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## FOREWORD

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## FOREWORD

LAWRENCE P. KING\*

This Symposium issue of the *South Carolina Law Review* is an encore to a similar Symposium issue published in 1992,<sup>1</sup> albeit with different topics. The similarity between the two issues, however, is that the articles are all of current interest and of the highest quality. Again, the *Review* has assembled a cast of first-rate authors to award the readership with their expertise. The articles follow general themes concerning Chapter 11 issues—both current problems for which solutions are recommended, but for which no authoritative judicial response presently exists, and a look to the future with some specific suggestions for change.

Among the areas included in this issue are discussions related to the single-asset Chapter 11 case, both from the point of view of its efficacy in the first place, and with respect to the specific problem bound up with claim classification and the need for an impaired class acceptance for confirmation.

There are also articles taking up the issues involved in the mass tort area, particularly concerning the discharge of unknown claims; this encompasses a broader constitutional issue of due process with respect to such claimants and the effectiveness of the Chapter 11 discharge with respect to claims generally.

Finally, although not in corresponding order in the issue, there are reviews of suggestions for structural change in the Bankruptcy Code. In one instance, Chapter 11 itself is taken up, and in the other, the administrative structure is discussed with a bold suggestion of a model bankruptcy judicial-administrative system.

In all then, the Symposium covers a wide, but related range of matters. It should serve well not only to open and continue discussions, but also as an extremely useful research tool. Following is a brief description of each of the articles.

Professor David Gray Carlson's article<sup>2</sup> addresses the gerrymandering

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1. *Symposium on Bankruptcy: The Trustee's Avoiding Powers*, 43 S.C. L. REV. 647 (1992).

2. David Gray Carlson, *The Classification Veto in Single-Asset Cases Under*

issue in single-asset cases that has been presented to several United States Courts of Appeals.<sup>3</sup> At the time of this writing, the Supreme Court has not granted a writ of certiorari in order finally to resolve the issue.<sup>4</sup> His article goes into the history of classifying claims (as well as the etymology of the term “gerrymandering”) and offers his opinion as to how that issue should be played out in the single-asset real estate case.

Professor Frank Kennedy and Gerald Smith, Esq. continue their collaborative effort.<sup>5</sup> Actually, the immensity of their project would seem to require the work of more than just two, for they have undertaken to run the gamut of problems that can arise during the postconfirmation and preclosing period in Chapter 11 cases. While the former Bankruptcy Act contained some sections in Chapter X and XII dealing with postconfirmation jurisdiction of the bankruptcy court, current Chapter 11 offers very little guidance. Retention of jurisdiction is one of the problem areas that they discuss, but there are others, including the effect of the Chapter 11 discharge, due process requirements with respect to it, the applicability of section 348, and serial Chapter 11 filings. This article should prove to be a valuable tool for researching postconfirmation problems, which are becoming more common.

Ralph Mabey, Esq. and his former associate, Jamie Gavrin, delve into the uncharted waters of important constitutional issues relating to future claimants in the mass tort context.<sup>6</sup> Mr. Mabey has called upon his expertise garnered from his appointment as examiner in the *A. H. Robins* Chapter 11 case, which involved, among other matters, structuring a plan to deal with future tort claimants. In essence, their discussion centers on the propriety and constitutionality of affecting claimants who are unknown to the Chapter 11 debtor and who are unknown even to themselves until, at some point in the future, an injury manifests itself. The competing concepts are to achieve a means of ensuring a structure that will allow for compensation of such injury while at the same time complying with the requirements of

*Bankruptcy Code Section 1129(a)(10)*, *infra* at 565.

3. *E.g.*, Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (*In re Greystone III Joint Venture*), 995 F.2d 1274 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 72 (1992); Travelers Ins. Co. v. Bryson Properties, XVIII (*In re Bryson Properties, XVIII*), 961 F.2d 496 (4th Cir.), *cert. denied*, 113 S. Ct. 191 (1992); Lumber Exch. Bldg. Ltd. Partnership v. Mutual Life Ins. Co. (*In re Lumber Exch. Bldg. Ltd. Partnership*), 968 F.2d 647 (8th Cir. 1992); John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154 (3d Cir. 1993).

4. *See, e.g.*, *Greystone*, 995 F.2d 1274; *Bryson*, 961 F.2d 496.

5. Frank R. Kennedy & Gerald K. Smith, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings*, *infra* at 621.

6. Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy*, *infra* at 745.

due process. Mabey and Gavrin argue, with great persuasion, that the Constitution permits the use of that notice which is reasonable under the circumstances in order to establish a form that will attempt to reserve some protection for such persons.

Professor Charles Tabb has contributed a piece that takes to task the doomsayers of Chapter 11 or, more generally, those who argue that liquidation should replace reorganization.<sup>7</sup> He forthrightly points out that, although there is room for improving the efficiency of Chapter 11 and reducing its costs, nevertheless, Chapter 11 works well overall. One must consider that its objective is to create a milieu in which parties can be prodded to negotiate and achieve a *consensual* plan of reorganization. That goal is accomplished by providing both incentives and disincentives or, worded differently, a fairly even playing field. It is also interesting to note that while there is some ongoing discussion questioning the utility of Chapter 11, for the first time, countries in other parts of the world—*e.g.*, Germany, Israel, and Sweden—are seriously looking at Chapter 11 for possible application there. Other countries—*e.g.*, England and France—have already made some adaptations.

Professor John Ayer investigates the efficacy of the single-asset real estate case and possible reorganization under Chapter 11.<sup>8</sup> His article is quite a bit more than an academic exercise and should be studied by practitioners and courts. One would do well, in today's continuing depression of real estate values, to contemplate whether Chapter 11 deserves a knee-jerk filing when things go bad. Chapter 11 need not, and in many instances should not, in reality replace the state mortgage foreclosure laws. In fact, with both the Carlson and Ayer articles, one should combine in thought the efficacy of Chapter 11 for the real estate case, the gerrymandering issue, and the related problem of new value and its demise or continuing life under the Bankruptcy Code. These are all of one, and no point is served in treating the issue separately. Along the same line, as is pointed out in the articles, one should remember the practice under Chapter XII of the former Bankruptcy Act.

Professor Barry Zaretsky calls on his experience as the examiner in the *Revco* Chapter 11 case.<sup>9</sup> He was appointed to investigate any possible causes of action that may have existed as a result of a prior leveraged buyout accomplished in that entity. His article points out the problems, as well as the utility, of the Chapter 11 trustee process and the use of the

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7. Charles J. Tabb, *The Future of Chapter 11*, *infra* at 791.

8. John D. Ayer, *Bankruptcy as an Essentially Contested Concept: The Case of the One-Asset Case*, *infra* at 863.

9. Barry L. Zaretsky, *Trustees and Examiners in Chapter 11*, *infra* at 907.

examiner. Professor Zaretsky, as with other of the authors in this Symposium, may well have laid the groundwork for future statutory amendments.

Richard Levin, Esq. calls on his experience as associate counsel to the House subcommittee that drafted the bills that eventuated in the Bankruptcy Code, as well as his experience in practice since the Code was enacted. He investigates the judicial-administrative functioning both under and prior to the Code and offers a model system that should stimulate discussion and action.<sup>10</sup> In his article, Mr. Levin reiterates the compromises inherent in the present system that established the United States Bankruptcy Trustee program, since the program started from the premise of separating out the judicial from the administrative duties in Bankruptcy Code cases. His model would scrap the compromises, place the bankruptcy judge in an exclusive judicial role (*i.e.*, responding to actual disputes), and establish some administrative arm that would serve to oversee the bankruptcy and reorganizations process. Again, this article is worth studying with a view to actual utility.

Kenneth N. Klee, Esq. and K. John Shaffer, Esq. have contributed an article that is intended “to survey the existing law” regarding the various matters that concern or relate to creditors’ committees.<sup>11</sup> Their article does indeed explore a large variety of matters, some very basic and others more complex. The authors note that there is relatively little case law about these matters, which, of course, may well be because committees on the whole function quite well and need little assistance from the judiciary. The article also notes that there is little in academic literature that attends to creditors’ committees and, while it refers to two articles, it omits mention of the lengthier pamphlet written by Irving Sulmeyer that deals exclusively with creditors’ committees from both an academic and practical viewpoint. The Klee and Shaffer article should prove a valuable analytic and research tool when one has a creditors’ committee-type problem.

It is rewarding to offer this Foreword when there is nary a critical thought to express. Each of the articles individually, and as a Symposium, can be unhesitatingly recommended for reading, study, and utility. As mentioned, the student editors of the *Law Review* are to be commended for structuring the Symposium and inveigling these authors to contribute to it. The bench and bar will do well to obtain copies of this issue and to encourage the Board of Editors to continue annually this worthwhile endeavor.

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10. Richard B. Levin, *Towards a Model of Bankruptcy Administration*, *infra* at 963.

11. Kenneth N. Klee & K. John Shaffer, *Creditors’ Committees Under Chapter 11 of the Bankruptcy Code*, *infra* at 995.