Tenth Circuit Bankruptcy History

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I. Historical Background

Procedures for resolving disputes between creditors and debtors have a colorful history. From ancient times there is a record of imprisonment, slavery, and torture as means for enforcing the collection of debts.[1] From their inception debtor insolvency proceedings were conducted for the purpose of providing equitable distribution of a merchant's assets which were insufficient to meet his obligations. Long before the dawn of consumer credit insolvency laws operated almost exclusively in the commercial arena, with little concern for debtor repose.[2]

The creation of formal bankruptcy laws in early eighteenth century England marked the beginning of modern government efforts to curb inhumane commercial debt collection practices. In the precursors to modern bankruptcy legislation the English Parliament defined the terms and consequences governing merchants and those owing debts to English creditors.[3] It also established a means for relief for the debtor by providing for a discharge, at the creditor's discretion.[4]

Creditor control of the discharge, along with such institutions as debtor's prisons and capital punishment for noncompliant or fraudulent bankrupts, effectively continued the domination of a debtor by his creditors through colonial times in America.[5] As the colonies developed, their laws began to reflect a more

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[1] Francis R. Steele, *The Code of Lipit-Ishtar*, 52 Am. J. of Archaeology 3, July – Sept., 1948, at 426.

[2] Theodor C. Albert, *The Insolvency Law of Ancient Rome, Part I*, Dec., 2005, http://www.ancientworlds.net/aw/Article/688167 (last visited on Aug. 11, 2009).

[3] Robert Weisberg, *Commercial Mortality, the Merchant Character, and the History of the Voidable Preference*, 39 Stan. L. Rev. 3, 16 (1986).

[4] *Id.* at 30.

[5] Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L. J. 325, 399 (1991).

humanitarian approach to creditors' rights.[6] As more humanitarian objectives began to be reflected in insolvency laws throughout the colonies, there was little uniformity in pursuit of such objectives until the Constitutional Convention in 1787.[7]

On September 3, 1787, the delegates to the Constitutional Convention approved the power of Congress to establish uniform laws on bankruptcy.[8] James Madison noted that the connection between bankruptcy law and the regulation of commerce was so intimate that passage of uniform laws of bankruptcy was not likely to be questioned.[9] It took, however, until 1800 before Congress first exercised its power under Article I, Section 8, Clause 4, of the Constitution in enacting the Bankruptcy Act of 1800.[10] The Act provided district judges with the power to appoint a commission, totaling no more than three, to oversee bankruptcy cases.[11] Although the Act was intended to operate for five years, frustration with its complexity, a national inability to administer its provisions uniformly, and disappointment in its lack of effectiveness lead to the Act being repealed in January 1803.[12]

Following repeal issues under bankruptcy law retreated from national attention and were treated, to the extent they were treated at all, as creatures of state law. Following the panic of 1837 many states had passed laws protecting debtors in the form of stay-laws and appraisal laws.[13] Bankruptcy law remained under state administration until August 19, 1841, when Congress passed the second bankruptcy act.[14] The 1841 bankruptcy

[6] Peter J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy 1607-1900 4-5 (Beard Books, 1999).

[7] *Id.* at 17 (The Federal Convention convened on May 25, 1787); Jack E. Staley, The Constitution of the United States of America, The Forming, the Fury, And the Framing 7-9 (Greenbrier Publishing, 1986).

[8] *Id.*

[9] The Federalist No.42 (James Madison), http://thomas.loc.gov/home/histdox/fed_42.html (last visited Aug. 11, 2009).

[10] BANKRUPTCY ACT OF 1800, 2 Stat. 19 (1800) (repealed by 2 Stat. 248 (1803)).

[11] *Id* at § 2.

[12] Charles Warren, Bankruptcy in the United States 19 (Beard Books, 1935).

[13] *Id.* at 25.

[14] *Id.* at 79; 2 Stat. 248 (1803).

law was the first legislation authorizing voluntary application by the debtor to commence a bankruptcy case.[15] Prior laws, both federal and state, had treated bankruptcy as an involuntary process to be initiated by creditors.[16] The 1841 statute, too, was not well received and was short lived. Several federal courts held the 1841 statute unconstitutional, which lead to its repeal in 1843.[17]

Following the chaos and destruction of the Civil War the newly bolstered United States Congress faced economic calamity and worked to establish a law that would address the thousands of personal and business failures resulting from the war.[18] The Bankruptcy Act of 1867 was signed into law by President Andrew Johnson on March 2, 1867.[19] The Act provided that the existing United States District Courts constituted courts of bankruptcy with original jurisdiction within their respective districts in all proceedings in bankruptcy. District Court judges were to appoint registers in bankruptcy to assist in the administration of bankruptcy cases.[20] No one could be appointed a register unless that person was also a counselor before the court.[21] A register was required to post a thousand dollar bond to the federal government with the condition that he would faithfully execute his duties.[22] Registers, however, had no judicial authority and were required to adjourn all disputed matters to the district court for final decision.[23] The majority of the powers and functions granted to registers were similar to those of the later created referees in bankruptcy.[24] Registers represented the first federally appointed officials charged solely with administering and adjudicating bankruptcy cases.

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[15] F. Regis Noel, A History of the Bankruptcy Law 97 (William S. Hein & Co., 2003).

[16] *Id.*; Warren, *supra* note 12, at 86.

[17] *Id***.**

[18] Noel, *supra* note 15, at 147.

[19] *Id*. at 153; BANKRUPTCY ACT OF 1867, 14 Stat. 517 (1867).

[20] BANKRUPTCY ACT OF 1867, *supra* note 19, at § 1.

[21] *Id*. at § 3.

[22] *Id*.

[23] *See* U.S. AG Comm. on Bankruptcy Admin., Administration of the Bankruptcy Act 3-4 (Government Printing Office, 1941) (hereinafter "A.G.'s Report").

[24] BANKRUPTCY ACT OF 1867, 14 Stat. 517 at § 4.

Public perception of bankruptcy was changing. On July 22, 1874, Congress enacted an amendment to the bankruptcy law that eased the requirements for an involuntary bankrupt to receive a discharge.[25] Discharge for involuntary bankrupts was no longer dependent on the debtor either making distribution to creditors equal to a certain percentage of his debts, or garnering assent to discharge of any portion of his creditors.[26] As to voluntary bankruptcies, the 1874 Amendments made discharge available for a bankrupt who could distribute assets equaling thirty percent of the proven claims against his estate, reducing the percent of payment requirement from fifty percent.[27] A voluntary bankrupt was still required to garner assent to discharge from one fourth of his creditors in number and one third in value.[28] Access to bankruptcy protection was apparently increasing as evidenced by more frequent press coverage of bankruptcies.[29] That development came to an abrupt halt in 1878 with President Rutherford B. Hayes' approval of Congress's repeal of the 1867 Bankruptcy Act.[30]

In the following years Congress regularly debated the need for a further national bankruptcy law. Business failures were prevalent throughout the portion of the country west of the Mississippi. Real estate speculation had gripped that entire region and dramatic swings in valuation resulted in enormous amounts of both individual and business debt. There was a division in Congress between those favoring a law that provided for involuntary proceedings and those favoring a law that provided for voluntary proceedings.[31] Congressmen Case Broderick of Kansas stated that throughout the western portion of the country there was a strong desire for voluntary bankruptcy law:

> There have been two unfortunate periods or conditions…which have tended to destroy the business interests and to bankrupt businessmen….From 1883 to 1889 a spirit of speculation swept over the entire country west of the Missouri River like a pestilence….[P]eople went into

[25] 18 Stat. 178 (1874).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *A New Bankruptcy Bill for the Benefit of Insolvents*, Rocky Mountain News, August, 1772, at P.6 C.2.

[30] *Expiration of Bankruptcy Law*, Rocky Mountain News, August 31, 1878, at P.2, C.2; Noel, *supra* note 20, at 156.

[31] Warren, *supra* note 12, at 140-41.

> wild speculation… [p]urchased more land than they had use for… [g]ave mortgages and incurred liabilities at the banks and when the boom collapsed, property was depreciated, people were in debt, mortgages had been given, interest had defaulted and there was no property which could be exchanged for money…. [B]efore the people of the West had recovered from that condition…a panic came upon the country which spread all over it and paralyzed every interest.… The people of Kansas who survived the years of folly and disaster are now prosperous, but we want this bankruptcy measure to relieve those who were carried down by the current and lost.[32]

Eventually Congress did produce legislation aimed at providing relief to the nation's citizens in their economic misfortune. The Bankruptcy Act of 1898 arose out of the Torrey Bill, which was first proposed by a leading bankruptcy expert, Jay L. Torrey, in 1889.[33] The law provided a balance of provisions for businesses and all classes of individual debtors. The law also incorporated recognition of state exemption laws.[34] The law contained the complementary objectives that no dishonest debtor could be offered escape from insolvency while honest but unfortunate debtors would be afforded repose.[35]

The Bankruptcy Act of 1898 was a more robust statute than any of the previous bankruptcy acts. It not only provided comprehensive rules of law, but also rules of administration based on contributions made by the district courts in New York, Pennsylvania and throughout the east coast.[36] In order to carry out the objectives of the statute, the office of referee in bankruptcy was created.[37] Referees were designated to take up office in every state and territory of the United States.[38] Serving at the discretion of the district court judges, referees were granted power to consider all petitions that were referred to them by the district courts and either to dismiss or make complete adjudications.[39] District court judges seemed content to place bankruptcy proceedings upon the

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[32] *Id.* at 141-42.

[33] Noel, *supra* note 15, at 158.

[34] Warren, *supra* note 12, at 144.

[35] Noel, *supra* note 15, at 159.

[36] *Williamson's Complete Code of Practice in Bankruptcy, Part I*, at 2-6, (1898).

[37] BANKRUPTCY ACT OF 1898, 30 Stat. 544 (1898).

[38] *Williamson's Complete Code of Practice in Bankruptcy, Part I*, at xiii, (1898).

[39] BANKRUPTCY ACT OF 1898, *supra* note 37 at *Id.*

shoulders of the referees, often leaving them with direct control over bankruptcy proceedings. The often unchecked discretionary power of the district court judges to appoint referees resulted in appointments of both full time and part time referees.

In the years directly following its enactment there were several attempts to either repeal the 1898 bankruptcy law or amend it by eliminating the provisions for voluntary proceedings.[40] These efforts did not succeed, and the 1898 Bankruptcy Act, with significant amendments in 1938 (the Chandler Act), in 1978 (the Bankruptcy Reform Act), and in 2005 (the Bankruptcy Abuse Prevention and Consumer Protection Act), has formed the basis for American bankruptcy law and practice for more than a century.

Early practice under the 1898 Act was in many ways not dissimilar to bankruptcy practice of the early twenty-first century. The docket from a case in 1899, the matter of Weil Brothers personal and business bankruptcy, illustrates how bankruptcies were handled in Colorado under the 1898 Act.[41] In an involuntary bankruptcy such as the Weil Brothers, a creditor filed a petition with the bankruptcy court, and the debtor was notified by subpoena delivered by a marshal. The debtor was referred to as "defendant" and was obligated to file an answer either confessing or denying the allegations of bankruptcy. The district court then entered an order of reference, referring the case to a bankruptcy referee. A formal copy of the reference order, designating the case and the particular referee, was submitted to all parties and their respective legal counsel. Schedules would then be filed with copies sent to the referee and all interested parties. The referee would hold proceedings and formally enter an order officially adjudicating the debtor a bankrupt. Once this order was issued the bankrupt debtor would file an offer of composition describing the assets of the estate and how they were to be distributed among creditors.

Under the 1898 Bankruptcy Act it was possible that once the debtor was adjudged a bankrupt and upon application of interested parties, a receiver or marshal would be appointed to take possession of the bankrupt's

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[40] Warren, *supra* note 12, at 143.

[41] Record of case no. 139, William and Leopold Weil, DBA Weil Brothers at 278, District of Colorado Bankruptcy (1899).

property for the necessary preservation of the estate.[42] The property of the debtor would be so secured until such time as either the petition was dismissed or an administrative trustee was duly qualified.[43] It was the additional responsibility of the referee to appoint the trustee. Trustees were not always appointed. Particularly in voluntary no asset cases the additional expense of involving a trustee was not indulged.

Once the defendant debtor filed the offer of composition the referee would generate a report reviewing the offer of composition and mail that report to all creditors of the debtor.[44] Notice would be published and a hearing would be held before the referee to address any objections raised by the creditors and other such interested parties. After the hearing was held another notice would be published in the newspaper of record detailing the results of the hearing. Notice of the hearing outcome would also be mailed to all recognized creditors. An application to have the composition offer confirmed in an order would be filed, and, barring any objections, that order would be entered by the referee.

As distribution and payments from the debtor's estate were made, the referee would counter-sign all checks written by the debtor to his creditors.[45] Any property that had previously been placed in the safekeeping of a receiver, marshal, or trustee would then be turned over to the referee for distribution and settlement. The referee would file with the district court an accounting of expenses and distribution payments, costs, and taxes incurred in the administration of the bankruptcy case. As the case was wound down, schedules would be returned to the clerk of court along with all orders of adjudication, settlement, exemptions, allowed and disallowed claims, expenses, and all other records of the proceedings. Finally the referee would enter a final order discharging the bankrupt as well as a final tally of expenses which the referee was due to be reimbursed. This order and the list of expenses would be approved by the district court, officially ending the bankruptcy case.

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[42] BANKRUPTCY ACT OF 1898, *supra* note 37, at § 2.

[43] *Id.*

[44] *Id.* at §§ 12-28.

[45] *Id.* at §§ 39-40.

Although the bankruptcy statute clearly stated the powers and responsibilities of the district court judges concerning administration of the bankruptcy courts, specific details were left to the discretion of individual judges and their courts.[46] The jobs of referees varied greatly between status as part time and full time and location. Referees serving in urban areas were more often appointed as full time while referees serving in rural areas predominantly worked part time. Rural areas often required referees to travel extensively throughout their territory in order to adjudicate cases. Traveling referees incurred greater expenses for which they were entitled to reimbursement. Therefore, having a greater number of part time referees serving in rural areas provided both flexibility and lower overhead costs. However, many of rurally situated part time referees were left with little consistent work due to the low concentration of bankruptcy business. The greater concentration of businesses and the convenience of traveling and conducting business in urban areas allowed smaller numbers of referees to handle larger numbers of cases.

In 1939 there were a total of 470 bankruptcy referees throughout the United States.[47] Three hundred and seventy eight were part time referees and 92 were full time.[48] This compares to 352 full time bankruptcy judges in 2008, handling a case load approximately 36 times the size of that of the bankruptcy courts of 1939.[49] Colorado, for example, had a total of six referees in 1939, all of whom were part time appointments serving two-year terms with eligibility for re-appointment at the completion of their terms. Like virtually all other referees at the time, those in Colorado worked under the statutory fee system that was widely perceived as exceedingly complicated and flawed.[50] The fee system was based on provisions first created in the original 1898 Bankruptcy Act; but by 1938 referees were the only remaining federal judicial employees paid on a fee basis.[51] Comparing individual judicial districts nationwide there was apparent tremendous disparity in compensation of referees garnered from case related fees. In 1939, not counting indemnifications, the referees

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[46] A. G.'s Report, *supra* note 23, at 77-87.

[47] *Id.* at 3-10.

[48] *Id. at* 61-64.

[49] *Id.*

[50] *Id.* at 83.

[51] *Id.*

in the Southern District of New York shared total compensation of $93,737. Three referees in New Mexico shared $1,053 and the six in Colorado's aggregate compensation totaled $6,707.[52]

Under the bankruptcy law referees were entitled to indemnification for all costs and expenses related to the handling and administration of their bankruptcy cases. These costs were accounted for in reports filed by each individual referee prior to their eventual recoupment. In 1939, the six Colorado referees filed for total indemnifications for their expenses that were one hundred and nine percent of their total compensation from fees.[53]

The collapse of America's capital markets in the great depression of the 1930's spawned the statutory framework that to this day regulates securities and securities trading in this country: The Securities Act of 1933; the Securities Exchange Act of 1934; the Investment Company Act; and the Trust Indenture Act. In the wake of passage of important reforms of the U.S. securities industry, in 1938 came the first significant revision of the 1898 Bankruptcy Act with passage of the Chandler Act.[54] This statute added provisions for reorganization of municipal debt (Chapter IX); reorganizations of secured and unsecured debt of corporations with significant public debt (Chapter X); extension and compromise of unsecured business debt (Chapter XI arrangements); real estate reorganizations (Chapter XII); wage earner plans (Chapter XIII); and railroad reorganizations (Section 77(b)).

The state of administration of the bankruptcy laws at the time of the enactment of the Chandler Act was less than ideal and is well documented in the 1940 Report of the U.S. Attorney General's Committee on Bankruptcy Administration.[55] This report was commissioned by U.S. Attorney General (later Associate Supreme Court Justice) Frank Murphy. It was prepared for U.S. Attorney General (later Associate Supreme Court

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[52] *Id.* at 91.

[53] *Id.* at XXI.

[54] THE CHANDLER ACT, 52 Stat. 840 (1938).

[55] U.S. A.G. Comm. on Bankruptcy Admin., *supra* note 23, at IX.

Justice) Robert H. Jackson and transmitted by him to Chief Justice Charles E. Hughes, House Speaker Sam Rayburn, and Senate Judiciary Committee Chair Henry F. Ashurst.[56]

This prestigious committee identified two principal areas in need of reform, necessary in the effort of "restoring to bankruptcy administration the confidence which it . . . unfortunately lack[ed] in many parts of the country."[57] First was the absence of any coordinated supervision of the national bankruptcy system. The recently created Administrative Office of the United States Courts had committed little to systematic oversight of bankruptcy courts. Some district judges undertook to oversee bankruptcy courts in their districts. This was done without statutory mandate, but through the inherent influence of the power to appoint and reappoint bankruptcy referees to two-year terms.[58]

Many bankruptcy courts of this time were wholly unsupervised. Referees not only presided over thousands of bankruptcy cases but also had largely unfettered control of fiscal administration of the bankruptcy system, without uniform administrative procedures or systematic financial accountability. The bankruptcy system's absence of coordinated supervision was not without adverse consequences: unnecessary expenses, inordinate delays, fiscal improprieties, and the absence of structure or process to field complaints about its operations. Such matters caused the integrity of the entire bankruptcy process to be questioned.[59]

The second aspect of the bankruptcy system identified as being in need of major reform focused on the officials who presided over the quasi-judicial bankruptcy process.[60] Referees were appointed for two-year terms with no limit to the number of reappointment terms they might serve. An "inordinately large" number of referees was appointed, many devoting very little time to the position.[61] In 1939, referees received widely disparate compensation, ranging from nothing to as much twenty thousand dollars, all from fees and

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[56] *Id.* at V.

[57] *Id.* at XI.

[58] *Id.* at XII.

[59] *Id.* at XI.

[60] *Id.*

commissions of the bankruptcy process. The 1940 Attorney General's Report found that referees had a financial stake "in practically every consequential decision which they make."[62] Because of the connection to their own compensation, referees had an interest in promoting bankruptcy cases. The expenses of operating the bankruptcy courts as well as the referees' compensation were reimbursed from case fees and commissions. Such "indemnification" of the expenses of the referees' office was administered with little uniformity, sometimes "haphazardly," often with no stated rules of procedure, and at best, presenting opportunities for misapplication of funds.[63]

The recommendations of the 1940 U.S. Attorney General's Committee of Bankruptcy Administration set in motion reforms that shaped in essential ways today's bankruptcy courts. The first of two principal recommendations was creation of a Bankruptcy Division within the newly established Administrative Office of the U.S. Courts, charged with coordination and supervision of the bankruptcy system, more particularly, auditing referee's offices, collection of bankruptcy statistics, receipt and investigation of complaints, and investigating and implementing rules and practices that worked well in the then fractured bankruptcy system, while discouraging questionable practices.

The Committee's second principal recommendation focused directly on reforming the office of referee, with the objectives of raising the quality of performance of this office and of "mak[ing] the position attractive to men of highest ability."[64] Specific suggestions to this end included reducing the number of referees, each with full-time employment, establishing salaries in lieu of commissions, and simplifying and standardizing the office expense indemnity process. In addition, the report recommended continuing appointment by district judges, but

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[61] *Id.* at XIII.

[62] *Id.* at XIV.

[63] *Id.*

[64] A.G.'s Report, *supra* note 23, at XVI. In addition this Report provided two incidental benefits. It collected and preserved in the library of the Justice Department much important information about how the bankruptcy process was then functioning. Furthermore, it brought to light and turned over to the Justice Department for appropriate action defalcations of bankruptcy funds amounting to more than $150,000.

for six-year terms, renewable upon satisfactory performance, with dismissal only for cause, and inclusion of referees in federal retirement benefits.[65] This report further proposed a specific means of implementing several of its recommendations: appointment of a Bankruptcy Division Chief in the A.O. with the responsibilities of determining the number and location of referees needed in the bankruptcy system, fixing salaries of each in the range of three to ten thousand dollars, and supervising and maintaining offices of referees just as with other federal judicial officials.[66]

Interestingly, the Attorney General's farsighted report recommended against funding a reformed bankruptcy/referee system with an appropriation from the federal government.[67] Instead, it recommended continuing to have debtors and creditors who participate in the system underwrite it with fees and commissions, specifically a uniform fixed fee from no asset cases and graduated commissions in asset cases, all to be paid into the U.S. Treasury and, in turn, disbursed to cover referees' salaries and expenses of staffing and maintaining referees' offices. Vestiges of this structure for funding the bankruptcy system remain. While by 1948 the federal judiciary's appropriation included funds to pay referees and their overhead, to this day the system is underwritten in significant measure from the pockets of debtors and creditors who use it. The sole source of compensation of trustees who collect and liquidate bankruptcy estates consists of filing fees[68] and commissions from the sales of bankruptcy estate property.[69]

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] There is an apparent upside to the suffering reflected in the bankruptcy filings of more than a million American families each year. The entire federal judicial system today relies most heavily on its least economically advantaged users and their creditors to help pay the way of the federal courts. Bankruptcy court filings in 2004 were 1,618,917 while combined civil and criminal filings in US District Courts were 352,360. *See* Admin. Office of the U.S. Courts, 2004 JUDICIAL BUSINESS, CASELOAD HIGHLIGHTS, http://www.uscourts.gov/judbus2004/front/JudicialBusiness.pdf (last visited August 18, 2009).

[69] This saving of taxpayer dollars may well have been, for more than a hundred years, at the expense of bankruptcy estate creditors. It gives rise to what in bankruptcy jargon is called the bankruptcy trustees' "rule of low-hanging fruit:" if it isn't there for the easy pickin', don't bother; there is no money to pay for difficult

After the revisions of the Chandler Act in 1938, the 1898 Bankruptcy Act did not see significant revisions for forty years, until the Bankruptcy Reform Act of 1978 was enacted. Most substantive bankruptcy law provisions of the 1898 Bankruptcy Act survived in the reenacted 1978 "Bankruptcy Code." The Code, a result of study and drafting efforts covering more than a decade, was generally heralded as a complex but artfully crafted and balanced piece of legislation. It was the product of recommendations from a National Bankruptcy Conference with substantial input from many of the nation's most highly regarded insolvency scholars, practitioners and bankruptcy judges; and highly sophisticated sponsors and staff from the Senate and House Judiciary Committees.

An important change in statutory nomenclature elevated the position of referee to United States Bankruptcy Judge.[70] The 1978 Reform Act also, for the first time, codified the Bankruptcy Code's automatic stay.[71] A further significant reform in the 1978 legislation created the Office of the United States Trustee in the Justice Department. Regional U.S. Trustees were, in consumer cases, to oversee appointment and supervision of bankruptcy trustees, separating and excluding bankruptcy judges from oversight of trustees and other routine supervision of the administration of consumer bankruptcy proceedings, such as presiding at creditors' meetings.

In business reorganization cases the U.S. Trustee effectively replaced the role of the Bankruptcy Division of the Securities and Exchange Commission, assuming particular responsibilities in scrutinizing qualification and compensation of professionals and reviewing plan disclosure statements. The 1978 legislation further radically reformed business reorganizations by eliminating Chapter X corporate reorganizations and substituting an overhauled Chapter 11, available to almost all businesses, not just corporations with substantial public debt. Revised Chapter 11, unlike the prior Chapter XI and like prior Chapter X, allowed for adjustment

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investigations that might not be successful.

[70] Another overhaul of statutory labels changed those who sought bankruptcy relief from "bankrupts" to "debtors."

[71] Prior to the enactment of the 1978 Bankruptcy Reform Act, the U.S. Supreme Court, on recommendation of the Judicial Conference and pursuant to Congressional authority, had, in 1973, promulgated Federal Rules of Bankruptcy Procedure that renamed bankruptcy referees as judges and put in place an automatic stay on the filing of a bankruptcy petition.

of secured as well as unsecured debt. It also, as a general rule, allowed a business debtor's existing management to remain in place to operate the "debtor-in-possession," with no mandatory appointment by the court of an independent trustee to run the business pending reorganization, as in prior Chapter X cases.

The final major revision in the Twentieth Century to the bankruptcy law came in response to the United States Supreme Court's decision of *Northern Pipeline Constr. Co. v. Marathon Pip Line Co*, 458 U.S. 50 (1982). The 1978 Bankruptcy Reform Act had sought to expand the bankruptcy court's historic, limited "summary" jurisdiction only over matters of administration of the bankruptcy estate. The 1978 legislation had given bankruptcy judges pervasive power to adjudicate to finality all civil plenary disputes of any nature so long as such disputes were "related to" administration of a bankruptcy case. This, the *Marathon* case held, was an unconstitutional expansion of the powers of an Article I, congressionally created court. Only federal judges appointed under Article III of the United States Constitution have constitutional authority to adjudicate plenary disputes, such as contract and tort claims, in federal courts. The *Marathon* ruling instructed that bankruptcy courts around the country had for three years been handling litigation over which they had no subject matter jurisdiction. Not to be discouraged, the Supreme Court ruled that *Marathon* was to be applied only prospectively, and then only after Congress was given time to revisit the jurisdictional provisions of the 1978 Bankruptcy Reform Act.

During the time between the decision in *Marathon* and the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the reach of bankruptcy court jurisdiction was, at best, unclear. The 1984 legislation gave the U.S. District Courts exclusive jurisdiction over bankruptcy cases. It, in turn, made bankruptcy courts "units" of the district courts and referred all bankruptcy matters to the bankruptcy judges. The constitutional infirmity of the1978 legislation was dealt with by providing that bankruptcy judges could enter final, appealable orders in any "core" proceedings "arising in" or "arising under" the Bankruptcy Code (a return to historic "summary" proceedings), but requiring that litigation only "relating to" the Bankruptcy Code ("plenary" matters) could be heard by bankruptcy judges, with their decisions subject to *de novo* review by an Article III district judge. The 1984 Bankruptcy Amendments and Federal Judgeship Act also provided for appointment of bankruptcy judges by the Circuit Courts of Appeal for fourteen-year terms with salaries fixed at ninety-two percent of those of district judges.

II. EARLY BANKRUPTCY PRACTICE IN THE TENTH CIRCUIT

During the late 1860's the area of the United States comprised of the state of Kansas and the Territories of Colorado, Oklahoma, New Mexico, Utah, and Wyoming contained little consistent federal presence.[72] The territorial federal courts' recognition and adherence to federal laws such as the 1867 Bankruptcy Act was inconsistent at best. Economic development in this area of the country lagged far behind the eastern and western coastal regions of the nation. Not long after the 1867 bankruptcy law was enacted, newspapers within the state of Kansas and the territory of Colorado began to carry stories on bankruptcy actions in the district courts.[73] Because these scattered newspaper accounts are essentially all that exist to show the early bankruptcy practice in the various states constituting the Tenth Judicial Circuit, examples of practice in Colorado are here relied upon as typical to illustrate that era.

In 1869 the Rocky Mountain News published notice of a sale of valuable mining property in Colorado.[74] The named bankrupts had been adjudicated by the Federal District Court in Eastern Missouri, which was conducting the sale. Papers such as the *Rocky Mountain News* continued sporadically to publish stories about amendments to the federal bankruptcy law and bankruptcy cases involving assets within Colorado.[75] In 1872, that paper published an article about an involuntary bankruptcy that had been remanded to the Colorado Territorial District Court from the United States Supreme Court and was to be conducted as a jury trial in order to ascertain whether the respondent debtor had committed an act of bankruptcy as his creditors had alleged in their petition.[76] In mid-August 1876 the *Rocky Mountain News* published a story on the appointment of a creditors' assignee to handle the case of a voluntary bankruptcy filing in the federal court within the then

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[72]The Federal Courts of the Tenth Circuit: A History 6-10 (ed. Hon. James K. Logan, U.S. Court of Appeals for the Tenth Circuit, 1992).

[73] Kansas entered statehood on January 29, 1861 as the 34th state to join the Union.

[74] *Assignee's Sale of Valuable Mining Property in Colorado*, ROCKY MOUNTAIN NEWS, April 30, 1869, at P.1, C.3.

[75] *Congressional News*, ROCKY MOUNTAIN NEWS, March 5, 1871,at P.1.

[76] *Cases Before the District Court*, ROCKY MOUNTAIN NEWS, December 20, 1872, at P.4, C.2.

state of Colorado.[77] News of debtors being granted discharges in federal court and amendments to the bankruptcy law continued to be published in sporadic fashion. In March 1877, the *Rocky Mountain News* published the local court rules for bankruptcy adopted by Judge Moses Hallett of the Federal Court for the District of Colorado, notifying practitioners and the public alike.[78]

The number of bankruptcy cases in Colorado, and Denver in particular, rose in the early 1900's. Court records from 1898 indicate that one hundred and nineteen bankruptcy cases were filed that year. At the end of 1900, court records reflect five hundred twenty-nine bankruptcy case filings. By December 1903, court records reflect a total of one thousand one cases filed for the year.[79]

Records of the Denver Bankruptcy Court contain the involuntary case of William S. Moraud, filed in May of 1899, which made interesting defensive use of the option to elect a jury.[80] In response to the involuntary petition filed by his creditors, the defendant debtor filed a demand for a jury trial. The record indicates that neither a referee nor a trustee was ever assigned. Rather, in response to the defendant debtor's demand, an agreement of the creditors was filed whereby the case was to be dismissed at the cost of the petitioning creditors. Referee Jacob B. Philipps was later assigned to enter the order, which would be approved by the district court, dismissing the case.

For the years 1898 through 1904 the number of men appointed to serve as bankruptcy referees in Colorado also increased. Candidates looking to be appointed to the position of referee would solicit the district court with individual letters and letters of reference. Often inexperienced candidates seeking an initial appointment would submit several reference letters in an effort to enhance their chances of being appointed. The campaign to re-appoint referee J.M. Brinson in January of 1906, involved several such letters that were sent

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[77] *D. Lowenstein Appointed as Assignee by District Court in Case of Bankrupt Adjudged Upon His Own Petition*, ROCKY MOUNTAIN NEWS, August 19, 1876 (Colorado entered statehood on August 1, 1876 as the 38th state).

[78] *Rules of Bankruptcy Adopted by Judge Hallett*, ROCKY MOUNTAIN NEWS, March 22, 1877 (Judge Hallett was the first federal district judge in Colorado, *See*, Logan, *supra* note 73, at 45).

[79] Federal Court Archives for the District of Colorado are located at the Federal Center in Lakewood, Colorado.

[80] *Id.*

to District Judge Moses Hallett. Several attorneys from the Cripple Creek area, where Referee Brinson served, respectfully urged Judge Hallett and the district court to see that Referee Brinson would be his own successor. In support of his own re-appointment, Referee Brinson wrote that he would not only accept the reappointment, but gladly welcome and very much appreciate it. There would often be a petition of signatures in support of the candidate for referee.[81]

Referee William B. Harrison was one of the original appointees who began serving as referee in Colorado in 1898. A letter of April 8, 1920, from Referee Harrison addressed to Charles W. Bishop, then clerk of the United States District Court in Colorado, contained an affidavit signed by Harrison.[82] In that affidavit Referee Harrison attested to a list of expenses incurred by the trustee in the course of administering an estate. Harrison stated that based on these facts the court would be justified in allowing the trustee to pay out of the assets of the estate all actual expenses incurred. The accompanying list of expenses included everything from the referee's expenses for office rent and utilities to stenographic work related to the preparation and transmission of notices and transcripts. The total expenses incurred were listed at one thousand and fifty dollars. During this era funding and administration of the bankruptcy process had little uniform oversight and was largely left to individual districts or the referees themselves.

Throughout the initial decades of the Twentieth Century turnover among Colorado bankruptcy referees remained high. Referee Frederick W. Heath retired as referee in Denver in 1911 in order to relocate with his family to California. After being re-appointed referee in 1904, Robert Kerr left his position in Colorado Springs to become a county court judge. Referee C.J. Moynihan, who practiced law with William Lee Knous before Knous was appointed United States District Court Judge, resigned from his position in Montrose to pursue election to the United States Senate. Inconsistent work-loads of referees, relegation to part-time status, limitations on their ability to derive income from other positions and jobs while serving as referees, and the

[81] *Id.*

[82] *Id.*

scant salaries derived from the complex and confusing system of fees were likely all factors that contributed to the considerable lack of continuity among bankruptcy referees in the first half of the Twentieth Century.[83]

In Colorado full time referees did not come into existence until 1947 when Referee Frank McLaughlin's position was made permanent. Frank McLaughlin came from Independence, Missouri and began his law career in Oklahoma. From Oklahoma he moved to Deadwood, South Dakota in 1890 where he worked as an attorney before arriving in Colorado in 1904. After nearly twenty years of practice in Denver, McLaughlin was appointed in 1923 to serve as referee in bankruptcy. He handled thousands of cases during his tenure marking the close of his ten-thousandth case in April 1952. At the time of his death from a series of heart attacks attributed to overworking, it was estimated that McLaughlin had presided over the settlement of one hundred million dollars in property.[84]

III. BANKRUPTCY PRACTICE IN THE MODERN ERA

A. COLORADO[85]

Although, in the wake of the Great Depression, the Bankruptcy Act of 1898 saw major revisions by the 1938 Chandler Act, in a very real sense the early 1950's mark the start of the modern bankruptcy era in Colorado. In 1953 Benjamin C. Hilliard, Jr. was appointed referee by Chief District Judge William Lee Knous. Hilliard was the first Colorado bankruptcy referee initially to take his office as a full-time bankruptcy referee. Before him Frank McLaughlin had become a full time referee in 1947 after having served part time for 27 years.

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83 *Id.*

84 *Frank McLaughlin, 85, Dies of Heart Attack*, THE DENVER POST, October 9, 1952.

85 By A. Bruce Campbell, Bankruptcy Judge for the District of Colorado, and Frank D. Tsu.

The source of much of the anecdotal information concerning the Colorado Bankruptcy Court and its judges contained in this section is interviews of retired judges and lawyers who were part of practice before this Court dating back as far as the late 1950's. The authors have elected not to credit particular tales to specific interviewees, but gratefully acknowledge the following individuals who have shared their experiences with the Colorado Bankruptcy Court: Craig A. Christensen, Carl A. Eklund, Charles W. Ennis, John Guadio, Hon. Glen E. Keller, Jr., Dolores B. Kopel, Gerald H. Kopel, Hon. Gaspar F. Perricone, Hon. John C. Porfilio (Moore), Paul D. Rubner, Thomas C. Seawell, Harvey Sender, and Harry M. Sterling.

Referee Hilliard sat in Denver, succeeding Frank McLaughlin. At various times during this same period part time bankruptcy referees sat in five other cities across the state: John P. Helman in Grand Junction (1924-1942); Raymond Sandhouse in Sterling (1924-1942); Sperry S. Packard in Pueblo (1923-1943); J.J. Bradford in Durango (1926-1930); E.D. Peters in Durango (1933-1940); and Charles S. Simon in Colorado Springs (1933-1939).

Ben Hilliard took the bankruptcy bench at age 56, shortly after an unsuccessful bid to be elected to the Colorado Supreme Court. In his first five years as a referee Hilliard saw the bankruptcy caseload expand from 300 cases in 1953, to 2500 in 1958,[86] reflecting Colorado's disproportionately large number of bankruptcy filings, given its population, a trend that has continued through the Twentieth Century to the present. In 1958, Colorado with approximately one percent of the country's population, accounted for 2.7 percent of the country's bankruptcy filings. Fifty years later in 2007, with 1.56 percent of the country's population,[87] Colorado had 1.82 percent of the country's bankruptcy filings.[88]

For those who practiced bankruptcy law in the 1950's and early 1960's, Referee Ben Hilliard and the bankruptcy court were synonymous. Though perceived as something of a solemn figure, Referee Hilliard was well regarded by the bankruptcy bar, such as it was in its early days. With the increased activity in bankruptcy court by the late 1950's, a second bankruptcy referee was appointed. J. Gordon Bartly presided in both Denver and Pueblo between 1959 and 1965. As bankruptcy practice expanded, administration of bankruptcy cases was handled by a small, but growing, group of professionals. Most were attorneys. Several had multiple connections to the court, acting as liquidating trustees, attorneys for bankruptcy estates, and appraisers. In some instances these professionals were handsomely compensated for their efforts. At this time there was little interest by the bar in general or the business bar in particular with bankruptcy practice.

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[86] Records of the Clerk's Office, United States Bankruptcy Court for the District of Colorado.

[87] U.S. Census Bureau, NATIONAL AND STATE POPULATION ESTIMATES TABLE 1, http://www.census.gov/popest/states/NST-ann-est2004.html (last visited August 10, 2009).

[88] Admin. Office of the U.S. Courts, ANNUAL BANKRUPTCY FILING TABLE F, http://www.uscourts.gov/stats/dec04/F00dec04.pdf (last visited August 10, 2009).

The statute provided, and to this day provides, that creditors are entitled to elect a trustee to gather and liquidate a debtor's assets as well as to scrutinize a debtor's transactions that occurred in the period prior to the bankruptcy filing. As today, in almost all cases, creditors simply did not exercise this right, and on their default in doing so trustees were appointed by the referees. Colorado's experience was typical. In the 50's, notwithstanding the Bankruptcy Court's invitation to the entire bar, a small group of trustees handled almost all individual bankruptcies. The trustees were lawyers who in more complex cases hired other trustees to act as their lawyers, a practice that continues to the present.

In the mid-50's one lawyer, fresh from passing the bar, became the most frequently appointed trustee.[89] He happened to be the son of the bankruptcy court clerk who, in turn, worked in close association with Chief Bankruptcy Referee Ben Hilliard. This fact hit the headlines and editorial page of the Rocky Mountain News in April 1959.[90] The newspaper reported that Herbert W. Delaney, Jr., son of bankruptcy court clerk Herbert W. Delaney, Sr., with 63% of the trustee appointments, made from thirty to fifty thousand dollars per year between 1956 and 1958. Notwithstanding the fact that this news coverage concluded that Colorado's Bankruptcy Court is "well and efficiently run," the publicity about the Court within a week resulted in the appointment by the Colorado Bar Association of a committee of Colorado's leading attorneys to study bankruptcy trustee appointments. The committee was chaired by soon to become Associate U.S. Supreme Court Justice Byron R. White. The suggestion of the Rocky Mountain News that "[t]he most obvious answer would be to provide for appointment of trustees on a full time salary basis,"[91] was never implemented in Colorado or elsewhere. In fact, Colorado's 1950's model of a small panel of private attorney trustees working full or nearly full time on a fee or commission basis continues in Colorado and across the national bankruptcy system today.

The 1960's saw continued growth and change in Colorado's Bankruptcy Court and bankruptcy practice. In the ten years from 1958 to 1967 the Court's caseload almost doubled, from 2500 cases to 4800 cases.[92] The Bankruptcy Court moved from the old Post Office building (now home of the Tenth Circuit Court of Appeals)

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[89] David Stolberg, *Son of Court Clerk Grosses $40,000 Fees*, ROCKY MOUNTAIN NEWS, April 5, 1959, at 6.

[90] *Id.* at 5.

[91] *Id.*

one block northeast to the new federal courthouse at 1929 Stout Street, where it shared the first floor with the District Court Clerk's Office.

In the early 60's the landmark case of *Katchen v. Landy* was decided at the trial court level by the Colorado Bankruptcy Court. Chief District Court Judge Alfred Arraj upheld the decision and, in turn, was affirmed by the Tenth Circuit in 1964.[93] In 1965, later to be Chief District Court Judge Fred M. Winner argued appellant's position to the U.S. Supreme Court, with George Creamer for respondent. The Supreme Court, in an opinion by Justice White, affirmed the Tenth Circuit's ruling that the Bankruptcy Court had summary jurisdiction of a preference counterclaim, even though it lacked jurisdiction to adjudicate the voidable preference in the absence of the proof of claim filed in the bankruptcy court by the recipient of the preference.[94] Justices Black and Douglas dissented.

In February 1965, Chief Judge Arraj made an appointment of Referee Bartley's successor on the bankruptcy bench that would have a profound and lasting effect on that court. At age thirty-five, Referee Matsch took the bankruptcy bench in Denver. When Matsch was appointed, he was mindful of the widely held perception that bankruptcy practice was generally not regarded as highly desirable.[95] After only three months on the bench he addressed the bar, commenting on the importance of this growing area of practice, but expressing reservation about levels of experience and professionalism among much of the bankruptcy bar.

This was soon to change. The very force of Referee Matsch's own reverence for the judicial process, his powerful intellect, and the demands he made of himself and of lawyers who appeared before him had a significant influence on raising the level of respect for the bankruptcy court as an institution. Court business was conducted formally, with the Rules of Civil Procedure and Federal Rules of Evidence governing contested matters. Matsch's insistence on formality and maintenance of distance from attorneys and other officers of the

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[92] Note 86, *supra*.

[93] *Katchen v. Landy*, 336 F.2d 535 (10th Cir. 1964).

[94] *Katchen v. Landy*, 382 U.S. 323 (1966).

[95] Richard P. Matsch, *Address at the Bankruptcy Committee Seminar on May 22, 1965*, BANKRUPTCY NEWSLETTER,

court have been hallmarks of his long career as a jurist. These traits had their roots in his early years on the bankruptcy bench. Notwithstanding the reserve for which he was known, he enjoyed a reputation with the bar as a bankruptcy referee who was scholarly, objective, fair and compassionate.

In early 1968 Referee Matsch again addressed the bar.[96] Ten years before they became effective, Matsch spoke of the importance of reforms of the bankruptcy law and practice that were in the works – – reforms that would establish referees as federal judges and further distance those judges from trustees' administration of bankruptcy estates. He spoke of the need for the bankruptcy bar to expand to include lawyers established as leaders in related areas of practice. He expressed pessimism about this coming to pass, as Colorado's bankruptcy practice involved so few cases where dollars involved could draw the attention of such practitioners.

This too was soon to change. In the summer of 1971 an involuntary bankruptcy was filed in Dallas, Texas against King Resources Company, the oil and gas exploration enterprise built by Denver tycoon John M. King. With over one hundred million dollars in debts, this was, at the time, the largest Chapter X corporate reorganization ever filed. At the behest of public debt holders, the case was moved that fall to Colorado's Federal District Court where it was handled in significant part by Referee Matsch, acting as special master for the district court.

Referee Richard Matsch's considerable accomplishments in almost nine years on the Colorado bankruptcy bench were rewarded with his being among the first bankruptcy referees in the country to be elevated, in 1974, to the United States District Court bench, an appointment received almost universally with favor.

As the 1960's drew to a close, the Bankruptcy Court conducted its business in modest quarters in the back of the first floor of the new federal courthouse. While they were courts of record for summary proceedings in bankruptcy, referees were not provided with court reporters, and the record of proceedings often was of poor

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Vol. IV, No. 1 (Gerald H. Kopel ed., 1965).

quality. Primitive recording equipment in the courtrooms sometimes resulted in a transcript replete with pages transcribed only as "inaudible." If any matter was of sufficient magnitude and import that an appeal was likely, counsel was well advised to bring his or her own court reporter to the Bankruptcy Court. Unlike at present, referees' decisions were not reported.[97] Word of cases of interest as well as commentary, court news, and other information of interest to the Colorado bankruptcy bar circulated in a newsletter that was published by Gerald Kopel, a highly regarded practitioner and consumer advocate. Kopel also served from 1964 to 1992 in the Colorado Legislature where, respected by leadership on both sides of the aisle, he was a leading spokesman for consumers as Colorado adopted modern consumer related legislation such as the UCCC and the Colorado Consumer Protection Act.

In response to the Bankruptcy Court's increasing caseload, Robert P. Fullerton had been appointed bankruptcy referee in early 1965. Fullerton had unsuccessfully sought election to the Denver District Court following his service on the county court bench. He served on the bankruptcy bench until 1973 when he was appointed under Colorado's merit appointment system by Governor Vanderhoof to the Denver District Court where he served for nearly twenty-five years.[98]

In early 1967 John F. McGrath was appointed bankruptcy referee as successor to Charles F. Keen. McGrath sat in Denver and in Pueblo where Referee Bartley had presided for years. Over his long service on the bankruptcy bench, McGrath was well known for his sense of fairness and empathy with those who had fallen on hard times. He was also well known for his temper (he referred to it as his "Irish"), which flared with his frustration when matters before him were not made sufficiently clear to him. His angry outbursts were frequently followed by his apologies. Young lawyers sometimes found it difficult to explain to clients when they were suddenly excoriated in open court and minutes later offered best wishes, sometimes on a first name basis, by the same judicial official. More seasoned barristers, once they knew they were about to lose before

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[96] Richard P. Matsch, *Chapter XI & X*, BANKRUPTCY NEWSLETTER, Vol. IX, No. 1 (Gerald H. Kopel ed., 1968).

[97] CCH Looseleaf Bankruptcy Service and Collier's Bankruptcy cases began publishing bankruptcy court decisions in 1979.

[98] *Judge Quits to Avoid Discipline Fullerton Steps Down After Moving From City*, ROCKY MOUNTAIN NEWS, Jan. 7, 1998, at A5.

Judge McGrath, went mining for reversible error by asking for elaboration on the judge's ruling. Those who sensed they were about to prevail charted a fleet exit. Whatever his articulated rationale in a given case, Judge McGrath's strong sense of fairness and caring usually lead to the correct legal result. He was beloved by many during his long service on the bankruptcy bench which came to an end due to ill health shortly before his death in 1987.

Vacancies on the bankruptcy bench created by Judge Fullerton's return to the state court bench and Judge Matsch's elevation to the U.S. District Court were filled by two young, exceptionally able lawyers, Patricia Ann Clark and Glenn E. Keller, Jr. Clark had been a business lawyer with Holme Roberts and Owen. Keller had practiced in a small suburban firm, served on the State Board of Health, and been active in Republican politics. Both new bankruptcy referees were highly regarded from the start for superior intellects, and both soon developed a comprehensive knowledge of bankruptcy law.

From early in her judicial career Judge Clark had little patience with lawyers who were incompetent or ill-prepared. She had even less patience for lawyers, their clients, or pro se litigants where she perceived a position was being taken that was unsupported by the law, unfair, or worst of all, abusive of the judicial process. She was not shy about letting counsel and litigants know when she thought the merits of their case, equities of their case, or their performance left something to be desired. Her disdain for a party's position might also be reflected in disadvantageous scheduling or the speed with which rulings were rendered or held under advisement. There was never any doubt among lawyers about who was in charge in Judge Clark's courtroom.

Her control of pro se litigants, as with other judges, was sometimes less complete. Early in her tenure on the bench, a pro se creditor stood in the rear of her small courtroom at 1929 Stout Street and began to express his agitation about conduct of the debtor. Judge Clark politely instructed him not to interrupt and suggested he would be well served to get an attorney. Moments later the creditor was again on his feet telling his story. Judge Clark abruptly told him to be seated or she would find him in contempt. Before long, up he popped, determined to finish his tale. Judge Clark fined him $100 on the spot to go along with a severe tongue lashing. Immediately after recessing the hearing, Judge Clark returned to the courtroom and courteously explained to the offender the necessity of maintaining order in the court and that he might effectively make his case if he would hire a lawyer. His amiable reply: "Thanks, Judge, but that would cost a lot of money. And now you know that debtor's a crook; and it only cost me $100."

In 2000, Judge Clark completed a 14-year term of appointment by the Tenth Circuit Court of Appeals, which followed twelve years of service before Congress created 14-year terms for bankruptcy judges. This was the second longest term of service of any bankruptcy judge or referee in Colorado, exceeded only by Frank McLaughlin's tenure as first a part-time and then a full-time referee from 1923 to 1952. Judge Clark's impatience with lawyers and litigants may have been exacerbated by health problems in her final years on the bench. This, in turn, was probably a factor in her unsuccessful application to the Tenth Circuit for a renewal 14-year appointment in 2000.

Shortly after Glenn Keller joined the Colorado bankruptcy bench, John C. Moore (now Porfilio) was appointed to join referees McGrath and Clark. Moore had been serving as Colorado Attorney General following the death in office of Duke Dunbar. Moore had recently lost a bid, in November of 1974, to be elected to a full term as Colorado Attorney General. Soon after his appointment, Judge Moore had endeared himself to the bankruptcy bar for bringing to the bench a rare combination of humility, grace and self confidence – – the ingredients that make up what trial lawyers call "a good judicial temperament." What Judge Moore did not bring to the bench was much knowledge of the bankruptcy law. Given others of his virtues and talents, this was not a problem and soon changed. When presiding over emergency hearings in his first Chapter XI business arrangement case, as five o'clock approached, Judge Moore simply looked over the bench and quietly announced to counsel, "we may have to stay all night, but we will be here as long as it takes you gentlemen to help me get this right." The hearing adjourned well before eight o'clock and Judge Moore got it right. In late 1981, President Reagan nominated Judge Moore to a seat on Colorado's U.S. District Court bench. He was sworn in there in July of 1982. In eight years' time two Colorado bankruptcy judges had been elevated to the Federal District Court, a fact that speaks clearly to the stature the Colorado Bankruptcy Court had then achieved. In 1985, Judge Moore (Porfilio) was again elevated by President Reagan to the Tenth Circuit Court of Appeals. He is one of very few bankruptcy judges who have served the federal judiciary at the level of the Circuit Court of Appeals.

Between the time Judge Moore's name was announced as the selection for the District Court and the time Moore was sworn in as district judge, Judge Keller left the bankruptcy bench for private practice. In his time on the bankruptcy bench, Judge Keller was known beyond Colorado as an exceptionally able jurist. As business bankruptcy cases became regional and even national in scope, Judge Keller became highly regarded by experienced, accomplished bankruptcy counsel, recognized for his competence and case management skills. He was occasionally perceived as hard on counsel whose preparations or competence fell below his expectations of what was acceptable in the Bankruptcy Court. Judge Keller joined the bankruptcy bench with his own aspirations of appointment to an Article III judgeship. Seeing a close colleague achieve that goal may have been instrumental in Judge Keller's seemingly abrupt career change in early 1982.

On leaving the bench Judge Keller joined Davis, Graham & Stubbs, one of Denver's oldest and most respected law firms and that at which Associate Justice White practiced before his career in Washington, D.C. Judge Keller was almost immediately recognized among the premier bankruptcy practitioners in the Rocky Mountain West. He headed what was soon to become one of the regions finest business bankruptcy practices. He received District Court appointments as SIPC liquidator in major cases. He represented debtors or institutional lenders in most of the largest cases filed in Denver in the 1980's and 1990's. He mentored several able young lawyers who have become leaders in their own rights among today's Colorado bankruptcy bar. Private practice also gave Glenn Keller expanded opportunities to give back to the community. Among other things, he chaired the school board of the state's largest school district. He continued his "other career" as director of the world renowned Westernaires, the non-profit youth precision horsemanship drill team. He gained recognition for his leadership and contribution to the Denver area law firms' highly acclaimed pro bono efforts of the Colorado Lawyers Committee.

The King Resources Company Chapter X reorganization case introduced Colorado's business bar to the Bankruptcy Court and perhaps for the first time introduced the Colorado Bankruptcy Court to the nascent national bankruptcy bar, attorneys from Dallas, New York and Chicago. Other substantial business filings followed King Resources. With a downturn in 1974 in Colorado's economy, young visionary real estate developer Steven Arnold took the Woodmoor Company into Chapter X, where it soon was converted to Chapter XI and ultimately was liquidated over several years in Chapter VII. Three of Woodmoor's four failed land developments have since become the well established suburban communities of Woodmoor and Roxborough Park in Colorado Springs and Denver, respectively, and the growing development of Stagecoach, south of Steamboat Springs.

The late seventies brought the filing of bankruptcy reorganization proceedings by one of Colorado's largest churches, Calvary Temple, and its affiliates the Blair Foundation and Life Center, an elder care facility. Popular evangelist Pastor Charles Blair and his colleagues built a far-reaching Christian ministry with proceeds of substantial amounts of debt securities that were sold to the faithful. The burden of these obligations led, with the help of the Colorado Bankruptcy Court, to the orderly demise of the Charles Blair empire and the rescue of the church for its congregants.

In the late seventies, another case from the Colorado Bankruptcy Court became important U.S. Supreme Court precedent. The Bankruptcy Court had held that a creditor who had obtained a state court consent judgment on a debt but had not challenged the debtor's conduct as fraudulent in obtaining the state court judgment was precluded in bankruptcy court from going beyond the state court record and presenting evidence to establish nondischargeability of the debt on the basis of the debtor's fraud. The District Court and Tenth Circuit Court of Appeals affirmed the decision. The judgment creditor took the appeal to Washington, D.C., represented by Craig A. Christensen of Dawson, Nagel, Sherman & Howard. The debtor was represented before the Supreme Court by Alex Keller. In an unanimous decision by Justice Blackmun, the Court ruled in favor of the judgment creditor, declining to apply the doctrine of *res judicata* in these circumstances.[99]

In 1977, when the District Court needed more space in the 1929 Stout Street U.S. Courthouse, the bankruptcy court was relocated to the Columbine Building at 19th and Sherman Streets, a few blocks northeast of downtown Denver and the other federal courts. That was not met with unbridled enthusiasm by the bankruptcy bench and bar. The Bankruptcy Court spent the next 14 years there, in a rundown vintage 1957 six-story office building, sharing the building with, among others, the newly-formed United States Trustee's Office,

[99] *Brown v. Felsen*, 442 U.S. 127 (1979).

the Social Security Administration, and the Peace Corps. Courtrooms were small and modestly adorned. Chambers suites consisted of offices for two judges with a shared adjoining pool for support staff.

The isolation of the Colorado Bankruptcy Court in the late seventies and 1980's was something of a mixed blessing. From its humble facilities the Bankruptcy Court and bar developed a separate culture, featuring exceptional civility among practitioners and, under the leadership of newly-appointed Clerk Bradford L. Bolton, a sense of common purpose among court staff and the bench in striving to provide quality service to debtors, creditors and the bankruptcy bar. Bankruptcy judges participated regularly in bar sponsored continuing legal education programs and otherwise engaged in closer communication with the organized bankruptcy bar in an effort to nurture an informed body of bankruptcy practitioners and better to understand their needs. These efforts were aided by the newly-appointed U.S. Trustee for Colorado, Delores Kopel, and her first staff attorney. Ms. Kopel had served for many years as a panel trustee prior to the creation of the U.S. Trustee's office by the Bankruptcy Reform Act of 1978. Her first staff attorney, Howard R. Tallman, appointed at age 30, now serves as Chief Judge of the Colorado Bankruptcy Court.

In March of 1982 Roland J. Brumbaugh succeeded Glenn E. Keller on the bankruptcy bench. Brumbaugh had been an experienced trial attorney with the Office of the U.S. Attorney for the District of Colorado. He served through the eighties and nineties, retiring in January 2000, after completing a full fourteen-year term following enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984.

Highly regarded Denver trial lawyer Jay L. Gueck joined R.J. Brumbaugh as a new bankruptcy judge in late 1982. Gueck brought little bankruptcy law background to the post, but, with a wealth of trial experience, was soon comfortable with a new discipline. He arrived on the bench just in time to confront the disruptive jurisdictional quandary created by the U.S. Supreme Court's *Marathon* decision.[100] Particularly disenchanted by the Article III bench's resistance to affording Article III status to bankruptcy judges as a response to *Marathon*, Gueck resigned from the bench after only three years. His time on the bench served him well, as he relocated soon after resigning to a very successful, high profile bankruptcy practice in Dallas, Texas.

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[100] *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

In the spring of 1986 the vacancy on the Court left by Jay Gueck's resignation was filled with the judge who perhaps had as great an impact on the Court as any bankruptcy judge since Richard Matsch became a referee twenty years before. To the surprise of the Denver business bar, Charles E. Matheson left his thriving practice at Fairfield & Woods, where he was among its senior partners, to take the bankruptcy bench. At age fifty, Matheson was the first bankruptcy judge to be installed after first having established himself as a seasoned, highly-skilled and respected practitioner and leader among the 17th Street bar. He had been a general business lawyer of the pre-superspecialization era, as comfortable at the conference table structuring a business acquisition as in the courtroom trying a complex commercial case. While not a bankruptcy specialist, he had played an active part in most major business bankruptcies that had taken place in Colorado, beginning with King Resources Company where he represented its principal secured creditor, now extinct Continental Illinois National Bank.

In 1987, Matheson was named by the U.S. District Court as Chief Judge of the Bankruptcy Court, where his leadership saw the Court through the busiest time in its history during the prolonged downturn in the regional economy in the late 1980's and early 1990's. As their principal author, Judge Matheson is credited with modernizing the Court's local rules that efficiently guided practice in the Court until major revisions of the Bankruptcy Code in 2005.

Many credit Chief Judge Matheson, like Richard Matsch before him, with elevating the level of practice and professionalism in the Colorado Bankruptcy Court. Judge Matheson's devotion to the letter of the law, intellect, preparedness, and demands of counsel brought out the best in practitioners who came before him. Despite a courteous, respectful judicial demeanor, Judge Matheson's quick wit and high standards intimidated some lawyers who practiced before him – the kind of intimidation that motivated able lawyers to perform at their best. Matheson's demands of counsel were not a reflection of arrogance or aloofness, as evidenced by his commitment to helping inexperienced or otherwise challenged attorneys who wanted to improve their skills and knowledge. For years, with no return beyond improving the quality of practice of the bar, Judge Matheson conducted brown bag luncheon continuing education sessions that were open to anyone wise enough to attend.

During the late 1980's the Court, with only four judges, handled more business filings than it had before or has since. This time was the high water mark for Chapter 11 practice in Colorado with several substantial regional and national businesses seeking reorganization, including Storage Technology, Frontier Airlines, Kaiser Steel, and Amdura Corporation. A number of substantial Colorado businesses were also reorganized or liquidated at this time in the Colorado Bankruptcy Court. These included Blinder Robinson Securities, Colorado-Ute Electric Association, Inc., Hans Cantrup and Levine's Discount Furniture.

The caseload challenge to the Bankruptcy Court in Colorado in the late 1980's was complicated by the failing health and ultimate retirement of Judge John F. McGrath in the spring of 1987, after twenty years of service on the bench. For most of a year, a bench of only three judges (Clark, Brumbaugh, and Matheson) handled perhaps the busiest caseload in the Court's history. Judge Sidney B. Brooks, himself an experienced bankruptcy lawyer, was installed as Judge McGrath's replacement in January 1988. He faced a busy docket from day one on the job, but provided critical relief to his new colleagues.

In early 1990 Donald E. Cordova was appointed to the Court, filling a fifth judgeship on the Court created in response to the continued high volume of business cases and continued increase in consumer filings. Judge Cordova, a past president of the Colorado Hispanic Bar Association and the Denver Bar Association, was a highly-respected, seasoned trial attorney before assuming the bench. His lack of bankruptcy background proved to be no impediment to his judicial performance. A comprehensive grasp of civil litigation combined with an exemplary judicial temperament caused Judge Cordova to be among the Colorado Bankruptcy Court's most beloved jurists from early in his tenure to his untimely, sudden death from a heart attack in February 2003.

In response to the volume of filings continuing into the early 1990's, Congress authorized a sixth temporary bankruptcy court judgeship for Colorado. This was not filled until early 1994, when Marcia S. Krieger, who had previously practiced with Judge Brooks, took the bench. By this time the Colorado economy had rebounded and the volume of business filings had subsided. Judge Krieger served ably, was named by the District Court to succeed Judge Matheson as Chief Judge in 1999, and in 2002 became the third member of the Colorado Bankruptcy Court to be elevated to the United States District Court for the District of Colorado.

In 1991 the Bankruptcy Court was rescued from its dingy quarters at the Columbine Building and relocated to 721 19th Street, across from the Circuit and District courthouses. The first and fifth floors of the U.S. Custom House were renovated and the roof partially raised, providing six beautifully adorned courtrooms, comfortable chambers and adequate space for the Clerk's office and growing support staff.

The early 1990's saw the continued filing in Colorado of a number of sizable corporate and individual Chapter 11 cases. MiniScribe Corporation, a publicly-held, Longmont-based early far east manufacturer of down-sized computer discs, sought bankruptcy relief when it was discovered that it had substituted boxes of bricks for warehoused inventory.[101] This Chapter 11 soon was converted to Chapter 7. The demise of MiniScribe spawned massive securities fraud litigation that ultimately resulted in a $134 million settlement with the debtor's accountants and investment bankers. In the scramble for those spoils, the astute negotiating prowess of bankruptcy trustee Tom Connolly resulted in a full recovery by general unsecured creditors and a modest dividend to subordinated bondholders.[102]

The principal owner of the Vail ski resort, George Gillette, filed Chapter 11 as did Oren Benton and his Nuexco Corporation, the world's foremost marketmaker in uranium products. Two large Chapter 11 filings, Hedged Investments, and M&L Business Machines, concerned imploding pyramid schemes that bilked hundreds of "private" investors. The former was the CBOE options trading brainchild of James Donahue; the latter was a largely fabricated equipment leasing business concocted by Robert Joseph. Each of these entrepreneurs was prosecuted and finished with the criminal justice system well before the largely unremediated havoc he wreaked on investors was unwound in literally hundreds of adversary proceedings in the Bankruptcy Court.

With the 1990's came a decline in the number of large business bankruptcies filed in Colorado. Much to the chagrin of the local business bankruptcy bar, two significant Colorado businesses sought Chapter 11 relief

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[101] Andy Zipser, *Miniscribe's Investigators Determine That 'Massive Fraud' Was Perpetrated*, THE WALL STREET JOURNAL, September 12, 1989, at A1.

[102] Christi Harlan, *Coopers & Lybrand Agrees to Payment of $95 Million in the Miniscribe case*, THE WALL STREET JOURNAL, October 30, 1992, at A1.

in neighboring districts. Pueblo's CF&I Steel Corporation filed in Salt Lake City. Colorado Rockies Owner Jerry McMorris' trucking company, NationsWay Transport, Inc., filed for bankruptcy in 1999 in Phoenix. Some ascribed the loss of this business to the reputation of the Colorado bankruptcy bench for being unduly sensitive to potential conflicts of interest in affiliate debtor cases as well as being stingy in compensating debtors' professionals. In each of these two cases, it is also possible that management's adverse treatment of a well organized work force played some part in the use of the Bankruptcy Code's very liberal venue provisions in the selection of a bankruptcy court in a forum remote from the debtor's own backyard. By the late 1990's, a national trend had emerged that saw a substantial majority of the country's large bankruptcy reorganizations being filed in Delaware or the Southern District of New York, familiar forums to the investment bankers who played an ever more dominant role while providing financing for what have come to be called Chapter 11 mega cases.

Throughout the last quarter of the 20th century, the Colorado bankruptcy bench and bar enjoyed what can fairly be characterized as an amicable relationship. Practice before the bankruptcy court consistently has reflected appropriate respect for the judicial process and an unusual degree of civility among members of the bar. The bench has sought input from those who practice before it. While the bankruptcy bench/bar relationship has traditionally been a good one, the bench has hardly been solicitous towards the bar. A deep concern for the reputation and integrity of the bankruptcy process is reflected in cases of the federal bench in Colorado, from the Tenth Circuit to the bankruptcy judges. Perhaps rooted in a legacy skeptical about perceived historical cronyism and coziness between the bankruptcy bench and bankruptcy fiduciaries (lawyers, trustees and other professionals), these decisions have imposed high standards of transparency and professionalism in bankruptcy practice, particularly concerning counsel's actual or potential divided loyalties. The decisions have not always been enthusiastically received by the bar.

Between 1994, when Judge Krieger was appointed to the bankruptcy bench, and 2000, the Colorado Bankruptcy Court was served by the same six judges who shared the load as consumer filings grew from 12,208 to 15,112.[103] With the year 2000 came the end of the first 14-year terms of judges appointed under the 1984

[103] Note 86, *supra*.

Bankruptcy Amendments and Federal Judgeship Act. That and other factors caused an abrupt turnover in the Colorado bankruptcy bench. In less than three years the sixth temporary judgeship, filled in 1994, expired with the retirement of Roland J. Brumbaugh; two other judges, Clark and Matheson, retired; Judge Krieger was elevated to the District Court; and Chief Judge Donald Cordova died in office.

The turn of the 21st century has brought interesting challenges to the Colorado Bankruptcy Court and Colorado bankruptcy practice. Among them are dealing with four new bankruptcy judges, conversion to a largely paperless court through the nationwide Case Management/Electronic Case Filing System, and adjusting to the most comprehensive reform to the Bankruptcy Code since 1978, the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act.

B. WYOMING[104]

Like almost everything else in the State of Wyoming, the development of the bankruptcy court system has been affected and structured by three factors: 1) the state's vast area covering approximately 97,000 square miles; 2) the lack of population, placing Wyoming at the bottom of the states in total numbers; and 3) the fact that only four individuals have ever served as bankruptcy referees or judges.

Wyoming's population in 1940 was 250,742; in 1970, 332,416; and in 2009, 509,300. This is a small steady increase, but well behind the growth of the rest of the nation. In addition, the four bankruptcy referees or judges are distinguished by exceedingly long terms in office, for an accumulated period of some 106 years.

In 1903 Thomas Blake Kennedy was appointed Wyoming's sole Referee in Bankruptcy. He held the position until 1921. Judge Kennedy was then elevated to the Wyoming Federal District Court bench in 1921 as the nominee of President Warren E. Harding. He held this position until taking senior status on November 6, 1955. His service ended with his death on May 21, 1957.

[104] By Peter McNiff, Bankruptcy Judge District of Wyoming

Clarence A. Swainson then held the sole position of Bankruptcy Referee from 1921 to 1971, an astonishing period of 50 years. Referee Swainson passed away in the Spring of 1972.

Harold L. Mai was named Wyoming's sole Bankruptcy Referee and later Bankruptcy Judge, in February 1971. He held that position until his retirement in October 1993, after some 22 years of service. Judge Mai passed away in 2008.

Peter J. McNiff was appointed Bankruptcy Judge for the District of Wyoming on February 25, 1994. Judge McNiff was reappointed to a second 14-year term on February 25, 2008, a position he presently holds.

The first bankruptcy recorded in the District of Wyoming was filed on February 25, 1899, before United States District Judge John A. Riner, who appointed Frank H. Clark as Referee for this case only. The case was entitled "In The Matter of William B. Sutphin, a Resident of Laramie, Wyoming."

In the District of Wyoming, there were 84 bankruptcies filed in 1940. The numbers then progressed upward with 612 filings in 1980. The highest number of filings—3,340--was recorded in 2005. Wyoming's numbers then fell to its lowest number in recent years with 723 in 2006. However, as bankruptcies rose nationwide from 2008 to 2009, Wyoming chalked the second highest increase at 60 %, followed by Nevada at 59% and California at 58%.

Probably the most recent noteworthy bankruptcies in Wyoming were seven Chapter 15 international cases filed involving the rapidly expanding minerals industry. These cases put the Wyoming court in simultaneous contact with its counterpart in Canada and involved several video conference hearings with Her Majesty's bench in Calgary. The video hearings serve as a great example of international judicial cooperation and coordination.

In an effort to cover the district efficiently, the Wyoming Bankruptcy Court developed an extensive telephone and video conferencing system which allows multiple hookups. The Court has developed rules and regulations that allow the Court to conduct these multiple location, telephone and video hearings. In the case of a video hearing, the court is able to review and accept exhibits and hear testimony, all in the normal course of a hearing or trial. This system allows the judge to remain in one location in Wyoming while conducting judicial business throughout the state as well as nationally and internationally.