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A Mini-Theme on Bankruptcy

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Think nationally, act locally: Confronting bankruptcy’s "solutions"

In Ernest Hemingway’s novel, *The Sun Also Rises*, one man asks another, “How did you go bankrupt?” The reply: “Two ways... Gradually and then suddenly.”

In these same two ways, lawyers have seen the ambiguities of the Bankruptcy Code resolved: gradually, as controversies percolated through lower courts, law review articles and committees, and then suddenly, as the Supreme Court or Congress addressed the issues on a national level.

The articles in this issue detail the “state of the art” on a whole range of issues. However, they also indicate where the code’s canvas remains blank, and suggest ways in which these gaps can be filled. By extending, expropriating, and exploiting the “gray areas” left by the most recent solutions, informed lawyers can develop and distinguish compelling new arguments. Raising an innovative interpretation encourages settlement on favorable terms.

These analyses also underscore the factors behind the code’s relatively slow evolution, each of which encourages lawyers to read the statute creatively and to monitor divergent interpretations from other jurisdictions.

After all, there is no federal agency such as an SEC, EPA or IRS to guide the bankruptcy community on the interpretation of such basic statutory terms as “adequate protection,” “executory contract” and “reasonably equivalent value.”

As courts develop their own methods of implementing the code, an informal “local bankruptcy culture” arises in each district, or even before each judge. Indeed, commentators have observed empirically the persistence over time in different districts, for instance, the strikingly different levels of the minimum acceptable repayment percentage to unsecured creditors in a Chapter 13 plan.

In bankruptcy matters, even formal written opinions are limited geographically. The holding of one bankruptcy judge does not bind another, nor is a district court’s decision dispositive to other district courts. The circuit courts of appeals, although determining issues for their respective circuits, have themselves been divided on many issues, sparking frequent petitions to the Supreme Court.

In the few bankruptcy-related decisions that the justices have recently issued, they have been reluctant to resolve more than the exact, and often narrow, issues before them. They have enunciated a “plain meaning” approach that purports to eliminate the use of legislative history and to reduce the code’s interpretation to a grammatical exercise. Not only does this method seem questionable in light of the contradictory readings of the appellate courts, but commentators have detected little coherence or predictability in its applications.

The Bankruptcy Reform Act of 1994, while accelerating the resolution of some issues, allowed the circuits to opt out of its revisions with regard to fast-track Chapter 11 proceedings, bankruptcy appellate panels and jury trials. To this extent, bankruptcy law will remain a “local” practice, and the severed ends of the code’s Gordian knots are susceptible to being entangled anew.

Will the sun ever set on clarifying the code?

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The Reform Act: A key to the changes

Here’s a quick guide to the main points of the ’94 act. The page numbers refer to discussions in this issue of Business Law Today.

- Bankruptcy appellate panels encouraged (page 12)
- *Deprizio* overruled (page 15)
- Equipment lessee not required to cure nonmonetary defaults (page 22)
- Equipment lessor can’t get stay modified before lessee rejects lease (page 22)
- Equitable standard adopted for payment of post-petition lease fees (page 21)
- Fast track Chapter 11’s possible (page 11)
- Jury trials authorized (page 13)
- Lien-stripping in Chapter 11 prohibited (page 26)
- Professional fees reviewed under new standards (page 14)
- Bankruptcy Review Commission created (page 14)
- Single asset real estate reorganizations defined (page 14)
- Valuations carried over to converted Chapter 13 (page 28)