

AMERICAN BANKRUPTCY INSTITUTE
LAW REVIEW

VOLUME 14

SPRING 2006

NUMBER 1

INTRODUCTION

The Spring 2006 issue of the *American Bankruptcy Institute Law Review* is an open issue comprised of seven articles and two student notes. The issue contains a wide variety of articles, from empirical study to cerebral scholarship.

This issue introduces our new "Supreme Court Review" section. Since we introduced our "Recent Developments" section in the Winter 2004 issue, that section has been used exclusively to feature articles on recent Supreme Court decisions. We recently decided to change the name of that section to a more accurate title—"Supreme Court Review." The Supreme Court rules on at least one important bankruptcy issue every term. Every time an opinion comes down, it is our goal to promptly deliver a scholarly interpretation of the Court's decision.

The very first article in our "Supreme Court Review" section, and the seventh article in our issue, is *State Sovereign Immunity: Bankruptcy Is Special* by Richard Lieb. The article covers the Court's recent decision in *Central Virginia Community College v. Katz*. In that case the Court held that a State does not have immunity from an action to recover a preference in bankruptcy court. The author reviews the Court's jurisprudence on the Eleventh Amendment as it relates to jurisdiction in bankruptcy courts, and tells us what the *Katz* decision means about where the law is headed.

Substantive Consolidation: Getting Back to Basics, by Seth D. Amera and Alan Kolod, is the first article in this issue. The article tackles a much-debated topic on the heels of the Third Circuit's decision in *In re Owens Corning*. The authors criticize the Third Circuit for diminishing judges' discretion in substantive consolidation litigation. They assert that over the years courts have lost sight of the fundamentals of substantive consolidation. It is an equitable remedy that should be rarely granted, rather than routinely approved for the sake of transactional certainty. The authors also reiterate that bankruptcy courts have the power to order substantive consolidation, until the Supreme Court rules otherwise.

Next, William H. Widen tells us how frequently substantive consolidation occurs in his article, *Prevalence of Substantive Consolidation in Large Bankruptcies from 2000 to 2004: Preliminary Results*. The author introduces his own definition of a "substantive consolidation bankruptcy," recognizing that plans and settlements often have the effect of substantive consolidation even when legal entities are not actually combined. Readers will be surprised to learn how influential the doctrine of substantive consolidation is in reorganization negotiations. The author notes that changes in the law of the doctrine are likely to affect bargaining practices.

Jason J. Kilborn is the author of our third article, *Continuity, Change and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*. Cultural characteristics and economic concerns influence the laws that a country adopts. Thus, it is not surprising to find liberal bankruptcy laws in the United States—the land of easy consumer credit. As credit markets become more accessible throughout the world, many countries are finding that they need consumer debt relief laws. Others, such as Belgium and Luxembourg, are enacting such laws before consumer indebtedness becomes a problem. The author praises the proactive efforts to pass debt relief legislation in those countries. He examines the new systems, and points to them as examples that effective debt relief laws can exist in civil law states.

The fourth article is *Intra-Committee Conflicts, Multiple Creditors' Committees, Altering Committee Membership and Other Alternatives for Ensuring Adequate Representation under Section 1102 of the Bankruptcy Code* by Kurt F. Gwynne. The article is a broad look at the appointment of creditors' committees in chapter 11 cases. The author focuses on committees' representation of all unsecured creditors despite conflicts of interest. In examining the many different types of conflicts that can exist, the author concludes that some conflicts of interest are unavoidable, and not necessarily harmful. The article also reviews the various remedies that courts may employ to ensure adequate representation in committees. These types of remedies are rarely utilized because the benefit they provide to the otherwise disadvantaged creditors is usually not worth the added expense to the estate.

Ali M.M. Mojdehi and Janet Dean Gertz authored the next article, entitled *The Implicit "Good Faith" Requirement in Chapter 11 Liquidations: A Rule in Search of a Rationale?* The Code does not require that a chapter 11 petition be filed in good faith. Yet, courts have developed a common law good faith requirement. Examining statutes and case law, the authors convincingly argue that the good faith requirement has a limited role when applied to debtors liquidating under a chapter 11 plan. The authors contend that chapter 11 liquidation plans should be subject to the same standard of review as chapter 7 liquidations.

The next article is *Bankruptcy Repeat Filings* by John Golmant and Tom Ulrich. The article is the first comprehensive report of consumer bankruptcy repeat filing rates. The authors amassed over 13 million records, covering a period of 10 years, to find that 8% of consumer filers in the United States were repeat filers. Unlike previous studies that were limited in geographic scope or based on voluntary survey, this study was based actual consumer bankruptcy petitions filed all across the nation over a 10 year period. Data was acquired from the PACER system or, in some cases, directly from the courts. The authors organized the results of the study to report repeat filing rates by district, by circuit and nationwide.

Finally, the issue ends with two student notes. The first is *Breaking Up Is Hard To Do . . . Especially When Bankruptcy Is Involved: A Look at the Unfair Results That Occur When Bankruptcy Intervenes in Domestic Relations Cases* by

Publications Editor, Andrew Cosgrove. If a person files for bankruptcy before a final resolution of that person's divorce, the automatic stay will stay the division of property in state court. Rather than seeking distribution of property through a state action, the non-debtor spouse might be forced into the position of an unsecured creditor in a federal bankruptcy proceeding. This note examines the issues raised when a debtor uses the bankruptcy system to harm a non-debtor spouse. Currently, the interplay between domestic relations law and bankruptcy allows a savvy, but immoral, debtor to use the Code to effectively cheat his wife out of receiving a more favorable distribution in state court. The author proposes statutory language that would help to solve this problem.

The second student note, "*Debt Relief Agencies: Does the Bankruptcy Abuse Prevention and Consumer Protection Act Violate Attorneys' First Amendment Rights?*", was penned by Staff Member Robert Wann, Jr. The newest amendments to the Code added many provisions applying to debt relief agencies. Among other things, the provisions compel debt relief agencies to make certain disclosures. The author first determines whether the term "debt relief agency" includes consumer bankruptcy attorneys. The note then examines the constitutionality of the provisions, as applied to attorneys, by finding what level of judicial scrutiny would apply to the statute and then putting it to the test.

Thank you to all of the authors for contributing to a great issue of the *American Bankruptcy Institute Law Review*. Further, thanks to the editors, our faculty advisors, Robert M. Zinman and G. Ray Warner, and the staff of the *Law Review*, without whose efforts none of this would be possible.

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Editor-in-Chief