1991

Editor's Notes

Peter A. Alces
William & Mary Law School, paalce@wm.edu
Editor's Notes

PETER A. ALCES*
Editor-in-Chief

With this inaugural issue of the Journal of Bankruptcy Law and Practice, or JBLP, Warren, Gorham & Lamont begins an endeavor to enhance the dialogue among bankruptcy scholars, both practitioner and academician, by publishing materials of theoretical interest and practical utility. Karl Llewellyn, not a bankruptcy scholar but an academician who knew his way around the practice of commercial law, recognized that legal inquiry may proceed on three levels: jurisprudence for the hundred, for the hundred thousand, and for the hundred million. He was impatient with jurisprudence for the hundred, saw it as an intellectually selfish activity of limited value to "the bar in daily living, and for the citizen who is willing to take a moment off to ponder." It is that constituency, the Bar and citizen Llewellyn cared about, that this journal cares about.

Fortunately, the sophistication and intellectual rigor of the bankruptcy practice has defied neat bifurcation of important bankruptcy scholarship into the practical and the theoretical: The practical article that is inconsiderate of the bigger picture is incomplete, perhaps fatally so; similarly, the theoretical piece, though it might earn its author tenure, will too often not really advance the literature. There is too much work to be done in the bankruptcy law, too much at stake to ignore the practical in favor of the purely theoretical or to lose sight of the fundamental and pervasive considerations when wrangling with ostensibly mechanical questions. This journal recognizes the challenge of balancing theory and practice and in each issue will aim to achieve the right mix.

The composition of the Editorial Advisory Board reflects the endeavor to maintain a persistent focus on the practical/theoretical balance. The members of the Board have all distinguished themselves as important thinkers and writers in the bankruptcy field, and all have demonstrated an appreciation of the importance of thoughtful scholarship that will make a difference. The members of the Board will monitor its development and suggest ways in which the journal may be responsive to the needs of the bankruptcy bar. They will also be engaged in identifying the types of commentators and commentary that will matter.

Volume 1, Number 1, to the extent possible, demonstrates the level and tenor of inquiry this forum will provide. It includes

* Professor of Law, Marshall-Wythe School of Law, The College of William and Mary, Williamsburg, Va.

three “lead” articles and three columns. While from one issue to the next the number and mix of articles, columns, and perhaps other features will vary, this first issue should be sufficiently typical to provide the reader a sense of the enterprise—what we are up to.

Because the journal will be published six times a year, and because we believe we can publish manuscript within three months of receipt and acceptance, the contributors to JBLP will be able to participate in the determination of important issues and in the process of bankruptcy reform rather than merely commenting on developments after the fact. Barkley Clark’s article in this issue represents an initial effort to consider the direction of preference law in light of the U.S. Supreme Court’s imminent review of payments on long-term debt. Because the articles and columns we publish are the product of careful and thorough research, JBLP will provide more than a current information service (titillating but often insufficient), and our frequency of publication will ensure the timeliness of the observations offered by JBLP authors.

There is another balance this journal must maintain: The bar is comprised of attorneys with varying levels of interest and sophistication in the bankruptcy law. It has been true for some time that lawyers with diverse areas of specialization and concentration remain ignorant of the bankruptcy law at their and their clients’ substantial peril. This aspect of the bar needs guidance provided in terms that introduce the important bankruptcy considerations without assuming an intimacy with all of the essential elements of bankruptcy jurisprudence.

But the bankruptcy professional, the lawyer who is conversant in the interstices of the Bankruptcy Code, would quickly become impatient with scholarship that provided no more than a primer. The journal will endeavor to run articles and features that, to the extent possible, steer a path between the Scylla of the pedestrian and the Charybdis of technicality beyond the reach of the conscientious nonexpert. That is to say that each piece will neither start at the very beginning (that is, a “debtor” is no longer a “bankrupt”) nor assume hypertechical familiarity with the rarified air of Section 1111(b)(2)—like law.

There is another, perhaps even broader, constituency that may not be ignored. Bankruptcy exposes legal conceptions to an acid test. In bankruptcy, there is “property,” and there is “property.” Normal relations are inverted when the collective interest is vindicated over the interests of the few. Constitutional conceptions resonate through even the most technical provisions. These pages must be available (and accessible) to those who would reconsider fundamental legal conceptions as distilled through the bankruptcy law. Such inquiry will often inform the commercial and bankruptcy law practice.

Related to that idea is the fact that bankruptcy law and policy do not exist and develop in a vacuum. Often, the Bankruptcy Code is either expressly or implicitly dependent on or molded in the image of analogous state or federal law.
For example, there is both a fraudulent transfer provision in the Bankruptcy Code\(^2\) and uniform state fraudulent transfer law, there is Bankruptcy Code setoff\(^3\) and state law setoff, and, of course, there are generic fraud matters both within and without bankruptcy. The fact that such parallelism permeates the commercial law—indeed, the law generally—provides good reason to focus on the elaboration of fundamental legal conceptions through the bankruptcy prism. We will do that.

In fact, one of the articles in this issue, by William Fellerhoff and Robert Aicher, invites comparison of bankruptcy avoidance powers with the parallel powers formulated in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). The article, in the course of surveying the FIRREA landscape, wonders aloud why the financial institution insolvency law should part company at crucial junctures (e.g., preferences, executory contracts) with the general insolvency law of the Bankruptcy Code. While there may be good reason to recognize distinctions between the two enactments, absent a reasoned and comprehensive explanation for the differences, the impact that one formulation may have on our understanding of the other's application is problematic.

Mark MacDonald and Daren Perkins, authors of another article in this issue, offer an entrée to the dynamic of prepackaged Chapter 11 plans. These two lawyers suggest that viewing prepackaged plans as a part of the elaborate dance that is bankruptcy will enable creditors' and debtors' counsel to appreciate the value of this increasingly popular alternative. Their exposition treats the practical considerations by incorporating discussion of the securities law and negotiation advantages prepackaged plans may provide. The regime they describe, drawing on their experience in important proceedings, offers the type of flexibility that bankruptcy, at its best, ensures.

This issue also contains three columns. Micah Bloomfield's bankruptcy tax piece will familiarize bankruptcy people with an introduction to the taxation issues that we know we do not know enough about. It is clear that careful bankruptcy planning must take into account the landscape Mr. Bloomfield describes. We intend to make this column a regular feature.

The bankruptcy litigation column, by Rhett Campbell, describes succinctly the parameters of the basic postconfirmation issues, bringing us up to date on developments that affect the litigation practice. We also intend to include a bankruptcy litigation

\(^2\) 11 USC § 548. Note, too, that there is state preference law within the uniform state fraudulent conveyance and transfer provisions: UFTA § 3(a) (see Kennedy, “The Uniform Fraudulent Transfer Act,” 18 UCCLJ 195, 204-205 (1986); UFTA § 5(b)).

\(^3\) 11 USC § 553.
column on a regular basis and hope as well that you will share with us your thoughts concerning the presentations offered and suggest issues we should treat in the column.

The third column is, we believe, an innovation. Martha Rush and Patrick Buchanan, two lawyers and law librarians, assembled a bibliography to guide research into the morass we have come to know as Deprizio. They provide the type of research base that should get a practitioner (or academician) off and running when approaching an issue within the Deprizio penumbra. This resource should enable counsel to appreciate the scope of the insider preference law both as it is and as it may develop. The authors have included a methodology to guide further research into subsequent developments. We would be interested in your sharing with us your reaction to this feature as well.