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Article 5

What a Difference a Day Makes

Kim Martin Lewis

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MS. LEWIS: Thank you. I am a bankruptcy and restructuring lawyer, so I never envisioned ever being before the United States Supreme Court. This case started out in February 2001 when I got a phone call from my partner in Lexington, Kentucky. And he said, "I have a friend that has an involuntary bankruptcy commenced against him, and he is the former governor of Kentucky. I need you to come down here and talk to him because there are some issues with the corporation. The bank wants to talk to the corporation."

So I went down the very next day and interviewed and got the job to represent the corporation, which was Wallace Bookstores. Wallace Bookstores was owned by the former governor of Kentucky, and an involuntary bankruptcy was commenced against the former governor by a number of people. One of them was Dave Thomas, the former owner of Wendy's.

It started out as a difficult case from a bankruptcy/restructuring standpoint, and we spent 20-hour days dealing with the bank, and we spent lots of those days with FBI investigations and spent lots of days with having to get rid of the former governor as the CEO of the company and his sons, et cetera. Needless to say, it was a very difficult case to start with but, again, I never envisioned that it might result in a case before the United States Supreme Court.

The business itself was a company that operated college book stores throughout the United States. And so we came into the case, realized that there wasn't enough cash to operate the company, and that we would have to quickly sell the stores, which were owned by public universities throughout the country.

So within the first month and a half of the case, I made phone calls to 80 some universities, and I got lots of phone calls from Attorney Generals throughout the country. And because we were not able to pay the amounts that were due under our contract, we were going to

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have to match up a buyer with a contract and ignore the RFP process within each and every state.

So I got lots of angry phone calls from Attorney Generals, and I said, "That's okay. If you don't participate in our process, we will just do going-out-of-business sales at your university." I got most of their attention except the Commonwealth of Virginia. The Commonwealth of Virginia Attorney General back at the early stages of the case said, "Ms. Lewis, we have sovereign immunity, so you can't come into bankruptcy court and you can't force us to go into this process." Again I said, "Okay. I understand what you are saying, however, I will conduct a going-out-of-business sale at Virginia Military Institute and all of your other universities." And eventually they cooperated in the process.

I thought that would probably be the last time I heard about sovereign immunity in this case. It wasn't the last time. It was just the beginning of the Commonwealth of Virginia's desire to assert sovereign immunity in the case. We ended up confirming a plan of reorganization, and we got a liquidating trustee appointed through the plan of reorganization.

The liquidating trustee then worked with us to look at preference payments and to receive all preference payments within 90 days before bankruptcy. Given the fact that this was a company that operated college book stores throughout the United States, lots of those preference payments went to colleges and universities. So in the Sixth Circuit, which I reside and the case resided, we had the lovely *Hood* decision that said sovereign immunity doesn't apply in bankruptcy.[1] Great. I get to sue them.

So I sued them. And although I heard from a number of the Attorney Generals, the only one to assert in a motion to dismiss sovereign immunity was the Commonwealth of Virginia. And I remember going to the bankruptcy hearing in front of Judge Howard. And William Thro, who is from the Attorney General's Office, said to me, "I am going to take this to the United States Supreme Court." I laughed at him. I said, "You have the *Hood* decision in the Sixth Circuit."

At that point in time, *Hood* had just been accepted for cert before the United States Supreme Court. I said, "You know, by the time we get to that point in this case, the *Hood* decision will have been decided, and either the Sixth Circuit is right or the Sixth Circuit is wrong." So the process continued. Actually, in our case, I think it

1. *In re* Hood, 319 F.3d 755 (6th Cir. 2003), *aff'd*, Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

was at the district court level where the Court, basically, awaited to get the decision from the United States Supreme Court on Hood before it rendered a decision.

And for those of you who don't recall the *Hood* decision, it involved a student loan discharge case. And the Sixth Circuit said that Section 106 of the Bankruptcy Code was constitutional, and that you could sue a state in bankruptcy court.[2] And it went through a very long historical analysis of the Federalist papers, et cetera, and it went up to the Supreme Court on the issue of whether or not 106 of the Bankruptcy Code is constitutional.

When it got up to the Supreme Court, I think it surprised everybody in the bankruptcy community that they didn't decide whether it was constitutional or not. Instead, the Supreme Court said, "You know, this is a discharge case. This involves something very different than going after a state for monetary damages. This involves the discharge of an individual so, therefore, we aren't going to reach that issue, and we are going to hold that it's — that part of bankruptcy, the discharge is *in Rem*."

Okay. Well, what does that mean for me? Well, at that point it went back — my case continued on, and it went to the Sixth Circuit. The Sixth Circuit ruled like it did in the *Hood* decision, in a one-page opinion saying, "We said this before in *Hood*." And then cert was filed in the United States Supreme Court. I really, really did not believe the United States Supreme Court was going to grant cert. They just had this issue in front of them. They chose not to decide it. Why would they take this case? Well, they did.

They accepted cert in April of '05. When they accepted cert, we had a very different court than we have today. When they accepted cert, Justice Rehnquist was there. Justice O'Connor had not announced her resignation. And I didn't know, really, what that meant because, frankly, I hadn't ever done an in-depth study on sovereign immunity throughout the United States because I didn't need to; I was in the Sixth Circuit. Sovereign immunity really didn't get raised much in the cases that I was involved in, so I really didn't do such an in-depth study.

Cert was accepted. I was an absolute neophyte. I had never been before the Supreme Court before. I didn't understand the significance of this constitutional question at that time. But within 24 hours I did, because I probably got 20 to 25 phone calls from practitioners and law professors from all over the country; constitutional experts, United

2. *Id.* (discussing 11 U.S.C. § 106).

States Supreme Court experts, all of which offered their services to assist in the preparation and to argue the case before the Supreme Court.

I contacted my client. I said, "You know what, this is a case I have been involved in since day one. I know the most about the case, but you need to know I am getting all these phone calls. Do you want me to talk to these people about having somebody else come in to argue it before the United States Supreme Court?" And he said, "Kim, you know what, you have done a great job on this case. You know this case like the back of your hand. You are the best person to do this job. You make the decision on whether or not you want somebody to help you on the briefs or you want somebody else to argue the case before the Supreme Court. But I completely trust you."

Okay. So that's how we started the process in April. I brought in some of my partners who — one who had practiced before the Supreme Court before, another who was a First Amendment lawyer, so that might help on the constitutional side, and we decided that we would bring in an expert to help us on the briefs.

So we interviewed a number of people and ultimately agreed on Eric Brunstad, who is a professor at Yale and also a partner at Bingham McCutchen, and he worked very closely with us. I soon realized also in the beginning of the process of looking at this issue that the Sixth Circuit really was in the minority. Every other circuit in the country ruled that Section 106 was unconstitutional, and that would have been, I think, five or six circuits.

And it soon became apparent to me that the Court's sole reason for accepting the case was to reverse the Sixth Circuit. That's a pretty daunting task ahead of you, especially for a neophyte like me who had never been before the United States Supreme Court before. And, frankly, I don't like history, and I am not a constitutional expert, but I needed to learn very quickly. So we began the process of preparing the briefs, because you have to file a brief long before the petitioner files their brief, because it takes a very long process. And in this process, I realized how important the bankruptcy community as a whole was to this process.

We contacted a number of the amicus parties that were involved in the *Hood* decision, and we worked with them. The professors submitted an amicus brief in *Hood*. The same group of professors submitted an amicus brief in our decision. And I think Professor Chemerinsky — I don't know if he is here yet, but he is one of the professors who will be here this afternoon. And we also contacted Bruce Mann, who did the historical brief for the *Hood* decision, because you only have

50 pages to express what you need to in an area like this, which was incredibly difficult.

So we knew we needed a professor's brief and we knew we needed an amicus brief on the history because we didn't have enough space in our brief. Then we began the process of thinking about -- I started looking at all the sovereign immunity cases having nothing to do with bankruptcy. That was very scary. Ever since Rehnquist decided that sovereign immunity was his baby, all of the decisions in the last 15 to 20 years were five-to-four decisions.

So I decided about and thought not only myself — like I said, this was a joint effort by many people in the bankruptcy community, including judges — Judge Haines from Arizona, who has written on this topic, was a — I can't tell you how much he helped me through this process. But we started talking about this: "You know, how are we going to get through this? Let's look at the justices that are on the court."

And you know exactly how they are going to line up because they have lined up that way before. And the only chance you have is that two justices who, potentially, are swing votes - they haven't been swing votes on sovereign immunity, but maybe there's a chance at getting at them, and that's Justice O'Connor and Justice Kennedy. We started thinking, how are we going to brief this with Justice O'Connor and Justice Kennedy in mind? Justice O'Connor loves *in rem*. And the reason why she loves *in rem* is that she authored a number of admiralty decisions that involved *in rem*. So we really liked the *in rem* theory. Our problem with the *in rem* theory is there was a case called *Nordic Village* that was decided by the United States Supreme Court that said a preference action isn't *in rem*.[3] Boy, how am I going to get around that one?

So we thought about that, and we decided we were going to distinguish that because in that case, at least in the transcript of the proceeding and in the opinion of the Court, it appeared that the trustee was seeking monetary relief as opposed to seeking the property back. So that's what we did. We distinguished *Nordic Village*, and we wanted to make the *in rem* argument because Justice O'Connor loved *in rem*.

Justice Kennedy. What did Justice Kennedy like? He authored a constitutional opinion called *Coeur d'Alene*[4], and in that opinion, what was very clear to us is that he believed in that case that alterna-

3. United States v. Nordic Vill., Inc., 503 U.S. 30 (1992).

4. Idaho v. Coeur D'Alene Tribe, 521 U.S. 261 (1997).

tive remedies are important; that there's got to be an alternative remedy. And that's why in *Coeur d'Alene* he felt very comfortable in saying sovereign immunity applied.

Well, that's a good thing because in bankruptcy there is no alternative remedy. The trustee sues in bankruptcy court. They can't go to state court. They can't go anywhere else, so there's no alternative remedy. So we decided to come up with theories that didn't exist for us in the Sixth Circuit or, I should say, we didn't argue in the Sixth Circuit because we didn't need to. We already had the *Hood* decision.

So we decided to argue waiver because in this case, one of the Commonwealth's institutions, the Virginia Military Institute, had filed a proof of claim. None of the other ones did, but one of them did. So we said, "Okay, waiver." Number two, *in rem*. Number three — this was the nice new innovative argument that kind of played into who Justice Kennedy is. This is a bankruptcy trustee. He is a federal entity. That's very different than an individual, a private citizen suing the United States Government. And the reason, again, why we wanted to put that in there is because we wanted to show the Court how bankruptcy was different. So that was our third argument.

And our fourth argument was the uniformity clause. I loved the uniformity clause. Every time I read about it, I got more into it. But every time I read about it and got more into it, I knew it was a loser because I was looking at the court that was there in April. Well, in June the petitioner filed their brief. Three days later Justice O'Connor announced her resignation. Oh, my gosh, now what are we going to do? Justice O'Connor, one of our swing votes, is potentially going to be gone by the time we argue this case.

All right. So our brief is due in August, but we still have to count on the fact that Justice O'Connor is, maybe, going to be there, because we don't know who the replacement is, other than Chief Justice Roberts had been nominated. We thought he would probably go through, but we weren't for sure, so we had to still hope that we have to play to Justice Kennedy and Justice O'Connor because, again, you can't persuade the other ones. You already know how they are going to vote.

So we submitted our brief in the beginning of August. And, literally, about a week after our brief was submitted, Chief Justice Rehnquist died. What does this mean? Well, that became apparent fairly quickly thereafter. Chief Justice Roberts was going to be taking over Chief Justice Rehnquist's position, or at least be nominated to take over Chief Justice Rehnquist's position. Now we have another opening with Justice O'Connor.

My argument was scheduled for Halloween, October 31. As the end of September neared, the beginning of October, Chief Justice Roberts was confirmed. Okay. Now I know that we got Chief Justice Roberts. I counted him as he was going to rule just exactly like Justice Rehnquist ruled, so I didn't think that really changed my dynamics too much. But President Bush didn't take too long before he came out with a nominee for Justice O'Connor, which was Harriet Miers. I don't think I pronounced that correctly. That was the beginning of October.

By about the third week of October, a week before my argument, it became apparent that she was no longer going to be the nominee. So now, again, we don't have anybody to be appointed by Justice O'Connor. So I don't know whether Justice O'Connor is going to hear my case or not hear my case, and whether she will be there when the decision gets rendered. So I am prepping, and the other thing that I had no idea is what does it take to prepare for a Supreme Court argument.

As I said before, I am not a history major. I know very little about history. I spent so much time reading Bruce Mann's book. I spent so much time reading a lot of history about preferences, about the Bankruptcy Code, about English bankruptcy law; something I never really thought I would do.

Then you have to read about the justices. So I read Justice Scalia's book. I read Justice Breyer's book. And as I told you before, I read every sovereign immunity decision that existed in the last 20 years, but then I had to go back to all the prior ones. So you spend a lot of time reading and prepping, and then you have to prepare for the reports.

And in the middle of this, I am actually doing another case. I was counsel for Huffy Corporation in their restructuring. Well, they emerged from bankruptcy on October 15. My argument was October 31. So I was in the closing of the Huffy case two weeks before my Supreme Court argument. So I literally left the closing table from Huffy to go to Washington, D.C. for my first moot court, which was at the Public Citizens in Washington. And the justices, fake justices that we used, were some of the people from Public Citizens as well as a number of professors. Professor Chemerinsky was one of them. Judge Haines was another one of the justices. And we had a number of other people who served as my justices. I started out that moot court by talking about waiver, because I thought that was our strongest way of winning this case. And so I went through the entire moot court and — I'm sorry. Actually, I started that one with the uniformity argument. I got through the moot court, and the justices said to

me, "Kim, you know, that's your weakest argument. Why do you want to start out with that?" I said, "That's why they accepted cert." They said, "Yes, but you made three other arguments in your brief, and you know that's your weakest argument, so don't start out with that."

Okay. Going back to the drawing board. I now have a week and a half before my next moot court, which is in Georgetown. My Georgetown moot court is the Thursday before my Supreme Court appearance the following Monday. So I go back to the office and prep for my next moot court, and I go to Georgetown. At Georgetown I had as my justices a number of former law clerks for Supreme Court justices and a few professors, and it was a great session. I mean, I got through it and answered all the questions. And afterwards they looked at me and they said, "Why did you start with waiver?" I said, "Well, I started with the uniformity clause before. And they said, "You know, the thing that we are struggling with is you are a bankruptcy lawyer, and you know a lot about bankruptcy, and your theories in your brief are that bankruptcy is different. And all those justices on the Supreme Court, they are constitutional experts, and you are never going to know as much as those justices on the Supreme Court about constitution, but you know more than those justices on the Supreme Court about bankruptcy. So if you are going to win this case, the only way you are going to win this case is demonstrating that bankruptcy is different."

So I left there, and I had already decided that I had been — I was in Washington now on Thursday, and I was not going to leave until after the Supreme Court case. I had lots of family coming in from all over and friends coming in from all over, and I had my husband and children promise me that — they actually were staying at another hotel. No one was allowed to speak to me until after the Supreme Court argument. They could all walk over with me, but that was about it.

So I was holed up in the room, and I actually had an associate with me that I could send e-mails to on my Blackberry and say, "I need you to research this, find this case." We would meet once a day, and he would bring me the cases that I asked him to look at. We spent 15 minutes together just talking, and then I would go back to my room.

My parents actually checked into the same hotel I was staying in, and that was Sunday night. And my father told me later that when he checked in, the woman at the front desk said, "Oh, you are related to that woman on the fifth floor. Well, the maids don't go in that room, and they haven't been in there since Thursday." And my dad said,

"Well, that would probably be Kim. She hasn't left there since Thursday." So that was my life for about five days.

And then it was actually walking over to the Supreme Court the morning of. And all I can — for those of you who have never argued before the Supreme Court — of course, I don't think I ever will again — it was a very frightening experience. I had actually gone to see arguments three weeks before then so I wouldn't be in total awe when I walked in. And I walked in the building. And you get checked in in a special area, and you go up to the attorneys' lounge, and they give you the speech about, "Now, you really shouldn't call them by the wrong name, but you really should say Justice O'Connor and Mr. Chief Justice, and — if you can remember their name. But if you forget, don't use the wrong name."

So that was right before, and I was the second case. They have two cases a day. And the first case is the 10:00 o'clock case, and the second case is the 11:00 o'clock case. And when you are the 11:00 o'clock case, you have to be there for the 10:00 o'clock case. You are just at the backup counsel table. And they let you come into the Supreme Court and check the podium and see how high it is compared to where you would stand.

And so we came in about 9:30 and, you know, of course, the justices aren't there and, you know, you are adjusting the podium to see how it fits. And, again, it's very scary. If this is the podium, the justices are a little bit higher than eye level. But if you see where Judge Waldron is, that's how close the justices are, and that's pretty intimidating.

So we started out by — I am at the backup table. And the first case comes in, and it's an antitrust case. And the first lawyer gets up and starts arguing, and Justice Breyer is just in one of those moods, and he is just reaming this guy, and — not at first. I mean, at first he asks him a question, two questions, and the lawyer couldn't answer the question, at least not the way Justice Breyer wanted him to answer the question. So it got worse, and it got worse. And I am thinking, "Oh, my gosh." And then Justice Scalia started to go after him, and I am thinking, "This is not going to be a lot of fun."

The case is over. What happens is the table in front of you gets up, leaves, the justices stay up there, and you just pick up your stuff, and you move to the table in front of you. I was lucky I was the Respondent, so I didn't have to get up first. The Petitioner got up first, and William Thro got up as the Attorney General for the Commonwealth. And he started out, and he actually got in more words than I did to begin with.

And Justice O'Connor was his first question. And Justice O'Connor asked him, "How often are states' creditors in bankruptcy?" And I am thinking, "Oh, I like this line of questioning." And then she continued on to questions about *in rem*. And I am thinking, "This is great." And, again, you know, I am taking notes as he's up there, and what the justices are looking for and asking for. And Justice Scalia, of course, is on his side. So Justice Scalia was trying to get him to answer the question that preferences aren't any different than contract claims.

He didn't really answer that like that, and he didn't — he could have really said that preferences, just like contract claims, aren't property in the state in bankruptcy. But he didn't go to that argument, and he didn't even mention that. He comes to me, and I get up. And I got one sentence out, and the Chief Justice interrupted me and said, "Ms. Lewis, how can you distinguish this case from the *Florida Prepaid* case?"

For those of you who don't know sovereign immunity, the *Florida Prepaid* case is a patent case under Article 1.[5] And I started to argue because I didn't want to go into the uniformity argument immediately, because I knew that I was going to be going down a bad road with that. I said that, "Well, in the *Patent Prepaid* case there was an alternative remedy." And, you know, I saw Justice Kennedy's eyes light up a bit.

Then Justice Souter — he is one of my friends. I mean, he is going to rule in my favor no matter what. Justice Souter said, "Ms. Lewis, I like your theory about there being an alternative remedy, but where is the exception in sovereign immunity that there has to be an alternative remedy?" He says, "You know how I would like to rule in this case, but I don't know how I can find that sovereign immunity doesn't apply if there's no alternative remedy."

And so, basically, once we got into a rapport with questions with him, we finally decide that my alternative remedy theory was that bankruptcy was different under the uniformity clause and that the uniformity clause made it different, and that's why there was no alternative remedy.

And, again, you know, you can get out, literally, two sentences before you get barraged by questions all over the place. About halfway through my argument, Justice Ginsburg is asking me a procedural question on my waiver argument, then all of a sudden, boom, there's

5. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (construing U.S. CONST. art. I, § 8, cl. 4).

this loud noise. Justice Ginsburg jumped. The marshals flew up to the front of the courtroom, and a light bulb exploded over Justice Ginsburg's head. Everybody in the courtroom thought it was a shot. So did I.

It felt like it took ten minutes, but I know it was just seconds until the Chief Justice said, "I think it's just a light bulb that exploded." And then he went on to make a joke about this is a joke that they are playing on the new Chief Justice. And Justice Scalia said, "Happy Halloween," and everybody started laughing. And Justice Kennedy looked at me and just — he just whispered to me — he said, "Take your time. We are interested."

All of the justices, I think, felt very sorry for me. Here I am, a brand new person to argue before the Supreme Court. By the way, they know that. They check you out long before you come up and argue before them. They knew I had never argued a case before the Supreme Court. And I think that when the light bulb exploded, it kind of broke any kind of nervousness that I had previously had. And Justice Ginsburg was absolutely amazing, because she jumped back into the question that she had and just continued on.

And after that, I finished up my argument. I saw my white light go on, and there wasn't any questioning going on. I figured I would make my conclusion and I would sit down. The alternative was you start getting into another argument. And the new Chief Justice, if you ever argue before the Supreme Court, does not let you go beyond the red light. When that red light goes on, he will stop you, and you will sit down. So I knew I had very little time, so I made my conclusion, and I sat down.

After we finished, and Mr. Thro got up, and he was questioned by Justice Stevens, and Justice Stevens actually started asking him questions about the plan on the convention. And I thought, I can't believe that's where this case is going to ultimately go.

This was, again, October 31. So we left. It was the most amazing experience I have ever had. And I thought, you know what, this was a great experience. I did the best that I could do. I worked really hard, and I know I couldn't have done any better. And the briefs were in the argument. But I knew the likelihood of winning is pretty slim, and maybe I will win on waiver. Maybe I will win on some alternative remedy, but I did the best I could do.

We left, and probably every day I checked on the United States Supreme Court web site to see what decisions got rendered on that particular day. And on January 23 I got a phone call at 9:30 in the morning; the United States Supreme Court on the phone. "Ms.

Lewis? Yes. This is the clerk of the United States Supreme Court. Yes. The Katz decision has just been handed down, and it has been upheld by a 5-4 decision. Justice Stevens authored the opinion." She continued to tell me who voted on what side. I just listened. And then she said, "And we will be e-mailing you the decision within a few minutes, and it will be made available for the public this afternoon, but you will get it via e-mail in a few minutes."

I hung up the phone, and I was just in shock. And I got the e-mailed decision. And I don't know how many of you have read the decision, but it was written by Justice Stevens. The decision was announced on January 23 because Justice Stevens was sick that day. Justice O'Connor actually got to announce the decision from the bench on January 23, which was her very last day on the bench, and her very last swing vote decision was the *Katz* decision, in which she voted with the liberal justices in the case.[6] And Justice Stevens' opinion couldn't be any better for bankruptcy practitioners, except for states if they are in bankruptcy.

It basically goes down the "plan on the convention" analysis and also adds the *in rem* flavor to it, because that's the only way they would have gotten Justice O'Connor's vote. And there's one particular footnote in the decision that I always point everybody to. They say, "Well, why do you think you won this case?" And I always say, "Well, look at Footnote 9 in the opinion." And I think that's exactly why Justice O'Connor went for it. There is a sentence in the middle of it that says, "Indeed, the bankruptcy clause's unique history combined with the singular nature of bankruptcy courts' jurisdiction have persuaded us that the ratification of the bankruptcy clause does represent a surrender by the states of their sovereign immunity in certain federal proceedings."[7]

And I believe that Justice O'Connor believed that bankruptcy was different. And that's why bankruptcy is different. And there have been a lot of people who have said, well, it's almost like bankruptcy is like the 14th Amendment now, because that's the only thing that's an exception to the sovereign immunity of being able to sue the states.

And it was a great victory. It was a lot of fun. I really enjoyed it, looking back on it. I was terrified at the time. And I couldn't be more thankful for having such a wonderful experience and, certainly, having such a great victory. Thank you.

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6. Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006).
7. *Id.* at 1000 n.9 (2006).