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The Changing Politics of American Bankruptcy Reform

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Abstract
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Keywords
Bankruptcy; Bankruptcy--Political aspects; United States

THE CHANGING POLITICS OF AMERICAN BANKRUPTCY REFORM©

By Elizabeth Warren*

The political atmosphere in which changes to the American bankruptcy laws occur has shifted since the adoption of the 1978 amendments to the United States *Bankruptcy Code*. Bankruptcy professionals, who once effectively controlled much of the legislative debate, have lost ground to creditors, who have become much more powerful in influencing bankruptcy legislation. The result has been the politicization of the debate and the setting of the stage for a series of amendments that have rhetorical appeal, but that do not reflect the underlying factual reality of the bankruptcy system.

L'atmosphère politique dans laquelle ont eu lieu des modifications dans la loi américaine sur la faillite a changé depuis l'adoption des modifications du *Code de la faillite* de 1978. Les professionnels de la faillite qui, jadis, contrôlaient efficacement la plupart du processus d'adoption, ont perdu du terrain en faveur des créanciers qui sont devenus beaucoup plus puissants en influençant la législation sur la faillite. Le résultat en est la politisation du débat et la préparation du terrain pour une série d'amendements qui font appel à la rhétorique, mais qui ne reflètent pas la réalité sous-jacente du système de la faillite.

I. INTRODUCTION

In the United States, bankruptcy is a creation of statute. Without congressional action, there would be no national bankruptcy laws—a

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situation that prevailed for much of the nineteenth century.[1] The shape of the laws, from the basic structure of the pre- and post-bankruptcy cleavage, to the most minute details of the definition of a family farmer, is within the discretion of Congress to establish, alter, or eliminate.

Since the discretion of the legislative body shapes the bankruptcy system, bankruptcy laws can be understood, not only as a function of the internal intellectual coherence of the economic system, but as a function of the politics of adoption. In a system such as bankruptcy, two groups rise to the fore as possible leaders in advising Congress as it shapes the course of bankruptcy relief. First, bankruptcy professionals—the repeat players in the system, such as specialists, attorneys, judges, trustees, and clerks—have an important personal stake in the operation of the bankruptcy system, and may try to influence any congressional decisions to amend the bankruptcy laws. Second, special interest groups—the repeat users of the system, such as creditors who try to collect or see their rights altered or discharged through the bankruptcy process—may try to shape the bankruptcy laws in ways they find most congenial.

The political story of bankruptcy in the 1990s is how these two groups—bankruptcy professionals and interest groups—compete for dominance in shaping congressional directives on bankruptcy, and how changes in their respective influence has the potential to change the face of American bankruptcy law.

II. THE 1970s

Bankruptcy legislation was on the front burner in the 1970s. There was a widespread perception that the laws had become too cumbersome and outdated to serve a modern economy. Concern over the lack of respect for the bankruptcy courts fuelled a push for change. This fear was magnified by stories of a "bankruptcy ring" of insiders that manipulated the system for private advantage. In the 1970s, Congress undertook substantial, system-wide reform.

The reform efforts of the 1970s were led by the professionals. Interest groups made their views known, and their lobbying efforts undoubtedly shaped much of the final version of the 1978 amendments to the United States *Bankruptcy Code*.[2] The commercial banks and

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[1] When federal law did not pre-empt the field, some states passed their own bankruptcy laws to deal with insolvency.

[2] See, for example, *A bill to establish a uniform law on the subject of bankruptcies*, Pub. L. No. 95-598 (1978); and 11 U.S.C (1998) [hereinafter *Bankruptcy Code*].

insurance companies were regularly—and effectively—represented in Washington by lawyers who were well-respected bankruptcy specialists. However, the most influential players on Capitol Hill were the National Bankruptcy Conference (NBC) and the National Conference of Bankruptcy Judges (NCBJ).

In the 1970s, the NBC was a small organization of elite bankruptcy lawyers (with a few academics and judges in the mix for seasoning) that had been advising Congress about bankruptcy laws since the Great Depression. The NBC practitioners mostly handled the largest business cases, and they were concerned that the business system functioned well for both debtors and creditors. Nonetheless, they also took a proprietary interest in the consumer system, supporting the efforts of their professorial and judicial colleagues to ensure balance in the personal bankruptcy system. The NCBJ was an organization of bankruptcy judges anxious to upgrade the status of bankruptcy for themselves and the practitioners in their courts, and concerned about a functioning consumer and business system. The 1973 Bankruptcy Commission[3] that set the agenda for the 1978 reforms had important ties to the bankruptcy professionals: the reporter, who did the lion's share of the work, was Frank Kennedy, a respected bankruptcy scholar and a long-time member of the NBC. His chief aide was Jerry Smith, also a member of NBC, and on the threshold of becoming a well-respected bankruptcy practitioner himself. Lawrence King, a long-standing member of the NBC, was among the frequent advisors to the Commission. Other NBC members, such as J. Ronald Trost, were frequent advisors to the Commission and its staff.

During the 1970s, members of the NBC were called on to explain, draft, review, and negotiate parts of the comprehensive bankruptcy overhaul. Through the NCBJ, the judges also actively developed their own alternatives to the current system. A "Judges' Bill"[4] was widely debated in Congress and, although it failed to carry the day, it strongly influenced the shape of the final bill.

Special interest groups, including consumer lenders and home mortgage issuers, made their calls on Congress and were effective in

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3 Commission on the Bankruptcy Laws of the United States, *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, pts. 1-2 (1973).

4 The National Conference of Bankruptcy Judges (NCBJ) drafted an alternative Act and introduced it into the 93d Congress because they disagreed with many of the provisions in the Commission's proposed Act. The NCBJ Act was introduced as *Bankruptcy Act,* H.R. 16643, 93d Cong. (1974), and re-introduced in the 94th Congress as *Bankruptcy Act,* H.R. 32, 94th Cong. (1975).

demanding certain concessions in the final shape of the bill. Overall, however, most of the perceived genius and warts in the 1978 *Bankruptcy Code* can be laid at the feet of the bankruptcy professionals—the insiders who wanted a stronger bankruptcy structure that could handle larger, more complex cases with efficiency; that would provide more effective relief for troubled families; and that would result in greater prestige for the bankruptcy system and its participants.

III. THE 1990s

In the 1990s, reform was in the air again. The professionals were always willing to quibble about a detail, or debate a fundamental yet ambiguous point, but they seemed largely satisfied with the system. As various amendments floated through Congress, few of the proposed changes drew the collective attention of the professionals. When Congress considered empanelling a bankruptcy commission to consider reform, elite groups, such as the NBC, actively opposed it. Other professionals were also opposed, seeing little reason to invite Congress to make major changes in the system.

Other groups were more enthusiastic. The newly-formed American Bankruptcy Institute, a much larger and more loosely aligned group of bankruptcy professionals, supported the formation of a commission, perhaps in the belief that it would prompt more national attention to the field. Lobbyists for the credit industry actively supported reforms and urged Congress to appoint a bankruptcy commission to consider more extensive changes to the law. Consumer advocates feared the rising power of the credit industry lobbyists, recognizing that in a dollar-for-dollar assault on Washington, the debtors would lose substantial ground. They also opposed formation of a commission.

In the bankruptcy debates of 1997-1998, the special interest groups largely replaced the professionals as the influential players. The most stunning move was the coordination and solidification of efforts among consumer creditors. Despite very real conflicts in their interests, they joined together to promote a "reform" agenda that blamed debtors for the rise in bankruptcy filings, and demanded a crackdown. They hired almost all of the most expensive Washington lobbying firms and law firms to help them advance their efforts in Congress. According to the *New York Times*, financial institutions spent, in 1997 alone, about $40 million lobbying for their bankruptcy agenda[5]—an amount matched only by the enormous tobacco lobby. One can only dream about how many millions were spent when lobbying intensified during 1998.

As an interest group, consumer debtors have a perpetual problem. They do not have money and they do not organize. Thus, they lose the two biggest influences they might otherwise have in Washington: money and votes. Although the debtors were represented by the National Consumer Law Center and the Consumer Federation of America, both were underfunded and had other issues on their agenda. Other interest groups, including labour organizations, women's groups, older Americans' organizations, and civil rights organizations, became involved in the bankruptcy debates. However, compared with issues such as union dues check-offs and affirmative action, bankruptcy was never a top priority.

The power of the credit industry lobbyists was summarized by one observer:

> Armed with $40 million in campaign contributions over this election cycle, the credit industry has been fighting for tighter bankruptcy laws, and it may get them. ... According to Ken Klee, a UCLA law professor who, as a Senate staffer, wrote much of the 1978 Bankruptcy Code, the bill was written by a law firm for the credit industry, Morrison & Forrester of San Francisco.[6]

To be sure, lobbyists were not the only ones talking with Congress. The judges wrote letters, and a few were active in expressing their views about the pending bankruptcy legislation. The NBC developed a thoughtful and detailed response to the consumer proposals, and actively supported its own legislative agenda. Academics acted both collectively and individually to express their views about the proposed legislation. A few debtors' lawyers, some long-time players, and some newer advocates using the newly-formed National Association of Consumer Bankruptcy Attorneys, participated in the debates. Nevertheless, the change in emphasis was unmistakable. Influence in Washington was wielded by the $300-an-hour lobbyists on behalf of a well-organized, well-funded creditor interest group. Other interest groups were active, but they had neither the resources nor the commitment to match the credit industry focus on consumer bankruptcy. The bankruptcy professionals, volunteering their time, and working in a far less structured and coordinated environment, fought an uphill battle

[5] See K.Q. Seelye, "House to Vote Today on Legislation for Bankruptcy Overhaul" *New York Times* (9 June 1998) A18.

[6] D. Henwood, "Squeezing Debtors" *Left Business Observer* (21 July 1998) at 1.

to find legislators and staffers who would listen to their views and understand the incredible complexity of the system Congress was considering re-writing.

IV. WHY THE CHANGE?

What was different about the landscape of the 1990s that produced a lobbyist-driven reform movement? Why now and not earlier?

There may be many reasons why anti-consumer reforms that could gain a foothold in the 1990s would have had little chance in the 1970s. Liberals and populists from an earlier era, who had regarded bankruptcy as part of a larger package of progressive social legislation, were gone. Without such legislators in Congress as Don Edwards, Robert Drinan, Peter Rodino, and Howard Metzenbaum, there was no one to insist that no single interest group be allowed to write bankruptcy legislation. The American political scene was generally moving away from a constellation of liberal or conservative issues and toward interest group identification. At the same time, the influence of campaign contributions seemed to accelerate.

However, some of the change in environment can be attributed to changes in the bankruptcy system itself. After more than a decade of huge business bankruptcies that produced startling headlines and national hand-wringing over major corporations in so-called strategic Chapter 11s, the number and the publicity of Chapter 11 cases in the mid-1990s began to shrink. Filings levelled off and began to decline. The shock of a bankruptcy filing by a well-known company wore off. Business bankruptcy, like many other forms of financial reorganization, drew fewer breathless headlines.

In place of the excited reporting about business bankruptcy were reports on the startling numbers of consumer bankrupts. The Chair of the National Bankruptcy Review Commission (NBRC), Brady Williamson, was fond of crediting Congress with enormous foresight in its 1994 decision to form a bankruptcy commission, just before the number of filings took a sharp upward turn. Whether his compliment to Congress was genuine or tongue-in-cheek did not matter; his observation was on the mark: by 1996, the steep climb in consumer filings made bankruptcy a headline story around this country. No longer did pundits worry over the financial health or morality of American industry as they once had; business bankruptcy was reasonable. Instead, it was the collective health and decline in morality of millions of American families that caused many reporters to learn such foreign terms as "Chapter 13" and "nondischargeability."

Consumer filings were undeniably up. In 1996, bankruptcy hit the magic one million mark. The number of families in bankruptcy in a single year soared to one in seventy-six. A four hundred per cent rise in filings at a time when consumer news seemed to be increasingly rosy made for good headlines.

The credit industry seized the moment. Fuelling the fire at every opportunity and making every effort to confirm investigative reporters' worst suspicions, the lobbyists sent out thousands of press releases declaring that the rising tide of bankruptcy was swollen by morally slack consumers who could repay their debts. Although largely a repeat of their 1982–1984 push that ended in the pro-creditor amendments of 1984, the campaign effort was more sophisticated this time. As they had in 1984, the industry rolled out "academic" studies from the Krannert School of Business of Purdue University that purported to show that debtors could repay substantial amounts of their debts.[7] When that effort faltered, they paid for another study, and then another. Some numbers they simply reproduced without even the benefit of a commissioned study to support the claim. For example, the most repeated credit industry advertisements carried the assertion that bankruptcy imposes a $400 "tax" on every bill-paying household. So far as anyone can tell, the number is simply made up, but it takes paragraphs piled upon paragraphs to explain why people outside bankruptcy are not being taxed when their fellow Americans file for bankruptcy relief.

Former Secretary of the Treasury and kindly senior Democrat, Lloyd Bentsen, was hired to make a public pitch for bankruptcy reform—without disclosing that he worked as a credit industry lobbyist. Former Republican National Committee Chairman, Haley Barbour, and senior Washington lawyer, Lloyd Cutler, signed on to the creditors' cause. Big law firms with little experience in consumer bankruptcy law, such as Washington's Wilmer, Cutler & Pickering, and San Francisco's Morrison & Forrester, dedicated teams of lawyers to writing and advising on bankruptcy laws. These teams were often staffed and led by corporate lawyers with no experience in consumer bankruptcy. Advertising agencies developed campaigns to illustrate the cost of

[7] See Credit Research Center, "Consumers' Right to Bankruptcy: Origins and Effects" in *Consumer Bankruptcy Study Vol. I* (Lafayette, Ind.: Krannert Graduate School of Management, 1982) [hereinafter *Consumer Bankruptcy Study*]; and Credit Research Center, "Personal Bankruptcy: Causes, Costs and Benefits" in *ibid.*

bankruptcy to ordinary families, as the consumer credit industry took out full page advertisements in Washington-area newspapers. Lobbyists were available for every talk show, to call every editorial staff and consumer affairs reporter, and to respond to every unfavourable story in the press. Messages and themes were developed, so that the same quotes appeared with multiple attributions. All in all, it was a well-orchestrated campaign.

V. WHY THE BIG COLLECTIVE PUSH NOW?

Although the credit industry might have been simply exercising the clout that any multibillion dollar industry can exercise, there are some other reasons that bankruptcy reform rose to the top of their agenda in the late 1990s. Although the consumer credit industry has long been critical of the bankruptcy laws, they have typically lobbied individually for the narrower reforms they needed. The home mortgage lenders, for example, worked to expand special protection for their liens, while the residential landlords fought for exceptions to the automatic stay. The creditors generally seemed to understand that most debtors did not have a lot of extra money, and that a dollar paid to one creditor was a dollar that did not go to another.

At the December 1996 meeting of the NBRC, lobbyists and spokespersons for the creditors announced the formation of a coalition to represent the interests of "all consumer creditors." The representatives of the new coalition insisted that they "spoke with a single voice" and expressed their collective concerns to the Commission. During the question and answer period, counsel for the banks, Michael McEneney, insisted that the creditors had a single interest, and "if any creditor deviated from it," he and his group wanted to be told immediately.

In one sense, the coalition worked magnificently. Press releases and lobbying were well-funded and well-orchestrated. But it was never a fully-balanced group. The credit card issuers took the lead, both in Washington and in the press, in developing the opening agenda and framing the issues. The initial legislative proposals, such as the McCollum bill[8] and the original Gekas bill,[9] were designed to help credit card issuers almost to the exclusion of other creditor groups. Spokespersons for Mastercard and Visa were prominently featured in

[8] See *Responsible Borrower Protection Bankruptcy Act*, H.R. 2500, 105th Cong. (1997).

[9] See *Bankruptcy Reform Act of 1998*, H.R. 3150, 105th Cong. (1998).

virtually every story on bankruptcy, deflecting attention from other credit issuers, and sparing their individual member banks any difficulties that might be caused by banks calling their own customers "deadbeats." The credit card issuers led the charge on Capitol Hill, exercising a form of leadership and discipline that had not marked the earlier legislative assaults.

As with any group consisting of members who have genuinely conflicting interests, coalition positions mutated over time. The credit card issuers took nearly all the heat in the press, while other groups pressed for statutory proposals that would benefit their own members. Residential landlords picked up four exceptions to the automatic stay in one incarnation of the bill, and home mortgage lenders got a pot-pourri of amendments that would make it harder for debtors to save their homes.[10] Perhaps the most breathtaking move occurred when car lenders got an anti-stripdown[11] provision inserted into the Senate bill, thus assuring that they would be paid $10,000 for a car worth only $6,000—with the resulting $4,000 to come directly out of the pockets of the credit card issuers and other key members of the coalition. These provisions drew almost no public attention, as everyone focused on the practices of the credit card issuers, but they caused the amendments to swell and distort from the original means-testing package into a two-hundred-plus page bill of almost every imaginable kind of special interest legislation.

Notwithstanding the shape of the final version of the bill, the fact that the credit card issuers were willing to lead the creditors, bear much of the cost, and put out much of the labour to press for bankruptcy

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[10] See H.R. Conf. Rep. No. 105-794, at H9954 (1998). See §§ 119-120 (restrictions on repeat filings and *in rem* relief to make bankruptcy a less significant impediment in a home foreclosure); §§ 121-122 (eliminating ride-through and allowing creditors to take property during bankruptcy if a debtor does not take action to affirm or redeem, increasing the rights of all secured creditors); § 124 (eliminating stripdown for purchase money security interests in Chapter 7, helping all secured lenders); and § 302 (expanded definition of debtor's principal residence to include: multi-unit property; mobile homes, whether or not attached to real property; and mortgages that are secured by other property to increase protection for home mortgage lenders).

[11] Under current law, a debt (other than one secured exclusively by a home mortgage) is bifurcated into its secured and unsecured portion. The Chapter 13 debtor pays the full value of the secured portion, including interest, but only a *pro rata* portion of the unsecured portion: see *Bankruptcy Code*, *supra* note 2, §§ 506, 1322. Under the proposed amendment, the debtor would have to pay the full face value of the loan on many debts, regardless of the value of the collateral. So, for example, a $10,000 car loan secured by a car worth $6,000 would be treated as a $6,000 secured loan and a $4,000 unsecured loan. Under the proposed amendment, the entire face value of the debt would be treated as secured, and the debtor would have to come up with the present value of the $10,000 to pay off the car, leaving less for other creditors. If the debtor could not make those payments, the debtor could not confirm a Chapter 13 plan.

reform, meant that they were able to do more to control and develop a national interest in—and concern about—consumer bankruptcy than ever before.

The credit card industry was willing to make a more concerted effort to press for changes in the consumer bankruptcy laws, in part because the industry had more money to spend due to record profits from credit card lending,[12] and in part because structural changes in the industry made it more profitable to keep debtors out of bankruptcy. These structural changes included the way the industry dealt with bad debt in the years just before the legislative initiative. In the 1980s and early 1990s, much of the credit card debt that was discharged in bankruptcy had already been written off before the debtor filed. In one sense, credit card issuers were not strongly affected by consumer debtors' filings. Since they had often long since given up trying to collect much of the debt, having it listed in bankruptcy was not particularly painful. Car lenders and home mortgage lenders were far more affected by consumer bankruptcies during those years because they continued to wrestle with debtors who had collateral in which they held interests.

During the 1990s, however, credit card debt grew enormously—both as a share of total debt and as a share of the debt listed in bankruptcy. More credit card dollars were at stake in the consumer bankruptcy filing system. This meant higher gains for the credit card issuers if debtors could be kept out of the bankruptcy system altogether—and if creditors could figure out how to collect from these financially troubled people.

With more credit card debt in default, a market niche developed. Companies sprang up to buy bad debt from the credit card issuers. These companies learned that they could pay a few cents on the dollar for such debt, work it over, and still make tidy profits. Companies developed new techniques to collect from troubled debtors. As a consequence, written-off debt, once seen as worthless, was now seen as a valuable commodity. A credit card issuer could bundle millions of dollars of bad debts and sell them off. The only truly worthless debt was debt that had been discharged in bankruptcy. The cost of writing off debts in bankruptcy had just gone up.

A related change took place as more lenders received bankruptcy notices about people they thought were good customers. A

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[12] The Federal Deposit Insurance Corporation documented the growth in credit card profits (after bad debt losses had been deducted) from the mid-1980s onward: see D. Ellis, "The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate" *Bank Trends: Analysis of Emerging Risks in Banking* (March 1998) 1.

constant theme of the creditors who testified before the NBRC was that, in the 1980s and early 1990s, debtors who filed for bankruptcy were generally months behind on their payments—which was why these debts had often been written off before filing. In the mid-1990s, creditors claimed that a rising number of debtors had been making their payments right up until the bankruptcy filing. These write offs were unanticipated and, from the creditors' perspective, they increased the cost of bankruptcy losses.

Why did so many trapdoor debtors emerge in the mid-1990s? One possibility is the change in lending practices. As declining lending standards were putting more and more credit—and cash—into the hands of failing debtors, many debtors could maintain the illusion of solvency as they fell further in debt. With offers for cash advances and actual "live cheques" arriving in the mail weekly, debtors could borrow to pay—even when they were hopelessly awash in debt. They developed the ability to maintain minimum monthly payments on accounts that they in fact would never have any reasonable chance to repay. In short, the creditors who complained about trapdoor debtors were enabling them to maintain their house of cards much longer by lending them the cash to continue the payment cycle. When the debtor finally gave up, the crash was startling.[13]

Shifts in other structural elements might also have contributed to the credit industry decision to press Congress for pro-creditor bankruptcy legislation. The decision to pour millions into lobbying Congress for changes in the bankruptcy laws is one made at the highest managerial levels among the credit issuing banks and other institutions. Many credit managers reported that management made that decision in consultation with the in-house specialists in government relations. Credit managers, they explained, were the people with day-to-day experience in collecting from troubled consumers, but they were rarely high in the decisionmaking loop. As credit card losses mounted among the issuers in the 1990s, executive officers called to account for these losses cast about for a plan. Credit screening had the bad effect of constricting lending

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[13] The macroeconomic shift in consumer debt and borrowing patterns documented by the Current Population Survey shows that lower income Americans are taking on more credit card debt as higher income Americans have decreased their proportional debt loads and moved out of consumer debt: see A.B. Kennickell, M. Starr-McCluer & A.E. Sundén, "Family Finances in the U.S.: Recent Evidence from the Survey of Consumer Finances" *Federal Reserve Bulletin* (January 1997) 1 at 1; 21, Table 14. The growth in consumer credit in recent years has been largest among the poorest Americans. The Federal Reserve's Survey of Consumer Finances notes that while debt burdens are generally falling for families with incomes above $50,000, families with incomes below $10,000 are increasing their debt loads: see *ibid*.

and cutting into market share, and more vigorous debt collection was yielding only incremental results. The lobbyists and in-house "legislative affairs" people offered a solution: change the laws and stem the losses. The credit management people might have been sceptical, but they were not the ones with the power to decide whether to pursue this initiative.

The consumer credit industry coalition was formed under the leadership of the credit card issuers who stood to gain the most from bankruptcy reforms. Changes in the industry made statutory amendments more valuable than they had been earlier. However, as the coalition members embraced a more diverse group of amendments, the benefits to the leadership—and to any of the individual creditor members—became increasingly elusive.

VI. WHAT HAPPENS WHEN POWERFUL INTEREST GROUPS TAKE OVER?

A report from the annual meeting of the National Association of Chapter 13 Trustees gives a window on how the process changed in 1998:

> News of legislative reports has always been a conference staple, but this year the tone was different. Many people expressed fear about the potential change, saying that this was the first time Congress has considered making major legislative changes with little or no input from bankruptcy judges, trustees and attorneys.
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> ...
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> The only people who are for this bill are the lobbyists, observed Henry Hildebrand, Chapter 13 trustee in Nashville, Tennessee.
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> ...
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> Many of the conference attendees said elected representatives met their efforts to communicate opposition to the bills with silence or indifference.[14]

Statutory reform movements led by professionals in the field are fundamentally different from those led by interest groups. The role of the press, almost absent when the professionals advised Congress, became central when a powerful coalition of interest groups pressed for favourable legislation. As the parties changed, the debates grew louder.

As the debates grew louder, they became increasingly blunt. Sound bites ruled the day. The esoteric debates over how to sharpen the distinction between pre- and post-filing income gave way to a steady drumbeat of regularly repeated catch phrases about abuse. Questions

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[14] "Legislators Ignore Input and Impact of Code Changes, NACTT Told" *Bankruptcy Court Decisions* (11 August 1998).

were framed for political appeal. Similarly, although the professionals understood that the creditors had conflicting interests, it was only when the conflict could be framed to involve a politically active group that it received any real attention. So, for example, the conflict between home mortgage lenders and credit card issuers received almost no attention, while the conflict between ex-wives trying to collect child support and the credit card issuers became front page news.

Both sides got better at making their points heard, but their progress was achieved at the cost of making the debate little more than a caricature of a discussion about what was, and what was not, right about the existing consumer bankruptcy system. The complex and textured decisions needed to form the core of the bankruptcy system gave way to meaningless phrases and name-calling.

By politicizing the debates, the special interest groups took some of the most important professionals out of the debates. Nearly all of the bankruptcy judges opposed the proposed legislation, but many felt hesitant about actively participating in the process. Rather than offering their expertise to devise and improve a complex and difficult statute—a posture they could maintain in the less heated environment of the 1970s—they saw themselves in the 1990s as risking involvement in a political battle that could cost them their reappointments, or more. Many of the comments that they would routinely have made about the current functioning of the bankruptcy system were censored, as they worried that they would now be perceived as engaging in inappropriate lobbying.[15]

The effort to silence the influential members of the NBC was direct. When the NBC took a strong position opposing the proposed reform, the general counsel of the Bank of America wrote letters to each practitioner who was an NBC member. The letter reminded them that the bank did substantial business with their firms and inquired as to whether the NBC position was shared by the firms' NBC members. The Bank of America asked that NBC members who disagreed with NBC's position "support ... consumer bankruptcy reform legislation at this very critical time."[16] Ken Klee, a long-time practitioner with a bankruptcy specialty

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15 Not all judges felt such constraint. The Honorable Edith Jones of the Fifth Circuit Court of Appeals, and former bankruptcy commissioner, testified before Congress in support of the creditors' bill; gave private briefings to congressional staffers; spoke to the press; wrote letters to key senators and congressmen to solicit their support on the pending legislation and to reassure them that any opposition was ill-motivated; and gave public speeches about the need for more creditor protection in a world filled with hopelessly abusive debtors.

16 "Bank Wants Firms to Know Where It Stands" *Bankruptcy Court Decisions* (7 July 1998) A1 at A12.

firm, noted that the letter was *"intended* to intimidate" members of the NBC. He opined that it did not meet that objective, and it is true that no NBC member spoke up on behalf of the banks' position.[17] At the same time, it is worth nothing that very few NBC members took public roles in opposition to the banks, nor did many of them make calls on Capitol Hill. With the principal debates focused on consumer issues rather than business issues, many NBC members might have felt out of their depth, but letters, such as the one from the Bank of America, made it clear that, in the heated environment of bankruptcy reform, a pro-consumer stand could impose a direct cost on some of the professionals.

VII. WHAT HAPPENS NEXT?

There are too many unknowns for sensible speculation, but there are a few minor points worth emphasizing. The first relates to the creditor coalition: because of the parties' inherent conflicts of interest, over time they cannot stand together. As more time elapses, their competition for the debtors' dollars increases. This might mean that the coalition could break apart, or that it will continue in an ever-weakening state. It is possible, however, that the coalition will remain officially united, while the real negotiations over the shape of bankruptcy laws takes place among the creditors. They could decide how to carve up the debtors, make their own internal deals, and give their packages to Congress.

Regardless, the presence of a strong creditor coalition has changed the bankruptcy debates forever. Not only has the role of professionals and expert consultants been sharply altered, but other interest groups have arrived to join the debates. The very modest interest groups representing debtors have increased in both strength and sophistication. They have been aided by some very thoughtful Washington insiders. They were unprepared for the initial assaults by the coalition, but they will not be unprepared again. As lobbyist Phil Corwin later explained about the 1998 lobbying efforts,

> [i]f the effort to enact bankruptcy reform was a sports analogy, it would be a football game in which the opposing team [debtors' supporters] fumbled badly at the game's outset, a lightning quick drive brought the [creditors'] ball down to the one yard line, but both a touchdown and a field goal were blocked in the final seconds of play. Now both

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[17] See *ibid.*

> teams are in their locker rooms, reviewing the videotapes, and plotting strategy for next season.[18]

Corwin's description may be apt, but the remarkable point he makes only in passing is that there is now a "team" to oppose the creditor coalition.

Other interest groups have grown more interested in bankruptcy. Women's groups have been particularly effective in lobbying on behalf of debtors, and they have thrown their considerable support behind altering the legislation to provide better protection for those collecting alimony and support. The American Association of Retired Persons has become more active, as has the American Federation of Labor-Congress of Industrial Organizations. The Leadership Conference on Civil Rights wrote stirring letters to both representatives and senators about why all the victims of economic discrimination—women, the elderly, African-Americans, Hispanic-Americans, Asian-Americans, gays, and lesbians—have a stake in fair bankruptcy laws; they have made bankruptcy one of the core issues on their "Civil Rights Report Card," in which they evaluate each member of Congress. The creditors may have the best funded and most focused interest group, but they will never again be the only interest group to speak to Washington, or the American public, about the bankruptcy laws.

The Washington players themselves have been changed by the 1997-1998 round of debates. The number of Senate and House staffers who now understand homestead exemptions, stripdowns, and how women would be affected by the bankruptcy amendments, has multiplied quickly. Not everyone is an expert, but one consequence of wresting bankruptcy reform out of the hands of the professionals is that more people have come to understand, and develop their own views about, the bankruptcy system. As health care insolvencies rise and as the bankruptcy bill to protect family farms expires,[19] the number of constituencies who will learn more about bankruptcy will continue to grow.

The public debates over bankruptcy reform may bring the creditors the changes in the law that they seek, but they have brought other changes as well. More than a dozen senators have now drafted

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18 P.S. Corwin, "Bankruptcy Reform: Another Bill That Will Hold Until Next Year" *Banking Policy Report* (16 November 1998) 1 at 1.

19 One of the few bankruptcy bills to make it through in 1998 was a temporary extension of Chapter 12, which expired on 1 October 1998. However, the extension is good only until 1 April 1999, which means that farm bankruptcy will be back on the legislative agenda almost from the moment Congress reassembles.

legislation that imposes some constraints on creditors. Newspapers around the country have written about credit card solicitations, sounding a message of creditor irresponsibility that resonates with many Americans. The Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve have begun to publish thoughtful papers questioning credit industry practices, and the industry's role in the rise in consumer debt. Usury laws, effectively dead in this country, have made it back into active discussion on the FDIC agenda. Creditors may find that all the noise about bankruptcy filings brought on other inquiries that could affect their industry far more profoundly than a rise in bad debt write offs.

The debates have changed. The professionals who once patiently crafted the section 11(b) election and other elaborate and highly technical provisions of the *Bankruptcy Code*, no longer have the power to write whole sections of the bankruptcy laws by talking only with each other. Debates that were once confined to those who were "in the know" have expanded greatly—in scope and in volume. The professionals still have an important role to play, but the world in which bankruptcy laws are made has shifted dramatically. Who shall rule that world, and what kind of bankruptcy laws shall result, are the questions that shall be resolved over the next few years.