

## A Tribute to Those Who Helped Me Get Here

### Judge Barry S. Schermer\*

I am overwhelmed and humbled by this program.<sup>1</sup> I want to specifically thank Professor Keating, Lloyd Palans, David Warfield, Emily Cohen and the American College of Bankruptcy for their efforts in initiating, developing and managing this day's events.

Early in my career as a bankruptcy judge, I had a particularly difficult Chapter 11 case in Cape Girardeau in which debtor's counsel did an outstanding job. I wanted to let him know in the presence of his client that his effort and results were uncommon. I did this and debtor's counsel, Tom O'Loughlin, responded, "Judge, when you see a turtle on a fence post, you know he had some help getting there." Well, to the extent I have achieved the lofty status of such a turtle, I would like to share with you the stories of some people who have helped me get here.

Unknown to me at the time, Judge John F. Nangle in 1976 set in motion circumstances for what was to become my career path. He was a smart, concise, get-to-the-point kind of guy. Judge Nangle was assigned a lawsuit brought by the Department of Housing and Urban Development (HUD) under section 220 of the National Housing Act in which HUD had guaranteed loans of more than \$36 million made to the owners of Mansion House Properties.<sup>2</sup> The Mansion House properties included three twenty-eight-story residential towers, underground parking, and street-level retail shops. Following construction, the Mansion House owners defaulted on their loans and HUD, as insurer, became the holder of the notes and deeds of trust. At that time, HUD agreed not to exercise its right to foreclose in exchange for the owners' promise to make capital contributions and other payments. In 1976, after learning that substantial project funds had been

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1. Conference Celebrating the Honorable Barry S. Schermer (JD '72) for His 30 Years on the Bench as a United States Bankruptcy Judge.

2. See *United States v. Mansion House Center North Redevelopment Co.*, 419 F.Supp. 85 (E.D. Mo. 1976).

diverted for improper purposes and that the mortgagors were engaging in other acts of mismanagement, the United States, on behalf of HUD, filed suit to recover the improperly expended funds and asked for the appointment of a receiver to manage, preserve and protect the properties. Judge Nangle appointed Gerald (Jerry) Rimmel as receiver of the properties. Jerry Rimmel was an excellent attorney who, in turn, chose me to work with him.

To my good fortune, this receivership litigation lasted over a decade. It introduced me to the intersection of running a business while managing litigation. Beyond that, buried in all of the issues was something totally unexpected: the world of bankruptcy. Mr. Maurice B. Frank, retired general partner of the ownership limited partnership attempted to regain control of the contested properties after the receiver was appointed by filing bankruptcy petitions, first in Chicago and then Orlando. Imagine my trepidation when I first appeared before legendary bankruptcy judge Alexander Paskay. Judge Paskay was the author of the then-bible for trustees, *The Handbook for Trustees and Receivers in Bankruptcy*.<sup>3</sup> He gave new meaning to the phrase, “Be prepared.” Before I could say, “If it pleases the court,” he had fired his first salvo of questions. His intimidating style aside, I survived and both bankruptcies were dismissed.

Meanwhile, back in St. Louis, Mr. Frank filed yet another reorganization petition for a company that had nothing to do with Mansion House Properties: Mr. Frank filed a Chapter 11 petition in St. Louis for his solely-owned water and sewer utility company, Ocean Sea Breeze. The company’s business was located in Palm Beach, Florida. The case was assigned to Judge John Shanahan. Judge Shanahan told Mr. Rimmel that, as Mr. Rimmel was making a lot of money as receiver of Mansion House, Judge Shanahan wanted him to take this “loser.” Guess who was appointed trustee of the Palm Beach, Florida water and sewer company: I was. It took several visits to secure the business records, inspect the system and retain a meter reading and billing service. Eventually, I sold the utility to Palm Beach County for \$640,000, a big number in the late 1970s. Despite Judge Shanahan’s initial perception of the case, it turned

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3. ALEXANDER PASKAY, *THE HANDBOOK FOR TRUSTEES AND RECEIVERS IN BANKRUPTCY* (Bender, 1973).

out to be a big winner. I was hooked on bankruptcy and thought it was the most exciting field of law. I enjoyed the intersection of law and the economics of business. I have Judges Nangle, Paskay and Shanahan to thank for introducing me to a field I knew nothing about, but, once introduced, immediately embraced. Through the good fortune of timing, things got even better.

Given my initial success, I was under the impression that, if I was a bankruptcy trustee, every case would provide me with the same level of interest, success and satisfaction. I applied to the Administrative Office of the United States Courts to become a panel trustee, and I was accepted. With my vast experience, how could they say no?

My role as Chapter 7 trustee allowed me to meet practitioners, draft pleadings and present matters to the court. Most importantly, it enabled me to learn the Bankruptcy Code. The Bankruptcy Reform Act was enacted November 6, 1978 and became effective October 1, 1979.<sup>4</sup> The playing field was suddenly level. It didn't matter how much experience you had with the Bankruptcy Act of 1898, as amended by the Chandler Act,<sup>5</sup> because the Code was new and it was comprehensive. We all had to learn it. And my trustee work helped me do that quickly.

I vividly remember the day I filed my first debtor's petition. The clerk's office was located on the fifth floor of the old courthouse at 1114 Market Street in downtown St. Louis. The clerk of court was Katherine Kemp, a woman of short stature who constantly patrolled the front counter, waiting to pounce on unsuspecting attorneys. I proudly submitted my client's petition, schedules and statement of affairs to Ms. Kemp. There was an old Cincinnati time clock on the counter which the clerk would use to stamp the time of filing of every petition. I envisioned her placing my petition in the clock to mark the time it was submitted. Instead, Ms. Kemp scanned every page. When finished, she flung the papers back to me saying, "Missed a zip code, sonny boy." Sometimes tough love comes as a good lesson: my mistake was not repeated.

While all bankruptcy attorneys needed to learn the new Code after

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4. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

5. Bankruptcy Act of 1898 (Nelson Act), ch. 541, 30 Stat. 544, *amended by* Act of June 22, 1938 (Chandler Act), ch. 575, 52 Stat. 840.

1979, I noticed some of the older attorneys had made a decision not to invest the time and resources to do so. This phenomenon meant those of us in St. Louis and Cape Girardeau who chose to focus on this area of the law were about the same age: Gregg Willard, Steven Cousins, David Lander, Carl Spector, Steve Goldstein, Norm Pressman, Tom O'Loughlin, Pete Burns, Paul Berens, and Lloyd Palans.

By coincidence, Lloyd and I enjoyed running. Every Saturday morning we would run the Forest Park<sup>6</sup> Loop, a ten-kilometer path around the park. Since I lived on the way, Lloyd would pick me up at 6:30 a.m. Lloyd is a modest person and his car, a Volkswagen "Bug," reflected that attribute. In his car, one had to be a careful because the floor boards in front of the passenger seat had rusted out, meaning one ran the risk of dragging one's foot on the pavement as Lloyd encouraged the Bug to charge forward to its top speed of thirty miles per hour. Regardless, our time together was well spent. While running, we would use each other as sounding boards on theories we considered using in our cases. Sometimes, these discussions would grow contentious.

Lloyd represented the largest liquor retailer in St. Louis, 905 Liquors,<sup>7</sup> in its Chapter 11 reorganization. Remember the Cincinnati time clock I previously mentioned? As only Lloyd would think of doing, he submitted his petition to the clerk of the court for filing at exactly 9:05 a.m. While he represented the debtor, I represented the creditor's committee. As we ran around the park one Saturday morning I would say, "Well, if you do that, here is what I am going to do." This played out in court one day when we argued my reclamation motion<sup>8</sup> before Judge Robert E. Brauer. The previous Saturday, as we ran around the park, Lloyd asked me what evidence I was going to put on regarding the identity of the two-liter bottles of Coca-Cola subject to my reclamation motion. I had done a ton of research on the issue and I said I didn't need such evidence because all two-liter bottles of Coca-Cola are fungible. Judge Brauer thought

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6. Forest Park is a public park located in St. Louis, Missouri and covers approximately 1,370 acres.

7. *In re 905 International Stores, Inc.*, Case No. 84-41824 (Bankr. E.D. Mo. Filed October 12, 1984).

8. Generally, a seller of goods may reclaim those goods delivered to a seller within 20 days of the buyer's bankruptcy.

otherwise.

Lloyd and I also shared another attribute. Good fortune allowed us to have a number of cases out of town. Our exposure to other attorneys and judges was enormously helpful. Yes, even the Monroe, Louisiana judge who said to me at the start of a trial, “Mr. Schermer, call your best witness.” The old adage that you learn from your mistakes certainly applied to us. We made our share of mistakes, but learned far more than we erred. Our learning curve of the new Bankruptcy Code was accelerated because of our out of town cases: our mistakes were made out of the view of our St. Louis contemporaries.

I was lucky enough to represent a client in a reorganization case in Little Rock, Arkansas. I say “lucky” because the debtor was represented by Ike Scott. This case also marked the start of a wonderful friendship with Ike, one of the finest bankruptcy attorneys I have known. To this day, I have not encountered anyone more professional and collegial both in and out of the courtroom. His presentation on behalf of the debtor in a contested Chapter 11 confirmation hearing still stands as a model for all such hearings. I owe Ike an enormous debt of gratitude for all the things I learned from him.

I digress here to relate another experience learned in Little Rock — a life lesson not involving a legal issue or case. I had a piece of litigation in the same reorganization case. Opposing counsel was a very nice attorney from Chicago, Joe Matz. Judge Charlie Baker adjourned our trial late in the afternoon on a Friday. Joe asked me if I was going to return to St. Louis and come back Sunday evening. I said I would and asked him what his plans were. Joe said he was going to stay in Little Rock during the weekend. We both left the courthouse, sharing a ride back to the Excelsior Hotel (now the Peabody Hotel). I checked out of the hotel and used its van service for a ride to the airport. The van driver looked to me to be a young, college-age student. He asked me if my friend knew anyone in Little Rock. I replied, “No, he did not.” Then the driver asked me if he would like to meet someone. Not giving it any thought, I said, “That would be nice.” I returned to Little Rock two days later on Sunday evening and met Joe in the lobby. He said, “Barry, you will never guess what happened Saturday night.”

I should mention one other case that taught me an important lesson. I

was fortunate to represent our morning newspaper, *The St. Louis Globe Democrat*,<sup>9</sup> in its Chapter 11 case. At the time, Mr. Jeffrey Gluck and his wife Debra owned the paper. Cash was scarce as advertising revenue decreased with a decline in circulation. Jeffrey and I would often meet in his office and on one particular day, I suggested to him that if we could reduce the combined salary paid to him and his wife to \$350,000, we could then pay the employee health insurance premiums. He said, “Let me think about that.” The next day when I sat down with him to go over some issues, I asked if he had time to consider my proposal. He said that he had, and added that I was fired! Sometimes your clients need to distinguish personal goals from those of the corporation you represent.

With so many lessons learned, I thought the next logical step was to apply for judgeship, particularly the role of Judge Brauer upon his retirement in 1986. Through luck, magic, or circumstance, I was selected by the Court of Appeals for the Eighth Circuit. At the time, I was blissfully ignorant of judges sitting on the Court of Appeals. But shortly after my appointment I became acquainted with the most impressive judge I have ever known, Judge Richard S. Arnold. He was impressive not because he was ranked number one in his graduating class of 1957 at Yale University or because he ranked number one in his class of 1960 at Harvard Law School. He was impressive because, when he spoke, people listened. He spoke plainly and with humility, but what he said was almost always significant. His biographer, Polly Price, wrote that Judge Arnold will be remembered like the great jurist Learned Hand, as perhaps the best judge never to serve on the Supreme Court.<sup>10</sup>

Judge Arnold was a giant in the judiciary, and was a good and true friend of the bankruptcy judges. Judge Arnold told me quite clearly one day in his Little Rock office that he did not believe that parties in bankruptcy should have two appeals as a matter of right. Despite this view, he was the force behind the Eighth Circuit’s decision in 1996 to form a Bankruptcy Appellate Panel as an alternative to appeals being heard by the district court. He took the time to learn the name and

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9. *In re St. Louis Globe-Democrat, Inc.*, No. 85-41605 (Bankr. E.D. Mo. August 19, 1985).

10. POLLY J. PRICE, RICHARD S. ARNOLD: A LEGACY OF JUSTICE ON THE FEDERAL BENCH (2009).

something about each bankruptcy judge in the circuit. He took telephone calls without screening and he always returned your call the same day.

A few years after my appointment, I met the academic equivalent of Judge Arnold, Dan Keating of the Washington University School of Law. The only academic difference between Judge Arnold and Dan is that Dan graduated at the top of his class from the University of Chicago Law School, earning Order of the Coif honors. When Lloyd and I expressed an interest in teaching, Dan supported the idea and volunteered to teach a Chapter 11 seminar with us. We are now in our twenty-eighth year of the class. All three of us attend each class, grade two sets of writing assignments, and give the students a perspective from the academic, practitioner, and judicial vantage point. Each year at the law school students vote with their enrollment and evaluations and Dan is a favorite of this school's students. One can't help but notice the way Dan addresses students' questions and his positive and encouraging comments on their writing assignments. I have not met anyone of his stature with as little ego as Dan exhibits. I often arrive at his office before our class and suggest an approach we can take on the subjects for that class. More often than not, he accepts the proposal. Equally important, Dan is a favorite of the University's chancellor, who has named Dan acting dean of the law school on three occasions.

When our Chapter 11 seminar started in 1989, we decided to add another star from academia, Professor Lawrence P. King of New York University. For anyone unfamiliar with Professor King, know two things: he was one of the handful of drafters of the 1978 Bankruptcy Reform Act and he was the Editor-In-Chief of *Collier on Bankruptcy*.<sup>11</sup> But, he was so much more: think of him as the Joe DiMaggio of bankruptcy. Larry would lead off the semester with a talk on jurisdiction. He never used a note card and when he finished explaining jurisdiction you were left with one impression: "That sounds easy and straight forward." On the contrary, bankruptcy jurisdiction has confounded both the courts and practitioners for decades. All three of us looked forward to Larry's annual visits in January. Larry and Dan are each world-class teachers.

My acknowledgment of learning from and being helped by great

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11. See COLLIER ON BANKRUPTCY (Lawrence P. King ed., 15th ed. 1996).

teachers would be incomplete if I didn't tell you of David Becker, my property law professor, friend, and mentor. I always refer to David as the gold standard of professors at Washington University School of Law. If you took one of his classes, you would instantly recognize the grandmaster of the Socratic method of teaching. If you recall the movie, *The Paper Chase*<sup>12</sup> with Professor Charles W. Kingsfield, David made Professor Kingsfield look like an unprepared slacker. Whenever I had a question about teaching my fall class on consumer bankruptcy, I went to David. He always provided thoughtful and insightful assistance. No one was more concerned about his students and no one wanted to learn more about them than David. Further, no one remains in contact with so many students as David. He remains a treasure of the school.

Inevitably, classes are only as good as the students who attend them. The Washington University School of Law has an abundance of excellent students, and I have had the good fortune of selecting my law clerks from my students. It's like having my own Triple-A farm system. Without exception, my law clerks have all been dedicated, loyal, hard-working and humble. You don't need to be the smartest person in the room, only the hardest working person in the room. And just as important, they are interesting people who are enjoyable to spend time with. The same can be said of my interns who work for law school credit, almost all of whom have been law students at Washington University.

Both my law clerks and interns quickly adapt to my naming of cases (since I have a dreadful time remembering actual names) and understand that not every case is a "Peabody Energy Chapter 11 reorganization," or a "Mister-I-am-in-prison-and-I-file-dozens-of-confusing-pleadings" case. To be honest, I could not even remember my law clerks' or interns' names until a substantial period of time had passed. Initially, they were known as "new boy" or in the case of Jessica Silverman, "Munchkin 1." Jessica joined our office at the same time as Karen Russell, another woman of similar stature, who was "Munchkin 2." Emily Cohen, my career clerk, periodically reminds me that almost everyone has a name. Furthermore, I quickly learned that without the substantial contribution of our law clerks

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12. See *THE PAPER CHASE* (Twentieth Century Fox 1973) (John Houseman plays Professor Charles Kingsfield as a brilliant but demanding contracts instructor).

and interns, whether I knew their names or not, our office could not timely handle the workload of assigned cases.

A key aspect of law clerk and intern involvement, one which is not public, is my goal to determine issues as promptly as I can, consistent with due consideration. Often it takes me several days to think through a complex issue or to fashion a line of reasoning. But given that, my goal is to render decisions as quickly as possible for two reasons. First, the parties, whether individuals or corporate entities have, in my opinion, a right to know on a timely basis: for example when a party might ask himself, “May I claim this as exempt or will I be successful in obtaining a discharge, will I prevail in this litigation or claim objection or will my plan be approved?” Second, there is a steady stream of issues and slowing the process only backs up the relentless inflow of cases. I believe a timely resolution is part of a judge’s job. The parties can then adjust to my decision or file an appeal. I have always appreciated my law clerks sharing my goal of timeliness, even when it affects their evening or weekend plans. Our court is a busy one. One last comment about the vital contribution of our law clerks needs to be mentioned. They all play well with others. By that I mean that they all respect and fully cooperate with court staff, and counsel with whom they communicate.

An acknowledgment of our office staff would not be complete without special mention of Barb Sutton and Wynne Abernathy, two team members who have worked with me for decades. I often say that I am lucky to have the world’s greatest secretary and courtroom deputy. They always welcomed our new law clerks and interns and they work until the project is complete, no matter the time of day. Their contribution is vital.

There are two aspects of what our office calls, “more work, same pay.” This concept includes work in courts outside of the Eastern District of Missouri and work on the Eighth Circuit Bankruptcy Appellate Panel. I was privileged to work for two years in monthly assignments to Denver, Albany, and Fort Myers. Our work in Miami lasted about eight years. I quickly learned that each city had its legal culture, which was quite different than that in St. Louis. Miami had a litigation culture. I remember the trial of a car dealer who was accused of wrongdoing — the type that would be associated with prison time. He testified for hours before his wife was called as a witness. The question first asked of her was, “Did you

hear the questions I asked your husband and his responses?” She testified, “No, I was too busy praying.” At this point in her testimony, Curt Burwell, an outstanding law clerk, passed me a note. You might wonder what notes are passed between law clerk and judge during a trial. Curt’s note was, “Over or under line until she starts crying.” I wrote, “Five minutes and take the under.”

Beyond these anecdotes, however, my biggest surprise was the other two judges in Miami, Judge Bob Mark and Judge A. Jay Cristol. Bob is everything you would want from a judge: smart, thoughtful, patient, and on top of his work. Jay possesses these same qualities, and has a wonderfully rich history. He is a naval aviator with eighty-six carrier landings to his credit, including sixteen night missions. He retired from the United States Navy with the rank of captain. Until recently, he flew sick children across Florida to receive medical treatment in Miami at his own expense. He didn’t settle for a mere Juris Doctor degree, he earned a Ph.D. from the University of Miami in his late 60s. He transformed his dissertation on the U.S.S. Liberty into the authoritative book on the subject.<sup>13</sup> His generosity to students, attorneys and his beloved “U”<sup>14</sup> have earned him a special place in their hearts. I am fortunate to call him my friend. There are many great lawyers in the Southern District of Florida and two great judges that I learned so much from.

Great judges are not limited to southern Florida. My colleagues on the Eighth Circuit Bankruptcy Appellate Panel (BAP) are exceptionally talented. There are six members of the Eighth Circuit BAP. If you are in Omaha, don’t be surprised if you see Chief Judge Tom Saladino riding his motorcycle. They are exceptional because they are astute, prepared, and collegial. Our most recent leaders, Bob Kressel, Art Federman and now Tom Saladino have consistently led by example. Cindy Harrison, our clerk of court, is the easiest person to work with.

The tricky part in working with the BAP judges takes place in our conference following oral arguments, when we vote on the decision we are called upon to make and, importantly, assign the writing component of our

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13. A. JAY CRISTOL, *THE LIBERTY INCIDENT: THE 1967 ISRAELI ATTACK ON THE U.S. NAVY SPY SHIP* (2003).

14. The University of Miami, a private university located in Coral Gables, Florida.

decision. Usually there are three cases: two cases in which the facts are generally undisputed and the case presents an issue of law, but also that one remaining case no one wants to write an opinion for because the facts are disputed and the transcript looks like a New York City phone book. The thorny part is to appear collegial but not get stuck with that third case. Sometimes you just have to bite the bullet because you know it's your turn to take one for the team. That's when I really appreciate my career clerk Emily's dedication and loyalty. It is a pleasure to work with them, even when our clerk, Cindy Harrison, sends us to Fargo in February.<sup>15</sup>

I hope I have given you a flavor for all of the many, many people who have helped me on my way up the fence post that Tom O'Loughlin so aptly described to me years ago. Thank you.

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15. As I am sure the reader is aware, the Eighth Circuit is comprised of Arkansas, Missouri, Iowa, Minnesota, the two Dakotas and Nebraska. We hold court in such chic places as Omaha, Little Rock, Des Moines, and Sioux Falls. Compare that with the Ninth Circuit BAP, which can hear cases in San Francisco, Phoenix, Seattle, and Honolulu. Where is the justice?