Rosenkrantz and Guildenstern Write Contracts

Author : Anna Gelpern

Date : September 17, 2012

Mark Weidemaier, Robert Scott, & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu,* **L. & Soc. Inquiry** (forthcoming 2012) *available at* SSRN.

Every so often, an odd take on an obscure thing resonates in a big way. My first clue came when a colleague who writes about cyberlaw blasted around a paper about a silly old clause in government bonds to the entire business law listserv. Then plaintiffs, defendants, and amici on all sides cited to the same paper in briefs to the Second Circuit. Then a big-time finance journalist talked it up over dim sum. Then a bankruptcy friend said that I should review it on Jotwell. To be sure, I knew and liked the piece (and the authors[1]) but what was in it for the general audience? It is about a clause with a Latin name and unknown meaning, collecting dust in contracts too-exotic for textbooks. The authors' major finding is that fancy corporate lawyers who draft the clause like to describe themselves as bits of debris bobbing on the waves of history … even as they paddle while no one is looking. And yet, in their seemingly discrete tale about a technicality, Mark Weidemaier and colleagues strike some important chords.

Weidemaier, Scott, and Gulati write about the *pari passu* clause in sovereign debt contracts. The clause usually says, with minor permutations, that the debt is and will rank *pari passu* (in equal step) with others like it. For all anyone knew, *pari passu* lived a quiet life in bond boilerplate until an enterprising creditor used it ambush a Brussels magistrate, get an injunction, and collect money from an immune government.[2] This caused a kerfuffle in both law and policy circles for upsetting the delicate balance between debt collection and sovereign immunity. To the policy people's credit, they fixed the narrow problem right away with a statute barring similar injunctions in Belgium. But the contract clause remained and even grew in stature, all the while eminent lawyers in New York and London heaped scorn on *pari passu* and the Brussels court.

The authors do not revisit the literature on the meaning of *pari passu*, which has convinced me that its contemporary meaning is indeterminate or trivial. Instead, they interview hundreds of lawyers and read hundreds of contracts to figure out why no one has bothered to fix the term, even as nearly everyone professed to be upset about it. Instead of a reason, they get stories of the mythical origins of *pari passu*, each with some basis in truth, but none that holds up against the facts. The unifying moral of the lawyers' stories is that *pari passu*'s birth—be it in early 20th century invasions, or late 20th century banking crises—irrevocably tainted its life, and emasculated its would-be saviors at New York and London law firms. Worse, when Weidemaier and colleagues uncover a pretty convincing version of the truth, the story-tellers do not want to know.

So why should the rest of us care about *pari passu* or tales of law firm impotence?

- First, the article comes out at a time when *pari passu* is again important on the merits. The same creditors that befuddled Belgian courts in 2000 revived the argument in New York, and have now taken it to the Second Circuit. Depending on what the judges say about the meaning of the term, long-uncollectable government debt could become collectable, potentially altering the ways in which governments manage crises. The article puts a damper on both sides' strong readings of the clause, and (to me) screams out against hanging big policy decisions on language that no drafter can explain or wants to own. Of course if the courts want to make it up, they can and they will.
- Second, the study offers a provocative take on business contracting. It uses insights from economics, sociology, history and political science to document a rational quest for "completion" that is mired in egos, politics, culture, and institutional frictions. Transaction cost engineers marry Mad Men. But what is to be done? Are the clients ill-served? Should they demand and pay for more original, and more accessible contracts? Is the litigation risk unavoidable (at least at a reasonable cost)? Should courts penalize drafters for writing contracts that are both meaningless and useful (no mean feat, by the way)? On all these questions, the article is mum—more existential sociology than pragmatic law review.
- Third, the article is methodologically lovely: a mix of archival research, original data mining and number crunching, and in-person interviews. It feels serious but also accessible and unpretentious, melding Weidemaier's earlier forays into sovereign debt (here and here) and the latest from Scott and Gulati (here). Its theoretical and methodological catholicism makes the piece intuitively credible, and serves as a nice reminder of the empirical potential in law scholarship.

In the end, we are left wondering about the lawyers— craving center stage but stuck in the shadows, with their slightly sad efforts to massage their place in history, smarter than they let on, not smart enough to outwit fate, doomed in the end to lose control over the precious words that were never theirs to begin with. They were sent for. We know how the play ends, but we keep watching. And the quest for *pari passu* continues.

1. I have co-authored with Mitu Gulati. [?]
2. Holdout creditors argued that the *pari passu* clause entitles them to pro-rata payment of amounts due. In this reading, creditors that agreed to restructure their bonds at 30 cents on the dollar would not get paid unless holdout creditors that did not agree to debt reduction got 100 cents on the dollar. Debtors have argued that *pari passu* is a promise of equal ranking, not equal payment. Equal ranking has limited or no significance in sovereign debt, where there is no bankruptcy and no estate to distribute among creditor classes. [?]

Cite as: Anna Gelpern, *Rosenkrantz and Guildenstern Write Contracts*, JOTWELL (September 17, 2012) (reviewing Mark Weidemaier, Robert Scott, & Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu,* **L. & Soc. Inquiry** (forthcoming 2012) *available at* SSRN),

https://corp.jotwell.com/rosenkrantz-and-guildenstern-write-contracts/.