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Editorial Introduction

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COLLOQUIUM

EDITORIAL INTRODUCTION

THE following is an edited transcript of a Panel Discussion held at the Fordham University School of Law on September 29, 1997. At the time, the Bankruptcy reform movement had just begun to gather momentum. The Responsible Borrower Protection Act ("RBPA") bill,¹ an attempt to transform the bankruptcy system into a needs-based system, had just been introduced in Congress. For 1997, personal bankruptcy filings increased by 20% to a record 1,350,118.² Some spoke of a "crisis" in the bankruptcy system.³

The National Bankruptcy Review Commission, created in 1994, had been holding hearings for over a year. In all, the Commission held twenty-one national and regional hearings, which were attended by over 2600 people over thirty-five days.⁴ Ultimately, the Commission was deeply divided. When the nine-member Commission issued its final report on October 20, 1997,⁵ it did so on a five-four vote. Judge Edith H. Jones, Commission member and panelist in the discussion below, wrote 255 pages in dissenting opinions.⁶

The report was immediately criticized by both debtor and creditor groups.⁷ Moreover, representatives of consumer creditors began furiously lobbying Congress "to ignore [the report's] contents and introduce legislation at odds with the Commission's findings."⁸ Indeed, the RBPA was seen as a preemptive strike by the lending industry and its

1. H.R. 2500, 105th Cong. (1997).

2. See American Bankr. Inst., *Bankruptcy Statistics from the American Bankruptcy Institute* (visited Mar. 11, 1999) <<http://www.abiworld.org/stats/stats.html>> [hereinafter American Bankr. Inst., *Statistics*] (collecting data from the Administrative Office of U.S. Courts).

3. See, e.g., *Gloomy Forecast*, CardFAX, Oct. 28, 1997 ("The bankruptcy crisis is going to get worse before it gets better." (remarks of Anthony E. Jennings, executive vice president of AT&T Universal Card Services)), available in 1997 WL 11980656; *Bankruptcy Efforts "Worsen" Chargeoffs*, Card News, Oct. 27, 1997 (referring to "our nation's personal bankruptcy crisis" (quoting Rep. Bill McCollum)), available in 1997 WL 8787867; Judy Nichols, *Plastic Blamed as Court Filings Rise*, Ariz. Republic, Oct. 12, 1997, at A1 (referring to "this crisis in bankruptcies" (quoting John Erickson, president of Consumer Credit Counseling Service Southwest)).

4. National Bankr. Review Comm'n, *Bankruptcy: The Next Twenty Years* at ix (1997) [hereinafter Report].

5. Report, *supra* note 4.

6. See *Chairman's Note*, in Report, *supra* note 4, ch. 5.

7. See, e.g., Dean Foust & Debra Sparks, *Bankruptcy Reform: Everybody's Mad—And That's Fine*, Bus. Wk., Nov. 3, 1997, at 154, 154 (quoting criticism from both the National Association of Consumer Bankruptcy Attorneys and America's Community Bankers).

8. *Consumer Bankruptcy on Center Stage*, Consumer Bankr. News, Nov. 20, 1997, at 1, 1; see also *id.* (observing that "[t]he lobbying has been incredible" (quoting Rep. John Conyers, Jr.)).

supporters in Congress against the Commission's recommendations.⁹ A Senate reform bill, the Consumer Bankruptcy Reform Act of 1997,¹⁰ "ignore[d] the Commission's majority proposals."¹¹

In 1998, two more reform bills were introduced,¹² and eventually reform legislation was approved by both houses of Congress. The primary feature of the approved bills was a needs-based approach to bankruptcy.¹³ The House and Senate disagreed, however, on how means testing would work. The House version declared some debtors ineligible for Chapter 7 relief and empowered creditors to seek dismissal of ineligible debtors' Chapter 7 petitions.¹⁴ The Senate version, on the other hand, required bankruptcy judges to consider a debtor's ability to pay in determining whether to dismiss a debtor's case or transfer it to Chapter 13.¹⁵ A Conference Committee ultimately combined these two proposals, "adopt[ing] the procedural approach of the Senate bill directing bankruptcy judges to consider repayment capacity, while instructing that such repayment capacity shall be presumed by the judge if the individual meets certain bright-line standards for measuring such repayment capacity."¹⁶ The Conference bill was passed by the House, but was not acted upon by the Senate before the end of the 105th Congress.

The end of the 105th Congress, however, was not the end of the bankruptcy reform movement. On February 25, 1999, Representative George W. Gekas introduced the Bankruptcy Reform Act of 1999.¹⁷ The bill is identical to that which was reported by the Conference Committee and approved by the House in the 105th Congress.¹⁸ Opponents of the bill have already begun to mobilize,¹⁹ and the Clinton

9. See, e.g., Paul Weisman, *Lenders Lobby for Reform of Bankruptcy*, USA Today, Oct. 21, 1997, at 6A ("Banks, credit card companies and other lenders have launched an all-out attack on a bankruptcy system they say coddles deadbeats. . . . Lenders are putting their muscle behind [the RBPA].").

10. S. 1301, 105th Cong. (1997).

11. *Senator's Welcome Commission, Reject Report*, Consumer Bankr. News, November 20, 1997, at 7, 7.

12. Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998, H.R. 3146, 105th Cong. (1998); Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998).

13. See H.R. Rep. No. 105-240, at 55-57 (1998) (discussing the bill's "needs-based" reforms); S. Rep. No. 105-253, at 24-26 (1998) (discussing "needs-based bankruptcy").

14. H.R. Rep. No. 105-240, at 55.

15. S. Rep. No. 105-253, at 26.

16. H.R. Conf. Rep. No. 105-794, at 121 (1998).

17. H.R. 833, 106th Cong. (1999); see also George W. Gekas, *Bankruptcy Conference* (visited Feb. 27, 1999) <http://www.house.gov/gekas/press/february/99/bank_conference.htm> (explaining Rep. Gekas's reasons for introducing the bill).

18. See American Bankr. Inst., *Today's Bankruptcy Headlines* (visited Feb. 25, 1999) <<http://www.abiworld.org/headlines/99feb25.html>> [hereinafter American Bankr. Inst., *Headlines*]; Gekas, *supra* note 17.

19. See Jerrold Nadler, *Press Release: Statement Regarding Bankruptcy Legislation in the 106th Congress* (visited Feb. 27, 1999) <<http://www.house.gov/nadler/statmnts/sbnkrpt2.htm>> (detailing Rep. Nadler's opposition to the bill).

Administration is on record as threatening to veto the legislation.²⁰ Both proponents and opponents of needs-based bankruptcy are girding for a repeat of the political battle fought in 1998.

This year, though, the outcome may be different. The sense of "crisis" in the bankruptcy system has lessened, and some of the direst predictions of the credit industry²¹ have proven incorrect. In 1998, the rate of growth in personal bankruptcy filings was only 3.5%, although even that modest growth resulted in a record 1,398,182 filings.²² Moreover, there have been movements to promote debtor education and to conduct additional, non-partisan studies of consumer bankruptcy. In March 1998, Professor Karen Gross, one of our panelists, launched the "Coalition for Consumer Bankruptcy Debtor Education."²³ In December, the American Bankruptcy Institute, a non-partisan organization that takes no official position on bankruptcy legislation, released a report by Professors Marianne B. Culhane and Michaela M. White that found that only three percent of Chapter 7 filers have enough income to repay even twenty percent of their unsecured debts over five years.²⁴

Historically, the Bankruptcy Bar has had a profound impact on the development and refinement of the Bankruptcy Code.²⁵ As the debate over bankruptcy reform is joined, it is our hope that the bar will once again make itself heard to ensure an approach that balances the needs of debtors and creditors. The issues discussed by the Panel will undoubtedly be the subject of heated debate throughout 1999 and beyond. We hope you find their discussion as entertaining and informative as we did.

20. See American Bankr. Inst., *Headlines*, *supra* note 18; Gekas, *supra* note 17.

21. See, e.g., *The Brighter Side of Bankruptcy*, Credit Card Management, Nov. 1, 1997, at 10, 10 (reporting that Visa U.S.A. was predicting a 14.9% increase in bankruptcy filings in 1998).

22. See American Bankr. Inst., *Statistics*, *supra* note 2, at 1.

23. See New York Law School, *Prof. Karen Gross Launches New Bankruptcy Education Coalition* (visited Feb. 27, 1999) <<http://www.nyls.edu/media/releases/330898.htm>>.

24. Marianne B. Culhane & Michaela M. White, *Means-Testing for Chapter 7 Debtors: Repayment Capacity Untapped?* (visited Feb. 27, 1999) <<http://www.abiworld.org/research/creightonstudy.html>>. The 20% figure was used by the House in the Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998).

25. See David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 Fordham L. Rev. 497 (1998).

