

ACCEPTANCE OF THE DISTINGUISHED SERVICE AWARD FOR LIFETIME ACHIEVEMENT: “PURSUING LAW REFORM OPPORTUNITIES”

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First, I wish to thank the editors of the *Emory Bankruptcy Developments Journal* for selecting me for the Journal’s 2015 Distinguished Service Award for Lifetime Achievement. I sincerely appreciate your recognition of my professional efforts in what for me turned out to be a series of very congenial professional settings. Emory Law School provided my first, welcoming “academic home” in Georgia when I served as its Southeastern Bankruptcy Law Institute Distinguished Visiting Professor in the spring semester of 1991. I have many positive memories of the time that I spent in your community then and am delighted to be back among you tonight.¹

Second, my sincere appreciation this evening goes to President Karen Gross for her generous, warm introduction. Karen and I have known each other for a long time, and her inventory of stories that she might have told about my approach to professionalism was overflowing. I am very grateful that the recollections that she chose to share seemed enjoyable for you, and not too embarrassing for me.

The Journal’s Editor-in-Chief, Gene Goldmintz, asked me to draw upon my own career as a basis for my presentation tonight. In particular, Gene asked that I emphasize aspects of my professional experience that might be especially useful to the students or recently-admitted bankruptcy specialists who are with us on this occasion. My task was to say something, in Gene’s words, “substantive and meaningful”—in fifteen minutes! Complying with Gene’s request, especially as an after-dinner speaker, created no small challenge.

Let me begin by saying that I was fortunate to have a professional career that was very satisfying almost every day. I began as an associate in private

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¹ When I concluded my service as the Dean of Georgia State College of Law, Dean Howard (“Woody”) Hunter invited me to return to Emory Law School as a Visiting Scholar for the fall semester of 1996. I certainly appreciated the opportunity that he provided to me at that time for decompression and re-orientation as I planned my future efforts in teaching and research as a full-time faculty member.

practice, then moved on to full-time research, and, finally, spent most of my career as a legal academic, combining teaching, research, and administrative responsibilities. Full-time legal academics have the benefit of ongoing flexibility in their professional schedules that bankruptcy specialists in private practice or public service, including the judiciary, cannot match consistently. However, I believe that almost every practicing attorney or judge can set priorities for their professional agendas that create time for varying the kinds of service that they provide. The exceptions are, of course, those lawyers and judges who have become so renowned and are in such demand that the resulting professional pressures leave little, if any, opportunity for them to vary the kinds of professional contributions that they make.

When I reflected upon my own experience in response to Gene's request, it was clear that my participation in a number of efforts to reform the structure, substance, or procedures for implementing U.S. bankruptcy laws resulted in a series of highlights in my professional life. Law reform activities forced me to step back and take a longer view of the functioning of the bankruptcy system than preparing the next week's classes or the next article's development would permit. At least as important were the reform-oriented opportunities to work with accomplished bankruptcy judges and expert bankruptcy lawyers whose usual endeavors were in private practice or public service. Invariably, I learned from them a lot about the "law in action" and the range of possible alternative techniques that we might employ to achieve the reforms that we were seeking. I valued such learning highly and repeatedly used it to enhance the quality of my classes and my writings.

I therefore urge each of you to consider participating in one or more efforts at law reform affecting aspects of our bankruptcy laws that are of special interest to you. Depending upon the demands of their early professional employment, recently-admitted lawyers may enjoy the most flexibility in considering such opportunities. Nonetheless, I hope those among us who may feel more "locked into" their current roles by their prior success will still be willing to consider undertaking "law reform" efforts in the years ahead.

Next, I wish to focus very briefly upon the range of roles in which law reform efforts affecting bankruptcy proceedings can occur. Perhaps at least a few of our newer attorneys will ultimately pursue opportunities to become full-time judges or legislators. Another comparatively small number may become legal academics or full-time staff members, at least temporarily, for legislative committees or judges.

Despite the existence of these full-time possibilities, most lawyers will pursue law reform activities as volunteers. One attractive aspect of law reform work is a lawyer's ability to predict, at least in general terms, the extent of the current time commitment that he or she is making. However, participation in law-reform work is not for the faint-hearted. Achieving success in a particular effort may take a very long time, whatever one's point of view is on an issue. As a result, a volunteer lawyer may need to evaluate repeatedly whether a particular time commitment can reasonably be continued, or whether it would be more appropriate for other lawyers to take on the responsibility.

A bankruptcy lawyer who is interested in pursuing law reform efforts need not be confined to providing suggested changes in the Bankruptcy Code's (the "Code") language. Very interesting work in related fields can develop when bankruptcy courts' decisions produce new understandings of the Code's impact. Alternatively, a general perception may develop that unanticipated societal costs are accumulating as a result of decisions required by particular Code sections. Such costs may suggest that new solutions are needed in an effort to reduce or avoid the need for bankruptcy filings.

I intend to discuss briefly an example of each of these three possibilities. One or more of them will undoubtedly be familiar to many of you. Let me acknowledge at the outset that I know how complicated the substantive issues in each of these examples are. However, my purpose in discussing them tonight is not to analyze the specifics but to illustrate how varied the opportunities for participating in law reform activities can be.

My first example involves efforts that occurred throughout my career to re-balance debtors' use of alternatives that the Code provides. This example requires employed or volunteer lawyers to focus on the possible need for extensive revisions in the Code's specific language. Their goal is, of course, to achieve Congressional enactment of a revised set of options. Achieving that success can take a very long time.

A. First, Alternatives for Business Reorganizations

When I began practicing law, general dissatisfaction was growing about the use of chapters X and XI of the bankruptcy legislation then in effect as alternatives for business reorganizations in bankruptcy proceedings. Chapter XI provided the much simpler procedural route because it theoretically affected only unsecured debt. Chapter X's procedures were much more complicated, involving the potential to affect all types of creditor and equity

interests. As experience with those two chapters accumulated, bankruptcy specialists appeared to be using chapter XI for cases that were more complicated than it was designed to affect because chapter XI provided a significantly less costly and time-consuming solution to a debtor's problems.

Reformers then argued for a single chapter that could be used by all businesses needing to reorganize so that strategic decisions that might produce litigation about the inappropriate choice of a chapter could be avoided. I began doing full-time research on the possibility of a general reform of the U.S. bankruptcy system at the Brookings Institution, in Washington, D.C., in 1965. It was 1978, some thirteen years later, after the participation of many expert bankruptcy lawyers, before Congress enacted an overall revision of the Code. It included chapter 11 as its only chapter for "Reorganization."

Now, nearly forty years later, the proverbial "pendulum" is swinging in the opposite direction. In recent years, dissatisfaction grew concerning the appropriateness of chapter 11's procedures for "small and medium-sized enterprises." As a result, in 2012, the American Bankruptcy Institute undertook a major research effort concerning the general operation of chapter 11, including, in particular, its appropriateness for use by smaller businesses.

Last December, the ABI issued the very thorough report of its Commission to Study the Reform of Chapter 11.² Public debate has since begun concerning the principles underlying the Commission's recommendations. They include less complex procedures for the reorganization of smaller entities.³ Later legislative efforts to enact reforms of the current chapter 11 will certainly need the volunteered talents of interested private and public lawyers.

B. Second, Alternatives for Debtors with "Primarily Consumer" Debts

The other re-balancing that occurred during my career involved the alternatives available under chapters 7 and 13 of the Code for petitioners whose debts primarily arose from their transactions as consumers. As experience accumulated under the 1978 Code, creditors increasingly voiced the concern that consumer petitioners who "could pay" their unsecured debts in

² MICHELLE M. HARNER, AMERICAN BANKRUPTCY INSTITUTE, FINAL REPORT OF THE ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11 (2014).

³ *Id.* at 279–302 (stating that a "small or medium-sized enterprise" must have no publicly-traded securities and less than \$10 million in assets or liabilities). See generally 32 *Emory Bankr. Dev. J.* __ (forthcoming May 2016) for a transcript of corporate panelists discussing the ABI Commission Report at the *Emory Bankruptcy Developments Journal's* Annual Symposium.

chapter 13 were inappropriately having those debts discharged in chapter 7 proceedings.

The creditors' efforts to re-balance the use of those chapters again took a substantial period of time. They culminated in enactment of a number of revisions affecting consumer cases, including a "means test" required of all consumer debtors who filed chapter 7 petitions.⁴ If a consumer debtor fails that test, the court can dismiss his or her petition as an "abuse" of the provisions of chapter 7 because the test results suggest that the debtor could pay at least some of his or her unsecured debts.

A very substantial number of consumer petitioners were affected by the increased costs for lawyers' more extensive representation required by these changes. It remains to be seen whether these procedures will continue to seem necessary for identifying those consumer petitioners whose chapter 7 filings are abusive. Even if criticism of the current requirements accumulates, it may still take considerable time and effort—often by volunteer lawyers—for enough momentum to exist so that enactment of updated procedures affecting consumer debtors' alternatives can occur.

My second example involves opportunities for law reform endeavors in fields related to bankruptcy. Let us look briefly at the status of public entities' pension obligations.

You may already know that bankruptcy judges in the chapter 9 financial reorganizations for the cities of Detroit, Michigan and Stockton, California each held very recently that public entities' pension obligations were contractual and subject to modification in municipal reorganization proceedings under the Code. Following subsequent developments on this issue should be fascinating. Even at this early stage, I can only imagine the amount of renewed attention that bankruptcy and employment lawyers are giving to the funding and consequences of public pension obligations in municipal debtors' planning. It seems inevitable to me that at least some of this attention will focus on "reform" agendas involving new frameworks or procedures for managing former employees' retirement claims.

To illustrate the potential for exciting intellectual challenges in fields related to bankruptcy, a comparable development occurred when "health law" became a specialty during my career. When I was a law student, health law

⁴ 11 U.S.C. § 707(b) (2012).

issues were considered in traditional courses, such as those that focused on agency, contract, or employment law. Now, law schools offer a number of specialized “health law” courses, sometimes supplemented by health law clinics that serve individual clients. Moreover, “health law specialists” have long since become well established as highly valued members of legal or business organizations.

I believe that similarly challenging issues will present themselves as we rethink the offerings of law school curricula so that the intersections between employment law, municipal financing, and bankruptcy can be effectively taught. Public and private lawyers will also need to determine how their organizational settings can best serve clients needing representation in these complex contexts.

My final example involves efforts to reform the functioning of a particular section of the Code or, alternatively, to deal with the consequences of its impact in other ways. As some of you will undoubtedly have guessed, the section that I wish to use as my example concerns the dischargeability of student loans.⁵

The most recent students among us may not know that when I attended law school, large-scale educational loan programs with eligibility based solely upon one’s status as a student did not exist. One needed to satisfy an additional eligibility criterion, such as being a military veteran, in order to have access to loans for obtaining additional education. Usually a particular student needing financial aid either qualified for a scholarship or she was employed part-time—or she attempted to combine both sources of funding. In some cases, of course, she might try to arrange a private loan from family members or friends. When I was a law student, such private loans were rarely used.

When I much later learned that the prediction of “undue hardship” would become the required standard for the dischargeability of educational loans, I was immediately very concerned that using such a standard would result in a misallocation of the bankruptcy system’s resources. I continue to believe that my concerns were justified. Disproportionate systemic costs can occur at least at several levels: (1) time spent in lawyers’ discussions with their clients about the details of whether the “undue hardship” standard can be satisfied; (2) additional time spent by lawyers and bankruptcy judges preparing for and attending a hearing focused on whether the particular debtor’s circumstances

⁵ 11 U.S.C. § 523(a)(8).

justify discharge of the remaining debt resulting from an educational loan; and (3) appellate judges' time spent in preparing opinions concerning whether bankruptcy judges in their jurisdictions had used the appropriate standard in evaluating whether "undue hardship" would result if a particular exception to a bankruptcy discharge was sustained.

I consider these costs to be excessive, because satisfying the "undue hardship" standard in each case involves presenting to one of many bankruptcy judges a particular combination of facts that defy standardized treatment. Those who seek reforms in our bankruptcy procedures for dealing with educational loans often also voice concerns about the long-term impact upon other U.S. economic sectors of the need to repay such substantial amounts of debt.⁶ In doing so, they emphasize other financial choices that those debtors will be unable to make and cite their need to delay or forego purchasing residences as an obvious example.

At this time, an effort to have Congress enact an overall legislative solution to a problem of this magnitude seems to have little chance of success. Creditors that count on the income from repayment of such loans and colleges and universities that count on the proceeds of such loans for tuition and fees would be among a number of powerful opponents of any significant change. Nonetheless, legislation has been introduced in the U.S. Senate that would return private lenders to their pre-2005 status, making the balances of their debts again subject to discharge.⁷ Following its progress, if any, toward enactment should suggest whether any other attempts at partial legislative solutions would be likely to succeed in the foreseeable future.

However, when able lawyers consider themselves effectively blocked from pursuing one solution or improvement, they are adept at creating others. Let me cite two examples of such efforts. First, repayment programs, whose requirements are calculated automatically based upon the debtor's income, include the federal program, "Pay As You Earn" ("P.A.Y.E."). That program requires a qualified borrower with federal educational loans to repay a maximum of 10 percent of his or her monthly income. The P.A.Y.E. program

⁶ See Chris Denhart, *How the \$1.2 Trillion College Debt Crisis is Crippling Students, Parents, and the Economy*, FORBES (Aug. 7, 2013, 12:30 PM), <http://www.forbes.com/sites/specialfeatures/2013/08/07/how-the-college-debt-is-crippling-students-parents-and-the-economy/>; Kelley Holland, *The High Economic and Social Costs of Student Loan Debt*, CNBC (June 15, 2015, 10:39 AM), <http://www.cnbc.com/2015/06/15/the-high-economic-and-social-costs-of-student-loan-debt.html>.

⁷ See Fairness for Struggling Students Act of 2015, S. 729, 113th Cong. (2015) (introduced by Senator Richard Durbin of Illinois).

also forgives any unpaid balance on such loans after the debtor has made payments for twenty years. Needed ongoing refinements and improvements in such programs and their collection procedures are likely to require attention from volunteer lawyers for the foreseeable future.

Second, during the *Emory Bankruptcy Developments Journal's* Symposium in late February, Professor Dalié Jiménez⁸ described a completely different approach as a partial solution to the problems created by the accumulated debt for educational loans. During the Symposium's "Undue Hardship" panel,⁹ she described a research project that is currently underway at three law schools.¹⁰ That project focuses upon the pro se or "Do It Yourself" segment of bankruptcy petitioners who have sought "undue hardship" discharges. Its goal is to develop packets based upon inter-disciplinary considerations that will increase those debtors' competence and confidence when they appear at hearings considering their requests.

It can take considerable time for the results of such experimental efforts to accumulate sufficiently to be considered a reliable reflection of the situation being studied. However, the ongoing need to develop additional possible alternatives for dealing with debt for educational loans should provide "law reform-oriented" lawyers with a number of interesting opportunities in the years ahead.

With these examples I hope to have alerted you to, or reminded you of, the wide array of possibilities that exist if you wish to include law reform-oriented work as part of your professional agenda. I can only imagine the time pressures that you will, or now, face in your professional roles. Nonetheless, I hope that you can find time for engaging in justice-enhancing endeavors that will serve a wider community. Based upon my own experience, they should provide a refreshing longer-term alternative to the incessant professional demands for rapid responses based upon your areas of expertise.

However you deploy your talents, be assured that my best wishes go with you. Thank you again.

⁸ Associate Professor of Law and Jeremy Bentham Scholar at the University of Connecticut School of Law.

⁹ The other panel participants were Emory Law School's Professor Rafael Pardo, who enjoys national recognition as an expert on issues involved in attempts to obtain "undue hardship" discharges and the Honorable Ray Mullins, Chief Judge of the U.S. Bankruptcy Court for the Northern District of Georgia.

¹⁰ The University of Maine Law School and Harvard Law School are the other institutional participants with the University of Connecticut School of Law.