

Lehman Judge Looks Back On Historic Case 10 Years Later

By Alex Wolf

Law360 (September 14, 2018, 3:43 PM EDT) -- Ten years ago, Lehman Brothers Holdings Inc. filed the largest bankruptcy in history, an event that accelerated the global financial crisis and inspired a new regime of banking regulation. Just four days after the Sept. 15, 2008, Chapter 11 filing, Lehman sold the majority of its U.S. business to Barclays Capital for \$1.75 billion in an unprecedented transaction.

U.S. Bankruptcy Judge James Peck presided over Lehman's bankruptcy during its frenetic start and for several more years before leaving the bench in 2014 and joining Morrison & Foerster LLP. He now serves as global co-chair of the firm's business restructuring and insolvency group.



James Peck

Law360 spoke with the retired judge, who shared his thoughts on the gravity of Lehman's historic bankruptcy and what it was like presiding over what he considers the "most remarkable" bankruptcy hearing of all time. Here, Peck discusses how his prior work helped him steward the case and how the Lehman proceedings convinced him that bankruptcies shouldn't always be randomly assigned to judges.

What were your primary concerns or thoughts when you were assigned the Lehman case?

"At least at first, I didn't think about the endgame. I began to think about that as I became more familiar with the issues and the challenges of getting to plan confirmation in a case this enormous. But at first, I disciplined myself to think of the case as just another one of my cases and not to be overwhelmed by it just because it was Lehman Brothers."

"I simply dealt with matters that were presented to me one at a time. I think the only way that a massive problem can be tackled is in very small pieces. So I treated it as part of my ordinary workload. And curiously, it became something that I found increasingly manageable. I never felt overwhelmed by anything in the case."

How did you organize yourself to handle the Lehman case?

"Because Lehman was such a massively complicated and important case, the emergencies were real and the timing demands were nonnegotiable. Things had to happen on a certain expedited schedule."

I credit the professionals who worked on it for their stature, their vision, their creativity, and, when it came to case management, their cooperation with the court in establishing procedures that made sense and that, in practice, worked really well."

"These were days that went on from morning until the evening. And I remember multiple hearings that went on into the late evening."

What prepared you for a case like this?

Pointing to a long career before his time on the bench, Peck said he had some experience working with complicated financial transactions. "That was simply an incidental part of a New York lawyer's practice. By no means did that adequately prepare me for being the judge in the case."

"I had the good fortune in January of 2008 to be asked by a friend on the National Conference of Bankruptcy Judges program committee to serve as panel chair for an educational program to be presented in September of 2008 on the subject of systemic risk. I spent essentially all of 2008 preparing myself for a panel presentation on systemic risk. The consequence of that is that I was paying a tremendous amount of attention to what was going on in the financial markets throughout 2008 and I was also speaking with a number of very sophisticated parties who were panelists with me."

"So I was, in addition to sitting as a bankruptcy judge in the Southern District of New York, thinking about systemic risk and its consequences, and that curiously had the effect of preparing me in ways I never could have imagined would be so relevant to the random assignment of the Lehman case to my docket."

Did you seek advice from anyone when you got the case?

"No. I was on my own in my chambers and the only people that I spoke with were my law clerks."

Did you feel outside pressure from a government agency to approve the emergency sale of Lehman's main assets?

"No. The only way that regulators or governmental entities appeared in court was the way everybody else did: through pleadings and through counsel who appeared and made argument. ... The regulators appeared at [the sale] hearing and they, through counsel, spoke on the record and made it clear to me and to everybody else who was there listening that it was critically important to the U.S. economy and indeed the global economy for the transaction that was before me to be approved."

What was that hearing like, from your perspective?

"It was the single most remarkable hearing in bankruptcy court of all time. It's not just my opinion, but I've heard people who were present in court tell me that. It was dramatic and filled with tension and uncertainty. ... Oddly, as I look back on it, I felt pretty calm for reasons that I cannot explain. I was there to provide procedural due process and to function as the source of judicial supervision for a process that appeared from the bench to be unsettled and lacking coherence."

What ultimately convinced you to approve the sale?

"The record, the evidence and my awareness that there was no alternative. I had a record to support a finding that this was the only transaction, that this was negotiated in good faith at a time of emergency, that it needed to be approved for the benefit not of the world economy, but for the benefit of all stakeholders in Lehman. Lehman was a melting ice cube that had to be sold."

Peck then retrieved a quote of his from the hearing, which he has framed, reading: "It's my job to do what the law permits in the exercise of my discretion. This week, more than any other week since I was appointed to the bench, I have felt the awesome power of this job."

Do you have any second thoughts on approving the sale?

"None whatsoever. I absolutely did the right thing and I'm very proud of it."

Do you think the Lehman sale has been isolated, or has it been used as precedent for other asset sales in bankruptcy?

"Yes. In fact, when I approved the sale, I was very clear on the record when I came back on the bench and made my oral rulings that this was totally unprecedented, that what was happening should not be viewed by anybody else in the future as a reason to do [an asset] sale this quickly. This was a real emergency, not some commercial emergency that was being concocted in order to get a tactical advantage. We were betting the ranch in every sense of the word."

Has the experience changed any of your perspectives on banking regulations or bankruptcy law?

"I think that cases as significant as Lehman Brothers should not be subject to random assignment to judges who may or may not be equipped to deal with cases that significant. I don't mean to say that there should be anything other than the ordinary random assignment of cases, generally. But for certain kinds of cases that require a level of uncommon financial sophistication, there probably should be a select bench — national, not limiting it to any particular court — in which judges who have the requisite financial skills can be called on to deal with cases of this sort. I think random assignment can be dangerous."

Was it difficult to leave the bench with the case still going on?

"No. I had a clear conscience. I left after five and a half years as the Lehman judge and I think that [U.S. Bankruptcy Judge Shelley C. Chapman] has done a truly admirable job as my successor, and part of the satisfaction of the case is that it was left in such good hands. I also think there is a limit to any one individual's ability to stay with something indefinitely and still remain fresh and effective."

Did the case leave any impressions on you?

"I actually think it was invigorating, life-changing in a very positive way, and I look back on the experience with a sense of appreciation that I was fortunate enough to be randomly chosen to handle something as spectacularly interesting and important."

Did it shape any bonds or relationships with those involved in the case?

"I ended up becoming a close personal friend of Harvey's, and that became more obvious after I retired as a judge," Peck said, referring to Weil Gotshal & Manges LLP's bankruptcy practice chair and Lehman's lead attorney Harvey Miller, who passed away in 2015. "There are limits to what judges can do with practitioners, especially those who are appearing in front of them. But we shared the experience of looking into the abyss together, and I think that shared experience was something that allowed us to become peers in ways that would not have been possible had we not worked together on such a significant shared experience."

Is bankruptcy the right place for a large financial institution to liquidate?

"The bankruptcy resolution of Lehman and the bankruptcy resolution of MF Global were both successes, from a bankruptcy perspective. But these are expensive, uncertain proceedings, and there really has to be a better way to deal with the failure of a significant financial institution and to avoid what is now 10 years of litigation."

What does a more ideal form of resolution look like?

"It's Dodd-Frank or something like it. Either regulators are responsible for this or courts are responsible for this. Bankruptcy works well but it's expensive and it's risky. To de-risk the financial system, you want to minimize the many litigations that took place in my court, to the extent you can, and you want to have orderly liquidation authority."

"Let's be frank, bankruptcy judges are not equipped to deal with transactions that require immediate approval. And due process of law requires notice and an opportunity to be heard, and that doesn't happen in a weekend."

--Editing by Alanna Weissman.

This is the first in a three-part series looking back at Lehman's collapse.