

Bankruptcy Law Survey

Leo M. Weiss, Esq.*
Office of the United States Trustee
Denver



Elizabeth E. Brown, Esq.**
Holme Roberts & Owen LLC
Denver

Bankruptcy is once again becoming a stable area of jurisprudence. Far fewer published opinions were issued by the Tenth Circuit and the Colorado bankruptcy and district courts in 1999 than in 1998. The Supreme Court's 1998-99 term was marked by only one opinion that explicitly decided an issue of bankruptcy law. There have been no laws passed this year that have effectuated a substantive change in the Bankruptcy Code. This stability will likely continue until the next major set of amendments. Notwithstanding this stability, there were a number of extremely important decisions rendered in 1999 that will have a significant influence on bankruptcy practice in the coming years, especially in the areas of abandonment, absolute priority rule, attorney-client privilege, attorney fees, bankruptcy jurisdiction, class settlements, Eleventh Amendment and sovereign immunity, estoppel by plan confirmation, mootness, prejudgment remedies, property rights, secured claims, stipulations, substantial abuse, trustee avoidance powers, trustee compensation, and vacatur.

LEGISLATIVE DEVELOPMENTS

The consumer credit industry, led by the credit card issuers, has sought reform of the Bankruptcy Code to make it less "consumer friendly." The major prongs of the industry's desired "reforms" are means testing to force more debtors to elect to file Chapter 13 bankruptcies rather than Chapter 7 bankruptcies, debtor counseling both pre- and post-petition, less liberal exemptions, and broadened exceptions to discharge. These "reforms" have been embodied in the proposed Bankruptcy Reform Act of 1999. Like its predecessor,

* **LEO WEISS, ESQ.**, has been an Attorney-Advisor with the United States Trustee's Office in Denver, Colorado from 1988 to present. As a staff attorney for the United States Trustee's Office, Mr. Weiss has given several dozen Continuing Legal Education Programs for the Chapter 7 Panel Trustees and Bankruptcy Bar on a variety of topics in bankruptcy related areas. Mr. Weiss has been a presenter for the past four years at Continuing Legal Education in Colorado seminars. He is an attorney of record in excess of 20 published opinions in bankruptcy related areas in Colorado and the Tenth Circuit. In 1985, he received a J.D. from the University of Colorado, where he served on the Staff of the *Administrative Law Journal*. As a research assistant to Professor Robert A. Hardaway, he helped author portions of the *Colorado Civil Rules Annotated* volumes of the West's *Colorado Methods of Practice* series. Mr. Weiss was also a research assistant to Professor Sandra Blackstone in natural resources law area.

** **ELIZABETH E. (BETH) BROWN, ESQ.**, co-chairs the Financial Restructuring/Insolvency/ Bankruptcy department at Holme, Roberts & Owen, LLP. She is a partner resident in its Denver office. Ms. Brown is a past president of the Colorado Bar Association's Bankruptcy Subsection and is a frequent lecturer for the American Bankruptcy Institute and CLE. in Colorado, Inc. In 1986, she graduated from the University of Colorado Law School, with Order of the Coif honors and as Managing Editor of its *Law Review*.

the Bankruptcy Reform Act of 1998, the 1999 Act quickly ran into legislative hurdles, which caused a bifurcation between the relatively flexible Senate version (S.625) and the less flexible House version (H.R. 833). Each of these bills largely adopted the pre-conference version of the 1998 Act, which had been passed by the respective houses of Congress. On May 5, 1999, the House passed H.R. 833. Senate consideration of S. 625 was to occur in May 1999 as well. However, the Senate's deliberations were postponed until fall 1999 due to the press of business precipitated by the Kosovo crisis, the impeachment trial of President Clinton, and various emergency supplemental appropriations bills related to disaster relief. President Clinton may have effectively postponed any meaningful consideration of many of the proposed "reforms" until the 107th Congress convenes in 2001 by virtue of his threat to veto any bill that contains many of the keystone provisions sought by the consumer credit industry, such as rigid "means testing" requirements for Chapter 7 relief.

Various studies and scholarly articles have cast doubt on the effectiveness of the proposed "reforms." These studies suggest that means testing would have, at best, a modest but significant impact on Chapter 7 filings. Some of these studies also suggest that the "exemption" reform proposals, especially those centered around the very large and unlimited homestead exemptions of states including Florida, Texas, and Kansas, would have an impact only on a relative handful of cases nationally. Other studies suggest that women, minorities, and the poor would be disproportionately affected by the enactment of the proposed legislation.

The American Bankruptcy Institute's ABIWorld Web site, www.abiworld.org, contains synopses of the various proposed bills and the studies of their probable impact on bankruptcy filings. The status and content of the proposed legislation, and therefore its impact on practitioners, remain quite fluid as of late summer 1999 when this comment was written.

The sole item of bankruptcy legislation that was enacted into law by September 1, 1999, was Pub. L. 105-277, as amended by Pub. L. 106-5. Collectively, these laws extended the "sunset" of Chapter 12 (11 U.S.C. §§ 1201, *et seq.*) from October 1, 1998, to October 1, 1999, retroactively to October 1, 1998. The retroactive provision was necessary to "ratify" some Chapter 12 filings that had been accepted by the bankruptcy courts between October 1, 1998, and the March 31, 1999, enactment date of the legislation. Some districts had refused to permit any new Chapter 12 filings during this period. If the 1999 Reform Act is not enacted by October 1, 1999, a similar extension bill will likely be enacted to further extend Chapter 12's sunset. The various Reform Act versions would all make Chapter 12 permanent. Congress' failure to make Chapter 12 permanent in the March 31, 1991, legislation seems to be due to a Congressional desire to avoid any piecemeal amendment of the code.

CASE LAW

Abandonment

Under 11 U.S.C. § 554(c), property that has been "scheduled," under 11 U.S.C. § 521(1), by the party preparing the debtor's schedules is deemed to have been abandoned by the trustee at the close of the bankruptcy case unless it has been "administered" or the court orders otherwise prior to close of the case. Abandonment is generally irreversible, with few exceptions. The decisions of *Woods v. Kenan* and *Dreiling v. Cimino*, published this year, explored two of the exceptions to "irreversibility."

In *Dreiling v. Cimino (In re Dreiling)*,¹ the Dreiling family had been a prominent owner of motor vehicle dealerships in Colorado for some years. One of its members, L.J. Dreiling, filed a Chapter 7 case due

to business reversals. One of the scheduled assets of the estate was a controlling interest in the stock of a Denver dealership. Based upon the representations made in the debtor's schedules and the debtor's responses to inquiries from the trustee, the trustee concluded that the stock was over encumbered and should not be administered. Long after the case was closed, however, the trustee discovered that the debtor had misrepresented the encumbrances against the stock. The trustee was allowed to reopen the case to file an adversary in which the primary issue was whether the stock had been abandoned or not under the judicially created "fraud" exception to § 554(c). The court found that this exception was applicable due to a pattern of concealment and deceptive disclosures, which invalidated the "technical" abandonment under 11 U.S.C. § 554(c).

In *Woods v. Kenan (In re Woods)*,² a liquidating trustee had closed the Chapter 11 case prior to consummating a sale of oil and gas interests. On reopening, the central issue was whether the trustee had irrevocably abandoned these interests. The Tenth Circuit held that, under Fed. R. Bankr. P. 9024, incorporating F.R.C.P. 60(b), the bankruptcy court had appropriately granted relief from judgment on equitable grounds in light of the trustee's clear mistake in prematurely closing the case, as well as the debtor's lack of clean hands.

The *Woods* opinion arose in a post-confirmation Chapter 11 case. There is an argument, which was apparently not presented at trial or on appeal, that § 554(c) was irrelevant, because the property had vested in the liquidating trust on confirmation and had been "administered" within the contemplation of § 554(c). Under this argument, once the transfer to the trust occurred, there could be no automatic abandonment under the Code, since the terms of the liquidating trust and/or applicable Oklahoma trust law would govern who was entitled to any residual property left in the trust on its winding up. Nevertheless, the opinion stands for the proposition that Rule 60(b) is applicable to § 554(c) questions.

Absolute Priority Rule

The only Supreme Court opinion from the 1998-99 term that explicitly decided a bankruptcy issue was *Bank of America National Trust and Savings Association v. 203 North Lasalle Street Partnership*.³ The Supreme Court once again declined to decide whether there is a "new value" exception to the "absolute priority rule" as codified in 11 U.S.C. § 1129(b)(2)(B)(ii). However, both Justice Souter's majority opinion and Justice Stevens' dissent rejected the Department of Justice's "starchy" reading of § 1129(b)(2)(B)(ii), which argued that this subsection acts as an absolute bar to "old equity" retaining any ownership interest in a reorganized debtor when an unsecured creditor class is a rejecting class. Thus, the Court implied that some exception to the "absolute priority rule" does exist. The "exception" implicitly recognized, however, is a narrow one.

Under § 1129(b)(2)(B)(ii), "old equity" may not "receive or retain under the plan *on account of* such junior claim or interest any *property*" [emphasis added]. Justice Souter's opinion divines three possible interpretations of the phrase "on account of." The first interpretation advanced by the government is that it means an absolute prohibition against existing equity ending up with an equity interest in the reorganized debtor. The second view, advanced by the debtor, would treat this phrase as equivalent to "in exchange for" in an accounting sense. The third interpretation, which apparently the majority endorses but does not explicitly adopt, makes the phrase synonymous with "because of."

The absolute prohibition view was rejected both because the Court viewed this interpretation as making the "on account of" language superfluous and because it is inconsistent with the reality that "old equity" is often the only available source of new capital and management for a reorganized debtor. The

“accounting” view advanced by the debtor was rejected because it was inconsistent with other Code provisions using the phrase “on account of,” and because it does not acknowledge the non-monetary aspect of retaining an exclusive right to acquire new equity.

After considering the middle view, that the phrase is somewhat equivalent to “because of,” the Court held that the debtor’s plan was not confirmable because the exclusive right to acquire the equity of the reorganized debtor was a property right that was “retained” under the debtor’s proposed plan. This property interest had to be valued in some manner before the plan could be confirmable. The Court suggested that the “valuation” process requires some exposure to the competitive sale process, for example by an auction of the right to acquire “new equity” or by creditors having the right to propose a competing plan.

Justice Thomas’s concurrence, in which Justice Scalia joined, seems to adopt the absolute prohibition view advanced by the government. These justices seem, therefore, to reject the concept of a “new value” exception to the absolute priority rule, even where “old equity” pays at least as much as any competitive bidder for the “new equity.”

Justice Stevens’ dissent curiously seems to concur that the debtor’s plan would not be confirmable if the lender bank had prosecuted an appeal of the denial of its motion to terminate the debtor’s exclusivity. Since the lender had not preserved this issue for appeal, Justice Stevens’ view was that the bankruptcy court properly confirmed the plan. Thus, Justice Stevens’ dissent also suggests that a creditor who is willing to propose a plan which pays more for the “new equity” can block confirmation by cramdown.

The “new value exception” that emerges from this decision apparently has five prongs. The first four of these are derived from the case law under the 1898 Bankruptcy Act, *i.e.*, that the “new value” must be substantial, necessary, in money or money’s worth, and in an amount at least “reasonably equivalent” to the value of the retained property interest. The fifth prong that *203 North LaSalle* appears to add is that the “new value” must be more than would be contributed under any actual alternative bid or that would be contributed in any proposed plan that has been or would be advanced by a party-in-interest, given an opportunity to do so. This fifth prong is not synonymous with the “reasonably equivalent value” prong because there are often reasons why someone would pay more than a “reasonably equivalent value.”

The facts underlying the *203 N. LaSalle* case illustrate some of the differences between “reasonably equivalent value” and value which would actually be offered by a party-in-interest. Under the debtor’s plan, three classes were critical to confirmation in the case. The secured class consisted of Bank of America’s \$54.5 million secured claim.⁴ The trade debt class consisted of \$90,000 in claims out of the original \$160,000 of trade debt that had existed on the petition date.⁵ The third significant class consisted of Bank of America’s deficiency claim of \$38.5 million. The plan provided that the trade debt would be paid off in full, without interest, on the effective date. It provided for a payment of \$1,149,500 on the secured claim on the effective date, with the remaining balance to be serviced over a seven- to ten-year period based upon a 30-year amortization schedule. The deficiency claim would be discharged by \$6.125 million in payments over five years from new capital contributions from some of the “old equity” partners. This contribution has a present value of \$4.1 million. The bank also would have received the net cash flow from the property and any proceeds in excess of the amortized secured claim amount on sale or refinancing. If the plan had been confirmed, it would have resulted in tax savings to the partners of about \$20 million.

The “reasonably equivalent value” of the equity in the debtor’s real estate was likely negligible due to the large deficiency owed on the property. However, the value to the partners of the retained interest was something closer to the \$20 million of tax liability that the plan’s confirmation would have permitted them to

avoid. The value of the “old equity’s” retained interest to the bank is not clear from the opinion. Obviously, if the bank’s proposed liquidating plan had been permitted to go forward, no value would have been given for the retained equity because none would have survived the liquidation. However, if the bank had been permitted to bid for the “new equity,” it likely would have been inclined to “bid” something over \$20 million for the retained interest to insure its successful bid. To be the successful bidder, the bank would not have to actually advance any cash, other than the amount necessary to pay off the trade debt with interest, plus the administrative claims, because anything over this amount simply would reduce its own deficiency claim.⁶ It is not clear why the bank was unwilling to accept the \$6.125 million minimum repayment on its deficiency claim. However, it is possible that the bank’s internal analysis suggested that a quick foreclosure would provide a better yield to it than the amount of any dividend that it would receive under the proposed plan.

Tenth Circuit case law has previously acknowledged many of the components of the Supreme Court’s analysis in *203 N. LaSalle*. In *Unruh v. Rushville State Bank*,⁷ the Tenth Circuit explicitly rejected an argument that the right to recapitalize the debtor had zero value. In fact, Judge Bohanon built upon *Unruh*’s concept of the “right to control” as a valuable property right in his well-respected opinion, *In re BMW Group I, Ltd.*⁸ Several of the Colorado bankruptcy judges have relied upon *BMW* as persuasive authority in interpreting 11 U.S.C. §1129(b)(2)(B)(ii). Professor Elizabeth Warren’s 1991 article, “A Theory of Absolute Priority,”⁹ which Judge Bohanon incorporated as an appendix to his *BMW* opinion, anticipates many of the problems and issues addressed in *203 North LaSalle*.

The true scope and impact of the Court’s discussions within *203 North LaSalle* are extensive and cannot be discussed with any authority or depth in this article. It is clear, however, that this opinion will make “single asset” Chapter 11 cases, and particularly “single asset real estate” cases, more difficult to prosecute to confirmation.

Attorney-Client Privilege

In the recent decision of *In re Foster*,¹⁰ the Tenth Circuit dealt with whether an individual debtor may assert the attorney-client privilege against a trustee. The debtor had been convicted of wire fraud and forced into an involuntary bankruptcy. The trustee sought to obtain the debtor’s attorneys’ files on pre-bankruptcy civil suits that constituted assets of the estate. Debtor’s counsel tried to withhold its files on the bases of the attorney-client privilege, work-product doctrine and the Fifth Amendment. Clearly, the United States Supreme Court had ruled previously that a corporation’s privilege in bankruptcy is controlled by the trustee,¹¹ but it acknowledged that its analysis would not apply to an individual debtor. In *Foster*, both parties to the appeal acknowledged that, in the case of individuals, the court must engage in a balancing act, “by weighing the interests of a full and frank discussion in the attorney-client relationship and the harm to the debtor upon disclosure [against] the trustee’s duty to maximize the value of . . . and represent the interests of the estate.”¹² Since both parties agreed that this was the proper test, the appellate court did not have to decide on a *per se* rule. Instead, the issue was whether the bankruptcy court had properly considered and balanced these competing interests. The Tenth Circuit found it had not and remanded the case for an *in camera* inspection on a document-by-document basis, with the court weighing these factors as to each document. The court held that the documents themselves were not protected from disclosure under the Fifth Amendment. In order to be exempt from disclosure, the production itself must be the functional equivalent of testimony and incriminating under the Fifth Amendment, such as the postmark on a postcard, proving the debtor’s whereabouts at a particular time.

Attorney Fees

Two 1999 United States District Court opinions have received a great deal of publicity within the bankruptcy bar this year. These decisions, in *Schofield v. United States Trustee (In re Jones)*¹³ and *George T. Carlson & Associates v. United States Bankruptcy Court (In re Ingersoll)*,¹⁴ are notable more for their impact on the procedural mechanisms applicable to the review of fees in consumer bankruptcy cases than for their discussion of substantive law. *Jones* arose in a Chapter 7 case. The *Ingersoll* decision represents four Chapter 13 cases in which the appeals had been consolidated.

Jones overruled *In re Friedland*,¹⁵ which had previously held that the Bankruptcy Reform Act of 1994, by enacting an amended version of 11 U.S.C. § 330(a) which omitted the phrase “debtor’s attorney,” effectively repealed the statutory authority for debtor’s counsel to be paid pre-petition for post-petition services in Chapters 7 and 13 cases. Chief Judge Matsch found this amendment to be irrelevant to the issue in the *Jones* case because the pre-petition fees in a Chapter 7 case are not property of the debtor’s estate, except to the extent that they are unreasonable. This view is contrary to a great deal of published law holding that the debtor’s right to terminate counsel as of the petition date, and presumably be entitled to a refund for the amount paid for anticipated post-petition services, is a sufficient property interest to bring the payment into the debtor’s estate. See *In re Mahendra*,¹⁶ *Iowa Supreme Ct. Bd. of Prof. Ethics and Conduct v. Winkel*.¹⁷ Judge Matsch’s rationale also appears to be contrary to the property analysis for retainers employed by the Supreme Court in *Phillips v. Washington Legal Foundation*,¹⁸ which held that the client’s right to direct whether interest should be earned at all on a retainer and the disposition of any interest are “property” under the Fifth and Fourteenth Amendments. Indeed, the opinion is arguably inconsistent with *In re Printcrafters, Inc.*,¹⁹ in which Judge Nottingham treats a pre-petition lien as a security device for the payment of post-petition services. Judge Matsch does not explain why a pre-petition Chapter 7 attorney fee should be distinguished from a Chapter 11 retainer. There may be a split of authority within the district on the nature of pre-petition payments to counsel under the circumstances.

On remand in the *Jones* case, Chief Judge Matheson held that the pre-*Friedland* case law, which limited pre-petition compensation for post-petition services to those services that assisted in the administration of the debtor’s case and/or that assisted the debtor in performing the various “debtor duties” under 11 U.S.C. § 521, remained viable in the aftermath of the district court’s opinion in *Jones*.²⁰ These post-petition services in a typical case involve little beyond attending the § 341 meeting, responding to the trustee’s requests, and filing missing documents in cases filed without completed statements and schedules. The bankruptcy court’s practice had been to allow these types of services to be paid for by a pre-petition fee despite *Friedland*.

Ingersoll, which reversed Judge Brumbaugh’s opinion in *In re Roffle*,²¹ does not contain any change in substantive law in the district. *Ingersoll* is nevertheless important insofar as it held that counsel was entitled to a hearing on fee objections and prior specific notice of the issues to be heard. A cursory checklist order of the court’s objection to fees, but which did not specify the objection with particularity, was found to be insufficient notice to the fee applicant.

Jones and *Ingersoll* both contain largely precatory language in which Judge Matsch suggests that the Colorado Bankruptcy Court adopt a local rule setting a presumptively reasonable fee for consumer cases. This presumptive fee is to be based upon a market price for the “community.” The opinion seems to hold that a single presumptive fee for the entire district may be improper if there are different fees customarily charged in the various “communities” in the district. Judge Matsch assumes that those practitioners with the largest case volume are the “market makers” for the community and that their fees are of particularly probative value in setting the community presumptive fee. The bankruptcy court has asked the Faculty of Federal Advocates to undertake a study of market rates for consumer cases. *Jones* and *Ingersoll* also suggest that bankruptcy

judges should take less of an advocate's role in the fee objection process, which is more within the province of the trustees and the United States Trustee.

The *Jones* and *Ingersoll* opinions contain cryptic discussions about the scope of debtor's counsel's duties in a typical consumer bankruptcy case. The opinions seem to imply that counsel's representation includes all post-petition activities in the case that are typical in a consumer case, including attending the § 341 meeting and providing legal counseling on reaffirmation and discharge-related matters. Such duties are consistent with Administrative Order 1999-6,²² which prohibits the "unbundling of services" in the district court and, since the bankruptcy court is a unit of the district court, by extension in the bankruptcy court as well. Several bench rulings subsequent to *Jones*, *Ingersoll*, and Administrative Order 1999-6 have held that debtor's counsel must withdraw in order to terminate the obligation to represent the debtor in whatever matters may arise during the bankruptcy case.

The third case in the triad of district court attorney fee opinions is the *Printcrafters* opinion.²³ This decision, which is briefly discussed in conjunction with *Jones*, triggered a proposed amendment to the Local Bankruptcy Rule 401, which would have required counsel to formally notice a motion for approval of a retainer to secure payment for post-petition services in much the same manner as a borrowing motion under 11 U.S.C. § 364. This proposed rule change was not adopted. Some variant of the proposed rule will likely be adopted in the near future. The thrust of the *Printcrafters* opinion is that a pre-petition retainer can secure payment for post-petition services to be rendered by a professional person employed under 11 U.S.C. § 327(a) and that this retaining lien, under C.R.S. §§ 12-5-119 and -120, cannot be avoided or subordinated to pay other administrative claimants in the case, even though such claimants may otherwise be entitled to a higher priority of distribution. The conflict of interest created thereby is viewed as a "tolerable evil," when the alternative is that otherwise professionals may be difficult or impossible to employ in bankruptcy cases.

Bankruptcy Jurisdiction

In recent years, there has been a trend in bankruptcy to view the bankruptcy courts as an appropriate or even a preferred forum for various types of litigation with little or nothing to do with bankruptcy law. The Tenth Circuit has been reluctant to expand bankruptcy jurisdiction. This year's Tenth Circuit opinion in *Franklin Sav. Corp. v. United States (In re Franklin Sav. Corp.)*²⁴ continues this reluctance. The Tenth Circuit finds that the filing of a proof of claim by the Resolution Trust Corporation (RTC) in the debtor's savings and loan holding company bankruptcy did not effectuate a clear waiver of sovereign immunity under 11 U.S.C. § 106 by the RTC and/or its successor, the Federal Insurance Deposit Corporation. Since the debtor had failed to raise waiver of sovereign immunity under 11 U.S.C. § 106 in the bankruptcy case, it could not raise the waiver issue on appeal. The Tenth Circuit, therefore, found that the lower court did not have jurisdiction over the RTC.

Class Settlements

The Supreme Court issued a detailed and fractured opinion in an asbestos-related class action case this term. Although not directly addressing bankruptcy issues, the effect of this opinion may be to force more companies into bankruptcy to deal with mass tort litigation. *Ortiz v. Fibreboard Corp.*²⁵ arose out of a suit by Fibreboard against its products liability insurers. These insurers had issued policies which covered liability associated with products manufactured between 1956 and 1959, the peak period for its manufacturing of asbestos products. Under a 1993 settlement between the insurers, Fibreboard and a certified mandatory class of plaintiffs, the parties agreed that \$1.535 billion would be available to satisfy class claims. Of this sum, \$1.525 billion was to be paid by two of the insurers and \$10 million was to be paid by Fibreboard. Fibreboard's

actual contribution toward the settlement was to be \$500,000. The remaining \$9.5 million of Fibreboard's share was to be paid by other insurance companies from whom the debtor had obtained other types of insurance coverage. The trial court had certified the underlying action as a mandatory class action under F.R.C.P. 23(b). The court reasoned that there was only "a limited fund" available since the settlement was capped by the insurance company payments and Fibreboard's contributions. The class certification excluded any person who had either already commenced action against Fibreboard or who had already concluded litigation or a settlement with Fibreboard.

The Supreme Court found that the class certification was improper for several reasons. The Court found that those persons with pending litigation against Fibreboard should not have been excluded because their claims were similar to the class members. More importantly, the Court also found that the trial court's application of the limited fund doctrine was improper. The Court concluded that the "limited fund" was only artificially limited. The "limited fund" doctrine can be utilized only in those circumstances in which the available funds are truly limited by extrinsic factors beyond the litigants' control, such as where an insurance company has interpled the policy limits, and the tortfeasors are judgment proof. The inference of the opinion is that in order for the "limited fund" doctrine to apply, a substantial proportion, or perhaps even the entirety, of Fibreboard's net worth had to be devoted to the settlement. Anything short of this makes the "limited fund" doctrine inapplicable.

Justice Breyer's dissent, in which Justice Stevens joined, argued that the fund in question was a fleeting asset because, absent the approval of the settlement, the insurance companies would continue the intractable litigation over coverage issues. Since the costs of litigation had to be deducted from the policy maxima, the insurance fund was essentially a diminishing asset. Justice Breyer was concerned that insurance coverage would be depleted to the point that the claimants would be worse off than under the settlement. He also feared that Fibreboard was likely to fail as a company if this type of settlement could not be approved. The dissent notes that the average "administrative cost" of an asbestos case was about 61 percent of the recovery, whereas the proposed settlement would have imposed only a 15 percent overall administrative burden.

As a result of *Ortiz*, more companies may use Chapter 11 bankruptcy filing to accomplish global settlements of mass tort actions, which have the potential to bankrupt the company absent a settlement. Under 11 U.S.C. §§ 1123, 1129, and 1141, a confirmed plan of reorganization can bind at least a substantial proportion of class members in these cases. Asbestos claims can be effectively dealt with by setting up a qualifying trust under 11 U.S.C. § 524(g)(2)(B). However, this subsection requires a debtor to fund the trust, at least in part, with securities that would permit the claimants as a class to exercise majority ownership of the debtor, if specified contingencies arise. Subsection 524(g) is a special interest provision of the Code that is applicable only to asbestos-related claims. If Fibreboard elected to file a Chapter 11 in order to use this statutory provision, it obviously would have had to contribute more than \$500,000 toward settlement of the claims. Courts sitting in bankruptcy are likely to permit the type of trusts authorized by § 524(g) in non-asbestos cases because the legislative history of this subsection reflects a desire to ratify various trusts set up prior to the adoption of the Bankruptcy Reform Act of 1994. The Manville "asbestos" trust is the best known of these pre-Reform Act trusts which had been approved as part of a plan of reorganization in an asbestos case. These pre-Reform Act trusts have largely survived appellate review.

Eleventh Amendment and Sovereign Immunity

The Supreme Court has redefined many of the basic tenets that form the foundation of "federalism" over its past several terms. It has handed down a series of opinions that shift the balance of power toward

the states and away from the federal government. Even in those areas where the balance of power has not been altered, these opinions have constricted federal jurisdiction. This trend is expected to continue. The Supreme Court has granted certiorari on “states rights” issues in several cases on its 1999-2000 docket. Decisions in these cases, expected to occur in June or July 2000, will likely further delineate the constitutional boundaries of federal jurisdiction.

The effect of these “states rights” decisions permeates all areas of federal jurisdiction, but bankruptcy jurisdiction may be disproportionately affected. *Seminole Tribe of Florida v. Florida*,²⁶ and its progeny, which hold that the waiver of the states’ sovereign immunity under 11 U.S.C. § 106 is unconstitutional, have a profound impact on even the most routine bankruptcy cases.

In *Florida Prepaid Secondary Education Expense Bd. v. College Savings Bank*,²⁷ the court held that sovereign immunity and the Eleventh Amendment effectively barred a patent infringement action against an instrumentality of the State of Florida. Under this opinion, no suit lies against a state absent a showing that the state has validly waived sovereign immunity or a showing can be made that the state’s action is a threat to the “uniformity of patent regulation.” Since bankruptcy law, like patent law, is an area of exclusive federal jurisdiction, the same rationale may apply in bankruptcy and enable the various states and their instrumentalities to avoid bankruptcy jurisdiction. Under this decision’s rationale, the exclusive right to promulgate substantive legislation in an area does not affect a state’s right to claim that it is immune from suit for violation of that law. Thus, the plaintiff may have had a valid claim for patent infringement but, absent a waiver of sovereign immunity by the state, it may have no remedy, unless the plaintiff can demonstrate a valid waiver or a “threat to the uniformity of the federal law.”

Three opinions on this topic were rendered on June 23, 1999 — *Florida Prepaid, College Savings Bank v. Florida Prepaid Secondary Education Expense Bd.*,²⁸ and *Alden v. Maine*.²⁹ In *College Savings*, the Court overruled its 1964 decision in *Parden v. Terminal R. of Alabama Docks Dept.*³⁰ and held that neither the interstate commerce clause nor the due process clause of the Fourteenth Amendment authorized the waiver of sovereign immunity for state’s “trademark infringement” under the Trademark Remedy Clarification Act³¹ and § 43(a) of the Lanham Act.³² The Court held, as it did in *Seminole* and *City of Boerne v. Flores*,³³ that the privileges and immunities clause of the Fourteenth Amendment³⁴ is a basis for the federal waiver of sovereign immunity only where some “privilege or immunity” was infringed upon by a state. Trademarks are neither a privilege nor an immunity under the Fourteenth Amendment because trademarks are not the type of state-based discriminatory practice, *i.e.*, civil rights, that this amendment was designed to remedy. The commerce clause was unavailing as a source of jurisdiction because a state’s participation in interstate commerce standing alone does not constitute an express waiver of sovereign immunity. *Parden* was overruled to the extent that it implied that a waiver could be inferred merely from a state engaging in interstate commerce.

In *Alden v. Maine*, the court held that the State of Maine could not be sued in state court for violation of the Federal Labor Standards Act³⁵ because it had not waived its sovereign immunity to suit in the state courts. In an opinion by Justice Kennedy, the court found that the Eleventh Amendment is applicable to actions under federal law brought in state court as well. As in *Seminole*, *City of Boerne*, and *College Savings*, the privileges and immunities clause of the Fourteenth Amendment was held not to be an effective basis for a waiver of the state’s sovereign immunity since the right to a fair workplace environment and compensation in accordance with the Federal Labor Standards Act was not the type of privilege or immunity that the Fourteenth Amendment was designed to remedy.

Both the majority opinion in *College Savings*, by Justice Scalia, and the dissent in this case, by Justice Breyer, recognize that the triad of cases decided on June 23, 1999, go to the heart of “federalism” under the Constitution. Justices Scalia and Breyer view these opinions as re-establishing the rule of law that had prevailed since at least 1890.

These opinions are already being utilized to argue that bankruptcy trustees and debtors cannot enforce various Bankruptcy Code provisions against state and local governments. The Tenth Circuit recently confronted these Eleventh Amendment issues in *Innes v. Kansas State University (In re Innes)*.³⁶ The Inneses had sought a hardship discharge of their student loans under 11 U.S.C. § 1328, which implicitly incorporates the hardship provisions of § 523(a)(8).³⁷ Kansas State University filed a motion to dismiss the adversary complaint under the Eleventh Amendment since it had not filed a proof of claim or taken any other action to submit itself to bankruptcy jurisdiction.³⁸ The Inneses alleged three bases for finding a waiver of immunity: (1) a state statute³⁹ that partially waived the state’s public colleges’ and universities’ sovereign immunity to suit; (2) the state’s participation in the Perkins Loan Program, which waived the university’s sovereign immunity; and (3) the contract between the university and the United States Department of Education, which required the university to defend dischargeability actions in the bankruptcy courts.

The Tenth Circuit reversed the lower courts’ decisions to the extent that they relied upon the Kansas statute because that statute reserved exclusive jurisdiction in the state courts over litigation against these educational institutions. The court further reversed the lower courts’ reliance on the university’s participation in this federal loan program as a waiver, citing *Atascadero State Hosp. v. Scanlon*,⁴⁰ in which the Supreme Court has already held that participation in federal programs and receipt of federal funds under such programs are not sufficient to constitute an explicit waiver of sovereign immunity. Similarly, the fact that a state agency agrees to abide by federal law in administering a federal program does not constitute a valid waiver of sovereign immunity.⁴¹ The Tenth Circuit noted in note 1 to the *Innes* decision that 11 U.S.C. § 106 may be unconstitutional as a waiver of sovereign immunity under *Seminole* and its progeny.

The Tenth Circuit relied on *College Savings* for the proposition that there must be an unequivocal indication that the state intends to consent to federal jurisdiction in order to be sued in federal court.⁴² It found, however, that the contract between the university and the Department of Education provides this unequivocal waiver by requiring the university to “perform the functions and activities set forth in 34 C.F.R. [§] 674,”⁴³ which require the filing of a proof of claim in the borrower’s bankruptcy “unless the borrower has no assets.”⁴⁴ Under 34 C.F.R. § 674.49(c), the institution is also required to defend dischargeability complaints brought by debtors.⁴⁵ The Tenth Circuit rejected the university’s argument that it could fulfill these duties simply by filing a motion to dismiss any dischargeability complaint on the grounds of the Eleventh Amendment. It also argued that the debtor could bring a dischargeability complaint in state court, thereby enabling the state to carry out its duty to defend dischargeability complaints. The court rejected this argument. Under *Brown v. Felsen*,⁴⁶ “dischargeability” is a unique bankruptcy remedy over which Congress has mandated that the bankruptcy courts should exercise jurisdiction.

Since contractual waivers found in *Innes* are not likely to be present in many situations in which state and local governmental units are significant participants,⁴⁷ the implications of the *Innes* decision on bankruptcy cases may be far reaching. Questions will likely arise in the areas of: (1) recovery of preferences and fraudulent conveyances where these conveyances retire the underlying debt, (2) sales free and clear of tax liens where the trustee seeks to preserve the lien for the payment of administrative expenses under 11 U.S.C. § 724 (especially where the taxing authorities will end up recovering nothing on their claim as a result of § 724’s subordination provisions), (3) determination of tax liabilities under 11 U.S.C. § 505, and (4) the enforcement of the anti-discrimination provisions of 11 U.S.C. § 525(a).

A simple fact pattern illustrates these potential issues. Assume that the debtor has located a prospective buyer for its business and can generate sufficient funds from the sale to pay off its secured and tax debt, if the amount of the tax debt is closer to the debtor's rather than the state's estimate. On the brink of a sale, the state closes the business under a distraint warrant and sets a date for an auction of the assets. This precipitates a bankruptcy filing in the hope that the sale can be quickly consummated post-petition using the trustee's strong-arm powers and 11 U.S.C. § 363(b). The state is concerned that a sale free and clear of liens would result in its lien being used to pay administrative expenses, and that it would receive little or nothing from the sale. As a result, it refuses to turn over the property to the trustee; continues with the tax sale; informs the trustee that even if the trustee obtained a turnover order, the state will nevertheless seize all the assets from the buyers in order to enforce its lien; and further informs the debtor's sole shareholder that because of unpaid tax liabilities, the principal will not be granted a business license of any kind from the state in the future. The state then informs the trustee that it will not file a proof of claim or otherwise consent to the jurisdiction of the bankruptcy court in the main case and in any adversary proceeding brought under § 505. In light of the recent Supreme Court Eleventh Amendment cases and *Innes*, the bankruptcy court may not be able to check the state's intransigence under these circumstances.

These issues may also arise in otherwise uncomplicated Chapter 7 cases. States may seek to enforce their public policies by denying drivers licenses until the debtor pays automobile accident-related damages. The state or its instrumentalities may deny business and professional licenses to debtors who fail to pay trade debts. State guaranteed and subsidized loans may be denied due to a bankruptcy filing. These types of practices had been common under the Bankruptcy Act. Congress sought to address these practices in the anti-discrimination provisions of 11 U.S.C. § 525(a). *Seminole Tribe* and its progeny, however, may effectively deny debtors the protections which Congress sought to grant consumer debtors.

Similarly, the protections of 11 U.S.C. § 525(b) against discrimination in employment and 11 U.S.C. § 525(c) in granting government insured or guaranteed student loans, to the extent that these loans are state funded, may have been eviscerated by the expansion of the states' protections under the Eleventh Amendment and sovereign immunity. The Bankruptcy Code's overall philosophy of giving debtors a "fresh start" has been consistently eroded over the twenty years since the Code was adopted. The extensive amendments to 11 U.S.C. §§ 523(a), 727(a), and 1328 to narrow the scope of a bankruptcy discharge are examples of this trend. Given the present legislative climate, as further evidenced by the proposed "reform" acts of the past two sessions, it is questionable whether Congress would take any action to restore the protections that the Code presently affords under § 525, if these protections are decimated by opinions favorable to "states rights."

Tax liability determinations under 11 U.S.C. § 505(a) may also be impacted by the Eleventh Amendment opinions. Assume the debtor has a large state tax liability assessed pre-petition, which is nondischargeable under 11 U.S.C. § 507(a)(8), but that the debtor has sufficient assets in the estate to satisfy the "true" tax debt, if this debt is the more modest sum scheduled by the debtor. However, if the assessed taxes are much higher than the sum that the debtor believes to be correct, and the state taxing authority does not file a proof of claim or otherwise submit to bankruptcy jurisdiction, there may be a valid Eleventh Amendment and/or sovereign immunity defense to any action brought under 11 U.S.C. § 505(a).

Bankruptcy practitioners may argue that such results will lead to "interference with the uniformity of bankruptcy laws" as a counterbalance to the Eleventh Amendment and sovereign immunity defenses. *Snyder*⁴⁸ suggests that, under some circumstances, a remedy may also exist in having the United States sue to enforce applicable federal law that is made applicable to a state or local government by grant or

participation provisions. Obviously, this is a cumbersome process that would require far too many federal resources to become commonplace.

Undoubtedly, this is a rapidly changing area of bankruptcy jurisdiction. Practitioners ignore this area at their peril.

Estoppel by Plan Confirmation

The confirmation of a bankruptcy plan creates a binding obligation between the debtor and the creditors holding most types of claims. Most often the plan is binding on those creditors whose claim is dealt with under the plan because such claims are dischargeable and not entitled to a more favorable treatment. Sometimes, plans are binding on the holders of nondischargeable claims that are not otherwise able to be compromised in bankruptcy because the claim's treatment is deemed a "consensual" treatment.

Two published 1999 opinions deal with the corollary plan issue of the extent to which a plan's provisions can be binding on collateral matters. Judge Brumbaugh's opinion in *In re Nale*⁴⁹ deals with a common problem in many recent Chapter 13 cases. The opinion arose post-confirmation on the motion of the holder of a second deed of trust on the debtors' principal residence. Under 11 U.S.C. § 1322(b)(2), a debtor may not propose a nonconsensual plan that alters the rights of a holder of a claim secured only by the debtor's principal residence, other than by providing for the cure of all defaults. In *Nale*, the plan provided that the second deed of trust would be avoided and the holder thereof treated as a wholly unsecured creditor. After the debtors completed their Chapter 13 plan, they filed an adversary proceeding in which they sought a declaration that the lien created by the second deed of trust was void and the debtors' obligation thereunder discharged. Judge Brumbaugh found that the creditor was estopped from contesting this result under § 1322(b)(2), because it had failed to object to confirmation and was now bound by the plan's terms, which treated the claim as wholly unsecured.

The opinion in *Nale* relies, in part, on the Tenth Circuit's June 1999 opinion in *Anderson v. UNIPAC-NEBHELP (In re Anderson)*,⁵⁰ in which the Tenth Circuit held that the lender in a post-confirmation adversary proceeding was estopped from arguing the nondischargeability of various student loans by the debtors' Chapter 13 plan provision, which had provided that confirmation would serve as a judicial determination that the debtors met the "hardship" standard for the discharge of these loans under 11 U.S.C. § 523(a)(8).

Despite the debtors' successes in *Nale* and *Anderson*, counsel should be wary of placing too much reliance on plan terms to effectuate a forced resolution of a difficult and material legal issue. If the proposed treatment of an issue is not well justified by the actual facts and law applicable to the situation, sanctions may well be appropriate, even if the tactic is successful.⁵¹ The tactic may not work at all if the creditor is a governmental unit properly entitled to claim sovereign immunity and/or Eleventh Amendment protections. The tactic will also be unsuccessful if the notice to all affected parties is not adequate.

Mootness

The Western Pacific Airlines case made new law on a number of aircraft leasing related issues. This year the Tenth Circuit rebuffed an attempt by some of the aircraft lessors to review these decisions. In *Boullion Aircraft Holding Co., Inc. v. Western Pacific Airlines, Inc. (In re Western Pacific Airlines, Inc.)*,⁵² the Tenth Circuit affirmed the district court's decision, holding that the funding of a debtor-in-possession line of credit mooted the appeal of the approval of that line of credit.

Prejudgment Remedies

The Supreme Court's 1998-99 term was marked by a continued trend of narrowing federal jurisdiction. In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,⁵³ the Supreme Court holds that the United States District Court for the Southern District of New York lacked subject matter jurisdiction to issue a prejudgment preliminary injunction restraining the defendants from dissipating assets. Grupo Mexicano de Desarrollo, S.A. (GMD), is a Mexican holding company that had both a "road construction" and an "investment" subsidiary involved in a toll road construction program. GMD was one of the road contractors and also invested in the concessionaires who were building these roads. Alliance Bond Funding and other respondents in the case invested heavily in GMD's unsecured notes. After the Mexican economy faltered, the toll road program on which GMD was heavily dependent for revenues also faltered. The Mexican government fashioned a legislative "bail out" for this program. This program included, in relevant part, the issuance of government-backed bonds to GMD and other similarly situated parties.

When GMD's business began to falter, it started to liquidate its assets primarily for the benefit of its Mexican creditors. After several interest payments had been missed, Alliance Bond Fund and the other creditors accelerated their notes and brought suit in the United States District Court for the Southern District of New York. GMD had consented to this jurisdiction in its notes. Alliance Bond Fund sought and obtained a prejudgment preliminary injunction restraining GMD and its subsidiaries from transferring, encumbering or otherwise further dissipating its interests in Mexican government bonds, which were GMD's sole significant remaining assets. The injunction did not grant Alliance a prejudgment attachment lien. A \$50,000 bond was posted by Alliance and the other plaintiffs.

GMD appealed the preliminary injunction to the Second Circuit. However, the district court trial occurred quickly, and judgment on the notes entered prior to a decision on the appeal. Alliance argued that the appeal was then moot because the preliminary injunction had been merged into the final post-judgment injunction. This argument was rejected unanimously by the Supreme Court, based on its holding that the trial court's jurisdiction to issue a prejudgment preliminary injunction is a distinct issue from its jurisdiction to issue a post-judgment permanent injunction. Thus, the issue was not mooted by the permanent non-appealed injunction.

The Court then held, in a fractured set of opinions, that F.R.C.P. 65 does not confer jurisdiction to enter a prejudgment injunction barring the dissipation of assets, pending a suit on a debt, because such injunctions were not permissible under the English common law of 1789.⁵⁴ No legislation since the Judiciary Act of 1789 had granted this jurisdiction to the federal courts, except in several specific contexts, such as the collection of taxes owed by a foreign citizen. This decision does not, however, alter the jurisdiction of the federal courts to issue this type of prejudgment injunction, under F.R.C.P. 64, if applicable state law provides for such an injunction. The Court reasoned that Rule 64 would be superfluous if Rule 65 merely provided the same remedy. The majority opinion suggests that Congress should statutorily authorize the remedy disapproved in the decision.

Justice Ginsburg wrote a dissent, in which Justices Stevens, Souter and Breyer joined, disagreeing with the majority opinion on all issues, other than the mootness section of the decision. In her dissent, Justice Ginsburg did not disagree with the conclusion that the specific type of injunction involved was unknown to the English courts of equity before 1789. However, she viewed the Judiciary Act of 1789 as adopting the "principles" of equitable jurisdiction found in the pre-1789 English courts of equity, rather than just the then-known "remedies." In her view, the injunction involved here fell within the penumbra of 1789 equitable principles, even though the remedy was unknown in 1789. She rationalized that necessity for this type of

injunction was unknown in a time when capital and assets could not be as easily or quickly transferred as they can today.

The *GMD* decision may impact bankruptcy practice in a number of ways. First, it will likely serve as a further restraint on the bankruptcy courts and other federal trial courts fashioning creative remedies out of their equitable jurisdiction. This continues a trend over the past several terms to constrain federal equitable jurisdiction. Second, it may promote involuntary petitions as an alternative to prejudgment remedies in circumstances where an insolvent debtor is dissipating assets. Third, if there is a foreign insolvency proceeding, *GMD* may create an incentive to have a foreign representative in that proceeding file an ancillary proceeding under 11 U.S.C. § 304. Finally, *GMD* will likely lead to the restructuring of many transnational financial transactions in such ways that would make it more likely that foreign businesses will be subjected to American jurisdiction over their assets and provide for contractual remedies and choice of law provisions that will recognize these prejudgment equitable remedies that federal law does not provide.

Property Rights

Section 541(a)(5) of the Bankruptcy Code⁵⁵ brings into the bankruptcy estate property acquired by “bequest, devise or inheritance” within 180 days after the petition date. On December 7, 1999, the Supreme Court rendered a unanimous decision in a tax case that will likely impact determinations of whether bequests, devises, and inheritances will be deemed property of the estate under §§ 541(a)(5) and 506. In *Drye v. United States*,⁵⁶ the Supreme Court unanimously affirmed the Eighth Circuit decision⁵⁷ which had held that the validity of a federal tax lien under § 6321 of the Internal Revenue Code⁵⁸ is determined under federal law once the court determines that the taxpayer has a “property interest” cognizable under state law. In this case, the taxpayer’s mother died after the Internal Revenue Service had filed valid tax liens under § 6321. The federal tax liens were valid even though, under applicable Arkansas law, the debtor’s disclaimer of his inheritance was valid to defeat the interests of creditors in the inheritance.

Mr. Drye’s mother died intestate in 1994. He was her sole heir under Arkansas law. The inheritance was worth approximately \$233,000. Mr. Drye unfortunately owed the Internal Revenue Service substantial back taxes. He disclaimed the inheritance to avoid having it be used to pay taxes. Under applicable Arkansas law, the effect of his disclaimer was to create the legal fiction that Mr. Drye had died prior to his mother’s death. Under Arkansas law, such a disclaimer is valid as against the disclaiming heir’s creditors. Mr. Drye’s daughter was the next heir in line to inherit. The daughter used the inheritance to set up a spendthrift trust which named Mr. Drye as a life beneficiary. The state probate court upheld this scheme as valid and refused to acknowledge the federal tax lien’s validity. The Internal Revenue Service filed a notice of levy against the trust assets and seized them to pay a portion of Mr. Drye’s taxes. The trust brought suit for wrongful levy. The district court ruled in favor of the government and against the Dryes. The Eighth Circuit affirmed.

The Supreme Court reiterated in *Drye* that the proper analysis under § 6321 is whether under state law the taxpayer had a property right. However, federal law determines the validity of the federal liens against the property. It was uncontested that the inheritance, although disclaimed, nevertheless vested a property right in Mr. Drye under Arkansas law. Thus, there was property to which the federal tax lien could attach. The validity of that attachment was a federal and not a state law question. Federal law does not recognize the disclaimer’s validity and, therefore, the tax liens attached to the trust res. Consequently, the levy and seizure were proper.

Prior to *Drye*, several published opinions under § 541(a)(5)(A) had employed a similar rationale to invalidate the debtor’s attempt to disclaim an inheritance that vests within the 180-day post-petition period set

forth in § 541(a)(5).⁵⁹ In Colorado, however, Senior Judge Weinsheink's opinion in *United States v. Davidson*⁶⁰ held that the taxpayer did not acquire an interest in the inheritance unless and until the inheritance was accepted. In note 1 of the *Drye* opinion, the Supreme Court expressly rejected the *Davidson* decision's analysis. The right to receive the inheritance is the right to which the Supreme Court holds the tax lien attached. Having once attached, the taxpayer's interest remains subject to the lien and a disclaimer or divestiture of the property does not defeat the lien.

Secured Claims

In *Rushton v. State Bank of Utah (In re Gledhill)*,⁶¹ the Tenth Circuit refused to allow the holder of an oversecured judgment lien, arising out of a deficiency judgment, to collect its post-petition attorney fees and costs. Since a deficiency judgment constitutes a nonconsensual lien rather than a consensual lien arising under the original loan agreement, the court held that 11 U.S.C. § 506(b) was not applicable. Section 506(b) allows post-petition attorney fees and costs to be included in the creditor's secured claim only when there is a consensual lien providing for attorney fees and costs.

Stipulations

In *Ridge at Hiwan, Ltd. v. Thompson (In re Thompson)*,⁶² Judge Kane enforced a settlement that had been incorporated into the debtor's confirmed plan of reorganization. The settlement between the debtor and his primary creditor provided that the creditor would be entitled to relief from stay to pursue post-trial matters in the case that had precipitated the Chapter 11 filing, and that further proceedings involving this lawsuit would be heard in state court. The Colorado Court of Appeals reversed the underlying judgment and remanded the matter for a new trial shortly after the bankruptcy court had approved the adequacy of the debtor's disclosure statement. The remand was a "non-ministerial" remand, which inferentially required a new trial. After the Colorado Court of Appeals denied the creditor's motion for rehearing, the debtor commenced a claims objection hearing before the bankruptcy court. The creditor sought to have the court abstain and to have the matter decided in state court based on the earlier settlement. Judge Brumbaugh held that the settlement was ineffective post-confirmation and denied abstention.

Judge Kane held that the settlement had been incorporated into the debtor's plan and remained binding on the parties. In Judge Kane's view, this settlement "was not some temporary or incidental aspect of the bankruptcy process; it was its essence. The RHL judgment formed the entire basis for Debtor's bankruptcy petition and its viability, or lack thereof, was the issue around which all others turned. . . . [*i.e.*, the] ultimate issue."⁶³ By refusing to abstain, the bankruptcy court erred in not enforcing this settlement and reversal was mandated. This decision illustrates the binding authority of settlements and plan provisions on all parties.

Substantial Abuse

In *Stewart v. United States Trustee (In re Stewart)*,⁶⁴ the Tenth Circuit adopted the "totality of the circumstances" test for determining whether a Chapter 7 case should be dismissed for "substantial abuse." Under this test, the ability to make significant repayment of debt through a Chapter 11 or 13 plan or some non-bankruptcy remedy is an important, but not an exclusive, factor in weighing whether a case should be dismissed. Other factors include patterns of abuse of credit, lack of candor in the bankruptcy, certain types of debts, other efforts to deal with the debt, absence of calamitous events, and patterns of debt accumulation. The court also rejected a variety of constitutional challenges to 11 U.S.C. § 707 (b), including arguments that the statute is vague and violates equal protection. Perhaps more importantly, it held that a party other than

the bankruptcy court and the United States Trustee can be the source of information that prompts the United States Trustee's filing of a motion under § 707(b), as long as the United States Trustee conducts an independent investigation of the case.

The Tenth Circuit also found that student loan debts are consumer debts to the extent that loan proceeds are used for personal, household, and family expenses. This decision interpreted the "predominately consumer debt" language of § 707(b) as merely requiring that a majority of the dollar amount of debts be comprised of consumer debt, resolving a split among the lower courts over whether the number of consumer debts versus non-consumer debts was a relevant factor, and whether "primarily" requires a "supermajority."

Trustee Avoidance Powers

Judge Babcock, sitting as the trial judge in an adversary proceeding, wrote an extensive opinion in *Sender v. Porter (In re Porter McLeod, Inc.)*,⁶⁵ addressing a number of substantive issues arising out of motions for summary judgment by the defendants in an action by the Chapter 7 trustee against the various debtors' principals, their counsel, several affiliates, and a lender. The underlying complaint alleged that the plaintiffs had engaged in a pattern of conduct calculated to place assets beyond the reach of the debtors' creditors. This adversary was brought by the trustee of Porter McLeod as trustee of that case and as an assignee of the Chapter 7 trustee in the related bankruptcy cases of four affiliates. The "Porter McLeod" trustee asserted that after Porter McLeod got into financial problems, it sought legal counsel from the attorney defendants, who counseled it to set up the affiliates for the purpose of reorganizing Porter McLeod. The trustee asserted that the attorneys aided and abetted the principals of the companies in their breach of fiduciary duties to creditors and that they thereby committed legal malpractice. Trade creditors of Porter McLeod filed an involuntary case against it to unwind the reorganization. The Porter McLeod trustee, Harvey Sender, then took control of the affiliates and filed voluntary petitions for the affiliates. A different trustee, Jeffrey Weinman, was appointed in the "affiliates'" cases. Weinman assigned the affiliates' claims to Sender for the purpose of collection. The adversary proceeding was withdrawn to the district court due to appropriate and timely jury demands.

Judge Babcock dealt with a number of procedural and substantive issues that are beyond the scope of this commentary. However, several "bankruptcy" issues were discussed at length. The court held that the defendants could not assert a defense that the trustees, as successors to the debtors, under 11 U.S.C. § 541(a), were *in pari delicto* where the causes of action were brought by the trustees in their capacity as "hypothetical judgment creditors" under 11 U.S.C. § 544(a)(1).

Under C.R.S. § 13-80-102(a)(1), as extended by 11 U.S.C. § 108(a)(2), the malpractice claims had a two-year limitations period that ran from the date of the order for relief in the case. However, this limitations period was equitably tolled by the defendants' alleged continuing concealment of the facts underlying the formation of eight subsidiary corporations as recipients of fraudulent conveyances from Porter McLeod. Thus, even though the amended complaint did not relate back, under F.R.C.P. 15, the action against the former "John Doe" defendants was timely.

Judge Babcock held that the assignment for collection of malpractice claims at bar was not barred by applicable Colorado law, which generally prohibits the assignment of professional malpractice claims. He found that the assignment was proper given the unity of interest of the various debtors' estates; the fact that "but for" the alleged fraudulent conveyances, the causes of action would have lain entirely in favor of Porter McLeod's creditors; and because the assignment fostered the efficient administration of the various bankruptcy cases.

Importantly, Judge Babcock found that the claim against legal counsel for aiding and abetting Porter McLeod and its principals to breach their fiduciary duties by consummating the fraudulent conveyances was a cause of action distinct from the legal malpractice claims. This claim is not governed by the restraints created on malpractice claims under state law. The defendants' liability on the claim may also be outside the scope of any malpractice insurance policy's coverage.

The *Porter McLeod* decision is a good overview of some complex issues involving a trustee's avoidance powers. It is also an illustration of the risks of non-bankruptcy restructurings that do not respect creditors' rights.

Trustee Compensation

Chief Judge Matheson issued two opinions during November 1999 that address trustee compensation issues. In *Connolly v. Harris Trust Company of California (In re Miniscribe Corp.)*,⁶⁶ Judge Matheson concluded that a modified lodestar approach that resembles a "common fund" fee analysis should be used to compute the reasonable fee in this very large Chapter 7 case. In *In re Rodriguez*,⁶⁷ Judge Matheson held that the Chapter 7 trustee was entitled to compensation, despite the fact that the case had converted from Chapter 7 to Chapter 13. *Rodriguez* has not been appealed. *Miniscribe* is currently pending on appeal.

In *Miniscribe*, the trustee had been the lead plaintiff in a securities fraud case, which settled for \$128.1 million. Of this sum, the estate's share was \$16.9 million. The remaining funds went to two secured creditors, the indenture trustee, and the debtor's shareholders. Based on an earlier unpublished opinion on summary judgment motions, the court permitted the trustee to include \$84.1 million, which had been distributed through the trustee's accounts, as his "base" for computing the maximum compensation permitted under 11 U.S.C. § 326(a).

The court held in the published opinion that the trustee was entitled to compensation of \$500 per hour for his work. It further held that a 3.5 multiplier was appropriate in light of the extraordinary circumstances. The court relied on cases that involved a "common fund" approach to compensation to find that this multiplier was appropriate. The court also relied upon the Tenth Circuit's analysis in *Gottlieb v. Barry*,⁶⁸ which had held that a "common fund" analysis was appropriate rather than a "lodestar" analysis. The use of a "common fund" analysis in bankruptcy had previously not been favored. Despite an abundance of case law that tends to discourage any award of bonuses in lodestar-based cases, *see, e.g., City of Burlington v. Dague*,⁶⁹ Judge Matheson concluded that *Miniscribe* was an exceptional case. In doing so, Judge Matheson seemed to rely on the fact that hourly billing is losing favor to result-oriented billing outside of bankruptcy.

The *Miniscribe* decision also rejected several legal theories advanced by the parties. The court rejected the trustee's urging to adopt a rule that a trustee is ordinarily entitled to the statutory maximum, absent adverse factors to the contrary. It also rejected an argument that a percentage of the funds distributed to parties in interest is the norm for similar work in non-bankruptcy settings, such as probate. It also failed to adopt the indenture trustee's argument that the trustee had run the entire \$84 million through the estate in order to raise his § 326(a) statutory compensation maximum. By doing so, the court implicitly rejected a line of cases that considered only the funds that were actually distributed by the trustee to creditors through the bankruptcy claims process, as opposed to considering the entirety of the funds distributed by the trustee, as the base for computing the § 326 maximum.

To date, *Miniscribe* is the largest Chapter 7 filing in Colorado and is unusual insofar as there was a surplus of funds to distribute. Thus, the opinion may have very limited application outside of the relative

handful of cases, which have similar large pools of funds from which large multipliers can be paid. In the more typical case, the § 326(a) statutory cap is simply too low to result in much enhancement of the fee over the “lodestar” amount.

In *Rodriguez*, Judge Matheson held that the § 326(a) statutory cap on trustee compensation was applicable in a Chapter 13 case that had been converted from Chapter 7. Since the standing Chapter 13 trustee’s compensation did not exhaust the statutory maximum on trustee compensation, the court held that the Chapter 7 trustee could receive the difference between the maximum and the standing trustee’s compensation. The court further held that this compensation had to be paid as a periodic pro rata distribution as funds were actually received into the Chapter 13 case.

Rodriguez is important because it enables Chapter 7 trustees to be compensated for their efforts in uncovering assets, despite a subsequent conversion of the case. Similarly, Chapter 7 trustees can be paid in cases in which 11 U.S.C. § 523(a) dischargeability and/or 11 U.S.C. § 727 discharge litigation is brought in the Chapter 7 case, which precipitates the conversion to Chapter 13. Several amendments to the proposed Senate version of the “Bankruptcy Reform Act of 1999”⁷⁰ were designed to address the issue of Chapter 7 trustee compensation in cases that convert due to trustees’ actions in recovering assets. Under these proposed amendments, the Chapter 7 trustee in the converted case would be entitled to reasonable compensation out of the Chapter 13 payments.

Chapter 13 practitioners should advise their debtor clients of two practical implications of *Rodriguez*. First, substantial payments may have to be made to the Chapter 7 trustee if the case converts from Chapter 7 to Chapter 13, which may well make a Chapter 13 plan in the converted case too costly to be feasible. Secondly, those debtors who seek a post-conversion dismissal may well find that the Chapter 7 trustee will oppose dismissal, if it appears to be designed to avoid the administration of property of the estate in a Chapter 7 by converting to a Chapter 13 and then filing a motion to dismiss. Motions to reconvert cases back to Chapter 7 may become more common as a result of *Rodriguez*.

Although *Miniscribe* and *Rodriguez* both appear to favor Chapter 7 trustees, they may not be harbingers of increased liberality in regard to compensation issues in other contexts. Trustee compensation has been and likely will continue to be an area which is *sui generis*.

Vacatur

Vacatur was an important issue in two opinions published during 1999. In the *Boullion* opinion discussed above,⁷¹ the Tenth Circuit also dismissed the lessors’ arguments that the earlier opinions under 11 U.S.C. § 1110 which they had unsuccessfully sought to appeal should be vacated due to the fact that the judgments below had become moot. The Tenth Circuit held that the important issues of public policy embodied in the lower courts’ opinions and detrimental reliance by others on those opinions stated sufficient cause for denying vacatur, even if the decisions themselves had become moot.

In *Clark v. Hiller (In re Hiller)*,⁷² Judge Nottingham granted a writ of mandamus, requiring Judge Brooks to vacate his prior decision, in order to enforce the terms of the settlement requiring vacatur. The debtor in this case, Mr. Hiller, had originally filed a Chapter 11 case and confirmed a 100 percent repayment plan of reorganization. Mr. Hiller defaulted on his plan by failing to make any payments post-conversion. When the case was converted to a Chapter 7 case, the trustee discovered a variety of pre-petition and pre-conversion post-petition transfers by Mr. Hiller. The trustee brought an adversary to deny Mr. Hiller’s discharge. Judge Brooks found that cause existed for the denial of Mr. Hiller’s discharge, but that the denial

of discharge could only serve to deny a discharge of the pre-petition debts that were restructured by the confirmed plan. In this case, the judgment was of no serious legal consequence because Mr. Hiller's Chapter 11 plan had not sought to discharge any pre-petition debts. While the judgment was on appeal to the Tenth Circuit, a settlement was reached in which Mr. Hiller waived his discharge and paid the estate sufficient funds to discharge his debts as compromised by settlements with the creditors. This settlement also required vacatur of both the district court and bankruptcy court opinions.

After both courts approved the settlement, Judge Nottingham vacated his opinion and remanded the case to the bankruptcy court to allow it to vacate its opinion as well.⁷³ Shortly thereafter, the United States Supreme Court issued its opinion in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,⁷⁴ in which the Court held that vacatur is ordinarily improper where a decision becomes moot due to settlement. Judge Brooks issued a lengthy opinion, largely premised on *Bonner Mall*, declining to vacate his opinion. In October 1994, a petition for a writ of mandamus was filed to compel Judge Brooks to vacate the decision. This petition was granted by Judge Nottingham who found "exceptional circumstances" justified vacatur as permitted by *Bonner Mall*.⁷⁵ Judge Nottingham also found that mandamus was appropriate because the lower court did not have the option of simply ignoring the remand of a higher court. Judge Nottingham did not indicate an alternative means by which the issue could have been raised by the bankruptcy court.

Pending Supreme Court Matters in Bankruptcy

To date the only case on which the Supreme Court has pending certiorari on a bankruptcy question is *Hartford Underwriters Ins. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*,⁷⁶ in which the Court will apparently decide a split between the circuits on whether a creditor has standing under 11 U.S.C. § 506(c) to surcharge a secured creditor's collateral for the costs associated with the preservation of that collateral. The Tenth Circuit does not have a published opinion on this issue. The Eighth Circuit's *en banc* opinion holds that under the explicit language of the statute, only trustees and, by virtue of 11 U.S.C. § 1107, debtors-in-possession have standing to assert claims under this subsection. The earlier panel opinion had held that creditors have standing to assert such surcharge claims and that the provisions of a post-petition financing order barring the assertion of surcharge claims are void.

Late Developments

Several significant developments occurred in the waning days of the year. Most notably, the Hon. Roland J. Brumbaugh announced that he was taking a medical retirement effective January 4, 2000. The Colorado Bar Association, through the Bankruptcy Subcommittee of the Business Committee, endorsed proposed amendments to the various Colorado exemptions. Two significant opinions were released for publication late in 1999. Finally, certain filing fees were increased, effective December 29, 1999.

Judge Brumbaugh's retirement will result in the reduction of the Colorado bankruptcy bench to five judges. The sixth judgeship had only been authorized as a "temporary" judgeship, and it will not be refilled. Pursuant to General Procedure Order Number 1999-4, dated December 27, 1999, case reassignments occurred for all pending matters.

A proposal to seek amendments to the Colorado exemptions, most of which are found in C.R.S. §13-54-102, was approved by the Colorado Bar Association last fall. If enacted into law, the proposal would effectively double most of the exemption amounts and "index" most of the exemptions for inflation. Senator Perlmutter has indicated that the bill, as introduced, may differ significantly from the draft approved by the Colorado Bar Association.

Judge Daniels affirmed Judge Brumbaugh's 1998 *Etcheverry* opinion, which held that "bad faith" does not state cause for the dismissal of a Chapter 7 case under 11 U.S.C. §707(a).⁷⁷ The opinion appears to overrule Judge Brooks' opinions in *In re Tanenbaum*,⁷⁸ and *In re Hammonds*,⁷⁹ in each of which Judge Brooks had found "bad faith" could state cause for the dismissal of a Chapter 7 case. Judge Daniels found that there is no guidance from the Tenth Circuit or Supreme Court on these issues and that the cited case law from the Sixth Circuit⁸⁰ and a number of bankruptcy and district courts is not persuasive. He distinguished the Tenth Circuit's discussion in *Stewart v. United States Trustee (In re Stewart)*,⁸¹ in which the Tenth Circuit seems to imply that "bad faith" is a basis for the dismissal of a Chapter 7 case under §707(b). An appeal to the Tenth Circuit is likely.

Judge Krieger recently released her November 1, 1999, opinion for publication that denied confirmation of the Mount Carbon Metropolitan District's proposed Chapter 9 plan,⁸² on the bases of lack of good faith and lack of feasibility. The opinion is very fact specific. Nevertheless, it is instructive as to the distinction between Chapter 11 and Chapter 9 cases and the resulting differences in the standards for confirmation. Since municipalities are not eligible for Chapter 9 relief unless they are insolvent, the court found that one of the fundamental purposes of Chapter 9 is to remedy the insolvency, not only on a balance sheet basis, but in terms of its ability to pay its debts as they fall due. Based on this, the court found that the primary purpose of debt restructure for a municipality is not future profit, but continued provision of public services. A determination of feasibility entails a finding not only that the municipal debtor can repay pre-petition debt, but also the cost of its continued governmental services. In this context, the court analyzed in depth the Chapter 9 confirmation requirements of establishing "feasibility" and "good faith."

In this case, the debtor essentially tried to circumvent the feasibility requirement with two arguments. First, it argued that the plan had the overwhelming support of creditors and the only opponent was a city, that could protect its executory contract rights after assumption, through state law remedies. The court held that it cannot deny standing to the city to object to feasibility based on some attribute (size, funding, or alternative remedies). In addition, the "best interest" test may be satisfied by creditor approval of the plan, but feasibility is a separate standard that must be satisfied in Chapter 9, regardless of creditor support. Secondly, the debtor argued that the plan's provision for the issuance of "no default" exchange bonds, which merely compound unpaid payments, but do not allow the holder to declare a default, meant that it need only establish that it can issue these bonds legally, and need not prove it can pay them timely. The court found this interpretation would render the feasibility requirement and purpose of Chapter 9 meaningless.

In determining whether the plan had been proposed in "good faith," the court applied the "totality of the circumstances" test. In this case, it found that the favorable treatment of the creditor co-proponent, by itself, did not run afoul of the "good faith" standard. However, the plan was not proposed in good faith because all profits under the plan were being funded by using the taxing power of a municipality without consideration of the municipality's obligation to provide future public services. No expenses for future services or infrastructure had been projected, and all projected revenue was to be devoted to bond repayment. In addition, the municipality would be unable to raise future revenue from other sources because the exchange bonds constituted a first lien on the property and under an agreement with the creditor co-proponent, the creditor held a veto power over any future increase in taxes. Under these circumstances, the plan effectively stripped the municipality of any public function and encumbered its future revenue to pay past debt and future profit to the creditor co-proponent. The court found that the plan was an attempt to harness a governmental entity's taxing power for private profit. Chapter 9 was not intended for this purpose and, thus, the plan was not proposed in good faith.

On November 29, 1999, the President of the United States signed into law an omnibus appropriations act, Public Law No. 106-113, which included a \$25.00 increase in the filing fees for Chapter 7 and Chapter 13 cases. The increase was effective December 29, 1999. The fees that are affected are as follows:

- \$200.00—Chapter 7 voluntary or involuntary case
- \$185.00—Chapter 13 case
- \$155.00—Motion to reopen a Chapter 7 or 13 case
- \$ 77.50—Deconsolidation of a Chapter 7 or 13 case

Conclusion

Continuing efforts by the consumer credit industry to restrain bankruptcy filings will continue. These efforts may result in a “reform” act passing in the near term that will impose serious impediments to the bankruptcy process, even if few are actually denied that access. Bankruptcy filings, including consumer bankruptcy filings, have dropped nationally and locally from last year’s record levels. With this decline may come decreasing pressure to implement means testing and other measures to discourage or prohibit some types of consumer bankruptcy filings.

This year’s “business bankruptcy” case law has been limited as well. However, those opinions that were published suggest that non-bankruptcy reorganizations and restructurings, which are often less costly and faster, may be a prudent alternative for many troubled companies. The Supreme Court’s view of “property” in the context of the absolute priority rule announced this year makes Chapter 11 a less attractive alternative for many business debtors. Other developments in business bankruptcy case law are also likely to promote non-bankruptcy solutions.

Thus, even with the modest number of published opinions during the year, 1999 was a watershed year for bankruptcy practice. In coming years, the trends embodied in this year’s published cases may reflect a change in societal attitudes toward bankruptcy. The view that bankruptcy is an attractive alternative for many persons with significant debt loads is shifting toward once again viewing bankruptcy as a drastic remedy, which should not be undertaken lightly. This shift reflects factors such as lower consumer interest rates, a narrower scope of debts subject to discharge, lower unemployment rates, and a stable economy.

** This commentary is written, in part, by Leo M. Weiss, Esq., a staff attorney for the United States Trustee's Office in Denver, Colorado. The opinions expressed herein do not constitute an official statement of the policies or opinions of the United States Trustee's Office, the Executive Office for United States Trustees, the United States Department of Justice or any other agency or instrumentality of the United States government. Co-Author Elizabeth E. Brown is a partner in the Denver office of Holme, Roberts & Owen, LLP, where she co-chairs its Bankruptcy/ Insolvency Department. She is a past President of the Colorado Bar Association's Bankruptcy Subsection.*

NOTES

1. *Dreiling v. Cimino (In re Dreiling)*, 233 B.R. 848 (Bankr. D. Colo. 1999).
2. *Woods v. Kenan (In re Woods)*, 173 F.3d 770 (10th Cir. 1999).

3. *Bank of America Nat'l Trust and Savings Ass'n v. 203 North Lasalle Street Partnership*, 526 U.S. 434 (1999).

4. The debt in question was based on a \$93 million non-recourse note which had been made by Bank of America's predecessor, Continental Illinois Bank and Trust. The Bank had made an election under 11 U.S.C. § 111(b)(2) to bifurcate its secured claim from its deficiency claim.

5. The Debtor's partners had acquired the remaining \$70,000 in trade debt claims. The plan proposed to pay nothing on these acquired claims.

6. The Bank would be required to pay interest even if the Debtor's plan did not provide for it for a pragmatic reason. By paying the trade creditors interest, these trade creditors would lose all standing to controvert the Bank's post-confirmation actions regarding the property. By depriving the trade creditors of standing, the Bank would avoid having to actually consummate the Debtor's proposed plan, which might provide for the funds to otherwise go to capital improvements or some other purpose rather than toward the reduction of the Bank's deficiency claim. As noted in the prior footnote, \$70,000 in trade debt had been acquired by insiders, apparently as a way to ensure that the trade creditors would be an accepting impaired class.

Under 11 U.S.C. § 1127, a plan can be modified prior to its substantial consummation. Since any bidding for the right to acquire the equity likely would have to occur before the plan was "substantially consummated," the Bank could then propose to buy the equity and modify the plan to make the unsecured creditors "unimpaired." Its own deficiency claim then could be an accepting impaired class and the "old equity" would likely be without standing to raise any issue because their equity interest would have been canceled and their debt claims satisfied.

7. *Unruh v. Rushville State Bank*, 987 F.2d 1506 (10th Cir. 1993).

8. *In re BMW Group I, Ltd.*, 168 B.R. 731 (Bankr. W.D. Okla. 1994).

9. "A Theory of Absolute Priority," 1991 *Ann. Surv. Am. L.* 9 (1991).

10. *In re Foster*, 188 F.3d 1259 (10th Cir. 1999).

11. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985).

12. *Foster*, 188 F.3d at 1265 (citing *In re Bazemore*, 216 B.R. 1020 (Bankr. S. D. Ga. 1998) and *In re Rice*, 224 B.R. 464 (Bankr. D. Or. 1998)).

13. *Schofield v. United States Trustee (In re Jones)*, 236 B.R. 38 (D. Colo. 1999).

14. *George T. Carlson & Assocs. v. United States Bankr. Court (In re Ingersoll)*, 238 B.R. 202 (D. Colo. 1999).

15. *In re Friedland*, 182 B.R. 576 (Bankr. D. Colo. 1995).

16. *In re Mahendra*, 131 F.3d 750, 755-56 (8th Cir. 1997) (Chapter 7 counsel's pre-petition attempted securing of post-petition services by a deed of trust on the Debtor's real property was ineffective

for the same reasons as a cash retainer would have been ineffective, since either is a transfer of “property of the estate.”).

17. *Iowa Supreme Ct. Bd. of Prof. Ethics and Conduct v. Winkel*, 599 N.W.2d 456 (Iowa 1999) (Attorney disciplined *inter alia* for placing a flat fee in a Chapter 7 bankruptcy in his operating account rather than his trust account, even though at the time he received the fee most of the work in the case had already been completed.).

18. *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

19. *Weinman, Cohen & Niebrugge, P.C. v. Peters (In re Printcrafters, Inc.)*, 233 B.R. 113 (D. Colo. 1999).

20. *In re Theresa Elaine Jones*, Case No. 96-13016 CEM (Bankr. D. Colo. Sept. 21, 1999).

21. *In re Roffle*, 216 B.R. 290 (Bankr. D. Colo. 1998).

22. Administrative Order 1999-6, United States District Court for the District of Colorado.

23. *In re Printcrafters, Inc.*, 233 B.R. 113 (D. Colo. 1999).

24. *Franklin Sav. Corp. v. United States (In re Franklin Sav. Corp.)*, 180 F.3d 1124 (10th Cir. 1999).

25. *Ortiz v. Fibreboard Corp.*, ___ U.S. ___, 119 S. Ct. 2295 (1999).

26. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (the Indian Gaming Act’s waiver of sovereign immunity was unconstitutional under the Eleventh Amendment where it permitted a disaffected tribe to sue a state in federal court under the Act.).

27. *Florida Prepaid Secondary Educ. Expense Bd. v. College Sav. Bank*, ___ U.S. ___, 119 S. Ct. 2219 (1999).

28. *College Sav. Bank v. Florida Prepaid Secondary Educ. Expense Bd.*, ___ U.S. ___, 119 S. Ct. 2199 (1999).

29. *Alden v. Maine*, ___ U.S. ___, 119 S. Ct. 2240 (1999).

30. *Parden v. Terminal R. of Ala. Docks Dept.*, 377 U.S. 184 (1964).

31. Pub. L. No. 102-542, 106 Stat. 3567 (1992).

32. 15 U.S.C. § 1125(a).

33. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

34. U.S. Const., Amend. XIV, § 5.

35. 29 U.S.C. §§ 201, *et seq.*

36. *Innes v. Kansas State Univ. (In re Innes)*, 184 F.3d 1275 (10th Cir. 1999).

37. The *Innes* case was filed prior to October 8, 1998. Section 971 of the Higher Education Amendments of 1998, Pub. L. 105-244, 112 Stat. 1581 (1998), repealed the student loan discharge provisions, formerly 11 U.S.C. § 523(a)(8)(A), which permitted the discharge of government-guaranteed student loans that first became due, exclusive of any applicable suspension of the repayment period by the obligee, more than seven years pre-petition. This statute was applicable to cases filed on or after October 8, 1998. The hardship discharge provisions of former 11 U.S.C. § 523(a)(8)(B) were recodified without amendment as current 11 U.S.C. § 523(a)(8). *Innes* arose under former 11 U.S.C. § 523(a)(8)(B).

38. If the University filed a proof of claim in the case, it would have eliminated the jurisdictional issues. *See Rose v. U.S. Dep't. of Educ. (In re Rose)*, 187 F.3d 926 (8th Cir. 1999) (state agency waived sovereign immunity defense as to all claims for which it had filed a proof of claim).

39. Kans. Stat. Ann. § 76-723.

40. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985).

41. *Innes*, 184 F.3d at 1279, citing *Florida Dep't of Health & Rehb. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981).

42. *Id.* at 1280.

43. *Id.* at 1281; *In re Innes*, 207 B.R. 953, 954 (Bankr. D. Kan. 1997).

44. *Id.*, quoting 34 C.F.R. § 674.49(b).

45. *But see In re Snyder*, 228 B.R. 712 (Bankr. D. Neb. 1998) (University of Nebraska's Board of Regents not empowered to waive the State of Nebraska's sovereign immunity and, therefore, contractual waiver ineffective).

46. *Brown v. Felsen*, 442 U.S. 127 (1979).

47. *Texas Higher Education Coordinating Bd. v. Greenwood (In re Greenwood)*, 237 B.R. 128 (N.D.Tex. 1999), illustrates this point well. In *Greenwood*, the student loans in question were state-guaranteed loans. The district court reversed the bankruptcy court's denial of the agency's motion to dismiss for lack of subject matter jurisdiction, finding that under *Alden* the state agency was immune from suit since the discharge of the loan balance would have a financial impact on the State of Texas.

48. *In re Snyder*, 228 B.R. 712 (Bankr. D. Neb. 1998).

49. *In re Nale*, 239 B.R. 235 (Bankr. D. Colo. 1999).

50. *Anderson v. UNIPAC-NEBHELP (In re Anderson)*, 179 F.3d 1253 (10th Cir. 1999).

51. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) (sanctions, including criminal prosecution under 18 U.S.C. § 152, may be imposed on debtors and counsel engaged in fraudulent attempt to claim exemption which was not well founded in fact and law).

52. *Boullion Aircraft Holding Co., Inc. v. Western Pac. Airlines, Inc. (In re Western Pac. Airlines, Inc.)*, 181 F.3d 1191 (10th Cir. 1999).

53. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, ___ U.S. ___, 119 S. Ct. 1961 (1999).

54. A 1975 opinion of the court of appeals permits such an injunction under British law based on more recent statutory law. *Mareva Compania Naviera S.A. v. International Bulkcarriers*, 2 Lloyd's Rep. 509 (1975). An 1890 decision of this English court had rejected this type of remedy. *Lister & Co. v. Stubbs*, 45 Ch.D. 1 (C.A. 1890). In 1981 the Parliament adopted a specific statute permitting "Mareva" injunctions. See Supreme Court Act of 1981 § 37, 11 Halsbury's Statutes 966, 1001 (4th Ed. 1985).

55. 11 U.S.C. § 541(a)(5).

56. *Drye v. United States*, 98-1101 (December 7, 1999).

57. *Drye Family 1995 Trust v. United States*, 152 F.3d 892 (8th Cir. 1998).

58. 26 U.S.C. § 6321.

59. E.g., *In re Chenoweth*, 132 B.R. 161 (Bankr. S.D. Ill. 1991), *aff'd*, 143 B.R. 527 (S.D. Ill. 1992).

60. *United States v. Davidson*, 55 F. Supp. 2d 1152 (D. Colo. 1999).

61. *Rushton v. State Bank of Utah (In re Gledhill)*, 164 F.3d 1338 (10th Cir. 1999).

62. *Ridge at Hiwan, Ltd. v. Thompson (In re Thompson)*, 231 B.R. 802 (D. Colo. 1999).

63. *Id.* at 807.

64. *In re Stewart*, 175 F.3d 796 (10th Cir. 1999).

65. *Sender v. Porter (In re Porter McLeod, Inc.)*, 231 B.R. 786 (D. Colo. 1999).

66. *In re Miniscribe Corp. (Connolly v. Harris Trust Co. of Calif.)*, 241 B.R. 729 (Bankr. Colo. 1999).

67. *In re Rodriguez*, Case No. 99-10597 (Bankr. Colo. Dec. 1999).

68. *Gottlieb v. Barry*, 143 F.3d 474 (10th Cir. 1994), *rev'g Gottlieb v. Wiles*, 150 F.R.D. 174 (D. Colo. 1993).

69. *City of Burlington v. Dague*, ___ U.S. ___, 112 S. Ct. 2638 (1992).

70. S. 633, 106th Cong., 1st Sess. (1999).
71. *Boullion*, 181 F.3d 1191 (10th Cir. 1999).
72. *Clark v. Hiller (In re Hiller)*, 148 B.R. 606 (Bankr. D. Colo. 1992). *See also Blumenthal v. Hiller (In re Hiller)*, 143 B.R. 263 (Bankr. D. Colo. 1992) (adversary proceeding concerning some of the alleged transfers).
73. *Clark v. Hiller (In re Hiller)*, 179 B.R. 253 (D. Colo. 1994).
74. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994).
75. *Clark v. Hiller (In re Hiller)*, 232 B.R. 480, 481 (D. Colo. 1999), quoting *Bonner Mall*, 513 U.S. at 29.
76. *Hartford Underwriters Ins. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 120 S. Ct. 444 (1999), granting cert. The Eighth Circuit's *en banc* opinion is reported at *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 177 F.3d 719 (8th Cir. 1999), *en banc vacated opin. on reh'g*, *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 150 F.3d 868 (8th Cir. 1998), *vacated on reh'g*.
77. *In re Etcheverry*, 242 B.R. 503 (U.S.D.C. Colo. 1999).
78. *In re Tanenbaum*, 210 B.R. 182 (Bankr. D. Colo. 1997).
79. *In re Hammonds*, 139 B.R. 535 (Bankr. D. Colo. 1992).
80. *Industrial Ins. Services, Inc. v. Zick (In re Zick)*, 931 F.2d 1124 (6th Cir. 1991).
81. *Stewart v. United States Trustee (In re Stewart)*, 175 F.3d 796, 811 n.14 (10th Cir. 1999).
82. *In re Mount Carbon Metropolitan Dist.*, 242 B.R. 18 (Bankr. D. Colo. 1999).

CASES

- *Alden v. Maine*
- *Anderson v. UNIPAC-NEBHELP (In re Anderson)*
- *Atascadero State Hosp. v. Scanlon*
- *Bank of America National Trust and Savings Ass'n v. 203 North Lasalle Street Partnership*
- *Boullion Aircraft Holding Co., Inc. v. Western Pacific Airlines, Inc. (In re Western Pacific Airlines, Inc.)*
- *Brown v. Felsen*
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- *Connolly v. Harris Trust Company of Calif. (In re Miniscribe Corp.)*

- *Dreiling v. Cimino (In re Dreiling)*
- *Drye v. United States*
- *Florida Prepaid, College Savings Bank v. Florida Prepaid Secondary Education Expense Bd.*
- *Florida Prepaid Secondary Education Expense Bd. v. College Savings Bank*
- *Franklin Sav. Corp. v. United States (In re Franklin Sav. Corp.)*
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- *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*
- *Hartford Underwriters Ins. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*
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