



2014

Acceptance Remarks

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Recommended Citation

David G. Epstein, *Acceptance Remarks*, 31 Emory Bankr. Dev. J. 5 (2014).
Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol31/iss1/3>

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**KEN KLEE, RICH LEVIN, LIZ WARREN,[♦] CHICO ESCUELA,
AND ME**

*David G. Epstein**

I am grateful to the *Emory Bankruptcy Developments Journal* for the award and this opportunity to see old friends. And, like myself, a lot of my friends are old.

I. KEN KLEE, RICH LEVIN, LIZ WARREN, AND ME

One of the benefits of being the sixteenth person so honored is that the remarks of earlier recipients published in the *Emory Bankruptcy Developments Journal* are there to learn from. I did my due diligence. I read all of the published remarks of past honorees . . . in a single weekend.

Kind of like watching *House of Cards*.¹ On reflection, reading the published remarks was nothing like watching *House of Cards*. No sex, no violence—instead, most of the published remarks included the Lifetime Achievement Award winners’ suggestions about how bankruptcy law should be reformed.

That presented a real dilemma.

Obviously, I knew what the editors of the *Emory Bankruptcy Developments Journal* wanted. They wanted me to come up with a law reform proposal appropriate for publication in the *Emory Bankruptcy Developments Journal*.

[♦] Ken, Rich, and Liz are only three of the fifteen distinguished honorees from prior years. I included only three names in the title because of the power of the rule of three in rhetoric. See Steven Wisotsky, *Speak with Style and Authority*, LITIG., Winter 2011, at 16, 21 (“The example given is Julius Caesar’s ‘I came; I saw; I conquered.’”).

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¹ Cf. Gina Keating, *5 Myths About Netflix*, WASH. POST, Mar. 3, 2014, at B02 available at http://www.washingtonpost.com/opinions/five-myths-about-netflix/2014/02/21/787c7c8e-9a3f-11e3-b931-0204122c514b_story.html.

[T]he broadband data company Prodera reported this past week that 5 to 15 percent of Netflix subscribers active on several worldwide broadband networks had sampled “House of Cards” and that 2 percent of U.S. subscribers it monitored had finished the series the weekend it was released. “Binge watching is real,” Prodera concluded.

Id.

On the other hand, what Rich Freer² and other friends in the audience wanted was equally obvious to me. They had a much greater interest in getting home in time to watch *The Americans* than in remaining at this dinner to hear how I would reform bankruptcy law.

For months, I wrestled with this challenge of how to be true to my obligations to both the Journal editors and to my friends in the audience. I wrote a speech advocating that consumer bankruptcy should basically be an administrative process³ and then tried writing a speech advocating that bankruptcy judges be required to hire term clerks instead of career clerks.⁴ In time, I realized that the only effect of a speech on either of those topics would be that judges would never appoint me as a claims representative again.

Then, I had an epiphany. And yes, Jews can have epiphanies—at least Jews who have taught at a Methodist school.⁵

Each year, I get two students who do not yet have a job to work with me on a law review article. The students get co-author credit for the article. That seems to have been helpful to the students in getting a job.

As luck would have it, in March, I finished this year's article, and it is a bankruptcy article.⁶ The article focuses on the special treatment bankruptcy law affords to prepetition claims of vendors, landlords, and licensors. It

² Rich Freer is Professor Richard D. Freer, who is the best Civil Procedure teacher at Emory or any other law school at which I have taught. See *Richard D. Freer*, EMORY UNIVERSITY SCHOOL OF LAW, <http://law.emory.edu/faculty-and-scholarship/faculty-profiles/freer-profile.html> (last visited Jan. 15, 2015). Rich is not only a co-author but also a good friend, and my remarks about Rich being “follicly challenged” and watching *The Americans* to decide which of Phillip’s wigs would look best on him does not now seem as funny as it did at the end of the cocktail hour.

³ My suggesting an administrative agency for consumer bankruptcy was hardly an original idea. Both the Brookings Institution study of bankruptcy and the later Report of the Commission on the Bankruptcy Laws of the United States made such a recommendation. See generally COMM’N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. I (1973); DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 196–218 (1971).

⁴ My draft of a speech suggesting that bankruptcy court law clerks be term clerks rather than career clerks was not as well-written or well-reasoned as the essay written by Judge William H. Pryor of the United States Court of Appeals for the Eleventh Circuit that advocates term clerks for all judges. The Honorable William H. Pryor Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007, 1024–26 (2008).

⁵ It is not necessary to reopen the question of whether Emory University is really a Methodist school. Before teaching at the University of Richmond School of Law, I taught at the Dedman School of Law at Southern Methodist University. Larry Brown to the contrary notwithstanding, Southern Methodist University is a real Methodist school as “Methodist” is a part of the school’s name.

⁶ David Epstein et al., *Not Just Anna Nicole Smith: Cleavage in Bankruptcy*, 31 EMORY BANKR. DEV. J. 15 (2014).

criticizes the administrative expense priority status of such prepetition claims. Administrative expense priority status should be limited to payment obligations that arise postpetition. A basic bankruptcy policy is that bankruptcy affects a cleavage, separating prepetition claims from postpetition claims.⁷

While that topic might seem boring, the article has a great title: *Not Just Anna Nicole Smith: Cleavage in Bankruptcy*. Notwithstanding the title (or perhaps because of it) neither the *Harvard Law Review* nor the *Yale Law Journal* offered to publish the article.

Now, at last, we get to the epiphany part. I figured out that if I submitted the article to the *Emory Bankruptcy Developments Journal* a week before this dinner when it was too late for Emory to cancel or find another honoree: (1) the editors would feel obligated to accept the Anna Nicole Smith article; (2) I would have fulfilled my law reform obligations to the Journal; (3) the article would be published in a prestigious journal, making my dean, who gives out research grants, happy; and (4) Professor Freer and the rest of you in the audience could get home in time to watch *The Americans* tonight. And fortunately, all of that worked.

II. CHICO ESCUELA AND ME

I have been fortunate that a lot of bankruptcy stuff that I have tried to do has worked—worked amazingly well.

To borrow from Chico Escuela, bankruptcy has been “berry, berry good to me.”⁸ I have had the opportunity to teach wonderful students at Emory and other law schools, to practice bankruptcy law with incredibly able lawyers at King & Spalding and Haynes & Boone, and to participate in continuing legal education programs in more than forty states.

A lot of people have been helpful to me. Given that David Letterman “owns” top ten lists⁹ and the United States Bankruptcy Code is in title 11 of the

⁷ See *Stalnaker v. DLC, Ltd. (In re DLC, Ltd.)*, 295 B.R. 593, 605 (B.A.P. 8th Cir. 2003) (“The date of the filing of the petition is important because it generally fixes the rights of the estate and other parties in interest. Congress and courts commonly refer to the date of the bankruptcy petition as the ‘date of cleavage.’”).

⁸ *Saturday Night Live* (NBC television broadcast Nov. 11, 1978) (Chico Escuela was a fictional baseball player whose catchphrase was “Baseball been berry, berry good to me!”).

⁹ See Andrew Beckerman-Rodau, *Toward a Limited Right of Publicity: An Argument for the Convergence of the Right of Publicity, Unfair Competition and Trademark Law*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 132, 164–65 (2012) (“[R]ight of publicity actions can be viewed on a continuum that includes both confusion-based and association-based relationships. . . . David Letterman has made his

United States Code,¹⁰ let me just quickly acknowledge eleven especially helpful people:

1. My father, Dr. Isaac Epstein, who was both an uncommonly skilled surgeon and a gifted teacher, operated during the day and taught me math and science in the evening. And he taught me how to teach. So much of what I have done in the classroom and on the lecture circuit has been based on my father's teaching techniques.
 2. My tenth grade English teacher, Alice Lindemann, who taught me how to write. Today, Ms. Lindemann would be dean of a law school like Emory University School of Law or the managing partner of a law firm like King & Spalding, but in the 1950's¹¹
 3. Vern Countryman who taught me bankruptcy and then got me a job teaching bankruptcy.
 4. Roger Noreen of West Publishing who gave me the opportunity to write West's bankruptcy nutshell even though I had only been teaching for a few months.
 5. Judge Homer Drake who invited me to speak at the Southeastern Bankruptcy Law Institute when I was a baby law professor at Chapel Hill and was instrumental in the Institute's decision to be a major donor to Emory University School of Law School when I was Dean.
 6. Professor Steve Nickles, my best friend, the brother I never had, and co-author on many of the books that I wrote and a book that I did not write.
- 7, 8, 9, and 10. Paul Baisier, Sarah Borders, Paul Ferdinands, and Darryl Laddin who were such able associates that I was able to keep a job at King & Spalding because of the quality and quantity of their work.
11. Last and first, Diane Floca Epstein, who has known me since junior high school and mistakenly thought that I could not get any worse than I was as a teenager. To call Diane "my better half" is not only using a sexist phrase from an earlier era but also using the wrong fraction.

humorous top ten lists famous. As a result, using a top ten list in advertising could create a mental association with Mr. Letterman.”).

¹⁰ 11 U.S.C. §§ 101–1532 (2012).

¹¹ See Susan J. Becker, *Being Out and Fitting In*, 46 J. LEGAL EDUC. 269, 270 (1996) (“[W]omen’s career options were pretty much limited to teaching, nursing, or a religious calling. But in the early 1970s a new message blared from every medium: *Women can be anything they want to be.*”).

And the number eleven is the wrong number for counting all the people who have been helpful to me. There have been many, many more. But even with all these people helping me there are a lot more people even more worthy of this recognition—including many of you sitting and listening.

Thank you for sitting and listening.