

ACCEPTANCE REMARKS OF CONRAD B. DUBERSTEIN

I am deeply grateful for the honor you have given me tonight. It is with the sincerest humility that I recognize your having selected me to join with the others you have honored in the past years: my dear friends Judge Bill Norton, Jr., Ken Klee, Frank Kennedy, Harvey Miller, and Dave Coar. All of them have had a profound influence in the practice of bankruptcy. Their receipt of the award has demonstrated their fine character and active engagement in not only the bankruptcy field, but wherever their paths have taken them.

At the very outset I am delighted to see many of my bankruptcy colleagues who sit in Georgia and who are outstanding players in the world of bankruptcy.

When Keith Shapiro informed me that I had been selected to receive the *Emory Bankruptcy Developments Journal's* Lifetime Achievement Award, in response to my question as to the nature of my remarks, he told me to be my usual Connie Duberstein self and speak on whatever I wanted to. To fulfill my promise to Keith, I'd like to tell you about my life in the world of bankruptcy.

It didn't start when I became a bankruptcy judge twenty-four years ago in 1981 when I was sixty-six. It didn't even start when I became a lawyer specializing in bankruptcy sixty-three years ago in 1942 when I was twenty-seven.

No, it started seventy-four years ago when I was fifteen in 1931. That was the year of the Great Depression. As a result, my father lost his business. I had to quit school and go to work. After a few months doing all kinds of menial jobs, I was fortunate to be hired as an office boy by my uncle who was an outstanding, nationally recognized bankruptcy lawyer with an office in Brooklyn. He was also the first bankruptcy professor at St. John's Law School. I worked every day except Sunday and went to night high school after work.

In those days there was no such thing as a computer for lawyers to enter their daily activities in support of their applications for fees. Each lawyer would dictate to his secretary a report on what he had done that day and the time spent in each case he was handling. She would then type it and paste it into a ledger, which contained similar reports by the other attorneys. My job was to write the contents of each report in a general ledger containing separate

pages for each case. Eventually, when the time came to prepare an application for a fee, each lawyer's secretary would type what I had entered. Sounds a bit confusing, but it worked—and so did I.

In performing that part of my job, I was introduced to what each lawyer had been doing. Since it pertained solely to bankruptcy, before long I had a very good idea of what bankruptcy was all about.

That area of my bankruptcy experience was a small part of my overall activity. For the most part I had to go to the offices of many bankruptcy firms in the metropolitan New York area and serve them with legal papers related to our own bankruptcy cases. I also made many trips to the offices of the clerk of the second circuit and the District Clerks' Offices in the Southern and Eastern Districts of New York.

It was during those early days as an office boy that I experienced the importance of learning as much as I could about bankruptcy. One day my uncle sent me to a client to have him sign some papers. The Client was Billy Rose, a wealthy entrepreneur who owned restaurants, produced Broadway shows, and even wrote popular songs. Rose told me that he made his money as a result of specializing and being a top short-hand reporter. That specialty landed him a job as secretary to the great financier, Bernard Baruch. Baruch gave him tips on the stock market, which made Rose a very rich man. When I told him I planned to go to college and then law school, he advised me to specialize in bankruptcy when I became a lawyer because of all the experience I was getting working for my uncle. The rest is history, except that I don't own any restaurants, produce Broadway shows, or even write popular songs. So my advice to you is also to specialize in whatever area of the law you pursue and who knows, maybe some day you'll wind up as rich as Billy Rose.

At that time there were no bankruptcy court clerks. All bankruptcy petitions, voluntary or involuntary, were filed with the clerk of the district court. He would then bring them to the district judge sitting in the court's miscellaneous part. He would then refer all matters arising under the petitions to a referee, retaining all other bankruptcy papers for further disposition where required by an Article III Judge. The concept of the referee, then known as the referee in bankruptcy, remained in effect until about 1970, when they were then called bankruptcy judges. One of the outstanding referees in bankruptcy who eventually became a bankruptcy judge is Georgia's own Judge Homer Drake.

My work called for me to file papers and make searches of the bankruptcy files, which were in the referees' offices. Until they were given chambers and courtrooms, most of them conducted hearings in their offices and in small courtrooms located there. My job was to accompany our lawyers to the hearings, carrying their files and whatever else they needed. If time allowed I would remain to hear the arguments presented to the referees for their consideration. That was another great experience for me, which continued for years while I attended college at night and finally law school at night. As a matter of fact I took my Uncle's bankruptcy course at St. John's law school by which time I knew enough about bankruptcy law and procedure to write the final examination. Naturally I knew all the answers and got an "A" for the course.

Shortly after I was admitted to the Bar in 1942, I spent two years as a combat infantryman in Italy in World War II. Even though I received a Purple Heart and Bronze Star medal, those medals didn't help when I returned home. I had sought to go back to my former law firm, but because hardly anyone was going bankrupt, there was no room for me there. Eventually after doing general law work I was called back to my old firm in 1952. The bankruptcy practice had begun to boom and I was very active in representing individuals in what are now known as chapter 7 cases, as well as corporate debtors involved in what were then known as chapter X corporate reorganizations and chapter XI's. A few years later, I became a partner during which time I was successful in having the firm represent the Hi-Fi appliance and record businesses in bankruptcy cases and out-of-court settlements. That led to attending meetings of creditors all over most of the country for which I was selected as counsel on behalf of my firm.

Because much of the bankruptcy practice was in the Southern District of New York and not in the Eastern District where my office was located, in 1970 I moved to the Manhattan law firm of Otterbourg, Steindler, Houston & Rosen as head of its bankruptcy department. After a very busy life there handling hundreds of bankruptcy cases and out-of-court settlements, including chapter XI's and chapter X corporate reorganization cases, I decided to retire in December of 1980. A few months later, before I could enjoy retirement, one of the bankruptcy judges in the Eastern District died. I was summoned by the chief district judge who, after twisting my arm, appointed me as a bankruptcy judge in February of 1981 at the age of sixty-five.

When the Bankruptcy Code was declared unconstitutional in the *Northern Pipeline* case, I was somewhat happy to leave and enjoy retirement. As it happened, my chief judge called upon me to work out emergency rules until the Code was finally amended, as well as to organize a seminar dealing with its changes. Shortly thereafter, I was invited to address a conference of international insolvency lawyers in Paris to bring them up-to-date on the Code's provisions. That gave rise to providing them with a short bankruptcy primer that I have made available to many of the law firms in New York at their request for distribution to new associates. Now that we will be having a new Bankruptcy Act, that primer will no longer be useful. I'll talk about the new Act shortly.

In 1984, I was appointed chief bankruptcy judge, a position I have held since. Thus, in addition to sitting on more than a thousand chapter 7, 11, and 13 cases, and writing scores of opinions dealing with them, I have been continuously involved on a daily basis carrying out my duties and responsibilities as chief bankruptcy judge.

In 1995, when I completed my fourteen year term at the age of eighty, I sent the chief judge of our Second Circuit a request for retirement. A few days later, the circuit council designated me as a recalled judge for a year. The district court followed by continuing me on as chief bankruptcy judge. Similar requests from our chief circuit judges have followed every year. Most recently, I was continued as a recalled judge and chief judge until December 31, 2005. When I told my chief that I'll be ninety years old in October before my term ends, his response was that we'll worry about that later.

During the twenty-four years that I have sat as a bankruptcy judge I have handled many chapter 7, 11, and 13 cases involving interesting and complex aspects of bankruptcy law and procedure. In several chapter 11 hospital reorganizations I found myself in difficult litigation where the debtors had instituted adversary proceedings against the Medicaid authorities, as well as passing upon multi-million dollar medical malpractice claims.

One of my most sensitive cases arose out of a chapter 11 filed by the company that did security screening in the airports throughout the country. That petition was filed a day after the World Trade Center tragedy. For days I was in constant communication with the Office of the Secretary of Transportation, the Port Authority of New York and New Jersey, representatives of the major airlines who were being serviced by the debtor, as well as scores of attorneys involved. After several years of almost daily

litigation, the debtor was able to confirm a plan of reorganization that resulted in its screening business being taken over by another organization designated by the government.

I have just completed participating in the annual Chief Judge Conrad B. Duberstein National Bankruptcy Moot Court Competition.

To change the subject and dwell less upon me and my activities, I should like to tell you that over the more than forty years as one involved in bankruptcy other than as a judge, and during the twenty-four years as a bankruptcy judge, I have had an opportunity to study and evaluate where the bankruptcy process has been going. With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, popularly known as S.256 and now awaiting the President's signature, we will soon have a good idea where the bankruptcy process will be going.

The new bill orders the most thorough overhaul of bankruptcy laws in this country since the Bankruptcy Code was enacted in 1978. It has at its core a "Means Test" which is intended to separate bankruptcy filers who can pay back a portion of their debts from those who cannot. Under the test, chapter 7 filers earning more than the state median income may have their cases converted to chapter 13 in order for them to make some payments to their creditors as determined by the provisions of chapter 13. Those filers earning less than the median income will face extensive disclosure requirements to prove lack of income.

The legislation includes a raft of other provisions backed by creditor groups. People filing for bankruptcy would be required to undergo credit counseling, at their expense, for six months before filing. They would have to repay the full amount of loans on cars purchased within thirty months of filing. They would have to document income with pay stubs and tax returns. The bill also clamps down on repeat filers. No one, for example, will be allowed to file a chapter 13 petition more than once every two years.

An important area that will affect debtors' attorneys will require them to certify the accuracy of all factual allegations in the debtor's bankruptcy petition and schedules. Attorneys will be subject to sanctions if any factual inaccuracies result in the dismissal of the client's chapter 7 petition or its conversion to a chapter 13 petition. The attorney may also be responsible for the fees of the U.S. Trustee or bankruptcy administrator who contested the chapter 7. It will also require the debtor's attorney to certify the debtor's

ability to make payments under a reaffirmation agreement. Currently the debtor's attorney must only certify that the reaffirmation is voluntary and will not impose an undue hardship on the debtor. The bill also contains a provision labeling any person who assists debtors with their bankruptcies in return for compensation a "Debt Relief Agency." That section would impose a number of disclosure requirements by those assisting debtors and require attorneys to include in their advertising an official communication or a statement that "we are a Debt Relief Agency." Fortunately, the bill exempts from the Means Test disabled veterans who incur debt while on active duty.

It is anticipated that the new provisions will give rise to a reduction of chapter 7 cases with the result that chapter 7 trustees may find a marked reduction in their workload, which will eliminate the need for the services of many of them. On the other hand the workload created by the increase of chapter 13 cases will require more chapter 13 trustees.

Notwithstanding the fact that the focus of the Act has been on its consumer bankruptcy provisions in general, there are plenty of changes in store for business bankruptcy cases. These include an entirely new chapter 15 that addresses cross-border insolvency cases and complicated rules governing the netting of certain financial contracts. The Act also includes an important conflict of interest provision, which imposes a requirement on the part of investment banking firms as recommended by the SEC, that limits the scope of asset protection trusts that could be placed beyond the reach of the bankruptcy trustees by providing the trustee with the right to avoid any transfer within ten years of the bankruptcy where the trust was created with actual intent to delay or defraud. Also covered are new provisions relating to preferences and transfers made in anticipation of a money judgment, settlement, civil penalty, equitable order, or criminal finding resulting from a Securities Act Violation or securities fraud.

Rumors have it that bankruptcy judges may soon have to reevaluate their own jobs and responsibilities because the Act increases their workload and draws them into sometimes tedious application of the new "Means Test" for filers. Although the Act does provide for additional bankruptcy judges in some of the districts, it fails to recognize a need in many districts for which no provisions were made. It is also evident that the work of the bankruptcy clerks as well as the U.S. Trustee will increase tremendously in order to meet the Act's requirements. It is anticipated that until the Act becomes effective, which will take place 180 days after the President signs it, in all probability

there will be an increase in filings because debtors will seek to avoid the requirements imposed upon them. When it does become effective it is expected that there will be a marked decrease in filings because debtors will be unable or unwilling to meet those requirements and their obligations.

We can expect that the Act will be subject to many efforts on the part of members of Congress to pass technical amendments after it has been signed by the President. I guess we now have to wait and see what happens.

I would be remiss if I failed to tell you and acknowledge that one of the most important factors in keeping me up-to-date with current highlights in bankruptcy law is what I read in the *Emory Bankruptcy Developments Journal* each time it is delivered to my chambers. For that I am most happy to be on the Journal's mailing list.

I thank you for inviting me here tonight to be among you, enjoying the new friendships I have made. Finally, and most importantly, I thank you again for honoring me as you do this evening.

Incidentally, the judges of the Second Circuit and the Eastern District of New York where I sit will be dedicating a new bankruptcy building in my honor. It is hoped that the dedication will take place by no later than October 22nd of this year on which day I will be celebrating my ninetieth birthday. You are all invited to attend the great occasion. Y'all come up to Brooklyn, Ya' Hear!

