

**DEBATE 1:
THE BALANCE OF POWER BETWEEN DEBTORS,
CREDITORS, AND JUDGES—THE ELIMINATION OF
JUDICIAL DISCRETION UNDER THE NEW ACT**

Moderator: MS. WENDY L. HAGENAU
Arguing on Behalf of Debtors: R. NEAL BATSON
Arguing on Behalf of Creditors: EZRA H. COHEN

MS. HAGENAU:¹ Good morning. My name is Wendy Hagenau. Welcome to our first panel discussion, which we've actually broadened a little bit beyond the loss of judicial discretion to the changes in the balance of power between debtors, creditors, and judges. To assist us in our discussion this morning, we've handed out a chart, and we thank Mark Duedall at Alston & Bird for preparing this for us. This is a summary of changes to the Bankruptcy Code since 1978, not just the 2005 amendments, but really all of the amendments to particular sections that we think impact the balance of power between those three parties. The 2005 amendments received a lot of attention. Principally the consumer changes were highlighted in the popular press, but there were many changes to chapter 11 and to business reorganizations as well.

Our session this morning is really not meant to be a bankruptcy-101 session. We're not going to go into detail into those particular amendments. What we're really after this morning is to explore the policies behind and the effect of these amendments on the bankruptcy process as a whole. But to make sure we're all on the same page before we get into the balance of power and the changes in that balance, I want to run through some of the amendments that you'll hear us speaking about.

The first are the amendments limiting the court's ability to extend the time within which a debtor can decide whether to assume or reject an unexpired lease of non-residential real property. Previously, the debtor had 120 days to assume or reject, but the court could extend that time for cause. And cause was pretty freely given. And now that is limited to 210 days from the petition date.

¹ Wendy L. Hagenau is a partner at Powell Goldstein, LLP, concentrating in the area of workouts and insolvency.

Second are the amendments limiting the Court's ability to extend the debtor's exclusivity period. The exclusivity period is the period of time within which the debtor has the sole right to file the proposed plan and disclosure statement. Previously, this exclusivity period could be extended without limitation. Good cause is all that had to be shown. But now, the courts are limited to eighteen months from the petition date.

The amendments have added new sections on Key Employee Retention Plans, or KERPs, as they are lovingly called. And this includes severance packages and stay bonuses. Previously there were no specific sections that dealt with KERPs and now you have limitations. It's a little bit of a complicated formula. But basically, the idea is that if you're going to give a stay bonus to insider management, first that manager has to show that he's received a job offer at the same or higher salary; and then second, you have to go through this mathematical formula to show that, basically, they're not getting paid more than ten times what I call "regular employees" would receive under a stay bonus.

And there is a similar limitation on severance plans. Now, there actually has to be a severance program for the company as a whole and the insider can't receive more than ten times what the regular employees would receive. And while ten times sounds like a lot, the truth is that most regular employees get somewhere between five and maybe twenty or twenty-five thousand dollars in these categories; whereas insider management, certainly in the large cases, was in the hundreds of thousands if not millions of dollars. So it is a restriction on what you can give those top managers.

There was also an amendment to § 366 dealing with adequate protection for utilities. We've always had to provide utilities with adequate protection to continue services, but the court made the decision as to what constituted adequate protection. There are some specific things that do not constitute adequate protection and some specific measures that must be taken that all boil down to the debtor really giving new cash in some form or fashion to the utility.

One of the largest changes, I think, is to the providers of prepetition goods. The reclamation provisions that were already in the Bankruptcy Code have been extended from twenty days to forty-five days. You basically have a federal right of reclamation now because your reclamation right doesn't key off of state law rights. And even more importantly, I think, is the right of providers of prepetition goods, within twenty days of the filing of the

bankruptcy petition, to receive an administrative expense claim for those goods. Previously you had sort of a curtain that fell when a bankruptcy petition was filed and any claims that arose prepetition you didn't pay and you paid those going forward. Clearly, this is a pretty large exception to that general rule.

And lastly, there were amendments to §§ 1112 and 1104. Section 1112 is the section that deals with the conversion or dismissal of a chapter 11 case, and § 1104 deals with the appointment of a trustee in a chapter 11 case. In § 1112, a number of different specific causes have been enumerated for conversion or dismissal. And in § 1104, now the U.S. Trustee is required to move for the appointment of a trustee if it has reason to believe that an insider, officer, or director is guilty of fraud, dishonesty, or criminal conduct.

So with the passage of these and many similar amendments last year, many commentators believed that creditors have taken control, judges have lost their power, and debtors have been hurt; and our job this morning is to explore this premise. But first, I think we need a little perspective. You know, most of us have only practiced under the 1978 Bankruptcy Code and not under the previous Bankruptcy Act. And many practitioners have only practiced since, say 1994, with the amendments that came in '94. And as such, our perspective on these changes may be a bit limited.

The bankruptcy process, like most of our legal system, is really a function of history. And sometimes when you're in the middle of history you don't really see it or fully appreciate it. So we're fortunate today to have two people here who are going to help guide us because they have practiced pre-1978 and under all the various versions of the 1978 Bankruptcy Code.

MR. COHEN: Prehistorical figures, so to speak.

MS. HAGENAU: So to my left is Ezra Cohen. Ezra is a partner with Troutman Sanders. He graduated from Emory Law School in 1969 and served as a bankruptcy judge here in the Northern District from 1976 to 1979. And among his many activities, he has been President of the bankruptcy section of the Atlanta Bar and the State Bar, as well as twice the President of the Southeastern Bankruptcy Law Institute. He's received a number of honors and he speaks frequently and writes frequently. He has represented all different types of parties in bankruptcy cases—debtors, creditors, and trustees. But today, he is going to be taking the creditors' view in our discussion about the changes in the balance of power.

And to my right is Neal Batson. Neal is Senior Counsel to Alston & Bird. He graduated from Vanderbilt Law School in 1966. He served as examiner in the chapter 11 bankruptcy case of Southmark Corporation, which was in Texas. And at that time, Southmark was the largest examination in the history of our bankruptcy process. And it held that honor until his most recent assignment, which was as examiner in Enron. He's under a gag order, he tells me, so he can't give us any good stories from Enron. But it's clearly a huge assignment.

Among his many activities, he's the past Chairman of the American College of Bankruptcy and a fellow in the American College of Trial Lawyers. He also is a former President of the Southeastern Bankruptcy Law Institute and of the Atlanta Bar Association. He served on the Advisory Committee on the Rules of Bankruptcy Procedure of the Judicial Conference of the United States. He has also received a number of honors. He speaks frequently and writes frequently. And he has also represented all different parties within a bankruptcy case from examiners, trustees, debtors, and creditors. But today, he is going to be arguing the debtors' point of view.

So with that background, Neal, let me ask you to start us off. Can you tell us briefly how the 1978 Code changed the balance of power as it existed prior to 1978?

MR. BATSON: Well, I think in order to understand what the drafters attempted to do in the 1978 legislation, you've got to go back to where we were under the Chandler Act, which was passed in 1938, and which essentially created three business rehabilitation chapters, and they were Roman numerals, unlike our Arabic 11 today. They were Roman numerals X, XI, and XII. Chapter XII cases were essentially real estate cases. Chapter X dealt with corporate reorganizations of public companies—companies that had public debt or equity. And Chapter XI dealt with arrangements for non-public companies including small businesses, proprietorships, “moms and pops” if you will.

In 1956, the Supreme Court handed down a decision in *General Stores v. Shlensky*,² which opened up a new era for Chapter XI, and we began to see a number of public companies, Fortune 500 companies in fact, file for Chapter XI relief. Frequently, they were met with motions by the Securities and Exchange Commission (“SEC”) seeking to convert the case to a Chapter X

² 350 U.S. 462 (1956).

corporate reorganization. Now, the advantage of an old Chapter X was that you could deal not only with secured debt, but also unsecured debt and equity in bringing about a rehabilitation of the debtor.

On the other hand, the major disadvantage of Chapter X was that, in most cases, you ended up with a mandatory trustee and management was essentially displaced from running the business enterprise. Also, the SEC played a significant role in these cases in terms of supervising the reorganization process. So that was the reason why many large companies did not like Chapter X—because management wanted to continue to run the business.

Now, Chapter XI on the other hand, also had advantages and disadvantages. The primary advantages were that the debtor remained in possession in most of the cases. You could have a receiver appointed, but that was an exception. The SEC played virtually no role in an old Chapter XI, but one of the major disadvantages was that, in bringing about the debtor's rehabilitation, you could only deal with unsecured debt in a Chapter XI. And that meant if you were going to avoid a situation where you were able to confirm a Chapter XI plan of arrangement and come out and only have the secured creditor exercise its creditor remedies and crater your plan, you had to work out some sort of out-of-court arrangement with your secured lenders.

Also, under the old law, there was no provision for a liquidation in these particular chapters so that if you got into one of these chapters and you could not reorganize, you had to go to what we call “straight bankruptcy,” comparable to our chapter 7 today. And in some of these cases, such as that of large real estate investment trusts in the 70s that attempted to reorganize, the cases started in Chapter XI only to be greeted with a motion by the SEC to convert to a Chapter X. Unable to reorganize in a Chapter X, the cases would then go to a straight bankruptcy and one of the concerns was that this caused a lot of delay and a lot of expense as the debtor was basically displaced by trustees and other professionals in the case.

Also, under the old law, in order to qualify for a Chapter X or XI, you had to show that you were insolvent. For example, take the A.H. Robins³ case in Richmond, Virginia in the 1980s. At the end of the day when that plan was confirmed, equity received \$750 million. Well, that type of case could not have been done under the prior legislation.

³ Menard-Sanford v. Mabey (*In re* A.H. Robbins Co.), 880 F.2d 694 (4th Cir. 1989).

Also, there were no committees in these Chapter X and XI cases. There was no automatic stay. Basically, you had to go in on the first day and get an injunction. We had a rather cumbersome system of borrowing certificates in order to generate the money that was necessary in order to operate in the case. So this was the backdrop, essentially, against which the drafters came to the table during the 1970s to construct the 1978 Bankruptcy Reform Act. What they came up with is essentially one reorganization chapter that would apply to public companies, to the “Mom & Pop,” to the real estate ventures, to all types of businesses.

Second, they concluded that the debtor-in-possession should be the norm. There was a strong presumption that the debtor would remain in possession. You could have a trustee, but you would have to make a “for cause” showing. They significantly diminished the role of the SEC. The SEC was essentially made a party in interest, but that was it. And we’ve seen over time that in most chapter 11 cases, the SEC has played a very minimal, and in some instances, nonexistent role.

They also decided that you could liquidate within the chapter 11 case, either by a sale of substantially all of the assets under § 363 or a liquidating plan of reorganization. There was no insolvency requirement. There was the creation of various committees, initially unsecured creditors’ committees and equity committees, and later we have seen asbestos committees and all sorts of future tort claim representatives and other representatives in the case.

In addition, there was a broad automatic stay. There was a concept of property of the estate under § 541, which was very broad. And in 1983, when the Supreme Court decided the *U.S. v. Whiting Pools, Inc.*⁴ case, it basically provided for broad turnover of property to the estate.

In addition, there were broad powers to use, sell, and lease property and to borrow money and reject executory contracts. And then, of course, there was exclusivity for the debtor to propose a plan of reorganization in the case. And the new chapter 11 borrowed the rule from the old Chapter XI, and that was to essentially give the debtor almost unlimited extensions of exclusivity in many cases where that was required.

So that was essentially where the drafters ended up in 1978. And in my judgment, they achieved an equilibrium. Not a perfect equilibrium, because I

⁴ 462 U.S. 198 (1983).

don't think you could ever get a perfect equilibrium. In terms of the various rights and interests of the various parties in chapter 11, to counterbalance what they had given to the debtor, they essentially gave to secured creditors the concept of adequate protection. They gave to creditors the ability to file involuntary chapter 11 cases. They gave to creditors in the whole plan process disclosure statements, the best interest test, the feasibility standard, and the modified absolute priority rule. So I think we came out of the 1978 legislation with a relatively balanced playing field, if you will, in terms of the bargaining that was to take place between the various parties in the case.

Finally, the Code created, I think, a bias toward bargaining. And if you you'll look back over the course of the last twenty-six years, we have seen very few cram-downs in chapter 11. Chapter 11 has been about consensual plans of reorganization, essentially about the notion of "let's make a deal."

So that's where we started in 1978. As we go through the process this morning, we're going to see that the pendulum, in my judgment, has, over the last twenty-six years, culminating in the 2005 amendments, swung back to creditor control in chapter 11 cases. In some instances due to a lot of legislative changes that we will talk about, in other instances due to externalities in the capital and financing world; such things as claims trading, the so-called creditor-in-possession that we'll discuss this morning, the emergence of vulture funds, hedge funds, leveraged buy-out funds, and private equity funds, all of which have had a significant impact on the dynamics of the chapter 11 case.

MS. HAGENAU: Ezra, how do you see the 1978 enactment of the Bankruptcy Code?

MR. COHEN: Well, I agree with Neal that it was a monumental achievement. It was like a magnificent hotel with pervasive bankruptcy jurisdiction and a chapter 11 that was very powerful. But like all structures, it had weaknesses. And if you operate a hotel for twenty-five years, you're going to find places where you want to change and improve the hotel. In fact, after twenty-five years, it may be time to overhaul the hotel based on experiences that you've had and problems that you've seen. And sometimes, if your customers have changed, it may be necessary to change the operating manual for the managers of the hotel. And that has happened up to 2005.

To me, the genesis of the '78 Code was legislation enacted in 1970 that was the true bankruptcy abuse prevention and consumer protection act. Back in the

1960s, it was the case that referees in bankruptcy (today's bankruptcy judges) would issue an order discharging a consumer debtor of all his dischargeable debts, but they had no power to determine whether a particular debt was dischargeable. And so creditors were free, after the debtor got a discharge, to sue the debtor in state court. If the debtor who was discharged did not come forward and plead the affirmative defense of discharge in bankruptcy, a default judgment would be entered against the debtor and the debtor would be liable for the very debts that he had sought to discharge.

This was seen as an abuse. Some of the nation's leading bankruptcy judges brought this problem to the attention of Congress and Congress undertook to remedy it with legislation which was enacted in 1970 which was the true bankruptcy abuse prevention and consumer protection act. And while they were at it, they learned from these bankruptcy judges that there were other troubles with the bankruptcy court's jurisdiction. They learned that generally the bankruptcy judge's jurisdiction was patchwork and did not meet the needs of business cases in particular. Jurisdiction in the business cases was based on the bankruptcy estate's actual or constructive possession of property. Questions of constructive possession and the possession of intangible property were quite arcane. So Congress said, "While we're at it, we need to create a blue-ribbon commission that will study the bankruptcy law, report on it, and recommend the needed changes so as to create a bankruptcy court with pervasive jurisdiction. And furthermore, we want to change the position of the bankruptcy judge to enhance the judge's prestige and elevate his status. And we want to remove any appearance that the judge is the leader of a bankruptcy ring."

1973 was a very crucial year in the bankruptcy world. In that year, the first set of national bankruptcy rules were issued to provide the procedure for the bankruptcy court's exercise of its jurisdiction to determine dischargeability and provide fair, standard bankruptcy procedures in general. To elevate the status of referees in bankruptcy, those rules provided that referees in bankruptcy would be called bankruptcy judges.

The second thing that occurred in 1973 was the Commission on Bankruptcy Laws came out with its report and recommendations. Two of the major components were the pervasive jurisdiction of bankruptcy judges, which they were going to appoint under Article I of the U.S. Constitution, and the creation of the U.S. Trustee system, which was designed to place the U.S. Trustee in charge of the administration of the estate. Thus, the judge was not

going to have to say, “I’m going to appoint Joe Shmoe to be the trustee and I’m going to adjudicate his cases and I’m going to award his fees,” and the judge was not going to have to do other sorts of administrative activities that, first, were beneath the bankruptcy judge and, second, called his impartiality into question.

Over the course of the next five or seven years, the major tumult about this legislation was really over how the court should be formed, under what Article, who should be the appointing powers, and the like. But 1973 is also important for another reason, because in October of that year began, in the United States, a very large recession. It particularly hit real estate and all related industries, and it was particularly acute here in Atlanta. And two young practitioners, one named Neal Batson, and one named Ezra Cohen, were drafted into the bankruptcy arena by their firms and encouraged by Judge Drake, who was one of the nation’s leading judges, and we began to deal with very significant bankruptcy cases in the ‘70s.

Now in these cases, from my experience, the filing of a bankruptcy by a debtor represented a declaration of war between the debtor and the secured creditor. If it was a single asset real estate case, the sponsor of the entity wanted to prevent a foreclosure because it would cause a tax recapture by all his limited partners. And if it was a general business company, it wanted to use the accounts receivable, the inventory, and the cash collateral, even though these might diminish over time, in order to operate the business.

The natural ally of the debtor was the trade creditor, and the trade creditors supported the debtors because they thought anything that could be taken away from the secured creditor was wonderful because it would inure to their benefit. The secured creditor, in every case, would be litigating with the debtor saying in four or five different ways, “Give me my property. I want relief from the stay. I want a trustee. I want the case converted.” And the secured creditor had to depend on the discretion of the judge. The judges would decide when the case would end. But nine out of ten would end in failure and in liquidation. And the secured creditor would ultimately get back what was left of his property and go home.

By the end of the 1970’s certain observations were made. One observation was that when the debtor’s principle is the manager and owner of the business and also the guarantor of its debts, his judgment is skewed as to whether or not his business can and should reorganize. And his concern for what his secured creditor might suffer approaches zero.

Another thing we found is that, even with professional managers who were not the owners of the business, when these managers face financial crises, they would be paralyzed. They wouldn't know what to do because the plans they had laid were now in tatters. They wouldn't know how to go back to the lenders to whom they had confidently promised that everything would be okay and say "everything's not okay," and deal with it.

The bankruptcy legislation was passed in 1978. And as I mentioned, it did have a few flaws. One technical flaw was that it was, well, unconstitutional. The Supreme Court so held in 1982, and Congress set about to try to fix that. It took Congress two years.

But the other thing that happened shortly after the enactment of the Code was the development of the turn-around management industry—because it was felt that the managers of these debtors were, in some cases, incompetent or dishonest or some combination thereof. In many cases the management was fine, but their secured creditors had the belief that the debtor's management needed turn-around help.

And the second thing that happened was being in the lenders' good graces became much more significant to the debtor. You begin to have revolving credit agreements whereby the debtor has a zero balance in its bank account at the end of any given day. The debtor quickly apprehended that if the lender was not happy with him, the lender could put the company out of business rather rapidly.

And another thing that happened was the secured creditors began to say, "Well, look, I have an interest in this debtor and I need to have this debtor rehabilitate if possible because, as a going concern, this debtor is worth more, its assets are worth more, and I recover more than otherwise. But again, I don't want the debtor free to run amuck."

So what began to happen is another realignment: a major, tectonic shift in the bankruptcy practice began to develop. The debtor's best friend, so to speak, became the secured creditor. And the secured creditor began to see that chapter 11 could be just the vehicle he needed to control the debtor, to make sure the debtor wasn't using the creditor's cash collateral to pay, say public debt or other creditors who were not providing new value, and to determine when it was time for this debtor to begin to sell or liquidate itself and to give up on its plans for rehabilitation.

And so we came to what Harvey Miller calls the creditor-in-possession, where now the debtor and the secured creditors are closely allied “big buddies” and the trade creditors are generally not such big buddies with the debtor. And with this came a shift in the role of the judge. Now the judge is not to determine whether this debtor is going to survive, whether it’s going to be able to rehabilitate, or whether it’s going to be able to sell itself, because that decision is being made by the secured creditor. And I would submit to you that most of the decisions that these creditors are making are salutary in that they do prevent a debtor from running amuck and having no concern for the creditors as long as the business can continue operating. The judge is then presented with a *fait accompli* when the debtor comes in and says, “Guess what? We have just been discussing this case with our lender and it looks like we’re going to put ourself up for sale.” And the judge says, “Okay, fine,” because there’s nothing else the judge can do.

So the judge’s role now changes from one who determined whether the case would be a rehabilitation, sale, or liquidation to one who is adjudicating many of the major disputes that now arise between the various parties but with the major thrust of how the case is going to be resolved being determined by the parties themselves, and largely by the secured creditor.

MS. HAGENAU: Neal, our topic today is all about the balance of power. Now why is that important?

MR. BATSON: Well, before I get to that, let me respond to one of the comments that Judge Cohen made, and that is essentially, over time, we have seen what Harvey Miller has also called the “creditor claw back,” and then we’ll talk about some of these changes this morning. But basically, he’s referred to it as a creditor-in-possession and has indicated that is a wonderful world, that very salutary things come from the creditor-in-possession.

Now, if you go back to what the drafters had in mind in 1978, they were not looking for one party, the secured creditor, or equity, or any particular player in the chapter 11 case to dominate the chapter 11 reorganization. If you look at the floor statements in the 1978 legislation, basically, they were looking at chapter 11 as a rehabilitation and reorganization chapter. They wanted to create a bankruptcy forum where all of the stakeholders in the case could come together in a democratic, participatory framework with representation, creditors’ committees, parties-in-interest, notice and an opportunity to be heard, all of these things were built into the 1978 legislation. And those people, together in that process, would make the decision as to the

future of the company. And it might be a rehabilitation of the company where certain divisions would be sold off but the company would emerge as a going concern, similar to what we saw in *Federated Department Stores*,⁵ for example. Or, the company could end up in liquidation, and that liquidation could be a liquidation of substantially all of the assets of the debtor. But it was going to be all of the stakeholders making these decisions and also making the decisions at the end of the day as to, after the direction of the case was determined, how the value of the company would be allocated among the various stakeholders.

The problem I have is for the secured creditor to be basically the person in charge of the reorganization case ignores the interests of all of the parties that we see in reorganizations. Over the years, the number of parties has proliferated. We've seen pension holders, we've seen other types of parties become a part of the bankruptcy process. So that's where I would take issue with my good friend, Judge Cohen.

Now, as far as why the balance of power is important, as I said earlier, the Code had built into it a bias toward bargaining, which is why we've ended up mostly with consensual plans of reorganization. I would submit to you this morning that chapter 11 and out-of-court restructurings that are done in what I call the shadow of chapter 11 are all about bargaining. And in order to have effective bargaining, I believe you need three basic ingredients: first, I think you need to keep the parties at the table; and second, you need to give them some chips to bargain with. That's essentially leverage. And if we go back to the 1978 legislation, it attempted to get an equilibrium, if you will, in that leverage, which has been distorted, in my judgment, by the creditor-in-possession and the creditor claw-back over the last twenty-six years.

Third, you need to create some ambiguity of outcome. I know that as lawyers we love certainty and we love predictability in the law, particularly in contractual relationships. But in my judgment, when it comes to successful bargaining, you've got to have ambiguity. Lawyers settle lawsuits because they don't know what judges and juries will ultimately do with those matters. Also, lawyers like to stay in control and their clients like to stay in control of their destiny, which is why mediation, I think, has been effective—because the parties to the mediation know that they have some control over the outcome of

⁵ *Spierer v. Federated Dep't Stores, Inc. (In re Federated Dept. Stores, Inc.)*, No. 01-4242, 2002 U.S. App. LEXIS 16059, at *1 (6th Cir. Aug. 5, 2002).

the matter that they're dealing with, but once they turn it over to a judge or a jury, they may get an outcome that they do not like.

And so what I would suggest to you this morning, is, and we'll talk more about this, that there have been three major developments that have occurred in the last twenty-six years culminating in the 2005 amendments that have altered, I think in a very negative way, what I would call the "negotiation imperative" in chapter 11 cases. I'll come back to these, but there are essentially three: first, the erosion of the automatic stay; second, the multiplication or proliferation of various administrative expense priorities and other priorities for various classes of creditors and preferential treatment for different classes of creditors so that what we have today, very different from what we saw in 1978, is that the large body of unsecured creditors has now been divided, if you will, where there are many of those participants who now have preferences in the case, which I believe are not justified; and the third development that has occurred is a diminution, in my judgment, of the discretion of the bankruptcy court. In large cases, every case is different. And there's got to be what Barney Shapiro, a great creditors' committee lawyer, calls some "flex in the joints"—the ability of a bankruptcy judge to tailor the particular remedy to the needs of a particular case.

Finally, there has been a loss of some of the ambiguity of outcome so that parties know what they're going to get because they've gone to Congress and they've gotten it through special-interest legislation. They don't need to bargain for it at the table. So the result of all of this, I believe, has been a negative impact on what the drafters had in mind, and that was to promote bargaining with multiple parties in a transparent forum, with a participatory, democratic framework and where no single party like a secured creditor would dominate, if you will, the chapter 11 reorganization case.

MS. HAGENAU: Well, Ezra, does the bankruptcy process really require ambiguity?

MR. COHEN: Well, it doesn't require ambiguity, I don't think, but it has ambiguity because there's inherent ambiguity in all litigation. As a matter of fact, I think a case could be made for the fact that predictability on the part of the judges is as important as any sort of ambiguity. You have to know the parameters of the framework in which you're working, and it is best if what the judge is going to do is limited to swinging a little bit this way or a little bit that way. If you have the possibility of wide swings in what the judges might do, that really promotes litigation.

I would suggest that over the last few years if you want to point to any sort of major changes in the priorities or the preferences given to parties, then I would say that you would have to look first to that extra-legislative priority preference scheme that was developed in Delaware through what they call the first-day orders, in which on the first day, although you're not supposed to pay pre-petition debt, you pay your employees several million dollars, you pay their medical expenses several million dollars. You may have workers' compensation claims that are clearly prepetition, and these get paid several million dollars.

And if you're a retail business and you have a customer who bought a gift certificate, that gift certificate is a pre-petition obligation. But everybody gives him a preference. No, let's go ahead and honor his pre-petition obligation. We're going to honor it postpetition. We're going to honor that one. If you have a warranty claim, we're going to go ahead and fix his problem. If you have a customer that is in the wholesale business and you have cargo claims, you definitely want to take care of that. And don't forget the critical vendor. Just as we speak right now, \$12 million worth of checks are whistling out of Dana Corporation⁶ on the second or third day of its bankruptcy to critical vendors.

So if you want to look at where priorities are being developed, yes, they're being developed, but they're being developed extra legislatively, one might say.

Let's compare that with some of the legislative changes. For instance, in 1984, Congress said, "Look, if you go into bankruptcy and you have a piece of property that you're renting, pay the rent postpetition. Don't go to the landlord and say, 'Well, maybe this property is not worth the rent, maybe it should be a different rent.' Just pay the rent. And if you're going to take a shopping center and if you're going to get a new tenant in there, don't just get 'Big Lots' (the prototypical undesirable tenant for a high-end shopping center) in there who's going to spoil the tenant mix. Try to keep the tenant mix in proper." Is it a big imposition on the debtor to ask the debtor to do that?

Or, take the example of an equipment lease on a piece of property that is depreciating. The Code says, "Well, you know, after sixty days, let's start paying this equipment lease." Well, I would say that these changes that we have seen, I would not call them claw-backs so much as I would call them

⁶ *In re Dana Corp.*, Case No. 06-10354 (Bankr. S.D.N.Y. 2006).

improvements in the system that have developed over the years to keep us focused on what we should be focused on, which is the real problems of the debtor.

Now, I admire the first-day orders. I think those first-day orders are perfectly proper because your problem is not with the employee. Your problem is not with your customer. Your problem is with your public debt or with your secured creditor or with your trade creditors or with your operations, and that's where you need to focus. And the idea that we're not doing everything as the 1978 Code indicated we should do is not necessarily bad because I think we have improvements.

And you talk about the deterioration of the position of the bankruptcy judge. I don't think so. I think that one of the things they wanted to do with the 1978 Code was to give the bankruptcy judge a lot of status so that we get good bankruptcy judges. I think that's been done. We have good bankruptcy judges. We have a fabulous bench nationwide. Let's take a look at Delaware and its judges. Cases flocked to Delaware in the 1980s and the early 1990s. Why? Because the judges were predictable, the judges were very good, and the judges had huge matters to decide and had to give direction in major cases. But they weren't deciding whether this debtor's going to be sold or not. They weren't deciding whether this debtor's going to make some sort of long-ball attempt at rehabilitation or not. They're not sitting as the CEO of the eighteen major corporations that they were adjudicating.

I think that the changes we have seen in the 1980s and 1990s have been largely good. If the secured creditor is owed \$200 million and it sits in a room where somebody is owed fifty-thousand dollars and somebody else is owed a million-and-a-half dollars, then if democracy works, two or three of these small unsecured creditors outvote the secured creditor? I don't think so. That's not the way it works because you have to vote dollar for dollar. Once you get a democracy like that, you get the secured creditor who has the most money in the case and who is the only one who's going to lend the next dollar to the debtor having by far the most to say about how the case will go forward.

MS. HAGENAU: And when we talk about the balance of power, most of the time you think about it between the debtor and creditor. But we've also heard this morning there's a balance among creditors and then also between the parties and the judge. So let's start talking just a little more specifically about each of these.

Neal, tell us about the shifts in the balance of power between debtors on one hand and creditors on the other with some of the specific 2005 amendments.

MR. BATSON: Well, as I said a moment ago, I think that chapter 11 and out-of-court restructuring is about bargaining and I think that's what the drafters had in mind. And I mentioned earlier there were three major shifts that have taken place in the last twenty-six years culminating in the 2005 amendments, and they are the erosion of the automatic stay; the proliferation of priorities and preferential treatment for various classes of unsecured creditors; and third, some limits that have now been imposed on judicial discretion.

Let's go back and take a look, for example, at the automatic stay. The first purpose of the automatic stay is to give the debtor a breathing spell from dismemberment of the estate by various creditors attempting to exercise their remedies so that all of the assets of the debtor can be dealt with in an orderly fashion in one forum where all of these stakeholders come together. The second purpose of the automatic stay is to promote equality of distribution, in particular, equality of distribution among unsecured creditors. The third purpose of the automatic stay is to give the Court an opportunity, in an orderly way, to preside over the administration of the debtor's rehabilitation case. That's where we started with the automatic stay.

Now what have we seen in the last twenty-six years? There were eight exceptions to the automatic stay in § 362(b) in 1978. What do we have today in 2005? Twenty-eight exceptions to the automatic stay, and that doesn't include other exceptions that are strewn throughout the Bankruptcy Code in § 1110, for example; in the new § 366 with the right of the utility to set off with respect to prepetition deposits without even notice, much less an order of the Court; in the ability of a personal property lessor under § 365(p)(1) to essentially exercise its remedies where the time has run for assumption or the debtor has rejected.

So what I'm suggesting to you this morning is that this proliferation of the exceptions to the automatic stay has resulted in some significant dismemberment of the bankruptcy estate. And what is the effect of that on bargaining? The effect is that certain parties that got what they wanted from Congress have left the bargaining table.

Another effect is that the size of the pie to be bargained over has been diminished. And I take issue somewhat with Judge Cohen, and I think it's

rather ironic since he's arguing the creditors' side and I'm arguing the debtors' side, but I do have some problems with how far some of the first-day orders have gone in terms of distorting, if you will, distribution among certain classes of creditors. So I think the erosion of the automatic stay has affected the equilibrium of the bargaining process in chapter 11.

The second thing is the proliferation of priorities, including administrative expense claims, as well as preferential treatment for various creditors. And we've seen this not just in 2005, but also if you go back and trace it, and you've got that in your chart so I will not go over it this morning. This is a process that's been happening over an extended period of time, which has culminated, as we now know, with an administrative expense claim for reclamation sellers who basically have sold goods that are received by the debtor in the ordinary course within twenty days of the commencement of the case.

We now have landlords receiving priorities. And the landlord situation is not just the two hundred and ten day limitation. There are other implications in the landlord limitation. If, for example, two hundred and ten days out or seven months into the case you have to make the decision to either assume or reject, and if you make the decision to assume and by the time you get sixteen months out to try to propose a plan of reorganization, you now have to reject; then, essentially, the landlord is going to get an administrative expense claim for the rent or other monetary obligations for a two year period.

In addition, if you've got a landlord who is willing to extend the lease, let's say because it's an above-market lease and the landlord's interested in extending it, I submit that the landlord is probably going to want some money to do that, a consent fee, if you will. And what is that going to do? It's going to further drive up the transaction costs of chapter 11 along with what you've got to pay, for example, to the utility provider in terms of cash or a letter of credit, and to these various administrative expense claims that I've talked about. And there are other provisions that time will not allow me to get into.

I think the net result of all of this, once again, is the equality of treatment of creditors, particularly unsecured creditors, through the proliferation of those priorities and preferential treatment, has been adversely affected. More parties have now left the bargaining table. The pie has been further diminished. And therefore, there has been a significant impact on what the drafters had in mind in terms of encouraging bargaining to get to a plan of reorganization, whether it is a rehabilitation plan or a liquidation plan in the case.

And then, finally, and we'll talk more about this, the limits on judicial discretion; I take a more proactive view for judges in bankruptcy cases, I tend to like bankruptcy judges to be more like chancellors in equity. Of course, in some states, we still have separate equity jurisdiction from jurisdiction at law because I think that these cases are so fact specific that you need to have a significant amount of judicial discretion in order to deal with them.

So, on balance, Wendy, I just think that, as I said earlier, this pendulum has swung too far. But if we look back historically, if we go back to the 1800s and trace through where we are today, two hundred years later, we see that the pendulum has swung between the creditors on the one hand and the debtors on the other. And there have been periods in our history when the debtor has had the advantage and other periods in our history in which the creditor has had the advantage. And I think we're now just going through a period where the pendulum has swung more to the creditor side of the equation. And while that's a wonderful thing for the parties who have gotten the special benefits through legislation in Congress, when you step back and look at what's best for all the players and for the entire bankruptcy process and the entire bankruptcy system, I think it's been hurt by a lot of these developments.

MS. HAGENAU: Ezra, would you like to respond and tell us your view about the shifts in the balance of power between the debtor and the creditor?

MR. COHEN: Well, yes, I would like to talk a little bit about it. Neal and I are going to come to an agreement very shortly as you'll see.

MR. BATSON: It's a consensual plan. Let's make a deal.

MR. COHEN: I would differ from him on all of the amendments that we see up until 2005 because I think most of these amendments up until 2005 turned out to be good. Now I, like many people, when each amendment was enacted, for instance in 1984 the amendment that said the debtor had to pay the rent postpetition to the landlords, resented it. It's as if you walk into your office one morning and you find out that somebody's rearranged all your furniture and you didn't tell them to do that or have anything to do with it. And then your world is kind of rearranged. But then you kind of get used to it after a while and you see some of the benefits. I see that with the landlord amendments. I see that the personal property amendments, now that I'm representing a debtor and we're paying personal property leases, it keeps them quiet. It's keeping them in the background where I like them. And it's a good

thing that I can tell the creditors' committee, "Well, I must pay them." That's good.

You have certain other legislation dealing with collective bargaining agreements and retirement benefits where there probably was the germ of a subject that needed to be fixed, but this legislation is what I call reactive where you have people who were doing sloppy draftsmanship and writing stuff that puts new standards in there, which was not done with a great deal of care. But on the whole, what they've done with collective bargaining agreements and retirement benefits is probably good. Plus, if you look today at all the collective bargaining issues that are going along with § 1113, you know, nobody is really interested in speeding up the process of rejecting the collective bargaining agreement because they're going to be faced with a strike. And so everybody wants to say, "We're going to reject your agreement." But they want to kind of go slow and hopefully work out something as they do. And so Congress' intent in making the parties go a little bit slower is probably good.

When we come to the 2005 legislation, however, I flunk it. It gets a grade below seventy. I first flunk it on draftsmanship. And second, I flunk it on what it did with the real estate leases, with the seven-month limitation. If I were a Congressman, I would have voted against this legislation, unless somebody had made it abundantly worth my while.

But probably the one change that worries me most is the real estate leases and the seven-month limitation. It's going to cause a major shift toward forcing the debtor into a quicker sell mode if he's a real estate debtor. And I'm talking about a real estate debtor, with say three hundred stores or five hundred stores, or like the recent Musicland⁷ of a thousand stores. We talked about the fact that the real estate lessor was getting his payment. So if he gets his payment, why does he care whether it's seven months before we assume the lease, or twelve months before we assume the lease, or eighteen months before we assume the lease? Why does he care?

Well, he does have a real concern there. And the real concern is the value of his shopping center depends on two things: one is the lease rentals, and the second is the capitalization rate at which you multiply those lease rentals. The capitalization rate is clearly affected by the quality of the tenants. Are they going to stay or not? The people with the shopping centers are finding that if

⁷ *In re Musicland Holding Corp.*, Case No. 06-10064 (Bankr. S.D.N.Y. 2006).

they don't have a debtor who's committed to the property, even if he's in bankruptcy, then they have a difficult time establishing a high value for that property. Therefore, they have a difficult time financing or selling the property.

So you've now impacted this creditor significantly. Is it significant enough to require that the debtor assume the lease within seven months? I don't think so. If it were something like a year or eighteen months, I think that would have been beneficial because one of the things that I notice is that debtors flop around in these real estate cases and say, "Well, let me wait until next Christmas and I'll see if my next Christmas will be better." And they do keep these real estate leases going longer than they should.

What we find now is in one recent case called *Musicland*,⁸ which recently filed bankruptcy in the Southern District of New York, they had about a thousand stores selling videos and CDs and whatever else they manufacture these days for selling music. They had to do a lot of pre-bankruptcy planning and they had to take a look at their leases and grade them as to desirability: A, B, or C. This is a good lease, this is a mediocre lease, and this is a bad lease. The lenders also told them before the bankruptcy, "By the way, I want to let you know that you're going to sell yourself. You're going to close your doors and sell yourself. That's your plan."

So the lenders gave the quarterback the instructions as to what was going to happen. And they ran into bankruptcy saying they quickly moved and they quickly acted and they were going to do everything within the seven-month period. But I think in the big retail cases, it's going to be a problem because they just can't go to a landlord and say, "How about you consent to extend me?" I think that would be hard because you need to have three hundred or four hundred stores extended, because if you're left with just a few stores, you don't have an operation.

And maybe it is good in a way to force debtors to make decisions on real estate leases more quickly, because there was a case called *Merry Go Round*⁹ in which Ernst & Young was sued for hundreds of millions of dollars because of the way they advised the company. One of the major charges was that they didn't review the leases quickly so they could advise which stores were not

⁸ *Id.*

⁹ *In re Merry-Go-Round Enters., Inc.*, No. 94-5-0161-SD, 1996 Bankr. LEXIS 136, at *1 (Bankr. D. Md. Jan. 23, 1996).

performing well and should be closed. So there's a lot to be said for quickly getting out of bad leases. There's a lot to be said for making that process go quicker. But I think in this case, with the landlord leases, that in and of itself for me is enough to flunk the 2005 Act.

The other problem that I have is with the twenty-day problem because this is the issue where, if you ship goods to the debtor within twenty days of bankruptcy, he has an administrative claim. My problem is that when you go into bankruptcy, you may not quite know how much of this you've done and it may impact the ability to get postpetition financing. But again, that's not such an unfair thing. I've had CFOs talk to me as we plan for bankruptcy. They said, "You know, we're going to file bankruptcy on March 1st and it's now February 1st and I'm still ordering goods that I'm not going to pay for. Is that legal? Is that fair? Am I'm committing a fraud?" So there is a germ in many of these situations of a problem to be corrected. But I'm not so sure that the so-called corrections they did were necessary.

Some so-called preventions of abuse are not going to be very important. With respect to utility deposits, the utilities were not losing money in the big cases anyhow. But, as it turns out, the amount of deposits that the utilities are getting in the big cases are relatively miniscule anyhow. So they're not really hurting the reorganization. And of course, you could say that something like keeping the senior management from getting these huge KERPs can be considered a salutary thing. They've caused a lot of comment. They've particularly upset many of the unions. And nobody who looks at bankruptcy from outside really understands why these senior managers are getting these half a million dollar KERPs just for standing there and breathing.

I think the one who is going to be paying for this new balance of power is the secured creditor because he's the one that has to write the checks for the various people that now have preferences. And I think it's ironic that it is the secured creditors, the banks and the financial institutions, who pushed this legislation so hard so that they could get the consumer issues in there, and then turned around and gave away the store in the commercial area, putting themselves in a much worse position. So we'll see whether their bet and gamble pays off.

MS. HAGENAU: Do you have any more comment on that?

MR. BATSON: We're in agreement.

MS. HAGENAU: You want to comment on that or should we move on to judicial discretion?

MR. BATSON: Well, let me talk about exclusivity for a minute.

MS. HAGENAU: Okay.

MR. BATSON: Just as Ezra has a hot button with the landlords, I have a hot button on the limitation on exclusivity extensions, and I'll tell you what my problem is.

Oftentimes we deal in bankruptcy without any empirical evidence on which to base judgments. And I know Congress does this almost every day of the week. And we're fortunate in that we have people now like Elizabeth Warren and Jay Westbrook and some other academics who are doing a lot of empirical work in the bankruptcy reorganization field. But what's interesting to me about the exclusivity situation is that if you look at where we were in 1978, we had a one-size-fits-all approach. We were going to put the small case in with the public company case and the real estate case. For those of you who believe in a cyclical theory of history, here we are twenty-six years later, and what have we done? We have a small business provision and we have separate real estate treatment in § 362 of the Code.

And so to a certain extent, we've come somewhat full circle because there was a notion that one-size-fits-all was not in the best interest of some of the smaller cases. But what did Congress do when it came down to the question of capping, if you will, the exclusivity extensions at eighteen and twenty months? Well, it decided to adopt a one-size-fits-all approach. It would essentially take a medium size case and it would treat it just like Enron, for example, or a mass tort case, or an airline case, any of these mega-cases that you've read about in the newspaper.

And I submit to you this morning that there was no empirical basis on which to do that. Look at the empirical work done by Professor LoPucki. He took a look at the length of time in cases under the old law prior to 1978 and the length of time under the post-1978 legislation. And he looked at it from the standpoint of the average time between the filing of the case and the confirmation of a plan of reorganization. And what did he find? Well, he found that basically, in smaller cases, the time had doubled between roughly eight months to sixteen or seventeen months under the new legislation. Therefore, it made some sense to do what Congress did with respect to the smaller cases in chapter 11.

But he also found, on the other hand, that the time between filing and confirmation in the larger cases had really not changed much between the old law and the new law—it was still around sixteen or seventeen months, on average. And he also found, not surprisingly, that the larger the case, the more complex the case, the longer it's going to take to get it to a confirmed plan of reorganization.

Now, when Harvey Miller spoke at the Boston College symposium in December, his evidence indicated that in fact the time between filing and confirmation in a number of chapter 11 cases in the last four years had dropped to somewhere in the thirteen to fifteen month period. He largely attributes that to liquidating chapter 11s. As to what the cause is, we really don't have a lot of good empirical evidence. So what was the empirical basis for that decision to be made? I don't see it.

Second, if you look at what has happened in the big cases, it took approximately thirty-six months for us to get to a confirmed plan of reorganization in the *A.H. Robbins*¹⁰ case, which was a mass-tort case. We essentially had to get notices out to claimants in forty countries in different languages. We had to go through the whole questionnaire and the estimation process. There is no way, in my judgment, that these larger cases are going to get to a confirmed plan of reorganization within an eighteen to twenty month period. So what's going to happen? Well, I don't know for sure what's going to happen, but I can see some things that may happen.

First of all, I think the major players in these cases are going to come to a consensual arrangement that the time for filing these plans will be extended because nobody in a big case wants a plan fight. You just don't want it in a large reorganization case. Now, what is that going to do, though, for the marginal player, the player that doesn't have a lot of leverage in the case? Well, I think those players are going to do something similar to what we saw back in the 1980s. After the Code was passed, you got mandatory equity committees, almost mandatory, in just about every chapter 11 case. By the time we got to the end of the 1980s, in a lot of those cases, equity was out of the money. There was nothing there for equity. So what happened? They were able to extract value, usually two to three percent, because the debtor and the unsecured creditors' committee wanted to pay nuisance value to get them out of the case.

¹⁰ *Menard-Sanford v. Mabey (In re A.H. Robbins Co.)*, 880 F.2d 694 (4th Cir. 1989).

And so what I think you'll begin to see here for the marginal players, they can come up with a deepening insolvency claim and they can couple it with the potential to file a plan at the end of the eighteen month period. And if you go back to what the drafters had in mind with this exclusivity extension, the so-called "Efficientists" group in the bankruptcy field adopts the notion that the faster the case, the lower the cost; and therefore, speed in chapter 11 is a wonderful thing.¹¹ Let's run the cases through like cars in a car wash. The problem is that it takes time in some chapter 11 cases, more time in others, to thoughtfully develop a reorganization plan.

And at the end of the day I don't think these cases are going to be shorter because you have capped the exclusivity extensions. You're going to have, as I say, other players who are going to be litigating, using it for tactical and strategic advantage. And I don't think it's going to reduce costs. At the end of the day, if you want to reduce costs in chapter 11, I think the only way you're going to do it is to dismantle the democratic participatory process that I had talked about earlier, which I'm not advocating by the way. I believe the democratic participatory process is essential if you're going to maintain a process where all stakeholders have an interest in the outcome and have an opportunity to be heard with respect to the outcome. And I frankly don't understand why an unsecured creditor who has extended money to a debtor shouldn't have a voice in the proceeding and why that proceeding should be necessarily dominated by, as Ezra would say, the creditor-in-possession.

So you've heard my hot button on the exclusivity extensions. Let me just—well, I don't have time to talk about limitations on judicial discretion. I think we're out of time.

MS. HAGENAU: I think we are. But I think we've talked about the limitations on judicial discretion throughout the course of this. But let me ask each of you, Ezra, and I'll ask you first to give us your perspective of what you think the next ten years will look like given what the last twenty-six years or so have looked like.

MR. COHEN: Well, yesterday when we were speaking about it, I think Neal, the way he expressed it, was really my view too. So I'm going to let Neal . . .

¹¹ See, e.g., James H.M. Sprayregen et al., *Chapter 11: Not Perfect, but Better Than the Alternative*, 24 AM. BANKR. INST. J., 1, 60 (2005) (describing the "efficientist" school of thought and citing various articles by Professors Baird and Rasmussen that promote the efficientist theory of chapter 11).

MR. BATSON: Okay. Well, Ezra and I talked about this yesterday. And I think we—as Ezra has predicted, we’ve come to agreement, as least with respect to how we see the future, or say the next ten years.

First of all, I think we’re going to see, in the short term, increased litigation costs because the lawyers are going to have to litigate some of the ambiguities and some of the issues that have arisen with respect to the new legislation. And that’s not something new. We saw that back in 1978. It took five, six, seven years to develop a body of law where the lawyers and their clients began to settle in. And we’ve seen that with subsequent amendments.

The second thing I think we’re going to continue to see is an increase in the number of liquidating chapter 11s. If you look at Harvey Miller’s statistics at the Boston symposium, he indicates that as of 2003, I think it was, roughly half of the chapter 11 cases are now moving to liquidation.

I don’t believe that that’s necessarily a bad thing. I think the drafters had a vision, as I mentioned at the beginning of this presentation, that you could do liquidations in a chapter 11 either through a sale of substantially all of the assets or you could do a liquidating plan. Therefore, there will be cases where you need to liquidate. And a lot of these liquidations are going to be sales of substantially all of the assets of the debtor so that, at the end of the day, you’re making decisions about who might be able to deal with those assets in the most economic and effective way. You’re preserving jobs and at the same time achieving the other objectives that the drafters had in mind in 1978.

But I think we will see some increase in liquidations in chapter 11. And also, as you know, the President signed the Deficit Reduction Act of 2005¹² on February 8th. And there’s a provision in there with respect to so-called termination premiums or termination surcharges when you terminate a pension plan in chapter 11. And now the price for that is essentially \$1,250 a head for each participant in the plan, payable each year for three years after you confirm the plan of reorganization. So think of it—if you’ve got a plan with a hundred thousand participants, you’re going to end up with an annual fee of a hundred and twenty-five million dollars, make that three hundred seventy-five million dollars over three years. I would suggest to you that is going to affect, from the standpoint of secured lenders, whether or not they want a liquidation in chapter 11 or whether or not they want a rehabilitation in chapter 11.

¹² Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (codified at 29 U.S.C. § 1306(a)(7)).

And finally, I believe we will continue to see what we've seen for the last forty years in my practice, and that is that bankruptcy lawyers are among the most creative people in the world. And they will find, over the course of the next several years, ways to get around all of these impediments that Congress has placed in their way in order to make sure they get to the ultimate objective that the drafters had in mind in 1978—to rehabilitate and to reorganize debtors who really have no lobby in this world. There is no national association of debtors. And basically, the creditors have been able to lobby for this legislation because they're well-organized and they're well-financed.

And while it is a wonderful thing for them individually, I will submit to you that at the end of the day, it is not what is in the best interest of the bankruptcy process, which I think we as lawyers, that's where we want to be in terms of trying to advance the system.

MR. COHEN: Just one comment. The other part of this is going to be crucial in talking about judicial discretion. The other part is going to be crucial in getting over some of the impediments of some of the bankruptcy judges. And I already notice that they're doing that. They're approaching the 2005 Act in a sensitive fashion. The 1978 Act gave us a great bankruptcy court and now we have great bankruptcy judges. And one of the things that they're doing is they're going into this Act very sensitively. They're trying to see what Congress intended and effectuate it. At the same time, they're also noting all the ambiguities that Congress put in there. And they're trying to come up with common-sensical ways to accommodate what Congress intended while not being too harsh on the system as a rehabilitation vehicle. So I think they're going to be very crucial in this situation and that's what we're going to see as well.

MS. HAGENAU: Well, thank you both. I think we see we have come just about full circle from pre-1978 until today, and clearly, the new Act will continue to present challenges to those of us who practice in this area of law.

