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## BANKRUPTCY LEGISLATION OF 1962

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If two instances can establish a tradition, Congress in 1962 exercised its traditional function of making a decennial review and revision of the Bankruptcy Act. The last such revision occurred, of course, in 1952.<sup>1</sup> There was no comparable enactment in 1942, but Congress had other overriding concerns in that year, and besides only four years had lapsed since the overhaul of the Bankruptcy Act in 1938. World War II intervened to preclude the running of a decennium from the Chandler Act of 1938. However, this interval which included the war years had not been insignificant in so far as bankruptcy administration was concerned. On the contrary, this period of relatively few bankruptcies dramatized so effectively the deficiencies of the fee system for compensating referees and financing the operations of their offices that the Referees' Salary Act of 1946 was a Congressional necessity.<sup>2</sup> Then there was the furor created by the discovery that the bona fide purchaser test incorporated in section 60 by the Chandler Act could be used by trustees in bankruptcy to subvert commercially important forms of chattel security, and so the next important item of bankruptcy business for Congress was to deal with the demand for revision of the preference section of the act.<sup>3</sup> So it is not surprising that

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<sup>1</sup> 66 Stat. 420 (1952) (codified in scattered sections of 11 U.S.C.). The legislative history and explanation are found in H.R. Rep. No. 2320, 82d Cong., 2d Sess. (1952), and Sen. Rep. No. 1395, 82d Cong., 2d Sess. (1952). See also Duberstein, *Highlights of Bankruptcy Amendments (1952)*, 27 *Ref. J.* 21 (1953); Montgomery, *Chapter XI and Recent Amendments*, 27 *Ref. J.* 18 (1953).

<sup>2</sup> 60 Stat. 323 (1946) (codified in scattered sections of 11 U.S.C.). The legislative history and background are set out in H.R. Rep. No. 1037, 79th Cong., 1st Sess. (1945). The House and Senate debates are reprinted in 20 *Ref. J.* at 48 & 105 (1946).

<sup>3</sup> The response to this demand is the elaborate amendment of section 60 and related sections by 64 Stat. 24 (1950), 11 U.S.C. §§ 96, 110 (1958). See H.R. Rep. No. 1293, 81st Cong., 1st Sess. (1949), for an exposition of the legislative purpose.

noncontroversial recommendations for change in the act were allowed to accumulate in an Omnibus Bill which did not go through until 1952.

The Omnibus Bill of 1952, as enacted, contained fifty-six sections and about one hundred amendments, including several important substantive improvements.<sup>4</sup> By contrast the Omnibus Bill of 1962<sup>5</sup> contains only sixteen sections, and the significance of the changes does not appear from this vantage point to be in any way comparable. The impetus for the decennial revision of the Bankruptcy Act comes largely from the National Bankruptcy Conference, a voluntary association of lawyers, referees, law teachers and others interested in improvement of bankruptcy law and practice. This group has "taken an active part in the work connected with the enactment of the Chandler Act in 1938, the revision by the Supreme Court in 1939 of the general orders and official forms in bankruptcy, the Referees Salary Act in 1946, and numerous other proposals directed at improving bankruptcy law and its administration."<sup>6</sup> The final versions of the acts of 1952 and 1962 incorporate substantially the recommendations submitted by the Conference for Congressional consideration.<sup>7</sup>

The modesty of the provisions adopted in 1962 is hardly due to a conviction in the National Bankruptcy Conference—or elsewhere, for that matter—that the Bankruptcy Act enjoys a completed or perfected status. On the contrary, the Conference has strongly supported recommendations for amendments which it believes to be of far greater consequence and urgency for the good of bankruptcy administration than those incorporated in the Omnibus Bill. In fact the Conference, after considerable deliberation, withdrew a number of proposals from the bill as originally drafted to avoid anticipated controversy which might have jeopardized the enactment of the remainder of the measures. Proposals affecting a half dozen sections of the act and a section of the United States Criminal Code were put aside for this reason. Another group of withdrawn proposals, affecting sections 18, 68, 133 and 136, were submitted to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States in anticipation of the enactment of H.R. 7405,<sup>8</sup> which would have en-

<sup>4</sup> See note 1 *supra*. Several of the changes included in the 1952 law were put forward and discussed in Moore & Tone, *Proposed Bankruptcy Amendments: Improvement or Retrogression?*, 57 *Yale L.J.* 683, 707-23 (1948).

<sup>5</sup> Pub. L. No. 87-681, 76 Stat. 570, enacted Sept. 25, 1962.

<sup>6</sup> H.R. Rep. No. 1208, 87th Cong., 2d Sess. 3 n.1 (1961). Among the organizations participating in the conference are the American Bankers Association, the American Bar Association, the American Institute of Accountants, the Commercial Law League of America, the National Association of Credit Management, the National Association of Referees in Bankruptcy, and the New York Credit and Financial Management Association.

<sup>7</sup> See H.R. Rep. No. 2320, 82d Cong., 2d Sess. 2 (1952); Sen. Rep. No. 1954, 87th Cong., 2d Sess. 2 (1962).

<sup>8</sup> Note 18 *infra*.

larged the Supreme Court's rule-making authority in respect to practice and procedure under the act. One of the amendments originally included in the bill, that of section 229c, which was intended to achieve closer correlation with section 222, was ultimately deleted.<sup>9</sup> Four subsequent additions were made—one at the instance of the Securities and Exchange Commission and two at the instance of the Judicial Conference of the United States. The Commission persuaded the National Bankruptcy Conference to add its proposed amendment of section 160 to the bill. The amendments of sections 21d and 48c were inserted at the suggestion of the Judicial Conference's Bankruptcy Committee.<sup>10</sup>

The sixteen amendments effected by Public Law 87-681 include five proposals affecting Chapters X and XI, which originated with the SEC. The Commission proposals had originally been introduced into the 85th Congress in four separate bills, along with three other Commission-sponsored bills proposing amendments to the Bankruptcy Act. The Judicial Conference approved the proposed amendments of section 265, expressed no opinion on the proposal for amending section 393, and gave qualified approval of the proposals affecting sections 160 and 247.<sup>11</sup> None of the bills was reported out of committee, but the proposals to amend sections 247, 265 and 393 were approved by the National Bankruptcy Conference at its meeting in 1959 for incorporation into its Omnibus Bill.

One other bankruptcy measure was enacted by the 87th Congress. Public Law 677 provides for compensation of retired referees recalled to active duty.<sup>12</sup> Occasions for such recall arise when there is a vacancy, an excessive workload or incapacity affecting a particular office.<sup>13</sup> The law heretofore allowed no payment to a recalled referee beyond his retirement annuity, which he received in any event.<sup>14</sup> The compensation made available by the new legislation is the same salary authorized to the referee serving the territory in which the recalled referee is assigned. If the recall is on a part-time basis, and the retired referee is recalled for full-time service, his salary will be fixed at the minimum rate established by the Judicial Conference of the United States for full-time service.<sup>15</sup>

<sup>9</sup> After the House Committee on the Judiciary had published a committee print of the proposed amendments with explanatory comment in the summer of 1960, the Omnibus Bill was introduced as H.R. 5393 on March 9, 1961.

<sup>10</sup> See H.R. Rep. No. 1208, 87th Cong., 2d Sess. 1-2 (1961).

<sup>11</sup> Ann. Rep. of Procdgs. of Jud. Conf. of United States 26-27 (1958).

<sup>12</sup> 76 Stat. 559, enacted Sept. 19, 1962, amending § 40d of the act. The statutory reference here and elsewhere in this article is to the familiar numbering of the sections of the Bankruptcy Act as enacted rather than to the numbering in Title 11 of the United States Code.

<sup>13</sup> H.R. Rep. No. 1940, 87th Cong., 2d Sess. 1 (1962).

<sup>14</sup> *Ibid.* See also Ann. Rep. of Procdgs. of Jud. Conf. of United States 21 (1960).

<sup>15</sup> Annuities allowable for the period of employment of the retired referee are deductible from the salary in accordance with the Civil Service Retirement Act.

The two bills enacted by Congress were a minor fraction of those on the subject of bankruptcy introduced during its two sessions. No doubt it is a good thing for the country that most of these bills were not enacted. Nevertheless, it is regrettable that widely supported bills to amend the provisions dealing with statutory liens,<sup>16</sup> the priority and dischargeability of tax claims in bankruptcy,<sup>17</sup> and the bill to conform rule-making in bankruptcy to the comparable process in most other areas of federal procedure<sup>18</sup> failed of enactment. In so technical and complex a field as bankruptcy, it is fairly easy for a persistent objector to delay and thwart proposed legislation by raising issues and arguments not necessarily related to what is good for bankruptcy administration.<sup>19</sup>

The improvement of bankruptcy administration is not the only

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<sup>16</sup> H.R. 1961, which passed the House in August 1961, was approved by the Senate Judiciary Committee on March 8, 1962. On September 26, 1962, however, it was referred to the Senate Finance Committee from which it never emerged. The purposes of the bill are explained in H.R. Rep. No. 708, 87th Cong., 1st Sess. (1961), and Sen. Rep. No. 1273, 87th Cong., 2d Sess. (1962). The predecessor of this bill, H.R. 7242, had the endorsement of the Judicial Conference of the United States, the National Bankruptcy Conference, the American Bar Association, the American Bankers Association and numerous other organizations. The predecessor bill was passed by both houses of the 86th Congress, but the President withheld his approval until after adjournment, thereby administering a pocket veto. H.R. 7242 included a provision overruling *Constance v. Harvey*, 215 F.2d 571 (2d Cir. 1954), cert. denied, 348 U.S. 913 (1955). This provision was deleted from H.R. 1961 by virtue of the overruling decision of *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603 (1961). The Court's opinion in *Lewis* (id. at 608) quoted from H.R. Rep. No. 745, 86th Cong., 1st Sess. (1958), which was the legislative report accompanying and explaining H.R. 7242. Quotations from the report and from the President's message of disapproval rebut the suggestion that the Court overruled a presidential veto, but the Court's use of the legislative materials is nonetheless interesting. See Comment, 2 B.C. Ind. & Com. L. Rev. 372, 379-80 (1961); 15 Sw. L.J. 420 (1961); 36 Ref. J. 118 (1962). The Supreme Court has more recently eliminated another of the problems that would have been dealt with by this bill, namely, the conflict among the circuits respecting the validity in bankruptcy of a lien securing a tax penalty. *Simonson v. Granquist*, 369 U.S. 38 (1962). The Treasury Department has announced its willingness not to exploit the mischievous potentialities of another court of appeals decision which would have been overruled by the bill, *In re Quaker City Uniform Co.*, 238 F.2d 155 (3d Cir. 1956), cert. denied sub nom. *Delsea Corp. v. Flickstein*, 352 U.S. 1030 (1957). See Sen. Rep. No. 1272, 87th Cong., 2d Sess. 22 (1962). The exercise of administrative restraint is commendable, but it is no substitute for a legislative solution of the difficulties that beset efforts to make a rational application of section 67c.

<sup>17</sup> H.R. 4473, which passed the House on August 7, 1961, was approved by the Senate Judiciary Committee on March 8, 1962. The purpose of the bill is set out in H.R. Rep. No. 537, 87th Cong., 1st Sess. (1961). Like H.R. 1961, referred to in note 16 supra, H.R. 4473 was buried with the Senate Finance Committee on September 26, 1962. A predecessor bill, H.R. 2236, passed the House on August 25, 1959, during the 86th Congress. Efforts of the American Bar Association and National Bankruptcy Conference to cut down the priority and nondischargeability of tax claims have a long history. See Moore & Tone, *Proposed Bankruptcy Amendments: Improvement or Retrogression?*, 57 Yale L.J. 683, 699-705 (1948); MacLachlan, *Bankruptcy* 102 (1956).

<sup>18</sup> H.R. 7405 passed the House on August 7, 1961.

<sup>19</sup> Cf. House Hearings on H.R. 272 and H.R. 2691, 81st Cong., 1st Sess. 57-61 (1949).

desideratum for Congress to have in mind when it considers proposals to amend the Bankruptcy Act. In any event, the continuing effort to attain the traditional objective of equitable distribution of insolvent estates, which is the historical *raison d'être* for any bankruptcy system, encounters considerable resistance today, especially from spokesmen for one creditor whose interests are almost always adverse to those of the general creditors.<sup>20</sup>

The burden of proof is, in any event, on the proponent of legislative change, and not all difficulties that arise under a statute are amenable to solution by amendment. Many matters are best left to the wisdom of courts. A disposition to correct every objectionable decision by legislation and to tie the courts down closely in the area of bankruptcy has had its apparent justification in a series of Supreme Court rulings which for years frustrated Congressional efforts to deal effectively with secret preferences.<sup>21</sup> This performance is to be contrasted with such recent Supreme Court decisions as *Corn Exch. Bank v. Klaunder*,<sup>22</sup> *Nathanson v. NLRB*,<sup>23</sup> *Lewis v. Manufacturers Nat'l Bank*<sup>24</sup> and *Simonson v. Granquist*.<sup>25</sup> In all these cases the Court found a pervasive purpose or principle reaching beyond the literal words of the most pertinent provision of the act. Bankruptcy legislation, like other legislation, should often articulate principles in language which permits the courts some leeway in assessing the significance of multitudinous facts which can never be fully anticipated and adequately dealt with by statute.

A summary of the purpose and effect of the amendments wrought by the Omnibus Bill follows.<sup>26</sup> The text of the amended portions of the act is set forth in an appendix following this article.

*Section 2.* Two correlated amendments affect section 2, which creates and defines the jurisdiction of the bankruptcy court. Section 2a(1), though couched in terms of jurisdiction, nevertheless defines proper venue for bankruptcy proceedings.<sup>27</sup> Prior to the 1962 amend-

<sup>20</sup> Cf. H.R. Rep. No. 2320, 82d Cong., 2d Sess. 12-13, 21 (1952).

<sup>21</sup> See 3 Collier, Bankruptcy 878-83 (14th rev. ed. 1950).

<sup>22</sup> 318 U.S. 434 (1943).

<sup>23</sup> 344 U.S. 25 (1952).

<sup>24</sup> 364 U.S. 603 (1961).

<sup>25</sup> 369 U.S. 38 (1962).

<sup>26</sup> The summary draws mainly on the explanations submitted by the National Bankruptcy Conference and the Securities and Exchange Commission. See H.R. 1208, 87th Cong., 1st Sess. (1961); Sen. Rep. No. 1954, 87th Cong., 2d Sess. (1962). Reference hereinafter will be only to the House Report, the Senate Report being practically identical.

<sup>27</sup> 1 Collier, Bankruptcy ¶ 2.14 (14th rev. ed. 1962); MacLachlan, Bankruptcy § 38 (1956); Seligson & King, Jurisdiction and Venue in Bankruptcy, 36 Ref. J. 36 (1962). It has been said, but without citation of authority, that a bankruptcy court would have jurisdiction of a petition filed by or against an alien or a nonresident of this country only if the filing was in one of the districts specified in section 2a(1). Note, 35 N.C.L. Rev. 476, 478 (1957). If so, the bankruptcy court has no power to transfer such a case

ment, this provision of the act included three relative clauses: The first dealt with venue for persons having a principal place of business, residence or domicile within a district of the United States; the second dealt with persons having none of these contacts within the United States but having property within the territory of a district; and the third dealt with persons adjudged bankrupt by a court outside the United States but having property within one of its districts. The third clause added nothing when the person adjudged bankrupt in a foreign jurisdiction had no principal place of business, domicile or residence in this country.<sup>28</sup> When the person so adjudged did have one of these contacts, the clause nevertheless arguably made the location of property within a district the only test of proper venue; or, in the alternative, it might be said to afford a basis for choosing as venue any district where the debtor had property or any of the three other possibilities mentioned in the first clause. The amendment deletes the third clause. The availability of a number of choices of venue is perhaps ordinarily not a matter requiring legislative restriction, particularly when there is adequate provision for transferring cases brought in an inconvenient forum. Notwithstanding the liberality of the language of the transfer provision and the hospitable construction accorded it, it seems defensible to eliminate from the act the option of allowing a bankrupt having a principal place of business, residence or domicile in the United States (or his creditors) to institute proceedings in any other district where he has property.<sup>29</sup>

The second amendment of section 2 adds a provision to make clear that the jurisdiction of the bankruptcy court is not compulsory where a foreign bankruptcy is pending against the debtor.<sup>30</sup> The

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pursuant to section 32 from a district not so specified—a conclusion to be eschewed, if possible.

<sup>28</sup> Since both the second and third clauses required the debtor to have property in the district selected for venue, the latter provided no additional choice. The clause did evidence a recognition by Congress that adjudication of bankruptcy outside the country was no bar to the initiation of a proceeding by or against the debtor in this country. Nadelmann, *The National Bankruptcy Act and the Conflict of Laws*, 59 *Harv. L. Rev.* 1025, 1039 (1946). As pointed out *infra*, the 1962 legislation deals more forthrightly with the effect of a foreign adjudication on the jurisdiction of a bankruptcy court.

The third clause did serve to found proper venue in *In re Neidecker*, 82 F.2d 263 (2d Cir. 1936), for a partnership which had been adjudged bankrupt in France and which had property in the Southern District of New York. The firm had also established its principal place of business in that district shortly before the petition was filed in this country, but the first clause of section 2a(1), as it then read, could be invoked only if the alleged bankrupt had established his contact with the district for more than half of the six-month period preceding bankruptcy. However, since the amendment of section 2a(1) in 1938, whatever district has been the debtor's principal place of business, residence or domicile for a longer part of the preceding six months than any other district is a proper choice of venue under the first clause.

<sup>29</sup> The fact of foreign adjudication creates no special need for an additional venue option.

<sup>30</sup> There is authority for regarding the bankruptcy court's jurisdiction compulsory,

premise of this new provision is that it may be most consistent with justice and fairness to permit a foreign bankruptcy proceeding to administer an estate in its entirety, including property located in this country.<sup>31</sup>

The obverse is that it will often be fair and just for a bankruptcy proceeding initiated under the legislation of this country to administer completely an estate which includes property located abroad. The title conferred on the trustee of a bankrupt by section 70a includes the bankrupt's property wherever located. If this title is to be respected outside this country, it is incumbent on Congress to make it possible for the courts of the United States to give full faith and credit to the title of a liquidator appointed by a foreign court.<sup>32</sup>

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absent such a statutory provision. See 1 Remington, *Bankruptcy* ¶ 38 (5th ed. 1950). But see Moore, *Debtors' and Creditors' Rights: Cases and Materials* 392-93 (1955).

<sup>31</sup> This new provision carries out a recommendation of Professor Nadelmann:

It would be advantageous from every viewpoint if the bankruptcy court had the power to refuse the local adjudication and to stay proceedings when bankruptcy has been declared abroad at the domicile of the debtor and it appears equitable and convenient that the local estate be liquidated in the foreign proceeding. As the bankruptcy jurisdiction over non-residents is maintained, local interests remain fully protected. On the other hand, when given discretion, the courts are in a position to reduce unnecessary duplication of proceedings to a minimum.

The National Bankruptcy Act and the Conflict of Laws, 59 *Harv. L. Rev.* 1025, 1044 (1946).

The Omnibus Act of 1952 made changes in sections 65d and 70a which were recommended by Professor Nadelmann in the same article. See *id.* at 1031-32 & 1050-51; Nadelmann, *Revision of Conflicts Provisions in the American Bankruptcy Act*, 1 *Int'l & Comp. L.Q.* (4th ser.) 484 (1952), 27 *Ref. J.* 53 (1953).

<sup>32</sup> Cf. *Restatement, Conflict of Laws* § 545(2) (1934): "A court will order the transfer of local assets to a foreign receiver, who applies for the transfer if it deems such transfer conducive to the convenient settling of the estate." I am indebted to Professor Nadelmann for calling my attention to this reference.

The new provision, section 2a(22), purports to apply only when the foreign adjudication of bankruptcy is by "a court of competent jurisdiction." There is thus room for argument as to whether a foreign order or determination affecting a particular debtor adjudged him bankrupt and whether the tribunal entering the order or making the determination was a court of competent jurisdiction. Whether the foreign or American law (or some general international body of law) shall provide the standards for determining these matters is not indicated. These questions could and did arise, however, under the venue provision deleted from section 2a(1). Thus, the court in *In re Neidecker*, cited *supra* note 28, held that a "jugement declaratif de faillite" entered by the Tribunal of Commerce of the Department of the Seine, sitting in Paris, France, constituted an adjudication of bankruptcy by a court of competent jurisdiction without the United States. The judgment of the French court had been entered *ex parte* without notice to the bankrupts, but the judgment had thereafter been published in newspapers and posted in the bankrupts' place of business, and the French law afforded them opportunity to object to the proceedings. A "court of competent jurisdiction," according to Circuit Judge Swan's opinion, was one "having jurisdiction according to the laws of any civilized country." In answer to objections based on the lack of any requirement in French law that an involuntary bankrupt have committed an act of bankruptcy, the lack of any provision for discharge, and the grant of power to the French court to adjudicate on its motion under certain circumstances, the court said further:

Undoubtedly the foreign proceeding must bear enough similarity to our own to be called an adjudication in bankruptcy, but it need not be based upon pro-



The 1962 amendment imposes no obligation on the courts of the United States to yield jurisdiction to a foreign court of bankruptcy or to surrender property to a foreign liquidator. Discretion is vested in the American bankruptcy court by the amendment to "exercise, withhold, or suspend the exercise of jurisdiction," temporarily or indefinitely, in the light of all the relevant circumstances, including the rights and convenience of local creditors. Local administration may be necessary to accomplish avoidance of preferential transfers or to enable local creditors to attain equality with foreign creditors.

Hopefully the lawmakers of other countries will be encouraged to follow the example of the United States in providing a basis for the exercise of judicial discretion in respect to the question whether a second administration of a bankrupt estate located in two or more jurisdictions should be undertaken. Ideally, assumption of concurrent jurisdiction will then depend on the outcome of an inquiry into whether it will contribute to efficient administration and the desideratum of achieving equality in the handling of the bankrupt's estate as a whole.

*Section 21d.* Section 21, which is concerned with evidence, contains five subdivisions dealing with certification of copies of orders and papers emanating from or filed in bankruptcy proceedings. Subdivision *d* makes certified copies "of proceedings before a referee, or of papers, when issued by the clerk or referee," admissible as evidence in United States district courts with the same effect as certified copies of records of such courts. The necessity of certification by the referee or the clerk of the district court imposes a heavy and needless burden on these officials,<sup>33</sup> and the amendment of subdivision *d* enables the referee to designate an employee in his office to issue certified copies with the same effect as those issued by himself or the clerk. The designation must be by an order filed in the office of the clerk.<sup>33a</sup>

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cedure identical with our own. Any judgment is sufficient by which the debtor's property is seized in accordance with the laws of a civilized country for distribution among his creditors.

The question that arises under section 2a(22) is, of course, different from that presented under 2a(1) as it formerly read. The court emphasized in the *Neidecker* case that the question was not whether the French judgment was enforceable in the United States but whether a condition on which depended the exercise of jurisdiction by the American court was satisfied. 82 F.2d at 265. If the American court concludes pursuant to the new provision that it should withhold or suspend jurisdiction to avoid unnecessary and wasteful duplication of administration of the estate of a bankrupt adjudicated abroad, the foreign adjudication is accorded considerably more significance than that contemplated by former section 2a(1). Nonetheless, it does not seem likely that the interpretative difficulties posed by the last clause of the new subdivision will be critical, since it is well nigh inconceivable that, in any case of doubt as to whether the clause applies, the American court would choose to withhold jurisdiction.

<sup>33</sup> H.R. Rep. No. 1208, 87th Cong., 1st Sess. 2 (1961), pointing out that the burden has recently been increased by the 1959 amendment of section 39a of the act to require a referee to retain all papers in a pending bankruptcy proceeding until the case is closed. The referee's office thus gets many more requests for certified copies than formerly.

<sup>33a</sup> Editor Whitehurst of the *Referees' Journal* reports the view of the Administra-

Although the amendment does not clearly make a designated employee's certification effective for the purposes specified in subdivisions *e*, *f*, *g* and *h*, it may be noted that only subdivision *d* heretofore limited the issuance of certified copies to the clerk or referee. If an employee's certification suffices for evidentiary purposes in the United States district courts, it ought to be adequate for the other purposes particularized in section 21.

*Section 48c.* This section, which prescribes the compensation for trustees under the act, had contained a clause apparently excusing the payment of the filing fee for the trustee "when a fee is not required from a voluntary bankrupt." Similar clauses in section 40, providing for the compensation of referees, and section 52, prescribing the compensation for clerks, were deleted in 1946 when the act was amended to authorize the Supreme Court to promulgate a general order permitting the payment of filing fees in installments. The failure to delete the clause in section 48c at the same time was an inadvertence, corrected by the recent amendment. It is theoretically arguable that a petitioner may nevertheless proceed in bankruptcy in forma pauperis pursuant to section 1915 of Title 28 of the United States Code,<sup>34</sup> but the amendment adds to evidence of Congressional intent that such petitions need not be entertained by the bankruptcy court.

*Section 57i.* This section, as it read before the amendment, indicated that if a surety on an obligation of a bankrupt debtor paid part of it, he was subrogated to that extent to the creditor's rights. A possible reading of the statute subjected the creditor in such a case to a duty to share with the surety any dividend received from the bankrupt estate.<sup>35</sup> Under the prevailing interpretation of the subdivision, however, the creditor has been entitled to prove his claim undiminished by any partial payment from the surety and to receive dividends thereon from the estate until his claim has been fully paid. Only when and if the sum of the dividends and receipts from the surety equals the amount of the claim is the surety entitled to receive the balance of the dividends.<sup>36</sup> If the creditor receives the balance, he holds it in trust for the surety.<sup>37</sup> The 1962 amendment codifies this existing state of the law.

*Section 58a(6).* Until the recent amendment and since 1938 the Bankruptcy Act has required creditors to get ten days' notice by mail of a proposed compromise of any controversy in which either party was

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tive Office of the United States Courts that only one clerk in a referee's office is to be designated under the new authorization and that certification should be made in the name of the referee by the clerk. 37 Ref. J. 10, 11 (1963).

<sup>34</sup> See 2 Collier, Bankruptcy ¶ 51.01 (14th ed. 1961 Supp.).

<sup>35</sup> See H.R. Rep. No. 1208, supra note 33, at 4; 3 Collier, Bankruptcy 339 (14th rev. ed. 1961).

<sup>36</sup> Id. at 340; MacLachlan, Bankruptcy 138-39, 312-13 (1956).

<sup>37</sup> Swarts v. Fourth Nat'l Bank, 117 Fed. 1, 12-13 (8th Cir. 1902).

claiming over \$1,000 or its equivalent. Prior to 1938 the notice requirement applied to all proposed compromises, and the manifest purpose of the change was to mitigate the administrative burden and expense which hindered the consummation of compromises of small controversies.<sup>38</sup> In practice, however, the \$1,000 requirement was confusing and did not achieve its purpose of limiting the notice requirement to controversies of consequence.<sup>39</sup> The amendment vests discretion in the court to eliminate the necessity of notice to creditors of a proposed compromise irrespective of the amount claimed by either party, but, unless the court so exercises its discretion, notice is required.

*Section 59b.* The Bankruptcy Act of 1898, by its section 59b, required petitioning creditors seeking an involuntary adjudication of their debtor to have provable claims in an aggregate amount of at least \$500. Amendatory legislation enacted in the Thirties, however, enlarged significantly the categories of provable claims by including therein rights of recovery in pending actions for negligence, contingent debts and claims for anticipatory breach of contract.<sup>40</sup> The draftsmen of the Chandler Act thought that holders of such claims, however, should not be enabled to institute involuntary bankruptcy proceedings against their debtor. In the first place, questions on which ultimate liability of the debtor depended might be resolved against the creditors, and it would be anomalous to have a debtor put in bankruptcy at the instigation of petitioners whose claims turned out not to be well founded. In the second place, the hearing and determination of the principal issues raised by the pleadings filed in the bankruptcy court, *e.g.*, whether the debtor has committed an act of this bankruptcy or is insolvent, should not be complicated and protracted by collateral inquiries into the fact and extent of the debtor's liability to the petitioning creditors. The Chandler Act of 1938 therefore required the petitioners to have claims that were fixed as to liability and liquidated as to amount.<sup>41</sup>

Criticism of these restrictions on the eligibility of petitioning

<sup>38</sup> See Analysis of H.R. 12889, 74th Cong., 2d Sess. 182 (1936).

<sup>39</sup> See H.R. Rep. No. 1208, *supra* note 33, at 5. Section 27 requires court approval of the compromise of any controversy arising in the administration of the estate. The compromise shall be upon terms deemed to be in the best interest of the estate. General Order 28 somewhat ambiguously prescribes notice for any hearings on a proposed compounding or settlement of a claim owing to the estate. Compare G.O. 33, dealing with the requirements of an application by a receiver, trustee or debtor in possession for authority to settle a controversy by arbitration and compromise.

<sup>40</sup> See Collier, *op. cit. supra* note 35, ¶ 63.01.

<sup>41</sup> Analysis of H.R. 12889, 74th Cong., 2d Sess. 184 (1936); Weinstein, *The Bankruptcy Law of 1938*, 116 (1938). These authoritative sources for discovering the intent behind the Chandler Act refer only to the second consideration mentioned in the text. The first is recognized in Morgan, *Section 59b of the Chandler Act: An Impediment to Involuntary Proceedings*, 37 Ill. L. Rev. 215, 219 (1942), 17 Ref. J. 89, 90 (1943).

creditors soon appeared.<sup>42</sup> It was suggested that the Chandler Act provision afforded an unscrupulous debtor a means for frustrating almost any involuntary bankruptcy petition lodged against him by the simple expedient of his denying liability to any or all of the petitioning creditors or disputing the amounts of their claims.<sup>43</sup> Section 59b was accordingly amended by the Omnibus Act of 1952 to substitute for the positive requirement that the liability to each of the petitioners be fixed, the less rigorous and negatively phrased qualification that the claims be "not contingent as to liability."<sup>44</sup> The reason given for this change was that the language of the Chandler Act was susceptible of a construction which would require every petitioner to have a claim founded on a fixed liability of the kind specified in section 63a(1), namely, one "evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition."<sup>45</sup> Since such a construction would have been unduly restrictive, the implication was removed by eliminating the reference to "fixed" liability.

This amendment still did not deal satisfactorily with the case presented when the debtor disputed the amount of the petitioning creditor's claim and contested his qualification as a petitioning creditor with a liquidated claim.<sup>46</sup> The change effected by the Omnibus Act of 1962 is a further step in the direction of relaxing the restrictive qualifications for petitioning creditors. It leaves the disqualification of the contingent creditor as it is,<sup>47</sup> but it eliminates any positive requirement that a petitioning creditor's claim be liquidated. A clause has nevertheless been added to the subdivision which in effect disqualifies the holder of an unliquidated claim under certain circumstances. The pur-

<sup>42</sup> 3 Collier, Bankruptcy 583 (14th ed. 1941); Morgan, *supra* note 41.

<sup>43</sup> Morgan, *supra* note 41. Morgan referred to the unreported case of *In re The Samaritan Treatment, Inc.*, in which the petition was dismissed on a denial of liability to the petitioning creditor. The liability was the subject of pending litigation, but after the dismissal of the bankruptcy petition, the disputed claim was settled for a substantial amount. See also note 49 *infra*.

Dismissal of an involuntary petition in bankruptcy was sustained in *In re Garrett & Co.*, 134 F.2d 227 (7th Cir. 1943), where the debtor denied any liability to the sole petitioner, who claimed over \$500 to be due for accounting services rendered the debtor.

<sup>44</sup> 66 Stat. 425 (1932).

<sup>45</sup> H.R. Rep. No. 2320, 82d Cong., 2d Sess. 8 (1952).

<sup>46</sup> MacLachlan, Bankruptcy § 40 (1956).

<sup>47</sup> Thus, the holder of an unmatured note remains disqualified from joining in a petition against an endorser, although he might have been a petitioner before the Chandler Act. See 3 Collier, Bankruptcy 575 (14th ed. 1941). Another example of a contingent creditor is found in *In re State Realty Co.*, 131 F. Supp. 554 (D. Mass. 1955), involving the contingent claim of a surety against the bankrupt for reimbursement. Cf. *In re Lawton*, 119 F. Supp. 724 (S.D. W. Va. 1954), where the existence of the debtor's liability in fraud was said to depend on the uncertain outcome of a plenary suit, even if the measure of liability, once established, could be predicted. A surety's liability to the creditor is not ordinarily a contingent one. *In re Gibraltar Amusements, Ltd.*, 187 F. Supp. 931 (E.D.N.Y. 1960), *aff'd*, 291 F.2d 22 (2d Cir.), cert. denied, 368 U.S. 925 (1961). What additional claims are contingent but provable under the act is a matter of some doubt. See 3 Collier, *supra*, at ¶ 63.30 (1961).

pose of the change is most easily understood by taking note of the criticisms it was intended to meet. As Professor Moore had pointed out,

*A* may have a large unliquidated, and unsecured claim and be incapacitated to become a petitioning creditor although there is little doubt that \$500 or more is due him on his claim. Or he may have a claim for \$10,000 that is partially secured; and it may be reasonably clear that the difference between the \$10,000 and the amount of his security is far in excess of \$500, yet the exact value of his security is not then determined and hence *A*'s unsecured claim is unliquidated.<sup>48</sup>

Moreover, a respondent, by urging a small counterclaim against an apparently liquidated claim of *A* for \$10,000, might remove it from the category of liquidated claims and thereby disqualify *A* from serving as a petitioner.<sup>49</sup> Under the Chandler version of section 59b, *A* could not be a qualified petitioner. The result was to accord inordinate importance to the matter of whether a creditor's claim was liquidated and to encourage resistance to involuntary petitions by the raising of disputes as to the amount of petitioners' claims in responsive pleadings. The undeniable interest in avoiding collateral inquiries at the hearing on an involuntary petition does not warrant the imposition of an absolute requirement that every petitioner's claim be liquidated. The advantage of simplifying proceedings in order to expedite hearings on

<sup>48</sup> Moore, *op. cit.* supra note 30, at 435. It was doubtful prior to the amendment that a secured creditor could ever qualify as a petitioning creditor without surrendering his security, in view of the necessity of determining the value of the security to be deducted from the face amount of the debt. In *re Silver*, 109 F. Supp. 200, 205 (E.D. Ill. 1952), *aff'd*, 204 F.2d 259 (7th Cir. 1953); In *re Central Ill. Oil & Ref. Co.*, 133 F.2d 657, 660 (7th Cir. 1943) (*dictum*). But see In *re Gibraltar Amusements, Ltd.*, supra note 47, 187 F. Supp. at 935; In *re Hayes*, 127 F. Supp. 514 (D. Alaska 1955); In *re Mann*, 117 F. Supp. 511 (D. Md. 1952).

<sup>49</sup> An unreported case was brought to the attention of the National Bankruptcy Conference, in which a bankrupt was resisting an involuntary petition by relying on counterclaims against petitioning creditors. Even if the total of the counterclaims had been deducted in full, the petitioners' claims exceeded the statutory minimum of \$500. The 1962 amendment withdraws any basis for the debtor's resistance in such a case.

Setoffs or counterclaims asserted against three of four petitioners in *Harris v. Capehart-Farnsworth Corp.*, 225 F.2d 268 (8th Cir. 1955), had been held by the district court not to disqualify them, not to be litigable in the trial of the issues pending adjudication, and to be entitled only to nominal value in the determination of the issue of solvency of the alleged bankrupt. In reversing, the court of appeals sustained the request of the debtor to have his claims tried on the merits. The court made no reference to the existing requirement of section 59b that petitioners' claims be liquidated, beyond observing that "there seems to be no sound reason why a set-off or counterclaim founded upon a contract between an alleged bankrupt and a petitioning creditor cannot be liquidated in bankruptcy proceedings." *Id.* at 270. See also *Schreffler v. Schreffler*, 155 F.2d 221 (10th Cir. 1946). The 1962 amendment recognizes the propriety of a trial of the issues raised by a responsive pleading asserting a set-off or counterclaim, but vests discretion in the court to disqualify a petitioner if it cannot be determined without undue delay whether his claim is enough, when added to the claims of other petitioners, to reach the \$500 minimum.

involuntary petitions must be weighed against the desirability of allowing creditors with undeniably valid claims to join in a bankruptcy petition notwithstanding some uncertainty as to the precise amount of their claims.

The objective of the Chandler amendment of section 59b can be served by allowing the holder of any unliquidated claim that is provable to be a petitioning creditor, unless there is doubt that the aggregate of the claims of the petitioning creditors totals \$500 or more.<sup>50</sup> If the alleged bankrupt contests that point and the court cannot readily determine that the aggregate of the petitioners' claims will reach the statutory minimum without unduly delaying the decision upon the adjudication, then the creditor holding the unliquidated claim shall be disqualified.<sup>51</sup> Dismissal does not necessarily follow, however. "Creditors other than the original petitioners may at any time enter their appearance and join in the petition."<sup>52</sup> Section 59g does not require notice to the creditors before dismissal for insufficiency of qualified petitioners.<sup>53</sup> In accordance with the spirit of the Federal

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<sup>50</sup> Editorial revision administered after publication of the Committee Print referred to in note 9 *supra* deleted the words "or over" after \$500. The result is literally to suggest that the petitioning creditor or creditors must have unsecured claims aggregating exactly \$500. It is to be hoped that this unfortunate implication will cause no serious difficulty to creditors and their counsel, when they consult the act for the purpose of preparing an involuntary petition, or to the courts when the amount of the petitioner's claims is questioned by the debtor.

<sup>51</sup> If the court is satisfied that the provable claims of petitioning creditors aggregate as much as \$500, no individual petitioner's claim need be liquidated. Each of the required minimum number of creditors—whether three or one—must, however, have a claim provable in some amount which is not contingent. See further the perceptive discussion in Herzog, *Bankruptcy Law—Modern Trends*, 37 *Ref. J.* 20, 22-23 (1963).

It is not to be assumed that the disqualification of a petitioner for the reason that a determination of the amount of his claim would unduly delay the decision on the adjudication renders the claim nonprovable or nonallowable. The amount of the claim will have to be determined or at least estimated in a manner and within a time directed by the court in order for the claim to be allowed. If liquidation or estimation of the claim will unduly delay the administration of the estate, it is not allowable under section 57d. *Collier, op. cit. supra* note 47, ¶ 57.15. To protect such a claim from being discharged, section 63d provides that the determination that a claim cannot be allowed because of the difficulty of liquidating or estimating its amount, renders it nonprovable. *Id.* ¶ 63.36. The difficulty of determining the amount of a petitioner's claim may unduly delay the hearing on the issue of adjudication, and yet, if adjudication nevertheless eventuates, the claim may be proved and its amount determined by the bankruptcy court without necessarily causing undue delay of the administration of the estate. The question of allowance comes up later, and the court then has more time and a better opportunity to permit development of the facts underlying the dispute as to the amount of a claim.

On the other hand, the fact that a petitioning creditor's claim has been counted for the purpose of determining the sufficiency of the petition is not conclusive of its allowability or even its provability in the ensuing bankruptcy proceeding. 2 *Collier, Bankruptcy* 113 (14th ed. 1940).

<sup>52</sup> Bankruptcy Act § 59f. The phrase "at any time" means during the pendency of the proceeding. 3 *Collier, Bankruptcy* ¶ 59.31 (14th ed. 1941).

<sup>53</sup> As it does for dismissals upon the application of the petitioner or petitioners, for want of prosecution, or on consent of the parties.

Rules, which are to be followed in bankruptcy proceedings "as nearly as may be,"<sup>54</sup> any amendment required to cure a defective petition should be liberally allowed.<sup>55</sup>

*Section 64a(1)*. The first priority in the distribution of bankrupt estates is accorded to costs and expenses of administration as defined in section 64a(1), but, curiously, until the recent amendment, this comprehensive expression appeared therein merely as one of several categories of claims dealt with. In its context it arguably included only receivers' and trustees' expenses. By the amendment the expression has been promoted from its position as the fifth among the seven varieties of claims entitled to first priority to the beginning of the clause, where it will serve as a general description of all the claims listed in the clause.

The change is not merely a matter of style and symmetry, however. Since 1952 the act has included a proviso creating two classes of priorities within section 64a(1) in the event of a supersession of a proceeding under a debtor-relief chapter. The higher priority is reserved for "the costs and expenses of administration of the ensuing bankruptcy" as against the unpaid costs and expenses of administration incurred in the superseded proceeding.<sup>56</sup> The transposition of the introductory words, "the costs and expenses of administration, including," makes it clear that all the administrative costs and expenses described in section 64a(1) and incurred in the bankruptcy proceeding are intended to be accorded superiority of priority over the costs and expenses of the other proceeding.

Presumably in the interest of avoiding stilted usage, the 1962 amendments eliminated the form but not the substance of the proviso from section 64a(1) and wherever else the form had appeared in subdivisions and clauses of the act undergoing revision. The use of the proviso form has long been a feature of the Bankruptcy Act, and the 1962 legislation did not achieve any substantial reduction in its usage. The proviso has served to state an exception to or qualification of the statement to which it is appended, and it has been commonly recognized that a proviso is to be strictly construed.<sup>57</sup> The awkwardness of

<sup>54</sup> General Order 37. The Bankruptcy Act and the General Orders prevail in case of inconsistency with the Federal Rules, as General Order 37 recognizes.

<sup>55</sup> 2 Collier, Bankruptcy ¶¶ 18.09, 18.18 to .21, 18.23 (14th ed. 1940); 3 *id.* ¶ 59.32 (1941).

<sup>56</sup> The Omnibus Act of 1952 incorporated this feature in section 64a(1) to assure the trustee in the subsequent bankruptcy proceeding that the expenses he will necessarily incur will be paid ahead of expenses accumulated in the prior proceeding. Without such assurance, administration is likely to break down. See H.R. No. 2320, 82d Cong., 2d Sess. 10 (1952). Except as provided in the amendment added in 1952, the items enumerated in section 64a(1) are of equal rank and share pro rata if the estate is not sufficient to pay all of them in full. In *re Delaware Hosiery Mills, Inc.*, 202 F.2d 951, 953 (3d Cir. 1953).

<sup>57</sup> [An] exception is said to restrict the enacting clause to a particular case, while a proviso is said to remove special cases from the general enactment and

the form of the proviso removed from section 64a(1) is replaced by the awkwardness of an independent sentence introduced into one of a series of so-called clauses separated by semicolons. The absence of any indication that the sentence qualifies the rest of clause (1) is not likely to be significant. In a long provision like section 64a(1) the use of the proviso form facilitated reference to it, but that incidental convenience hardly affords a sufficient reason for its retention.

Language introduced into section 64a(1) just preceding the sentence at its end is intended to overrule *Guerin v. Weil, Gotshal & Manges*.<sup>58</sup> There, the court disallowed claims of petitioning creditors for reimbursement of expenses for appraisals and accounting services incurred in supporting the petition against a contesting debtor. The court rejected the petitioners' reliance on General Order 34, which authorizes recovery by successful petitioners of "the same costs that are allowed to a party recovering in a civil action cognizable as a case in equity."<sup>59</sup> The amendment is responsive to the court's suggestion that some express Congressional authorization would be necessary to warrant the allowance being sought.<sup>60</sup> By explicitly according priority to "the reasonable costs and expenses incurred, or the reasonable disbursements made" by petitioning creditors in a contested proceeding,

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provide for them specially, and the saving clause is said to preserve from destruction certain rights, remedies or privileges which would otherwise be destroyed by the general enactment. These distinctions, however, certainly do not motivate legislative draftsmen and judicial definition discloses that courts seldom make consistent distinction in the interpretation of the three types of limitation.

2 Sutherland, Statutes and Statutory Construction § 4830 (3d ed. Horack 1943). See also id. §§ 4932-34.

<sup>58</sup> 205 F.2d 302 (2d Cir. 1953).

<sup>59</sup> The decision is hard to reconcile with a fair reading of General Order 34. The opinion articulates a philosophy of restricting allowances in bankruptcy to those which Congress has explicitly authorized in the act and implies that the General Orders must be given a construction consistent with this view. There was only an oblique reference in the opinion to section 2a(18), which authorizes bankruptcy courts to tax costs against unsuccessful parties and against estates in proceedings under the act. For comments on the case, see Nadler, Fallacies in Judicial Attitudes Toward Legal Fees in Bankruptcy, 58 Com. L.J. 305 (1953); 54 Colum. L. Rev. 125 (1954); 29 N.Y.U.L. Rev. 1132 (1954).

<sup>60</sup> Although section 62 appears to be generally concerned with expenses of administering estates, its provisions are pretty much confined to authorizing reimbursement of expenses and allowances to officers and attorneys. Since section 64a(1) is more specific regarding reimbursement to creditors, courts have generally relied on that section in determining questions of allowability as well as priority of expenses incurred by creditors. See 3 Collier, Bankruptcy ¶¶ 62.04[2], 62.21, 62.23 (14th ed. rev. 1961). It seems appropriate, therefore, for the amendment under consideration to be made to section 64a(1).

The American Bar Association's Committee on Bankruptcy (in its Section of Corporation, Banking and Business Law) and other professional groups early went on record favoring legislation to overcome the *Guerin* case. 9 Bus. Law. No. 3, p. 4 (April 1954). Chairman Kupfer of the American Bar Association's committee stated that comparable expenses had been frequently allowed in Chapter X proceedings under Section 241, but no case authority was cited. *Ibid*.



the statute clarifies the statutory basis for General Order 34. The amendment also makes clear that the right to priority otherwise conferred shall not be lost by virtue of an adjudication on a voluntary petition filed by the debtor during the pendency of an involuntary proceeding.<sup>61</sup>

*Section 70b.* The Chandler Act prescribed a sixty-day period following adjudication for the trustee in which to exercise an option to assume or reject any executory contract.<sup>62</sup> Although the time could be extended (or reduced) for cause shown, the sixty-day limitation was too stringent in practice because of the number of cases in which the trustee either did not qualify at all within that period or did so near the expiration of the period.<sup>63</sup> While expedition of administration remains as important a consideration as ever, the premise of the 1962 amendment is that a trustee should ordinarily have at least thirty days for reaching a sound judgment on whether to assume or reject an executory contract. Accordingly the amendment gives him thirty days after his qualification when that runs longer than sixty days following adjudication. The amendment adds a sentence which recognizes for the first time anywhere in the act that a court may direct that a trustee not be appointed.<sup>64</sup> The entry of such an order has the effect of approving rejection of the debtor's executory contracts.

*Section 70f.* The last sentence of section 70f has, since 1938, required an auctioneer employed in any bankruptcy proceeding, "if an individual or a partnership, . . . [to] be a bona-fide resident and citizen of the judicial district in which the property to be sold is situated, or, if a corporation, . . . lawfully domesticated and authorized to transact such business in the State in which said judicial district is located."<sup>65</sup> The provision was inserted in the bill that became the Chandler Act to protect local against outside interests, a particular instance of need being localized in Boston.<sup>66</sup> The wisdom of including such a parochial provision in national legislation is generally doubtful.<sup>67</sup> Aside from the awkwardness of its language,<sup>68</sup> it appeared to require different auc-

<sup>61</sup> This provision is consistent with the usual rule that adjudication on such a voluntary petition will not prejudice the rights of the creditors under the earlier involuntary petition. 3 Collier, *Bankruptcy* ¶ 59.17. (14th ed. 1941).

<sup>62</sup> 52 Stat. 880 (1938). All of section 70b was new in the Chandler Act.

<sup>63</sup> H.R. Rep. No. 1208, 87th Cong., 1st Sess. 7 (1961).

<sup>64</sup> Prior to the 1962 amendment, the Bankruptcy Act was apparently drafted on the assumption that a trustee must be appointed in every case. See, e.g., §§ 7a(3) & (6), 44a, 47 & 70a. General Order 15 and Official Form No. 25, both promulgated by the Supreme Court in 1898 (the official form being No. 27 before 1939), proceed on a different assumption, however, and the Supreme Court seems never to have doubted their validity. See *Smalley v. Langenour*, 196 U.S. 93, 97 (1905).

<sup>65</sup> 52 Stat. 882 (1938).

<sup>66</sup> House Hearings on H.R. 6439, 75th Cong., 1st Sess. 98-99 (1937).

<sup>67</sup> Cf. *MacLachlan*, *Bankruptcy* 350 n.11 (1956).

<sup>68</sup> Neither a partnership nor even an individual is likely to be a citizen of any judicial district.

tioneers if the property of an estate is situated in different judicial districts. Employment of different auctioneers in such a case may or may not be in the interest of efficient administration. The amendment eliminates any requirement for an auctioneer beyond that he be "a duly licensed or authorized auctioneer in the place where the sale is to be conducted."<sup>69</sup> If the law of the place has no applicable licensing requirement, then the bankruptcy court ordering the sale is not limited in its choice of an auctioneer.

*Section 77(a)*. The main reason for amending section 77 was to provide for payment of a full filing fee of \$150 to the clerk for the district court.<sup>70</sup> Prior to the amendment the fee was "\$100 . . . in addition to the fees required to be collected by the clerk under other sections of this Act."<sup>71</sup> The fees collectible under other sections of the act now total \$50,<sup>72</sup> and the amendment does not change the amount payable with a petition under section 77.<sup>73</sup> Since the judge performs all the judicial functions exercisable under section 77, however, there is no reason for requiring any part of the filing fee to be collected and distributed by the clerk as in straight bankruptcy cases.<sup>74</sup>

A number of other conforming changes were made in section 77(a), which had not been changed since its original enactment in 1933. Thus, references to the "federal district court" and "circuit court of appeals" were conformed to the descriptions that have been proper since the Judicial Code was amended in 1948.<sup>75</sup>

*Section 160*. Under the Chandler Act section 160 conferred an apparently unlimited discretion on the judge to appoint additional

<sup>69</sup> Most states apparently have statutes requiring persons engaged in the business of auctioneering to obtain licenses. 5 Am. Jur. Auctions § 3 (1936). Often the power to license and regulate auctioneers is delegated to municipalities, and a license is typically restricted in its scope to a particular city or county. 7 C.J.S. Auctions and Auctioneers 1245 (1937).

<sup>70</sup> See H.R. Rep. No. 1208, 87th Cong., 1st Sess. 2 (1961).

<sup>71</sup> Section 77(a) had so provided since its original enactment in 1933. 47 Stat. 1474 (1933).

<sup>72</sup> The filing fee in straight bankruptcy went from \$45 to \$50 by virtue of the increase of the filing fee for the trustee from \$5 to \$10 in 1960. 74 Stat. 198 (1960), 11 U.S.C. § 76 (Supp. III, 1960).

<sup>73</sup> It may be noted that petitioners under Chapter X are required by section 132, as amended in 1960, to pay a filing fee of \$120, i.e., \$70 above the fees otherwise collectible under the act. If the petition is filed in a pending bankruptcy proceeding pursuant to section 127, the bankruptcy court presumably retains the \$50 previously collected. If a proceeding initiated by an original petition filed pursuant to section 126 eventuates in bankruptcy, \$50 of the original \$120 paid as a filing fee goes to the clerk for distribution as in any other bankruptcy case. Discrimination between section 77 petitions and those filed under Chapter X, insofar as filing fees are concerned, goes back to the Chandler Act, when the principle was established of allowing a filing fee paid with a bankruptcy petition to be deducted from the fee payable with a Chapter X petition filed thereafter in the same proceeding.

<sup>74</sup> H.R. Rep. No. 1208, 87th Cong., 1st Sess. 2 (1961).

<sup>75</sup> 62 Stat. 870, 895 (1948), 28 U.S.C. §§ 43, 132 (1958).

trustees<sup>76</sup> or remove trustees and appoint substitute trustees in Chapter X proceedings.<sup>77</sup> The 1962 amendment includes cotrustees among the persons who may be so appointed by the judge.<sup>78</sup> In any event when the judge exercises the power of appointment under the section, he must fix a hearing to consider objections to the retention of the trustee so appointed. The hearing must be held within thirty days of the appointment, and at least ten days' notice of the hearing must be given to the persons named in section 161.<sup>79</sup> These are the same persons entitled to notice of the hearing on the question whether a disinterested trustee appointed pursuant to section 156 should not be retained because not qualified or not disinterested under the act. The provision for this additional hearing was included in the Omnibus Act at the instance of the Securities and Exchange Commission.<sup>80</sup>

*Section 247.* This section prescribes the procedure for notice and hearing on applications for allowances in proceedings under Chapter X. The 1962 amendment explicitly authorizes the elimination of notice to any class of creditors or stockholders which does not participate under a confirmed plan.<sup>81</sup> Once a plan which excludes participation of any such class has been confirmed,<sup>82</sup> the disposition of allowance applications cannot affect the members of the class, and notice to them is eliminated in the interest of economy and reduction of needless

<sup>76</sup> An "additional trustee," who is to be differentiated from a disinterested trustee appointed under Chapter X, may be a director, officer or employer of the debtor. Bankruptcy Act §§ 156, 158. The additional trustee's function is restricted to that of operating the business and managing the property of the debtor during the period of his appointment. 6 Collier, Bankruptcy ¶ 8.12 (14th ed. 1947).

<sup>77</sup> *Id.* ¶ 7.10.

<sup>78</sup> Whether the cotrustee must be disinterested presumably depends on whether he is appointed for purposes other than those specified in section 189. Inferentially, a cotrustee is more than an additional trustee.

<sup>79</sup> They are creditors, stockholders, indenture trustees, the Securities and Exchange Commission and any other persons designated by the judge.

<sup>80</sup> The Commission's explanation of this proposal as originally embodied in H.R. 11587, introduced in the 85th Congress, is set out in 33 Ref. J. 18 (1959). The National Bankruptcy Conference and the Judicial Conference were originally reluctant to accept the Commission's recommendation for a hearing to be routinely required after every appointment pursuant to section 160. See Ann. Rep. of Procdgs. of Jud. Conf. of United States 26 (1958) for a statement of the Judicial Conference's position. The Commission's argument finally prevailed that removal of an objectionable trustee appointed under this section during the course of the proceeding is more likely to occur without undue delay if the hearing does not have to wait for some objector to take the initiative.

<sup>81</sup> A typical case to which the new language may apply would be one involving an insolvent corporation where no provision for stockholder participation is contained in the confirmed plan.

<sup>82</sup> Confirmation itself must be preceded by submission of the plan, after approval by the judge, to all creditors and stockholders affected by it. Bankruptcy Act § 175. After acceptance of the plan by the requisite majority of the creditors and, if the debtor is not insolvent, by the requisite majority of the stockholders, the judge holds a hearing for the consideration of the confirmation of the plan and of objections that have been made to the confirmation. Bankruptcy Act § 175. Notice of the hearing goes to creditors, stockholders and other persons specified in section 179.

paperwork.<sup>83</sup> No class is excluded from participation by a confirmation order for the purpose of this provision, however, until the time allowed for appeal from the order has expired and not even then if an appeal is pending.<sup>84</sup>

*Section 265a.* Special provisions applicable to the Securities and Exchange Commission are contained in section 265. In particular subdivision *a* lists orders entered and papers filed in Chapter X proceedings of which copies must be transmitted to the Commission. Heretofore copies of orders approving plans and modifications of plans, and copies of the plans and modifications approved, have been required to be forwarded to the Commission.<sup>85</sup> The Commission has been entitled to copies of Chapter X plans in advance of judicial approval only if the scheduled indebtedness of the debtor exceeds \$3,000,000. In such a case, section 172 requires the judge to submit for Commission examination and report any plan regarded by him as worthy of consideration, but he *may* submit a plan to the Commission for study and report in a case involving a lesser indebtedness.

By amended clauses (6) and (7) of section 265a the clerk, or the referee, in the event a reference has been made, must transmit copies of all plans, alterations and modifications, notices of all hearings thereon and orders approving any plans, alterations and modifications. Transmission of the copy of an unapproved plan pursuant to the amended provision does not impose any responsibility on the Commission to examine and report as does submission by a judge under section 172. Receipt of copies of plans, and of notices of hearings thereon, before approval will, however, enable the Commission to participate at an earlier stage in cases of under \$3,000,000 indebtedness and to make recommendations before approval of a plan has rendered their adoption impracticable.<sup>86</sup>

*Section 393a(2).* Section 393 of the Bankruptcy Act exempts from the requirements of Section 5 of the Securities Act of 1933 securities issued as certificates of indebtedness pursuant to section 344 in a Chapter XI proceeding, and any transaction in securities issued pur-

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<sup>83</sup> The administrative burden imposed by the similar notice requirements of section 496 in Chapter XII does not appear comparable to that entailed by section 247. The National Bankruptcy Conference has consistently rejected proposals to modify the existing requirements respecting notice of the hearing on the trustee's final account, or of applications for allowances of compensation for services rendered, in straight bankruptcy proceedings. See, e.g., Summary of Proceedings of Ann. Meeting of Nat. Bkrptcy. Conf., Res. No. 4 (1961); Summary of Proceedings of Ann. Meeting, Res. No. 33 (1960). The Conference's position is that creditors of a bankrupt estate are always entitled to notice of a proposed disposition of any money in an estate, no matter how small.

<sup>84</sup> The Judicial Conference had objected to eliminating the notice requirement as to any class before its participation has been finally and completely foreclosed. Ann. Rep. of Procdgs. of Jud. Conf. of United States 26 (1958).

<sup>85</sup> Bankruptcy Act §§ 265a(6) & (7).

<sup>86</sup> H.R. Rep. No. 1208, 87th Cong., 1st Sess. 8-9, 11-12 (1961).

suant to a Chapter XI arrangement, subject to certain limitations spelled out in section 393. Section 5 of the Securities Act prohibits use of the mails or facilities of interstate commerce to sell, to deliver for or after sale, or to offer to sell or buy any security for which no registration statement is in effect.<sup>87</sup> The Securities and Exchange Commission raised the objection that the exclusion in section 393 went too far in purporting to cover exchanges of securities for securities, since a Chapter XI arrangement can not deal with the rights of either secured creditors or stockholders.<sup>88</sup> The purpose of the section is served adequately by confining the statutory dispensation to exchanges for claims against the debtor and eliminating the reference to exchanges for securities.<sup>89</sup>

APPENDIX

The changes effected by Public Law 87-681, referred to in the foregoing article as the Omnibus Act of 1962, are shown in this appendix by italicization of new language and bracketing of deleted portions of the Act. Some purely technical and conforming changes are omitted in this presentation.

*Amended Section 2a(1)*

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, [or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions,] or in any cases transferred to them pursuant to this Act;

*Added Section 2a(22)*

(22) *Exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States.*

*Amended Section 21d*

d. Certified copies of proceedings before a referee, or of papers, when issued by the clerk, [or] referee, *or an employee of the referee designated by his order, which shall be filed in the office of the clerk,* shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

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<sup>87</sup> 48 Stat. 77 (1933), as amended, 15 U.S.C. § 77e (1958).

<sup>88</sup> H.R. Rep. No. 1208, 87th Cong., 1st Sess. 12 (1961); 33 Ref. J. 19 (1959). The permissible scope of a Chapter XI arrangement is spelled out in section 357 of the act.

<sup>89</sup> Section 393 copies almost verbatim section 264 in Chapter X and section 518 in Chapter XII. The sections in these chapters appropriately exempt exchanges of securities for securities.

BANKRUPTCY LEGISLATION OF 1962

*Amended Section 48c's First Paragraph*

c. Trustees. [—] The compensation of trustees for their services, payable after they are rendered, shall be a fee of \$10 for each estate, deposited with the clerk at the time the petition is filed in each case, except [when a fee is not required from a voluntary bankrupt] *where installment payments may be authorized pursuant to section 40 of this Act*, and such further sum as the court may allow, as follows:.

*Amended Section 57i*

i. Whenever a creditor whose claim against a bankrupt estate is secured, *in whole or in part*, by the individual undertaking of [any] a person, fails to prove and file [such a] *that claim*, [such] *that person* may do so in the creditor's name, and [, if he discharge such undertaking in whole or in part,] he shall be subrogated to [that extent to] the rights of the creditor, *whether the claim has been filed by the creditor or by him in the creditor's name, to the extent that he discharges the undertaking except that in absence of an agreement to the contrary, he shall not be entitled to any dividend until the amount paid to the creditor on the undertaking plus the dividends paid to the creditor from the bankrupt estate on the claim equal the amount of the entire claim of the creditor. Any excess received by the creditor shall be held by him in trust for such person.*

*Amended Section 58a(6)*

(6) the proposed compromise of [any] a controversy [in which the amount claimed by either party in money or value exceeds \$1,000] *unless the court, for cause shown, directs that notice be not sent;*.

*Amended Section 59b*

b. Three or more creditors who have provable claims [liquidated as to amount and] not contingent as to liability against [any] a person, [which amount] *amounting* in the aggregate to \$500 in excess of the value of any securities held by them, [if any, to \$500 or over] or, if all of the creditors of [such] *the person* are less than twelve in number, then one or more of [such] *the creditors* whose claim or claims equal [such] *that amount*, may file a petition to have him adjudged a bankrupt; *but the claim or claims, if unliquidated, shall not be counted in computing the number and the aggregate amount of the claims of the creditors joining in the petition, if the court determines that the claim or claims cannot be readily determined or estimated to be sufficient, together with the claims of the other creditors, to aggregate \$500, without unduly delaying the decision upon the adjudication.*

*Amended Section 64a(1)*

SEC. 64. DEBTS WHICH HAVE PRIORITY.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) *the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary [fund] and [for the referees'] expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition,*

[shall have been] *is* recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; [the costs and expenses of administration, including] the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of title 18 of the United States Code, or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, [to the petitioning creditors in involuntary cases and] to the bankrupt in voluntary and involuntary cases, *and to the petitioning creditors in involuntary cases, and if the court adjudges the debtor bankrupt over the debtor's objection or pursuant to a voluntary petition filed by the debtor during the pendency of an involuntary proceeding, for the reasonable costs and expenses incurred, or the reasonable disbursements made, by them, including but not limited to compensation of accountants and appraisers employed by them, in such amount* as the court may allow [:]. [Provided, however,\* That where] *Where* an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any;

*Amended Section 70b*

b. [Within sixty days after the adjudication, the] *The* trustee shall assume or reject [any] *an* executory contract, including *an* unexpired lease[s] of real property, *within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but* [Provided,\*\* That] the court may for cause shown extend or reduce [such period of] *the* time. Any such contract or lease not assumed or rejected within [such] *that* time [, whether or not a trustee has been appointed or has qualified,] shall be deemed to be rejected. *If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed.* A trustee shall file, within sixty days after adjudication or *within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time,* a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee[:]. [Provided, however,\*\* That the court may for cause shown extend or reduce such period of time.] Unless a lease of real property [shall] expressly otherwise provides, a rejection of [such] *the* lease or of any covenant therein by the trustee of the lessor [shall] *does* not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subse-

\* The two preceding words were italicized as they appeared in the statute before amendment.

\*\* The deleted words, "Provided" and "Provided, however," were italicized as they appeared in the statute before amendment.

quently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same [shall be] *is* enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns such contract or lease to a third person, [shall] *is* not [be] liable for breaches occurring after [such] *the* assignment.

*Amended Section 70f*

f. The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. Whenever [any] *a* sale of real or personal property of [any] *a* bankrupt is made by or through [any] *an* auctioneer employed by the court, receiver, or trustee, [such] *the* auctioneer [, if an individual or a partnership, shall be a bona fide resident and citizen of the judicial district in which the property to be sold is situated, or, if a corporation, shall be lawfully domesticated and authorized to transact such business in the State in which said judicial district is located] *must be a duly licensed or authorized auctioneer in the place where the sale is to be conducted.*

*Amended Section 77(a)*

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction [such] *the* corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the 'Commission') [:]. [*Provided,\** That when] *When* any railroad, although engaged in interstate commerce, lies wholly within one State, [such] *the* proceedings shall be brought in the [Federal] *United States* district court [of] *for* the district in which its principal operating office [in such State] *has been located* during the preceding six months or the greater portion thereof [has been located]. The petition shall be accompanied by payment to the clerk of a filing fee of [\$100,] *\$150* [which shall be in addition to the fees required to be collected by the clerk under other sections of this Act]. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that [such petition] *it* complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which [such] *the* order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section,

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\* The word "Provided" was italicized as it appeared in the statute before amendment.



which a [Federal] court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and [circuit] courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a 'debtor.' Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which such other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of [such] the other debtor; and upon the filing of [such] the petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that [such petition] it complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon [such] the court, if it approves [such] the petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to [such] the other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 per centum of all the indebtedness of [such] the corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if [such] the corporation has not filed a petition under this section, file with the court in which [such] the corporation might file a petition under this section, a petition stating that [such] the corporation is insolvent or unable to meet its debts as they mature and that [such] the creditors have claims aggregating not less than 5 per centum of all such indebtedness of [such] the corporation and propose that it shall effect a reorganization; copies of [such] the petition shall be filed at the same time with the Commission and served upon [such] the corporation. [Such] The corporation shall, within ten days after such service, answer [such] the petition. If [such] the answer [shall] admits the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If [such] the answer [shall deny] denies either the jurisdiction of the court or any material allegation of the petition, the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury, and if he [shall] finds that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise, he shall dismiss the petition. If [any] such a petition [shall be] is so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. [In case any] If a petition [shall be] is dismissed, neither the petition nor the answer of a debtor [shall] constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this Act or in any State or

[Federal] *United States* court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors, [shall,] prior to the hearing provided for in paragraph (1) of subsection (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition.

*Amended Section 160*

SEC. 160. In any case, the judge at any time, without or upon cause shown, may appoint additional trustees *and cotrustees*, or remove trustees and appoint substitute trustees; *and upon each such appointment the judge shall fix a hearing to be held within thirty days to consider objections to the retention in office of the trustee. At least ten days' notice of the hearing shall be given to the persons designated in section 161 of this Act.*

*Amended Section 247*

SEC. 247. The judge shall fix a time of hearing for the consideration of applications for allowances, of which hearing notice shall be given to the applicants, the trustee, the debtor, the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate, except that *notice need not be given to any class of creditors or stockholders which does not participate under the plan as confirmed by the court from which no appeal is pending and the time allowed for appeal has expired.* [, in] In the case of allowances for services and reimbursement in a superseded bankruptcy proceeding, notice need be given only to the applicants, the debtor, the trustee, and the unsecured creditors, and may be given to such other classes of creditors or other persons as the judge may designate. In the case of the dismissal of a proceeding under this chapter and the entry of an order therein directing that bankruptcy be proceeded with, notice of the hearing to consider allowances need not be given to stockholders.

*Amended Section 265a(6) & (7)*

(6) [the orders approving any plan or plans, together with copies of such plans] *copies of plans, alterations or modifications in plans, and any notices of hearings on the plans, alterations, or modifications;*

(7) the orders approving [alterations or modifications in plans, together with copies of such alterations or modifications] *any plan or plans or alterations or modifications in plans;.*

*Amended Section 393a(2)*

(2) any transaction in any security issued pursuant to an arrangement in exchange for [securities of or] *claims* against the debtor or partly in [such] exchange and partly for cash and/or property, or issued upon exercise of any right to subscribe or conversion privilege so issued, except [(a)] (A) transactions by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the arrangement, and [(b)] (B) transactions by a dealer as to securities constituting the whole or a part of an unsold allotment to or subscription by [such] *the* dealer as a participant in a distribution of such securities by the issuer or by or through an underwriter otherwise than pursuant to the arrangement.