harmful because of its potential to "indiscriminately restrict the value creation . . . that comes with business and financial innovation."[55]

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backed securities, arranged by the preeminent firm of Donaldson, Lufkin & Jenrette Securities Corporation).

50. *Inherent Irrationality*, *supra* note 1, at 37 (quoting *In re* Murray Indus., Inc., 119 B.R. 820, 828 (Bankr. M.D. Fla. 1990). This type of an overall liberal trend is illustrated, for example, by Karlin v. H & L Maintenance, No. 97 CV. 2551, 1997 WL 720769 (E.D.N.Y. Oct. 1, 1997) (holding a medallion owner liable for damages caused by a leased taxicab).

51. *See Inherent Irrationality*, *supra* note 1, at 43 & n.229.

52. *See id.* at 43-44 & n.233.

53. *See id.* at 46-47.

54. *Irrefutable Logic*, *supra* note 1, at 71.

55. *Inherent Irrationality*, *supra* note 1, at 53.