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Foreword: Mississippi College Law Review - Symposium on Bankruptcy Law

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FOREWORD:
MISSISSIPPI COLLEGE LAW REVIEW
SYMPOSIUM ON BANKRUPTCY LAW

by Scott F. Norberg and Todd J. Zywicki

The timing of this Symposium issue of the Mississippi College Law Review is propitious. This year marks the twentieth anniversary of the enactment of the Bankruptcy Act of 1978 and the first anniversary of the National Bankruptcy Review Commission's 1997 report to Congress, *Bankruptcy: The Next Twenty Years*. With consumer bankruptcy filings at record levels, bankruptcy law has drawn much attention in the popular press and the halls of Congress. Closer to home, Mississippi College moot court teams have earned national recognition in the past three years for their accomplishments in the Conrad B. Duberstein National Bankruptcy Moot Court Competition.

We are grateful to the authors who have contributed to the Symposium. They are noted judges, practitioners, and academics whose contributions address current issues in both business and consumer bankruptcy law.

The National Bankruptcy Review Commission's Report and Recommendations

The issue begins with a paper by Brady Williamson, who President Clinton appointed to chair the National Bankruptcy Review Commission. He writes that the Commission report recommends significant, but incremental, changes in the law. Mr. Williamson argues that comprehensive change must await the development of reliable empirical data on the bankruptcy system and cautions that reform must strike a careful balance between debtor and creditor interests.

The Disinterestedness Requirement for Employment of Professionals in Bankruptcy

Next, three authors address one of the difficult issues considered by the Commission, a proposal to eliminate the so-called "disinterestedness" requirement for professionals employed by a debtor in possession. Professor Todd Zywicki, until this year a member of the Mississippi College School of Law faculty, introduces the topic with his article *Mend It, Don't End It: The Case for Retaining the Disinterestedness Requirement for Debtor in Possession's Professionals*. Professor Zywicki, who authored with Commissioner and U.S. Court of Appeals Judge Edith H. Jones a memorandum on the topic when it was being considered by the Commission, elaborates on the Commission's final decision to retain the requirement. Professor Zywicki argues that a strict standard of disinterestedness is justified by the unique pressures created by the bankruptcy system, the checkered history of ethical issues in bankruptcy in America, consistency with state law ethical codes, and the confidence of participants and the public in the fairness of the bankruptcy system. In the end, he concludes that advocates for repeal of the disinterestedness requirement have failed to identify

the problem for which the repeal of the disinterestedness requirement is the correct solution.

Professor Zywicki's article is the subject of two comments by noted individuals. Gerald Smith, a partner at Lewis and Roca and a long-time leader in the bankruptcy community on ethical issues, responds to Professor Zywicki's article, arguing for repeal of the disinterestedness requirement. Mr. Smith criticizes Zywicki's reading of the historical record and argues that the disinterestedness requirement results in unnecessarily disqualifying many lawyers from representing debtors in possession. He further argues that while it is appropriate to retain the disinterestedness requirement for trustees, requiring disinterested counsel for debtors in possession has created confusion and uncertainty for lawyers and judges, undermining public confidence in the bankruptcy system. Professor Charles Wolfram, Frank L. Reavis Professor of Law at Cornell School of Law, reflects on the debate from his perspective as Reporter for the American Law Institute's Restatement of the Law Governing Lawyers, which has been wrestling with many of the same issues. As his article cautions, bankruptcy ethics are intertwined with many substantive facets of the bankruptcy system, presenting unique challenges for ethical reform in the bankruptcy context. Professor Zywicki concludes the debate by briefly discussing some of the points raised by Smith and Wolfram.

Classification of Claims in Chapter 11

Courts and commentators are sharply divided regarding when a Chapter 11 plan may assign similar claims to different classes. The confirmability of numerous plans--and the roles played by creditors and the court in the confirmation process--depend on how the issue is resolved. The Bankruptcy Review Commission addressed the ongoing controversy by proposing an amendment to the Chapter 11 classification statute. In his article, *The Bankruptcy Review Commission's Recommendation on Classification in Chapter 11*, Professor Scott F. Norberg appraises the Commission recommendation, concluding that the proposal will only exacerbate the problems which plague the current statute.

Settlement Agreements in Bankruptcy

The Symposium addresses several additional business bankruptcy issues which are significant in day-to-day practice. The vast majority of litigation, including bankruptcy litigation, is settled, not tried. Thus, the bankruptcy law governing settlement agreements is of great practical significance. In *Compelling Settlement Agreements in Bankruptcy Cases: Holding Their Feet to the Fire*, Neil P. Olack and Kristina M. Johnson discuss the procedural and substantive requirements for litigants to obtain court approval and enforcement of settlement agreements in bankruptcy. The authors comprehensively survey and thoughtfully analyze the Fifth Circuit and Mississippi case law.

The Right of Reclamation

Both the Uniform Commercial Code and the Bankruptcy Code contain provisions governing a seller's right to reclaim goods for which the buyer has not paid. While the U.C.C. and Bankruptcy Code provisions are similar in many respects, there are important differences. The seller's counsel must understand these differences in order to protect her client's interests. Conversely, the buyer's or trustee's counsel may defeat the unwitting seller's rights. Craig M. Geno and Meade W. Mitchell provide a comprehensive guide to the U.C.C. and Bankruptcy Code reclamation statutes, comparing and contrasting them in *Basic Principles of Bankruptcy and State Reclamation*.

The Intersection of Gambling and Bankruptcy Law

The growth of the gambling industry in recent years has led to, and inevitably will lead to more, bankruptcy filings by casinos (and their patrons). Casino bankruptcies raise several unique and difficult issues. In *When the Dealer Goes Bust: Issues in Casino Bankruptcies*, Professor John Czarnetzky carefully examines state government regulation of casinos in bankruptcy and secured creditors' rights in two types of collateral that are generally present in casino operations, cash and "ships."

Tolling of the Three-Year Period for Discharge of Tax Claims

This Symposium also addresses several consumer bankruptcy law issues which have divided the courts in recent years. There is a split of authority on the question of whether the three-year non-dischargeability period for certain taxes is tolled during the pendency of a previously filed bankruptcy case. Judge William Houston Brown and Daniel Alan Hawtof consider this important dischargeability issue in their article, *Tolling the Three-Year Period for Discharge of Income Taxes: Is There Plain Meaning in 11 U.S.C. § 507(a)(8)(A)(I)?*

Debtor and Creditor Rights to Post-Bankruptcy Increases in the Value of Collateral

The often-cited adage that "debts are discharged, but liens survive bankruptcy" is not entirely accurate. The principle sometimes conflicts with the fresh start policy of the consumer bankruptcy provisions. As a result, recent cases and the 1994 amendments to the Bankruptcy Code have significantly modified the principle. In their article, *The Effect of a Pre-Bankruptcy Judicial Lien on the Post-Bankruptcy Accrual in Value of Exempt Property*, Judge David W. Houston and David J. Puddister explore the principle in light of these changes as they affect pre-petition judicial liens.

The Standard for Appointment of a Trustee in Chapter 11

This issue includes Glenda Raborn's Note, *Setting the Standards for Appointment of a Chapter 11 Trustee Under § 1104(a)(1) of the Bankruptcy Code: Can a Debtor Cooperative Remain in Possession?* Upon graduation in May, Ms. Raborn took a position as law clerk for the Honorable Jennie D. Latta, United States Bankruptcy Judge for the Western District of Tennessee. Member-owned cooperatives, common in many industries, present difficult bankruptcy problems because of the dual owner-customer status of members. Ms. Raborn's Note reviews a significant Fifth Circuit decision involving the appointment of a Chapter 11 trustee as a result of conflicts of interest within the Cajun Electric debtor cooperative and the potential implications of the court's ruling on future debtor cooperatives.

Mississippi College Successes in the National Bankruptcy Moot Court Competition

Finally, this Symposium commemorates the accomplishments of the Mississippi College moot court teams which have competed in the Conrad B. Duberstein National Bankruptcy Moot Court Competition. The Law School has sent two teams to the Competition in each of the past three years. All six teams advanced to the semi-final rounds of the competition. Three of the six competed in the final round. Mississippi College has captured one national title and three second-place finishes. In 1997, the Law School swept the Competition awards as both teams reached the final round, capturing the championship, runner-up, best brief, and individual best oralist awards. The 1998 teams were similarly accomplished. One of the teams finished second and captured the best brief award. In part, it was the enthusiasm created by these accomplishments which led Sandy Sanford, Trey Jones, and the Law Review board to approach us one year ago and ask for our assistance in assembling a symposium issue on bankruptcy law.