



Judicial Profile

by Bryan J. Hall and Hon. Alan S. Trust

Hon. Robert D. Drain U.S. Bankruptcy Judge, Southern District of New York

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—Judge Robert Drain

Whether handling first day motions in a multibillion dollar Chapter 11 mega case or facilitating a consensual mortgage modification that enables a consumer debtor to keep her house, no case is too big or too small for Judge Robert D. Drain of the U.S. Bankruptcy Court for the Southern District of New York.

Judge Drain has distinguished himself throughout his career. After graduating cum laude and with honors from Yale College in 1979, Judge Drain attended Columbia University School of Law, where he was a Harlan Fiske Stone Scholar for three years, and received his JD in 1984.

Judge Drain's entire professional career has been dedicated to bankruptcy law. "My interest in bankruptcy began when I was a summer associate between my second and third years of law school," says Judge Drain. "I found the complexities of bankruptcy law, the frequent role of numerous other substantive areas of law, and the strong and often odd personalities of the clients and practitioners strangely compelling." After graduating from Columbia, Judge Drain joined Milbank, Tweed, Hadley & McCloy as an associate in 1984 and, in 1992, joined Paul, Weiss, Rifkind, Wharton & Garrison (Paul, Weiss), becoming a partner in its bankruptcy group in 1993. While in private practice, Judge Drain focused exclusively on large corporate reorganizations, representing various stakeholders including debtors, trustees, secured creditors, unsecured creditors and official committees, as well as buyers of distressed assets. He also undertook bankruptcy-related litigation and representations of clients in out-of-court restructurings.

After nearly 10 years as a partner at Paul, Weiss, on



May 24, 2002, Judge Drain was appointed by the U.S. Court of Appeals for the Second Circuit to become a bankruptcy judge. Judge Drain began his tenure on the bench at the courthouse in the Alexander Hamilton U.S. Custom House in the heart of lower Manhattan, just blocks from Wall Street and ground zero, when New York City was still recovering from the worst terrorist attack in our nation's history. "Obviously, September 11 was an incred-

Judge Alan S. Trust sits on the U.S. Bankruptcy Court for the Eastern District of New York. Bryan J. Hall is a law clerk to Judge Trust.



ibly tragic event whose effects lasted for years,” the judge reflects. “On that day, our courthouse was actually a place of refuge for people who were nearby and needed shelter. In the weeks and months that followed, we also witnessed firsthand some of the unfortunate economic effects of that tragedy; our court handled a number of liquidations of businesses that failed as a result of the attacks.”

When Judge Drain took the bench, the Southern District of New York had already established its reputation as a bankruptcy court that could handle very large Chapter 11 cases, often called “mega cases,” such as Enron and WorldCom (two matters on which Judge Drain had worked while in private practice). With nearly 20 years of experience in such cases, Judge Drain was able to get up to speed very quickly. Within several weeks, he was presiding over several well-known Chapter 11 cases, including telephone company Allegiance Telecom and Italian dairy Parmalat S.p.A. and its U.S. subsidiaries. However, interesting legal questions were not limited to the large cases. “My very first matter as a judge was a constitutional challenge under the Eleventh Amendment—a psychiatrist’s attempt to enforce his discharge against New York State’s attempt to revoke his Medicaid privileges. Another very early case was that of an ambulance service, TransCare, on the brink of liquidation; the debtor’s management, union, and creditors were able to reach a consensual resolution, however, with some encouragement from me, and the company is still operating today,” notes Judge Drain.

As the newest member of the Southern District Bankruptcy Court, Judge Drain not only handled mega cases, but was also assigned the Manhattan courthouse’s Chapter 13 caseload, which was a new experience. “I’ve found the individual cases both interesting and rewarding,” he notes. “We have direct contact with the people whose lives are being affected by our decisions. In fact, most Americans’ experience with the federal courts is through the bankruptcy courts.”

Over the years, Judge Drain has presided over many large Chapter 11 bankruptcy cases, including Loral Space & Communications, commodities and futures broker Refco, the law firm Coudert Brothers LLP, automobile parts manufacturer Delphi, Readers Digest, Frontier Airlines, and more recently grocer The Great Atlantic & Pacific Tea Co. (known as A&P) and baker Hostess Brands, maker of the Twinkie. “Presiding over cases like these presents unique challenges given the various constituencies and numerous parties-in-interest. For example, over 15,000 claims were filed in Delphi. In addition to handling discrete litigation issues, the bankruptcy judge needs to manage these cases, like all Chapter 11 cases, to confirmation of a Chapter 11 plan or to determine, when necessary, when a plan will not be achievable. Sometimes that’s difficult. In Delphi, there was a serious question whether the debtor would survive, although its liquidation would jeopardize GM. Today, however, it has a several billion dollar market cap.”

Judge Drain’s consumer bankruptcy docket expanded in May 2009 when he transferred from the Southern District’s courthouse in lower Manhattan to suburban White Plains,

New York. There, he presides over all consumer cases filed in Westchester and Rockland counties, as well as continuing to preside over Chapter 11 business reorganizations.

From his vantage point in suburban Westchester County, Judge Drain saw firsthand the impact of the 2008 financial crisis on consumer debtors, especially homeowners. As a result, he has been an advocate for the Southern District’s pioneering loss mitigation program (LMP). Introduced in January 2009, the LMP facilitates an exchange of information and dialogue between consumer debtors and secured lenders, monitored by the court. On request of either party, the court enters an order that establishes certain protocols and deadlines for the parties to meet and communicate with the goals of enabling the debtor to remain in his or her house and the lender to restructure a loan in default, thus saving the lender the time and expense of seeking

stay relief and proceeding with foreclosure in state court, a process that can take more than a year in New York State. According to Judge Drain, both creditors’ and debtors’ attorneys sought the establishment of the LMP, and constituents on both sides have strongly supported it. The program’s goal is not to coerce a result; rather, the LMP helps bridge impasses and information glitches to ensure that the parties negotiate in good faith.

On Feb. 1, 2011, Judge Drain testified before the U.S. Senate’s Committee on the Judiciary in support of the LMP, where he pointed out that “about one-half of the loss mitigations that have concluded have resulted in some form of an agreement—usually a loan modification reducing the interest rate and stretching out payments—that has meant that the home remains occupied or that it is turned over in a way beneficial to both sides.” Judge Drain noted that even when a consensual modification cannot be reached, the parties and the bankruptcy process often benefit because borrowers are actually able to engage with their lenders (often an otherwise frustrating process notwithstanding federal programs like the Home Affordable Modification Program, 12 U.S.C. Section 5219a, that encourages loan modifications) while also seeing from a dollars and cents perspective why they could not keep their house.

Judge Drain has also handled a number of international insolvency cases, which include both plenary cases and ancillary proceedings brought under former Section 304 or Chapter 15 of the Bankruptcy Code. Judge Drain has helped to develop the growing body of international insolvency law, presiding over many such cases, including *Corporacion Durango*, *Satellites Mexicanas*, *Parmalat S.p.A.*, and *Yukos (II)*, among others. In so doing, he was again able to draw from his professional experience handling transnational insolvency matters.

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Judge Drain is a member of the International Insolvency Institute and annually presides over a mock transnational bankruptcy case for INSOL International. He is also a fellow of the American College of Bankruptcy and a member of the American Bankruptcy Institute, where he currently serves on the Advisory Board to the Committee on Financing Chapter 11 of the Commission to Study the Reform of Chapter 11.

Judge Drain also takes an active role in training the next generation of bankruptcy attorneys as an adjunct professor at St. John's University School of Law's LL.M. in Bankruptcy Program, where he teaches negotiations in bankruptcy, a course on negotiation techniques and strategies within the bankruptcy context. He also frequently speaks at the Practising Law Institute, the American

Bankruptcy Institute, and law school programs.

Besides his love of teaching, Judge Drain enjoys collecting records, listening to jazz, and cheering on his often-suffering New York Mets, Jets, and Knicks. He also recently finished writing a novel, although he professes, "John Grisham I'm not."

In May 2012, Judge Drain reached a milestone, celebrating 10 years on the bench. "I still really enjoy being a judge; almost every day brings a new issue," says Judge Drain. "I also continue to admire the commitment of bankruptcy professionals to making the system work, notwithstanding limited resources, often nearly impossible financial predicaments and the constraints imposed by the 2005 Amendments to the Bankruptcy Code." ☺