BOOK REVIEW: BANKRUPTCY AS THERAPY

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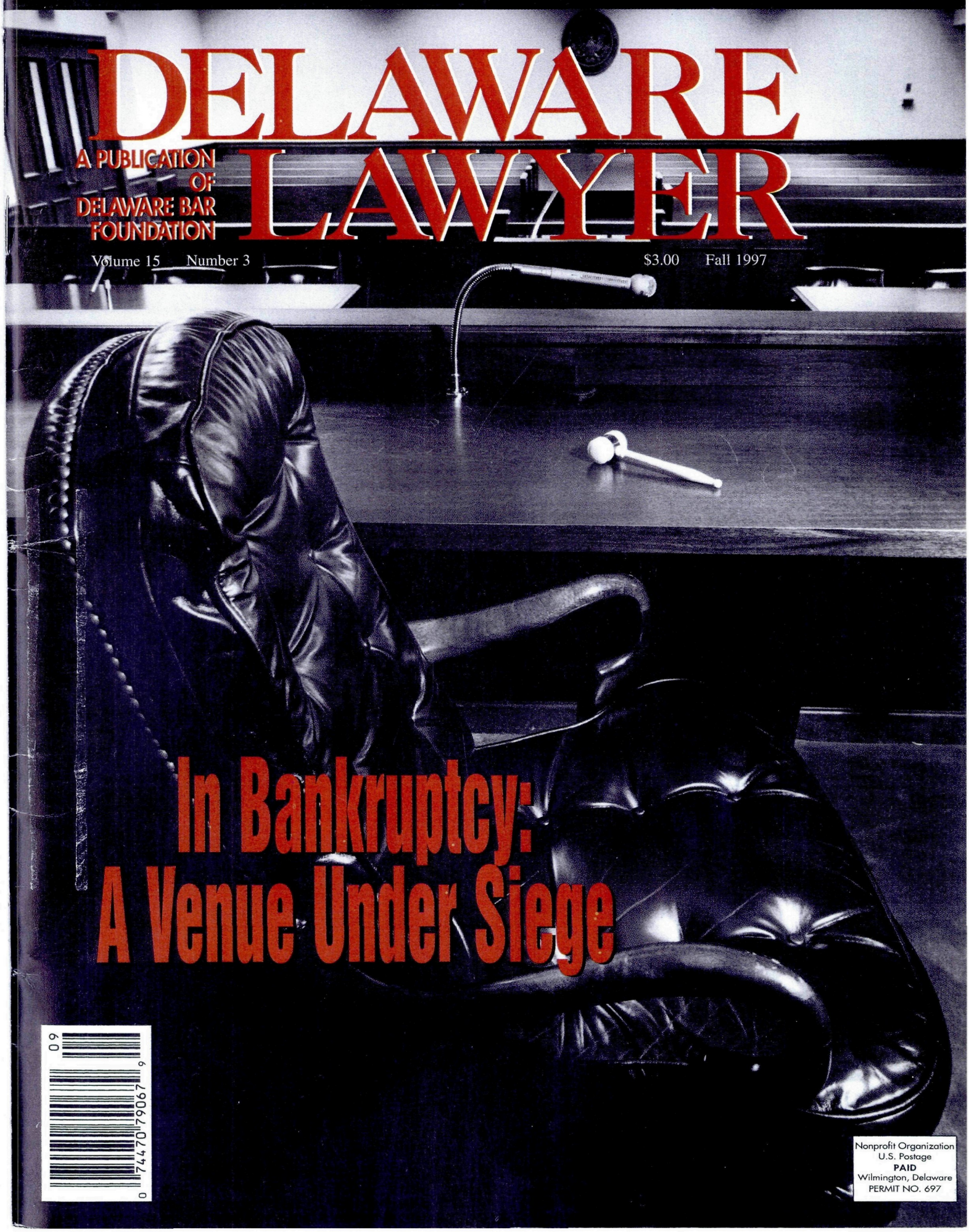

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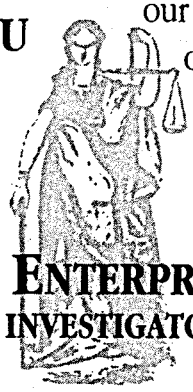

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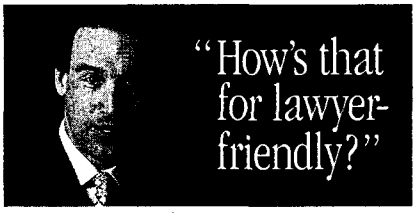

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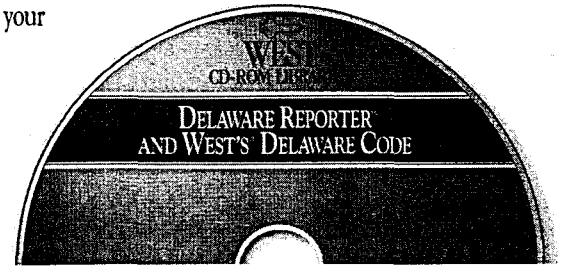

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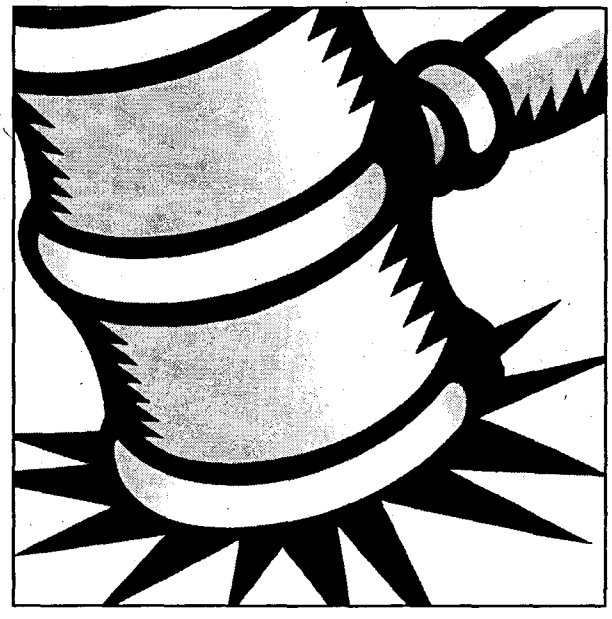

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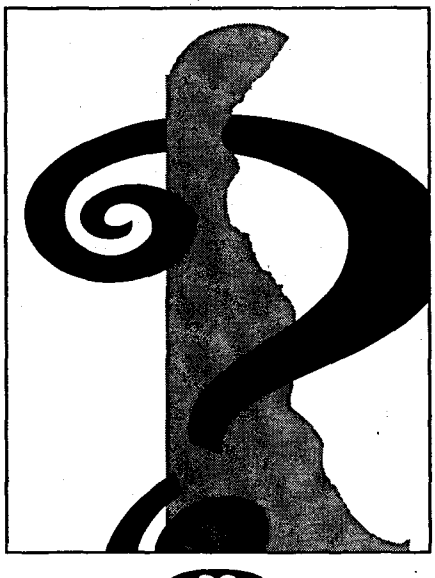

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Why Delaware?

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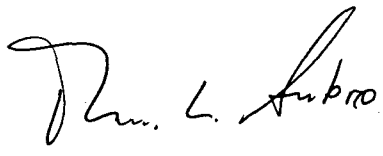
Delaware is much in the bankruptcy news, so much so that it has been front page material in national publications. Because Delaware is a (indeed, perhaps *the*) favored forum for the filing of major bankruptcy cases under Chapter 11 of the federal Bankruptcy Code, efforts are being made outside this State to eliminate place of incorporation as a venue choice. If this is done, far fewer bankruptcies of significant size could be filed here.

Place of incorporation as a proper venue has long been a part of the federal bankruptcy system. Except for five years in the mid-1970s, a corporation's place of formation was available as a venue choice. No one on record cared when, after that five year hiatus, Congress reinstated place of incorporation as a valid venue. In fact, nothing was said throughout the decade of the 1980s on the venue issue. It was only when Delaware became "hot" as a bankruptcy forum in the 1990s that the efforts came to eliminate it as a venue choice. The National Bankruptcy Review Commission, charged with reporting to Congress this October, currently has a tentative proposal eliminating place of incorporation as a place of venue. See Alesia Ranney-Marinelli's "The Biased Business of Venue 'Reform'" at page 10.

But all of this begs the obvious questions – why did Delaware become "hot," and why does it remain favored as a bankruptcy venue? Mark Collins attempts to answer these questions in this article "Why Delaware?" Further indications of "why Delaware" are given from the human interest perspectives presented in the articles by D. J. Baker, a partner at the Weil, Gotshal firm in Houston, Texas who has appeared often in the Bankruptcy Court in Delaware, and by my co-editor, Jeffrey M. Schlerf.

We hope that after reading these articles, you come away not only with a better sense of what is happening, but why. Understanding why begets yet another question – "Why don't other districts emulate Delaware instead of trying to eliminate it?"



Thomas L. Ambro

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D.J. Baker is a partner with the firm of Weil, Gotshal & Manges LLP, and managing partner of its Houston office. His practice is devoted primarily to bankruptcy, business reorganization, and creditors' rights. He has played a significant role in a number of large out-of-court restructurings and Chapter 11 cases throughout the United States, as counsel either to the debtor or to a major creditor or other party in interest. He regrets that he holds lifetime membership in a number of frequent flyer programs.

Mark D. Collins is an associate at Richards, Layton & Finger. Mr. Collins graduated *summa cum laude* from the Washington College of Law at The American University of 1991. He is the current Chair of both the Young Members' Committee and the Secured Creditor's Subcommittee of the Business Reorganization Committee of The American Bankruptcy Institute and is a member of the Business Bankruptcy Committee of the Section of Business Law of the American Bar Association.

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Alesia Ranney-Marinelli has been a partner in the New York office of Skadden, Arps, Slate, Meagher & Flom since 1985. She started her career in 1977 as a Delaware lawyer, first at Richards, Layton & Finger, later at Skadden, Arps' Delaware office for six months in October 1982. She now practices in Skadden, Arps' New York office.

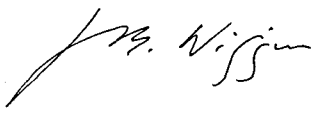
Jeffrey M. Schlerf is an attorney with Bayard, Handelman & Murdoch in Wilmington, Delaware. His practice includes bankruptcy, commercial transactions, creditors' rights, business law, and administrative law. His firm represents creditors' committees, major creditors, commercial lessors, and debtors in most large Chapter 11 cases in the District of Delaware.

This magazine commenced publication in the Spring of 1982 with few means of survival other than some talented writers and the enthusiastic support of our sponsor, Delaware bar Foundation. When I reflect on the history of Delaware Lawyer I am startled to realize that it has survived into the second half of the second decade of what, beginning as an experiment in enriching our professional lives, has matured into an institution, useful, durable and fairly reflective of the wide range of our interests as lawyers. I believe that this has happened only because of the dedication of our board of editors, the strong support of the Bar Foundation, and the professional skills and resources of our publisher, Suburban Marketing Associates.

We have now arrived at a moment of change when it is fitting to congratulate and thank our immediate past chair, Vernon Proctor, for the splendid leadership he has provided. We should also be grateful that he has agreed to continue to serve as a board member of the publication to which he has contributed so generously.

In July, late in the preparation of the issue you are now reading, the board of editors met to discuss plans for future issues. It was a lively and stimulating discussion during which a great many topics were considered, and some were tentatively adopted. We expect that over the next year and a half we shall highlight professional ethics, the latest in environmental law, admiralty law updated, and the changing aspect of domestic litigation, to name only a few of the subjects we plan to address.

But! We also need to hear from you, our readers, about topics of importance to you, for it is the thoughtful reader who ultimately determines the utility and the success of a publication. Please keep us informed about your interests and concerns, for we are your servants in this enterprise.



William E. Wiggin
Chairman, Board of Editors

BOOK REVIEW

BANKRUPTCY AS THERAPY

Joel Friedlander

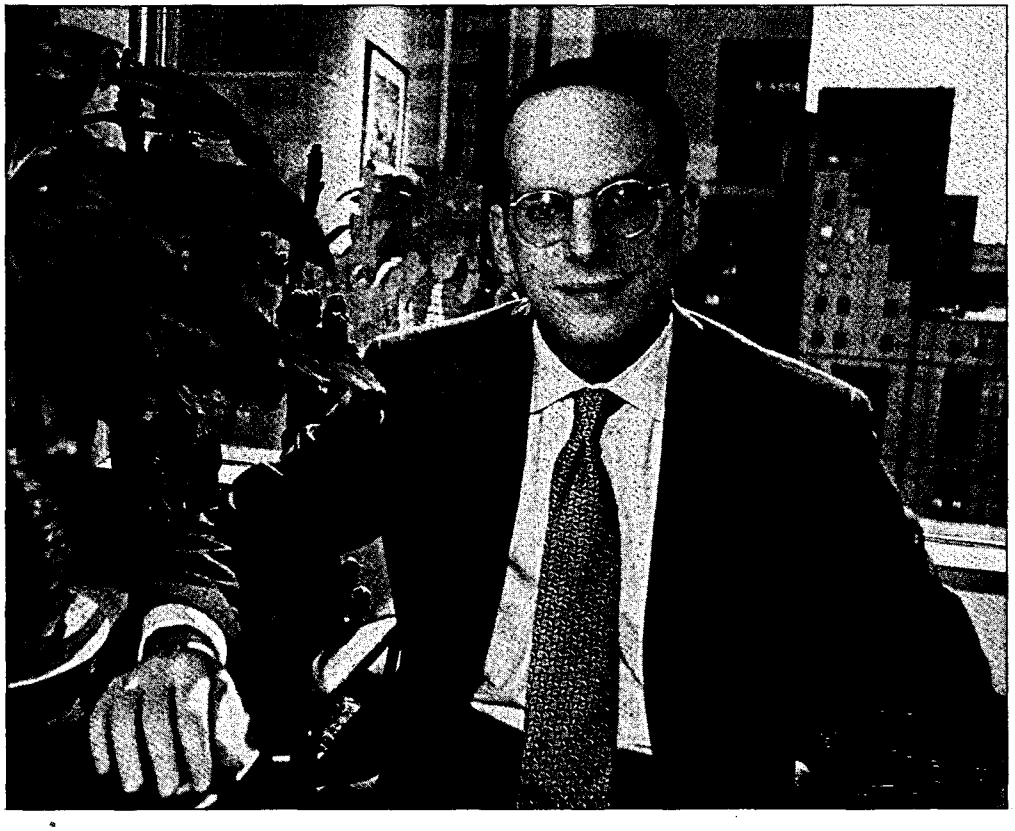
FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM

By Karen Gross

(Yale University Press, 320 pp., $30)

Professor Karen Gross believes the premises of the Bankruptcy Code require reexamination. The Code helps creditors recover on their bad loans, but it ignores the interests of persons who depend on the bankrupt's business. The Code aids debtors, but it does not promote their rehabilitation. Most academic commentary seeks to reform the Code according to a utilitarian model that aims at the maximization of creditor wealth. Gross thinks that in a humane society, "the bankruptcy system needs to mirror how society wants people to feel about themselves." Since Gross wants people to feel better, her prescriptions would turn bankruptcy court into a therapeutic institution.

Bankruptcy law already possesses a therapeutic dimension. Instead of imprisoning debtors, society now forgives many of their preexisting obligations. As Gross notes, a bankruptcy discharge is commonly referred to as a "fresh start."



Photograph by Pat Crowe, II

Gross thinks the rehabilitative possibilities of bankruptcy are not fully appreciated. Debtors have the opportunity "to regain self-esteem." Creditors can overcome their "resentment, anger and pain." Gross wants to encourage the rehabilitation of all debtors who can be rehabilitated, even if they default "for reasons we find offensive." Forced reorganizations under Chapter 13 should be eliminated, since "[a]s a psychological matter, choice is important to individuals." Gross also suggests providing financial counseling to all debtors (either by graduate students on a pro bono basis or by the consumer

credit industry under force of law), finding debtors new jobs, or providing them the psychological benefit of the "opportunity to appear in court and tell their stories."

This approach is open to criticism on grounds other than its admitted divergence from optimal economic efficiency. It is not readily apparent why a just society would require creditors to confer material benefits on persons whose conduct towards them may be blameworthy. And if debtors have committed a wrong, why should bankruptcy law aim to cure their supposed lack of self-esteem, rather than instill a sense of shame?

Gross offers two arguments in favor of rehabilitation. One is that a credit-based economy needs to encourage risk-taking and provide a mechanism for reintegrating into the economy those persons who fail because they took on risks. Gross notes that lenders are themselves culpable to the extent they encourage borrowers to take on debt without adequately monitoring the credit risk. This argument may justify the bankruptcy discharge, but it does not explain why we should aid the farmer who gambles away the money he borrowed, to use an example Gross herself provides.

The second argument is that rehabilitation is more humane than retribution, although Gross allows that society may decree that certain debts, such as alimony and child support, are so important that they must be repaid in full. Pointing to the biblical allegory of the widow whose debts were miraculously repaid, saving her children from slavery, Gross declares that bankruptcy's fresh start "is the legal analogue to divine intervention." The allegory strikes me as a uniquely compelling case,[1] but under Gross's proposed regime almost every debtor deserves a benevolent deity for a bankruptcy judge.

And not just debtors. Gross also advocates "the creditors' analogue to the fresh start", a legal rule that would allow any unsecured creditor to obtain an accelerated priority upon a showing of irreparable injury. Involuntary creditors could challenge a debtor's payment plan on the ground that it is substantively unconscionable to that creditor. The burden of these various rules falls upon large, voluntary unsecured creditors, who, Gross argues, are better able to pass through their costs and have the option of not lending in the first place.

This may not seem more fair than the current rule mandating pro rata distribu-

1. Gross omits the widow's plea that her husband "thy servant did fear the Lord." 2 Kings 4:1

tions for all secured creditors and unsecured creditors, but Gross believes her approach "enriches American society, both economically and emotionally." Citing feminist jurisprudence and affirmative action programs, Gross argues: "Since the 1980s, there has been a strong movement away from both equality of treatment (formal equality) and absolute equality and toward a model based on equality of effect (outcome)." One can debate whether the movement toward quality of outcome is salutary, but if nothing else, the rule mandating equal treatment of all creditors is easier and cheaper to implement than Gross's alternative.

Since Gross wants people to feel better, her prescriptions would turn bankruptcy court into a therapeutic institution.

Gross's most unwieldy proposal is that various "community" interests be given standing in bankruptcy proceedings. Standing would be conferred on any person with an identifiable nexus to the debtor who is injured as a result of the bankruptcy and whose injury is capable of redress in bankruptcy court. Once it is determined which persons qualify as communities, the court must find that the reorganization plan "takes the interests of community into account unless the balance of equities clearly favors denial of those interests." The judge is left with the task of "balancing the interests" of debtors, creditors and communities.

This model of adjudication reflects a therapeutic ideal. The court is a public forum for those affected by bankruptcy to "tell their tale of woe." Since we each may want the opportunity to tell our story some day, we are, in paying for this system, "buying solace." The full costs of a therapy-driven bankruptcy law cannot be measured. We would do well to note, however, that whatever the costs of Gross's prescriptions, they do not even aim at a cure. ◆

Alesia Ranney-Marinelli

THE BIASED BUSINESS OF VENUE "REFORM"

In December of 1993, the Board of Directors of the American Bankruptcy Institute ("ABI") commissioned a comprehensive study project to examine significant issues affecting the way bankruptcy law is practiced in this country. The ABI Bankruptcy Reform Study Project set up a series of symposia sprinkled throughout the country during 1995 and 1996 with as one of its express purposes "flesh[ing] out the debate on important policy controversies" for the benefit of "policymakers charged with reviewing and reforming our nation's bankruptcy laws," a reference to the National Bankruptcy Review Commission (the "Commission").

One of the nine topics selected for symposium treatment was whether the current venue statute applicable to bankruptcy cases – which permits a corporate debtor to file a bankruptcy case in the district where it is incorporated, the district where its principal place of business is located or the district where its principal assets are located – should be amended so as to restrict existing venue choices. I agreed to participate in the July 1995 venue symposium and to present a paper and argue in favor of at least maintaining, if not expanding, existing venue choices in corporate cases. Others were asked to argue in support of curtailing existing venue choices.

Although the proposed venue symposium seemed to be a well-balanced and fair attempt to explore and report on the legal and practical effects of venue choice, my illusions of impartiality bit the dust when I saw the promotional materials and bound volume that had been prepared for the symposium. Emblazoned on the symposium materials were the words "THE BIASED BUSINESS OF VENUE SHOPPING." So much for neutrality. Neutral like Switzerland in World War II.

While the ABI's slanted program title arguably (if one is feeling charitable) can be explained as a wrong-headed marketing attempt to make a dry topic sexy (yes - this is what passes for sexy in the bankruptcy bar; we're a sorry lot), the Commission's adoption of inflammatory and unsubstantiated statements about venue choice cannot. Despite its pejorative title, the ABI symposium at least was conducted in a fair and professional manner, with a moderator who tried to maintain a balanced discussion of all the issues raised by venue choice and to elicit the views of both venue choice reformers and venue choice apologists. The Commission, on the other hand, seems uninterested in any argument, any facts, any statistics that support existing venue choices. It is particularly hostile to venue premised on a troubled company's state of incorporation and astoundingly oblivious to the need to maintain impartiality – or even the appearance of impartiality – before adopting and publicizing its recommendations for "reform." The Commission's undue haste in supporting the elimination of state of incorporation as a venue predicate, coupled with its refusal to address proposals that would solve many of the problems purportedly created by corporate venue choice, strongly suggest that venue "reform" is being driven by a desire to restrict Delaware, and perhaps New York, bankruptcy filings, not by a desire to remedy real or perceived problems created by multiple venue choices.

The Commission, of course, denies any anti-Delaware animus, and a November 19, 1996 draft report prepared by Commission staff (the "November Report") asserts that the proposal to eliminate filings based on state of incorporation "is

not directed at the bankruptcy courts in the Southern District of New York, those in Delaware, or in any other specific bankruptcy venue." The November Report characterizes the venue proposal as one "directed at ameliorating the problems that arise as a result of the broad venue choices available to corporate and partnership debtors" and implies that the elimination of state of incorporation as a venue predicate is justified by the Commission's receipt of "numerous letters on the problem of the disenfranchisement of creditors due to forum shopping." There are, however, at least three fundamental problems with the statements in the November Report, problems which highlight the political and cursory nature of the Commission's deliberations on venue "reform."

The first problem is timing. It may not be everything, but it certainly can be revealing. According to a summary of correspondence provided by the Commission, as of October 15, 1996, the Commission had received approximately 38 letters relating to venue, virtually all of which proposed eliminating venue based upon state of incorporation. Thus, the November Report accurately reported that the Commission had received "numerous letters" urging changes to the current venue statute. What the November Report does not reveal, however, is that only two of the 38 letters were on file on June 21, 1996, when the Commission formally adopted a proposal to eliminate domicile-based venue for corporations. And there was but a single letter on file with the Commission in February of 1996, when the Commission first reached "a consensus that there be a narrowing of venue options" in corporate cases. (See February 23, 1996 Commission Minutes.) The February Minutes, which presumably reflect the basis for the Commission's consensus, evidence an uncritical acceptance by the Commission of the one-sided and subjective views expressed at the February meeting. Among those views is that venue choice "demean[s] the entire [bankruptcy] system by suggesting that bankruptcy courts [are] for sale" and "has a pernicious effect on rulings of [debtor-friendly] courts." The Commission also failed to challenge the notion that a corporation's only "real connection" is to the fora "where it [conducts] business or where its principal assets [are] located." (See February Minutes.) There is no reference anywhere in the February Minutes to letters from disenfranchised creditors or their lawyers. Thus, unless the Commission members had somehow mastered time travel, the "numerous letters" focusing "on the problem of disenfranchisement of creditors due to forum shopping" referred to in the November Report could not possibly have formed the basis for the Commission's decisions and views in February and June of 1996.

A second problem in the November Report is internal inconsistency. The same five-sentence paragraph that suggests that "numerous letters" raising disenfranchisement issues are at the heart of the Commission's venue proposal concludes by saying that the Commission's venue proposal "does not eliminate the problem of creditor disenfranchisement, but rather attempts to limit a debtor's venue choices to places most relevant to the ongoing business: the principal place of business or location of principal assets." In other words, the proposed solution does not even pretend to remedy the perceived (but unsubstantiated) problem, a problem raised by a few dozen letters received by the Commission months after it had already unleashed its own peculiar rendition of venue reform.

The third problem, of course, is that there has been no objective showing that venue needs reforming. The February 23 Minutes record and reflect gut feelings, unsubstantiated beliefs, and highly subjective perceptions; at best, they reflect the anecdotal experience of a handful of people who

were invited to attend the Commission's February meeting. The Commission's June 20 position paper on venue (the "June Position Paper"), which was used in connection with the Commission's June 21, 1996 meeting, is no better. While anecdotes, along with feelings, beliefs, perceptions and similarly squishy intangibles, may afford a legitimate basis for further study and data gathering, they do not warrant changes in federal legislation. And yet they apparently were all that the Commission felt it needed to justify proposing significant changes to the current venue statute.

As far as can be gleaned from the Commission's February 23 Minutes, no attempt was made to test the validity of the beliefs and assumptions expressed by the participants at the Commission's February meeting. It simply was assumed that there are serious and systemic venue problems and abuses that must be remedied through federal legislation. No data were presented to the Commission at that time to support the assumptions and beliefs underlying the proposal to curtail venue choice. The February 23 Minutes reflect no analysis of filings by district; no analysis of whether asset- and headquarters-based venue predicates are more rational, fair, or meaningful – and less subject to "abuse" – than venue predicates based upon corporate domi-

While anecdotes, along with feelings, beliefs, perceptions and similarly squishy intangibles, may afford a legitimate basis for further study and data gathering, they do not warrant changes in federal legislation.

cile; no analysis of whether asset- and headquarters-based venue predicates are in fact more convenient to creditors; no discussion of the potential effect of technology on creditor participation in bankruptcy cases; no analysis of the continuing usefulness of principal assets and principal place of business as venue predicates; no discussion of amending rules or statutes so as to require litigation involving creditors with small claims to be prosecuted in courts convenient to such creditors; and no research or consideration of federal venue statutes outside the context of bankruptcy.

Nor does its appear that the Commission made any attempt to include as participants at its February meeting anyone who does not believe that domicile-based venue is abusive or problematic. The minutes state that "Professor [Elizabeth] Warren [of The Harvard Law School] presented arguments against" the proposal to restrict corporate venue choices "[t]o assure that all of the arguments were heard by the Commission before it reached a consensus." The sole argument presented, however, was that the current venue statute allows larger companies "to choose courts that specialize in dealing with large cases and have the resources so that such cases are moved through the system expeditiously." (The courts that supposedly "specialize" in large cases were not identified, but presumably are a reference to the Southern

continued on page 23

Almost as troubling as the Commission's indifference to facts is its willingness to adopt wholesale the inflammatory and insulting accusations being slung by venue "reformers."

FEATURE

D. J. Baker

REFLECTIONS ON DELAWARE BANKRUPTCY PRACTICE: THOUGHTS OF AN IMMIGRANT

We all want to be liked. Whenever an American encounters an immigrant from a foreign country, almost inevitably, the first question posed by the American is, "How do you like the United States?" Not surprisingly, Delaware bankruptcy lawyers are not immune from this desire to be liked. Their current slight sense of unease with respect to how they are regarded nationally may be understandable in light of the criticism of the migration of large Chapter 11 cases to Delaware by a variety of sources, including the National Bankruptcy Review Commission. Those of us who practice in Delaware from time to time are in the position of immigrants there, and we receive frequent inquiries from Delaware attorneys about our views on appearing in Delaware. It was as part of one such inquiry that I was asked to write this article, to try and tell our friends in Delaware what visiting lawyers really think about their experiences in Delaware.

The truth, of course, is that there is a fair amount of unhappiness with respect to the recent high incidence of Delaware Chapter 11 filings, at least among bankruptcy practitioners who do not reside within an easy train ride of Delaware. Not surprisingly, those who practice in Delaware or surrounding areas evidence a high degree of equanimity with respect to its having become the venue of choice for many large Chapter 11 cases. The unhappiness of those not fortunate enough, however, to reside so close to Delaware is understandable from a professional point of view: it inevitably grates to be a well-regarded bankruptcy practitioner in, say, California, and see a "California case" go to Delaware. Of course, that discontent would be dramatically reduced if the filing in Delaware resulted in the involvement of bankruptcy professionals from the immediate area in which the debtors' business operations are located, but this is rarely the case. More typically, clients who might have retained a California or Colorado or Texas firm to handle a matter in California, Colorado or Texas will conclude that, for a Delaware case, they are equally well (or even better) served by hiring counsel in Delaware, Pennsylvania, or New York. Unfortunately, for those of us not within that easy train ride of Delaware, such is life.

The "big-case" bankruptcy practice in Texas has been affected just as significantly by the exodus to Delaware as has that in other states. With the Dow sprinting toward seemingly new highs every day, and interest rates not only reasonably low but also stable, the incidence of major new cases nationally has declined dramatically in the last few years, and, of those that have occurred, a stunningly large number have ended up in Delaware. Do I like this trend with respect to its effect on the bankruptcy practice in Texas? Of course not; I already have more frequent flyer miles in various accounts than I will probably ever be able to use, and accumulating more has long since lost whatever fleeting appeal it once had. Moreover, like many bankruptcy professionals around the country that I have practiced with and against since the beginning of the 1970s, I find the appeal of travel much less exciting as I proceed ever deeper into what I prefer to regard as "profound middle age".

Notwithstanding all of the above, I have a closely-guarded secret never disclosed previously. While I should far prefer practice in Houston to commuting anywhere, including Delaware, the fact remains: if I have to face the prospect of yet another case to which I will commute, there are few, if any, venues more attractive than Delaware. Would I prefer to have all the large cases in which I might be fortunate enough to be involved occur in Texas? Of course. But, if those cases do not come to Texas, then Delaware has a great deal to commend it. Certainly, I have encountered extraordinary competence, hospitality, and professional courtesy in cases in other areas throughout the United States. One that comes to mind immediately is Phoenix, a place where I have spent a great deal of

Illustration by Sam Day

time during the past decade, and to which I would return with great enthusiasm. Certain other venues, however, have not been so hospitable to outsiders. In the interests of discretion, and because I might return to one of such venues at some point in the future, the names of the guilty will be omitted.

So, what is it that makes visiting bankruptcy attorneys feel well treated when they venture into Delaware? The answer, I believe, is not in any single quality or characteristic unique to Delaware. Instead, the visiting bankruptcy practitioner encounters there an aggregation of factors, no one of which is necessarily unique, but the sum total of which most outsiders find congenial.

First and foremost, one must begin with the Bankruptcy Court and its judges. There are many words that I have heard used to describe the process of dealing with the Bankruptcy Court in Delaware (both judges and staff), but probably the term most often used is that of "user friendly". I once asked a well-known practitioner with a large out-of-state firm who had used that term what he meant, when applying it to Delaware, and he replied, "On a procedural basis, everything in Delaware is designed for the convenience of all of the parties and participants, including both debtors and creditors." That answer probably sums it all up about as well as can be done.

The procedures by which one obtains, for example, an expedited hearing strike most outsiders as refreshingly direct and straight forward. If any party, creditor or debtor, has a matter that in its judgment requires an emergency hearing, it requests its Delaware counsel to communicate with the clerk of whichever judge has the case (whether the judge be a Bankruptcy Court judge or a District Court judge). The clerk then consults with the judge, and a return phone call is promptly forthcoming, either advising of the time and date of the hearing, or advising that it will not be possible to provide any expedited consideration. Remarkably, more often than not, requests for expedited treatment are granted. That is, I concede, a seemingly minor issue, but, the longer I practice, the more I come to appreciate that "the devil is in the details." Anything that expedites and simplifies procedure is always appreciated by practitioners.

What about the substance? How different is Delaware, if at all, from other jurisdictions? The answer, in my experience, is, not all that different, with one important exception. That is what is sometimes called the "predictability" factor, and it is a feature widely remarked upon by practitioners. In many judicial districts around the country, there are five, six, seven, eight, or more bankruptcy judges. Both debtor and creditor clients ask, when you explain to them a particular type of relief that might be sought in the event of a Chapter 11 filing, "How is the court likely to rule on that issue, if there should be a filing?" The answer, unfortunately, more often than not, is, "It depends." If Judge "X" is the judge, then he will likely do this; if Judge "Y" is the judge, then she will likely do that; if Judge "Z" is the judge, then you probably haven't got a prayer, and so on. This type of inability to predict with a high degree of confidence the outcome of various key issues, unless and until the identity of the particular bankruptcy judge is known, is frustrating for both attorneys and clients alike.

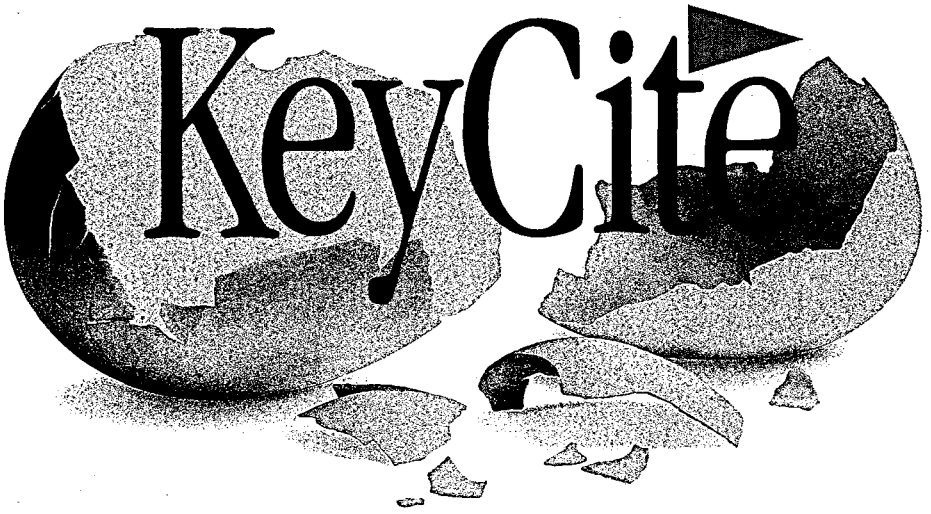
"On a procedural basis, everything in Delaware is designed for the convenience of all of the parties and participants, including both debtors and creditors."

There is, however, much less uncertainty of this type in Delaware. The positions of the judges in Delaware on most (but not all) issues are reasonably similar.[1] And, most importantly, there are enough prior cases that have been reported so as to permit prediction with a relatively high degree of certainty how decisions will be made. It is, I suspect, the predictability factor that, paradoxically, often leads creditors to propose Delaware as their preferred venue if a borrower is contemplating a filing. When I asked one well-known creditor attorney why his client preferred that a prospective debtor file in Delaware, he replied, "We know where the courts there are likely to come out on most of the issues that our clients care about. Nothing is more important to lenders than predictability, and Delaware provides that." The paradoxical nature of this comment, of course, is that it is allegedly the debtor that always seeks to file in Delaware, but my completely non-scientific judgment on this issue (as well as the judgment of various other practitioners whom I know) is that creditors are often as significant as debtors in a decisions to file in Delaware.

Another significant ingredient of practice in Delaware is, of course, Delaware counsel. I have worked with a variety of counsel around the country in numerous cases, and my experiences with such counsel have been remarkably good. Over the past few years, however, I have had the opportunity to work with most of the well-known Delaware firms and counsel who practice regularly before the Delaware bankruptcy courts. I can say, without exception, that it is a bar of a remarkably high caliber and consistency. The firms that practice most routinely before the Delaware bankruptcy courts have all of the normally troublesome logistical issues reduced to a science: filings are made on time, orders issued by the court and pleadings from other counsel are distributed effortlessly, and the often gargantuan mail-outs proceed without complication. More importantly, we routinely rely on Delaware counsel for significant substantive involvement and participation in all phases of a matter. They have proven themselves to be real partners in handling complex matters for sophisticated clients. Finally, the overwhelming majority of Delaware bankruptcy attorneys I have encountered are not only remarkably professional, but thoroughly congenial. All in all, practicing with the Delaware bankruptcy bar contributes significantly to the efficiency of the entire process.

Finally, there is one additional element that must be mentioned, contributing as it does in a variety of ways, both intangible and otherwise, to the totality of the experience involved in

1. The recent addition of the District Court to this equation has complicated somewhat the predictability factor, and the long-term consequences of this development are still unclear.



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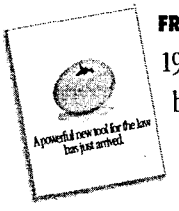

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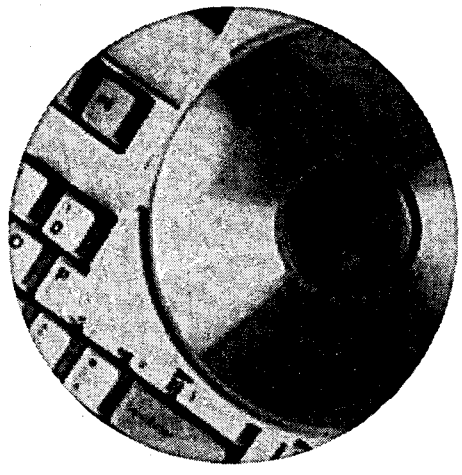
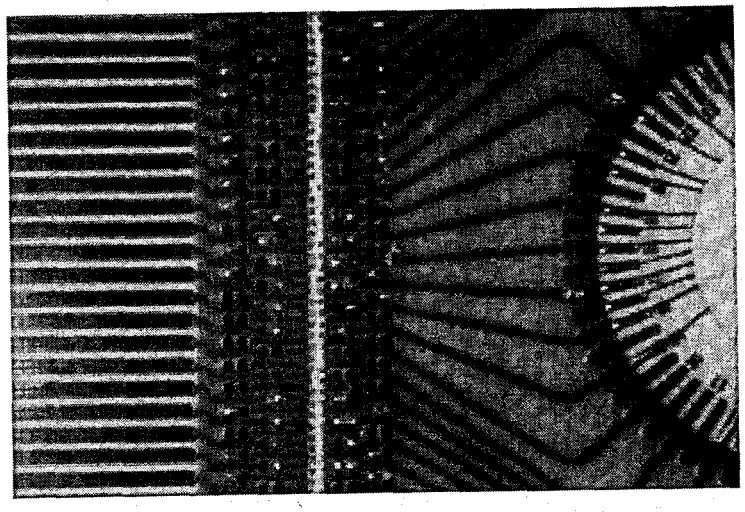
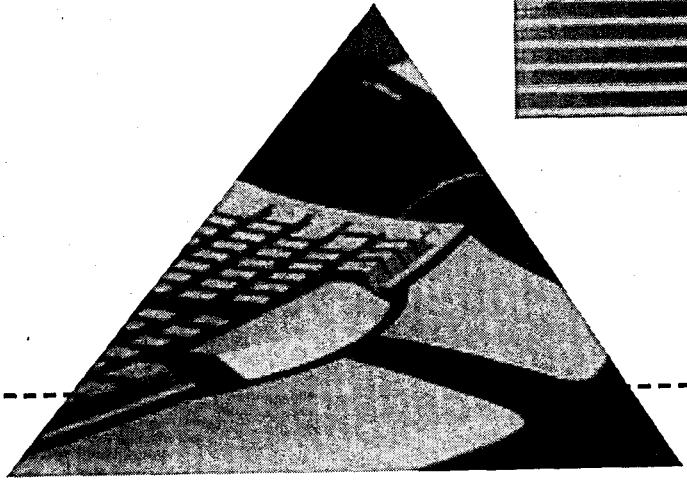
bankruptcy practice in Delaware. I refer, of course, to the Hotel du Pont, that splendidly refurbished doyenne of great mid-Atlantic hotels. I have travelled so much that the particulars of any given hotel are almost immaterial, provided it has adequate hot water, reasonably firm mattresses, and room service that can deliver breakfast in 30 minutes or less. Even so, the du Pont is something special. The public spaces are among the grandest on the Atlantic Seaboard. The rooms have been completely renovated and provide extraordinary comfort. The staff is attentive and efficient. And, last of all, its prices are remarkably reasonable. What more could one want of an hotel? This blissful image is marred only by the fact that everyone travelling to Wilmington seems to want to stay at the Hotel du Pont, and it can sometimes be quite difficult to get in, even making reservations far in advance.

The Hotel du Pont figures in what will probably be one of my most indelible memories of Delaware bankruptcy practice. After a difficult case in which the debtor sold substantially all of its assets to a buyer, we concluded the closing around midnight and then adjourned to the Brandywine Room at the Hotel du Pont where the president of the purchaser was hosting a party to celebrate the closing. The party ended several hours later, after the cellar of the Hotel had - literally - run out of champagne. A group of extraordinarily wrung-out (and, perhaps, soon to be hung-over) clients and professionals then adjourned. They noticed a piano adjoining the Brandywine Room and the partner leading the representation of the successful buyer was importuned to sit at the piano. A few of us knew that, in his distant youth, and before succumbing to the temptations of a regular income, he had pursued for several years a career of professional piano playing in a variety of New York establishments, reputable and otherwise (unlike most of the rest of us, he really could give up his day job if he so desired). The crowd soon got into the spirit of the occasion, and for several more hours a somewhat incoherent and very tired group stood around the piano, attempting (generally unsuccessfully) to recall the words to the innumerable tunes that were played. All in all, it was quite an evening. And Delaware continues to be quite a place for a big bankruptcy case, if one isn't fortunate enough to have it in his or her hometown. ◆

TECHNOLOGY







Makes life easy

There was a time, if anyone can remember back that far — before copiers, before carbons — when the only way to reproduce a lengthy contract was to have an assistant type it.

But since then technology has changed almost daily. New software and nifty machines like "mopiers" and scanners with character recognition are making everyone's life a lot easier — and speeding productivity.

Let's start with Microsoft's Windows 95. Windows 95 is an updated version of Windows 3.1 and soon to be replaced by Windows 98, the next operating platform for Microsoft software applications.

With the pace of change in computer technology, putting all your eggs in one basket is hardly a prudent course. But because of Microsoft's dominance, Tower Business Machines in Wilmington is banking on Bill Gates for now, says Tower president Bill McMillan.

Tower now specializes in building Microsoft NT networks. NT is the operating system that is quickly overshadowing IBM's (once Apple's) DOS, or disk operating system. NT will allow any machine to run Microsoft products, such as its latest bundle of organizational joy, Microsoft Office.

Microsoft Office is among the latest of software "suites," or packages, of coordinated programs. Office includes the hugely popular Microsoft Word for word processing, Excel for creating spreadsheets, the Outlook group of e-mail and web tools, and Powerpoint for designing presentations that are clear, effective and sometimes even entertaining.

Lotus offers a similar package featuring WordPerfect, Lotus 1-2-3 and software for presentation design and net access. And when the technology changes, upgrades to Office and Lotus are much less expensive to buy than new suites or individual programs.

Another trend is the combination of technologies for printers and copiers into "mopiers" such as the Hewlett-Packard Laser Jets. Instead of running to the copier every time your computer printer spits out a hard copy to be reproduced, you can have the mopier make the copies while it stores all other jobs sent to it. And you can continue to work on the computer without interruption. Another plus: Like the most advanced copiers, a mopier will also collate and staple your task. Advances in ink jet printing have led to better colors and higher resolution for bright, crisp documents.

Scanners have also advanced. With optical character recognition software, the scanner will recognize a letter as a letter, not simply as an image. The software allows the user to edit the document just as he would with word-processing software. Any assistant will tell you: Scanning a multipage contract or summary is much faster than keying it in. And big monitors are flying off the shelves. The larger screens show much more information at one time.

Modems are also big sellers at Tower. With more people downloading huge volumes of information from the internet — including memory-intensive graphics — speed is of the essence. New modems process information twice as fast as their predecessors of two just years ago. "The average product life is about six months," McMillan says. "After that, it's not exactly obsolete, but it has been superceded by new technology."

Tom Poppert of National Computer Rental (NCR) in King of Prussia, Pennsylvania, agrees. "We utilize only name-brand, state-of-the-art, show-quality

computers, and we change them all the time," Poppert says. "We don't use clones. You want the best, and you want the warm, secure feeling only the best can give you. If the thing works well but the stand is wobbly, that's unacceptable."

When fire ravaged a building full of law offices in downtown Wilmington last year, many called NCR to bail them out of trouble. With more than 500 laptops, servers and notebooks available at a moment's notice, NCR filled the need for those who can't survive an hour without computer equipment.

Through rentals and leases, NCR can help anyone deal with an overflow of work, peak job loads (the legal equivalent of an accountant's job at tax time) or complete special projects.

"For some people, renting is a viable alternative," Poppert says. "If there's no ongoing need for a computer, there's no need for a capital expenditure. And there's nothing to sell."

NCR also provides monitors, printers and high-resolution projection devices that will transmit the image on a monitor screen directly to a large screen. It sure beats a tripod with a flip pad and markers in the courtroom.

NCR will install, free of charge, any software provided by the customer, and the company provides 24-hour emergency service. "In a pinch, you can acquire a complete system, installed and demonstrated, in less than 24 hours," Poppert says. "All our personnel are technicians. They can make any adjustment and put together custom configurations. And they're all in touch with mobile phones and beepers."

If your office needs are more permanent, Total Office in Newport can help. The company will design and install any office system you can dream up. Total Office's staff can work with an architect or interior designer, or provide its own interior designer, to determine how to fill your needs best using a sophisticated computer-aided design system. Color schemes, storage needs, space plans — everything is based on the client's needs. Total Office can start from the ground up or reconfigure existing offices, which sometimes seem to be in a state of constant flux. The company considers every detail, from upholstery and fabric care, to wall coverings and drapery to wood refinishing and electroplating of old furniture. And it factors your computer system needs into the plans. ◆

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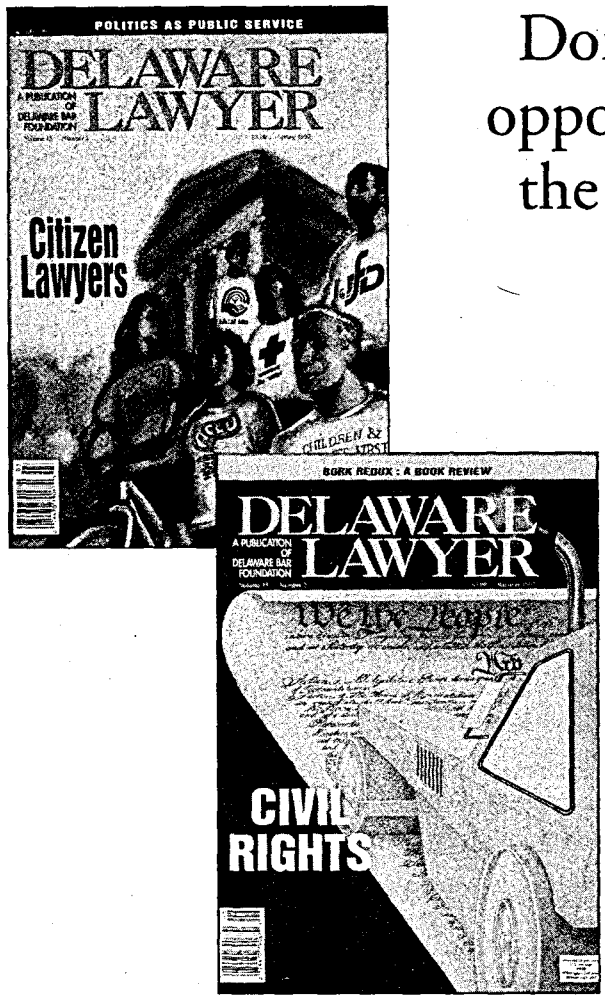

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THE BIASED BUSINESS

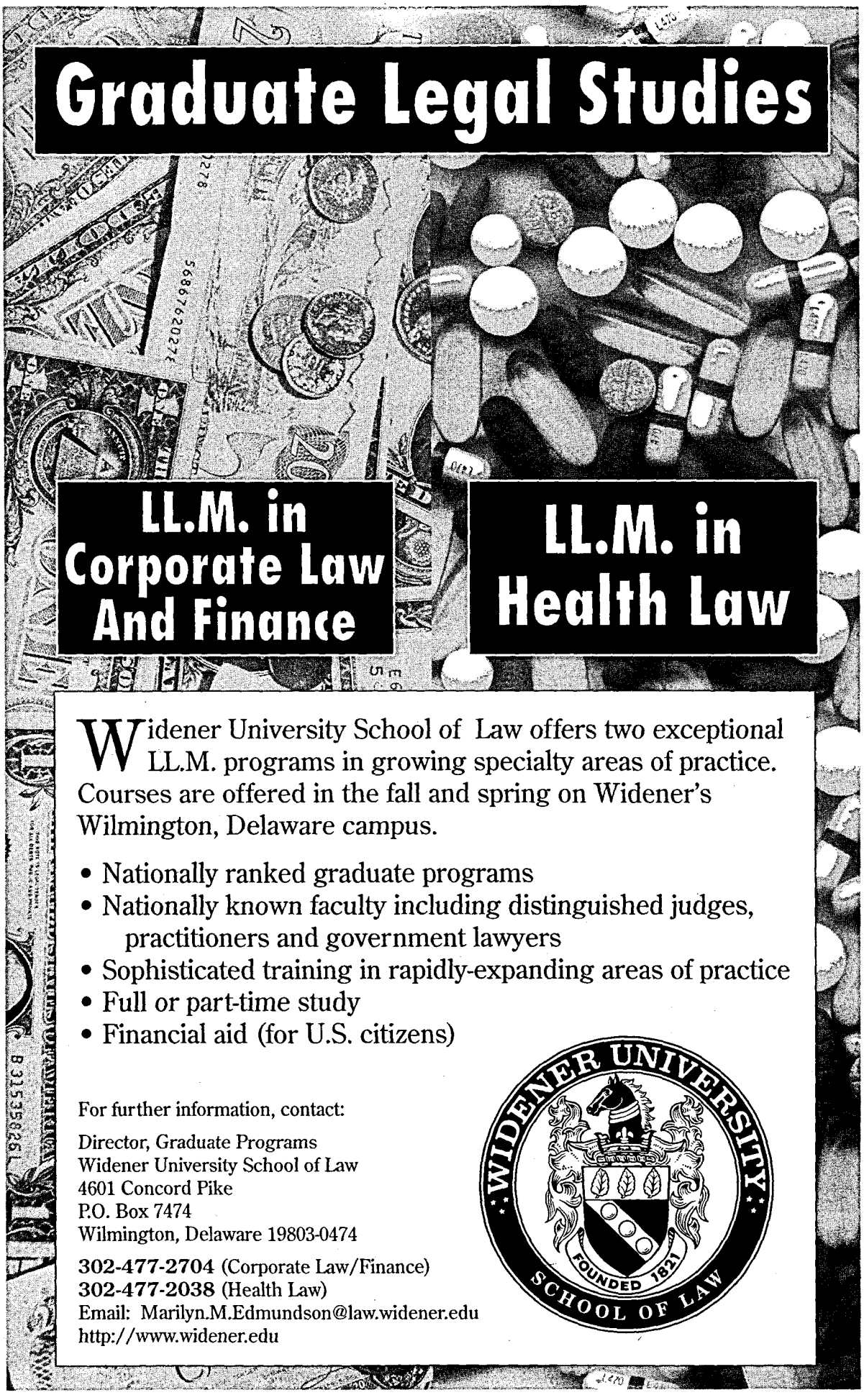
continued from page 13

District of New York and the District of Delaware.) This lone "argument" advanced in support of the current venue statute wrongly minimized and ignored the efforts and abilities of the many able judges sitting in districts that supposedly do not "specialize" in large cases and, understandably, it was given short shrift by the Commission. The many valid reasons for not amending the current venue statute were never even mentioned, let alone debated, at the Commission's February meeting.

Unless the Commission members had somehow mastered time travel, the "numerous letters" focusing "on the problem of disenfranchisement of creditors due to forum shopping" referred to in the November Report could not possibly have formed the basis for the Commission's decisions and views in February and June 1996.

The June Position Paper reveals a similarly flawed and biased approach to the question of whether new venue legislation is warranted. That paper, circulated at the Commission's June meeting, reveals that the Commission continued to assume the existence of venue-generated problems, without any viable underlying analysis to support that assumption. Indeed, the June Position Paper exhibits its bias on venue choice when it notes almost at the outset that "[f]or multi-state corporations venue options are broad, and here is where the mischief begins." The June Position Paper relies, to the exclusion of any other factual source, upon selected information set forth in a single outdated venue study by Professors Lynn LoPucki and William Whitford to support preconceived notions regarding the problems supposedly associated with venue choice. The June Position Paper, however, ignored the *conclusions* reached by Professors LoPucki and Whitford; namely, that there are benefits associated with forum shopping, benefits that militate in favor of accommodating it rather than eliminating it. Although the November Report belatedly acknowledges that the LoPucki/Whitford paper favors accommodation over elimination, the Commission's position remained unchanged.

The sole comprehensive paper with data and supporting evidence presented to the Commission prior to its final decision to propose the elimination of state of incorporation as a venue predicate was submitted by the Delaware State Bar Association shortly before the Commission's October meeting. Thomas Ambro and I, after some prodding, finally were invited to address the Commission at that meeting, as was Gerald Munitz, whose November 1995 letter to the Commission apparently precipitated the Commission's interest in venue "reform." Mr. Munitz had addressed the Commission at its February meeting, the one at which Professor Warren purportedly presented all the arguments in favor of retaining existing venue choices. But, no matter, he was back, still with no data and no analysis. His remarks – some of which were used to profess his "respect" for Tom and me – were along the same lines as those delivered in February, but were nevertheless received without interruption. He did not address any of the arguments or data in the Delaware Report. Tom and I, on the other hand, were addressing the Commission for the first time to present



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the recently completed Delaware Report and to demonstrate that the fears and assumptions that ostensibly had prompted the venue-reform movement – and presumably the Commission's decisions in February and June – were not supported by facts. We were given a total of twelve minutes to speak and interrupted three times during that twelve minutes with warnings to speed up our presentation. And all our facts and figures and data? About as effective as the DNA evidence at the OJ trial.

The politically inexperienced might conclude that the Commission simply discounted the Delaware Report because it was sponsored by the bar of the state that has the most to lose if the Commission's venue proposal is adopted. The Commission did not, however, dismiss the anecdotes and assumptions of those who support changes to the venue statute, even though they, too, clearly have a dog in this fight. Even more revealing (or damning, depending on your perspective) is that the Commission, knowing full well that two independent, empirical studies regarding venue were underway, one by the Federal Judicial Center and the other an updated study by Professor LoPucki, did not even bother to elicit the views of the people conducting the studies, let alone defer a decision pending completion of these studies.

Almost as troubling as the Commission's indifference to facts is its willingness to adopt wholesale the inflammatory and insulting accusations being slung by venue "reformers." The reformers, of course, see problems, abuses, plots, and schemes everywhere. Unfortunately, the November Report seems to accept their view of the venue world uncritically. Thus, while the November Report contains only two sentences describing possible "benign" reasons for "forum shopping" by debtors and their attorneys, it burbles on for almost two pages describing the "less benign" reasons that supposedly motivate a debtor to select a forum that is not based on asset or headquarters location. For example, the November Report, relying on various "commentators," accuses debtors' lawyers of filing in jurisdictions that "permit high attorneys' fees and do not proactively review fee applications;" of selecting a forum in order to "[g]ain strategic advantage over other litigants, such as choosing a forum where a harmful ruling is not applicable;" of choosing a venue "for its inaccessibility for certain litigants, driving up the costs

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of their pursuit of their claims and making it difficult for them to serve on committees." Venue choice (a/k/a forum shopping, the Commission's preferred, value-neutral terminology) becomes a "strategic tool, available for clever parties to manipulate outcomes to the disadvantage of smaller creditors who are cut out of the bankruptcy process."

Not satisfied with merely maligning debtors and their lawyers, the November Report concludes that "[t]he real costs of forum shopping, *if* it is widespread, *might* be even greater. The damning *charge* that forum shopping is used to select fora that are fee-friendly, combined with the *allegation* that judges want to keep high visibility cases, raised a troubling specter of courts competing for big-bankruptcy business . . . by making lawyer-friendly rulings." (Emphasis added.) By all means, let's change the laws of the United States just in case these "ifs," "mights," "charges," and "allegations" are true.

Unfortunately, by focusing solely on venue, the Commission is abdicating its responsibility to examine whether there are meaningful legislative solutions to the substantive problems that purportedly exist in large Chapter 11 reorganization cases. Improper and repeated extensions of exclusivity. Creditor disenfranchisement. Effective deprivation of the ability to pursue a small claim or defend against a debtor's lawsuit. Fees run amok. If these and other substantive problems really exist, and are not merely being used as an excuse for advancing political agendas designed to redistribute cases and bankruptcy business, they deserve to be debated and addressed directly and effectively rather than through the back door of venue legislation.

Proponents of venue "reform" have asked the Commission, which should be an independent, apolitical body, to recommend legislation based on fears rather than facts, suppositions rather than statistics, anecdotes rather than analysis, pocketbooks rather than principle. And the Commission has assented. The "reformers" repeatedly have argued that the current venue statute generates cynicism and disrespect for the entire bankruptcy system. They apparently have lost sight of the fact that effecting substantive change through seemingly procedural legislation, and advancing political and redistributive goals of selected groups in the guise of procedural "reform," can also generate cynicism and disrespect. ◆

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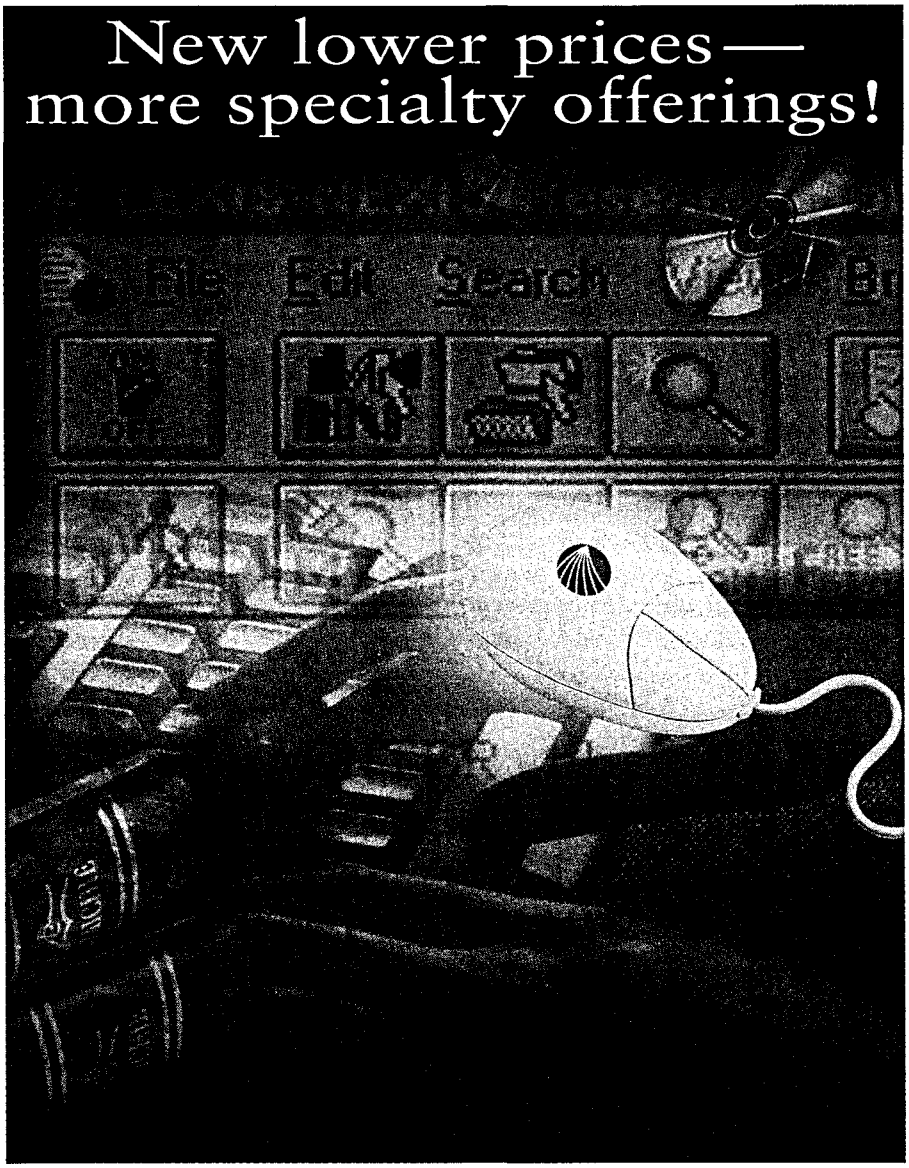

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FEATURE

Jeffrey M. Schlerf

LIFE AS A DELAWARE BANKRUPTCY ATTORNEY

In many respects bankruptcy law can be daunting to lawyers who do not practice it. Like tax, securities, or ERISA law, it embodies a separate statutory framework and set of rules, which tend to increase in size and complexity. However, there is much more to it. The bankruptcy practice also has its own language, from financial jargon and terminology relating to "secured transactions" to bankruptcy-specific conceptions like an "estate." Furthermore, within the chapter 11 (business reorganization) context, the amount of dollars at stake and the presence of large financial institutions can intimidate most lawyers. Yet, an unfamiliar feature of bankruptcy is the day-to-day practice, which can place enormous demands upon a lawyer. Bankruptcy attorneys, especially those in Delaware, will assure you that there is nothing quite like it.

Statutes and Rules

No bankruptcy lawyer is suitably prepared for battle in court without his federal Bankruptcy Code. At the latest count *Collier's* abridged version of the Code, *Collier Portable Pamphlet* (1997), runs to 301 pages, single spaced. Even the most familiar provisions, such as sections 362 and 365, contain many potential pitfalls for the unsuspecting. Section 362, governing the "automatic stay," and section 365, "executory contracts and unexpired leases," span 9 and 17 pages, respectively, in the abridged *Collier's*. And the complexity of certain bankruptcy provisions, with their many subsections and subparagraphs, can send shivers down the spine of even a tax attorney. Not only do you regularly hear bankruptcy professionals say "I've never seen that provision before." I have heard a judge make that same admission.

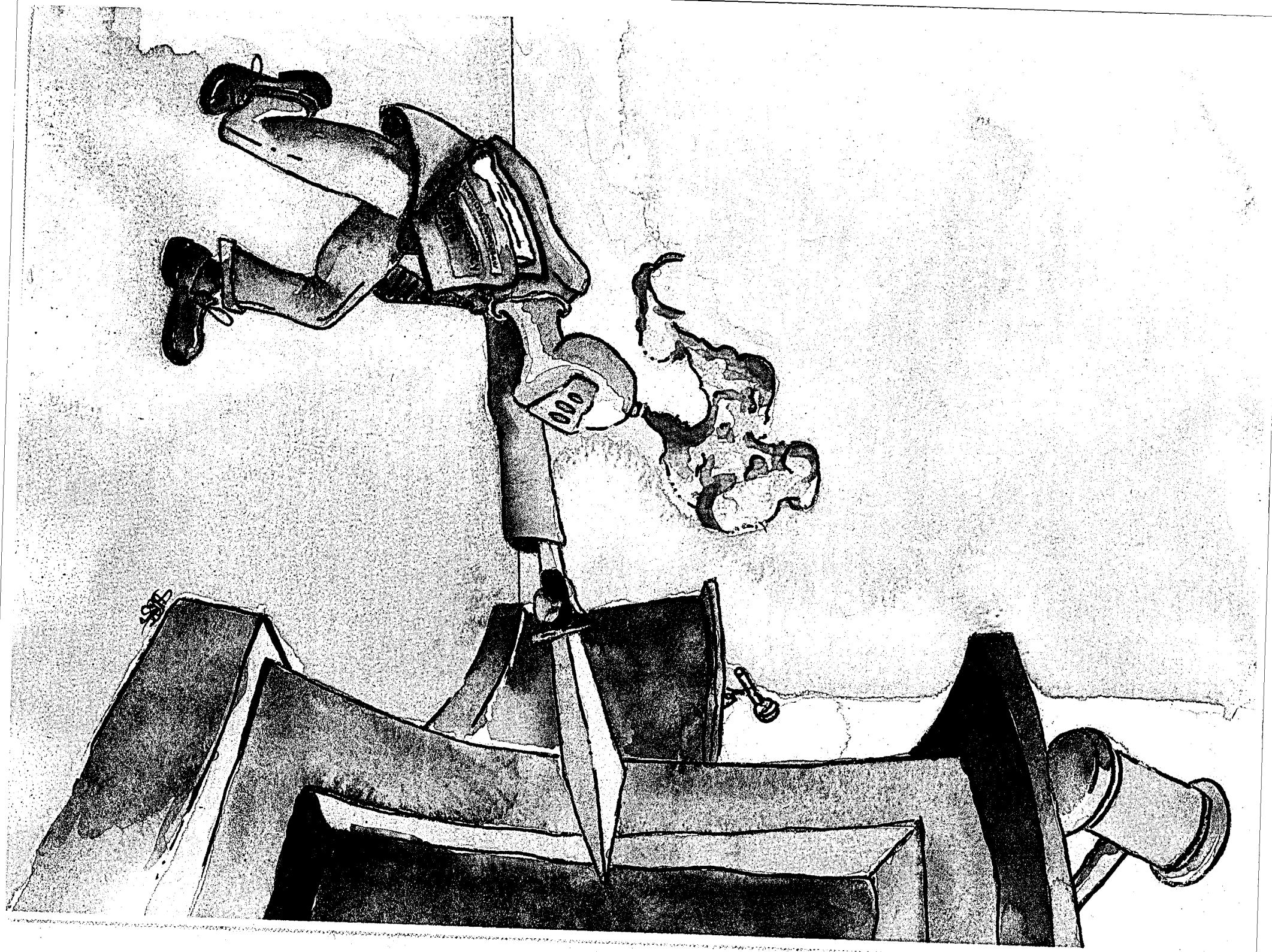
While the Bankruptcy Code is not amended as frequently as the Internal Revenue Code, it does change. Those practicing for at least 20 years remember the replacement of the old code under the Bankruptcy Act with the current Bankruptcy Code in 1978. The amendments were so substantial that lawyers avoid citing cases under the old Act if possible. Since the new Code was enacted it has been the practice of Congress to make periodic amendments, prompting most bankruptcy attorneys at a minimum to attend a day-long seminar at least to recognize what has changed.

In addition to its large, comprehensive and evolving statutory framework, bankruptcy law has its own set of federal rules, the Bankruptcy Rules of Federal Procedure (the "Bankruptcy Rules"). At last count there were about 200 of them. For every statute in the Bankruptcy Code there are one or more rules. To make life even more challenging, "adversary proceedings" in the bankruptcy court (a specific category of litigation involving a debtor in bankruptcy), and in part "contested matters" (other litigation relating to a debtor), adopt many of the Federal Rules of Civil Procedure ("FRCP"). One must be careful because some of the FRCP are wholly incorporated into the Bankruptcy Rules, while others are adapted versions.

Delaware lawyers also have to follow another layer of rules, the Local Rules for the United States Bankruptcy Court for the District of Delaware (the "Local Rules"). There are currently 32 Local Rules. Moreover, one must adhere to the Local Rules of Civil Practice and Procedure of the United States District Court for the District of Delaware.

It is important to appreciate that the Bankruptcy Code and the multitude of procedure rules serve merely as a working framework for bankruptcy practice. In fact other substantive areas of the law apply to most issues that arise in bankruptcy. Secured transactions is obviously one critical area, but it is not by any means the only one. Recently in Delaware there have been a significant number of Chapter 11 filings by companies in the very competitive retail industry. These retailers usually enter bankruptcy overburdened with commercial leases. A key to a successful reorganization is their ability to "reject" (terminate) the most unfavorable leases, assume and assign (sell) the ones not needed but with value, and assume (keep) the remainder.

Illustration by Shannon Stevens



Without an adequate understanding of real estate and contract law, including landlord-tenant law and contract remedies, a bankruptcy lawyer will not be of much use to his client.

In fact, almost any other substantive area can overlap with bankruptcy law. For instance, mergers and acquisitions are an inherent part of many Chapter 11 filings. It is only fitting that corporate law issues be decided by the Bankruptcy Court in Delaware, the preeminent jurisdiction for matters of corporate governance. Moreover, in any corporate acquisition the subject of preserving the "NOLS" ("net operating losses", which may be used to offset future income tax liability) arises, requiring the well-rounded bankruptcy lawyer at least to have a solid understanding of that principle. Even securities law issues may be implicated. In short, the practice demands in addition to a mastery of pure bankruptcy law a working knowledge of even more specialized law.

Bankruptcy Terminology, Principles

The need to be able to distinguish between a "debtor" (the borrower) and a "creditor" (the lender) is enough of a hurdle to discourage many from venturing any further into the world of bankruptcy. Even if you manage to overcome that prerequisite, any lingering suspicion you had that bankruptcy contains a language of its own soon will be confirmed.

For instance, perhaps a debtor's greatest protection following its filing for bankruptcy is the "automatic stay." The "stay" imposed by the Bankruptcy Code prevents a party from commencing or continuing almost any kind of action against a debtor to determine liability, or collect on any liability. In order to obtain "relief" from the automatic stay, generally a creditor must establish "cause," which is not a simple task (alternatively, to repossess collateral the stay will be "lifted" where the debtor lacks equity in property which is not necessary for reorganization). Where a creditor seeks to recommence pending litigation, a bankruptcy court will apply a difficult balancing test, weighing the interests of the debtor and its creditor-adversary. Courts are generally reluctant to modify the stay if a reorganization will be put in jeopardy.

That is not to say that bankruptcy is complete anathema to creditors. For example, the Bankruptcy Code allows a creditor, under certain conditions, to file an "involuntary" petition and push a reluctant borrower into bankruptcy. On occasion, an even more attractive option to some larger lenders is the "pre-packaged" bankruptcy (the "pre-pack"), where Delaware practice is preeminent. With a pre-pack, before entering Chapter 11 a debtor and its largest creditors negotiate the terms of a plan of reorganization. Then, unlike the typical case, the negotiated plan and an accompanying disclosure statement are filed with the bankruptcy court at the same time the debtor files its bankruptcy petition. Typically the pre-pack plan includes a reasonable return to general ("unsecured") creditors, whose support was solicited prior to the filing. The beauty of this cutting edge practice is, *inter alia*, that a debtor is in bankruptcy for only a brief time, maybe two months. To give some perspective on how short that is, under the Bankruptcy Code a debtor has the exclusive right to file a Chapter 11 plan for 120 days, and generally it is not too difficult to establish "cause" for extending that period. Hence a pre-packaged plan can result not only in an enormous conservation of judicial resources, but also significant cost savings to all parties by avoiding an extended, contested bankruptcy case. Creditors favor that result.

Another principle unique to bankruptcy, "DIP" ("debtor-in-possession") financing, can be an attractive business opportunity to some lenders, or at least a means of minimizing losses from existing loans. A "DIP" lender provides financing to the debtor, who in bankruptcy parlance actually is known as a "debtor-in-possession" (a new creature born at the bankruptcy filing, as distinct from its prior life as a "debtor"; to simplify matters, the terms are used interchangeably in this article), to allow it to continue operating its business while in Chapter 11. While a "DIP" lender is not always your stereotypical, risk averse financial institution, still it is in a position to negotiate terms that minimize its chances of not getting repaid. For example, DIP lenders are sometimes given a "priming" lien against all or most of a debtor's assets, which means essentially that the lender leaps to first in line of those able to seize collateral if that becomes necessary. Another common protection is giving the lender an "administrative" claim for the full amount of its DIP loan, so that in terms of priority of distributions to creditors the DIP lender is at the top of the hierarchy. Therefore, the lender almost certainly will be repaid, except in the case of the most sickly debtor.

Notwithstanding those features of bankruptcy favoring certain creditors, others such as the ability of a debtor to "cramdown" an under-collateralized creditor will correct any impression that Chapter 11 is painless for most large lenders. A "cramdown" works as follows. The Bankruptcy Code sets forth the requirements for a Chapter 11 plan to be "confirmed" (approved) by a bankruptcy court, including votes in favor of the plan by each class of impaired creditors and equity holders (shareholders). At first glance this would appear to give dissenting groups the power to block confirmation. However, there is a significant exception: where the plan does not discriminate unfairly (i.e., treat similarly situated claimants differently), and is "fair and equitable" towards the classes not voting for the plan, it may be confirmed despite a lack of support by some creditor classes.

This exception can be very important, especially with respect to so-called "secured" creditors. As a general rule these creditors are in the most favorable position because their loans have been "secured" by an interest in the debtor's property (the collateral). The Bankruptcy Code limits those advantages by making the "cramdown" available to a debtor. It does this by expressly providing that it is fair and equitable for a debtor's plan of reorganization, in essence, to "cramdown" the amount of the creditor's secured claim to the value of its collateral. Thus, if a secured creditor' collateral has declined in value (perhaps from a debtor's failure to maintain the property) and the balance of its loan has not decreased at the same pace, so that the amount of the loan exceeds the collateral's value, the creditor's vote against a plan can be overridden. The debtor can do this by forcing the secured creditor to accept under the plan the return of its collateral or, alternatively, deferred cash payments in an equivalent amount. This leverage offered to a debtor under the Bankruptcy Code can have a significant effect on plan negotiations in a Chapter 11 case.

Besides understanding principles and terminology specific to bankruptcy law, secured transactions and the like, a bankruptcy attorney is lost without being well-versed in the language of mergers

and acquisitions. There is the distinct possibility, if not already the stated desire of a debtor and its creditors, that as a financially distressed company enters bankruptcy soon it will be sold as a going concern. The main event in many Chapter 11 cases is the marketing and sale of the debtor. Sometimes that debtor already has selected a partner, although its creditors may not favor its selection. In any event, unless a bankruptcy lawyer is familiar with the jargon of mergers and acquisitions – such as "topping fees," "stalking horses," "standstill agreements," "out of the money," the same terms used before Delaware's Court of Chancery – he will be limited in his practice. It is essential that attorneys not only speak the language of their peers, but that of their clients.

Daily Bankruptcy Practice

When bankruptcy attorneys hear general litigators complain about the number of pleadings they must handle at once, or the fast pace of certain cases, they have to chuckle. I have dealt with civil litigation enough to know that there can simply be no comparison to bankruptcy practice. It is not even close except, of course, some types of practice before the Chancery Court.

First, in bankruptcy "bilateral" litigation is the exception rather than the rule. There are many constituencies affected by the major events in a Chapter 11 case who want to be heard. Two of the major players are the debtor and a statutory committee appointed by the Office of the United States Trustee to represent "unsecured" creditors. Each is represented by Delaware counsel and typically a large law firm from a major city. On some days the debtor and the creditors committee agree on an issue and sit on the same side of the aisle in court. On another day each may be the other's worst enemy.

But, the drawing of battle lines does not end there. Inevitably there is a large lender who is not represented by the statutory committee of unsecured creditors because it has a secured loan. This creditor has much at stake, must be part of plan negotiations, and will voice its position at every juncture of the case. In addition, although shareholders of a bankrupt company are often "out of the money" (not entitled to receive anything under a plan because a debtor's liabilities exceed its assets) a separate statutory committee is sometimes appointed to represent their interests. Furthermore, there are often other groups with common interests or grievances, who establish more informal alliances, for example "ad-hoc" committees of trade creditors, employees, retirees, or personal injury litigants. On any given occasion in a Chapter 11 case there also is the "little guy," sometimes with lawyer in tow but often not, who believes (often correctly) that his interests are about to get steamrolled. This person is entitled to his day in court. Although we sophisticated bankruptcy types can view such people as nuisances, frankly it can be refreshing to see that the Chapter 11 process retains a human side.

These constituencies, all of them with their own agenda, generate a flurry of activity before a bankruptcy court. Wisely, in their larger cases the Bankruptcy Judges in the District of Delaware schedule "omnibus" hearing days to consider numerous matters before them at once. This means that the two courtrooms on the sixth floor of 824 Market Street on any given day can be packed with attorneys and clients. The litigation tables on either side of the Judge will be full of lawyers, typically supported by another flank of their colleagues in a row of chairs pulled up immediately behind. These prized seats in the front of the courtroom can sometimes be the setting for a game of musical chairs between professionals, not only before but sometimes during a hearing. I actually have seen debtors' attorneys move from their usual position on the left to the right hand table, and then back again, in the span of one hearing. Those professionals not privileged (or aggressive) enough to have a front row seat still manage to march from their seats in the back of the courtroom, one by one, through the swinging doors to the podium to say their piece.

Given the legions of participants in the larger cases and what is at stake, it is not uncommon to see sights such as these in the otherwise relatively quiet city of Wilmington, Delaware: lawyers and investment bankers with large attaché cases chatting on cellular phones in front of Marine Midland Plaza, or over yogurt in the neighboring TCBY; armies of expensively dressed professionals hurriedly marching down Market Street to court; unfamiliar, slightly stressed faces asking (sometimes impatiently) for directions to the Hotel DuPont and then again later to the Amtrak Station.

But these are not the only distinctive features of bankruptcy court practice. There are always stacks of pleadings to deal with. The various constituencies in bankruptcy do not limit their activity to attending Chapter 11 hearings. They file motions, applications and complaints requesting a wide range of relief from the bankruptcy court. They respond to similar pleadings filed by others, where appropriate. Almost everyday, an overwhelming amount of paper can be generated for attorneys to review, owing in part to something commonly referred to as the "2002 Service List."

The 2002 Service List (the term, while somewhat a misnomer, is derived from Bankruptcy Rule 2002, which governs notice and service of certain pleadings) is a constantly growing list of the names and addresses of attorneys and parties entering an appearance and requesting notice and service of pleadings. Generally, in Delaware persons on the 2002 Service List are served with a copy of most pleadings filed in the bankruptcy court. This practice creates more challenges in at least two respects. First, the demands on the staff and facilities of the law firm serving a pleading (and the pressures on the supervising attorney) – inevitably in the hour before the usual 4:00 p.m. deadline – are tremendous. Second, bankruptcy attorneys representing a major player in a Chapter 11 case must review daily the pile of pleadings constantly growing in their "in box". And this must be done not only to keep up with required reading: if you fail to stay on top, you risk missing deadlines to respond to pleadings or even failing to attend an important hearing.

Furthermore, the general rule in Delaware's Bankruptcy Court is that almost everything will be on a relatively fast track. Notwithstanding their tremendous case loads, the Bankruptcy Judges do a remarkable job of keeping their dockets moving and managing their cases. Usually it is possible to schedule a hearing on any matter within a few weeks, if not earlier. Therefore, parties whose interests are affected by any given matter before the court must react quickly.

However, this pace is only the general rule. When there is an emergency, sometimes events can happen so fast as to impress even the most seasoned Delaware corporate lawyer from the 1980's merger era. Here is an example:

recently I appeared before the District Court on an appeal in mid-afternoon (Thursday), and prevailed; followed my opponents back to the bankruptcy court where they asked for an immediate hearing time for a motion for a temporary restraining order ("TRO"); prepared for the TRO hearing scheduled for the following morning (Friday); learned while waiting for the TRO hearing to begin that my opponents were appealing yesterday's decision to the Third Circuit, and might seek an immediate hearing to stay that decision pending appeal; attended a two hour TRO hearing, and prevailed; followed my opponents outside the courthouse in an attempt to find out whether they were going to file another appeal, this one regarding the TRO denial, and whether they would seek a stay pending either that appeal or yesterday's appeal; learned that my opponents had tracked down the District Court Judge (who was out of town) and had managed to schedule a teleconference later that (Friday) afternoon to ask the District Court for some kind of relief; split up with my co-counsel so that they could go to Philadelphia in case we discovered our opponents had scheduled some kind of emergency hearing before the Third Circuit that afternoon; participated in an approximately 40 minute teleconference with the District Court Judge, who denied my opponents' request for a stay pending appeal of the TRO denial – which meant that on Friday evening my creditor-clients were able to exercise their right to replace the board of directors of the company in bankruptcy. A procedural walk in the park, right?

Administrative Fees

One other misconception I would like to correct is that, because Chapter 11 involves financially distressed debtors and unpaid creditors, it is a money trap for the unwary and generally should be avoided. The Bankruptcy Code offers incentives to those (including attorneys) who assist in keeping a debtor alive and heading towards reorganization. This takes the form of "administrative expenses", which have priority over other kinds of claims. Since only in the rare case of a terminally ill debtor will "administrative" claims be paid less than 100%, this is a very real incentive.

Under the Bankruptcy Code, the "actual, necessary costs and expenses of preserving [the debtor's] estate . . . for ser-

vices rendered after the commencement of the case" shall be paid as an administrative expense. What this means is that those parties providing services necessary to the debtor while in Chapter 11 can continue to be paid with minimal disruption (actually, ongoing, uninterrupted payment of some expenses will require pre-approval of that procedure by the bankruptcy court at the outset of a case).

However, this administrative claim status is not limited to parties providing services directly in connection with a debtor's ongoing business. The Bankruptcy Code recognizes that parties providing services specific to a Chapter 11 reorganization need proper incentives. The persons to be rewarded include "professionals," such as attorneys, financial advisors, investment bankers, and accountants, whose retention by the debtor and the statutory committees has been approved by the bankruptcy court. So as a case progresses, these professionals periodically file an application with the bankruptcy court for payment of their fees and expenses. The debtor's estate pays the fees of certain professionals, including those of the statutory creditor's committee. In short, many of us bankruptcy lawyers will usually get paid, which is something many attorneys representing some very wealthy non-bankruptcy clients are not always guaranteed.

Most bankruptcy lawyers, especially those who represent debtors or statutory committees, support this system. Of course, there are critics who point to the most egregious cases where professional fees have mounted over a span of years, typically in cases that have become litigation nightmares. Notwithstanding those rare cases, giving professional fees the status of an administrative claim is good for the Chapter 11 process, and there are built-in protections against potential abuses.

Lawyers representing debtors or statutory committees must seek approval of their fees and expenses with the bankruptcy court. In Delaware the application must describe in detail the tasks performed, by project categories, with attached copies of all time entries for each professional. The court is thereby enabled to scrutinize professional fees in an effective manner. If necessary, the court may even appoint a fee auditor for heightened review. Moreover, all interested parties have an opportunity to object before the statutorily required hearing for approval of an application.

This system benefits the reorganization process for several reasons. If professional fees were not treated as administrative claims, in all likelihood the best lawyers would represent only the largest and wealthiest debtors and creditors. Professionals tend to avoid representing clients with riskier prospects for payment of fees, and bankruptcy lawyers are no different.

Also, it is my general observation, shared by others, that in the bankruptcy setting clients receive more efficient and effective services from their lawyers. In most cases in Delaware there is a general mind set to keep matters moving forward (assisted by the continued prompting of the Bankruptcy Judges), and thereby to allow a debtor to accomplish what Chapter 11 offers it, a reorganization. Therefore, you will observe more often than not a general spirit among bankruptcy lawyers that matters can be "worked out."

This mind set can be especially evident during the "claims administration" process, whereby a debtor must deal with literally hundreds or even thousands of disputed "claims" filed against it by creditors. The claims can range from mom and pop small dollar amounts to multimillion dollar disputes. My non-bankruptcy colleagues are astonished at how readily disputes with significant dollars at stake are resolved without protracted litigation (and with limited discovery). Lawyers really can feel (for once) that their clients will appreciate the value of their services. For example, following a recent 1-2 hour hearing I realized that we had just reduced the total amount of claims against a debtor by approximately $200 million. The client must have felt it got its money's worth that day. In bankruptcy, results are a little easier to measure, and both lawyers and their clients can appreciate that. The incentives seem to work.

Not too long ago, even when some of the larger Chapter 11 cases began to receive national attention, the bankruptcy practice was still frowned upon by many. Perhaps some viewed it as not a "clean" enough practice. That perception has nearly vanished, especially here in Delaware. I have practiced in other branches of the law in which I have worked with many fine lawyers. However, I can state with confidence that some of the brightest, most articulate, thoughtful, and even most ethical attorneys practice before the Delaware Bankruptcy Court. ◆

FEATURE

Mark D. Collins

WHY DELAWARE?

On December 3, 1990, Continental Airlines filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. Bankruptcy practice in the District of Delaware has not been the same since.

Since 1990 alone, over 500 debtors (primarily companies) with assets exceeding one million dollars have filed for Chapter 11 reorganization in Delaware. Of these, 19 had assets totaling more than one billion dollars, and 63 had assets over one hundred million. Since 1995 alone, nine companies with assets exceeding one billion dollars have filed Chapter 11 petitions in Delaware. Moreover, unlike the substantial majority of other districts, the District of Delaware has continued to receive a steady flow of bankruptcy filings over the past few years.

The option of filing for bankruptcy in Delaware is available to any company incorporated in the State. The Bankruptcy Code allows a corporate debtor to file for bankruptcy in, among other places, the jurisdiction in which it is incorporated or the jurisdiction in which it maintains either its principal place of business or its principal assets. Because Delaware has long been the state of incorporation for many of America's largest companies, these companies have the option of filing in Delaware. This does not mean, however, that a creditor cannot petition the Bankruptcy Court to have the case transferred from Delaware to another jurisdiction if that creditor can establish that a transfer is in the best interests of all parties. Indeed, two-thirds of all motions to transfer venue filed since 1988 have been granted.

Critics reason (far too facilely) that Delaware's emergence as a favored forum is limited to two causes – the perception that the District of Delaware is "pro debtor" and that it is liberal with respect to the awarding of professional fees. While the perception of reality is normally more important than reality itself and the District of Delaware is perceived as pro-reorganization, this impression is hardly unique. The perception that bankruptcy judges generally are "pro debtor" pervades the entire American bankruptcy system. Moreover, fees for professionals are scrutinized carefully in Delaware and frequently fee requests are reduced.

Facts aside, assuming that these perceptions were true and the District of Delaware pushed the end of the spectrum in its consideration for debtors and their professionals, why was Delaware rarely used as a bankruptcy forum before late 1990 for entities other than those located exclusively in the State? Why did so many large Delaware corporations file elsewhere almost exclusively?

Delaware's status as a preferred place for bankruptcy filings has many reasons, some simple and readily apparent, and some subtle. The first reason has little to do with Delaware specifically. In 1978, the Bankruptcy Code was enacted, replacing the Bankruptcy Act. The changes in tone were significant, in effect conferring on reorganization efforts a "fresh start" for debtors. Bankruptcy was no longer a social stigma that carried far beyond the temporal reorganization case. Instead, reorganization meant just that – the restructuring of debt in a climate far more receptive to those restructurings, thus allowing debtors to save jobs and enhance the going concern value of their businesses. A debtor was given many means of making sure the reorganization was effected – the automatic stay of actions against the debtor and often those who are instrumental in its reorganization effort, the ability to reject contracts and leases, and the ability to assume and assign contracts and leases over the objection of other contracting parties, are among the many tools given to a debtor in bankruptcy. While many of these same means existed pre-Bankruptcy Code, reorganizations under its more lenient provisions developed such widespread acceptance that the words "Chapter 11" even acquired a certain distinction.

In the 1980s, bankruptcy gained in popularity, rising nationwide from 6,700 Chapter 11 filings in 1980 to nearly 21,000 in 1990. And in 1990 a change occurred that exponentially increased the number of mega-filings – a major recession. The economic downturn cut the pins from under many of the biggest leveraged buyouts in American history. Investors buying companies by pledging (i.e., leveraging) the acquired companies' assets found that they could not service the massive debt incurred. In the airline industry, the recession

was particularly damaging. The inevitable fallout of a recession – fewer passengers, was exacerbated by the fear of highjackings and plane bombings spawned by the Gulf War and the build-up to that conflict in 1990-91. In this atmosphere, already weakened companies like Continental Airlines and TWA could not survive absent reorganization.

Why Continental Airlines chose to file in the District of Delaware instead of elsewhere is another story. But it did, and Delaware proved not to be a one hit wonder. Mega-cases followed – Columbia Gas (a Delaware-incorporated and a Delaware-based company), Days Inn, TWA (though it elected to file a later case in St. Louis) – and continue through today (e.g., MobileMedia). "Prepackaged" bankruptcies, where the debtor and its creditors negotiate a plan of reorganization before the debtor files its Chapter 11 petition, occur perhaps more frequently in the District of Delaware than anywhere else.

What happened in the Continental Airlines case is that it brought together in Delaware hundreds of bankruptcy attorneys from New York to Seattle to Miami to Minneapolis. These attorneys saw a court that joined the vast majority of other courts in being pro reorganization and favoring the "fresh start" premise that underlies the Bankruptcy Code.

But they witnessed much more. Omnibus hearing dates in major cases could be scheduled months in advance so that an attorney could know in January when he or she would be in Delaware in July. Long range scheduling was not only possible, but "prepacks" could on the filing date have the time set for the confirmation hearing. Emergency scheduling could be done by merely calling the Judge's scheduling clerk instead of going through the usual route of the Clerk's Office. That Office, in turn, proved to be incredibly well organized. Personnel responded to questions immediately and made sure no calls were unreturned, and when returned they were handled by appropriate personnel. Judges were willing to postpone hearings (often at the expense of their own convenience) to allow last minute negotiations to be completed. In fact, Chief Bankruptcy Judge Helen Balick even went so far as to return two weeks ahead of schedule after surgery to handle the confirmation hearing in Continental Airlines.

Adding to these user-friendly conveniences, the District of Delaware is only one and a half hours from New York by pleasant Metroliner. Overnight stays in Delaware were thus minimized, but even those stays were inviting since accommodations as favorable as the finest in New York (the Hotel duPont) could be availed of for rates significantly cheaper than New York. Moreover, nearly everything was in walking distance.

As a result of the avalanche of Chapter 11 cases in the District of Delaware, the bankruptcy bench in the District of Delaware was expanded in November 1993. This much needed addition not only did not detract from the allure of Delaware, it enhanced it. That was because the judges were consistent in their rulings and their approach, and continue to be. The benefits of Delaware have expanded without the nagging inconsistency of rulings that sometimes prevail in other bankruptcy courts. In addition, the District of Delaware regularly encounters difficult and often subtle issues of major restructurings. This experience adds to the strengths of an efficient and expert court.

The real reasons for attorneys' advice to their clients to file Chapter 11 cases in Delaware are far more pragmatic, having to do with experience, consistency, convenience, and service. Given the opportunity to witness and participate in these benefits, bankruptcy practitioners often opt to come back.

So when bankruptcy attorneys advise clients whether to file Chapter 11 cases and where those filings should be made, Delaware is inevitably a consideration for Delaware entities because bankruptcy counsel throughout America are comfortable being there. Moreover, the benefits of a Delaware bankruptcy case are not only a comfort to debtors, but to creditors and other parties in interest as well. This is demonstrated by the fact that non-debtors seldom file motions seeking to transfer larger cases out of Delaware. Of the seven largest cases filed in the District of Delaware through June of 1997, only one motion was filed seeking to transfer venue. (As noted, Delaware's bankruptcy judges have not been reluctant to transfer cases that they believe belong elsewhere, e.g., Ernst Home Center, Inc., Spirit Holding Company, Inc., MEI Diversified Inc., F&M Caribbean, Inc., and Sam Houston Race Park, Ltd.). Many creditors familiar with corporate bankruptcies, including both trade creditors and lending institutions, are as comfortable with a Delaware filing as prospective debtors are. Major lending institutions routinely recommend Delaware to struggling debtors as an appropriate forum. Moreover, in 1995, unsecured creditors of a Delaware corporation with its principal place of business in California filed an involuntary petition against it in the District of Delaware.

When critics suggest abolishing the domicile of the debtor's organization as a permitted forum, they convey the inaccurate perception that somehow Delaware has an unfair advantage so ingrained as to discriminate against filings in other jurisdictions. Allowing Delaware as a possible bankruptcy forum is merely an enabling provision. The real reasons for attorneys' advice to their clients to file Chapter 11 cases in Delaware are far more pragmatic, having to do with experience, consistency, convenience, and service. Given the opportunity to witness and participate in these benefits, bankruptcy practitioners often opt to come back. Their recommendations of Delaware as a bankruptcy forum will continue so long as these advantages endure. ◆

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