

BANKRUPTCY

SIXTH EDITION

WILLIAM D. WARREN

DANIEL J. BUSSEL

UNIVERSITY CASEBOOK SERIES

BANKRUPTCY

SIXTH EDITION

by

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PREFACE TO SIXTH EDITION

Bankruptcy is more in the mind of the American public than at any time in the last 60 years. In the recession year 2001, bankruptcy filings soared to a record 1.5 million, and in past year filings include a number of the largest Chapter 11 reorganization cases in history, such as Enron, K-Mart, Global Crossing, and Pacific Gas & Electric. Major bankruptcy legislation has been before Congress for years, and at the beginning of 2001 each House passed reform bills by veto-proof margins, only to have these measures languish as rapid political and financial developments, including the shift in the partisan balance in the Senate, followed by recession and war, derailed that legislation. As bankruptcy casebook authors, we are condemned to live in exciting times.

This Sixth Edition reflects the current ferment in bankruptcy law. Recognizing that the Congress likely will make major changes in the way bankruptcy law deals with consumer debtors, this Edition comes to grips with the policy issues that have been before Congress for the past several years. These issues are collected in a single coherent chapter encompassing Chapter 7 liquidation and Chapter 13 rehabilitation as they effect consumer debtors. We address access to Chapter 7 (is a “means” test desirable?), the reaffirmation controversy, the “ride-through” issue, the effect of the Charitable Donation Protection Act on the disposable earnings test, the modification of wholly unsecured home mortgages, and much more.

The Sixth Edition continues to increase the coverage of matters related to business bankruptcies. The Supreme Court’s “new value” opinion, *LaSalle*, is followed by a detailed critique that challenges the “some form of market valuation” standard. The Ninth Circuit’s recent *Catapult* decision adopting the “hypothetical test” for assumption of executory contracts is critically analyzed. A fresh look is taken of the *Pioneer Ford* reconciliation of § 365(c) and (f), and an alternative approach is offered. Substantive consolidation is suggested as a viable means for attacking the “bankruptcy remote vehicles” used in asset securitization transactions. The growing importance of “break-up” fees in asset sales is discussed. The expanding role of “earmarking” in preference law is recognized by the addition of *Superior Stamp & Coin* (9th Cir. 2000) and criticized as unjustifiably frustrating the equality of distribution norm of the Code. The sovereign immunity materials are updated with a discussion of the opinion on rehearing in *Arecibo Community Health Care* (1st Cir. 2001).

In order to make room for materials at the cutting edge of bankruptcy law, as well as the growing canon of caselaw under the 1978 Bankruptcy Code, we dropped two short chapters on subjects that have not seen major developments in recent years, those on involuntary bankruptcies and Chapter 12 farm family debt adjustments. However, references are made to Chapter 12 throughout the book so that instructors interested in covering that area may do so as they work through the materials.

As in the past, this casebook provides the instructor enough material for a 4-unit primarily business bankruptcy course, a 4-unit introduction to both business and consumer bankruptcy course, or a 3-unit primarily consumer bankruptcy course.

This is the first edition of this book that Professor Robert L. Jordan has not co-authored. Although blameless for the revising and updating, Bob Jordan still pervades this book, and his efforts provide its foundation. We are deeply grateful to him, not only for allowing us to appropriate his work, but for the many years of collegial friendship we have shared.

Ken Klee provided us indispensable insight into the legislative process surrounding the proposed Bankruptcy Reform Act of 2001 as well as many helpful comments throughout. We also acknowledge the many valuable comments, on past editions and this revision, from our adopters and our colleagues, the fine research assistance rendered by Andrew Ritz and Steve Cademartori and Tal Grietzer's skillful and careful work in preparing the manuscript for publication.

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D.J.B.

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