EASTERN WASHINGTON BANKRUPTCY NOTES

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October Bankruptcy Seminars Scheduled for Richland/Spokane

By now, you should have received an application for the bankruptcy seminars scheduled in Richland, WA on October 29, and Spokane, WA for October 30. If not, please call William Hames at (509)586-7797, Gary Farrell at (509)353-2999, or Ian Ledlin at (509)838-6055. The cost for members is $20.00 - for six credits, with a delicious lunch included. The seminars are aimed for both the part-time and usual practitioners, and we feel that the program will be of great help to both groups. We have a national speaker in the Honorable Randall J. Newsome, bankruptcy Judge for the district of Oakland, California. Our Judges will inform the bar as to what we can expect for the next 18 months, and have agreed to subject themselves to questions. A credit for ethics is also included.

You may ask why we do it for so little cost? The board of directors of the bankruptcy bar realizes that one of the chief goals of the organization is education, and this seminar at below cost is an effort to meet that goal.

1997 Bankruptcy Seminar and Retreat

By Ian Ledlin

The Bankruptcy Bar Association presented its Annual Seminar and Retreat in June at Sun Mountain Lodge in Winthrop. This year's program was held in conjunction with the Annual Joint East-West Bankruptcy Judges' Meeting.

Featured speakers included the Honorable Barry Russell, Bankruptcy Judge from the Central District of California, and Robin Phelan, of the Dallas firm of Haynes and Boone. Judge Russell has published the Bankruptcy Evidence Manual. Mr. Phelan has written treatises included in Cowans Bankruptcy Law and Practice and in Bankruptcy Litigation Manual.

Judge Klobucher was honored for his years of service to the District at a dinner attended by nearly 150 judges, lawyers and guests.

Thanks to the following, who contributed to the success of this year's Seminar and Retreat: Bruce R. Boyden, Daniel M. Caine, Jean H. Campbell, Frederick P. Corbit, Mary Ellen Gaffney-Brown, Hon. Thomas T. Glover, Hon. Richard P. Guy, William L. Hames, Mary Jo Heston, Hon. John M. Klobucher, Ted S. McGregor, Robert D. Miller, Jr., Hon. Karen A. Overstreet, Robin E. Phelan, John T. Powers, Hon. John M. Rossmeissl, Hon. Barry Russell, Frank W. Smith, Sarah Weaver, Hon. Patricia C. Williams, and Peter Arkison, Tom Bassett, and Gary Farrell.

Mark your calendars now for next year's Seminar and Retreat, June 4 - 6, 1998.

Igwe Pleads Guilty to Bankruptcy Crime

On August 26, 1997, Henry Igwe pled guilty to one count of failing to fully disclose the total income that he was making when he filed his chapter 7 bankruptcy in 1995. Mr. Igwe did so on the second day of his trial. Mr. Igwe had also been charged with failure to disclose an asset in a subsequent chapter 13 (a lawsuit filed against the City of Sunnyside, WA) and for perjury (false statements made under oath in a hearing for a motion to dismiss for substantial abuse before Judge Rossmeissl).

The U.S. Trustee, on a tip, realized that Mr. Igwe had understated him income when he filed his chapter 7. The U.S. Trustee filed a motion to dismiss under §707(b), believing that the debtor could fund a substantial repayment in a chapter 13. In a hearing before Judge Rossmeissl on January 4, 1997, Mr. Igwe testified that his wife was no longer living with him, and did not know where she was. In reality, his wife was downstairs waiting for him in a van, and she ultimately took the stand in the proceeding. Judge Rossmeissl dismissed his case at the conclusion of the hearing.

Mr. Igwe then filed a chapter 13 on April 2, 1997. In the meantime, Mr. Igwe had filed a lawsuit against the City of Sunnyside, Wash., but did not disclose the lawsuit on his schedules.

Mr. Igwe will be sentenced on November 3, 1997.

Inside...

Patricia C. Williams Appointed to Bankruptcy Court Bench

By Ian Ledlin and Gary Farrell

Patricia C. Williams has been appointed by the Ninth Circuit Judges as the Judge for the United States Bankruptcy Court for the Eastern District of Washington in Spokane. Ms. Williams replaced the Honorable John M. Klobucher, who retired on July 11, 1997.

Judge Williams left her partnership in the Spokane law firm of Winston & Cashatt, where she practiced since 1976. Bankruptcy was the primary emphasis of her practice.

Judge Williams is a past officer of the Bankruptcy Bar Association of the Eastern District of Washington and a former treasurer of the Federal Bar Association of the Eastern District of Washington. She is a past president of the Spokane County Bar Association, a past member of the Executive Committee of the Creditor-Debtor Section of the Washington State Bar Association, and was a founding member and past president of the Spokane Chapter of Washington Women Lawyers. Judge Williams also served on the Board of Governors of the Washington State Bar Association.

Judge Williams was sworn in on Friday, July 11, 1997 and reported for work on Monday, June 14. She is rapidly developing a reputation for expecting lawyers appearing before her be prompt and prepared, and for delivering immediate decisions that fairly and carefully address the concerns of debtors and creditors alike.

Lawyers throughout the state will miss the many contributions Judge Williams made to the various Bar Associations with which she was involved, and are looking forward to the contributions she will make from the Bench.

The bankruptcy selection process is long, involved, and perhaps the most open process for the appointment of a federal judge. The process began with a public announcement last Fall, informing of the opening and soliciting applicants. A merit screening committee was appointed by the Circuit. The members were a circuit judge, the senior district court judge and the senior bankruptcy judge or their designees, and members of the local bar.

The application form was 32 pages in length. It required the applicants to outline their practice activities, educational background, professional and community involvement, publications, and the like. It requested writing samples and letters of recommendation. Applicants also were to list recent and significant cases in which they participated, along with the names, addresses and telephone numbers of co-counsel and opposing counsel. The completed applications, with all attachments, took the form of a small book.

The Merit Screening Committee reviewed all applications for the position, and contacted the opposing counsel and co-counsel listed in the Applications. The committee met and selected nine applicants to interview. At the conclusion of the interviews, the committee selected five candidates and drafted its recommendation to the Ninth Circuit. The five finalists, in addition to Judge Williams, were (listed alphabetically): Frederick P. Corbit, J. Ford Elsaesser Jr., Ian Ledlin and John T. Powers, Jr.

The Court-Council Committee, consisting of three Ninth Circuit judges (with the chief of the chief bankruptcy judges sitting as an ad hoc member), interviewed the finalists on February 24, 1997. At the conclusion of the interviews, the committee drafted a report and forwarded it to the Ninth Circuit Judicial Council. The Judicial Council reviewed the recommendations for the Court-Council Committee and forwarded the name of one candidate to the full Court of Appeals. The Court of Appeals then selected Judge Williams as the nominee. After Judge Williams cleared an FBI background check, her appointment was confirmed.

Judge William's appointment is for 14 years. The bankruptcy bar looks forward to many productive and satisfying years working with her.

FOR SALE

A limited quantity of written material for the 1997 Bankruptcy Seminar and Retreat are available for $10.00.

These materials include excerpts from Judge Barry Russell's Bankruptcy Evidence Manual, a treatise on Bankruptcy Ethics issues, and a bankruptcy Case Law Update.

To order your copy, send a check for $10.00 payable to Bankruptcy Bar Association, c/o Ian Ledlin, Phillabaum, Ledlin, Matthews & Gaffney-Brown, 421 W. Riverside Ave., 900 Paulsen Center, Spokane, WA 99201.

Williams' Recusal Policy

The following policy will be in effect as to all cases pending before Judge Patricia Williams or assigned to her in the future.

Disclosures. Judge Williams is a former partner of Winston Cashatt in Spokane, WA. Prior to assuming the bench in July of 1997, Judge Williams regularly represented General Motors Acceptance Corporation. She also represented Seattle First National Bank in certain matters.

Recusal Policy. Until August of 1998 Judge Williams will not hear cases in which a significant party in the case is represented by Winston Cashatt e.g. as counsel for the debtor, the trustee, the unsecured creditors committee or a major secured or unsecured creditor. If Winston Cashatt represents a significant party, the case will be transferred to another judge. In other cases where Winston Cashatt does not represent a significant party in the case but does represent a party involved in a contested matter, that contested matter will be determined by another judge.

Until August of 1998 Judge Williams will not hear any cases in which General Motors Acceptance Corporation (GMAC) is a significant party in the case e. g. as a major secured or unsecured creditor. For example, if GMAC provided financing to a Chapter 11 debtor such case would be transferred to another judge. In other cases where GMAC is an interested party in a contested matter, that matter will be determined by another judge. For example, in a Chapter 13 proceeding if GMAC were to file a motion to lift stay, that motion would be heard by another judge but the case would not be transferred. The same recusal policy will be followed concerning Seattle First National Bank.

In any situation in which counsel believe that recusal by Judge Williams should be considered, even though it may not fall within the above guidelines, counsel should immediately notify Judge Williams' chambers. Cases filed or contested matters occurring after August 1998 will be reviewed on a case-by-case basis if Winston Cashatt appears or GMAC or SFNB is an interested party.

On Judge Klobucher's Retirement

June 28, 1997

Honorable John M. Klobucher
U.S. Bankruptcy Court
Eastern District of Washington
Post Office Box 1493
Spokane, WA 99210

Re: On the occasion of your retirement from full time judicial service

Dear Judge Klobucher:

I am writing you as you approach your retirement from full time service as Bankruptcy Judge for the Eastern District of Washington on July 11, 1997. Your term in office has been a full and eventful one.

Appointed to the bench on December 3, 1981, your service has spanned the most turbulent era for the bankruptcy courts in over half a century. The challenges faced included the difficulties and problems of implementing the new Bankruptcy Code, the Marathon decision and the chaos of its aftermath, the struggle of the newly constituted bankruptcy judiciary to establish its own identity, the implementation of Chapter 12 which provided much needed relief to the family farmers of our district, and the struggle to meet the ever increasing demands on our court caused by the economic vagaries of the 80's and 90's.

During the mid 1980's, you faced a huge case load which made you one of the busiest bankruptcy judges in the country. This burden was compounded by the travel necessary to serve the litigants of the district at four different venues scattered throughout the district. Suffice it to say your work load was crushing.

Faced with the crisis and the responsibility for administration of the bankruptcy system in the district, you responded with remarkable innovations. Perhaps the most important and far sighted one is the introduction of telephone hearings for non testimonial hearings. Our district was one of the earliest to rely on this most efficient and economical means of conducting court proceedings in a large geographic area. By conducting hearings by phone the litigants, many of them in strapped financial condition, and the public saved huge sums in professional fees and travel expenses. The use of telephone hearings has become so convenient and popular in our district that fully two thirds of our hearing time is conducted by phone. Only now, ten years after the initiation of this innovation, are other courts coming to see the beauty of this procedure which is extremely popular wherever it is adopted.

Likewise it is your administrative leadership which sparked the automation of our court. We have been on the cutting edge of implementing technological advances in the work of our court thanks to your direction. Within weeks, the public will be able to access, via their own computers, pleadings in our court files without leaving their homes or offices.

Your direction has enabled this to happen and make our court one of the first in the country to provide this revolutionary public service.

Despite the importance of these very significant contributions, they are not in my mind the most important. The most significant of your contributions is the tone you have set for the administration of justice and the practice of law. Your informal demeanor, your ability to see to the heart of the matter, and your sense of justice leavened with compassion, have made your court a place where practical and just results are reached for difficult problems. This tone has permeated all that we do which in turn has enabled all involved in the administration and practice of bankruptcy law in the district to ably serve the public and the parties.

The bankruptcy bar owes much to your innovative mind. It was your idea which sparked the formation of the Bankruptcy Bar Association in our district. Likewise it was your initiative which introduced the very popular Notes publication which periodically advises practitioners of current important decisions made in our district. The Bar's high regard and warm feelings for you were very evident at the banquet given in your honor at the most recent Sun Mountain Retreat (by the way that annual retreat was another of your ideas).

Having expressed the public and the Bar's gratitude for your faithful service, I would now like to express my own personal debt of gratitude. As you are aware, it was your suggestion and encouragement which inspired me to apply for a position on the Bankruptcy bench in this district. Your support in establishing a permanent duty station and bankruptcy court facility in Yakima was of great importance to me and has immeasurably increased the access of parties residing in the western half of our district to our court. Your wise counsel has been of great aid over the years. I greatly enjoy and benefit from our weekly conferences when we discuss the knotty problems of the district. I have the greatest of respect and affection for you and owe you a deep debt of gratitude.

It was with the greatest pleasure we have heard that Chief Judge Proctor Hug has asked you to continue to serve the Ninth Circuit in a recall capacity. Thus you will be able to act as a bankruptcy judge in our district and other districts in the Circuit on a part time basis. Judge Williams and I certainly will appreciate your continued help and wise counsel as we struggle to face the challenges of a record case load. It is a comfort to all of us that you will be here to help us meet the demanding challenges we face as we approach the 21st century.

Our best wishes to you, your wife Ginger, and your family at this time of celebration.

Yours very truly,

JOHN A. ROSSMEISSL
CHIEF BANKRUPTCY JUDGE

Letter of Thanks

To the Members of the Bar:

Thank you!

I'm writing to you, on behalf of John and myself, to express our appreciation and gratitude for the warm and wonderful tribute that you prepared for him at Sun Mountain in June.

A special thank you to the organizers and presenters that put thoughtful time, effort and humor into the program. We were very touched.

On a personal level, I especially thank you for the warm friendship and acceptance you have given to us over the years and the honor and respect that you have given to both of us over the years and the honor and respect you have shown the robe, and I hope, the man.

In gratitude to the best Bankruptcy Bar in the United States!

John & Ginny Klobucher

Judge Klobucher's Pending Cases

Editor's note: As practitioners, you need to know which judge is assigned to your case. The following lists of Judge Klobucher cases are current as of September 12, 1997. As you can well imagine, the list is truly a work in progress as conflicts are discovered. It is a safe general statement that the remaining "Spokane" cases are Judge Patricia Williams cases, and the remaining "country" cases are Judge John Rossmeissl cases.

Judge Klobucher's Bankruptcy Cases

CASENO	*JDG*	*CHAP*	*FILED*
DEBTOR			
84-02413	K41	11	11/07/84
WHEATLAND SUPPLY CO INC			
85-01648	K41	11	07/15/85
LUCKY BADGER ORCHARDS INC			
85-01798	JMK	7	08/01/85
VOSS, LAWERENCE EDWARD			
88-00730	K31	11	06/16/97
INDIAN WELLS ORCHARDS			
90-01138	K11	11	04/12/90
BRODRICK, WARREN E, JR			
91-00857	K11	11	03/18/91
STAR PHOENIX MINING COMPANY			
91-01165	K1B	7	07/31/97
SIGNPOSTERS INC			
91-02087	K11	11	06/28/91
BUNKER LIMITED PARTNERSHIP			
91-02474	K13	13	09/11/96
SOLVERSON, NEIL RUSSELL			
91-03317	K1O	7	07/29/97
SUPREME FOODS INC			
91-03789	K1B	7	03/15/95
L-BAR PRODUCTS INC			
92-01154	K11	11	04/17/92
NORTHWEST TRAVEL AND RECREATION INC			
92-03562	K11	11	12/03/92
OMACHE LIMITED PARTNERSHIP			
92-03563	K11	11	12/03/92
OMACHE PARTNERSHIP			
93-00785	K11	11	03/24/93
HAL R & EVA L DIXON SURVIVORS TRUST			
94-02037	K11	11	08/10/94
MASINGALE, MONTE L			
94-02696	K1B	7	10/24/94
FRITZ, SHARON L			
95-00251	K11	11	01/27/95
PHOENIX CONSTRUCTION NORTHWEST INC			
95-01095	K11	11	04/14/95
UTTER MOTOR COMPANY			
95-01096	K11	11	04/14/95
UTTER INFINITI INC			
95-01937	K11	11	06/26/95
KAL MISS INC			
95-02938	K12	12	09/20/95
LAUTENSLAGER, DAN			
95-03804	K11	11	05/30/96
EVANS, WILLIAM VICTOR			
96-01317	K11	11	05/17/96
MIKE'S PAINTING INC			
96-01352	K13	13	03/28/96
STEPHENS, MICHAEL L			
96-01632	K13	13	04/16/96
SMITH, CATHERINE LOUISE			
96-02141	K11	11	05/16/96
RAY GENERAL ENTERPRISES INC			
96-02640	K11	11	06/18/96
MARJAN CONSTRUCTION INCORPORATED			
96-02967	K13	13	07/11/96
MASINGALE, MARK T			
96-02980	K11	11	07/11/96
FONTANA PROPERTIES LIMITED PARTNERSHIP			
96-03054	K11	11	07/16/96
ROBOTIC PROCESS SYSTEMS INC			
96-03301	K11	11	07/31/96
SOUTHERN CALIFORNIA LIMITED PARTNERSHIP			
96-04079	K1K	7	07/30/97
GENERAL MANAGEMENT CORPORATION			
96-04175	K1K	7	07/30/97
10TH & MAPLE LIMITED PARTNERSHIP			
96-04178	K1K	7	07/30/97
13TH & MAPLE LIMITED PARTNERSHIP			
96-05168	K21	11	11/21/96
BRADLEY LANDING ASSOCIATES LTD			
96-05174	K11	11	11/22/96
LANCER ENTERPRISES INC			
96-05299	K12	12	12/02/96
WEGNER, GARY L			
96-05442	K1G	7	12/10/96
D L WARD & ASSOCIATES INC			
97-00124	K11	11	01/10/97
JAKE'S STEAK PIT INC			
97-01527	K1G	7	07/31/97
VINCENT, HELEN LOUISE			
97-01626	K11	11	03/25/97
W T B INC			
97-01705	K1Z	7	08/05/97
INLAND NORTHWEST LEASING INC			
97-01781	K1R	7	04/01/97
WARD, LOLETTA L			
97-01790	K1R	7	08/14/97
POWELL, JAMES BERNARD			
97-02759	K11	11	05/19/97
SNYDER, ROBERT B			

Judge Klobucher's Adversary Proceedings

ADVNO	*JUDGE*	*CAPTION*	*NATURE*
93-00082	K13	SOLVERSON v REMBOLT	454
94-00060	K1G	SMITHS PACIFIC SHRIMP INC v SILVA	426
94-00139	K11	BUNKER LTD PA v CENTURY INDEMNIT	454
94-00156	K11	L-BAR PRODUCTS IN v N'WEST ALLOYS	454
94-00210	K1B	FRITZ v WASHINGTON MUTUAL	454
95-00042	K1O	DELOBEL v PENNSYLVANIA HIG	426
95-00146	K11	STAR PHOENIX MINI v WEST ONE BANK	434
95-00153	KAD	NEU-INVEST INC v COHIG & ASSOCIAT	454
96-00003	K13	JONES v WA STATE	434
96-00033	K1B	COLBAUGH v NEWMAN	426
96-00088	K11	UTTER MOTOR COMPANY INC v HOLMS	454
96-00102	K11	UTTER MOTOR CO v NORWEST CORP	454
96-00120	K11	KAL MISS INC v ROY STANLEY CHEV	454
96-00144	K1G	PIERRE EQUIP. v RAYMOND D SACCHI	426
96-00151	K1R	BOUSSARD v NORTH	426
96-00166	K1B	L-BAR PROD. INC v N W ALLOYS INC	454
96-00171	K13	SMITH v HAYS	435
97-00014	K12	CARR v WEGNER	426
97-00026	K11	MCNEIL v EMPIRE FINANCIAL	457
97-00027	K1B	JAMES v NELA, WSU	426
97-00036	K1G	FORT KNOX FEDERAL v SMITH	426
97-00054	K11	EVANS v EKSTROM	454
97-00066	K11	UTTER MTR CO. v LAYMAN LOFT & WH	454
97-00067	K11	UTTER MTR CO. v SPOKANE CLUB INC	454
97-00068	K11	UTTER MTR CO. v FRED B & NANCY H	454
97-00069	K11	UTTER MTR CO. v GENERAL MOTORS A	454
97-00070	K11	UTTER MTR CO. v UNIGLOBE EXCEL T	454
97-00071	K11	UTTER MTR CO. v AMERICAN EXPRESS	454
97-00072	K11	UTTER MTR CO. v MACOM ENERGY INC	454
97-00073	K11	UTTER MTR CO. v NORDSTROM INC	454
97-00074	K11	UTTER MTR CO. v WESTERN TITLE &	454
97-00076	K11	UTTER MTR CO. v MURRAY & KAUFMAN	454
97-00077	K11	UTTER MTR CO. v YELLOWSTONE TRAN	454
97-00078	K11	UTTER MTR CO. v GOODALE & BARBIE	454
97-00092	K11	INLAND NORTHWEST v MONTAGUE	454
97-00093	K1B	BANK OF AMERICA v WICKER	426
97-00103	K11	W T B INC v ICON HEALTH, ET AL	435
97-00109	K11	SNYDER v MILLER	434
97-00124	K13	GARCIA JR v WA STATE EMPLOYM	434
97-00165	K11	INT'L. HOU v RAY GENERAL ENT	454
97-00171	K1B	GALLUCCI v VERN BYRD & ASSO	434
97-00182	K21	BRADLEY LANDING A v LINDA ADLER	454

From the Clerk

Advisory Committee Members Named

The judges of the court have established a Standing Advisory Committee by general order. The purpose of the committee is to serve as a representative body to provide advice and comment to the court in areas of mutual interest, including local rules, practices and procedures. Members of the committee are the judges of the court the clerk of the court, the chairman of the Bankruptcy Bar Association, the Chapter 12 and 13 standing trustees, the assistant United States trustee for the Eastern District of Washington, and five lawyer representatives. Anyone who would like to bring a matter on for discussion by the committee may do so by contacting any member of the committee. All members may request items to be placed on the agenda. The committee held its initial meeting at Sun Mountain in June and decided to meet three times a year, in addition to its meeting at the annual seminar of the Association. The exact dates of these meetings have not yet been established, however, two of the meetings will be by telephone conference. The names and contact numbers are listed below:

Ted McGregor - Clerk of Court
Phone: 509-353-2404, ext. 228
Fax: 509-353-2417
Address: 904 W Riverside, 3rd Floor, Spokane WA 99201

Jake Miller - U.S. Trustee
Phone: 509-353-2999
Fax: 509-353-3124
Address: 920 W Riverside, #593, Spokane WA 99201

Ford Elsaesser - Chapter 12 Trustee
Phone: 208-263-8517
Fax: 208-263-0759
Address: 123 S 3rd, 2nd Floor, Sandpoint ID 83864

Dan Brunner - Chapter 13 Trustee
Phone: 509-747-8481
Fax: 509-623-2126
Address: 818 W Riverside, #540, Spokane WA 99201

Ian Ledlin - Debtor Consumer
Phone: 509-838-6055
Fax: 509-625-1909
Address: 900 Paulsen Bldg., Spokane WA 99201

Bill Hames - Bankruptcy Bar Association
Phone: 509-586-7797
Fax: 509-586-3674
Address: 601 W Kennewick Ave, Kennewick WA 99336

Jim Conley - U.S. Attorney
Phone: 509-353-2767
Fax: 509-353-2766
Address: 920 W Riverside, #300, Spokane WA 99201

Tony Grabicki - Panel Trustee
Phone: 509-747-2052
Fax: 509-624-2528
Address: 1500 Seafirst Ctr., Spokane WA 99201

John Powers - Creditor Business
Phone: 509-455-6000
Fax: 509-838-0007
Address: 1200 Washington Trust Bldg., Spokane WA 99201

Jim Hurley - Debtor Business
Phone: 509-248-4282
Fax: 509-575-5661
Address: 411 N 2nd Street, Yakima WA 98901

Rick Hayden - Creditor Consumer
Phone: 509-624-1111
Fax: 509-456-8654
Address: 1427 W 6th Ave., Spokane WA 99204

Filings Reach All Time High

Filings in the Eastern District of Washington and nationwide are breaking all previous records. Nationally, filings for the period January 1997 to June 1997 have increased some 30.5% over the previous year for the same time period . In our own district for the same period the increase has been 26.7%, among the highest in the nation. Below are statistics that provide detail.

NATIONWIDE:
January through June of 1997, 722,241 cases filed
January through June of 1996, 553,311 cases filed

USBC, EDWA:
January through June of 1997, 3,571 cases filed
January through June of 1996, 2,818 cases filed

Modifications

Chapter 13 plans may be modified before or after confirmation. However, it is important to pay attention to when a modification is made since different procedures apply. Modifications to a plan made prior to confirmation are able to be made only by the debtor as set out in 11 U.S.C. §1323. LBR 2083-1(k)(1) requires 20 days notice to the master mailing list, and hearing be given, except that LBR 2083-1(k)(4) does permit a modification by stipulation between the trustee and the debtor where no parties are adversely affected. If this rule is used, a representation must be made that no party will be adversely affected. A plan may not be confirmed until the time to object to any pre-confirmation modification has expired and any objections resolved.

Modifications made after confirmation are allowed by 11 U.S.C. §1329 and may be proposed by the debtor, trustee or the holder of an unsecured claim, and then only for the purposes set out in the statute. LBR 2083-1(k)(2) sets out the procedural requirements and when the modification becomes effective. Close attention needs to be paid to LBR 2083-1(k)(5) which requires that the Chapter 13 trustee receive copies of documents relating to modifications.

Chapter 13 Concerns Discussed

The judges recently participated in a meeting with the clerk's office and Chapter 13 office which was a general review of how chapter 13s are processed. This meeting was prompted by the fact that there are presently pending in the court some 1,036 unconfirmed chapter 13 cases, which represents 44% OF ALL PENDING chapter 13 cases. As a result of this meeting the following actions were agreed upon by the participants:

Uncontested confirmation hearings will be placed on the court's calendar by the court only after review by the clerk's office for procedural correctness. Plans that are not ready for consideration by the court due to procedural discrepancies will be returned to the Chapter 13 Trustee for correction of the discrepancies.

If the court declines to confirm a Chapter 13 plan, a re-hearing will be scheduled to a date certain, unless cause exists to not set a specific date.

Specific expectations and time standards will be developed, along with reports that will identify selected statistical data, particularly the time from filing to confirmation of plans.

From the Clerk cont'd

Areas in which lack of knowledge or awareness of rules and procedures may be causing time delays will be identified and methods developed for passing information to plan preparers so that more "confirmable" plans are able to be filed.

Establish an expectation for the time in which most plans ought to be confirmed, and if plans are not confirmed within that time a procedure for conversion or dismissal of the case.

Adequate Protection Orders Encouraged

11 U.S.C. §1326 (a)(2) provides that distributions in a chapter 13 are made pursuant to a confirmed chapter 13 plan, however, LBR 2083-1 (l)(6) provides that adequate protection payments may be made prior to confirmation with an order of the Court. Most normally, these are orders are submitted ex parte by the debtor for the purpose of ensuring that secured debts that are to be paid through the plan are properly serviced prior to confirmation. Without such an order the secured creditor is left unpaid until the plan is confirmed, which in some cases causes the secured creditor to seek to lift the automatic stay.

Adequate Protection Orders Not to Include Attorney Fees

Attorney fees are payable as a cost of administration through a Chapter 13 plan, and are normally paid by the Chapter 13 trustee after the plan is confirmed. Payment of attorney fees as adequate protection based on LBR 2083-1(l)(6) prior to confirmation of the plan is not within the contemplation of this rule.

Most Common Errors

The following is a list of the most common errors that the case administrators are seeing as they process files and documents. Attention to these areas will serve to allow this office to serve its customers better and more efficiently:

- Name and case number on pleadings do not match;
- Documents, particularly Proofs of Claim, do not contain the case number, or do not contain the last three digits or letters of the case number;
- Document is not signed or endorsed by attorney;
- Mandatory local forms not used;
- More than one item is included in a document where such practice is not permitted by rule, such as notice and certificate of mailing;
- Correct number of copies not included;
- The notice or MML is not attached to a certificate of mailing;
- A self-addressed stamped envelope is not provided for return of copies;
- Form documents are of poor quality due to excessive copying;
- Statistical/Administrative Section of Petition contains inaccurate information as to whether or not there will be funds available to unsecured creditors.

Use of VCIS Victim of Its Own Success

Presently this court employs a Voice Case Information System (VCIS) that handles approximately 4400 calls per month. You may find the system is busy during peak hours of use, 9 a.m. to 12 p.m. Monday through Friday. Therefore, it may be easier to gain access to the VCIS at other times of the day.

Efforts are under way to make VCIS available 24 hours per day 7 days per week and to add additional lines and features.

To access VCIS call the Clerk's office (353-2404) and press 6 when the voice mail system answers your call. If you need additional assistance using VCIS please call Denise at extension 215 or Jo Ann at extension 218.

Desk-Top Faxing

Desk-top faxing, a technology recently employed by the court enables court employees to send or receive faxes utilizing their desk-top computer.

To send a fax to a court employee's desk-top you must first place a call from your fax machine to the Clerk's Office telephone number, 353-2404, and then enter a three digit fax extension number. These new extension numbers are the same as each employee's regular telephone extension number but begins with a 3 instead of a 2. For instance, Jolene Britton's fax extension number is 343 and her telephone extension is 243.

The fax call must be monitored until the Clerk's Office voice mail answers and the three digit fax extension is entered. The fax will then go directly to the employee's desk-top.

If you would like to use this service and have any difficulty please call Denise Christenson at extension 215 or Kent Myles at extension 219. A voice mail and fax mail extension list with employee names is included in this edition of NOTES for your convenience.

PAS Pitfalls

When searching PAS to see if an entity has filed a petition for relief, not only will bankruptcy case names and numbers appear, adversary parties and numbers will also. This can be confusing, but to clarify, click on the name and see if basic case or adversary information appears.

Imaging

The court began imaging in all documents in January of 1997, and to date the court's image data base contains approximately 300,000 images. Presently these images are retrievable internally, and on the computers located in the viewing room of the Clerk's Office in Spokane. It is anticipated that external use will be initiated by January 1998.

Requests to Delay Granting Ch. 7 Discharge

FRBP 4004(c) provides that on motion of the debtor, the court may defer granting a chapter 7 discharge for 30 days, and on motion, within such period, may defer entry of the order of discharge to a date certain. This provision is usually used so as to allow the debtor additional time in which to enter into a reaffirmation agreement, since 11 U.S.C. §524(c)(1) requires that a reaffirmation agreement must be entered into before the granting of a discharge. Once the first deferral is allowed, unless an extension motion is made, the discharge will be granted promptly after the expiration of the 30 days.

Returning Proposed Orders Inefficient and Time-Consuming

LBR 2002-1(e) allows for the signing of orders based on notice and hearing where there is no objection pending. When a pro-

From the Clerk cont'd

posed order is received by the court based on this rule, it is the function of the Clerk's Office to ensure that the order is procedurally ready for signing. This is accomplished by the use of local form AD 08, which was published in the Fall 1996 edition of NOTES, along with the Notice and Hearing Tables. Copies of these documents are also available over PAS or from the Clerk's Office on request. Persons submitting orders for signature are encouraged to use this form as a checklist to ensure that all the necessary supporting documents have been filed. Reviewing proposed orders for procedural correctness is a significant part of the job of the Clerk's Office. Returning proposed orders is time consuming, expensive and inefficient for the Clerk's Office, and equally so for the presenter.

Address for Objection for Proofs of Claim

LBR 3007-1 sets forth certain requirements for objections to the allowance of a claim and directs on whom the objection is to be served. If the objection is to be served on the claimant by mail, it is appropriate to send the objection to the claimant at the name and address stated by the claimant on the proof of claim form where notices should be sent.

Application for Payment of Filing in Installments

FRBP 1006 allows for the payment of filing in installments, however, if the debtor has paid or transferred any money to an attorney or other person in connection with the case, the application is not able to be granted. FRBP 1006(b)(1) requires that the application state that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case. If an application is not granted, for this or for any other reason, the debtor will receive 5 days notice and hearing to pay the filing fee in full, and if it is not paid and no objection is made, the case will be dismissed.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

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(509) 353-2404

Employee Name	*VOICE Ext. #*	*FAX Ext. #*	*Title/Responsibility*
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Jolene Britton	243	343	Court Room/ Calendar Deputy
Kathleen Chapman	227	327	Clerk's Secretary
Denise Christenson	215	315	Automation/Financial
Dianna Cunningham	225	325	Operations Manager
Trish Elser	213	313	Case Administrator
James Grisham	207	307	Case Administrator
Wendy Jo Imming	214	314	Case Administrator
Jo Ann Jennings	218	318	Automation/Financial
Jill Laurie	204	304	Case Administrator
Terri Lockwood	201	301	Intake/Front Counter
Marcia Matzinger	210	310	Case Administrator
Ted McGregor	228	328	Clerk of the Court
Kent Myles	219	319	Automation/Financial
Karen Munding	208	308	Case Administrator
Shannon O'Brien	226	326	Chief Deputy Clerk
Kelly Parsley	216	316	Automation/Financial
Neal Penney	242	342	ECR Operator
Joyce Peters	206	306	Case Administrator
Denise Schuster	211	311	Case Administrator
Dee Sindlinger	240	340	Judge Williams' Secretary
Mary Welch-Knowles	224	324	Automation/ Financial Manager
Lee Wolfand	209	309	Case Administrator

Your Contributions Are Welcome!

This edition boasts articles that are timely, relevant to our practice, and, as you can see, very well written. We need many more of such articles. And we know that the talent pool in our district has been barely tapped. Please submit your articles on a floppy disk (formatted in WordPerfect if possible).

Clinic Established for Bankruptcies

The Spokane County Volunteer Lawyers Program (VLP) and **University Legal Assistance (ULA)** have started a jointly-operated **Personal Bankruptcy Legal Clinic.** Staffed by law students enrolled in Gonzaga's clinical law program and volunteer attorneys specializing in bankruptcy, the clinic will provide legal services for Ch. 7 personal bankruptcy to low-income residents of Spokane County and clinical instruction in bankruptcy to Gonzaga law students, supervised this fall by Nancy Isserlis and Mary Ellen Gaffney-Brown. VLP referrals are screened through a Screening Clinic presented by Bev Benka and Richard Solis.

Spokane County volunteer attorneys are needed. For more information call Ms. Gaffney-Brown at 509-838-6055.

News from Chambers

By Bev Benka,
Law Clerk for Judge John Klobucher

Judge Klobucher Retires — Recalled by Chief Judge of the Ninth Circuit

The Honorable John M. Klobucher retired on Friday, July 11, 1997, after 16 years of service as a Bankruptcy Judge in the Eastern District of Washington. Judge Klobucher's retirement was, however, short-lived. He was recalled into service effective July 13, 1997, by Chief Judge Hug, United States Courts for the Ninth Circuit, and was back in the office on Monday, July 14.

Judge Klobucher is retaining a number of bankruptcy cases, including several chapter 11 cases with complex histories. He will also be handling those matters from which the newly-appointed bankruptcy Judge, The Honorable Patricia Williams, has recused herself. Judge Klobucher will also be assisting with the Yakima docket in September during Judge Rossmeissl's absence and with the Central District of California's docket in early 1998.

Beverly A. Benka Appointed as Judge Klobucher's Law Clerk

Beverly A. Benka will continue to serve as Judge Klobucher's Law Clerk. Ms. Benka was appointed in May, 1996, as one of two law clerks serving Judge Klobucher. Prior to joining the Bankruptcy Court, she was an associate at a local firm and practiced in Eastern Washington and Northern Idaho. Ms. Benka graduated from Gonzaga School of Law in 1994.

Julianne L. Hirsch Appointed as Judge Williams' Law Clerk

Julianne L. Hirsch has been appointed as Law Clerk to Judge Patricia C. Williams. Formerly, Ms. Hirsch served as senior law clerk to Judge John Klobucher from January, 1990 through July, 1997, and as law clerk to Judge Ward Hanel from November, 1987 through December 1989. Ms. Hirsch will be on maternity leave from late-September through late-November. Her temporary replacement will be announced at a later date.

Dee Sindlinger Appointed as Secretary to Judge Williams

Dee Sindlinger has been appointed as Secretary to Judge Patricia Williams, effective September 2, 1997. Ms. Sindlinger is a certified paralegal and currently works as a part-time secretary to Judge Wm. Fremming Nielsen in the Federal District Court for the Eastern District of Washington.

Jolene Britton Continues as Case Manager

Jolene Britton is continuing in her position with the Bankruptcy Court Clerk's Office as a Case Manager and will be scheduling Judge Williams' docket and serving as courtroom deputy. Ms. Britton has been with the Court since 1981.

Clerk's Office Appoints Neal Penney as Electronic Court Recorder

Neal Penney has joined the Bankruptcy Court Clerk's staff and will be performing ECR functions for the Court. For the past nine years, Mr. Penney worked in Superior Court as a bailiff and court recorder. Prior to that position, he worked for Kaiser and Douglas, after graduating from a paralegal program. Mr. Penney hails from Montana, Alaska, Nevada and points West.

Practice Tips...

from the Spokane Chambers

Scheduled Hearings. Judge Williams has initiated a "no continuances" policy regarding scheduled hearings. Once a hearing is placed on the docket, a continuance will not be granted absent exigent circumstances. Matters will be taken off the docket only if an agreed order resolving the issues is received in chambers prior to the scheduled hearing.

Chamber Copies. Local Rule 9073-1(e)(2) provides that when a document to be considered at a hearing is filed LESS than SEVEN DAYS before the hearing, a copy is to be delivered to chambers. For instance, if a chapter 13 plan is modified the day before the hearing, the preparer must deliver a copy to the appropriate Judge's chambers.

Scheduling Conferences in Adversary Proceedings. FRBP 7026 requires the parties to an adversary proceeding to confer at least 14 days before a scheduling conference is held and to submit a proposed discovery plan to the court at least five days before the scheduling conference. The sanctions for failure to comply with this rule are set out in FRBP 7037(g). FRBP 7016(f) sets out the sanctions for an attorney who fails to appear at a scheduling conference, is substantially unprepared to participate, or fails to participate in good faith.

Objections to Claims. Pursuant to Local Rule 3007-1, an objection to claim must include an affidavit or statement under penalty of perjury sufficient to overcome the prima facie effect of the proof of claim. Orders disallowing claims which are submitted ex parte will be returned if there has not been compliance with this rule.

Proposed Orders. Now that there are two Judges in Spokane and it is not always possible to know which Judge will be signing a document submitted to the Court, please format the signature block as follows:

DATED:

_____
United States Bankruptcy Judge

A *RASH* DECISION: Valuation of Secured Claims in Chapter 13 Cases

By Ian Ledlin

How is a creditor's collateral to be valued in a Chapter 13 case? This is an important question to creditors and debtors alike.[1] If the debtor elects to retain the collateral, she must pay the secured creditor its full value if the obligation is undersecured, or the full amount of the debt if the collateral is oversecured. Valuing collateral at wholesale (e.g., the amount the creditor would receive at a foreclosure sale) makes it easier for a debtor's plan to pay for the property;[2] while valuing the property at replacement value (e.g., fair market value) will benefit the creditor holding the claim secured by the property.

The U.S. Supreme Court addressed this issue in *Associates Commercial Corp. v. Rash*, 65 LW 4451 (1997). There, Rash had obtained financing from Associates for the purchase of a truck. When Rash filed his Chapter 13 case, he owed Associates $41,171. Rash's Chapter 13 Plan provided that he would retain the truck and pay Associates $31,875 (the foreclosure value) on the secured portion of its claim. Associates objected, claiming the replacement value of the truck was $41,000, and that Rash should be required to pay that amount.

The Fifth Circuit determined that Associates was only entitled to receive the foreclosure value of the property.[3] It determined that requiring the debtor to pay the replacement value would give Associates a benefit to which it would not be entitled absent the bankruptcy. It also parsed 11 U.S.C. 506(a)[4] and decided that the value to which the creditor is entitled is determined from the creditor's foreclosure value position rather than the debtor's replacement value position.

The Supreme Court rejected this analysis,[5] and held that the debtor is required to pay the replacement value when retaining the collateral.[6]

It found that the first sentence of §506(a) is *not* an instruction which equates the "creditor's interest" with a means of fixing the value of collateral. Instead, it directs that the "secured creditor's claim is to be divided into secured and unsecured portions, with the secured portion of the claim limited to the value of the collateral."[7]

The Court next found that the second sentence of §506(a) directs the method of determining the value of the collateral. This value is determined by the debtor's disposition or use of the collateral.[8]

The Court noted that Chapter 13 provisions permit a debtor to either surrender or to keep collateral. If the collateral is surrendered, the creditor gets immediate use of its property, thus the "foreclosure" value applies. If the debtor keeps the property, the creditor is exposed to the risks of future non-payment and of depreciation. The debtor must pay the creditor the equivalent of the present value of the collateral. This is the "replacement" value of the collateral (that is, what it would cost the debtor to replace the collateral with like property), plus interest during the term of payment.

[1] This issue was first addressed in the 9th Circuit in the case of *In re Mitchell*, 954 F2 557 (CA9 1992). The wholesale value of the collateral (an automobile in that case) was the maximum an undersecured creditor could recover. In 1996 the 9th Circuit reversed itself in the case of *In re Taffi*, 96 F3 1190 (CA9 1996). The *Taffi* case involved the debtor's residence; however the Court made the holding specifically applicable to personal property. Despite the 9th Circuit's recent bad reputation for Supreme Court reversals, The *Rash* Court cited *Taffi* and followed it in reaching its decision.

[2] And maybe provide payment on general unsecured claims.

[3] This is the result the 9th Circuit would have reached pre- *Taffi*.

[4] 11 U.S.C. 506(a) provides in pertinent part:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property . . . .

[5] It also rejected the practice of splitting the difference between the wholesale and replacement values.

[6] It emphasized that this did not mean what it would cost the debtor to replace the collateral with brand new property. It adopted the 9th Circuit *Taffi* approach of what a willing buyer would pay to a willing seller to acquire the property.

[7] In his dissent, Justice Stevens found that this first sentence means valuation of the collateral in the creditor's hands.

[8] Justice Stevens stated that "purpose of valuation and proposed distribution" referred to whether the creditor was entitled to the time-value (interest) of the property in addition to its wholesale value (debtor retains the collateral), or only to the wholesale value of the collateral (debtor surrenders the collateral).

Case Notes

Prepared by Sandee Gabriel

Whether Exchange of Property Appraisals for Purposes of Determining Valuation Waives a Party's Right to Withdraw it's Expert From Testifying at Trial?

In *L.O. Gannon & Son, Inc.*, 96-00312-R31, one of the material issues in a contested confirmation revolved around the valuation of the Debtor's property. The scheduling order required the bank and Debtor exchange their experts' appraisal reports simultaneously. The reports were exchanged simultaneously; the Debtor's report, however, valued the property significantly less than the bank's appraisal. When the parties subsequently submitted their pre-trial order, the Debtor did not designate its appraiser as an expert to testify at trial, but the bank designated both its expert and the Debtor's expert as trial witnesses. In a motion in limine, the Debtor moved to exclude the bank from calling the Debtor's expert under FRCP 26(b)(4)(B) which provides that a party may discover facts/opinions held by an expert who has been retained by another party in anticipation of trial *and* who is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain the information by other means. (*emphasis court's*). However, since the Debtor had already provided the bank with its appraisal, it did not object to its admission but only to calling its appraiser to testify. The bank argued the Debtor had clearly indicated its intention to

Continued on Page 84

History of Bankruptcy - The American Experiment

The following is the transcript of the lecture given by Frederick P. Corbit, who is a lawyer practicing in Seattle and a shareholder in the law firm of Heller Ehrman White & McAuliffe. The lecture was given on June 7, 1997, at the seminar held in conjunction with the Eastern Washington Bankruptcy Section's annual meeting.

Part I, 1787–1898[1]

In the few minutes I have today, I will cover what I call the American Experiment, Part I. This period is from our founding fathers' creation of the Constitution in 1787 to Congress' enacting our first comprehensive bankruptcy law in 1898.

The subject today is just a small part of the history of bankruptcy. If I had the energy to write a book on the history of bankruptcy, there would be several chapters. The subjects of the chapters would include Roman law, bankruptcy during the Middle Ages, bankruptcy in England, at least two chapters on the Great American Experiments, and one chapter on historical bankruptcy patterns. (The historic patterns show that there are no new ways to lose money, just variations on old tried and true methods.)

The best place to start is to pick a founder of American bankruptcy law. In this regard, Charles Pinckney is probably as good as any and better than most.

Charles Pinckney, from South Carolina, was not only one of the original framers of our Constitution, but was the individual that made the recommendation at the end of the Federal Convention of 1787 to add a clause to the Constitution dealing with "uniform laws with respect to bankruptcies."

There was little discussion about Charles Pinckney's recommendation and only one objection. The objection was made by Roger Sherman of the State of Connecticut. Roger Sherman objected to any grant of power that would make it possible to punish bankruptcies by death, as had been possible under early English law.

Under early English law, bankruptcy was punishable as a crime, and if the act was considered to be serious enough, the sentence could be death. The English judges had a polite way of sentencing criminals to death. Specifically, the death penalty was imposed when a criminal was sentenced "without the benefit of clergy."

Just imagine the scene where the English judge with his long white wig sits up high in a formal courtroom. Standing before the judge are the barrister and his client who is accused of a serious act of bankruptcy. The judge looks down from his bench at the accused and says: "I find you guilty of the act of bankruptcy and sentence you without the benefit of clergy."

Immediately upon hearing the judge's ruling, the bankrupt turns to his barrister and asks: "What does the judge mean?"

The barrister solemnly turns to his client and says: "The judge has just ordered you to promptly pay your legal fees."

The framers of the Constitution concluded that there was no danger of the legislature of the United States imposing the death penalty, and without any debate, in clause 4 to section 8 of Article I of the Constitution, granted Congress the power: "to establish uniform laws on the subject of bankruptcies throughout the United States . . . ." Without this clause creditor/debtor issues would have been decided under state law.

As an aside, there were some self-serving reasons to adopt the Constitution. Many of the founding fathers were eager to have a federal government formed so that it could assume at full value the obligations the colonies incurred in financing the revolution because these founding fathers had purchased many of these obligations at a 75% to 90% discount. As you know, the union was formed, but what you might not know is that the union did assume at full value the obligations of the colonies and many founding fathers profited handsomely. Over John Madison's objection, the Northern Congressmen seeking the assumption of obligations incurred by the colonies were able to pass a bill by gathering additional support from Southern Congressmen by agreeing to move the capital closer to Virginia.

In the first session of Congress, when Congressmen only presented legislation on subjects that they felt was most needed, a bankruptcy bill was filed. In the country there was a pressing need felt for some form of bankruptcy law as a result of a serious financial crash. Much money was lost by investors attempting to get rich quick by investing in bank, canal, turnpike, manufacturing, coal and land companies that had unfortunately been recklessly organized. Also, the year before, there was Shay's rebellion where 2,000 angry farmers, under the lead of Daniel Shay, a former captain in General George Washington's army, seized control of several Massachusetts courthouses. Further, imprisonment for debt was rising.

Included in the multitude of hard-hit investors was Robert Morris of Pennsylvania, who is one of the founding fathers and the great financier of the American Revolution. Robert Morris was in Philadelphia's Prune Street jail for three years for his inability to repay approximately $12 million of debt. Also, James Wilson of the United States Supreme Court had to flee to North Carolina to avoid imprisonment for debt. Just as in a Dickens novel, America has a history of debtors' prisons. However, divisions between the North and South, commercial regions and agricultural regions, and merchants and farmers, kept Congress from enacting any bankruptcy law.

Principal in the opponents of the bankruptcy law was Thomas Jefferson, who, like other Virginia land owners, objected to any bankruptcy law that would allow the seizing and selling of land. Under early Virginia statutes, freehold land could not be taken on execution and Northern creditors had little chance of collecting debts if debtors remained in the South.

Nevertheless, when the French seized American ships in 1799, the financial problems faced by many influential business persons increased, and Congress passed its first bankruptcy law in 1800. The Bankruptcy Act of 1800 was limited to five years and passed the House on the slimmest of margins by a vote of 49 to 48.

The Bankruptcy Act of 1800 proved to be a failure. Not only was it difficult for people to travel to the federal courts, bankruptcies provided small dividends, and most of the debtors that were petitioned into bankruptcy were already in jail. Accordingly, in 1803, two years before the Act was set to

History of Bankruptcy - The American Experiment *cont'd*

expire, and in a time of relative prosperity, the Bankruptcy Act of 1800 was repealed by lopsided votes in the House and Senate.

Over the next four decades, there were various financial downturns in the United States economy and much debate about enactment of another bankruptcy act, but no bankruptcy bill came close to being passed by Congress. The combination of Southern congressmen that did not want a federal bankruptcy law and Northern congressmen that thought any such law should be limited to merchants, kept killing bills.

During this time period, there was much debate about what the framers of the Constitution meant by the term "bankruptcy" and whether a voluntary bankruptcy law would be constitutional. We now take for granted that bankruptcy encompasses individuals and merchants; however, that conclusion was not so obvious in the 1800s. "Bankruptcy," as opposed to "insolvency," was frequently used only with respect to the failure of a merchant. Bankruptcy was considered distinct from insolvency law. It was available for those that "bought and sold." Insolvency law was related to nonmerchants turning over their property under a state law that would allow them to get out of debtors' prison. In fact, the common wisdom was that the Tenth Amendment required nonmerchant insolvency matters to be left with the states. Accordingly, the application of the bankruptcy clause to farmers and individuals not operating a business required the broadening of the term "bankruptcy."

Additionally, there was great debate about the constitutionality of a voluntary bankruptcy act. The question was whether Congress was limited to passing laws that were in essence debt collection measures, or whether it had the power to enact a law that would allow debtors to voluntarily escape from their contractual obligations. Northern congressmen supporting a bankruptcy act continued to fail in their attempts, but there were some changes in state insolvency laws, some of which seriously improved the lives of debtors. Between 1821 and 1857, there was a spread of laws across the States abolishing imprisonment for debt.

However, political winds did change, and in 1841 the Whigs gained the presidency when President Tyler was elected. The presidential election was influenced more than any others by debtors. In five states, including New York, Maine and Pennsylvania, in which there were 900,000 voters, and 89 electoral votes, the total Whig majority was only 18,000 votes. At this time, there were a number of debtors that had not had any bankruptcy act available for many years. These voters were pulled aboard the Tyler bandwagon, and without them Tyler might not have won the election.

These voters actually petitioned Congress through the President by presenting a memorial signed by 3,000 individuals. President Tyler addressed Congress and requested it to pass a bankruptcy act. In spite of President Tyler and other Whigs, the bankruptcy bill failed in the Senate by a vote of 110 to 97.

What happened next has been described by its supporters as a "skillful piece of political maneuvering" and by its opponents as "legislation openly and shamefully disgraced by a system of bargain and sale." The Whigs were attempting to put through other bills, but not one of their measures had the same body of supporters, and some mutual support was needed.

Western congressmen hoped to pass a bill relating to the distribution of government lands and the proceeds, while Northeastern congressmen wanted a bankruptcy measure. Apparently Whig members were entertained throughout the evening before a vote where it is said that the wine flowed freely. The next day, Congress passed both the land distribution bill and the Bankruptcy Act of 1841.

The Bankruptcy Act of 1841 was the first time that a federal bankruptcy law pertaining to individuals, as well as merchants, was passed. However, like the Act of 1800, it quickly became unpopular and was repealed. Since it was on the books a little more than one year, there was no opportunity for it to be challenged as in violation of the Tenth Amendment.

While the Act of 1841 was in effect, approximately 34,000 people took advantage of its benefits, of which less than 10 percent were denied a discharge. The cases involved debt of approximately $440 million and the surrender of property of approximately $44 million. Owing to expenses of administration, there were very small dividends paid to creditors.

However, the cyclical nature of our economy continued and demands for a national bankruptcy law continued. As in the past, in the mid-1800s, there were four factions. There were those that were opposed to any bankruptcy law, those opposed to any involuntary bankruptcy, those who favored a bill for creditors, and those who favored a bill for creditors and debtors.

Many of those opposed to any bankruptcy law resided in the South, and the results of the Civil War affected their influence in Congress. Further, pressure for a bankruptcy bill was building as Northern creditors of Southern debtors wanted to collect on their claims. The former needed bankruptcy laws to get at land owned by the latter. Eventually, the Bankruptcy Act of 1867 was passed.

With the two previous bankruptcy laws, the Act of 1867 quickly became unpopular. Its unpopularity was due not to harshness but to the recurring theme of excessive costs and unbearable fees. Further, supporters of the Act believed that it may have accomplished its mission. The Act had served as the needed sponge for the indebtedness that existed after the Civil War.

In 1878, the Bankruptcy Act of 1867 was repealed. Following the repeal, the debate about the need for a bankruptcy act continued. The unpopular experiments of the past led many in Congress to advocate for a permanent institution that was not crafted in an attempt to alleviate temporary ills, but one that could survive our economy's cycles. By 1898 the common wisdom about need for bankruptcy law appeared to be close to our beliefs today, and the Bankruptcy Act of 1898 was enacted.

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[1] A more detailed discussion of the history of bankruptcy for this period can be found in a 1935 book entitled Bankruptcy in United States History, by Charles Warren. Also, the first 570 pages of The Division and Destruction of Value and Economic Analysis of Bankruptcy Law, by Joseph Pomykala, covers the history of bankruptcy from Roman times until 1994. Mr. Pomykala's materials are not yet published but were presented as a dissertation in economics to the faculties of the University of Pennsylvania in partial fulfillment of the requirements for the Degree of Doctor in Philosophy in 1997

Case Notes *cont'd*

use this expert at trial until the exchange of appraisals and it was only after the exchange the Debtor changed it's mind; further once the reports were admitted the court should have access to the appraiser's testimony as to the foundation of his opinion on valuation.

Under FRCP 26(b)(4)(A) the substance of facts and opinions, and the grounds for those opinions to which an expert is expected to testify are necessarily discoverable, while under FRCP 26(b)(4)(B) the facts and opinions of non-testifying experts are discoverable only upon showing of exceptional circumstances. *House v. Combined Insurance Company of America,* 168 F.R.D. 236 (U.S. Dist. Ct., Western Div. Iowa 1996); *Durflinger v. Artiles,* 727 F.2d 888 (10th Cir. 1984); *Peterson v. Willie,* 81 F.3d 1033 (11th cir. 1996). In this case, the court was presented with a case lying somewhere between these two rules, i.e., although the Debtor had permitted discovery of its witness, it had ultimately not designated that witness as one to be called at trial. The court found under these circumstances, the exchange of appraisals essentially "opened the door" and therefore waived the Debtor's right to preclude testimony of its expert at trial.

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