TENTH CIRCUIT BANKRUPTCY HISTORY - - BACKGROUND AND OVERVIEW

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Procedures for resolving disputes between creditors and debtors have a colorful history. From ancient times there is a record of imprisonment, slavery, and torture as means for enforcing the collection of debts.[1] From their inception debtor insolvency proceedings were conducted for the purpose of providing equitable distribution of a merchant's assets which were insufficient to meet his obligations. Long before the dawn of consumer credit, insolvency laws operated almost exclusively in the commercial arena, with little concern for debtor repose. [2]

The creation of formal bankruptcy laws in early eighteenth century England marked the beginning of modern government efforts to curb inhumane commercial debt collection practices. In the precursors to modern bankruptcy legislation the English Parliament defined the terms and consequences governing merchants and those owing debts to English creditors.[3] It also established a means for relief for the debtor by providing for a discharge, at the creditor's discretion.[4]

Creditor control of the discharge, along with such institutions as debtors' prisons and capital punishment for noncompliant or fraudulent bankrupts, effectively continued the domination of a debtor by his creditors through colonial times in America.[5] As the colonies developed, their laws began to reflect a more humanitarian approach to creditors' rights.[6] As more humanitarian objectives began to be reflected in insolvency laws throughout the colonies, there was little uniformity in pursuit of these objectives until the Constitutional Convention in 1787.[7]

On September 3, 1787, the delegates to the Constitutional Convention approved the power of Congress to establish uniform laws on bankruptcy.[8] James Madison noted that the connection between bankruptcy law and the regulation of commerce was so intimate that passage of uniform laws of bankruptcy was not likely to be questioned.[9] It took, however, until 1800 before Congress first exercised its power under Article I, Section 8, Clause 4, of the Constitution in enacting the Bankruptcy Act of l800. [10] This Act provided district judges with the power to appoint

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[1] Francis R. Steele, *The Code of Lipit-lshtar,* 52 AM. J. OF ARCHAEOLOGY 3, July – Sept., 1948, at 426.
[2] Theodor C. Albert, *The Insolvency Law of Ancient Rome, Part 1,* Dec., 2005, http://www.ancientworlds.net/aw/Article/688167 (last visited on Aug. 11, 2009).
[3] Robert Weisberg, *Commercial Mortality, the Merchant Character, and the History of the Voidable Preference,* 39 STAN. L. REV. 3, 16 (1986).
[4] *Id* at 30.
[5] Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge,* 65 AM. BANKR. L. J. 325, 399 (1991).
[6] Peter J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy 1607- 1900 4-5 Beard Books, 1999).
[7] *Id.* at 17 (The Federal Convention convened on May 25, 1787); Jack E. Staley, The Constitution of the United States of America, The Forming, the Fury, And the Framing 7-9 (Greenbrier Publishing, 1986).
[8] *Id.*
[9] The Federalist No.42 (James Madison), http://thomas.loc.gov/home/histdox/fed_42.html (last visited Aug. 11, 2009).
[10] BANKRUPTCY ACT OF 1800, 2 Stat. 19 (1800) (repealed by 2 Stat. 248(1803)).

a commission totaling no more than three, to oversee bankruptcy cases.[11] Although the Act was intended to operate for five years, frustration with its complexity, a national inability to administer its provisions uniformly, and disappointment in its lack of effectiveness lead to the Act being repealed in January 1803.[12]

Following repeal, issues under bankruptcy law retreated from national attention and were treated, to the extent they were treated at all, as creatures of state law. Following the panic of 1837 many states had passed laws protecting debtors in the form of stay laws and appraisal laws.[13] Bankruptcy law remained under state administration until August 19, 1841, when Congress passed the second bankruptcy act.[14] The 1841 bankruptcy law was the first legislation authorizing voluntary application by the debtor to commence a bankruptcy case.[15] Prior laws, both federal and state, had treated bankruptcy as an involuntary process to be initiated by creditors.[16] The 1841 statute, too, was not well received and was short lived. Several federal courts held the 1841 statute unconstitutional, which lead to its repeal in 1843.[17]

Following the chaos and destruction of the Civil War the newly bolstered United States Congress faced economic calamity and worked to establish a law that would address the thousands of personal and business failures resulting from the war.[18] The resulting Bankruptcy Act of 1867 was signed into law by President Andrew Johnson on March 2, 1867.[19] The Act provided that the existing United States District Courts constituted courts of bankruptcy with original jurisdiction within their respective districts in all proceedings in bankruptcy. District Court judges were to appoint registers in bankruptcy to assist in the administration of bankruptcy cases.[20] No one could be appointed a register unless that person was also a counselor before the court.[21] A register was required to post a thousand dollar bond to the federal government with the condition that he would faithfully execute his duties.[22] Registers, however, had no judicial authority and were required to adjourn all disputed matters to the district court for final decision.[23] The majority of the powers and functions granted to registers were similar to those of the later created referees in bankruptcy.[24] Registers represented the first federally appointed officials charged solely with administering and adjudicating bankruptcy cases.

Public perception of bankruptcy was changing with growth of concern with debtor relief as well as creditor protection. On July 22, 1874, Congress enacted an amendment to the bankruptcy law that eased the requirements for

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[11] *Id.* at §2.
[12] Charles Warren, Bankruptcy in the United States 19 (Beard Books, 1935).
[13] *Id.* at 25.
[14] *Id.* at 79; 5 Stat. 440 (1841).
[15] F. Regis Noel, A History of the Bankruptcy Law 97 (William S. Hein & Co., 2003).
[16] *Id.;* Warren, *supra* note 12, at 8.
[17] *Id.*
[18] Noel, *supra* note 15, at 147.
[19] *Id.* at 153; BANKRUPTCY ACT OF 1867, 14 Stat. 517 (1867).
[20] BANKRUPTCY ACT OF 1867, *supra* note 19, at § 1.
[21] *Id* at § 3.
[22] *Id.*
[23] *See* U.S. AG Comm. on Bankruptcy Admin., Administration of the Bankruptcy Act 3-4 (Government Printing Office, 1941) (hereinafter "A.G.'s Report").
[24] BANKRUPTCY ACT OF 1867, 14 Stat. 517 at § 4.

an involuntary bankrupt to receive a discharge.[25] Discharge for involuntary bankrupts was no longer dependent on the debtor either making distributions to creditors equal to a certain percentage of his debts, or garnering assent to discharge of any portion of his creditors,[26] As to voluntary bankruptcies, the 1874 Amendments made a discharge available for a bankrupt who could distribute assets equaling thirty percent of the proven claims against his estate, reducing the percent of payment requirement from fifty percent. [27] A voluntary bankrupt was still required to garner assent to discharge from one fourth of his creditors in number and one third in value of claims against him.[28] Access to bankruptcy protection was apparently increasing as evidenced by more frequent press coverage of bankruptcies.[29] That development came to an abrupt halt in 1878 with President Rutherford B. Hayes' approval of Congress's repeal of the 1867 Bankruptcy Act.[30]

In the following years Congress regularly debated the need for a further national bankruptcy law. Business failures were prevalent throughout the portion of the country west of the Mississippi. Real estate speculation had gripped that entire region and dramatic swings in valuation resulted in enormous amounts of both individual and business debt. There was a division in Congress between those favoring a law that provided for involuntary proceedings and those favoring a law that provided for voluntary proceedings.[31] Congressmen Case Broderick of Kansas stated that throughout the western portion of the country there was a strong desire for voluntary bankruptcy law.

> There have been two unfortunate periods or conditions …which have tended to destroy the business interests and to bankrupt businessmen…From 1883 to 1889 a spirit of speculation swept over the entire country west of the Missouri River like a pestilence…[P]eople went into wild speculation ... [p]urchased more land than they had use for. .[g]ave mortgages and incurred liabilities at the banks and when the boom collapsed, property was depreciated, people were in debt, mortgages had been given, interest had defaulted and there was no property which could be exchanged for money .... [B]efore the people of the West had recovered from that condition. ..a panic came upon the country which spread all over it and paralyzed every interest... . The people of Kansas who survived the years of folly and disaster are now prosperous, but we want this bankruptcy measure to relieve those who were carried down by the current and lost.[32]

Eventually Congress did produce legislation aimed at providing relief to the nation's citizens in their economic misfortune. The Bankruptcy Act of 1898 arose out of the Torrey Bill, which was first proposed by a leading bankruptcy expert, Jay L. Torrey, in 1889.[33] The law provided a balance of provisions for businesses and all classes of individual debtors. The law also incorporated recognition of state exemption laws.[34] The law contained the complementary objectives that no dishonest debtor could be offered escape from insolvency while

[25] 18 Stat. 178 (1874).
[26] *Id.*
[27] *Id*.
[28] *Id*.
[29] *A New Bankruptcy Bill for the Benefit of Insolvents,* ROCKY MOUNTAIN NEWS August, 1874, at P.6 C.2.
[30] *Expiration of Bankruptcy Law,* ROCKY MOUNTAIN NEWS, August 31, 1878, at P.2, C.2; Noel, *supra* note 20, at 156.
[31] Warren, *supra* note 12, at 140-41.
[32] *Id.* at 141-42.
[33] Noel, *supra* note 15, at 158.
[34] Warren, *supra* note 12, at 144.

honest but unfortunate debtors would be afforded a fresh start.[35]

The Bankruptcy Act of 1898 was a more robust statute than any of the previous bankruptcy acts. It not only provided comprehensive rules of law, but also rules of administration based on contributions made by the district courts in New York, Pennsylvania and throughout the east coast.[36] In order to carry out the objectives of the statute, the office of referee in bankruptcy was created.[37] Referees were designated to establish offices in every state and territory of the United States.[38] Serving at the discretion of the district court judges, referees were granted power to consider all petitions that were referred to them by the district courts and either to dismiss or make complete adjudications. [39] District court judges seemed content to place bankruptcy proceedings upon the shoulders of the referees, often leaving them with direct control over bankruptcy proceedings. The often unchecked discretionary power of the district court judges to appoint referees resulted in appointments of both full-time and part-time referees.

In the years directly following its enactment there were several attempts to either repeal the 1898 bankruptcy law or amend it by eliminating the provisions for voluntary proceedings. [40] These efforts did not succeed, and the 1898 Bankruptcy Act, with significant amendments in 1938 (the Chandler Act), and substantial restructuring in 1978 (the Bankruptcy Reform Act), and further amendments in 2005 (the Bankruptcy Abuse Prevention and Consumer Protection Act), has formed the basis for American bankruptcy law and practice for more than a century.

Early practice under the 1898 Act was in many ways not dissimilar to bankruptcy practice of the early twenty-first century. The docket from a case in 1899, the matter of Weil Brothers personal and business bankruptcy, illustrates how bankruptcies were handled in Colorado under the 1898 Act..[41] In an involuntary bankruptcy such as the Weil Brothers, a creditor filed a petition with the bankruptcy court, and the debtor was notified by subpoena delivered by a marshal. The debtor was referred to as "defendant" and was obligated to file an answer either confessing or denying the allegations of bankruptcy. The District Court then entered an order of reference, referring the case to a bankruptcy referee. A formal copy of the reference order, designating the case and the particular referee, was submitted to all parties and their respective legal counsel. Schedules would then be filed with copies sent to the referee and all interested parties. The referee would hold proceedings and formally enter an order officially adjudicating the debtor a bankrupt. Once this order was issued the bankrupt debtor would file an offer of composition describing the assets of the estate and how they were to be distributed among creditors.

Under the 1898 Bankruptcy Act it was possible that once the debtor was adjudged a bankrupt and upon

[35] Noel, *supra* note 15, at 159.
[36] *Williamson's Complete Code of Practice in Bankruptcy, Part I,* at 2-6, (1898).
[37] BANKRUPTCY ACT OF 1898, 30 Stat. 544 (1898).
[38] *Williamson's Complete Code of Practice in Bankruptcy, Part I,* at xiii, (1898).
[39] BANKRUPTCY ACT OF 1898' *supra* note 37 at *Id.*
[40] Warren, *supra* note 12, at 143.
[41] Record of case no. 139, William and Leopold Weil, OBA Weil Brothers at 278, District of Colorado Bankruptcy (1899).

application of interested parties, a receiver or marshal would be appointed to take possession of the bankrupt's property for the necessary preservation of the estate.[42] The property of the debtor would be so secured until such time as either the petition was dismissed or an administrative trustee was duly qualified.[43] It was the additional responsibility of the referee to appoint the trustee. Trustees were not always appointed. Particularly in voluntary no asset cases the additional expense of involving a trustee was not indulged.

Once the defendant-debtor filed the offer of composition, the referee would generate a report reviewing the offer of composition and mail that report to all creditors of the debtor.[44] Notice would be published, and a hearing would be held before the referee to address any objections raised by the creditors and any other interested parties. After the hearing was held, another notice would be published in the newspaper of record detailing the results of the hearing. Notice of the hearing outcome would also be mailed to all recognized creditors. An application to have the composition offer confirmed in an order would be filed, and, barring any objections, that order would be entered by the referee.

As distribution and payments from the debtor's estate were made, the referee would counter-sign all checks written by the debtor to his creditors.[45] Any property that had previously been placed in the safekeeping of a receiver, marshal, or trustee would then be turned over to the referee for distribution and settlement. The referee would file with the district court an accounting of expenses and distribution payments, costs, and taxes incurred in the administration of the bankruptcy case. As the case was wound down, schedules would be returned to the clerk of court along with all orders of adjudication, settlement, exemptions, allowed and disallowed claims, expenses, and all other records of the proceedings. Finally the referee would enter a final order discharging the bankrupt as well as a final tally of expenses which the referee was due to be reimbursed. This order and the list of expenses would be approved by the district court, officially ending the bankruptcy case.

Although the bankruptcy statute clearly stated the powers and responsibilities of the district court judges concerning administration of the bankruptcy courts, specific details were left to the discretion of individual judges and their courts.[46] The jobs of referees varied greatly between status as part-time and full-time and location. Referees serving in urban areas were more often appointed as full-time while referees serving in rural areas predominantly worked part-time. Rural areas often required referees to travel extensively throughout their territory in order to adjudicate cases. Traveling referees incurred greater expenses for which they were entitled to reimbursement. Therefore, having a greater number of part-time referees serving in rural areas provided both flexibility and lower overhead costs. However, many of the rurally situated part-time referees were left with little consistent work due to the low concentration of bankruptcy filings. The greater concentration of businesses and the convenience of traveling and conducting business in urban areas allowed smaller numbers of referees to handle larger numbers of cases.

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[42] BANKRUPTCY ACT OF 1898, *supra* note 37, at § 2.
[43] *Id.*
[44] *Id* at §§ 12-28.
[45] *Id.* at §§ 39-40.
[46] A.G.'s Report, *supra* note 23, at 77-87.

In 1939 there were a total of 470 bankruptcy referees throughout the United States.[47] Three hundred and seventy-eight were part-time referees and 92 were full-time.[48] This compares to 352 full-time bankruptcy judges in 2008, handling a case load approximately 36 times the size of that of the bankruptcy courts of 1939.[49] Colorado, for example, had a total of six referees in 1939, all of whom were part-time appointments serving two-year terms with eligibility for re-appointment at the completion of their terms. Like virtually all other referees at the time, those in Colorado worked under the statutory fee system that was widely perceived as exceedingly complicated and flawed.[50] The fee system was based on provisions first created in the original 1898 Bankruptcy Act. By 1938 referees were the only remaining federal judicial employees paid on a fee basis.[51] Comparing individual judicial districts nationwide, there was apparent tremendous disparity in compensation of referees garnered from case related fees. In 1939, not counting indemnifications, the referees in the Southern District of New York shared total compensation of $93,737. Three referees in New Mexico shared $1,053 and the six in Colorado's aggregate compensation totaled $6,707.[52]

Under the bankruptcy law referees were entitled to indemnification for all costs and expenses related to the handling and administration of their bankruptcy cases. These costs were accounted for in reports filed by each individual referee prior to their eventual recoupment. In 1939, the six Colorado referees filed for total indemnifications for their expenses that were one hundred and nine percent of their total compensation from fees.[53]

The collapse of America's capital markets in the great depression of the 1930's spawned the statutory framework that to this day regulates securities and securities trading in this country: the Securities Act of 1933; the Securities Exchange Act of 1934; the Investment Company Act of 1940; and the Trust Indenture Act of 1939. In the wake of passage of important reforms of the U.S. securities industry, in 1938 came the first significant revision of the 1898 Bankruptcy Act with passage of the Chandler Act.[54] This statute added provisions for reorganization of municipal debt (Chapter IX); reorganizations of secured and unsecured debt of corporations with significant public debt (Chapter X); extension and compromise of unsecured business debt (Chapter XI arrangements); real estate reorganizations (Chapter XII); wage earner plans (Chapter XIII); and railroad reorganizations (Section 77(b)).

The state of administration of the bankruptcy laws at the time of the enactment of the Chandler Act was less than ideal and is well documented in the 1940 Report of the U.S. Attorney General's Committee on Bankruptcy Administration.[55] This report was commissioned by U.S. Attorney General (later Associate Supreme Court Justice)

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[47] *Id*. at 3-10.
[48] *Id. at 61-64.*
[49] *Id.*
[50] *Id. at 83.*
[51] *Id.*
[52] *Id.* at 91.
[53] *Id*. at XXI.
[54] THE CHANDLER ACT, 52 Stat. 840 (1938).
[55] U.S. A.G. Comm. on Bankruptcy Admin., *supra* note 23, at IX.

Frank Murphy. It was prepared for U.S. Attorney General (later Associate Supreme Court Justice) Robert H. Jackson and transmitted by him to Chief Justice Charles E. Hughes, House Speaker Sam Rayburn, and Senate Judiciary Committee Chair Henry F. Ashurst. [56]

This prestigious committee identified two principal areas in need of reform, both necessary in the effort of "restoring to bankruptcy administration the confidence which it . . . unfortunately lack[ed] in many parts of the country."[57] First was the absence of any coordinated supervision of the national bankruptcy system. The recently created Administrative Office of the United States Courts had committed little to systematic oversight of bankruptcy courts. Some district judges undertook to oversee bankruptcy courts in their districts. This was done without statutory mandate, but through the inherent influence of the power to appoint and reappoint bankruptcy referees to two-year terms.[58]

Many bankruptcy courts of this time were wholly unsupervised. Referees not only presided over thousands of bankruptcy cases, but also had largely unfettered control of fiscal administration of the bankruptcy system, without uniform administrative procedures or systematic financial accountability. The bankruptcy system's absence of coordinated supervision was not without adverse consequences: unnecessary expenses, inordinate delays, fiscal improprieties, and the absence of structure or process to field complaints about its operations. Such matters caused the integrity of the entire bankruptcy process to be questioned.[59]

The second aspect of the bankruptcy system identified as being in need of major reform focused on the officials who presided over the quasi-judicial bankruptcy process.[60] Referees were appointed for two-year terms with no limit to the number of reappointment terms they might serve. An "inordinately large" number of referees was appointed, many devoting very little time to the position.[61] In 1939, referees received widely disparate compensation, ranging from nothing to as much twenty thousand dollars, all from fees and commissions of the bankruptcy process. The 1940 Attorney General's Report found that referees had a financial stake "in practically every consequential decision which they make."[62] Because of the connection to their own compensation, referees had an interest in promoting bankruptcy cases. The expenses of operating the bankruptcy courts as well as the referees' compensation were reimbursed from case fees and commissions. Such "indemnification" of the expenses of the referees' office was administered with little uniformity, sometimes "haphazardly," often with no stated rules of procedure, and at best, presenting opportunities for misapplication of funds.[63]

The recommendations of the 1940 U.S. Attorney General's Committee of Bankruptcy Administration set in motion reforms that shaped today's bankruptcy courts in essential ways. The first of two principal

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[56] *Id.* at V.
[57] *Id.* at XI.
[58] *Id.* at XII.
[59] *Id.* at XI.
[60] *Id.*
[61] *Id.* at XIII.
[62] *Id.* at XIV.
[63] *Id.*

recommendations was the creation of a Bankruptcy Division within the newly established Administrative Office of the U.S. Courts. The Bankruptcy Division was charged with coordination and supervision of the bankruptcy system, more particularly, auditing referees' offices, collection of bankruptcy statistics, receipt and investigation of complaints, and investigating and implementing rules and practices that worked well in the then fractured bankruptcy system, while discouraging questionable practices.

The Committee's second principal recommendation focused directly on reforming the office of referee, with the objectives of raising the quality of performance of this office and of "mak[ing] the position attractive to men of highest ability."[64] Specific suggestions to this end included reducing the number of referees, each with full-time employment, establishing salaries in lieu of commissions, and simplifying and standardizing the office expense indemnity process. In addition, the report recommended continuing appointment by district judges, but for six-year terms, renewable upon satisfactory performance, with dismissal only for cause, and inclusion of referees in federal retirement benefits. [65] This report further proposed a specific means of implementing several of its recommendations: appointment of a Bankruptcy Division Chief in the A.O. with the responsibilities of determining the number and location of referees needed in the bankruptcy system, fixing salaries of each in the range of three to ten thousand dollars, and supervising and maintaining offices of referees just as with other federal judicial officials.[66]

Interestingly, the Attorney General's farsighted report recommended against funding a reformed bankruptcy/referee system with an appropriation from the federal government.[67] Instead, it recommended continuing to have debtors and creditors who participate in the system underwrite it with fees and commissions, specifically a uniform fixed fee from no asset cases and graduated commissions in asset cases, all to be paid into the U.S. Treasury and, in turn, disbursed to cover referees salaries and expenses of staffing and maintaining referees' offices. Vestiges of this structure for funding the bankruptcy system remain today. While by 1948 the federal judiciary's appropriation included funds to pay referees and their overhead, to this day the system is underwritten in significant measure from the pockets of debtors and creditors who use it. The sole source of compensation of trustees who collect and liquidate bankruptcy estates consists of filing fees[68] and commissions from the sales of bankruptcy estate property. [69]

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[64] A.G.'s Report, *supra* note 23, at XVI. In addition, this Report provided two incidental benefits. It collected and preserved in the library of the Justice Department much important information about how the bankruptcy process was then functioning. Furthermore, it brought to light and turned over to the Justice Department for appropriate action defalcations of bankruptcy funds amounting to more than $150,000.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] There is an apparent upside to the suffering reflected in the bankruptcy filings of more than a million American families each year. The entire federal judicial system today relies most heavily on its least economically advantaged users and their creditors to help pay the way of the federal courts. Bankruptcy court filings in 2004 were 1,618,917 while combined civil and criminal filings in US District Courts were 352,360. *See* Admin. Office of the U.S. Courts, 2004 JUDICIAL BUSINESS, CASELOAD HIGHLIGHTS,
http://www.uscourts.gov/judbus2004/front/ JudicialBusiness.pdf (last visited August 18, 2009).

[69] This saving of taxpayer dollars may well have been, for more than a hundred years, at the expense of bankruptcy estate

After the revisions of the Chandler Act in 1938, the 1898 Bankruptcy Act did not see significant revisions for forty years, until the Bankruptcy Reform Act of 1978 was enacted. Most substantive bankruptcy law provisions of the 1898 Bankruptcy Act survived in the reenacted 1978 "Bankruptcy Code." The Code, a result of study and drafting efforts covering more than a decade, was generally heralded as a complex but artfully crafted and balanced piece of legislation. It was the product of recommendations from a National Bankruptcy Conference with substantial input from many of the nation's most highly regarded insolvency scholars, practitioners and bankruptcy judges, as well as highly sophisticated sponsors and staff from the Senate and House committees.

An important change in statutory nomenclature elevated the position of referee to United States Bankruptcy Judge.[70] The 1978 Reform Act also, for the first time, codified the Bankruptcy Code's automatic stay.[71] A further significant reform in the 1978 legislation created the Office of the United States Trustee in the Justice Department. Regional U.S. Trustees were, in consumer cases, to oversee appointment and supervision of bankruptcy trustees, thus separating and excluding bankruptcy judges from oversight of trustees and other routine supervision of the administration of consumer bankruptcy proceedings, such as presiding at creditors' meetings.

In business reorganization cases the U.S. Trustee effectively replaced the role of the Bankruptcy Division of the Securities and Exchange Commission and assumed particular responsibilities in scrutinizing qualification and compensation of professionals and reviewing plan disclosure statements. The 1978 legislation further radically reformed business reorganizations by eliminating Chapter X and substituting an overhauled Chapter 11, available to individuals and to almost all businesses, not just corporations with substantial public debt. Revised Chapter 11, unlike the prior Chapter XI and like prior Chapter X, allowed for the adjustment of secured as well as unsecured debt. It also, as a general rule, allowed a business debtor's existing management to remain in place to operate the "debtor-in-possession," with no mandatory appointment by the court of an independent trustee to run the business pending reorganization, as in prior Chapter X cases.

The final major revision in the twentieth century to the bankruptcy law came in response to the United States Supreme Court's decision of *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co,* 458 U.S. 50 (1982). The 1978 Bankruptcy Reform Act had sought to expand the bankruptcy court's historic, limited "summary" jurisdiction only over matters of administration of the bankruptcy estate. The 1978 legislation had given bankruptcy judges pervasive power to adjudicate to finality all civil plenary disputes of any nature so long as such disputes were "related to" the administration of a bankruptcy case. This, the *Marathon* case held, was an unconstitutional expansion of the powers of an Article I, congressionally created court. Only federal judges appointed under Article III of the United States Constitution have constitutional authority to adjudicate plenary disputes, such as contract and tort claims, in federal courts. The *Marathon* ruling instructed that bankruptcy courts around the country had for three

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creditors. It gives rise to what in bankruptcy jargon is called the bankruptcy trustees' "rule of low-hanging fruit:" if it isn't there for the easy pickin', don't bother; there is no money to pay for difficult investigations that might not be successful.

[70] Another overhaul of statutory labels changed those who sought bankruptcy relief from "bankrupts" to "debtors."

[71] Prior to the enactment of the 1978 Bankruptcy Reform Act, the U.S. Supreme Court, on recommendation of the Judicial Conference and pursuant to Congressional authority, had, in 1973, promulgated Federal Rules of Bankruptcy Procedure that renamed bankruptcy referees as judges and put in place an automatic stay on the filing of a bankruptcy petition.

years been handling litigation over which they had no subject matter jurisdiction. Not to be discouraged, the Supreme Court ruled that *Marathon* was to be applied only prospectively, and then only after Congress was given time to revisit the jurisdictional provisions of the 1978 Bankruptcy Reform Act.

During the time between the decision in *Marathon* and the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the reach of bankruptcy court jurisdiction was, at best, unclear. The 1984 legislation gave the U.S. District Courts exclusive jurisdiction over bankruptcy cases. It, in turn, made bankruptcy courts "units" of the district courts and referred all bankruptcy matters to the bankruptcy judges. The constitutional infirmity of the 1978 legislation was dealt with by providing that bankruptcy judges could enter final, appealable orders in any "core" proceedings "arising in" or "arising under" the Bankruptcy Code (a return to historic "summary" proceedings), but requiring that litigation only "relating to" the Bankruptcy Code ("plenary" matters) could be heard by bankruptcy judges, with their decisions subject to *de novo* review by an Article III district judge. The 1984 Bankruptcy Amendments and Federal Judgeship Act also provided for appointment of bankruptcy judges by the Circuit Courts of Appeal for fourteen-year terms with salaries fixed at ninety-two percent of those of district judges.

The later decades of the 20th century and first years of the 21st century saw both an explosion in the availability of consumer credit[72] and an enormous increase in the number of consumer bankruptcy filings.[73] Some commentators and vocal spokesmen for the consumer credit industry ascribed the increase in consumer bankruptcies to moral decay and reduced stigma associated with bankruptcy, encouraged by the 1978 Bankruptcy Reform Act's purported tilting of the debtor-creditor playing field in favor of consumer borrowers.[74] A substantial body of data and scholarly literature argues that any such conclusion is mere speculation unsupported by empirical evidence and that this increase in filings more likely reflects increased financial distress among America's middle class.[75] Whatever the merits of these competing arguments, in 2000 the 106th Congress passed a bill that later became the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") – the first comprehensive amendments to the 1978 Bankruptcy Reform Act. These amendments were generally regarded as complicating and reducing relief available to consumers in bankruptcy. This 2000 legislation was met with then President Bill Clinton's pocket veto after the close of the 106th Congress' second session. This legislation was resurrected early in the George W. Bush administration, only to be stalled by a fierce debate over dischargeability of tort liabilities arising from the battle between advocates of "choice," on the one hand, and "right to life," on the other.

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[72] Utilizing reported figures from the Federal Reserve, Professors Teresa Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook observe that total non-mortgage consumer debt in the United States, adjusted for inflation, more than doubled between 1981 and 2001. Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STANFORD L.R. 212 at n.50 (2006). [hereinafter Sullivan/Warren/Lawrence *Less Stigma or More Financial Distress*].

[73] The Administrative Office of the United States Courts accounted for slightly under 316,000 consumer cases filed nationally in 1981. This number had climbed to just over 1,563,000 in 2004. (www.uscourts.gov/bankruptcy/states - Table F). Professors Sullivan, Warren and Lawrence note that this represents an increase over this period in consumer bankruptcy filings in the U.S. from 3.6 to 14 per one thousand households. Sullivan/Warren/Lawrence, *Less Stigma or More Financial Distress, supra* note 72 at p.215.

[74] *See* e.g., Edith H. Jones and Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. Rev. 177; Kartick Athreya, *Shame as it Ever Was: Stigma and Personal Bankruptcy*, 90 FED.RES. BANK Richmond ECON.Q. 1 (2004); Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1097 (2005).

[75] *See* Sullivan/Warren/Lawrence, *Less Stigma or More Financial Distress*, *supra*, note 72.

After lobbying of both sides of the aisle by the financial industry and with favorable votes by substantial majorities of both parties,[76] in the Spring of 2005, BAPCPA became law, with an effective date of October 17, 2005. This significant amendment to the Bankruptcy Code had a profound impact on the nation's bankruptcy courts. Perhaps the most immediate challenge to the courts was the deluge of consumer filings that preceded the effective date of BAPCPA. Total non-business bankruptcy filings in the United States in 2004 were 1,563,145. This number jumped to 2,039,214 for 2005, reflecting consumers' efforts to file before BAPCPA's effective date in October, 2005.[77]

The massive pre-BAPCPA effective date filings were in significant measure an uninformed over-reaction to BAPCPA. So many consumer filers reacted to the perceived disadvantages to them under BAPCPA that the supply of consumer bankruptcy lawyers who might have advised to the contrary was exhausted. Many prospective consumer filers simply could not find counsel who were accepting clients. The result: many bankruptcies were filed where no filing was necessary; and many cases were filed which, in the more orderly ordinary course, might have been filed with the assistance of counsel in the last quarter of 2005 or in 2006. A precipitous drop in filings in late 2005 and 2006 was probably a simple reflection of the fact that the universe of prospective filers was largely diminished by the flood of pre-BAPCPA filings.[78]

BAPCPA brought with it other significant challenges for the bankruptcy bench and bar. Perhaps the most notorious was the advent of "means testing" in consumer cases. If a Chapter 7 consumer debtor whose income exceeded the median for his state had the "means" to make payments to creditors going forward, he could be required to convert his case to Chapter 13 or to have it dismissed as an "abuse" of Chapter 7. In Chapter 13, his plan had to pay general creditors at least that which he had the "means" to pay. The complex calculation of a debtor's "means" to pay creditors was prescribed in detail in BAPCPA, utilizing fixed expense guidelines drawn from the Internal Revenue Service's regulations concerning settlement of delinquent tax liabilities. In short order disputes and misunderstandings concerning these calculations resulted in literally thousands of contested matters in bankruptcy courts across the country. Scarce, valuable resources of the U.S. Trustee's trial attorneys were directed to means testing litigation in consumer cases under BAPCPA. This was often to the great consternation of the bankruptcy bench in many parts of the country where it came at the expense of the critical function performed by the U.S. Trustee's legal staff in small and medium-sized reorganization cases.

BAPCPA brought with it further challenging innovation. It heightened the level of responsibility of consumer debtors' counsel concerning "inquiry" and accuracy of a debtor's petition and related documents. It

[76] Modest opposition was led by a young, relatively little-known law professor. Not surprisingly the consumer debtor lobby's resources paled beside those of Wall Street. This law professor did enlist the support of one influential legislator, who, with her, later spearheaded the creation of the Consumer Financial Protection Bureau as part of the regulatory reform of Wall Street following the recession of 2008. Professor Elizabeth Warren subsequently emerged from academic obscurity to occupy an endowed chair on the Harvard Law School faculty, achieving the distinction of Wall Street's least beloved public spokesperson and senior U.S. Senator from the State of Massachusetts, the seat previously held by her co-spokesperson against BAPCPA, the late Senator Edward M. Kennedy.
[77] USCourts.gov – Bankruptcy Filings, Business and Nonbusiness cases filed by chapter of the Bankruptcy Code, twelve months ended December 31, 2004 (Table F-2) and twelve months ended December 31, 2005 (Table F-2).
[78] Total nonbusiness bankruptcy filings in 2006 dropped to 597,965. *Id*. at twelve months ended December 31, 2006 (Table F-2).

created "debt relief agencies" and imposed a duty on them of "reasonable care" concerning untrue or misleading statements in documents filed in consumer cases. It prohibited "debt relief agencies" from advising consumer debtors to incur debt in contemplation of filing bankruptcy – in some instances a rather unusual incursion into the attorney-client relationship.

BAPCPA created an additional bankruptcy phenomenon, the "bankruptcy petition preparer." A bankruptcy petition preparer under BAPCPA is formally recognized as a compensated, non-lawyer, now statutorily regulated entity that may assist consumer debtors in filing their bankruptcies, usually in pro se cases. This creature arose from a perceived need to reduce the legal cost of some consumer bankruptcy cases while at the same time protecting the process and consumer debtors from abuse. Any such motivation is not altogether without irony, as the complexities and expanded responsibilities of counsel under BAPCPA continue to be a significant factor in driving up the cost of consumer cases.

The very nature of the task of the petition preparer created confusion and invited litigation in bankruptcy courts across the country. A bankruptcy petition preparer is defined as a non-attorney "who prepares, for compensation, a document for filing [in a consumer bankruptcy case]." While a petition preparer may prepare documents for filing, he, she or it may not engage in the unauthorized practice of law and, specifically, "may not offer ... any legal advice … concerning bankruptcy procedures and rights".[79] Read literally, this would appear to limit the function of the bankruptcy petition preparer to a paid word processor. That hardly makes sense, as there would otherwise be no need to provide the elaborate scheme contained in BAPCPA for regulation of petition preparers and sanctions against those who fail to comply with the regulations. The resulting conundrum concerning the scope of what a bankruptcy petition preparer can properly do in any given bankruptcy court was left for litigation.

BAPCPA invites the Supreme Court, by rule, or the Judicial Conference, by guideline, to prescribe maximum allowable fees to be charged by bankruptcy petition preparers, failing which the bankruptcy court is charged with disallowing any fee of a petition preparer "in excess of the value of any services rendered by the petition preparer ."[80] Not surprisingly, the U.S. Supreme Court and the Judicial Conference have not responded to the aforementioned invitation, and disputed petition preparer fees have been added to the litigation load of bankruptcy courts.

It is likely that in limited, appropriate circumstances, bankruptcy petition preparers have performed valuable services to consumer debtors and the bankruptcy courts. Those circumstances ordinarily involve bankruptcy petition preparers who are competent, scrupulous, and well informed about bankruptcy forms and procedures. They also involve scrupulous, cooperative, intelligent debtors who are unable to afford counsel and whose bankruptcy estates are relatively small and uncomplicated with regard to assets, liabilities, and prepetition transactions with parties in interest. Such circumstances are not always present in consumer bankruptcy cases. In

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[79] 11 U.S.C. §110(e).
[80] 11 U.S.C. §110(h).

their absence, utilization of a bankruptcy petition preparer may be a recipe for complicating administration of consumer bankruptcy cases or for outright abuse.