



Emory Bankruptcy Developments Journal

Volume 36
Issue 2 *The Seventeenth Annual Emory Bankruptcy Developments Journal Symposium*

2020

Keynote Address

Honorable Wendy L. Hagenau

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Recommended Citation

Honorable Wendy L. Hagenau, *Keynote Address*, 36 Emory Bankr. Dev. J. 665 (2020).
Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol36/iss2/13>

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KEYNOTE ADDRESS

*Honorable Wendy L. Hagenau**

MR. MATT LINDGREN: I hope everyone enjoyed the Consumer Panel this morning. This year at our Seventeenth Annual Symposium, I'm excited to introduce our wonderful keynote speaker. We are very lucky to hear from Judge Hagenau today. The Honorable Wendy Hagenau is the Chief Judge of the Northern District of Georgia. Judge Hagenau assumed the bench on May 25, 2010 and became Chief Judge on October 1, 2017. Prior to her appointment, she was a partner at Bryan Cave Powell Goldstein in Atlanta which is a combination between Powell Goldstein and Bryan Cave. Judge Hagenau graduated from Duke University Law School with honors in 1983. Judge Hagenau is a native of Memphis, Tennessee, and received her Bachelor's with highest honors from the University of Tennessee, Knoxville, in 1980. Judge Hagenau has served in numerous leadership positions in the community, including as an Advisory Board member for our Journal, as well as the Treasurer and Director of the Southeastern Bankruptcy Law Institute. It is my great honor and distinct privilege to introduce Judge Hagenau, and I hope you all join me in welcoming her.

JUDGE HAGENAU: Thank you for inviting me. I have been involved with the *Emory Bankruptcy Developments Law Journal* Symposium for many years, serving on the Advisory Board before I came on the bench. The Symposium is always well done and brings great speakers to the area, so I'm thrilled to be a part of this program.

I was asked to speak today a little bit about my background, the evolution of bankruptcy since I've been practicing, and where I think it is going or should go next. My first exposure to bankruptcy was as a law student working my first summer in 1981 for a sole practitioner who was a Chapter 7 trustee. The Bankruptcy Code was in place (having been passed in 1978) but it was still new, with lots of questions by the practitioners. I began practice in Atlanta in 1983 with a small firm. Several of the lawyers there had been trustees or represented trustees or otherwise had a bankruptcy practice in conjunction with their general litigation practice. The firm also had what was then a very extensive healthcare-related practice. The firm represented Northside Hospital and several other smaller hospitals in the area and as a member of a small firm, I did quite a bit of healthcare-related work. In 1988, our small firm merged into Powell Goldstein, which then was one of the largest firms in Atlanta. I practiced there in both their

* Chief Judge, United States Bankruptcy Court, Northern District of Georgia

bankruptcy and healthcare groups until eventually choosing bankruptcy as my sole area of practice. However, I utilized my healthcare background in a number of healthcare-related bankruptcies. Powell Goldstein merged into Bryan Cave eventually and then I came to the bankruptcy bench in 2010.

I loved the area of bankruptcy law for several reasons. First, I really enjoyed the balance between litigation and negotiation that bankruptcy cases present. I also really appreciated that the bankruptcy practice and bankruptcy practitioners approached their work from a practical perspective. Moreover, because the bar of bankruptcy practitioners was relatively small, you got to know each other and could really work collaboratively on many matters. Finally, it became obvious to me that bankruptcy law is something that is really necessary in our society.

Like many of you coming out of law school, everyone asked me, well, do you want to be on the litigation side of the practice or on the corporate side of the practice. I tended to go the litigation route. But once I started practicing in the area of bankruptcy law, I realized the opportunity it presented me to learn more about corporate law and about negotiation. You know the Bankruptcy Code sets up a framework for negotiation. Since every action requires notice and a hearing, the lawyer could expect to either litigate many issues or resolve them with the opponent. Nine times out of ten, the solution was a resolution. Through great lawyers that I worked with I learned so much about drafting corporate documents, and loan agreements; I learned about bond transactions and real estate transactions, and I just thought it was fascinating. There are really very few areas of practice where you get to be both a litigator and a corporate lawyer. Some people say that bankruptcy is the last true general practice area. Practicing in bankruptcy means generally being aware also of corporate law, contract law, real estate, tax law, and perhaps other areas such as employment or securities law. It's hard to be bored with that many opportunities.

I also really liked the bankruptcy bar. The bar was small enough that you ran across the same people over and over again, which meant you got to know each other. It also meant that you better not be unreasonable in your demands or your requests, because it is certain that what goes around comes around. I frequently had a very different experience if I was negotiating or dealing with someone in a "general litigation" court. Seeing the same people over and over again gave you an opportunity to really hone your skills by watching those that you admired and who were successful in what they were doing. You could see their growth and therefore anticipate your own.

I also appreciated the way the bankruptcy bar was so practical in its approach to the practice. After all, in the bankruptcy setting, both the debtor and creditor

are already short of money before the case even begins; there are no deep pockets. The creditor holds a defaulted obligation and the debtor can't pay its debts as they come due. So, what I found was that parties staked out their positions but immediately began looking for a logical solution that could actually be implemented. Most of the time the litigation in bankruptcy is not on "principle" but because the dispute is real. At the outset of my practice, the debtors and the creditors were all local. The banks were the local banks: First Atlanta, C&S, National Bank of Georgia. That meant the lending officer was likely still at the bank, and it also meant frequently there was a personal relationship between the lending officer and the principal of a corporate debtor or even of an individual. This affected the dynamics of the collection process and of negotiation. It contributed to a sense of practicality.

Finally, I enjoyed the bankruptcy practice because I felt then, and feel even more strongly now, that the Bankruptcy Code is something this country really needs. It is necessary for individuals and it is necessary for corporations. When I was sworn in to the bench, Judge Edmonds of the Eleventh Circuit Court of Appeals explained his theory about the necessity for bankruptcy. He pointed out that many of our forefathers came to America to escape debtors' prison. If the punishment for failing to pay your debts is going to prison, entrepreneurship and ingenuity tend to be scarcer. People are less likely to take risks if they believe the downside of the risk is going to jail. It is interesting that of all of the many rights that our forefathers considered important in the Constitution, the right to have uniform bankruptcy laws in this country was right there at the forefront. As Judge Edmonds explained, this was necessary so that our original settlers could start new businesses, invent new gadgets, and take business risks understanding there would be an organized mechanism to wind up the result and to avoid jail as long as they were honest in their attempts. I think he may be right about that. I suspect if you survey the history of particularly business bankruptcies in this country you would find many businesses that were born of and from a bankrupt business. One I witnessed in my very early career days, believe it or not, was Colony Square. When I first started practicing, there were almost no office buildings in Midtown. But a group of developers had foreseen that it would be the next great area of expansion for Atlanta and so they built Colony Square. Unfortunately for them, they were way ahead of their time and Colony Square ended up filing bankruptcy twice before the rest of the city caught up with the vision of those folks. But it took someone, like those initial developers, to see that this was going to be an area of expansion for the City of Atlanta.

I also think it's important when you think about bankruptcy to recognize that, of our entire federal court system, the bankruptcy court is probably the

number one place that citizens come into contact with the federal court. They may be debtors, they may be creditors, they may be employees of a debtor, they may even be an employee in a debtor's employer that has to handle their employment deduction orders. But it's amazing the number of ways that our U.S. citizenry comes into contact with the bankruptcy court.

I hope the things that I love about the practice will continue in the future. I hope that parties will continue to see not just the litigated result but continue to find negotiated resolutions. I note that the leverage for negotiation is quite different than when the Bankruptcy Code was initiated in 1978. Then, it was contemplated to be more of a three-legged stool, with the debtor, the secured lender, and the unsecured creditors having equal bargaining power to arrive at a successful solution for the debtor. However, changes in lending and business practices have changed that some. If a business debtor files bankruptcy, usually all of its assets are lien-ed up by the secured lender, really leaving no assets available for unsecured creditors. Whereas the judges in 1983 when I came out of law school would have expected to hear three different views on an outcome and then a negotiated settlement among the three, now really you may only hear one view and that is the view of the lender because the debtor also espouses the lender's view many, many times.

I think the bankruptcy bar will continue to be a small tighter knit bar than the bar as a whole, but I hope that our bankruptcy bar will grow more diverse. And by diversity, I mean in every respect, race, sex, gender, nationality, but also simply background and more. After all, debtors are very diverse and they deserve representation that understands them, their backgrounds, their business model, and their challenges. They also deserve judges who are diverse, and we hope that the bankruptcy bar will make a concerted effort to bring in law students of many backgrounds, give them the opportunity to learn bankruptcy law so that they can be our next leaders.

One of the things that's already changed and will continue to change is that bankruptcy is no longer a local practice. There are few local creditors in a case and most creditors are nationwide in consumer and business cases. Because the lenders are now national and international our bankruptcy law will need to continue to adjust to a world economy as opposed to a local economy. It is interesting to recognize that a failure in a particular type of business, even if not in your area of the country or the world, can affect the people that live there, both businesses and individuals. For example, who would have foreseen that securitization would cause so many people to lose their jobs in Atlanta and lose their homes. The people who lost their homes in the recession were not just the

people who were borrowers on subprime loans. No, they were also the constructions workers, appraisers, lumberyards, painters, bankers, and more. When GM failed, it was not only the workers of GM that felt that loss, but rather the companies that were the suppliers to GM and all of their employees, and as each employee lost their job at any supplier level, then the local businesses (think grocery store, drycleaner, etc.) also lose income. Our most recent example is the coronavirus outbreak. Just last week drug technology company Valeritas Holdings, Inc. filed chapter 11 in Delaware because the shutdown of the Chinese factories blocked delivery of goods needed by the Debtor. When a virus in Wuhan, China causes a U.S. company to file bankruptcy, you know we truly have a world economy. We are all tied together in a much greater way than we were when I started practicing, and our bankruptcy laws will need to adapt to that change in culture.

I do see a couple of changes in our bankruptcy law that I think are aimed at trying to adjust to changes. One is the new Small Business Reorganization Act that just went into effect in February. That act was passed in recognition of the fact that the chapter 11 process of plans and disclosure statements and votes and the absolute priority rule and cramdown and 1111(b) elections just don't work for all businesses of all sizes. So, it's a step towards understanding what needs to be done to allow different types of businesses to reorganize. The Bankruptcy Code already has special provisions for farmers and special provisions for international businesses. And I would expect that we will continue to see development in specialized areas. I also think the courts will continue to struggle with defining property as the nature of property has changed (think of Bitcoin) and as our world continues to come up with new kinds of rights, whether they be intellectual property type rights, air rights, water rights, etc. We will all be trying to figure out how to fit those into the historical definitions that we use.

I believe bankruptcy will continue to be very necessary to our country. Because of the world economy, a blip one place can affect another place relatively quickly. The affected parties may not have an opportunity to make adjustments quickly enough, and bankruptcy is a place, with the benefit of the bankruptcy stay, where the business can be restructured or even pared down and sold so that it continues on as a business.

So, I hope you all find the practice of bankruptcy law as rewarding, interesting and challenging as I did, and still do. It is a changing, dynamic area of the law—and there is never a dull moment!