

The Cerebral Hercules and the Bankruptcy Hydra:
How Judge Schermer Slayed a Multi-Headed Monster
While Deep in the Heart of Texas
(and What Any of This Lone Star State-Grecian Hero
Analogy Has to Do with Just a Little Bit of Yiddish)

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This essay is co-authored by the Honorable Charles E. Rendlen III, U.S. Bankruptcy Judge in the Eastern District of Missouri, and Abigail B. Willie, the career law clerk to Judge Rendlen. Part I is written from the perspective of Judge Rendlen as a colleague of Judge Schermer and discusses Judge Schermer's contributions as a mediator in the Chapter 11 mega-case of *In re U.S. Fidelis, Inc.* ("*U.S. Fidelis*").¹ Part II is written from the perspective of Mrs. Willie, who has known Judge Schermer as her professional mentor and personal friend for more than a decade, and discusses how the *U.S. Fidelis* mediation is a reflection of Judge Schermer, the man.

PART I

It is not uncommon for parties to a dispute arising in a bankruptcy case to hire to a private mediator. Most commonly, they do so in an effort to avoid the costs that otherwise would be incurred by full litigation. They also may want to limit the risk exposure attendant in any litigation, or avoid publicity that may accompany a trial. Because of the costs involved with hiring a private mediator, there usually is at least a reasonable prospect of a successful mediation; otherwise, the expense would not be

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1. *In re U.S. Fidelis, Inc.* (U.S. Bankr. Ct. for the E.D. Mo. Case No. 11-41902) (J. Charles E. Rendlen, III, presiding).

undertaken. In a mediation conducted by a private mediator, there ordinarily are a few discrete issues to be mediated with a limited number of parties at the table, and the objectives of the parties are clear.

Occasionally, bankruptcy disputes can be considerably more complicated. In particular, multi-party, multi-issue disputes in complex Chapter 11 cases can form a Lernaean Hydra. In such circumstances, a judge-mediator may be the best choice to play the part of Hercules. For example, recently, the Honorable Gerald Rosen, Chief Judge of the U.S. District Court for the Eastern District of Michigan, served as the mediator in the City of Detroit's massive municipal bankruptcy case.² Judge Rosen brilliantly negotiated the deal that became colloquially referred to as Detroit's "Grand Bargain" — a deal that, among other things, saved the Detroit Institute of Arts' collection from the auction block through funds raised from the state, donors and foundations, while also salvaging Detroit's retiree pensions.³

Having a judge serve as mediator can offer several advantages. First, a judge does not charge for his services, allowing parties who cannot afford a private mediator to mediate. Second, even where the expense of a private mediator is not a prohibitive concern, a judge-mediator can provide shepherding that money cannot buy. Most notably, a judge can evaluate the facts and dynamics of the disputes through the eyes of an adjudicator. Even though a judge does not literally wear the black robe while acting as a mediator, he or she nevertheless can offer analysis and a perspective that is unique to a judge — and is able to do so with the gravitas afforded to a judge. The parties have the chance to hear for themselves the strengths and weaknesses of their positions, as evaluated by an experienced trier-of-fact. Third, a judge likely has experience not only as an adjudicator, but also from private or government legal practice. A judge-mediator can offer real-world expertise (or, sometimes, a much-needed "reality check"), which can guide the parties to resolutions and compromises that they otherwise might not have considered.

During my tenure on the bench, my esteemed colleague, the Honorable

2. *In re City of Detroit*, 524 B.R. 147, 168 (Bankr. E.D Mich. 2014).

3. Randy Kennedy, "Grand Bargain" Saves the Detroit Institute of Arts, N.Y. TIMES, (Nov. 7, 2014), https://www.nytimes.com/2014/11/08/arts/design/grand-bargain-saves-the-detroit-institute-of-arts.html?mcubz=3&_r=0.

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Barry S. Schermer, on occasion has mediated disputes in cases before me. The types of disputes he mediated varied widely. Some involved relatively small-dollar disputes in Chapter 7 cases of individual debtors — the kind of disputes where the outcome matters deeply to the parties, but where no one can afford the costs of ten minutes of WestLaw research, much less the price tag of lengthy litigation. Other disputes involved all-out, multi-million-dollar dogfights in Chapter 11 cases, helmed by impeccably attired attorneys armed with precise diction and unwieldy five-inch exhibit binders — the kind of disputes that also beg for mediation, but for precisely the opposite reason (because the parties have the money to conduct protracted, but not necessarily productive, litigation). With his usual humility, Judge Schermer afforded each matter he mediated the fullest investment of his efforts, regardless of the parties or pocketbooks involved.

U.S. Fidelis is an excellent example of Judge Schermer's nearly unmatched gifts as a mediator. The mediation was an outlier in terms of issue complexity, party animosity, and the absolute need for a global resolution. Managing the disputes and dynamics at play in *U.S. Fidelis* was akin to playing a chess game, simultaneously on four planes, with eight sets of sixteen pieces — while time-traveling, blindfolded (perhaps it is no surprise: Judge Schermer is an avid and accomplished chess player). Moreover, the disputes facing the *U.S. Fidelis* parties threatened to push the entire bankruptcy case into free-fall, which likely would have resulted in the assets of the estate being drained away in litigation, instead of being available to creditors (including to the hundreds of thousands of victims of the deceptive trade practices of U.S. Fidelis).

In early 2011, the spectacularly ignominious collapse of U.S. Fidelis, Inc. landed the company before the Bankruptcy Court — a destiny that was not entirely unpredictable, given the company's owners and business

model.⁴ U.S. Fidelis was formed in 2003 by two scam artist brothers with prior criminal histories, Darain and Cory Atkinson. U.S. Fidelis provided telephonic direct-marketing of vehicle service contracts (each, a “VSC”). A VSC was an aftermarket contract whereby a third-party administrator covered the repair costs of the vehicle owned by the VSC purchaser. The vast majority of purchases of VSC contracts were financed, although due to the way the financing was arranged through a third-party, no creditworthiness check of the VSC purchaser was done.⁵ The purchase of a VSC set into motion a highly involved system of advances and payments among and between the four parties involved with the VSC business model. When a VSC was cancelled, things became even more complicated, involving refunds, holdbacks, offsets, and guaranties.

By 2009, U.S. Fidelis faced investigations from numerous state attorneys general for deceptive trade practices. It was near financial collapse, amid high cancellation rates and the Atkinsons’ use of the company as their personal ATM.⁶ The breaking point came on December 7, 2009, when Mepco Finance Corporation, the principal financier, advised that it would no longer finance VSCs. Thereafter, U.S. Fidelis stopped marketing VSCs and made mass layoffs. On March 1, 2010, the company filed for Chapter 11 bankruptcy relief. The Official Committee of Unsecured Creditors (the “UCC”) was appointed and became the oarsman of the case.

The case was often contentious. Within the first month, an adversary proceeding was brought by former employees claiming WARN Act violations, the Missouri Attorney General filed a motion to appoint a trustee, and the UCC brought an adversary proceeding for an extension of the automatic stay, seeking to enjoin numerous parties. On occasion, attorney tempers grew short in the courtroom; tensions were palpable. But,

4. All facts about U.S. Fidelis and its bankruptcy case are drawn from the findings made by the bankruptcy court in its written orders, and from the authors’ recollections of the case of *In re U.S. Fidelis, Inc.*, 481 B.R. 503, 507-513 (Bankr. E.D. Mo. 2012).

5. U.S. Fidelis also had another, smaller business, selling bottles of “engine additive.” A bottle of the engine goo was so exorbitantly expensive that its purchase also was financed (it was hard not to hear the score to Meredith Willson’s *The Music Man* playing in one’s head during some of the hearings).

6. The Atkinsons ultimately pleaded guilty to charges in connection with their operation of U.S. Fidelis, and were incarcerated. Much of their property, including luxury real estate, ostentatious jewelry, and other accoutrements of nouveaux riche gaudiness were turned over to the estate.

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despite these dynamics, an injunction was entered that halted the race-to-the-courthouse being conducted outside the bankruptcy case by the Atkinsons' creditors, in an effort to seize the Atkinsons' personal assets. Had the Atkinsons' creditors been successful in their seizure efforts, the UCC's ability to recover the assets for the estate would have been jeopardized.

However, the entry of the injunction was hardly the end of the disputes. To the contrary, the attack moved from an air blitz to a bloody, slogging ground invasion. Adversary proceedings with numerous claims, cross-claims, and third-party claims were brought between and among the UCC, Mepco, and Warrantech Automotive, Inc., a VSC administrator. The UCC filed a complaint against Mepco, seeking a declaratory judgment regarding the validity and priority of Mepco's security interests and subordination of Mepco's claims. Warrantech filed a complaint for equitable subordination against Mepco. There was a tangle of complicated inter-creditor disputes. There were the WARN Act creditors, seeking to be paid off. These actions would have been expensive and lengthy to litigate, and litigation offered little certainty of the result to any party. And, layered onto these private-party disputes, there were more than two dozen state attorneys general seeking compensation for their respective states' victimized citizens. However, even this shared goal of the state attorneys general did not unite them entirely; sometimes the state attorneys general spoke with a unified voice and, at other times, they did not.

Unfortunately, the parties made little progress on reaching settlements. By mid-2011, the *U.S. Fidelis* case again stood perilously close to becoming an operation for paying attorneys and sorting out secured creditors' interests, instead of returning a distribution to the unsecured creditors and the consumer victims.

Finally, several state attorneys general filed a motion to compel mediation, asking the court to authorize a global mediation of the major pending disputes. However, such a mediation called for a massive undertaking with only dubious prospects for success, given the complexity issues raised and the growingly apparent interpersonal clashes that had arisen. After all, bi-lateral, single-issue mediations are often difficult enough. By comparison, in *U.S. Fidelis*, there were dozens of moving parts and pieces, between the voices and interests of the lenders, state attorneys general, the UCC, the WARN Act litigants, the consumers, and

others. However, there was one thing that almost everyone (including the court) could agree upon: if a global mediation were to take place, Judge Schermer was the parties' best hope for success.

Judge Schermer graciously accepted the challenge and agreed to mediate the *U.S. Fidelis* disputes over several days in the spring in Austin, Texas.

Many of the specifics regarding the mediation events cannot be disclosed in this essay. Setting aside the fact that the court was not made privy to many of the details, there are non-disclosure agreements in place. However, there can be no question that the success of the global mediation — and, by extension, the preservation of the bankruptcy case as a Chapter 11 proceeding — is attributable to the perseverance, acumen, creativity, and intellect of Judge Schermer.

As his fellow members of the bench and any attorney who has ever appeared before him know well, Judge Schermer prepares thoroughly for any matter before him. The *U.S. Fidelis* mediation was no exception, as he committed himself to knowing everything he could, broadly and deeply, about the facts and issues. As a result of his groundwork, when the mediation began, Judge Schermer was out ahead of even the attorneys, having familiarized himself not with just one or two perspectives, but the entire universe of positions and concerns. As recounted later by several of the awed attorneys, Judge Schermer's mastery of the mediation chessboard was "stunning" and "genius."

But, as important as Judge Schermer's command of the facts and issues was, it was his commitment to understanding the *people* involved in the disputes — their motivations, concerns, and emotions — that made the mediation successful. Judge Schermer made it his first task on the first day of the mediation to understand these dynamics. He sat down with the constituents, to drill down beyond the politely drafted legal arguments and identify what was truly needed. One attorney described Judge Schermer as being exceptionally able to "draw out information" from the parties — information that perhaps had not been considered or revealed before, but which was relevant in getting to the issue of what was really needed for a settlement. With his particularly calm demeanor and patience, it was clear

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to all involved that he was listening intently, processing quickly, and carefully taking in all of the details.

Another attorney involved with the mediation described it this way: Judge Schermer focused on the critical difference between *want* and *need*. While distinguishing between want and need in a mediation may sound like a simple thing to do, it is anything but. When parties frame their demands in litigation, they necessarily present their positions in terms of wants. The problem with this is entrenchment. Over the course of litigation, parties can become invested in what they want. A creeping sense of entitlement to their wants can develop. The bigger picture perspective can be lost, and heels can become dug in. By the time mediation occurs, parties can be reticent to reflect on wants and needs; they may even be incapable of recognizing the difference, or they may refuse to accept the true needs of another party as a starting point for negotiation. But, when one enters into mediation, he or she must be willing to switch gears, because no one is going to walk away from mediation with everything he or she may want. If there is a compromise to be made, it lies at the intersection of needs, not wants. Judge Schermer sought to form a settlement in the crucible of the parties' needs.

The way some of the attorneys tell it, they left the first day of the mediation somewhat demoralized — not by Judge Schermer's mediation efforts, but at the seeming bleakness of the reality. The company had been ravaged by the Atkinsons; there was no going-forward business; there was little of easily liquidated value. There were many collateral concerns to be addressed. Releases were needed. Funding was required. There were thousands of consumer-creditors who had been victimized by U.S. Fidelis, and the public interest was crying out for justice on their behalf, too. There was simply too small a pot and too many needs that had to be met. The parties parted ways to their respective camps to mull over the day — with a few camps, no doubt, being set up on barstools on Austin's Sixth Street for inspiration (or consolation). Each set to work, assessing the day's developments and considering how to move forward.

Meanwhile, Judge Schermer also continued working. He returned to his hotel room for the evening, knowing that he had about twelve make-it-or-break-it overnight hours. If the parties left Austin without a framework for a possible resolution, the bankruptcy case could spiral into a Chapter 7 liquidation, with creditors left to vulture the carcass of the estate. So,

alone, at one of those little tables that passes for a writing desk in a hotel room, surrounded by a sea of papers, Judge Schermer took out a ballpoint pen and a pad of legal paper. He began jotting in long-hand. No computer. No drama. No fussiness. Just a night of solitude and script, evaluating the chessboard, with a singular focus: how to make it all fit. And over the course of the evening, piece-by-piece, he assembled the jigsaw puzzle (another task that also can be accomplished only by hand, I would note). By the morning, the outline for what would eventually become the plan of liquidation had been drafted.

The next day, Judge Schermer again met with the parties, to discuss the product of his late-night endeavor. Significant compromises of claims would be required. Cash contributions to a consumer reinstatement fund were called for. Third-party releases would have to be consented to. In addition, the proposal called for pulling a multi-million dollar rabbit out of a hat (or perhaps — for a more apt analogy — out of a sunhat). The UCC had been sitting on Darrain Atkinson's \$4.5 million Cayman Island beachside mansion, which the UCC had not been able to sell and which had become an administrative albatross for the UCC's counsel. Judge Schermer's proposal was to take the mansion off the UCC's hands by allowing Mepco to take it, which Mepco could book as an asset. Millions of dollars in value could be injected into the plan.

Ultimately, the parties took Judge Schermer's hand-drawn proposal and used it to create the plan that was confirmed in July 2012. Over the course of the next few months after the mediation, additional meetings were held and the details were pounded out — the original outline offered by Judge Schermer was the foundation for moving forward. At the confirmation hearing, lead counsel for the UCC made it clear that the consensual plan was possible because of Judge Schermer. As one of the attorneys later commented, "by preparing so thoroughly, listening so intently, and just being smarter than anyone else," Judge Schermer was able to see a vision for how the case could be salvaged. As another attorney observed, "It truly takes talent to harmonize the interest of 650,000 harmed consumers with those of the other parties in interest and Judge Schermer was able to masterfully do just that . . . Judge Schermer brought to the table that rare combination of gravitas, creativity and humor that resulted in a highly successful mediation." And as a result, assets were preserved from attorney drain and estate administration, and the secured

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creditors likely fared far better than they would have in a fire sale Chapter 7 bankruptcy. And, the most vulnerable of the creditor constituencies, the consumer-victims of the Atkinsons' fraudulent business, had access to a tiered system of consumer restitution, made possible through the consumer restitution fund, created and funded by the confirmed plan.

PART II

Part I of this essay observes that the *U.S. Fidelis* mediation was a success because of Judge Schermer's commitment to identifying what really mattered to the parties. However, the *U.S. Fidelis* mediation is more than an example of the incomparable skills Judge Schermer, the mediator. It is a reflection of Judge Schermer, the man — a man who knows what really matters.

Unquestionably, Judge Schermer knows what matters for being a good and decent jurist: fidelity to the law; erudition; intellectual integrity; rigorous exegesis; moral clarity; and sincere humility. This is evident in his opinions and adjudications. But as important as these qualities are, Judge Schermer knows that what *really* matters, above all else, does not lie in the robe, or in the mastery of abstruse legal esoterics, or even in the law itself. He knows that what really matters is *mishpocha*⁷ — in the broadest and richest sense — and he lives a life consonant with that knowledge.

Mishpocha is Yiddish for “family.”⁸ As with much of Yiddish, the word is not a sterile, technical term. It is emotive and expressive; it captures a feeling of great warmth and personal affection. To be *mishpocha* is to belong, and to belong gives purpose to what you do and who you are. You have both connections and obligations beyond yourself, to others, as they have to you, and those connections and obligations are definitional to who you are. *Mishpocha* is a glorious refutation of solipsism.

7. Also transliterated *mispocha*, *mishpokhe*, *mishpocheh*, and *mushpuche*, and referring to the concept of “family.” LEO ROSTEN, *THE JOYS OF YIDDISH: COMPLETELY UPDATED* 252-53 (Lawrence Bush ed., Random House 2001) (1968).

8. *Id.*

Judge Schermer's *mishpocha* begins with his immediate family. When his parents were with him, Judge Schermer was deeply committed to their care, with obvious filial respect and love. Today, the center of his *mishpocha* is his children and grandchildren. There is no broader smile that can be gotten from Judge Schermer than the one that appears when he talks about his grandchildren (*naches*,⁹ if you've ever seen it). He also has two sisters, to whom he has been unwaveringly devoted through all the blessings, and turns, of life. His affection for them, and his brotherly sacrifices for them, is a model of how we should all treasure our siblings. *Mishpocha* also can include close friends, of which Judge Schermer counts so many. The Schermer *mishpocha* includes attorneys, law clerks, mentees, interns, teaching colleagues, chambers staff, other judges, Shabbat companions, lifelong friends, and innumerable others.

For those not born into Judge Schermer's extended *mishpocha*, there is no formal invitation. Adoption is quiet and subtle, but unmistakable. It's a thoughtful gesture or a little *mitzvah*.¹⁰ Judge Schermer may telephone, expressing concern, just when you need it the most. Or he gives you his well-considered perspective or encouragement that makes all the difference. Or he treats your children like his own, sneaking them a little trinket from his desk drawer or treating them to a birthday chess game in his chambers. Or he invites you to a "business lunch" at a certain St. Louis greasy-spoon diner (required attire being pointedly informal), to discuss absolutely nothing about work, but to chat about current events or to catch up on the happenings with your family. Or, when you return to St. Louis after being away for far too long, his greeting to you is not "welcome back," but "welcome home." And one day, you realize that your own *mishpocha* is also little broader: you will have a perplexing problem, or a personal victory, or just a funny inside-baseball anecdote, and the first person you will think of calling is Judge Schermer, for his guidance, or congratulations, or laugh.

While *U.S. Fidelis* tells the story of Judge Schermer as a masterful mediator, it also offers a far more profound insight into Judge Schermer's

9. Also transliterated *nahkes*, and referring to "[p]roud pleasure, special joy — particularly from the achievements of a child." *Id.* at 262.

10. Also transliterated *mitzvah* and *mitsve*, and referring to "a good work, a truly virtuous, kind, considerate, ethical deed." *Id.* at 254-55.

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humanity. Judge Schemer did not deploy some “mediator skill set” in *U.S. Fidelis*; he did not change anything about himself to serve as mediator. He didn’t have to. He lives a life that is centered on what really matters. It should come as no surprise that he intuitively understands that solutions to problems — and ultimately, to peace — lay in identifying and preserving that which really matters.