

Remarks on Receipt of Distinguished Service Award

American College of Bankruptcy, March 24, 2023

Douglas G. Baird

Rich, many thanks for those most kind words. I only wish my parents could have been here. My father would have been very proud, and my mother would have believed every word.

Receiving this award reminds me of my extraordinary good fortune. I have been witness to bankruptcy law as it has taken shape over the last 40 years. I graduated from law school just a few months after Rich and Ken Klee put the finishing touches on the Bankruptcy Code. I did not approach bankruptcy law with any preconceived ideas. Indeed, I did not approach it with any ideas at all.

But, like many before me, I discovered that the world of bankruptcy was not how Robert Frost described free verse. It was not playing tennis without a net. There were principles deeply embedded in the law. The honest, but unfortunate debtor deserves a fresh start. Nonbankruptcy rights should be respected in bankruptcy unless a specific bankruptcy policy requires a different result. Plans of reorganization should preserve going-concern value and be fair and equitable.

I spent my journeyman years in the legal academy thinking about the Big Picture, much of it in collaboration with Thomas Jackson. My obsession with the Big Picture is plain from the titles of my papers from this period: A world without bankruptcy; The uneasy case for corporate reorganizations. You get the idea. I was a Young Turk. It was intoxicating and exciting. I was looking at the Big Picture. That's "Big" with a capital B.

But what I was doing was somewhat removed from Planet Earth. This is how one judge later described it:

[It is] original and thoughtful . . . But there [is] an eerie sort of abstraction about [it]. I always [feel] about Baird . . . on bankruptcy a little like I feel about Henry James on love: remarkable stuff, but can you trust an author who doesn't seem to know how babies are made?

Everything changed for me when I got a phone call out of the blue from someone named Ron Trost. I had little connection with the

bankruptcy bench or bar, and I had never met Trost before or indeed anyone else like him. Trost was, and remains, a giant in the world of bankruptcy, and also forthright and to the point. Ron Trost always says exactly what he thinks. And this phone call was no exception. “I probably shouldn’t be doing this,” Trost began. “I’m probably making a big mistake. But I am going to invite you to speak at this conference I am organizing anyway.”

The conference was in Williamsburg celebrating the tenth year of the Bankruptcy Code. It was there I discovered how much was to be gained from listening and watching and not just thinking big thoughts.

At that conference, I found a lifelong mentor in Ron Trost. I met such legends as George Treister. For reasons than are mysterious and indeed inexplicable, I was even invited to more conferences.

At these gatherings and in many other venues, I went on to learn from other greats, from consummate gentlemen like Leonard Rosen to the irrepressible Harvey Miller. And wisdom from splendid judges like Gene Wedoff, Tom Ambro, and Barbara Houser. I learned that bankruptcy law is not about abstract principles, or at least it not *just* about abstract principles.

In the first instance, our bankruptcy law is rooted in history. And our history starts not with the 1978 Bankruptcy Code, but everything that came before. There was Chapter X and Chapter XI. There was the 1898 Act. And stuff from even before that. When confronting mischief done with complicated corporate shell games, we still go all the way back to 1602, *Twyne’s Case*, and a Hampshire farmer who transferred sheep, but continued to shear them and mark them as his own.

But these principles are not locked in some mysterious past. They live and breathe. As they say, history does not repeat itself, but it does rhyme.

New challenges arise all the time. We have dealt with mass torts in bankruptcy for decades, but today the problems are harder than ever. On a single day a few months ago, one-third of the federal civil docket found itself on the desk of a single bankruptcy judge. On another, billions of dollars in cryptocurrencies fell on the desk of a different judge.

And even tougher challenges are coming. There are folks with small businesses down on the luck. Subchapter V is an entirely new bankruptcy regime that may help them— if we do our jobs right. And do not forget

consumer debt either. There are nearly two trillion dollars of student loans, much of which is uncollectable. Our country can deal with this mountain of debt outside of bankruptcy only for so long.

As we pursue these challenges, we must keep an eye on history. When you encounter a new flavor of fraud, there is considerable wisdom to be found in reading *Cunningham v. Brown* and the Supreme Court's take on Charles Ponzi.

Or looking again at *Chicago Board of Trade v. Johnson*, the next time you are dealing with an exotic problem involving a new species of property of the estate. Or *Local Loan Company v. Hunt* when you want to explore the frontiers of the fresh start.

But our history is not fixed in amber. Events force us to look at things in a new light. Ideas that once seemed obvious are no longer as clear. A year ago, I was quite confident I knew what financial distress meant. After *LTL*, I am not so sure.

Bankruptcy is an ever-unfolding mystery, an endless narrative that continues to be written. More to the point, it is history that you are writing. The work you do today isn't history yet, but it will be. This is a world in which each of you is responsible for ensuring that our bankruptcy laws will continue to work as well in the future as they have in the past. You are weaving a marvelous tapestry. It has been, and it continues to be, my great privilege to watch you do it.