UTAH BANKRUPTCY PRACTICE IN THE MODERN ERA

1950 - 2015

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Hon. Judith A. Boulden[3]
Kenneth L. Cannon II[4]

THE RITTER YEARS

Judge Tillman Davis Johnson, described as a skinny little animated shoestring of a man,[5] took senior status on May 28, 1949,[6] at 91 years of age and after over 34 years on the federal bench - the oldest practicing federal judge in the United States at the time. The end to Judge Johnson's long judicial tenure was anticipated for some time among the members of the bar, even to the extent that in 1944, the Attorney General of the United States had written to Judge Johnson suggesting it might be appropriate to retire. Judge Johnson responded to the Attorney General that it was none of his business when he retired[7] and remained an active judge for five more years.

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[1] Much of the anecdotal information reported here was gleaned from interviews of Utah judges and lawyers. Though credit is not given to specific interviewees, we recognize the time and memories of the following, in no specific order: R. Mont McDowell, Roger G. Segal, Annette Jarvis, Ralph R. Mabey, Bruce S. Jenkins, Sara Jense, Glen E. Clark, Danny Kelly, Anna Drake, David Leta, Kevin Whatcott, Jeffrey Hagen, William T. Thurman, Kevin R. Anderson, R. Kimball Mosier, Joel T. Marker, Duane H. Gillman, Kenneth Rushton and Steven J. McCardell.

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[2] Originally published in 2010. Updated in 2015 by Judge Boulden.

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[4] Kenneth L. Cannon II, Partner, Durham Jones & Pinegar P.C.

[5] Hon. Bruce S. Jenkins, *Lessons Learned From The Principles, Practices and Personalities of Utah's First Chief Federal Judge*, Federal Bar Assoc. Seminar, Salt Lake City, UT Nov. 7, 2008, at p. 5.

[6] Biographical Directory of Federal Judges, Federal Judicial Center, http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (last visited Nov. 21, 2010.)

[7] Jenkins, *supra* note 5, at p. 7.

Among those members of the bar anticipating Judge Johnson's retirement was Democrat Willis W. Ritter who, it was rumored, had been promised the judgeship by Senator Elbert D. Thomas.[8] The fulfillment of that promise was to have an impact on not only practice in the federal court for years to come but on the appointment of four bankruptcy referees spanning the next 30 years. In due course President Harry Truman appointed Willis W. Ritter to an interim recess appointment as U.S. District Judge for the District of Utah on October 21, 1949, with final commission on July 7, 1950.[9] The appointment process had been bitter and controversial, entailed extensive closed-session hearings with more than 70 witnesses called in Salt Lake City and Denver regarding Ritter's fitness for the position,[10] and ended with Judiciary Committee approval by a vote of six to three.[11] During the second phase of the appointment hearings held in Salt Lake City, William H. Leary, Dean of the University of Utah Law School, testified in Ritter's behalf.[12]

Leary, the last child of ten of Irish immigrant parents, was born June 5, 1881, on his father's tobacco farm in Hatfield, Massachusetts.[13] He eventually followed an older brother (who

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[8] Jenkins, *supra* note 5 at p. 6.

[9] FJC Bio. Dir. *supra* note 6. Service to the court terminated on March 4, 1978, due to death. See also *Federal Judge Willis W. Ritter Confirmed*, PARK RECORD, July 6, 1950.

[10] The confirmation process became bitter by some competing for the position, by the Mormon desire for a Mormon judge, and by the Republican desire to wait until a Republican president could appoint a Republican. Questions of Ritter's loyalty, morality and arbitrary behavior were raised, both directly and behind the scenes. The bitterness of the process is said to have significantly affected Ritter's actions over the next twenty-eight years on the bench. Jenkins, *supra*, note 5 at p. 17.

[11] *Federal Judge Willis W. Ritter Confirmed*, PARK RECORD, July 6, 1950.

[12] Cowley, Patricia F. and Parker M. Nielson, *Thunder Over Zion: The Life of Chief Judge Willis W. Ritter*, 153 (Salt Lake City, Utah: The University of Utah Press) (2007).

[13] Dean William H. Leary, 2 Utah L. R. 1, 5 (1950) (foreword).

owned a string of stockyards in Utah and Idaho) to Utah. Leary graduated from the University of Chicago and in 1908 was admitted to the Utah Bar and practiced in Salt Lake City. Two years later in 1910 he ran unsuccessfully for city justice as a Democrat.

The College of Law at the University of Utah was established in 1913. In 1916, eight years after being admitted to the bar and three years after its establishment, Leary was appointed Dean of the University of Utah School of Law, succeeding Frank E. Holman.[14] Initially the position was part time because World War I significantly reduced the Law School enrollment, and Leary continued his general practice of law. When the War ended, Leary moved toward the goal of obtaining accreditation of the Law School. Leary was the school's one full-time teacher with other classes conducted by judges and lawyers as part-time instructors.[15] During 1921-1922, Ritter was enrolled in the Law School as an undergraduate.[16] In 1926, Leary was able to achieve accreditation for the Law School by, among other things, obtaining two full-time law professors in addition to himself. One of the new law professors was Willis W. Ritter, who had recently graduated from the University of Chicago Law School.[17] Leary and Ritter became academic colleagues, and that relationship lasted through the time of Ritter's 1949 District Court interim appointment.

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[14] *Id.* at p. 5, 8.

[15] Cowley, *Thunder Over Zion*, *supra* note 12, at p. 27.

[16] Ritter eventually graduated from the University of Chicago Law School and began the practice of law. *Id.*, at p. 28.

[17] Cowley, *Thunder Over Zion, supra* note 12, at p. 32.

During his 34 years as Dean of the Law School,[18] Leary was described as having sound scholarship and distinguished service in building a fledgling law school and having a dry and pungent wit.[19] Over those same years, Ritter was described as a popular and highly respected professor,[20] but also demanding and tough, and was even described as *"The Paper Chase* personified."[21] During Ritter's appointment hearings, Leary testified that he knew Ritter intimately and further testified to Ritter's temperament.

William H. Leary Appointed as Referee

Leary retired as Dean of the Law School in 1948[22] but continued as acting dean until a successor was appointed. When Ritter was appointed to the bench, he appointed Leary bankruptcy referee[23] on November 28, 1949,[24] to replace Thomas D. Lewis. We have no information why Lewis, who had served for ten years as referee, was replaced, although he would have been 84 years old. Leary was 68 at the time of his appointment, and he continued in the referee position for eight years until his death on April 6, 1957, at the age of 76.

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18 2 Utah L.R. 1, *supra* note 13, at p. 1, 2.

19 2 Utah L.R. 1, *supra* note 13, at pp. 5, 10.

20 Cowley, *Thunder Over Zion, supra* note 12, at p. 39.

21 Jenkins, *supra* note 5, at p. 13. One of Professor Ritter's students was Bruce S. Jenkins. *Judge Bruce S. Jenkins*, interviewed by James Holbrook, Tenth Circuit Historical Society, Mar. 13, 2006. A 1932 article in the UNIVERSITY OF UTAH DAILY CHRONICLE described Ritter as "a big little man" who taught more in one hour than other professors did in a week, and as "impatient with the dumbbell and the sluggard."

22 Cowley, *Thunder Over Zion, supra* note 12, at p. 90-91.

23 2 Utah L.R. 1, *supra* note 13, at p. 11.

24 *4 Named to Telegram Honor Roll*, SALT LAKE TELEGRAM, Dec. 3, 1949.

Leary's appointment highlights issues regarding the referee appointment process under the 1898 Bankruptcy Act and the modifications made thereto by the 1938 Chandler Act. The 1940 Report of the Attorney General's Committee on Bankruptcy Administration questioned who, under the statute or in practice, was to appoint the referee, the chief judge or a concurrence of a majority of the district judges in the district.[25] The Report also raised concerns that the only qualifications of referee required by the Chandler Act were that referees be residents of their respective districts and members in good standing at the bar of their district courts. Additional criticisms addressed by the A.G.'s 1940 Report related to possible political appointments, the possibility of personal relationships between the appointing judge and the referee, the lack of a requirement of bankruptcy experience, and the lack of guidelines regarding legal experience.[26] If political affiliation, personal relationship, lack of bankruptcy experience, and age are viewed as negatives, then Leary's appointment would have fueled the suspicion that referees were patronage appointments enjoyed by the federal judiciary (in other words, appointments made for the political advantage of judges). Certainly the lack of transparency in the appointment process added to that suspicion.

We have no evidence to indicate that Leary was not an appropriate appointee. Although his experience was largely in academics, he enjoyed a "profound"[27] knowledge of the law, was a skilled administrator, was perceptive of the human condition, and was a hard and persevering worker–all in all, the description of an ideal bankruptcy referee.

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[25] *Administration of the Bankruptcy Act: Report of the Attorney General's Committee on Bankruptcy Administration 1940*, at P. 54 (U.S. Gov. Printing Office, 1941) (hereinafter "A.G.'s 1940 Report").

[26] *Id.* at pp. 56-57.

[27] 2 Utah L.R. 1, *supra* note 13, at p. 9.

During his service as referee, Leary saw a relatively significant increase in bankruptcy filings. A wartime buildup had revitalized Utah's defense installations including private defense contractors, especially those that produced missiles - Thiokol, Sperry Rand, Hercules, and Marquardt,[28] and expanded uranium development in the Colorado Plateau had brought prosperity to the Wasatch and Oquirrh Fronts. There was also an increased demand for processed goods. In Utah, farms produced sugar beets for plants owned by Amalgamated and Utah-Idaho Sugar, cattle for meatpackers including Armour, Cudahy, Doctorman, Jordan, McFarland, and Miller, and farm produce for canning companies such as Blackington and Woods Cross. Industrial production from the Geneva Steel plant shipped out rolled steel, and smelters at Midvale, Garfield, and Tooele refined and processed copper, lead, and zinc from Utah's mines.[29]

This prosperity was also accompanied by a yearly increase in bankruptcy filings. From bankruptcy filings for the fiscal year ending June 30, 1950, the filings almost tripled to 482 for the fiscal year ending June 30, 1957.[30] The increase in filings also occurred at a time when the state was experiencing an increase in population and urbanization. Between 1940 and 1950, Utah's population increased by 25 percent, and Salt Lake County alone increased from 211,000 to 274,000, with the Wasatch Front comprising 70 percent of the total population of Utah.[31]

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[28] Thomas G. Alexander, *Utah, The Right Place*, http://historytogo.utah.gov/utah_chapters/utah_today/coldwarprosperity.html (last visited Aug. 23, 2010).

[29] *Id.*

[30] Administrative Office of the U.S. Courts. William T. Rule II, Ph.D., Bankruptcy Judges Division.

[31] Wendell B. Anderson, *The Work of the Utah Local Government Survey Commission*, THE WESTERN POLITICAL QUARTERLY (1957) http://www.jstor.org/pss/444258 (last visited Aug. 30, 2010).

The final chapter in Leary's term as referee involved a jurisdictional tussle with the District Court that highlighted challenges in the District Court bench in Utah at the time. A. Sherman Christensen was appointed by President Dwight D. Eisenhower and confirmed by the Senate on May 8, 1954 to become the second United States District Judge in Utah,[32] some say in an attempt to dilute Judge Ritter's power.[33] Thus began a difficult 17-year relationship between Ritter and Christensen. Shortly after Judge Christensen's appointment, a contractor named Oscar M. Lyman filed a voluntary bankruptcy petition,[34] and the case appears to have been assigned to Judge Ritter and referred to Referee Leary. Unauthorized postpetition collection efforts by a creditor in state court created jurisdictional headaches in Leary's administration of the case.[35] Over two years after Lyman's bankruptcy filing, another of his creditors filed a collection action in District Court, and this case[36] was assigned to Judge Christensen. After the District Court complaint was served upon Lyman, the bankruptcy trustee requested and received a restraining order from Referee Leary prohibiting the plaintiff from proceeding further in the District Court until a determination was made if the debt was dischargeable. A copy of the TRO was filed in the District Court action on December 17, 1956, and the next day, as luck would have it, Judge

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[32] Cowley, *Thunder Over Zion, supra* note 12, at p. 200.

[33] *Id.*

[34] *In re O.M. Lyman*, Case No. B-190-54, July 14, 1954. Findings of Fact, Conclusions of Law and Order dated Nov. 10, 1959.

[35] Lyman had surrendered certain construction equipment prepetition to secured creditor C.I.T Corporation, and despite the bankruptcy filing, C.I.T. Corporation proceeded to liquidate its collateral postpetition through an existing state court receivership of an alleged related partnership. Once a trustee was appointed in Lyman's case, the trustee proceeded to attempt to recover the surplus sales proceeds for the benefit of the estate and obtained a Turnover Order and Restraining Order against C.I.T. Corporation from Referee Leary. *In re: O. M. Lyman*, U.S. Dist. Ct., Dist. of Utah, B-190-54, Findings of Fact, Conclusions of Law and Order, Nov. 10, 1959.

[36] *United Pacific Insurance Company v. O. M. Lyman* (C 152-56) (a civil action for damages to property asserting $37,007 in damages). Order to Show Cause, Civil No. C-151-56, p. 1, Jan. 11, 1957.

Christensen came across the TRO as he was reviewing inactive cases to determine if there was reason for failure to diligently prosecute the cases. As Judge Christensen stated,

> [T]his Court . . . informally suggested to the said Referee and to counsel upon whose behest the said order was procured and filed . . . the apparent inappropriateness of the Referee's enjoining proceedings in the above entitled cause and thus requiring inactivity in connection therewith, contrary to the policy of the court . . . without at least some contact or representation to this Court to ascertain whether any such extraordinary proceedings would be reasonably necessary or proper on the part of the Referee or counsel for the defendant.[37]

The issue apparently percolated until, on January 11, 1957, Judge Christensen issued an Order to Show Cause to both Referee Leary and Lyman's attorney. Leary filed a statement in response indicating,

> I was sorry to learn Your Honor was disturbed by the injunction issued in the Lyman bankruptcy against United Pacific Insurance Company. . . . [I]t was issued in a routine manner with no knowledge as to whether the case had been assigned or to who . . . and that two or three injunctions have been issued in the matter . . . so this was just another routine injunction."[38]

Leary and Lyman's attorney relied on the argument that the injunction applied only to the litigants, and not Judge Christensen himself, and case law approving an injunction issued by a New Jersey federal court staying proceedings in a Pennsylvania federal court. Christensen disputed Leary's ability to restrain a case pending in a coordinate branch of court. The Order to Show Cause was heard about a week later, and Ritter's biography describes the hearing as a "clash in judicial style between Ritter and Christensen. . ."[39] with the 78 year-old Leary caught in the middle. However, those familiar with bankruptcy law today will recognize a touchy area of

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[37] Order to Show Cause, Civil No. C-151-56, p. 2, Jan.11, 1957.

[38] Statement of Referee on Order to Show Cause, U.S. Dist. Court, Dist. of Utah, Civil No. C-152-56, p.1.

[39] Cowley, *Thunder Over Zion, supra* note 12, at p. 203.

law involving the ability of the bankruptcy court, as a unit of a district court, to stay district court proceedings in the referred case. Rather than focusing on the legal issue, Ritter's biography states that he took issue with Christensen's disrespectful treatment of "one of the most beloved and highly revered members of our profession," and accused Christensen of having "abused him [Leary] unmercifully" in the presence of local and out-of-state lawyers."[40] The biography goes on to say that Leary died 78 days later, "with Ritter at his bedside, still tortured by memories of the hearing, addressing himself to the 'judge' in his dying delirium."[41]

Clinton D. Vernon

Given the general circumstances of the relationship between Ritter and Christensen over administrative matters, Ritter's feeling about Christensen's treatment of Leary, and the Judicial Code's provision for appointment by the senior district judge of all officials to be appointed by the court in case the majority of judges cannot agree,[42] it is probably safe to say that Ritter made his next referee appointment without much input from Christensen.[43] Ritter once again turned to a long-time friend who had assisted in his judicial appointment, Clinton D. Vernon.

Clinton Dewitt Vernon was born on April 22, 1907, in Logan, Utah,[44] and received his law

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40 Cowley, *Thunder Over Zion*, *supra* note 12, at p. 204.

41 *Id*.

42 A.G.'s 1940 Report, *supra* note 25, at p. 55.

43 Jenkins, *supra* note 5, at p. 20, stating that the appointment of the referee was Judge Ritter's choice only.

44 Individual record, Clinton Dewitt Vernon, http://www.fmailysearch.org/eng/secarch/IGI/individual_record.asp?, submission search 5596000-0518109111826, C.D. #146, pin #3735037.

degree from George Washington University in 1932. He held several positions in Washington[45] and, after returning to Utah, was admitted to the Utah State Bar in 1940.[46] Ritter and Vernon were "longtime friends"[47] and political associates. Vernon served as secretary of the Utah Senate from 1945-46,[48] was Utah chairman of the Democratic Party from 1946 to 1948, and also served as a delegate to the Democratic National convention from Utah in 1948.[49] He had enlisted Ritter's assistance in defending the contested election of Democrat Walter K. Granger to the U.S. House of Representatives in 1941.[50] During the nomination process that led to Ritter's appointment as a District Judge, Vernon strongly advocated that Senator Elbert D. Thomas[51] continue to support Ritter's appointment.

Vernon continued his political career during that same eventful year of 1948, when Harry Truman defeated Thomas Dewey. Utah had voted 54 percent Democratic and 45 percent Republican in the presidential election, but Republican Wallace F. Bennett defeated Democratic incumbent three-term senator Elbert D. Thomas. The political split continued on a state level, with J. Bracken Lee elected governor of Utah as a Republican, defeating incumbent Herbert B.

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45 Asst. Sec. to Senator William H. King, legal secretary to a U.S. Judge, attorney in the Agricultural Adjustment Administration, and assistant U.S. Attorney in the Dept. of Justice. *Who's Who in American Law*, Marquis.

46 *Id*.

47 Cowley, *Thunder Over Zion*, *supra* note 12, at p. 173.

48 *Who's Who in American Law*, *supra* note 45.

49 http://politicalgraveyard.com/bio/verna-vigorito.html#0LM0PIXRK (last visited Aug. 24, 2010).

50 Vernon employed Ritter to represent Granger before the Committee on House Administration of the United States House of Representative where Ritter was successful in having the challenge to Granger's election dismissed. Cowley, *Thunder Over Zion, supra* note 12, at p. 90.

51 Cowley, *Thunder Over Zion, supra* note 12, at p. 102.

Maw principally because of alleged mismanagement of the state's liquor monopoly.[52] During this same election, Democrat Vernon was elected Attorney General for the State of Utah with 126,895 votes, defeating A. Pratt Kesler with 99,745 votes.[53] Vernon served until the next election in 1953, and among his assistants was Bruce S. Jenkins who had just graduated from law school and who had passed the bar in 1952.[54] Vernon was defeated in the next election, and then practiced law in the firm of Reichman, Vernon and Bennett in the Kearns Building. After Leary's death, Ritter appointed 50 year old Vernon to be the bankruptcy referee on May 7, 1957.

During the period when Vernon was the referee, there was a uranium rush that christened Moab as "The Uranium Capital of the World." Uranium excitement was not limited to the redrock desert. In the 1950s and 1960s, Salt Lake City became known as the "Wall Street of Uranium Stocks," and a mania for buying penny stocks to finance developing uranium mines swept the country. People from all walks of life stood in line to buy certificates to finance large corporations such as Uranium Corporation of America, Standard Uranium, Federal, and Lisbon, as well as scores of entities that held false claims that "didn't have a whiff of ore."[55]

Utah also experienced growth in the petroleum industry. In 1959, there were only ten states which produced more crude oil than Utah's 40.1 million barrels. That same year the value of Utah crude-oil production surpassed the value of the state's copper production, the most

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[52] Lee garnered 151,253 votes to Maw's 123,814. Linda Thatcher, *Beehive History* 18, historytogo.utah.gov. (last visited Nov. 11, 2010).

[53] O. N. Malmquist, *Lee Defeats Maw, Democrats win all Other Posts (Here's Count for Utah at a Glance)*, THE SALT LAKE TRIBUNE, Nov. 3, 1948, at p. 1.

[54] Judge Bruce S. Jenkins, interviewed by James Holbrook, Tenth Circuit Historical Society, Mar. 13, 2006.

[55] Raye C. Ringholz, *Utah History Encyclopedia*, Uranium Mining in Utah. http://historytogo.utah.gov/utah_chapters/utah_today/uraniumminginutah.html (last visited Aug. 23, 2010).

important mineral produced in the state (partly because of the prolonged work stoppage in the Utah copper industry during the same period).[56] The economic activity was reflected in an increase in bankruptcy filings. At the time of Vernon's appointment in 1957, 482 bankruptcy cases were filed, up from the 393 cases filed in 1956. The filings continued to increase to 778 in 1962.[57] On March 18, 1962, Vernon's appointment terminated after four years.

Herbert B. Maw

Continuing with the nexus between Ritter's referee appointments and Democratic politics of the time, Ritter appointed Herbert B. Maw to fill the vacancy left by Clinton Vernon. Maw was born in Ogden on March 11, 1893.[58] He graduated from the University of Utah with a L.L.B. in 1916, returned for a B.S. degree in 1923, and received an M.A. and a J.D. from Northwestern University in 1926 and 1927, respectively.[59] Maw was elected as a Democrat to the Utah State Senate in 1928, and served until 1938, acting as President of the Senate from 1934 to 1938. Maw was first elected governor of Utah in 1940, and in 1944 was narrowly re-elected over Republican J. Bracken Lee. Maw was characterized as a pro-New Deal Democrat.[60] His two terms were characterized by progressive legislation that effected a substantial reduction in utility rates and that reorganized state government to increase efficiency and economy.[61] In a rematch in 1948,

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[56] Osmond L. Harline, *Utah Historical Quarterly* 31 #3 *Utah's Black Gold, The Petroleum Industry*. http://historytogo.utah.gov/utah_chapters/utah_today/utahsblackgold.html (last visited Aug. 23, 2010).

[57] A.O. Rule *supra* note 25.

[58] Utah State History - Burials Database, http://history.utah.gov/burials/execute/viewburial?id=21306&cemeteryid=SL2105 (last visited Oct. 12, 2010).

[59] Dennis Lythgoe, *Utah Governors Profiles,* DESERET NEWS, Jan. 28, 1996.

[60] Cowley, *Thunder Over Zion*, *supra* note 12, at p. 80.

[61] Lythgoe, *supra* note 59.

Lee defeated Maw in what has been termed Utah's nastiest race. Thereafter, it is reported that Maw was eagerly seeking the District Court appointment that, after so much controversy, was finally given to Ritter.[62] Eventually, Maw was appointed by Ritter to be referee on March 23, 1962, and served only 3 years until February 28, 1965, when his service terminated at the age of 71.

During Referee Maw's tenure on the bench, case filings almost doubled from 778 at the end of June, 1962, to 1,390 in June of 1964. Maw mentions his term as a referee in his autobiography, *Adventures with Life*, but gives it short shrift by stating, "[t]his I have been doing for the last three decades [practicing law in an office by himself where he could take whatever cases he desired] except for a couple of years when I accepted an appointment as part-time Referee in Bankruptcy."[63]

Bruce Sterling Jenkins

Born in Salt Lake City on May 27, 1927, Bruce S. Jenkins started his higher education at the University of Utah after returning from serving in the United States Navy. He received a B.A. in 1949 from the University of Utah and his L.L.B. from the University of Utah College of Law (located in the Park Building) in 1952.[64] Upon graduation, he was in private practice with George McMillan in the Kearns Building. He also served as assistant state attorney general of Utah in 1952 under Clinton Vernon, and part-time deputy county attorney of Salt Lake County from 1954 to 1958, during the time that Aldon Anderson was the District Attorney. He was appointed to a

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62 Cowley, *Thunder Over Zion, supra* note 12, at p. 107.

63 Herbert B. Maw, *Adventures with Life*, at p. 259 (Salt Lake City, UT) (1978).

64 Wikipedia.org http://en.wikipedia.org/wiki/Bruce_S._Jenkins (last visited Aug. 30, 2010).

vacant seat in the legislature and was subsequently elected to the Utah State Senate as the representative from Rose Park where he served from 1959 to 1965. He became minority leader in 1963, and President of the Senate in 1965. He drafted and obtained passage of an act that created the "Little Hoover Commission" to reorganize the executive branch of government.[65] Partly because of Jenkins' work in restructuring the executive branch, in 1965 Ritter offered Jenkins the position as referee in bankruptcy for the District of Utah. Jenkins resigned his positions as an elected representative and President of the Senate and closed his private practice to accept the full-time position as referee on March 17, 1965, at the age of 37. From 1973 to 1978, he served as a Bankruptcy Judge[66] after the title of the position changed.[67]

For years Referee Jenkins conducted creditors meetings and contested matter proceedings in the historic center courtroom on the second floor of the courthouse, located between Judge Ritter's and Judge Christensen's courtrooms. He also traveled to Ogden where he held court every week on Thursday. He had a trustee's investigative bent and an exhaustive knowledge of the Bankruptcy Act. As he conducted the meeting of creditors, he could probe a witness, ferret out untruths and undisclosed evidence, and point out possible preference or fraudulent conveyance actions, all of which were diligently recorded by the present note-taking Chapter VII trustee. He could also deliver to the Chapter VII trustee for liquidation any piece of non-exempt jewelry the

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[65] Together with the members of the Commission, including Joseph Rosenblatt, 209 executive branch agencies that reported directly to the Governor were restructured into departments.

[66] Judge Jenkins recounts that once Judge Ritter lamented that "there are just too damn many judges around here."

[67] Jenkins, interviewed by Holbrook, *supra* note 54.

bankrupt happened to be wearing. He knew the business and competitors of the business filers before him. Judge Jenkins trained the Chapter VII trustees that he selected in the same skills. He managed the trustees by checking periodically to see their progress in administering the estates and in filing the proceedings he had suggested. Once the proceedings were filed, he was not shy about ruling against the trustee if the evidence so warranted.

At the time, the bankruptcy bar was small, with perhaps 20 attorneys[68] who were generalists but who had a knowledge of the Act. The leaders of the bar were Herschel Saperstein and William G. Fowler.[69] The bar was generally collegial,[70] and everyone knew everyone else. On occasion an out-of-state attorney made an appearance in Salt Lake. Harvey Miller from New York would periodically travel to Salt Lake to describe to Judge Jenkins why the automatic stay in the Rodeway Inn case should be lifted so that his client, the Equitable Insurance Company, could be allowed to foreclose. But the Judge courteously denied the repeated requests, and eventually the Chapter XI case was successfully reorganized.

Filings were on a declining trend, with 1,475 cases filed in 1965; 1,377 filed in 1970; and

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[68] Several women practiced in the Bankruptcy Court under the Act, including Harriet Styler, Judith Whitmer, Anna Drake, and Judith Boulden. Although not an attorney, Alice Burke served as a trustee for many years during the early 1900s. Chapter VII trustees included Roger Segal, George Speciale, Robert Clendenin, John Green, Kenneth Rushton, Styler, Boulden and William Thurman.

[69] Fowler's practice also included Las Vegas where he represented Trustee La Mont Robison in attempting to recover funds taken from a bankrupt at gunpoint upon threat that if they were not delivered the bankrupt would be thrown off a hotel balcony.

[70] Fowler reportedly had a Spence-like tendency to point out to opponents how "his" Judge Jenkins was surely going to rule in Fowler's favor.

1,233 filed in 1975.[71] Technology consisted of a reel-to-reel tape recorder in the courtroom[72] and carbon paper copies at attorney offices. The bar was assisted by clerk's office personnel[73] who reviewed schedules in detail, page by page, and returned them to the attorneys for correction if the documents were incomplete. Most of the filed cases were consumer cases, or more rarely chapter XII cases. The few Chapter X cases that were filed were heard by the District Court.

Judge Jenkins played a national role as the Tenth Circuit representative to the National Conference of Bankruptcy Judges (NCBJ). He participated with the NCBJ to formulate and comment on legislative proposals that eventually became the 1978 Bankruptcy Code. He also participated in conferences and seminars through the University of Utah extension division offering bankruptcy instruction to attorneys and to representatives of various financial institutions.

With a formidable memory, an imposing and intimidating demeanor, and an exhaustive knowledge of the content of the files in his cases, Judge Jenkins was usually two steps ahead of the litigators who appeared before him. While the meetings of creditors over which he presided were quite informal, the litigation was similar to current practice, with argument, witnesses, and evidence. The formality of litigation practice in the Utah Bankruptcy Court, patterned after the proceedings in District Court, evidenced a divergence in bankruptcy practice from some other bankruptcy courts nationwide where proceedings were much less formal. Judge Jenkins produced

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[71] A.O. Rule *supra* note 30.

[72] When Referee Jenkins was appointed, there was no recording mechanism in bankruptcy court. He implemented a recording technology similar to the one he had initiated while at the State Senate, so that for the first time bankruptcy proceedings were recorded.

[73] The clerk's office staff of eight skilled and competent people was run by Mary Lynch along with Mary Beth Simpson.

many written opinions, but unfortunately none were published. Although at times it must have been trying to go about doing his administrative and adjudicative work positioned between two District Judges who communicated mainly through the press, he did his work well enough to warrant reappointment three times with both Judge Ritter's and Judge Christensen's full agreement. The standard set by Judge Jenkins established the quality of the Utah bankruptcy bench and the formality of the court, and the skill of the early practitioners set the baseline for the skill level of future members of the bar.

Chief Judge Ritter passed away in March of 1978. The Tenth Circuit established a broad-based 11-member merit commission of citizens and lawyers to locate a replacement. It was headed by B.Y.U. Law School founder and dean Rex Lee and sought applications in a selection process that was used for the first time in Utah. Bankruptcy Judge Jenkins, who was getting tired of liquidating and reorganizing companies, filed an application.[74] After completion of the process, Jenkins was nominated by Jimmy Carter on August 28, 1978 to the seat vacated by Willis W. Ritter, confirmed by the Senate on September 20, 1978, and received his commission on September 22, 1978, at the age of 50. He had served the Bankruptcy Court for 13 years.

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[74] Jenkins, interviewed by Holbrook, *supra* note 54.

THE YEARS OF BANKRUPTCY REFORM

The recommendations in the A. G.'s 1940 Report for reformation of the administration of the bankruptcy system,[75] designed to prevent "an inevitable loss of public confidence in bankruptcy administration that ultimately reflects on all judicial administration,"[76] had been considered by reformists but had not been acted upon. The suggestions to modify the appointment process to eliminate political patronage and to enhance the stature of bankruptcy referees remained unfulfilled. It was not until 1973, that the Supreme Court issued rules that recognized the importance of the judicial duties of bankruptcy referees and applied the title of bankruptcy judge to the referees.[77] Over the next five years, a range of bills to establish bankruptcy courts with their own judges was considered by Congress. A debate concerning the method of appointment and terms of service for bankruptcy judges ensued. Finally, the Bankruptcy Reform Act of 1978 (the Code) passed November 6, 1978, and established bankruptcy courts in each judicial district with bankruptcy judges to be appointed by the President and confirmed by the Senate for terms of 14 years. The Code severed many of the administrative duties of the referee system from judicial responsibility, passing those duties to the trustees and either an estate administrator or to the newly established United States Trustee system within the Department of Justice.

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[75] The recommendations were to establish a division of the Administrative Office of the U.S. Courts to oversee bankruptcy administration, to limit the number of part-time referees and determine the number of full-time referees needed in the system, to change the method of compensation from fees and commissions to a salary, and to extend the referee's tenure from two to six years with assured reappointment if his services were satisfactory. *A.G.'s 1940 Report, supra* note 25 at pp. XI-XVII.

[76] *Id.* at p. XIII.

[77] Bankruptcy Judgeships, http://www.fjc.gov/public/home.nsf/hisj (last visited Oct. 20, 2010).

Ralph R. Mabey Appointed

Judge Ritter's death on March 4, 1978, occurred only six months before passage of the Code. Judge Jenkins's elevation to fill Judge Ritter's vacant position created the need to appoint a new bankruptcy judge. Appointment of a new bankruptcy judge was, therefore, critical both in terms of the substance of the law and continuity of case administration. It was Chief Judge Aldon Anderson's prerogative to fill the bankruptcy judge position to his liking. He was the sole District Judge in charge while Judge Jenkins appointment was pending and Senior Judge Christensen was out of the country and not available for consultation. Ralph R. Mabey, born May 20, 1944, had served as Judge Anderson's law clerk for a year between 1972 and 1973, after graduation from Columbia Law School. After his clerkship, Mabey started a general private practice with two friends that emphasized securities law, and was also serving as assistant professor in the College of Business at the University of Utah. After consulting with various parties, including his then-law clerk Danny Kelly, Judge Anderson contacted Mabey about filling the vacancy. Mabey, who had only been out of law school for seven years, declined the offer, indicating that he had no knowledge of bankruptcy. A few days later Mabey was having lunch with Micky Duncan, a good friend of Judge Jenkins, who pointed out the advantages of accepting the vacant position because of the substantial changes that were to be made to the law. Despite Mabey's concerns about his lack of involvement with bankruptcy, he realized that the Code was such a dramatic change from the Act that it leveled the playing field, that everyone else would have to learn the new statute as well, and that he would have about nine months to become familiar with the law before the Code became effective on October 1, 1979.

Mabey submitted his application. He was subsequently appointed by the District Court and sworn in February 9, 1979, at the age of 34.[78] He was educated in the substance of the Act by the local bar including prominent practitioners such as Herschel Saperstein, William Fowler, Robert Merrill and John Allen, by out-of-state attorneys, and by the Chapter VII trustees.[79]

Between 1965 and 1978, case filings had been averaging about 1,322 cases per year, or roughly 110 cases per month.[80] But by 1979, the country was experiencing an energy crisis that negatively affected he nation's economy. Inflation reached a startling 11.3 percent that year and soared to 13.5 percent in 1980.[81] A mild recession from January to July 1980, kept unemployment high, and it remained at historically high levels (about 7.5 percent) through the end of 1981. Once the Code became effective,[82] 1,667 cases were filed by June 30, 1980, the end of the reporting year (or about 185 per month). Also of note, by December 31, 1980, 227 Chapter 13 cases and 101 Chapter 11 cases had been filed in the District of Utah under the Code. So, although the gross number of cases filed do not compare to filings in 2010, there was a significant increase in

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[78] As an existing bankruptcy judge, Judge Mabey's term was automatically extended by the new Code to Mar. 31, 1984. PL 95-598, Sec. 404(b).

[79] The first time Chapter VII trustee Roger Segal encountered soon-to-be Judge Mabey was just prior to Mabey's appointment when Mabey was observing court from the back of the room, and when the hearing was finished, he walked out with Segal's new overcoat by mistake.

[80] 1967 saw the highest number of filings during this period, with 1,677 cases filed, and 1973 saw the lowest total, with 1,010. For the year ending June 30, 1978, 1,163 cases were filed, but for the year ending June 30, 1979, just prior to the effective date of the Code, 1,480 cases were filed (or about 123 per month). A.O. Rule *supra* note 30.

[81] Wikipedia.org, *Early 1980's Recession*, http://en.wikipedia.org/wiki/Early_1980s_recession (last visited Nov. 11, 2010).

[82] In the three months prior to the Code's effective date, 442 cases were filed under the Act, and there were about 41 wage earner cases pending.

total filings, a significant increase in people trying the new Chapter 13 procedure (rather than the old wage earner plan), and an explosion of Chapter 11 cases by any measurement. With the new Code, the stature of the court was to change, with bankruptcy judges enjoying the position of almost-Article III judges and a consequential increase in the stature of the national bankruptcy bar. No more would some district courts in other parts of the country deny bankruptcy judges the privileges of riding in the Article III judges' elevators. The jurisdiction of the bankruptcy court was expansive, and the Code turned the practice of the nation's busiest commercial courts into courts of substance.

The new bankruptcy courts had their own clerk of court and clerk's office. In Utah, a nationwide search resulted in the selection of Mike Shephard as the first clerk of court, and, true to his Army Ranger background,[83] he aggressively advocated for resources for his court. Funding increased so that the court's physical amenities were increased – no more All-Steel desks – and the bankruptcy court obtained its own designated courtrooms. Judge Mabey hired Annette Jarvis as part of the clerk's staff, and when the Code became effective, he was able to elevate her to law clerk. The two of them learned the new Code together and at the same time proceeded to resolve the various pending matters that had been taken under submission by Judge Jenkins and remained pending as Judge Jenkins moved on to resolve the large number of matters left as a result of Judge Ritter's death. The "state of the art" recording system during the Act had been a reel-to-reel tape

[83] A story is told of Judge Mabey being sued by the Center for the Independence of Lawyers and Judges, a self created group allegedly promoting justice. They discovered that Judge Mabey had ruled in cases in which Zions Bank was a party and that his father was a shareholder of the bank. That, they believed, warranted a personal suit against the Judge for damages. Mr. Shephard was upset by the attack on his Court. When one of the plaintiffs appeared at the intake counter, a dust-up occurred with the clerk of court drawing on his special forces training and the litigant ending up pinned to the floor in the Court's hallway.

system which, when played back, was at times inaudible. As a result, some of the matters had to be retried. But now under the Code, the bankruptcy court could retain court reporters to record the proceedings so there were no more retrials because of inaudible tape recordings.[84]

Judge Mabey and law clerks Jarvis, Alan Smith, and later Steve McCardell,[85] spent much intellectual energy dealing with the substantive changes to the Code including examining its legislative history and going about resolving the myriad issues that arose. The pace was grueling, with hearings held into the evening and on weekends. Besides resolving the backlog of Act cases, in 1981, they dealt with 3,824 new Code cases, of which 186 were Chapter 11 cases,[86] and Chapter 13 cases doubled to 492 filings.[87] Through this challenging time Judge Mabey maintained a courteous, thoughtful and kind demeanor, at times personally shaking the hand of a newly confirmed Chapter 11 debtor in congratulations. He was described as very understated and patient on the bench, careful and deliberate, with an ability quickly to assess data. His sense of humor showed itself when, one April Fools' Day, he conducted court all day in a British barrister's wig.

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[84] *See* generally PL 95-598, Sec. 404(e).

[85] Mr. McCardell took Annette Jarvis's position and clerked for Judge Mabey for one year, and then remained to clerk for Judge Clark for two years.

[86] By way of comparison, in 2009, with three bankruptcy judges on the bench, 90 Chapter 11 cases were filed. United States Bankruptcy Court, District of Utah filing statistics, http://www.utb.uscourts.gov/statistics (last visited Oct. 25, 2010).

[87] A.O. Rule *supra* note 30.

The pace of the Court continued through the severe national recession that ran from July 1981 through November 1982.[88] Both the trucking and the airline industries were deregulated with corresponding economic disruption in those sectors. By the end of 1983, the 435 Chapter 11's that had been filed during the year comprised 12 percent of total filings.[89] Help with the caseload came from visiting Judges Harold Mai from Wyoming and Judges John McGrath, John C. Moore (Porfilio),[90] and Glen E. Keller from Colorado.

It was not just the volume of cases that was exhausting, resulting in 13-14 hour days, but that so many cases contained novel legal issues that required careful analysis, research, and communication with the bar. Because of a lack of precedent, Judge Mabey had great latitude to address important issues, but it also took substantial courage to be the first judge to publish opinions on significant, difficult areas of the new statute. Often he would try to rule from the bench and then follow with a written decision to explain his reasoning. Those written opinions became part of the backbone of the nationwide interpretation of the Code, and his reputation as a thoughtful judge and skilled communicator soared. Opinions such as those in the Clearinghouse

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[88] Wikipedia.org, *Early 1980s Recession*, http://en.wikipedia.org/wiki/Early_1980s_recession (last visited Nov. 11, 2010).

[89] A.O. Rule *supra* note 30.

[90] Judge Moore tried a case involving a debtor represented by Richard Calder. Calder became agitated as Judge Moore began to rule against him from the bench and kept jumping up and interrupting the judge in the middle of his ruling. Judge Moore told him repeatedly to sit down and listen to the ruling and, if he disagreed, to appeal, but to stop interrupting. When Calder continued his interruptions, the exasperated Judge Moore threw his pencil at Calder, hitting him in the head, and at last the startled Calder stayed quiet long enough for the judge to finish.

cases,[91] South Village,[92] Alyucan,[93] Booth,[94] Colonial Ford,[95] and Curlew Valley[96] became historic interpretations of the statute. As one practitioner put it, he could present an issue to Judge Mabey– a sort of legal slow pitch– and Judge Mabey would hit it out of the park.

Then in June 1982, in *Northern Pipeline Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), the Supreme Court decided that it was unconstitutional for Congress to grant bankruptcy jurisdiction to independent courts composed of judges who did not have the protections of Article III and prospectively invalidated the court structure and jurisdictional system set up by the Code. The decision cut the legs out from under the bankruptcy court.

A Second Judgeship is Created for Utah and Filled by Glen E. Clark

On July 1, 1982,[97] Glen E. Clark was appointed to fill the newly created second bankruptcy judgeship for Utah.[98] He was born in Cedar Rapids, Iowa on November 23, 1943, and received his B.A. in 1966 from the University of Iowa. He came to Salt Lake City in 1968 to

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[91] *Independent Clearing House Co., (Merrill Trustee) v. Abbott*, 41 B.R. 985 (Bankr. D. Utah 1984) (a ponzi scheme case providing much drama, including allegations that the judge's chambers were bugged).

[92] *In re South Village, Inc*., 25 BR 987 (Bankr. D. Utah 1982) (adequate protection).

[93] *Banker's Life v. Alyucan*, 12 B.R. 803 (Bankr. D. Utah 1981) (adequate protection and equity cushion).

[94] *In re Booth*, 19 B.R. 53 (Bankr. D. Utah 1982) (unexpired lease of non-residential real property).

[95] *In re Colonial Ford, Inc.*, 24 B.R. 1014 (Bankr. D. Utah 1982) (abstention under §305(a)(1)).

[96] *In re Curlew Valley Assoc*., 14 B.R. 506 (Bankr. D. Utah 1981) (Chapter 11 debtor's business judgment).

[97] Justices and Judges of the U.S. Courts, U.S. Gov. Printing Off., 2004 at p. 742.

[98] The Code provided a transition period during which the Judicial Conference of the United States, after recommendations of the judicial councils, could increase the number of full-time United States Bankruptcy Judges. PL 95-598. Sec. 404(g). Apparently under this authority, a second judgeship for Utah was created.

attend the University of Utah College of Law after spending two years in the Army[99] and graduated from the University of Utah with his J.D. in 1971. He practiced with Fabian & Clendenin from 1971 to 1982 and served as a visiting professor at the University of Utah's College of Law and advanced business law at University of Utah's Graduate School of Business. His practice specialized in commercial law, and, after representing Continental Bank in a bankruptcy involving Charley Steen (the uranium multimillionaire), and the debtor in the Terracor Inc. bankruptcy, he became the firm's bankruptcy expert.

One of Judge Clark's partners became aware of the opening on the bench and suggested he apply. Although the Code provided for presidential appointments, a transition provision did not make the Code fully effective until April 1, 1984. It appears that there was no appointed screening committee, but Clark was interviewed by the Utah District Court judges in their robes in the ceremonial courtroom. He was appointed by the District Court at the age of 38.

Judge Clark had just assumed the bench when the Supreme Court issued its opinion in *Marathon* which greatly complicated the work of Judge Mabey and Judge Clark. They received conflicting information regarding their authority to conduct proceedings. The Administrative Office of the U.S. Courts issued a directive indicating that bankruptcy judges would not be paid their salary if they exercised jurisdiction over their cases, perhaps at the insistence of Chief Justice Burger who was very concerned about bankruptcy judges achieving Article III status. The judges ceased holding court for a period of time. The bankruptcy firm of Boulden & Gillman held a wake for the jurisdiction of the court, with a doll dressed as a judge laying in a coffin along with a

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[99] Peter Scarlet, *She Takes Energy on Road, But Heart's at Home*, THE SALT LAKE TRIBUNE, July 20, 1996.

copy of the Code. The Chapter 13 trustee presided over confirmation "meetings" and forwarded consensual confirmation orders to the District Court for signature.

The Supreme Court twice postponed the application of its judgment so that Congress could enact legislation to restructure the bankruptcy courts. Those extensions expired.[100] When Congress failed to act by December 24, 1982, the Administrative Office of the United States Courts promulgated the Emergency Jurisdictional Rule adopted by the nation's District Courts that redelegated some of the jurisdiction from the District Courts back to the Bankruptcy Courts as adjuncts of the District Courts, but not to adjudicate finally related proceedings. The bankruptcy judges became assistants to the Article III judges. Some parties challenged the effectiveness of the Emergency Jurisdictional Rule as adopted by the Utah District Court. The District Court held an *en banc*[101] hearing (although there was no specific provision for such a hearing), and on February 22, 1983, issued a ruling authored by Judge Jenkins indicating that the bankruptcy judges derived their powers from the District Court, and thus the bankruptcy judges resumed their duties.[102]

Judge Clark was a very popular Judge in the 1980s and 1990s. He came to the bench as an experienced commercial law litigator with an expertise in commercial code matters and was able to "hit the ground running." He had a great ability to listen to the parties, and over the years he impressed the bar with his ability to judge the character of those witnesses before him. He had a

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100 On one occasion parties were assembled in Judge Clark's courtroom, and he took the bench in street clothes. He announced there was no judicial officer available to preside, left the bench, and walked out the front door of the courtroom, leaving the mystified attorneys baffled as to their next move.

101 Anderson, Chief Judge; Jenkins and Winder, District Judges; and Christensen, Senior Judge.

102 *In re Color Craft Press Ltd.*, 27 B.R. 962 (D. Utah 1983).

desire to do the best he could on each case, was very careful, and was viewed as highly intelligent. He participated in many CLE programs and was described as a delightful, clever, and charismatic contributor on the panels. He was noted for his sense of humor and his April Fools' Day jokes. Sometimes those jokes were not particularly welcomed by the attorneys on the receiving end. He was not considered either a debtor or creditor judge. Having an agenda to make things better,[103] he was always concerned about making sure that debtors received the benefit of the exemption statute. One of his most important decisions was *In re Roberts,*[104] which defined adverse interest to the estate in the context of attorneys seeking to represent multiple related debtors. He presided over many high-profile cases,[105] including a series of transportation cases (IML Freightlines, Rocky Mountain Helicopter, and Simon Trucking) and Geneva Steel. Together, Judge Mabey and Judge Clark actively encouraged the bankruptcy bar to pursue continuing legal education courses to improve the quality of the practice.

Appointment of a second bankruptcy judge was very helpful in dealing with the burgeoning caseload. It also helped ameliorate the isolation that Judge Mabey was feeling since assuming the bench. Both judges had several talented law clerks that also remedied in part the bench's isolation. It was during this stressful period that Judge Mabey decided it was time to leave the bench. The continuing jurisdictional controversy contributed to his decision to leave, as

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[103] He became chief judge on March 6, 1986. Justices and Judges of the U.S. Courts, U.S. Gov. Printing Off., 2004 at p. 742.

[104] *In re Roberts*, 46 B.R. 815, 826-27 (Bankr. D. Utah 1987), *aff'd in part, rev'd and remanded in part on other grounds*, 75 B.R. 402 (D. Utah 1987).

[105] The cases included VesCor Capital Corporation, Seven Peaks Water Park, and Tesco American Inc.

did his feeling that he could benefit from a broader legal experience since he had been appointed at such a relatively young age. He also felt that he might be getting a bit full of himself because of the national acclaim over his published opinions,[106] and he became concerned that his position as bankruptcy judge might adversely impact his ability to meet the cost of educating his children. He resigned effective July 1, 1983, without any commitment for a new position, and simply waited to see what would happen. Soon after, he was contacted by Orrin Hatch regarding an opening on the Tenth Circuit Court of Appeals, but he declined to pursue this.

John H. Allen Fills Judge Mabey's Position

A search was made to fill Judge Mabey's vacant judgeship, and a little over a month after his resignation, the District Court appointed a new judge. John H. Allen was born in Salt Lake City, Utah on August 30, 1930. Prior to going to law school, he served as an officer in the Army in Korea.[107] He graduated from Utah State University in 1952, and the University of Utah College of Law in 1957. After serving in Korea, he served in the U.S. Army Reserve as a senior commander over all the Judge Advocate General units in the 96th Army Reserve Command and retired as a full colonel in 1991, after 32 years of service.[108] He practiced with Callister, Green & Nebeker where he became a prominent creditors' attorney representing Zions First National Bank under both the Act and Code and served as a trustee on several occasions.[109] He was a "detail

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106 His work early on came to the attention of national seminar participants such as J. Ronald Trost and Harvey R. Miller.

107 Terry Welch, *Profile of Judge John H. Allen*, Utah State Bar Journal, Vol. 5, 1992 (Jan-May).

108 Obituary, THE SALT LAKE TRIBUNE, July 24, 2001.

109 Welch, *supra* note 107.

person" and a mentor to the younger attorneys in the firm.[110]

Fifty-three-year-old John Allen was appointed by the District Court on August 24, 1983,[111] in the gap period between the *Marathon* decision and Congress's resolution of the jurisdictional issue. Because he filled Judge Mabey's unexpired term, his appointment was for the remaining term, subject to reappointment to a 14-year term, which occurred on August 24, 1987.

Judge Allen had, during his early term on the bench, a usually kind, friendly, and pleasant courtroom demeanor. He had a lively sense of humor. He was in command of his courtroom and handled with poise and dignity many high-profile cases. He was generally considered fair, straightforward, and knowledgeable by the bar in most routine matters, could be especially sympathetic when a debtor had fallen on hard times, and would do everything he could to support a trustee within the confines of the Code. His years as a trustee were reflected in his opinions that showed a knowledge of the ins and outs of case administration and estate causes of action. He became renowned for his enforcement of the automatic stay and would levy substantial fines upon violators, especially if they appeared before him challenging the authority of the court and the Code.[112]

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[110] Stephen Hunt, *Services Set for Judge John H. Allen - 18-year Bankruptcy Veteran Respected as Meticulous Jurist*, THE SALT LAKE TRIBUNE, July 26, 2001.

[111] Justices and Judges of the U.S. Courts, U.S. Gov. Printing Off., 2004.

[112] Sheila R. McCann, *Repo Firm Appealing Fine in Bankruptcy Case*, THE SALT LAKE TRIBUNE, July 22, 1997.

He published several opinions still referred to today, including *Jensen-Farley Pictures,*[113] *Independent Clearing House Co.,*[114] and *In re Curtis.*[115] Several high-profile cases were assigned to him, such as *Triad Holding* and *Bonneville Pacific Corporation*. Both cases had political implications, *Triad Holding* on a national level[116] and *Bonneville Pacific* locally.[117] Bonneville Pacific's trustee, Roger G. Segal, was able to obtain huge recoveries in the case.[118] Judge Allen levied substantial fines[119] and denied fees[120] in the case in a manner that seemed to some as though he considered that he had been personally betrayed by some of the members of the bar involved in the case.[121]

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[113] *In re Jensen-Farley Pictures*, 47 B.R. 557 (Bankr. D. Utah 1984) (fee opinion applying the 12 "*Johnson* factors").

[114] *In re Independent Clearing House Co.*, 41 B.R. 985 (Bankr. D. Utah 1984) (a Ponzi scheme in which the trustee filed 2,000 preference and fraudulent conveyance adversary complaints that laid the foundation for treatment of Ponzi scheme cases in bankruptcy court).

[115] *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984) (setting forth a standard on whether to lift the stay to permit litigation to proceed in another court).

[116] Triad Holding Company's principal Adnan Khashoggi was a Saudi Arabian arms dealer and businessman purported to have involvement with the Iran-Contra affair and Ferdinand Emmanuel Marcos.

[117] Steven Oberbeck, *Judge Unseals Corradini's '93 Testimony - 400 Pages Reveal No Surprises About Bonneville Pacific*, THE SALT LAKE TRIBUNE, Sept. 9, 1995.

[118] John Keahey, *Law Firm to Pay Nearly $7 Million to Bonneville Pacific Trustee*, THE SALT LAKE TRIBUNE, July 1, 1995; Joe Costanzo, *Firm Agrees to $65 Million Settlement*, THE SALT LAKE TRIBUNE, Apr. 23, 1996. The Trustee pursued and recovered from lawyers, financial advisors, investment firms, accounting firms, banking institutions, and co-conspirators approximately $212,000,000. Eventually the recovery enabled Segal to make a full return plus interest to creditors and to return a viable company to shareholders.

[119] *Accountants Hit with Another Fine*, THE SALT LAKE TRIBUNE, July 30, 1993.

[120] Steven Oberbeck, *Lawyer Wants Judge to Take Back Words*, THE SALT LAKE TRIBUNE, June 20, 1996.

[121] There were other cases where the attorneys perceived that outside factors unrelated to the case motivated Judge Allen's rulings and that rulings were issued on a very personal basis rather than on the issues in the case, thus making him hard to predict.

Judge Allen also presided over the initial days of the bankruptcy filing of Geneva Steel, a case significant for its economic impact on the state of Utah. Upon declining to grant a motion for the use of cash collateral, the case was removed to the District Court and eventually reassigned to Judge Clark.

1984 to 1988

Finally, the Bankruptcy Amendments and Federal Judgeship Act of 1984 (98 Stat. 333) (1984 Act) was enacted to resolve the *Marathon* jurisdictional issues. It made the courts of appeals responsible for the appointment of bankruptcy judges and declared that the bankruptcy judges "shall serve as judicial officers of the United States district court established under Article III of the Constitution." Although the bankruptcy judges constituted a bankruptcy court under the terms of the new statute, Congress reserved for the district courts certain jurisdiction over bankruptcy proceedings in order to meet the concerns expressed by the Supreme Court. Some of the concerns of the A.G.'s 1940 Report regarding the lack of transparency and the necessity to eliminate political patronage in the appointment of bankruptcy judges were resolved when the 1984 Act authorized the Judicial Conference to establish qualifications for bankruptcy judges and authorized the circuit councils to establish merit selection committees to recommend nominees for bankruptcy judgeships.

The Bankruptcy Judges, United States Trustees, and Family Farmers Bankruptcy Act of 1986 made additional changes to the bankruptcy practice. In Utah bankruptcy judges had previously appointed the trustees and the estate administrator, an office held by Robert Wiley and William Stillgebauer, had monitored the estates. Prior to the 1986 Act, each estate was separate and independent, and each estate account was balanced at the end of administration and a final

accounting filed with and reviewed by the Court. In addition to monitoring the trustees and Chapter 11 cases, the estate administrator was viewed by some as being there to help attorneys and make their jobs easier.

The Act of 1986 eventually established the U.S. Trustee (UST) system nationwide(except in Alabama and North Carolina) and placed supervision of trustees and estates in the Department of Justice. Many perceived that the first executive director of the UST – Tom Stanton – took an unduly skeptical view that trustees were not to be trusted (no pun intended). Subsequent directors took a more reasoned and moderate view and, while in the process of establishing consistent nationwide policies and procedures, acknowledged that the vast majority of trustees were hardworking and honest. However, the agency had a tendency to swing from issue to issue based upon a variety of political and administrative issues and changes of administration. Some argued that if the estate administrator position had been funded as well as the UST program, it could have produced the same or better results, and some argued that the agency's tendency to micromanage the administration of the estates was burdensome to the trustees, counterproductive, and ultimately costly to creditors who bore the cost of increased administrative expenses.

At the regional level, several who served as United States Trustee in Region 19 had significant bankruptcy experience and were accommodating for the trustees to work with. The agency facilitated interaction between the trustees as a group with quarterly meetings at the UST office. The local UST staff worked diligently to protect the system and to implement the provisions of the Code. In Chapter 11 cases the UST was sometimes viewed as simply another entity to be dealt with, further complicating an already-complicated system, that it took inconsistent positions, and that some parties attempted to lobby the UST for support. In cases

where there was little creditor involvement, the UST's intervention was welcome by the court.

During the period between 1983 and 1988, bankruptcy filings continued to increase even though some parts of the national economy were improving. National unemployment fell from a high of 9.7 percent in 1982, to 5.5 percent in 1988.[122] Inflation fell from 8.39 percent in 1982 to 2.46 percent in 1983.[123] During this time the country was also suffering through the savings and loan (S&L) crisis with hundreds of voluntary and involuntary S&L mergers and insolvencies that caused ripples through the economy, including the bankruptcy courts.[124] On October 14, 1987, the Dow Jones Industrial Average dropped 95.46 points (then a record) to 2412.70, and fell another 58 points the next day, down over 12 percent from the August 25 all-time high.[125] In Utah, bankruptcy filings increased from a total of 3,440 cases filed in 1983 (with 435 Chapter 11's and 888 Chapter 13's), to 7,686 cases filed in 1988 (with Chapter 11 cases dropping to 256 but Chapter 13 filings almost tripling to 2,423).[126]

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122 http://search.census.gov/search?q=unemployment+1982 (last visited Nov. 3, 2010).

123 http://inflationdata.com/inflation/Inflation_Rate/HistoricalInflation.aspx?dsInflation (last visited Nov. 3, 2010).

124 Beginning in 1979, S&Ls began losing money due to spiraling interest rates and a slowdown in the real estate markets. Net S&L income, which had been $781 million in 1980, fell to -$4.6 billion in 1981 and -$4.1 billion in 1982. Tangible net worth for the entire S&L industry was virtually zero. Beginning in 1982, many S&Ls rapidly shifted away from traditional home mortgage financing into new, high-risk investment activities such as casinos, fast-food franchises, ski resorts, junk bonds, arbitrage schemes, and derivative instruments. Both federal deregulation and deregulation of state-chartered S&Ls increased the risk exposure of S&Ls at a time when the economy was sliding into recession. A large number of S&L customers' defaults and bankruptcies ensued, and the S&Ls that had overextended themselves were forced into insolvency proceedings themselves. Hundreds of S&Ls became insolvent. Between 1980 and 1983, 118 S&Ls with $43 billion in assets failed. The Federal Savings and Loan Insurance Corporation pushed mergers as a way to avoid insolvency, but there were still 415 S&Ls at the end of 1982 that were insolvent. All in all, there was a failure of 747 S&Ls. An approximation of the total cost of resolving the S&L crisis was more than $160 billion. *See generally*, http://en.wikipedia.org/wiki/Savings_and_loan_crisis (last visited Nov. 3, 2010).

125 Wikipedia.org, *Black Monday*, http://en.wikipedia.org/wiki/Black_Monday_(1987).

126 A.O. Rule *supra* note 30.

A Third Judgeship is Created for Utah and Filled by Judith A. Boulden

Congress attempted to deal with the national increase in bankruptcy filings by enactment of the Bankruptcy Judges, United States Trustees, and Family Farmers Bankruptcy Act of 1986, and created 52 new bankruptcy judgeships. One of those new judgeships was allocated to Utah. On January 5, 1988, it was filled by 39-year-old Judith A. Boulden, who at the time was the standing Chapter 13 trustee and the first woman appointed to the federal bench in Utah. Born December 28, 1948, Judge Boulden graduated from the University of Utah School of Law in 1974, as one of eight women in the class[127] and clerked for A. Sherman Christensen, Senior United States District Judge. After her clerkship, she joined the law firm of Roe & Fowler although she had no background in insolvency law. She learned the Act from William Fowler and from Judge Jenkins who appointed her in 1976 to be a Chapter VII trustee.[128] After becoming one of the numerous quislings to leave Roe & Fowler, Judge Mabey appointed her in December of 1979, as standing Chapter 13 trustee to administer the provisions of the new and substantially expanded replacement of the Act's wage earner program. In 1981, William T. Thurman asked her to join McKay, Burton & Thurman to assist him with his burgeoning Chapter 11 practice, which she did. The growth of the Chapter 13 Trustee case load soon overwhelmed that law firm's administrative resources.[129] So in 1982, Boulden formed a law firm with Chapter 7 trustee Duane

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[127] Also in the class of 1974 were soon-to-be bankruptcy attorneys Richard Calder, David L. Gladwell, John B. Maycock, and William T. Thurman.

[128] She administered approximately 800 Chapter 7 cases under the Act and approximately 600 Chapter 7 cases under the Code until her resignation as Chapter 7 Trustee in 1981.

[129] From an initial wage earner caseload in 1979 of forty-one cases, Chapter 13 filings grew so that in 1988 she was administering over 6,700 cases. Judicial application (Feb. 13, 1987). The increase in Chapter 13 filings occurred, in part, because she was instrumental in structuring the framework of Chapter 13 cases in the District, including suggesting various standing orders, procedures, and rules to assist attorneys in filing Chapter 13

Gillman, where she practiced in the capacity of Standing Chapter 13 and 12 Trustee, handling private clients in Chapter 11 cases, and representing trustees.

The judicial selection process, as defined by the 1984 Act, now made the courts of appeal responsible for the appointment of bankruptcy judges. Accordingly, Boulden's application was forwarded to the Tenth Circuit. The Circuit established a search committee of attorneys, chaired by Judge Jenkins, that reviewed many applications and narrowed the applicant pool into a group for interviews that were conducted at the courthouse. The committee eventually forwarded three applications to the Tenth Circuit, which, without further interview, selected Boulden.

Judge Boulden presided over several large cases[130] including *In re CF&I Steel Inc*. and *In re Utah 7000*. She became a judge known for her preparation, extraordinary knowledge of the case at hand, and the consistency of her rulings. She was meticulous in her approach to cases, sometimes to the consternation of attorneys, but always with the purpose of upholding the rules. She was characterized as the consummate patient teacher as a judge, urging with a nod, a frown, or a $100 fine everyone to move through the system at a higher level of competency. Attorneys viewed her as even-keeled and fair, indicating that she did not act out of emotion or bias. She promoted civility in her courtroom, and if attorneys acted out of hand, the conduct was soon terminated.

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cases. By September 30, 1979, she disbursed $5,338,002 of which $1,012,648 was returned to unsecured creditors and $556,091 to debtors' counsel. Annual Report and Account, Year Ended Sept. 30, 1987 at p. 3.

[130] She presided over other notable cases including Jeremy Ranch Golf Club, Mountainwest Ambulance Services, The Enterprise Business Newspaper, CloverClub Foods, WynnCo Inc., LLC., and C.W. Mining.

Changes in the Bar and the Court's Outreach Programs

By 1988, the Utah bankruptcy bench, consisting of Judges Clark, Allen, and Boulden, was structured as it would remain for the next 13 years. As was the tradition of the District Court and the Bankruptcy Court as structured by Judge Jenkins, the Bankruptcy Court continued to be a formal place for litigation with a tradition of excellence. The bench took not only the substance of the law seriously but also the procedural rules, local rules, evidentiary requirements, and traditions of the court. This was not a court where a bankruptcy judge would amble out to the bench in street clothes to chat with the parties without a formal court opening. The judges purposely maintained the court as a place where parties, consumer or commercial, could have their disputes resolved by a judicial officer and resisted the position taken by some nationally that bankruptcy–especially chapter 13 cases–should become an administrative proceeding. The three judges tried to resolve court administrative matters amicably by having lunch every Monday to discuss the business of the court and to keep each other informed of substantive rulings by circulating draft opinions.

The bench made a substantial effort to become involved in other activities to improve the bankruptcy practice locally and nationally. This tradition of outreach also served to an extent to ameliorate judicial isolation. Judge Clark became involved on a national level in the National Conference of Bankruptcy Judges[131] and continued his national focus during his judgeship. Judge Clark served as chairman of the board of trustees for the endowment for education, and was on the

[131] The NCBJ is a national organization of bankruptcy judges and professionals that promotes educational programs, monitors pending legislation, conducts bankruptcy conferences, and is involved in monitoring and lobbying for increased judicial benefits.

Board of Governors of the NCBJ from 1988 to 1994.[132] In 1993, he served as president of the NCBJ.[133]

Judge Allen, who was naturally gregarious and outgoing, was for many years open to his colleagues and available to practitioners. He had devised a plan to keep from being isolated from the bar. He launched an educational program focused on practice pointers, especially for those attorneys who practiced outside the metropolitan Wasatch Front, called the "Bench and Bar Dialogue Series." The sessions might be held at the Alta Club or at various venues in Provo, Ogden, Brigham City, or St. George. The meetings were fun, relaxing, informative, and very popular with the members of the bar.

Judge Boulden was concerned about the disciplinary action taken by the Court against Richard Calder, who ran the court's first consumer filing mill. She thought the bench should be more proactive in assisting attorneys, especially those new to the practice, rather than simply reactive when an attorney made an error. So, along with certain members of the bar, she initiated the Utah Bankruptcy Lawyers' Forum[134] where the bench and attorneys could improve the trial advocacy skills of bankruptcy lawyers and prepare practitioners to deal with the pressures of

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[132] National Bankruptcy Archives, Clark, Glen, National Conference of Bankruptcy Judges: Oral History Project Oct. 10, 2004 NBA.012 7.

[133] The position was time-consuming in addition to being prestigious. Judges Allen and Boulden carried a portion of his case load so that he could attend to this important position.

[134] As set forth in a description of the Forum prepared at the time, "[t]he judiciary is often critical of the trial skills of lawyers, but because of its circumscribed role as adjudicator, has limited opportunity to provide constructive suggestions to improve skills. Criticism of attorney conduct would be more effective if an opportunity existed to improve behavior viewed as improper. The UBLF provides a positive approach to upgrading substantive attorney skills as well as offering insight in coping with the demands of practice, rather than relying on a punitive approach to correct inappropriate behavior. The methodology employed is to draw on the collective strength of the local practitioners to educate their colleagues in the nuances of the practice." Utah Bankruptcy Lawyers Forum description.

bankruptcy practice. Initially, the format of the Forum was similar to the Inns of Court, with the 120 attorneys participating in the Forum divided into two groups containing seven teams, each team comprised of six to seven members inclusive of both experienced and new attorneys taking parts litigating a particular issue each month. Eventually the Forum evolved into more of a lecture format that was less work intensive for the participants, but that was still informative, inexpensive, and a useful CLE and that encouraged socializing after the presentations. The turnout was and has continued to include most of the practicing members of the bankruptcy bar and, with the able help of the current judges, remains a most viable local bankruptcy CLE program.[135]

The bankruptcy bar has changed over the years from a small number of generalist practitioners who sometimes practice in bankruptcy to the growth of bankruptcy sections in large firms, boutique specialist firms, and large-volume consumer firms. The sophistication of the bar has grown such that the most skilled attorneys in Utah are the equal to any in the nation. The pace has quickened, and the Utah bar may have become less congenial and more adversarial. With the efficiencies of digital technology ans reduced face-to-face communication, some attorneys may be more prone to tactics to win at any cost rather than to obtain the right result or build consensus. The bar continues to be generally collegial, employing hard-nosed tactics when necessary but without being fundamentally unfair or dishonest. There are also an increasing number of sole

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[135] The first Board of Trustees consisted of Anna Drake, William Fowler, Duane Gillman, David Leta, Mona Lyman, Herschel Saperstein, and George Speciale. Professor Richard Aaron assisted with the problems for the course, and Danny Kelly and Robert Prince served as section leaders for the two groups of 80 lawyers. Group leaders charged with organizing each presentation were Kevin R. Anderson, Douglas Cannon. Andres′ Diaz, Weston Harris, Vernon Hopkinson, Noel Hyde, Scott Lundberg, Joel Marker, William Marsden, Robert Merrill, Carolyn Montgomery, Roger Segal, William Thurman, and Steven Waterman.

practitioners who do not have access to mentors or peer instruction as members of the bar may have had in the past. Accordingly, the Court's educational outreach continues to provide a needed service in helping to train the bar.

Creation of the Bankruptcy Appellate Panel

On February 6, 1996, the Judicial Council of the Tenth Circuit authorized the creation of the Bankruptcy Appellate Panel (BAP)[136] for an initial three-year period beginning July 1, 1996, and ending June 30, 1999. Chief Judge Stephanie Seymour traveled to Salt Lake City, and over lunch and with the consent of the District Court, requested that Judge Clark and Judge Boulden serve on the newly created court in addition to maintaining their trial court responsibilities. Despite some misgivings about what resources would be available and the time commitment that would be required, both judges agreed to serve. On February 7, 1996, the Chief Judge of the Tenth Circuit appointed nine of the 22 bankruptcy judges within the circuit to serve on the BAP with staggered terms.[137] At a conference in Pasedena, California, the judges went about the rather heady and unique business of creating a new court, taking input from judges and staff from BAPs in other circuits. A chief judge of the panel was appointed by the Chief Judge of the Tenth Circuit, rules were drafted, procedures were adopted, and facilities were obtained. The panel members took very seriously their duty, as they perceived it, to do three things: timely (*i.e.* - faster than the District Courts) and correctly resolve bankruptcy appeals, develop a unified and

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[136] The Bankruptcy Reform Act of 1994 amended section 158 of title 28 of the U.S. Code to require the judicial council of each circuit to create a Bankruptcy Appellate Panel unless the council found that (1) there were insufficient judicial resources in the circuit to do so, or (2) the establishment of a BAP would result in undue delay or increased cost to parties in bankruptcy cases.

[137] Three judges were appointed to a three-year term, three judges to a two-year term, and three judges appointed to a one-year term.

consistent body of appellate bankruptcy case law for the Tenth Circuit, and prepare such appeals as may find their way to the Circuit in an efficient and articulate manner to assist that court in determining the issues.[138] The nine judges also committed among themselves to meet a rigorous and exceedingly short schedule for reviewing briefs, hearing argument, and circulating first drafts and final opinions, so that the BAP could meet the commitment to resolve appeals quicker than the District Courts had been able to. The Utah BAP judges were aided in meeting that schedule by Mary Margaret Hunt, the first BAP law clerk, who was instrumental in drafting many of the early BAP opinions that helped establish the BAP's reputation for carefully reasoned and skillfully drafted opinions. The BAP judges also agreed that, insofar as possible, they would not publish opinions as trial judges on issues that had the possibility of coming before them as BAP judges. They felt strongly that authoring published opinions as trial judges might prejudice their impartiality on the BAP, or might cause litigants to second-guess how a panel may rule.

The establishment of the BAP provided an alternative appellate structure for those attorneys who perceived that the District Court was not enthusiastic about handling bankruptcy appeals. Some attorneys believed that certain of the District Judges were not familiar with bankruptcy issues and had openly expressed an intent not to learn finer points of bankruptcy law. The BAP provided a somewhat more expert forum with quicker resolution of appellate issues.[139]

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[138] The goals must have been met because on March 8, 1999, the Judicial Council of the Tenth Circuit unanimously voted to authorize the permanent establishment of the BAP in the Tenth Circuit, and the appointment of the original nine judges was extended. The districts of Kansas, New Mexico, Oklahoma, Utah, and Wyoming have participated in the BAP since its inception in July 1, 1996. The District of Colorado has participated in the BAP since January 3, 2005, when the Colorado District Court judges joined the other districts in the circuit in embracing the BAP.

[139] For example, from July 1, 1996 to June 30, 2003, the median disposition time at the BAP was only 151.9 days. BAP History, and statistics, Chief Judge's report for BAP web cite. The disposition time for the District Courts was 294.9 days. Annual Report of Bankruptcy Appeals in Participating BAP Districts for the Statistical Year

It was not until 2003, six years after the BAP was established, that one of the BAP's decisions was reversed by the Tenth Circuit Court of Appeals.[140]

Chapter 11 Filings

During the 1980s a large number of Chapter 11 cases were filed, both in number and as a percentage of filings. For example, in 1986, of the total of 5,747 bankruptcy cases filed in Utah, 438 were Chapter 11 cases.[141] The number of Chapter 11 filings and the percent of the case load decreased in later years. By 2005, only 38 of the 21,925 total cases filed were Chapter 11 cases.[142] Although many significant Chapter 11 cases were filed in Utah, the Code's liberal venue provisions allowed a national trend to evolve whereby many of the largest Chapter 11 filings were drained off to Delaware or the Southern District of New York. Attorneys reported that the decision of where to file is based on a variety of factors and that the established body of Chapter 11 case law in those districts affects the decision. The cost to file in Utah if many attorneys involved in the case are in other states may also be a factor. The Utah judges are viewed as up to the task of handling complex cases, and when presented with large cases on short notice have resolved issues so that the businesses are stabilized and get off to a good start. The bench also has allowed professional fees based on out-of-state rates. Some say that the large consumer caseload the Utah judges carry adversely impacts the availability of the court for complex hearings. Predictability is often cited as a significant factor in choice of venue. Some attorneys reported

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July 1, 2002 – June 30, 2003, BAP Clerk's Office, p. 8.

140 *In re Duncan*, 271 B.R. 196 (10th Cir. BAP 2002), *rev'd,* 329 F.3d 1195 (10th Cir. 2003).

141 A. O. Rule *supra* note 30.

142 *Id*.

they believed that large Chapter 11 cases were not filed in Utah because of the unpredictability of the bench, but that was not a universal opinion.

Increase in Consumer Filings

The period from 1988 to 2001, saw an increase in Utah yearly filings from 7,686 to 19,411,[143] handled by the same three bankruptcy judges. Beginning in 1990 a new phenomenon developed in Utah. Utah began reporting more non-business filings per household than any of the other districts in the Tenth Circuit, culminating in 2002, when Utah ranked first in the nation.[144] That unusual status continued into 2004, when 24 out of every 1,000 households in Utah filed for bankruptcy, trumping the national rate of 13 out of every 1,000 households.[145] Within those figures, the breakdown between Chapter 7 and Chapter 13 filings was even more unusual. Starting in the 1990s, Utah's Chapter 13 filings comprised a greater percentage of non-business filings than any other district within the Circuit.[146] Of those Chapter 13 filings, the percentage of filed cases that actually received a discharge was less than the national average.[147] Something was happening in Utah related to consumer bankruptcy that was different from both the Circuit and the nation.

Because of the nationwide increase in bankruptcy filings that created dismay in the

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143 A. O. Rule *supra* note 30.

144 Holly Farnsworth, *Going for Broke: Utah's Alarming Bankruptcy Problem*, Utah Foundation. Report Number 670, Dec. 2004, at pp. 4-5.

145 Ezekial Johnson and James Wright, *Are Mormons Bankrupting Utah? Evidence from the Bankruptcy Court.* Suffolk University Law Review, Vol. XL:3 at p. 610.

146 Farnsworth, *supra* note 144, at p. 11.

147 *Id*.

financial industry and consternation among politicians, scholars examined the data and realized that those filing consumer cases were not part of a chronically poor segment of society, but were solidly middle class.[148] The national data seemed to show that the increase in risks to household income; greater idiosyncratic expense uncertainty due, for example, to higher medical bills; changes in the population and family structure; decrease in the social and economic costs of filing bankruptcy; the removal of interest rate ceilings[149] which eased the expansion of credit to higher-risk borrowers; and reliance on two incomes to make ends meet[150] were all factors that contributed to the increased filings.[151]

Utah possessed many of the factors that scholars reported led to increased consumer bankruptcy filings, and studies attempted to find the combination of elements that led this state–known for responsible social behavior and self-reliance–to repeatedly top the list of consumer filings. One study conducted during 2004-2005 reported that employment issues (specifically under employment rather than job loss), medical expenses, divorce, or other family problems as well as difficulty managing finances and overuse of credit cards were significant Utah factors. Further, the study indicated that Utah debtors were more likely to be self-employed or to have suffered a reduction in income rather than job loss and that more than half owed medical

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148 *See generally* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Fragile Middle Class* (2000).

149 *Marquette Nat. Bank of Minneapolis vs. First of Omaha Service Corp.*, 439 U.S. 299 (1978).

150 Elizabeth Warren and Amelia Warren Tyagi, *The Two Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke*, Basic Books (2003).

151 Igor Livshits, James MacGee, and Michele Tertilt, *Accounting for the Rise in Consumer Bankruptcies*, The National Bureau of Economic Research (Sept, 2007) at p. 1 http://www.nber.org/papers/w13363 (last visited Dec. 1, 2010).

providers.[152] A different study between June 2003 and June 2004, found that a majority of debtors were employed when they filed, but almost half suffered a decrease in income in the prior years, 12 percent of filers tithed, and many had large credit card and medical debt.[153] Yet another study conducted in 2005 concluded that financial management skills and economic factors such as healthcare and employment were cited by Utah debtors as the reasons for their filings. Utah's median monthly mortgage payment in 2002 was 45.3 percent of the average monthly income for a worker, or the fourth highest nationally.[154] Utah has the largest family size in the nation (3.57 persons per family as compared to 3.14 nationally).[155] Larger families may have higher debt levels and bigger cars, as well as additional expenses for clothes, food, medical care, and other items. Some filings resulted from bad judgment, and some because there was simply no one there to say no when the marketing forces of Madison Avenue were stronger than common sense.

One study took the issue further to inquire if being a Mormon was the cause.[156] The conclusion was that Mormons may seek assistance from their church before resorting to bankruptcy court and, of the sample studied, 29.1 percent indicated that they sought help from a

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[152] Jean M. Lown, *Consumer Bankruptcy in Utah (USA); Who Files and Why*? International Journal of Consumer Studies 32 (2008) at p. 233.

[153] Steven Oberbeck and Tony Semerad, *Utahns and Bankruptcy: Why We're Going Broke, Bankruptcy; key findings*. THE SALT LAKE TRIBUNE, Jan. 9, 2005, at p. A1.

[154] Farnsworth, *supra* note 144, at p. 13.

[155] United Way of Salt Lake, *Living on the Edge: Utahns' Perspectives on Bankruptcy and Financial Stability* (2006).

[156] That study concluded that in fact Mormons were slightly under represented in bankruptcy filings and that tithing, having larger families, and taking on financial burdens at an early age were not driving Utah's high bankruptcy rate. *See generally* Johnson, *supra* note 145, at pp. 617-627.

religious or charitable organization prior to filing.[157]

Most of the studies reflect two key drivers: economic factors such as job loss or under employment, and medically related debt. The data is rather depressing. It indicated that over 78 percent of Utah debtors reported a job or income issue, which is a 15 percent increase over the national sample.[158] Utahns were 73 percent dependent upon income from wages and salaries as opposed to 68 percent nationally.[159] They were the third most likely in the U.S. to hold multiple jobs and have an average annual pay of $31,606, or 82 percent of the national average.[160] For those employed, many Utah jobs do not supply good benefits, so if there was an interruption for medical or other reasons, there was no safety net in the form of leave time or other compensation. Women were a large percentage of Utah's labor force, but were more likely to be employed part time, and Utah reported one of the largest gender wage gaps in the nation with women earning 70.3 percent of male wages as opposed to 76.2 percent nationally.[161] Also, medically related debt nationally is cited by over 50 percent of debtors as a reason for filing, but in Utah the number was 61percent.[162]

There may have been other factors driving the high filing rates not specifically covered by the scholars. This period of time was economically stressful for the nation as a whole with the

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157 *Id.*, at p. 620.

158 *Id.*, at p. 629.

159 Farnsworth, *supra* note 144, at p. 13.

160 *Id.*

161 *Id.*

162 Johnson, *supra* note 145, at p. 630.

economic downturn after the September 11, 2001 terrorist attacks in New York. An additional factor unique to Utah was the 2002 Winter Olympic Games. While that may not seem like a reason to file bankruptcy, the state engaged in an extraordinary pre-Games building program that was completed–on time–prior to the opening of the games in February of 2002.[163] These projects, as well as the tourism related to the Olympic and Paralympic games, came to an abrupt halt in the spring of 2002. Higher paid construction workers who were able moved to other locations and so did their income and consumption which impacted sole proprietorships and small businesses. The benefit of a vigorous construction environment did not continue after the projects were completed. Unemployment increased in the spring of 2001, peaked in February of 2002 at 6.1 percent,[164] and did not recede until early spring of 2003. Bankruptcy filings followed the unemployment figures with the highest filing period in the first quarter of 2002.

Local legal and judicial culture may also have played a part, especially in the shift to a larger percentage of Chapter 13 filings. Many attorneys dealing directly with Utah debtors report that most debtors simply wanted to "do the right thing" by at least trying to repay their creditors, and so they filed Chapter 13 cases. Since the 1980s, Utah has had consumer attorneys who file

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[163] The remodeling of the Rice-Eccles Olympic Stadium, which was the site of the opening and closing ceremonies, was completed well before the Games. The construction of the new five-star Grand America Hotel in downtown Salt Lake City was completed in March of 2001. The Utah Transit Authority had already completed the 15-mile north/south light-rail TRAX transit line in 1999, but a 2.5-mile east west line connecting downtown Salt Lake City with the University of Utah and the Olympic Village was completed in 2001. Other preparations for the Olympics included rebuilding parts of Interstate Highways 15 and 80, redesigning or upgrading other critical transportation routes, and adding a runway to the city's airport.

[164] http://www.google.com/publicdata?ds=unemployment&met=unemployment_rate&idim=state (last visited Oct. 14, 2010).

large numbers of cases[165] and were the first to advertise their services, a practice considered unheard of by other members of the bar at that time. Eventually in the 2000s, one large consumer firm reports that it, as well as other firms, employed direct mailing programs with thousands of pieces in the mail every month to distressed consumers. Therefore, people who may not otherwise have considered filing, now became aware that bankruptcy was an option. The bench encouraged at least some repayment to unsecured creditors, which may have stretched some debtors' budgets thin and made the cases more likely to be dismissed.[166] There also seemed to be a tendency among some attorneys to "let the case be dismissed" knowing there was no adverse impact in refiling a new Chapter 13, and, in fact, often fewer creditors would file claims with each filing. If Chapter 13 debtors defaulted in payment plans, the court often granted abatements but conditioned remaining in the plan on timely future payments and provided an automatic dismissal mechanism if future defaults occurred. This so-called rule-centered philosophy espoused by the Utah judges versus an outcome-oriented philosophy used by some other courts could have accounted for more repeat filings in Utah than other districts. So in some sense, Utah's culture may indeed have played a part in the larger than average number of Chapter 13 filings.

Judge Allen Retires

Eventually, Judge Allen became more reclusive, less available to practitioners and colleagues, and insulated from others by his staff. There were attorneys who felt Judge Allen's law clerk exercised influence beyond that of a normal clerk and that she controlled the process

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[165] *Disciplinary Panel Recommends Bankruptcy Attorney be Disbarred*, DESERET NEWS, January 25, 1989. Attorney claims he filed 762 Chapter 13s and 463 Chapter 7s during 1987.

[166] In Colorado, zero payment Chapter 13 plans were the norm, and their Chapter 13 filings were below those in Utah.

unreasonably. Judge Allen's health began to decline due to Parkinson's Disease, and he announced his intent to retire. In May of 2001, his cases were reassigned to Judge Clark and Judge Boulden because he was unable to attend to them. He officially retired on July 15, 2001. He passed away just six days later on July 21, 2001, at age 70 after serving 18 years on the bench.[167]

William T. Thurman Fills Judge Allen's Position

The next major change in the Utah court was the appointment of Judge Allen's replacement. William T. Thurman attended the University of Utah as an undergraduate, and received his Juris Doctor from the University of Utah College of Law in 1974, the same class as Judge Boulden. Born in Washington, D.C. on October 8, 1947, his family moved to Utah in 1951, and he has considered Utah home ever since. Judge Thurman practiced with the firm of McKay, Burton & Thurman[168] from 1974 until August 2001. Shortly after joining the firm he was asked to represent a creditor who was a producer of the film *The Great American Cowboy* and had filed a Chapter XI case, which became his introduction to practice under the Act. He was appointed as a Chapter VII Trustee in 1975, by Judge Jenkins.[169] Judge Thurman was educated in how to be a trustee under the Act by Judge Jenkins and also by fellow trustee Roger G. Segal who

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[167] Some attorneys expressed that they felt that Judge Allen wanted to retire sooner but stayed on to accommodate his staff, and that he lost the energy and enthusiasm to enjoy his time on the bench.

[168] In addition to his father serving as United States Attorney from 1961 to 1969 and being the named member of the firm, his great grandfather Samuel R. Thurman served for eleven years as a Justice of the Utah Supreme Court.

[169] Judge Jenkins had served during the 1950s as campaign chairman for William T. Thurman, Judge Thurman's father. The elder Thurman served for eight years as Chief Civil Deputy in the office of the Salt Lake County Attorney under County Attorney Frank E. Moss, later a U.S. Senator, and was also active in Utah Democratic politics, serving as Salt Lake County and Utah State Democratic Chairman. He served as United States Attorney, District of Utah, under Presidents Kennedy and Johnson. United States Attorney's Office, District of Utah, http://www.justice.gov/usao/ut/history.html (last visited Nov. 17, 2010).

was appointed at about the same time. When the Code was enacted, Thurman became a member of the panel of Chapter 7 trustees. Beginning with the 1980s, his practice consisted primarily of representing business and personal debtors and creditors in complex Chapter 7 cases and business debtors in Chapter 11 cases. Judge Thurman served as a Chapter 7 Trustee until 1982, when his practice representing business debtors in Chapter 11 became too busy.

Thurman continued to practice before all the bankruptcy judges, including those who came from out of state to assist with the Court's caseload. Judge Harold Mai, Judge Stewart Rose, and Judge Roland Brumbaugh each had a style different from the Utah judges, and Judge Thurman considered it a good experience to be exposed to their somewhat less formal methods.[170] Some of the cases in which he participated while in practice were *In re Alyucan* and *In re South Village*, dealing with adequate protection issues; *In re Dewsnup*, a Chapter 7 lien stripping case; and *In re Kerry Jackson* dealing with the scope of sanctions for violation of the automatic stay.

Thurman applied for the bankruptcy judge position when Judge Allen announced his retirement. Tenth Circuit Chief Judge Deanell Tacha formed a large selection committee to which applications were referred. Ralph Mabey chaired the committee, which included Laurie Crandall, Anna Drake, Peter Billings, Danny Kelly, and others. The committee was formed to draw participation from different corners of the legal community and provided a relatively formal interview process. There were over 80 applications, and the committee diligently reviewed them all and winnowed them down to interview about ten applicants. Eventually, three names were recommended from a total of six applicants forwarded to the Tenth Circuit Council with the

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[170] At hearings Judge Mai would usually call the trustee by his or her first name, simply asking what the trustee wanted done, and he did not see much reason to consider opposing views. Judge Rose most often proceeded by inviting the litigants back to the conference room for a cigarette and a chat to settle the dispute.

selection committee's comments. As a result of the selection committee's recommendations, further interviews were conducted by the Circuit, and eventually the appointment was made by the Court of Appeals. Judge Thurman was sworn in as a United States Bankruptcy Judge on September 4, 2001, at the age of 53.

Judge Thurman has become a popular judge, well received, with a great judicial demeanor and conversational style. He easily communicates to litigants what he wants in a proceeding and is accommodating in scheduling his time. He initiated hearings in St. George and opened up that geographic area to regular, in-person visits, eventually in new facilities. He is an energetic judge participating in various national conferences and programs, and is usually willing to lend his presence to committees and projects. With a great deal of practical experience as a Chapter 7 Trustee and Chapter 11 debtor's attorney, he shows real empathy for the parties. He is viewed as seeing the human side of the bankruptcy process and works diligently to protect the humans involved in it. Above all, he has a practical approach to resolving issues. Among his most significant cases are *In re Medical Software Solutions*[171] and a series of cases interpreting the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[172]

Judge Thurman was appointed to the BAP on May 6, 2003, to a five-year term to replace Judge Boulden when she retired from that court at the end of her two renewed terms. Many of the judges on that court became friends and colleagues, helping to ameliorate the isolation of the bench.

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[171] *In re Medical Softwear Solutions*, 286 B.R. 431, 439-40 (Bankr. D. Utah 2002) (sales of assets in Chapter 11cases).

[172] *See, e.g. In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006) (the interpretation of projected disposable income).

Technological Changes

During the Modern Era, technology was progressing step by step. In Utah attorneys' offices, carbon paper turned to mimeographs, IBM mag cards, Wang systems and eventually PC word processing. Fax machines and runner services helped the practice. Letters disappeared, and phone calls turned into e-mails. The Court took the lead in innovations to improve access, convenience, and efficiency. The four clerks of court, Mike Shephard, Robert Wiley, William Stillgebauer, and David Sime, have all contributed to the Court's leadership in technology, and the clerk's staff, in addition to being responsive, customer oriented, and skilled, was trained on an evolving series of technological advances.[173] Cases once filed over the counter and filing fees paid in cash or check have given way to electronic filing and electronic payment of fees. The Court's paper dockets were converted to the BANCAP docketing system, and voluminous files began to be electronically scanned. The Court allowed pleadings to be filed after hours in a drop box outside the courthouse or in kiosks scattered around the area, which provided a significant benefit, especially to attorneys located outside the Salt Lake metropolitan area. Eventually, the paper file was no longer deemed the Court's official file, replaced instead by an electronic file. The court reporters that had advanced Judge Mabey's court were replaced by an electronic recording system with copies of proceedings available on disk, rather than waiting for paper transcription. Chambers calendaring went from word processed to an increasingly sophisticated case management and calendaring program called CHAP.[174] Hearings were obtained first by

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[173] The Court's highly skilled IT department was to eventually become one of the larger divisions in the clerk's office.

[174] The Utah-created CHAP system was eventually adopted by the Administrative Office of the U.S. Courts as the only bankruptcy chambers program supported by the AO.

phone call to chambers, then by request over the internet, then by group automatic setting. Briefs and memoranda once filed on paper, then submitted on disks, were eventually uploaded electronically. Proposed orders, once delivered to the judges' chambers or the clerk's office, are now submitted and signed electronically, then uploaded to the noticing center and mailed through the Court's contract carrier. The Court also tried to use technology to accommodate those outside the Wasatch Front by holding hearings in Ogden and St. George via videoconferencing. The judges also benefitted by having access, while on the bench, not only to the content of the docket sheets for all cases, but to Westlaw and Lexis services to provide case law support for pending issues.

Almost everyone interviewed for this history believes that the remarkable technological advances in bankruptcy practice have improved the Court's service to its customers and the security of the Court and enhanced attorneys' service to their clients. The ability to work around the clock is available to those who wish to do so. But a price has been paid by way of the increase in the pace of practice and less time for face-to-face communication and deliberation. Most attorneys feel that technology has added to the strain of practicing and keeping informed because of the sheer volume of information and the possibility of missing important communications. Some attorneys feel that the ability to file voluminous pleadings has added to the use of improper tactics to bury an opponent in paperwork and that elaborate infrastructure must be developed just to keep up with the volume of e-mails and electronic notices.

There is also some downside for the bench as technology has further increased isolation of judges from the bar. Orders once submitted during a face-to-face chat in chambers are now resolved without direct interaction, explanation, or the pleasantries and catching up of the old

days. As a result, there are many new members of the bar who have never even been in chambers. Judges have also lost the discretion of which opinions are significant enough to warrant publication because national reporters can simply sweep the dockets for rulings, as opposed to the prior practice where opinions were submitted directly by the judge.

BAPCPA

The national angst about the soaring number of bankruptcies culminated with the April 20, 2005 enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). Because of the content of the statute and publicity speculating as to its projected effect, a wave of filings was created shortly before its effective date in October, 2005. By the end of 2005, Utah had 21,925 filings, including 16,800 Chapter 7 filings, only 38 Chapter 11 cases, and 5,086 Chapter 13 cases.[175] Through October alone, 21,385 cases were filed, with 5,680 filed in October and only 340 cases filed in November and December.[176] The avalanche of Chapter 7 cases was processed by the trustees. But for the Court, the real work began in the days after the October 17, 2005 effective date, trying to reconcile the pro-creditor provisions of BAPCPA with the existing provisions of the Code.

Judge Clark Retires

During the last few years of his judgeship, some attorneys described Judge Clark as unpredictable, sometimes significantly late in starting court, and, on occasion, unduly hard on

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[175] A. O. Rule *supra* note 30.

[176] United States Bankruptcy Court for the District of Utah, filing statistics, found at http://www.utb.uscourts.gov/ (last visited Nov. 12, 2010).

attorneys, bringing some to the point of tears.[177] The perception of some members of the bar was that there was a power vacuum at the Court and that the bench had become dysfunctional. Judge Clark eventually retired from his long and diligent service with the BAP effective April 28, 2008, and from the Court on January 5, 2009 at the age of 66. Upon Judge Clark's retirement, by agreement of the District Court bench, Judge Thurman was appointed Chief Judge with a fixed term that was to be rotated among the bankruptcy judges.

R. Kimball Mosier Fills Judge Clark's Position

The attorney selected to fill Judge Clark's vacancy was R. Kimball Mosier, a well-known practitioner and Chapter 7 trustee. Born in Denver, Colorado on November 5, 1959, Mosier had obtained an undergraduate degree in economics at the University of Utah, and had continued his education in Madison, Wisconsin with the intent to teach. He then changed direction and obtained a J.D. from the University of Utah. Upon graduation, he practiced for a year with Kipp & Christian and then went to work for Roe & Fowler. He initially had little knowledge of bankruptcy, but after practicing found it very interesting and rewarding. William Fowler and David Leta were involved in several large cases and were representing the Trustee, Robert Merrill, in the Clearing House cases. Mosier found the work attractive because it often involved working out disputes through negotiation, rather than strictly litigation. He started a sole practice, in association with John Straley, for eight years. He was selected as a panel trustee and expanded his practice to cover trustee litigation. Thereafter, he was with Parsons Kinghorn Harris, P. C. and

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[177] In early 2005 the press reported that Judge Clark had been arrested for driving drunk one Sunday afternoon and that he eventually plead guilty to alcohol-related reckless driving. Stephen Hunt, *Judge gets probation, community service for driving offense*. THE SALT LAKE TRIBUNE, July 7, 2005. The press report spread quickly through the national bankruptcy bar. Some attorneys felt sorry for Judge Clark, but others were surprised that he did not resign from the bench, was not removed as Chief Judge, or that the District Court did not in some other way acknowledge the incident.

ultimately practiced for 29 years.

The Merit Selection Panel for the Bankruptcy Judge Vacancy for the District of Utah was chaired by District Judge Dale A. Kimball, with a much smaller panel than for Judge Thurman's application, consisting of Mona L. Burton, Kim R. Wilson, and Danny C. Kelly. Twenty-one applications were considered, eight candidates were interviewed, and the Panel forwarded the names of five attorneys to the Tenth Circuit for its consideration. After in-person interviews, the Circuit selected Mosier, and he was sworn in on February 13, 2009, at the age of 58.

Judge Mosier is viewed as being very proactive in communicating with attorneys regarding his preferences on procedural matters. He spelled out clearly his philosophy and preferences in several seminars with the bar. He is well prepared and is adept at identifying issues and communicating those aspects of the case that parties do not need to address. He has the ability to balance the technical aspects of the statute with the equitable principles of the Code with an even hand. He has been instrumental in trying to unify the procedures of the three chambers to reduce unnecessary differences in procedures and in projecting to the bar that any "dysfunctional" nature of the three different chambers was being resolved.

The Great Recession

The years following BAPCPA saw first a precipitous decline followed by a steady increase in filings as the bar and bench became familiar with the new statute. The fall of Lehman Brothers on September 15, 2008,[178] subsequent stock market crash, the housing bubble and crash, employment dislocation, and increasing unemployment, all generally known as the Great Recession, have impacted Utah's filings. Filings for the year 2008 totaled 9,447. For 2009,

[178] Wikipedia.org. *Lehman Brothers*, http://en.wikipedia.org/wiki/Lehman_Brothers (last visited Nov. 16, 2010).

filings had increased to 14,829.[179] Chapter 11 filings increased from 78 in 2008, to 91 in 2009, and unlike some prior years, the Chapter 11 cases that were filed were complex and significant in size. Chapter 13 filings increased from 3,772 to 5,122, and Chapter 7s from 5,413 to 9,283. Those debtors who had used the equity in their fast-appreciating homes to fund living expenses– and those attorneys who filed Chapter 13 cases, stripped down the unsecured debt and then encouraged their clients to refinance home mortgage debt out of the plan–found that the rapid decline in home values brought their schemes to a screeching halt. Although Utah was a little late in entering the recession,[180] beginning in September 2008, unemployment rapidly increased, and eventually bankruptcy filings followed. As of September 2010, the total filings for year-to-date were 13,571. And once again Utah appeared to be leading the nation in the percentage gain in filings, with Utah seeing a 27 percent gain in the first nine months of 2010, as opposed to 11 percent for the nation.[181] The ratio of Chapter 13's to Chapter 7's changed starting in 2007, with the percentage of Chapter 13's decreasing from 43 percent to 33 percent in 2010.[182] Yet the amount of funds returned to creditors in Chapter 13 cases was still staggering by any measure. For the period October 2009, to October 2010, Kevin R. Anderson, the Standing Chapter 13 Trustee, had distributed a total of $37,830,703 for 2010, of which $9,899,373 was paid to unsecured creditors and $7,667,875 to debtor's attorneys.[183]

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179 A.O. Rule *supra* note 30.

180 Jeff Thredgold, economic consultant to Zions Bank, as quoted in *Bankruptcies in Utah jump, outpacing U.S.*, THE SALT LAKE TRIBUNE, Oct. 16, 2010.

181 Steven Oberbeck, *Bankruptcies in Utah jump, outpacing U.S.*, THE SALT LAKE TRIBUNE, Oct. 16, 2010.

182 Bankruptcy Filing Statistics, http://www.utb.uscourts.gov/.

183 Chapter 13 reports, Kevin R. Anderson, Standing Chapter 13 Trustee.

Judge Boulden Retires

Judge Boulden announced her retirement effective on June 30, 2010. She was generally viewed as handling her courtroom very well, hard-working, and always prepared. Her rulings were predictable and consistent, and the bar liked an outcome that they could anticipate and that was not a surprise to anyone. Her opinions were viewed as clearly thought out and well supported, and some members of the bar viewed her as a technician of the Code. Sometimes attorneys would complain that they were required to do more work than necessary and disliked it when she would raise facts or issues *sua sponte* for which they were not prepared. Her approach harkened back to her mentor, Judge Jenkins, with his exhaustive knowledge of the files and litigation before him. As with the judges before her, Judge Boulden had been heavily influenced by Judge Jenkins and his absolute dedication to truth and integrity. Judge Boulden retired at the age of 61 after 21 years on the bench.

Joel T. Marker Fills Judge Boulden's Position

Joel T. Marker was born in La Crosse, Wisconsin on November 20, 1956, and received a business degree in 1979, from the University of Wisconsin. He then spent two years in Chicago at a commodities brokerage firm gaining experience on the commodities exchange. He applied to the University of Utah College of Law and was accepted. During his 1983 year, he took a bankruptcy class from Professor Richard Aaron and interned at the Bankruptcy Court before graduating in 1984. The 1984 job market was not good, and Marker struggled to find a job. He contracted with R. Kimball Mosier, then a young trustee, to do contract work filing preference complaints. He then contracted with McKay, Burton & Thurman to finish up William T. Thurman's Chapter 7 trustee matters after Thurman resigned from the panel. Over the years

Marker did primarily debtor work with a third of his practice representing debtors with small businesses in 7s and 11s. In 1987-89 he also filed a dozen or so Chapter 12 cases. One of his most significant cases was the involuntary Chapter 11 case of a copper mining company in Lisbon Valley near Moab in which creditors were eventually paid 100 percent of their claims.

Marker applied in 1995-96 for a Chapter 7 panel trustee position and was eventually appointed in December of 1997. Over the 13 years he served as a trustee, he administered over 11,000 cases which comprised two-thirds of his practice. He could call on the experience of Stephen Rupp who has served as a Chapter 7 trustee for 28 years and on the experience of fellow trustees Roger Segal, Duane Gillman, and Kenneth Rushton. In addition, he found that the local bankruptcy bar would give no quarter but were cordial and professional, with a willingness to figure out the solution to most problems.

Marker had applied for a judicial appointment before, beginning when Judge Allen retired, and made the short list along with Annette Jarvis and William Thurman. When Judge Clark retired he applied a second time and did not make the short list to the Circuit. When Judge Boulden announced her retirement, he decided at 53 years old to try one more time since he had seen bankruptcy practice from just about every angle and wanted to try something else without jettisoning twenty-plus years of bankruptcy experience.

The selection committee included District Judge Kimball, Roger Segal, Michael Johnson, and Mona Burton, who considered the pool of applicants and interviewed about 8 people, offering three to the Circuit. Circuit Judges Michael R. Murphy, Senior Judge Stephen H. Anderson, and Timothy M. Tymkovich conducted the final interviews. Marker was selected and sworn in on July 1, 2010, at the age of 53.

Marker had the same reservations about leaving private practice as his predecessors, including the economics of judicial pay. He was also aware that there would be some isolation, but was surprised at the extent of the loss of association with fellow attorneys. He found the position was more isolating than he expected. He has, nevertheless, found the environment on the bench intellectually challenging, the other members of the bench (with whom he had practiced in the past) collegial, and his staff talented and accommodating.

Rebounding from 2008

Following the economic downturn of 2008, the number of filings increased, as did the complexity of the cases. The economy continued to struggle, but construction projects such as the NSA's $1.6 billion Data Center, continued Trax, Frontrunner, and freeway construction, the 20-acre City Creek Center, the expanding Milford Wind Corridor, and the huge $1.4 billion Falcon Hill aerospace research park at Hill Air Force Base all helped. Not only helpful for Utah's economy, but for the Court, in particular, was the final approval of funding for construction of the new U.S. District courthouse which employed 700 workers over the three years of its construction.[184]

2015 Brings Changes to the Court

Utah's improving economy resulted in changes in filings in the Bankruptcy Court. A reduction in unemployment to 3.6% as of September, 2015,[185] an improving housing market,[186]

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184 Matt Canham, *U.S. District Courthouse Gets Final OK*, SALT LAKE TRIBUNE, Dec. 4, 2010.

185 Bureau of Labor Statistics (bls.gov) Utah (last visited Oct. 28, 2015).

186 Tony Semerad, *Wasatch Front home sales, prices ride 'perfect storm' to strong gains*, SALT LAKE TRIBUNE, Oct. 28, 2015.

population growth, and moderate prices[187] all may have impacted case filings from 2010 to 2015. Annual filings in 2010 totaled 17,968, but dropped to 9,374, as of September of 2015. The mix in filings by chapter changed somewhat, increasing 4% in Chapter 13's with a corresponding reduction in Chapter 7 case filings, resulting in 62% of cases filed as Chapter 7's and 38% as Chapter 13's.[188] The U.S. District courthouse construction was completed and the District Court moved into new space, while the Bankruptcy Court remained in its prior location in the Frank E. Moss Courthouse. Soon, other Federal agencies may occupy the historic facilities vacated by the District Court.

Judge Thurman Steps Down and is Recalled by the Circuit

Judge Thurman continued to serve his fourteen year term, since January of 2009, as Chief Judge of the Bankruptcy Court. He also continued his twelve years of service on the Bankruptcy Appellate Panel for the Tenth Circuit, including three years as Chief Judge. With the conclusion of his 14-year term, on September 3, 2015, Judge Thurman stepped down as Chief Bankruptcy Judge for the Bankruptcy Court and also stepped down from the Bankruptcy Appellate Panel for the Tenth Circuit. The Tenth Circuit Court of Appeals reappointed him to serve as a Bankruptcy Judge, in recall status, for a three year term. He continues to hear cases, primarily in the Southern Division of the District of Utah in St. George.

Judge Mosier becomes Chief Judge

Judge Mosier, appointed to the Bankruptcy Court bench on February 13, 2009, became

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[187] Bureau of Labor Statistics (bls.gov) Utah Consumer Price index, West Region – September 2015. (last visited Oct. 28, 2015).

[188] United States Bankruptcy Court for the District of Utah, filing statistics, found at http://www.utb.uscourts.gov/ (last visited Nov. 18, 2015).

Chief Judge of the Bankruptcy Court of the District of Utah effective September 4, 2015. Chief Judge Mosier was also appointed by the Tenth Circuit Court of Appeals on August 25, 2015 to the Bankruptcy Appellate Panel for the Tenth Circuit, to serve a renewable five-year term commencing September 8, 2015.

Kevin R. Anderson Fills Judge Thurman's Position

Having served as Standing Chapter 13 Trustee for the District of Utah since May of 1998, Kevin R. Anderson is a familiar and respected figure in the Utah Bankruptcy Bar. He was born in Ogden, Utah, graduated from Brigham Young University in 1980, and the J. Ruben Clark Law School in 1985. He clerked for David Naugle, United States Bankruptcy Judge, in Riverside, California. Starting in 1986, he was an associate with Watkiss & Campbell and in 1988, became a partner with Allen, Nelson, Hardy & Evans. In 1992, he joined Kruse Landa Maycock & Ricks, LLC as a partner. In private practice he represented private clients as well as Chapter 7 and Chapter 11 trustees in litigation matters before the Bankruptcy Court, with an emphasis in real property, avoidable transfers, and civil fraud. In 1995, he shifted his emphasis from bankruptcy to commercial litigation in Federal Court, with an emphasis on real property, contract disputes and civil fraud.

Since his appointment as Standing Chapter 13 Trustee in 1998, he administered more than 65,000 cases, received and disbursed millions of dollars in debtor payments to creditors (including $61 million in 2014 alone), managed an office of forty-one employees, all while keeping the Trustee commission one of the lowest of similarly situated trusteeships around the country.

His experience in bankruptcy matters extends nationwide. Judge Anderson served as a member of the Executive Committee of the National Association of Chapter 13 Trustees from

2005-2008; and served as the President of that association from 2009-2010. He served on various national committees dealing with bankruptcy rules and forms, participated in educational conferences, consulted with members of Congress regarding pending bankruptcy legislation, and improved computer security, imaging and privacy in Chapter 13 Trustee offices. His national educational outreach included an educational video regarding the Home Affordable Modification Program. He also initiated a process for making Chapter 13 payments via electronic fund transfer and provided free access to required financial management courses. Perhaps his most complex achievement was his leadership with a four-year project to create the National Data Center which gathers data daily from approximately 200 Chapter 13 trustee offices into a single database accessible by debtors and creditors.

Anderson was humbled to be chosen as a United States Bankruptcy Judge. After applying in 2001, 2009 and 2010, he has now achieved his career goal to continue his service in the bankruptcy field from the bench. No doubt he will contribute to both the local and national development of bankruptcy law and continue to refine its procedure.

The Future

The Utah Bankruptcy Court has much work ahead. The structure of the bar is changing. There is a whole new bankruptcy bar in the St. George area, and there are new attorneys all over the state who need to be mentored. Congress is ever on the horizon with the ability to tinker with the Code with unforeseen results. But the skill level of the bar and the bench is great. The newly constituted bench has the knowledge, enthusiasm, and commitment to public service to meet the challenges the future holds. All concerned have a rich heritage to draw upon, which will serve to guide and inspire their future actions.

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Utah Bankruptcy Referees and Judges

1950 - 2015

William H. Leary Nov. 28, 1949–April 6, 1957

Clinton D. Vernon May 7, 1957–March 18,1962*

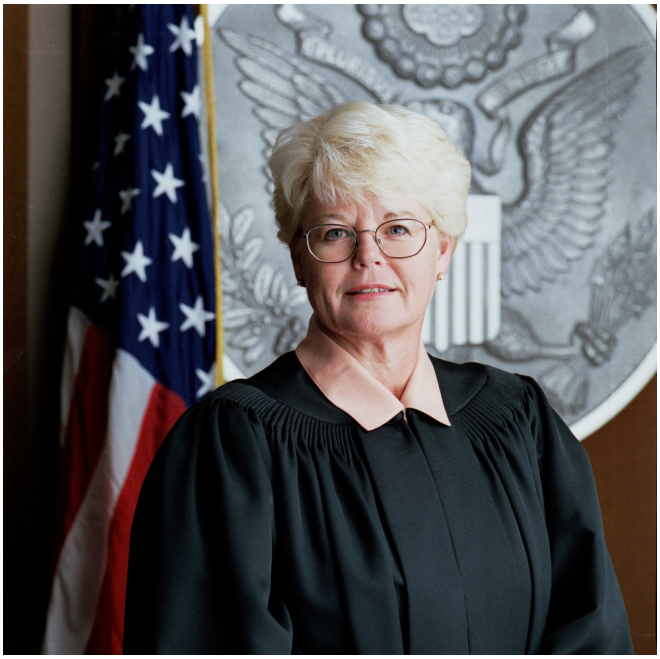
Herbert B. Maw March 23, 1962–March 17, 1965*

Bruce S. Jenkins March 17, 1965–Oct. 11, 1978

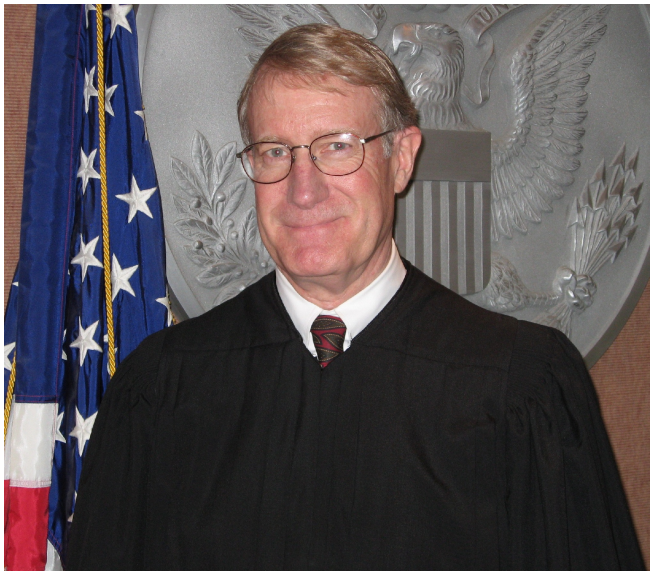
Ralph R. Mabey February 9, 1979– July 1, 1983

Glen E. Clark July 1, 1982–- January 5, 2009

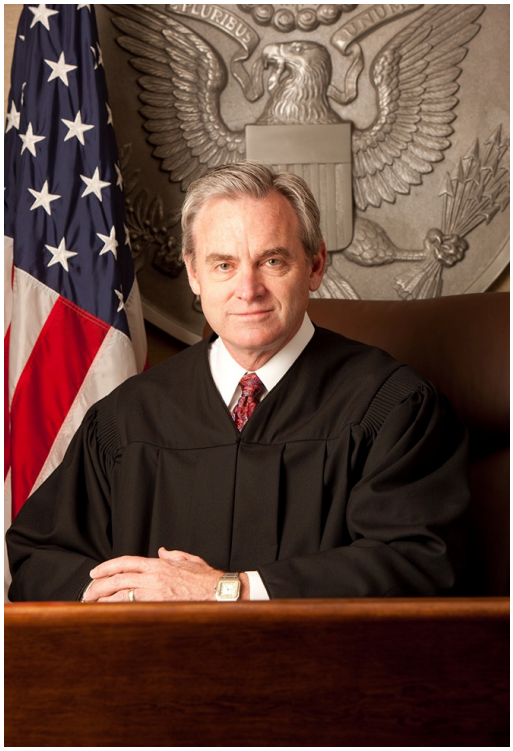
John H. Allen August 24, 1983– July 21, 2001



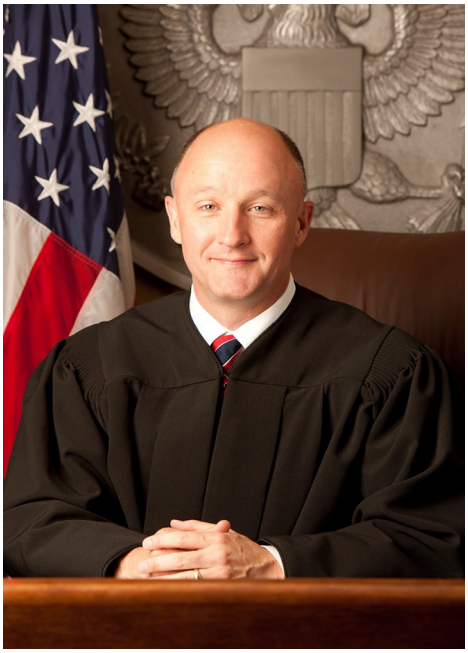
Judith A. Boulden January 5, 1988– June 30, 2010



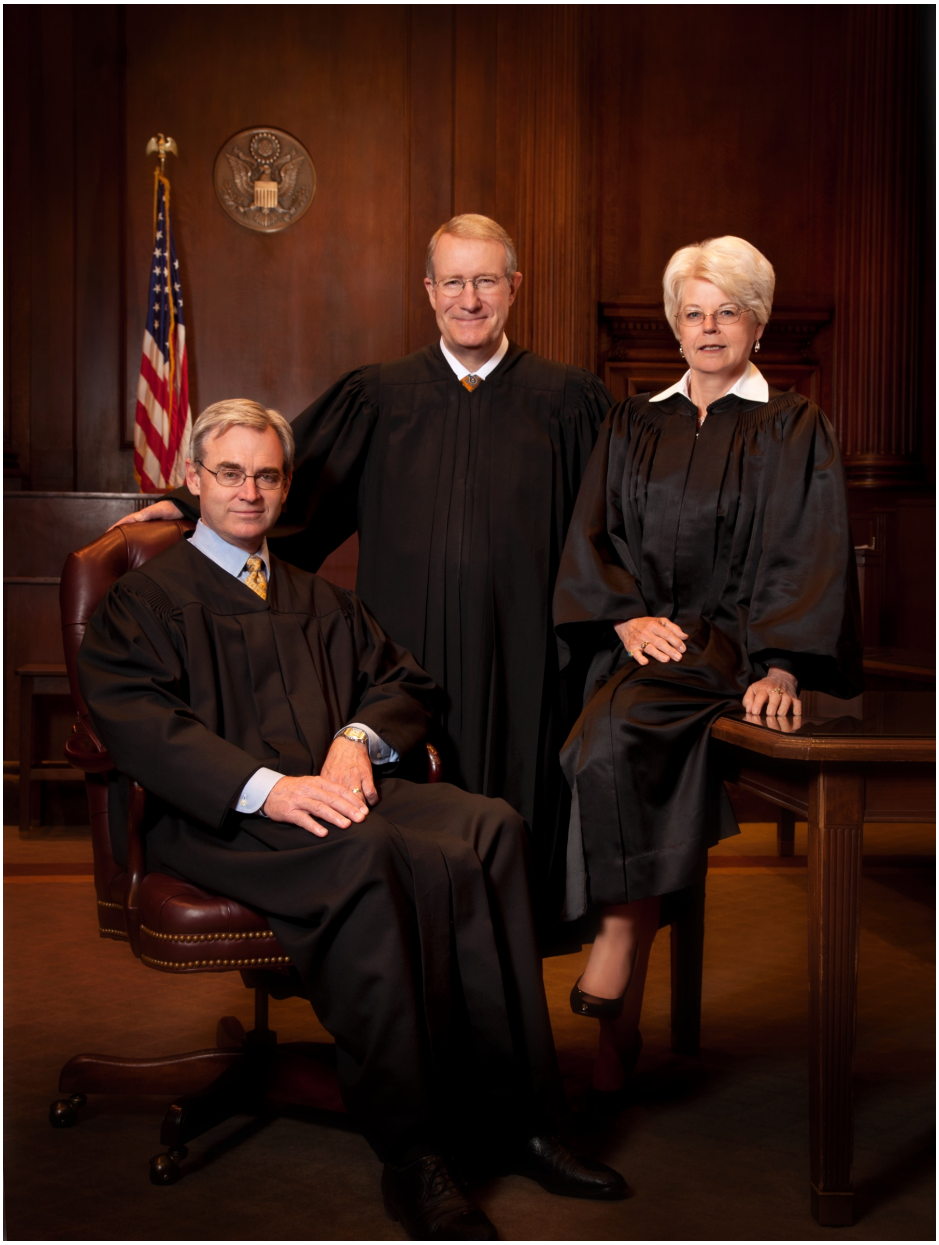
William T. Thurman September 4, 2001



R. Kimball Mosier February 13, 2009

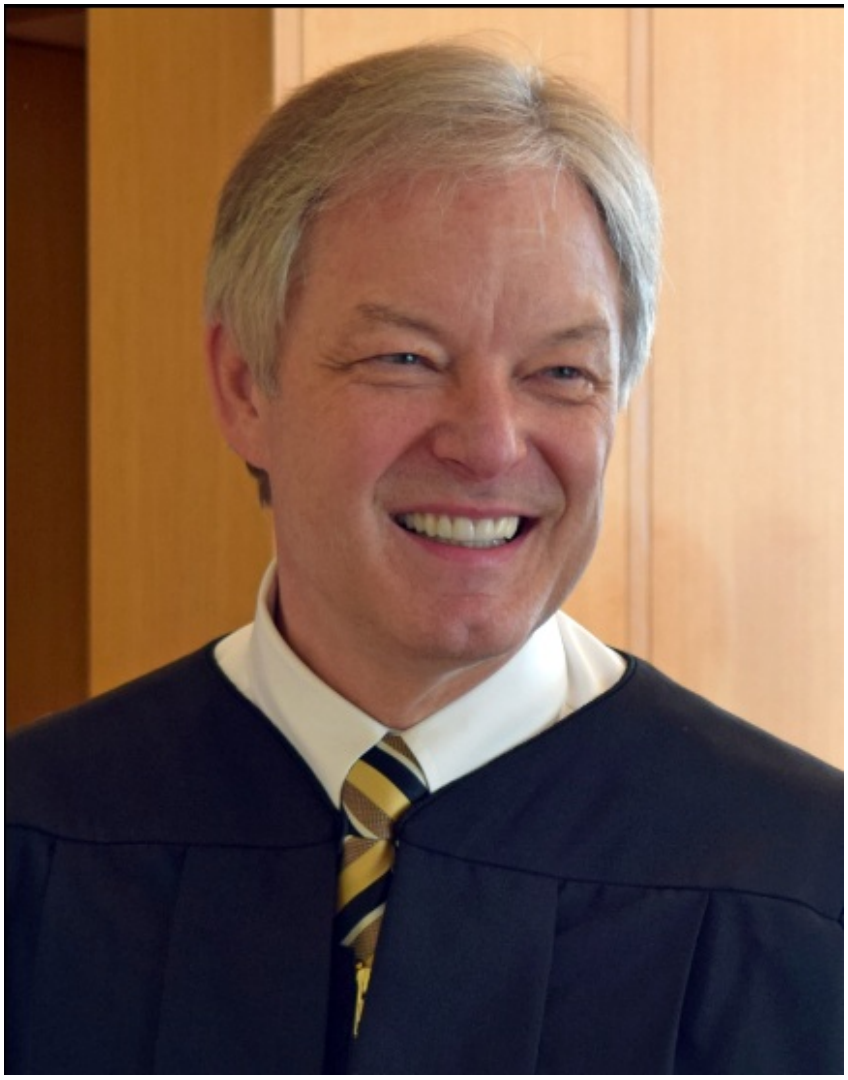


Joel T. Marker July 1, 2010



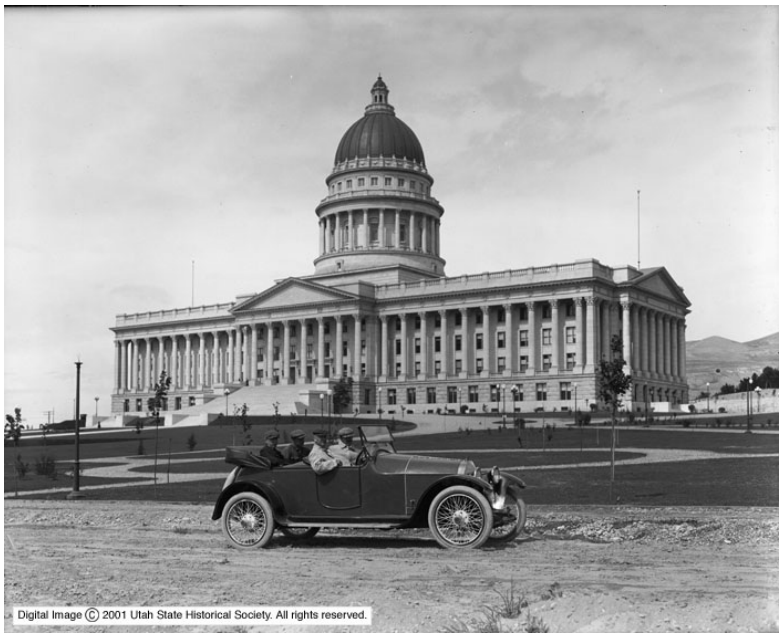
Judges Mosier, Thurman and Boulden - 2010

* Photographs of Clinton Vernon and Herbert Maw used by permission of the Utah State Historical Society, all rights reserved.



Judge Kevin R. Anderson September 4, 2015

Buildings



University of Utah Park Building - February 16, 1916

Law School - Third Floor

Utah State Capitol - September 10, 1916