

THE PACE PICKS UP: IT'S STILL A LONG WAY TO CERTIORARI,
BUT BANKRUPTCY CASES ARE NO LONGER TREATED AS THE COURT'S STEPCHILDREN.

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The Supreme Court is paying more attention to bankruptcy than it has in a great while. Throughout the 1980s, despite the vast amount of bankruptcy litigation in the federal courts, the Supreme Court decided, on average, fewer than two bankruptcy cases a year. In the 1980-81 term, it decided none. This pattern of inattention, however, abruptly changed in the 1990-91 term.

In a break from the past, the Court decided six bankruptcy cases last term. The increase appears to reflect more than a statistical aberration or a passing interest. Already equaling last year's record, the Court has granted certiorari in six bankruptcy cases for the 1991-92 term.

In addition to its growth, the bankruptcy docket is changing in character. The justices formerly eschewed narrow questions under the Bankruptcy Code when determining which cases to review. They may have preferred, over the last decade, to lend their consideration to matters perceived to have significance throughout the bankruptcy system. This policy led to several landmark precedents.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), for example, the Court placed the Bankruptcy Courts in disarray by deciding that bankruptcy jurisdiction in many instances violated Article III. In *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513 (1984), the Court shook the balance of labor forces by ruling that a debtor could unilaterally reject a collective-bargaining agreement without committing an unfair labor practice. Most recently, in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the Court upset the workings of the bankruptcy system by holding that the Seventh Amendment guarantees jury trials in many adversary proceedings.

Yet, by most evaluations, the Supreme Court's certiorari policy in the 1980s left a number of pressing matters unresolved.

The bankruptcy cases decided in the 1990-91 term began to make amends for that oversight. They mostly focused on rather technical questions that the Court might not have considered in earlier years; whether individual debtors may seek relief under Chapter 11 (*Toibb v. Radloff*, 111 S. Ct. 2197 (1991)); whether debtors may reduce payments on mortgages by filing sequential Chapter 7 and Chapter 13 petitions (*Johnson v. Home State Bank*, 111 S. Ct. 2150 (1991)); when debtors may avoid liens that impair exemptions (*Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991)); and *Owen v. Owen*, 111 S. Ct. 1833 (1991)); and what standard of proof applies to the fraud exception to dischargeability (*Grogan v. Garner*, 111 S. Ct. 654 (1991)).

The Court last term also followed up on a *Granfinancier* jury-trial issue in *Langenkamp v. Culp*, 111 S. Ct. 330 (1990) (per curiam). None of these cases made headlines, but they did involve issues over which lower courts had disagreed.

Detail Work

The Court in the term that convenes next month will continue to focus on more technical issues. Four of its cases will address traditional bankruptcy topics like lien avoidance, preferences, and the duties of the bankruptcy trustee.

In *Dewsnup v. Timm*, No. 90-741, the Court will decide whether a debtor has a right to redeem property that the trustee has previously abandoned to an undersecured creditor by paying the creditor only the market value of the property. It will determine in *Union Bank v. Wolas*, No. 90-1491, whether payments of interest on a long-term revolving line of credit satisfy the exception to voidable preferences for payments in the ordinary course of business. In the two related cases of *Holywell Corp. v. Smith*, No. 90-1361, and *United States v. Smith*, No. 90-1484, the justices will decide whether, in a Chapter 11 case, a trustee appointed solely for purposes of liquidating the debtor's estate must file a federal income-tax return and pay taxes on the debtor's estate.

The Court will test the power of the Bankruptcy Courts with respect to the federal government in the other two cases already granted certiorari. It will decide, in *MCorp v. Board of Governors of the Federal Reserve System*, No. 90-914 (which is consolidated with *Board of Governors of the Federal Reserve System v. MCorp Financial Inc.*, No. 90-913), whether a federal court sitting in bankruptcy can enjoin an administrative proceedings against a bank holding company by the Federal Reserve System's Board of Governors. In *United States v. Nordic Village Inc.*, No. 90-1629 -- one of the most interesting bankruptcy cases of the term -- the Court will decide whether the Bankruptcy Code sufficiently waives the federal government's sovereign immunity to enable a trustee to recover a voidable transfer made by the debtor to the Internal Revenue Service.

The Supreme Court's willingness to accept more bankruptcy cases might have several explanations. Most likely, in the past, the Court considered itself too busy to straighten out the technicalities of bankruptcy law. In the early 1980s, the Court issued an average of more than 150 signed opinions each year. Last year, as a result of a decrease in the conflicts generated in the lower courts, greater agreement among the justices, and the end of mandatory appellate jurisdiction, the number of signed opinions dropped to 112. This reduction in the Court's workload may have freed it to pursue less extraordinary bankruptcy issues.

The Court, in the past, may also simply not have had much interest in the subject of bankruptcy. Then Associate Justice William Rehnquist, dissenting from a denial of certiorari in a 1981 case, lamented: "Bankruptcy cases seldom receive much notice outside those who are familiar with this branch of the law, and it is therefore understandable that there is a dearth of recent bankruptcy cases decided on the merits by this Court, as compared with constitutional cases, labor cases, and other more alluring subjects."

Perhaps during the 1980s, with political controversies becoming ever less pleasant, the Court became more comfortable with bankruptcy and less interested in the "alluring subjects."

Finally, the Supreme Court's longstanding policy of granting certiorari primarily to resolve conflicts may have shut out many bankruptcy cases in the 1980s. Congress completely rewrote the bankruptcy laws when it replaced the Bankruptcy Act with the Bankruptcy Code in 1978. The Court may have considered resolving conflicts under the act unproductive following the adoption of the code, even though litigation under the act continued for several more years. The newness of the code, moreover, may have contributed for a short time to the paucity of cases in the Supreme Court because conflicts worthy of certiorari often take several years to develop. The passage of time from 1978 until now, however, has probably placed bankruptcy on an equal footing with other statutory subjects.

Whatever the causes and effects of the increase in cases, the departure of Justices William Brennan Jr. and Thurgood Marshall may also change the Court's bankruptcy jurisprudence. In many areas of business law, one or two of the justices seem to have more influence than the others. Justice Harry Blackmun, for example, frequently writes the majority opinions in tax cases, and Justices Byron White and John Paul Stevens frequently control the Court's antitrust decisions.

Justice William O. Douglas, who had taught bankruptcy at Yale, wrote the majority of the Court's bankruptcy decisions when he sat on the bench. The nearly inseparable duo of Brennan and Marshall largely took his place after he retired. Marshall wrote four bankruptcy opinions in the last decade (a record tied only by White), and Brennan took credit for *Marathon Pipe Line* and *Granfinanciera*. Who will take their place as bankruptcy specialists remains unclear.

The Supreme Court, despite its increased interest in the subject, probably will not attempt to develop a comprehensive theory of bankruptcy in the future. Instead, it will decide cases by examining carefully the relevant language of the Bankruptcy Code and usually will decline to consider legislative history and policy implications. If, as the evidence suggests, Justice Antonin Scalia's "plain meaning" approach to statutory interpretation has gained support from a majority of the Court, litigants in bankruptcy cases should come prepared foremost to discuss the meaning of the specific words of the Bankruptcy Code.

It's still a long way to certiorari, but bankruptcy lawyers no longer need feel that the Supreme Court is overlooking them. If the patterns of the past two terms continue, bankruptcy cases should have about the same chance of obtaining review as those in other fields.