

SURVEY OF RECENT DECISIONS
OF
THE HONORABLE PAUL J. KILBURG

**U.S. Bankruptcy Court
Northern District of Iowa**

October 16, 2001 - September 1, 2002

Prepared by

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The case summaries are categorized to correlate with the Key Number Classification of West's Bankruptcy Digest. West's key numbers are included in the topic headings below. Summaries of prior decisions (April 23, 1993 to October 17, 2001) are available on our web site, www.ianb.uscourts.gov.

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I. IN GENERAL, 2001-2120

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In re Robert Butler

11 U.S.C. § 707(b)

No. 01-03843, 277 B.R. 917, Ch. 7, 5/14/02

U.S. Trustee requests dismissal for substantial abuse, asserting Debtor has disposable income which could fund a Chapter 13 plan. HELD: Debtor's budget includes significant amounts of discretionary spending, including fuel and washing of his vehicle, drycleaning and clothing expenses, gifts and charitable contributions. It would be substantial abuse to grant Debtor a Chapter 7 discharge while he continues to pay excessive discretionary expenses.

In re James & Pamela Elliott

11 U.S.C. § 707(b)

No. 02-00227, 2002 WL 970410, Ch. 7, 5/3/02

U.S. Trustee asserts Debtors could generate disposable income by reducing expenses for housing and utilities which exceed IRS collection standards by \$1,365 per month. HELD: It would be substantial abuse under § 707(b) to grant Debtors Chapter 7 relief. Amounts for discretionary expenses plus increases in income and elimination of a vehicle payment could fund a hypothetical 3-year plan. Further, the amount by which excessive housing and utilities expenses exceed the IRS standards could provide income to pay off 82% of unsecured claims over three years.

In re David & Dorothy Zimmerman

11 U.S.C. § 707(b)

No. 02-00782, Ch. 7, 5/3/02

U.S. Trustee seeks dismissal for substantial abuse. He asserts disposable income from payroll deductions, tax withholdings and credit card payments could fund a hypothetical Chapter 13 plan. HELD: Payroll deductions for 401(k) loan repayment and savings are discretionary expenses. Excess tax withholdings are disposable income. The "totality of the circumstances" test is not the correct standard under § 707(b). Rather, the Court evaluates disposable income.

In re Christy Achey

11 U.S.C. § 707(a)

No. 02-00058, 2002 WL 539036, Ch. 7, 4/8/02

§ 305(a)

Debtor seeks to dismiss after receiving a notice of inheritance. U.S. Trustee asserts Debtor should not be allowed to dismiss her case as there are assets which could be distributed to creditors. HELD: Debtor

must show dismissal will not prejudice creditors. The inheritance is property of the estate which is available to pay creditors through the bankruptcy estate. Debtor must formally disclose this property and make it available to Trustee.

In re Keith & Sally Beckel

11 U.S.C. § 707(b)

No. 01-02076-D, 268 B.R. 179, Ch. 7, 10/17/01

U.S. Trustee seeks dismissal for substantial abuse. Debtors have substantial tax refunds and are supporting their daughter in college. They admit they have at least \$400 per month available to pay creditors. HELD: Debtors' anticipated tax refunds and discretionary spending including recreation, 401k payments and gifts show debtors could pay between 30% and 80% of unsecured debts over three years. Dismissal under § 707(b) is appropriate.

IV. EFFECT OF BANKRUPTCY RELIEF; INJUNCTION & STAY, 2361-2490

C. Relief from Stay, 2421-2460

In re Shalom Hospitality, Inc.

11 U.S.C. § 362(d)(3)

No. 02-00276, Ch. 11, 5/8/02

Real estate contract vendor seeks modification of the stay to proceed with forfeiture of Debtor's single asset real estate property. HELD: Debtor is not making monthly payments on the contract and hopes of reorganization appear remote. The automatic stay is lifted to allow the creditor to serve notice of forfeiture and proceed with forfeiture under state law. A \$300,000 check for insurance proceeds shall be held by Debtor's attorney until further order of Court. The creditor's oral motion for appointment of a receiver is denied.

D. Enforcement of Injunction or Stay, 2461-2480

Adams v. Peterson (In re Daniel & Heather Adams)

11 U.S.C. § 362(h)

No. 01-02576, Adv. 01-9226, 2002 WL 844350, Ch. 7, 4/19/02

Debtors seek damages for Seller's retention of personal goods after Debtors vacated the mobile home they were purchasing on contract. They assert the Seller violated the automatic stay. HELD: Debtors must show injury from Seller's willful violation of the stay. A waterbed is the only property of consequential value in the mobile home after Debtors vacated. Seller moved the bed to storage after attempting to contact Trustee and Debtors' attorney to determine what to do with it. The Court refuses to hold Seller in contempt. Debtors have 30 days to pick up the waterbed from Seller, or it may be discarded.

Debtor seeks sanctions against Younkens and its collection agency for violation of the automatic stay. Younkens filed a small claims action against Debtor postpetition. HELD: Younkens filed the small claims action while the automatic stay was in effect. It had notice of the bankruptcy case. Debtor is entitled to actual damages of \$500, punitive damages of \$1,000 and attorney fees of \$387 for the violation of the automatic stay.

V. THE ESTATE, 2491-2760

D. Liens & Transfers; Avoidability, 2571-2600

Huisinga v. Portfolio Servs., Inc. (In re Lonny & Diana Orcutt)
No. 01-03265, Adv. 02-9026, 280 B.R. 837, Ch. 7, 5/21/02

11 U.S.C. § 544(a)
Iowa Code § 321.50(1)

Trustee seeks summary judgment avoiding Creditor's lien on Debtors' vehicle. He asserts Creditor failed to perfect its lien within 30 days as required by Iowa law. HELD: The lien on the vehicle is void and unenforceable because the auto dealer failed to follow the required procedures in the Iowa Code for perfection of the lien. The lien was not perfected within the time limits required by statute.

Youngblut v. Solon State Bank Tiffin (In re Ralph & Maria Henry)
No. 01-03369, Adv. 02-9004, 2002 WL 539047, Ch. 7, 4/5/02

11 U.S.C. § 544(a)(1)

Trustee seeks summary judgment in its action to avoid the Bank's unperfected lien on Debtors' vehicle. The lien was noted on the title postpetition, more than 30 days after Debtors traded in the Bank's previous collateral and purchased the substitute vehicle. HELD: Summary judgment is not appropriate. Further briefing and exploration of the law is required as the pertinent transactions straddled the effective date of the newly-enacted Revised Article 9.

F. Fraudulent Transfers, 2641-2670

Youngblut v. Pepmeyer (In re Robert W. Pepmeyer)
No. 00-02486-C, Adv. 01-9027-C, 275 B.R. 539, Ch. 7, 2/15/02
(appeal dismissed)

11 U.S.C. § 548(a)(1)(B)

Trustee asserts Debtor's change of ownership of an annuity to his daughter's name, either pre- or post-petition, is an avoidable transfer. HELD: Debtor was the owner and his daughter was the beneficiary of the annuity contract. Debtor maintained his sole interest in the property and did not make a gift to his daughter. Changing ownership of the annuity constitutes a transfer, avoidable whether it occurred prepetition or postpetition.

VI. EXEMPTIONS, 2761-2820

In re Lawrence & Janet McCabe
No. 02-00250, 280 B.R. 841, Ch. 7, 6/17/02

Iowa Code § 627.6(2)
§ 627.8(f)

Trustee objects to Debtors' exemption of a shotgun, purchased for \$10,320, and IRAs. HELD: As the legislature has not imposed a dollar limitation on the shotgun exemption, Trustee's objection to the exemption is overruled. As Debtors' annual contributions for IRAs do not exceed the \$2,000 statutory limit, the IRAs are also exempt.

In re Henry & Pamela Banke
No. 01-01281-W, 268 B.R. 541, Ch. 7, 10/19/2001

Fed. R. Bankr. P. 4003(b)

Bank moves to reconsider denial of its objection to exemption, finding the objection was not timely. HELD: The time limits for objecting to exemptions are not "mere technicalities" as the Bank asserts. The Court is not at liberty to ignore the mandates of a time limitation because it seems harsh or unfair.

VII. CLAIMS, 2821-3000

A. In General, 2821-2850

In re John F. Aschtgen
No. 01-01348, 2002 WL 1842444, Ch. 7, 7/16/02

11 U.S.C. § 524(a)
Iowa Code § 249A.5(2)

Executor of Debtor's probate estate seeks to amend schedules to include liability for state-paid medical assistance due on Debtor's death. The debt relates to prepetition medical services. HELD: The State's right to payment arose at Debtor's death, postpetition. The debt is not a prepetition claim subject to discharge.

B. Secured Claims, 2851-2870

In re Jeff & Amy Nehl
No. 97-60192, 2002 WL 1001001, Ch. 7, 5/14/02

Iowa Code § 561.22(2)

Creditor objects to Trustee's Final Report, asserting its claim is secured. Trustee argues Creditor's lien is invalid because required homestead waiver language was not included in lien documents. HELD: Creditor's lien is unenforceable against Debtors' agricultural homestead. The Notice of Lien does not include required language for a waiver of the homestead in agricultural land.

C. Administrative Claims, 2871-2890

In re Tama Beef Packing, Inc.

11 U.S.C. § 503(b)(1)

No. 01-03822, Ch. 7, 8/20/02, appeal pending with B.A.P.

Unsuccessful bidder for assignment of Debtor's lease with City of Tama seeks allowance of \$47,000 as administrative expense claim. It argues legal fees, engineering fees and travel costs are costs of preserving the estate as the successful bidder would not have placed a bid but for the claimant's bid. HELD: Claimant did not meet strict burden of showing expenses were actual and necessary to preserve the estate. Its loss was not a result of administration of the bankruptcy estate. Incidental benefit to the estate from Claimant's bid does not entitle it to an administrative claim. Claim denied.

VIII. TRUSTEES, 3001-3020

IX. ADMINISTRATION, 3021-3250

C. Debtor's Contracts and Leases, 3101-3130

In re Shalom Hospitality, Inc.

11 U.S.C. § 365(d)(2)

No. 02-00276, 2002 WL 1001000, Ch. 11, 5/9/02

Creditor requests a deadline for Debtor to assume or reject a real estate contract for Debtor's motel property. HELD: It is appropriate to set a deadline to assume or reject the contract. The motel is Debtor's sole asset and has been dark since a fire, Debtor is in default under the contract, and reorganization appears problematic.

In re Tama Beef Packing, Inc.

11 U.S.C. § 365(b)

No. 01-03822, 277 B.R. 407, Ch. 7, 4/19/02

Trustee wishes to assume Debtor's lease with the City of Tama and requests permission to assign the lease to one of two competing bidders. HELD: The offer Trustee wishes to accept meets the business judgment test and the requirements of § 365(b). The unsuccessful bidder will receive reimbursement of funds the Court previously required it to pay to Trustee.

In re Tama Beef Packing, Inc.

11 U.S.C. § 365(d)

No. 01-03822-C, Ch. 7, 3/12/02

Trustee seeks a second extension of time to assume or reject Debtor's lease with the City of Tama. A third party has proposed to pursue assignment of the lease. HELD: Costs under the lease are accruing and the bankruptcy estate has no funds to cure. Additional time is granted on the condition that the third party advance \$100,000 as proof of its commitment to pursue the lease assignment.

In re Tama Beef Packing, Inc.
No. 01-03822-C, Ch. 7, 2/22/02

11 U.S.C. § 365(d)(4)

Trustee requested an additional 45 business days to accept or reject a lease with the City of Tama. The Court granted a 10 day extension to preserve Trustee's rights pending a hearing. The City objects and seeks to rescind the order granting the 10-day extension. HELD: Cause exists to extend time to assume or reject the lease until after the bar date for objections and the time for hearing to allow for full consideration of the matter.

E. Compensation of Officers and Others, 3151-3250

In re Internet Navigator, Inc.
No. 01-02353, Ch. 11, 4/29/02

Disqualification of attorney

Creditor/former shareholder seeks to disqualify attorney from representing Debtor's largest unsecured creditor, a law firm. The attorney had previously represented Debtor. He asserts Debtor has waived any conflict of interest. HELD: The attorney's continued representation of the creditor law firm presents numerous and substantial conflicts of interest on many levels. The purported waiver is inadequate to address the numerous conflicts. The attorney is directed to withdraw.

In re Keith & Jo Jeanes
No. 01-00760-W, Ch. 13, 12/20/01

11 U.S.C. § 330(a)(1)(A)

Attorney for Debtors seeks approval of fees. HELD: Some services were not shown to relate to the bankruptcy filing. Travel time is allowed at one-half the regular hourly rate. Finance charges are not allowable. Fees for legal services beyond customarily basic services are compensable.

In re Margaret Bails
No. 98-02717-C, Ch. 13, 12/12/01

11 U.S.C. § 330(a)

Attorney for Ch. 13 Debtor seeks approval of additional fees arising postconfirmation. HELD: Recent attorney fees and expenses are included within the compensation which has already been approved and paid. Considering the funds already paid to the attorney and the low payout to unsecured creditors through the plan, the Court declines to approve additional attorney fees.

X. DISCHARGE, 3251-3440

B. Dischargeable Debtors, 3271-3340

Orr v. Derouin (In re Robert Derouin)
No. 01-03189, Adv. 02-9006, 2002 WL 511504 , Ch. 7, 3/28/02

11 U.S.C. § 727(a)
Rule 4004(a)

Debtor moves to dismiss pro se Plaintiff's complaint as untimely. HELD: The informal complaint was filed a few days after the deadline to oppose discharge. Thus, whether Plaintiff seeks denial of discharge under § 727(a) or an exception from discharge under § 523(a)(2),(4) or (6), the complaint must be dismissed as untimely.

C. Debts and Liabilities Discharged, 3341-3410

Cavin-Elmore v. Elmore (In re Kelly & Kerry Elmore) 11 U.S.C. § 523(a)(5)
No. 01-03782, Adv. 02-9019, 2002 WL 1842457, Ch. 7, 7/28/02

Debtor's former spouse asserts a debt is excepted from discharge as support. In the parties' dissolution, Debtor assumed an auto loan and promised to pay insurance premiums. HELD: The parties intended Debtor's assumption of these liabilities were in the nature of support. The debt is nondischargeable. The remedy is a judgment for the value of the vehicle prior to its repossession. Debtor will also reimburse Plaintiff for insurance premiums through the term of the original vehicle loan.

Schmitz v. Kruger (In re Michael & Diana Kruger) 11 U.S.C. § 523(a)(2)(A)
No. 01-01666, Adv. 01-9268, 2002 WL 1483870, Ch. 7, 7/9/02

Plaintiff who purchased real estate from Debtor asserts Debtor fraudulently stated the lot was free of liens. HELD: Under the circumstances, Plaintiff justifiably relied on Debtor's representations regarding clear title to the real estate. The \$6,000 Plaintiff paid to have Debtor's bank quit claim its lien interest is nondischargeable.

Zio Johnos, Inc. v. Ziadeh (In re Ramon & Linda Ziadeh) 11 U.S.C. § 523(a)
No. 01-01059, Adv. 01-9185, 276 B.R. 614, Ch. 7, 3/26/02 Rooker-Feldman Doctrine

Creditor seeks summary judgment on dischargeability complaint. It asserts its state court judgment has preclusive effect. HELD: Creditor's summary judgment in state court after Debtor failed to appear or answer does not have preclusive effect in this dischargeability action.

Whitlach v. Allgor (In re Tammy Allgor) 11 U.S.C. § 523(a)(15)
No. 01-01484, Adv. 01-9146, 276 B.R. 221, Ch. 7, 3/22/02

Debtor's former spouse seeks to except from discharge a \$3000 credit card debt he paid after Debtor defaulted on payment. The parties' dissolution decree assigned this debt to Debtor. HELD: Debtor has the ability to pay. The detriment to Plaintiff who was forced to pay the credit card debt outweighs the benefit to Debtor in discharging the debt.

Maynard Savings Bank v. Banke (In re Henry & Pamela Banke) 11 U.S.C. § 522(f)(1)
No. 01-01281, Adv. 01-9157, 275 B.R. 317, Ch. 7, 3/11/02 § 523(a)(2)

Debtors seek to avoid Bank's lien on a boat as tool of the trade. Bank seeks to except debt from discharge for fraud. HELD: The boat was not a tool of the trade at the petition date. The debt is excepted from Mrs. Banke's discharge for fraud, but is included in Mr. Banke's discharge. The lien Mrs. Banke agreed to never attached and is unenforceable against Mr. Banke's boat.

Ashby v. Emerson (In re Bradley & Kimberly Emerson) 11 U.S.C. § 523(a)(2)(a)
No. 01-00446-C, Adv. 01-9151-C, 2001 WL 1636439, § 727(a)
Ch. 7, 12/14/01

Plaintiff seeks summary judgment on her complaint to deny discharge and/or to except from discharge damages from Debtor's painting job at Plaintiff's home. She asserts Debtor has failed to deny the facts asserted in her complaint. HELD: Debtors' general denials are sufficient to survive summary judgment. Without deemed admissions by Debtors, the record merely contains dueling affidavits and issues of intent remain. Summary judgment is not appropriate.

John Deere Comm. Credit Union v. Feddersen 11 U.S.C. § 523(a)(2)(C)
(In re Allen Feddersen)
No. 00-03300-C, Adv. 01-9044-C, 270 B.R. 733, Ch. 7, 12/11/01

Debtor charged \$2,000 on his credit card within 60 days before filing his bankruptcy petition. Plaintiff asserts this constitutes consumer debt for luxury goods or services and the debt is excepted from discharge. HELD: Debtor used his credit card to purchase equipment for use in his restaurant business. The charges were not intended primarily for personal, family or household purposes. Thus, this is not a "consumer debt" under § 523(a)(2)(C). It is discharged.

Wilson v. Educational Credit Management Corp. 11 U.S.C. § 523(a)(8)
(In re David & Jacqueline Wilson)
No. 99-02097-W, Adv. 00-9164-W, 270 B.R. 290, Ch. 7, 12/4/02

Debtors seek to discharge Mrs. Wilson's student loans for undue hardship. HELD: Mrs. Wilson is healthy and well-educated, has marketable skills and is capable of continuous employment. Mr. Wilson is disabled with limited employment opportunities and potentially high medical expenses. Mrs. Wilson has failed to prove undue hardship. Net income exists with which Debtor could pay down the loan over the long term.

Durns v. Dawson (In re Sarah Dawson) 11 U.S.C. § 523(a)(2)(A)
No. 00-01534-W, Adv. 00-9121-W, 270 B.R. 729, Ch. 7, 11/14/01

Plaintiffs seek to except from discharge their state court judgment against Debtor for damages related to a remodeling contract to be done by Debtor's former boyfriend. HELD: Debtor misrepresented her

relationship with her boyfriend and his business. She also misrepresented that the contract would be completed at a time when Debtor's boyfriend was within a month of being sentenced to prison. The debt is excepted from discharge.

Thies v. Iowa Dep't of Revenue & Finance (In re Danny Theis) 11 U.S.C. § 523(a)(1)
No. 99-01885-C, Adv. 00-9230-C, 269 B.R. 212, Ch. 7, 11/5/01

Debtors seek determination that tax debt from underreported income is dischargeable. HELD: Although the IDOR was aware of the unreported income, Debtor was still required to file a return reporting his total income. As he never self-reported the income, the related tax is nondischargeable.

Intra America Seed Serv., Inc. v. Ricki Engelby 11 U.S.C. § 523(a)(2)
(In re Ricki & Mary Ann Engelby) § 523(a)(4)
No. 99-01581-C, Adv. 99-9144-C, Ch. 7, 10/22/01

Plaintiff seeks exception from discharge. It asserts Debtor violated a fiduciary duty under the PACA Act or committed fraud by failing to disclose relevant information concerning his business failure. HELD: Plaintiff failed to show Debtor's seed corn is a perishable commodity or that it has correctly pursued its rights under PACA. It also failed to prove all elements of § 523(a)(2)(A). The doctrine of passive false pretenses does not extend to Debtor's conduct wherein he did not have knowledge of his imminent financial collapse or an intent to deceive.

XI. LIQUIDATION, DISTRIBUTION, AND CLOSING, 3441-3460

XII. BROKER LIQUIDATION, 3461-3480

XIII. ADJUSTMENT OF DEBTS OF A MUNICIPALITY, 3481-3500

XIV. REORGANIZATION, 3501-3660

C. Conversion or Dismissal, 3591-3620

In re Fort Knox Mini Warehouse, Inc. 11 U.S.C. § 1112(b)(1)
No. 01-03493, 2002 WL 1842452, Ch. 11, 7/31/02

U.S. Trustee moves to dismiss or convert Chapter 11 case for continuing loss to the estate. The case has been on file nine months. Debtor is experiencing losses and has accumulated unpaid taxes. Debtor's anticipated early collection on a note is speculative. HELD: Financial statements show losses and do not include all pertinent information, which would increase the losses disclosed. Monthly reports inflate gross revenue. Cash flow projections are inaccurate. Case is dismissed.

In re Midwest Communications, Inc.
No. 01-00653-D, 269 B.R. 40, Ch. 11, 11/6/01

11 U.S.C. § 1112(b)

U.S. Trustee seeks to dismiss or convert Chapter 11 case, arguing Debtor is experiencing losses, is incurring additional debt and taxes, and cannot propose a confirmable plan. Debtor argues there is a chance for rehabilitation. HELD: The case has been on file for seven months. The Court is not convinced Debtor's efforts will reverse the financial fortunes of the corporation. Grounds for dismissal are established.

XV. ARRANGEMENTS, 3661.100-3661.999

XVI. COMPOSITIONS, 3662.100-3670

XVII. ADJUSTMENT OF DEBTS OF FAMILY FARMER, 3671-3700

A. In General, 3671-3680

Schellhorn v. Farmers Savings Bank
(In re Duane & Nina Shellhorn)

11 U.S.C. § 1227

Twin River Farms, Inc. v. Farmers Savings Bank
(In re Twin River Farms, Inc.)

No. 87-00424, 87-00425; Adv. 01-9005, 01-9006;
280 B.R. 847, Ch. 12, 6/17/02 (appeal withdrawn)

The Bank's secured claims were treated in Debtors' Ch. 12 plans which were confirmed in 1988 and completed in 1995. The plan treatment failed to amortize the debts in full. The parties dispute whether the plan payments satisfy the Bank's claim in full, or whether the Bank remains entitled to the full amount of its claim plus interest. HELD: The confirmed plan is binding and the Court must determine the intent of the parties. The parties either failed to express their intent or never had a meeting of the minds concerning treatment of the Bank's claim. The Court concludes the Bank's claims are satisfied by the number and amount of payments provided in the plans. In the Schellhorn case, the Bank's claim is satisfied by receiving the present value of the remaining future stream of payments, discounted by the actual interest rate the Bank received under the provisions of the plan.

XVIII. INDIVIDUAL DEBT ADJUSTMENT, 3701-3740

In re Patricia DeVore
No. 01-03558, 2002 WL 970407, Ch. 13, 5/3/02

11 U.S.C. § 1328(a)
§ 522(f)(1)(A)

Debtor's former spouse asserts a lien against her homestead and a claim for indemnity. Debtor argues the indemnity claim was discharged in her previous Chapter 13 case and the lien is avoidable. She also asserts a right to setoff for medical bills her former husband owes to her. HELD: Creditor's lien and right to

indemnity survived Debtor's prior Ch. 13 discharge as they were not provided for in her plan. The lien is not avoidable. Medical expenses Debtor paid for which Creditor is liable may be offset against his unsecured claim.

In re Vincent Michels

11 U.S.C. § 1325(a)

No. 01-01415-W, Ch. 13, 1/28/02 (appeal pending with B.A.P.)

Bank seeks to assert secured claim in Debtor's Ch. 13 case, although no timely proof of claim was filed. It filed, but later withdrew, an untimely proof of claim. HELD: The Bank's involvement in this case does not constitute an informal claim. The Bank does not have an allowed claim and shall not be paid through the plan. Thus, the plan is now feasible and confirmable.

In re Vincent Michels

11 U.S.C. § 1322(b)

No. 01-01415-W, 270 B.R. 737, Ch. 13, 12/18/01
(appeal dismissed as moot)

§ 1325(a)

Creditors challenge the feasibility of Debtor's plan, citing farming losses. The Bank, holding an oversecured claim, asserts Debtor has failed to make payments and its claim is not correctly treated. The Court notes the Bank had failed to file a proof of claim. HELD: The Plan may modify the Bank's claim. Feasibility is problematic. The Bank's claim is based on an untimely proof of claim which is disallowed if an objection is filed. If such an objection is filed, the plan may be confirmable. The parties are given time to evaluate their positions in light of this ruling.

XIX. REVIEW, 3741-3860

XX. OFFENSES, 3861-3863