

# University of Michigan Journal of Law Reform

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Volume 11

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1977

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### Recommended Citation

Marjorie Girth, *The Bankruptcy Reform Process: Maximizing Judicial Control in Wage Earners' Plans*, 11 U. MICH. J. L. REFORM 51 (1977).

Available at: <https://repository.law.umich.edu/mjlr/vol11/iss1/4>

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# The Bankruptcy Reform Process: Maximizing Judicial Control in Wage Earners' Plans

Marjorie Girth\*

Immediately after the 95th Congress convened in January 1977, a new version of legislation designed to accomplish a major revision of the Bankruptcy Act<sup>1</sup> was introduced in the House of Representatives.<sup>2</sup> This version was based upon reactions to earlier legislative proposals and suggestions submitted during extensive hearings held by the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights during the 94th Congress.<sup>3</sup> Senate action on bankruptcy legislation was delayed by the implementation of an extensive committee reorganization plan.<sup>4</sup> As a result, the House legislation became the focus of attention for all interested parties in the new Congress. After extensive subcommittee markup sessions, the full Judiciary Committee overwhelmingly approved the legislation for House action.<sup>5</sup>

Discussions of earlier versions of the legislation had emphasized varying proposals for structuring the bankruptcy process.<sup>6</sup> The first recommendation, known colloquially as the Brookings proposal, suggested that

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<sup>1</sup> 11 U.S.C. §§ 1-1103 (1970).

<sup>2</sup> H.R. 6, 95th Cong., 1st Sess. (1977).

<sup>3</sup> *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st & 2d Sess. (1975-1976)* [hereinafter cited as *Bankruptcy Act Revision*]. Rep. Don Edwards, who chairs the subcommittee, had earlier served on the Commission on Bankruptcy Laws of the United States. See note 8 *infra*.

<sup>4</sup> The Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery had also held extensive hearings during the 94th Congress. *The Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st & 2d Sess. (1975-1976)* [hereinafter cited as *The Bankruptcy Reform Act*]. Sen. Quentin Burdick, who had long chaired the subcommittee, moved to the Appropriations Committee as part of the reorganization. Sen. Dennis DeConcini was then appointed to chair the subcommittee, all of whose members were also new appointees. Letter from Robert E. Feidler of the subcommittee staff to the author (April 19, 1977).

<sup>5</sup> The Judiciary Committee vote was 26-3. Wall St. J., July 20, 1977, at 2, col. 3. The reported legislation was substituted for the earlier version and became H.R. 8200, 95th Cong., 1st Sess. (1977). Consideration of the Senate version of the legislation, introduced on October 31, 1977, is scheduled for 1978. S. 2266, 95th Cong., 1st Sess. (1977).

<sup>6</sup> See Girth, *Prospects for Structural Reform of the Bankruptcy System*, 63 CALIF. L. REV. 1546 (1975).

an administrative agency process bankruptcy cases.<sup>7</sup> Such a structure would require the services of administrative law judges but would not continue the current bankruptcy courts. The Commission bill<sup>8</sup> recommended an administrative agency only for initial processing of all bankruptcies, and proposed a new bankruptcy court to review agency decisions and serve as the initial trial forum for specified issues.<sup>9</sup>

The present bankruptcy judges<sup>10</sup> wished to preserve their own status by retaining the present decisionmaking structure. The Judges' Bill,<sup>11</sup> drafted by representatives of the National Conference of Bankruptcy Judges, presented an alternative proposal which maximized judicial control over the processing of bankruptcy cases. As a result, status politics became very important as the House legislation evolved.<sup>12</sup>

This article examines the effort to maximize judicial control over the bankruptcy process and its impact on H.R. 8200's procedural requirements for the nonbusiness bankruptcy option known currently as the wage earners' plan.<sup>13</sup> As background, it describes the present nonbusi-

<sup>7</sup> D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 199-204 (1971).

<sup>8</sup> H.R. 10792 and S. 2565, 93rd Cong., 1st Sess. (1973), *reintroduced as* H.R. 31 and S. 236, 94th Cong., 1st Sess. (1975). This legislation resulted from the work of the Commission on Bankruptcy Laws of the United States, authorized by Congress in 1970. Kennedy, *Foreword: Bankruptcy Reform—1973*, 21 U.C.L.A. L. REV. 381-87 (1973).

<sup>9</sup> Girth, *supra* note 6, at 1546, 1547-49.

<sup>10</sup> The referee in bankruptcy is usually the presiding officer, pursuant to § 22 of the Bankruptcy Act, 11 U.S.C. § 45 (1970), and is to be called judge. RULES BANKR. PROC. Rule 901(7). [hereinafter cited as RULES]

<sup>11</sup> H.R. 32 and S. 235, 94th Cong., 1st Sess. (1975).

<sup>12</sup> Status concerns and economic self-interest coincide in the present bankruptcy judges' efforts. But status politics may also reflect self-defined perceptions of social worthiness, as the legislative activities of the American temperance movement reveal. J.R. GUSFIELD, *SYMBOLIC CRUSADE* (1963).

Another example of status politics in the bankruptcy reform process emerged in the effort to extend the terms and change the appointment process for judges in the reformed system. The Commission Bill and the Judges' Bill had agreed on a 15 year term for the new judgeships, but they differed significantly on the method of judicial appointment. § 2-102(a) and (b), H.R. 31 and 32, 94th Cong., 1st Sess. (1975). The 15 year term appeared to increase the status of present judges, whose appointments are for six years. However, the Commission Bill coupled the longer term with a Presidential appointment, requiring the advice and consent of the Senate. Such a proposal threatened to shift the political setting for such appointments away from the professional politics which dominate the present selection process by the United States district judges. Bankruptcy Act § 34(a), 11 U.S.C. § 62(a) (1970); D. STANLEY & M. GIRTH, *supra* note 7, at 158-60. The judges' proposal attempted to retain the judicial influence, recommending selection by the judicial council within each circuit.

H.R. 8200 proposed the creation of United States Bankruptcy Courts for each judicial district. H.R. 8200, 95th Cong., 1st Sess. § 201(a) (1977). Judges appointed by the President, with the Senate's advice and consent, would serve during good behavior, i.e., for life, except in rare cases of professional misconduct. The power over appointments would shift to each state's Senators and away from the present district judges, who reportedly oppose dilution of their status by the creation of new bankruptcy courts. Their concerns are reflected by the U.S. Judicial Conference which has criticized the new system as "entirely unnecessary." Wall St. J. May 16, 1977, at 2, col. 3. The strength of this reaction was reflected in a 183-158 House vote on an amendment which rejected the proposed court system. Wall St. J., October 31, 1977, at 8, col. 2. House rules permit the issue to be reconsidered, and a later 262-146 vote approved the new court system. Wall St. J., February 2, 1978, at 8, col. 3.

<sup>13</sup> Chapter XIII of the Bankruptcy Act, §§ 601-686, 11 U.S.C. §§ 1001-1068 (1970). The comparable procedure in H.R. 8200 can be found at Chapter 13, H.R. 8200, 95th Cong., 1st

ness bankruptcy options and the statutory procedures for monitoring confirmed wage earners' plans. Then, using illustrative samples from three years of cases in the Buffalo region of the Western District of New York, it assesses whether present plans are being administered in accordance with the statutory formalities. The economic incentives which affect creditors' behavior in taking advantage of their opportunities to monitor these proceedings are also examined. The article describes the procedures which were developed for such cases in the Bankruptcy Rules and the legislative processes which produced H.R. 8200. Finally it assesses the consequences if status politics produces procedures which do not reflect accumulated experience.

## I. PRESENT BANKRUPTCY PROCEDURES

### A. *Nonbusiness Bankruptcy Options*

For at least fourteen years, nonbusiness or personal cases administered under the Bankruptcy Act have constituted between eighty-five and ninety percent of the total caseload.<sup>14</sup> The present statute provides two basic options for nonbusiness debtors who cannot informally resolve problems with their creditors. In one procedure, known as straight bankruptcy, the debtor's nonexempt assets<sup>15</sup> are identified and converted into cash for payment to creditors. Straight bankruptcy has the advantage of providing the debtor with a discharge from all unsecured debts.<sup>16</sup> Only on very rare occasions does the debtor's prebankruptcy behavior give creditors grounds for blocking the issuance of the discharge.<sup>17</sup> A debtor who receives a discharge, however, cannot receive another unless the later bankruptcy petition is filed more than six years after the petition pursuant to which the discharge is granted.<sup>18</sup>

The other option is the Chapter XIII wage earners' plan, which focuses on the debtor's income instead of on nonexempt assets. Wage earners' plans have been used with widely varying frequency among the federal court districts but have consistently constituted sixteen to eighteen percent of the nonbusiness bankruptcy filings during fiscal years 1972-76.<sup>19</sup> A

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Sess. §§ 1301-1331 (1977), providing for the "adjustment of debts of an individual with regular income."

<sup>14</sup> See, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, TABLES OF BANKRUPTCY STATISTICS, Table F3 (1976) [hereinafter cited as TABLES OF BANKRUPTCY STATISTICS.], for the fiscal year ending June 30, 1976. See also earlier years. Business cases constitute the remaining 10 to 15%. For details on the business bankruptcies, see D. STANLEY & M. GIRTH, *supra* note 7, at 107-17.

<sup>15</sup> At the present time, the Bankruptcy Act allows the exempt status of assets to be determined by state law. Bankruptcy Act, § 6, 11 U.S.C. § 24 (1970). These laws vary greatly in their treatment of debtors, but their typical effect in nonbusiness cases is to make very few nonexempt assets available for liquidation and payment to creditors. D. STANLEY & M. GIRTH, *supra* note 8, at 81-84.

<sup>16</sup> Straight bankruptcy has no effect on fully secured debt, because the creditor has the option of liquidating its collateral if the debtor defaults. Bankruptcy Act, § 57(h), 11 U.S.C. § 93(h) (1970).

<sup>17</sup> D. STANLEY & M. GIRTH, *supra* note 7, at 90-91.

<sup>18</sup> Bankruptcy Act, § 14(c)(5), 11 U.S.C. § 32(c)(5) (1970).

<sup>19</sup> TABLES OF BANKRUPTCY STATISTICS, *supra* note 14, at Tables F2 and F3.

debtor who selects this option proposes to pay all or part of his or her debts over an extended period of time. If creditors agree to the proposal, the plan is confirmed by the bankruptcy judge and payments begin.<sup>20</sup>

A wage earners' plan may be an attractive option to debtors and their creditors for a number of reasons. Many debtors wish to meet their obligations and to avoid what they perceive to be the stigma of bankruptcy.<sup>21</sup> Nonbusiness debtors who reaffirm a substantial proportion of their unsecured debts after receiving a straight bankruptcy discharge find that the discharge is of limited value.<sup>22</sup> The wage earners' plan may benefit unsecured creditors by producing more payments than if the debtor had chosen straight bankruptcy<sup>23</sup> and by offering more equitable treatment than if the creditor's claim had been among those not reaffirmed after a straight bankruptcy proceeding. In addition, the straight bankruptcy discharge remains available to a debtor who has fully paid all creditors pursuant to a wage earners' plan, if financial problems recur.

After the court confirms a wage earners' plan, the present Bankruptcy Act and Rules<sup>24</sup> provide formal procedures for modifications. "Any party in interest," usually the debtor,<sup>25</sup> may request a change in the amount of payments or the time period for the plan. Upon receiving the request, the court must give notice to interested parties and hold a hearing<sup>26</sup> before reaching a decision. If the court denies the request for modification and the debtor is unable to meet the requirements of the confirmed plan, several options are available. The debtor can request a discharge if three years have elapsed and the failure to complete the plan is caused by circumstances beyond his or her control.<sup>27</sup> Creditors must be given the opportunity to object to the discharge before it is granted by the court. If the required three years have not elapsed, the court can dismiss the proceeding or, with the debtor's consent, adjudicate him or her a bankrupt.<sup>28</sup> Once a case is dismissed, creditors are free to pursue the debtor for payment of the remaining amounts owing to them. A debtor in a wage earners's proceeding may be adjudicated a bankrupt without his or her consent if the petition was originally filed as a straight bankruptcy and later converted to a wage earners' plan. If adjudication occurs, nonexempt assets are liquidated and distribution is made pursuant to

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<sup>20</sup> For confirmation of a plan, Chapter XIII requires the consent of a majority in number and amount of the unsecured creditors and of all secured creditors who are affected by the plan. Bankruptcy Act, § 652(1), 11 U.S.C. § 1051(1) (1970). Allegedly secured claims must therefore be examined very closely in the effort to devise feasible plans for such debtors. If the secured status is not validly perfected or the value of the collateral is less than the amount of the claim, it will be wholly or partially unsecured.

<sup>21</sup> D. STANLEY & M. GIRTH, *supra* note 7, at 65-69, 230-32.

<sup>22</sup> H. JACOB, DEBTORS IN COURT 109-10 (1969); D. STANLEY & M. GIRTH, *supra* note 7, at 59-62.

<sup>23</sup> In at least 84% of the nonbusiness straight bankruptcies, unsecured creditors received nothing; in the remaining cases, they received only seven cents on the dollar. D. STANLEY & M. GIRTH, *supra* note 7, at 87, 93.

<sup>24</sup> See Section II A, *infra*, for a discussion of the development of the Rules.

<sup>25</sup> RULE 13-214(a), modifying Bankruptcy Act § 646(5), 11 U.S.C. § 1046(5) (1970).

<sup>26</sup> *Id.*

<sup>27</sup> Bankruptcy Act, § 661, 11 U.S.C. § 1061 (1970) and RULE 13-404(b).

<sup>28</sup> RULE 13-215(a), modifying Bankruptcy Act §666, 11 U.S.C. § 1066 (1970).

straight bankruptcy procedures. Dismissal or adjudication can be requested either by the debtor or by any other interested party.<sup>29</sup>

*B. Case Study of Present Administration of Wage Earners' Plans*

In order to compare the actual administration of wage earners' plans with the statute's procedural requirements, a random sample was initially drawn from Chapter XIII cases filed in fiscal year 1971 with the bankruptcy judge in the Buffalo office of the Western District of New York.<sup>30</sup> The results of an examination of these records can illustrate administrative practices in the Buffalo area but may not represent the experience of the nation as a whole. However, the Buffalo statistics are consistent with information from seven diverse districts concerning two preliminary issues: the financial profiles of the debtors<sup>31</sup> and the importance of the bankruptcy judge's receptivity to efforts to use wage earners' plans.<sup>32</sup> The debtors' financial profiles may indicate their ability to complete a confirmed plan without subsequent modifications.<sup>33</sup> The judge's attitude affects not only the initial choice of the wage earners' plan but also his reactions to problems arising in the debtor's performance under the plan.

<sup>29</sup> *Id.*

<sup>30</sup> This phase of the research was assisted by David Klein, J.D., 1972, State U. of N.Y. at Buffalo, with the support of the Jaeckle-Abrams Fund for student assistance, Faculty of Law and Jurisprudence, State U. of N.Y. at Buffalo. Officially reported data on such cases do not include the details of case administration which are crucial to this comparison, but are limited to numbers of cases filed and closed, the amounts of creditors' claims, and the amounts distributed.

<sup>31</sup> D. STANLEY & M. GIRTH, *supra* note 7, at 43; see also other studies cited therein.

<sup>32</sup> D. STANLEY & M. GIRTH, *supra* note 7, at 94-105.

<sup>33</sup> In this study, blue collar workers with low incomes predominated:

Type of Employment	Fiscal Year of Filing <sup>a</sup>		
	1971	1973	1975
Semiskilled or unskilled	55%	49%	40%
Craftsmen or skilled <sup>b</sup>	12.5%	24.4%	19%
Professionals or Semiprofessionals <sup>c</sup>	10%	2%	14.2%
Sales	7.5%	2%	2.4%
Clerical	5%	14.2%	9.5%
Service	5%	6.1%	2.4%
Proprietors and Managers	—	2.0%	4.8%
Others or Unknown	5%	—	7.1%

<sup>a</sup> For fiscal year 1971, N=40 cases; for fiscal 1973, 49 cases; for fiscal 1975, 42 cases.

<sup>b</sup> Job descriptions in the files were often not precise. Doubts about the distinction between the semiskilled and skilled categories were resolved in favor of classifying the petitioner as skilled.

<sup>c</sup> Usually public employees, such as police or corrections officers, or deputy sheriffs. For fiscal 1971, the median take-home pay was \$6,250; for fiscal 1973, \$6,750; and for fiscal 1975, \$7,250. The petitioners were obviously heavily indebted at the time they filed:

	Scheduled Indebtedness as Percent of Take-Home Pay		
	1971	1973	1975
Median .....	65%	65%	55%
Low .....	15%	15%	25%
High .....	200%	165%	185%

For fiscal 1971 and 1973, the median scheduled indebtedness was \$4,250; for fiscal 1975, \$4,750.

Wage earners' plans had rarely been used in the Buffalo area of the Western District of New York when Judge Beryl McGuire was appointed in April 1968.<sup>34</sup> After acquiring experience in administering nonbusiness straight bankruptcy cases, Judge McGuire decided that wage earners' plans should be more widely considered because of the repayment potential which they offered. He launched an educational effort aimed at the practicing bar and at creditors, appointed a standing trustee for all such cases,<sup>35</sup> and made arrangements to utilize a computerized service for maintaining case records and handling disbursements. In combination, these decisions resulted in a rapid increase in filing and disbursements to creditors, as well as in accumulated cases pending at the end of successive fiscal years.<sup>36</sup>

Fiscal year 1971<sup>37</sup> was chosen for the initial sample because it was the first full year of experience with Judge McGuire's efforts to encourage the wage earners' plan as a nonbusiness bankruptcy option and because the Buffalo labor area experienced a sharp increase in unemployment shortly thereafter.<sup>38</sup> Earlier research had supported a predictable relationship between overall bankruptcy filings and the state of the economy.<sup>39</sup> The 1971 sample was selected so that debtors' progress under difficult employment conditions could be monitored in order to allow more precise analysis of the relationship between unemployment conditions and an ability to complete wage earners' plans successfully. It was hypothesized that unemployment would make completion of the wage earners' plans

<sup>34</sup> Ten wage earners' plans were filed in fiscal 1965; 10 in fiscal 1966; 7 in fiscal 1967; 2 in fiscal 1968; and 3 in fiscal 1969. Letter from the staff of Judge Beryl McGuire to the author (November 10, 1976).

<sup>35</sup> The first standing Chapter XIII trustee was appointed on November 25, 1969. When his caseload became too great, a second standing trustee was added on October 1, 1974. These appointments provided the court with in-house experts who could answer attorneys' and creditors' inquiries, in addition to monitoring debtors' performance under their plans.

<sup>36</sup> Annual reports filed by Judge McGuire and the Chapter XIII trustees with the Administrative Office of the United States Courts indicate that for fiscal years 1970-75, the respective data were as follows:

FY	Cases Filed <sup>a</sup>	Cases Pending <sup>a</sup>	Disbursements to Creditors
1970	49	49	\$ 54
1971	280	292	\$ 101,117
1972	301	586	\$ 351,823
1973	368	869	\$ 643,754
1974	541	1386	\$ 933,084
1975	1059	2072	\$1,206,114

<sup>a</sup> Understates the number of individuals involved, because spouses' cases were consolidated for purposes of administration.

<sup>37</sup> When this research was conducted, the federal government's fiscal year ran from July 1 to June 30, with the fiscal year identified by its final month. Thus, cases for fiscal year 1971 were filed as early as July 1, 1970.

<sup>38</sup> Unemployment in the area rose to an annual average of 9.3% in fiscal 1972 from 6.3% in fiscal 1971. For fiscal 1973 and 1974, it declined to an annual average of 7.6% and 7.9% respectively, before rising sharply again to 10.3% in fiscal 1975. Information provided by George P. Smyntek, Senior Economist, New York State Department of Labor (June 24, 1976).

<sup>39</sup> D. STANLEY & M. GIRTH, *supra* note 7, at 27-28.

difficult for the debtors, thereby causing either the debtor or creditors to move to modify or terminate the plans.<sup>40</sup>

The Bankruptcy Act contemplates a maximum of three years for performance under wage earners' plans by allowing the debtor to seek a discharge thereafter if the failure to complete the payments is due to circumstances beyond his or her control.<sup>41</sup> The fiscal 1971 sample was therefore reexamined in the summer of 1975. By that time all of the sample cases had been filed at least four years earlier,<sup>42</sup> and, even allowing for some delays, all might have been expected to be closed. Instead, thirty percent of the sample cases were still open. The open cases faced a median repayment period of six years, with the longest repayment period scheduled for eleven years. Closer examination of these cases revealed that debtors were not asking for the section 661 discharge; creditors were neither objecting to missed payments nor filing motions to dismiss the payment plans; and, as a result, no hearings were being held on the modifications which resulted from missed payments.<sup>43</sup> The standing trustee was holding the cases open as long as he was able to contact the debtor and there was some prospect of future repayment.<sup>44</sup>

In order to test whether the 1971 sample was unique and not representative of later experience in Buffalo wage earners' plans, samples were then drawn from fiscal years 1973 and 1975. The later samples confirmed the fact that the experience of the 1971 cases was typical for this geographical area. The combination of debtors who wished to pay their debts, a judge who was willing to let them try, and creditors who had less to lose by waiting than by forcing the debtor out of the wage earners' proceeding, produced cases which stayed open as long as any hope of payment remained.<sup>45</sup> Termination of wage earners' plans was not affected either by temporary unemployment or by Bankruptcy Act procedures.

Unemployment may have had an effect upon the amounts which debtors proposed to repay. All of the debtors in the 1971 sample had proposed 100% payment of their debts. In fiscal 1973, there were a few exceptions to this pattern, but by fiscal 1975 partial repayments were proposed by more than one-third of the sample's debtors.<sup>46</sup>

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<sup>40</sup> Bankruptcy Act, § 646(5), 11 U.S.C. § 1046(5) (1970) and RULE 13-214; Bankruptcy Act, § 666, 11 U.S.C. § 1066 (1970) and RULE 13-215.

<sup>41</sup> Bankruptcy Act, § 661, 11 U.S.C. § 1061 (1970) and RULE 13-404(b).

<sup>42</sup> Not later than June 30, 1971.

<sup>43</sup> See text accompanying notes 24-29 *supra*.

<sup>44</sup> Some payments were even received from debtors who had long since moved out of the state.

<sup>45</sup> At this stage the creditors' cost would be limited to whatever personnel expense was involved in monitoring an account which remained open to receive an occasional payment.

<sup>46</sup> A wage earner's plan does not require full payment of scheduled debts, because a plan can be confirmed at any repayment level which creditors will accept. The United States Supreme Court has held that partial repayment plans have the same effect as a straight bankruptcy discharge, however. A debtor who chooses partial repayment could be faced with an objection to a later discharge if another petition were filed within six years. *Perry v. Commerce Loan Co.*, 383 U.S. 392 (1966); note 18 *supra*.



Percent to be paid	1971	1973	1975
100%	100%	95.9%	64.3%
75%	—	—	2.4%
70%	—	4.1%	2.4%
60%	—	—	2.4%
50%	—	—	23.8%
40%	—	—	2.4%
25%	—	—	2.4%

Debtors' attorneys reported that the increasing use of partial repayments resulted from a combination of economic realities affecting the debtors and lawyers' accumulated experience with wage earners' plans. The attorneys described these debtors as people with very heavy debt loads who attempted to ride out the inflationary recession with borrowing. Although debtors often wished to pay 100%, their attorneys sometimes suggested paying less, because they believed that Judge McGuire would not confirm a proposed plan which would run for more than three to five years. Attorneys were initially hesitant to propose less than 100% repayment, because the educational effort aimed at creditors had stressed the potential for full repayment with wage earners' plans. Accumulated experience revealed, however, that creditors would cooperate with partial repayment plans, because "anything they get is better than nothing."<sup>47</sup>

A final review of all three samples occurred in June, 1976. Table I shows their status as of that time.

TABLE I

**Percentage of Sample Cases Completed, Dismissed, Adjudicated,  
and Pending as of June, 1976, by Fiscal Years**

	1971	1973	1975
Successfully Completed	47.5%	26.5% <sup>a</sup>	—
Dismissed	27.5%	20.5%	11.9% <sup>b</sup>
Adjudicated	5.0%	10.2%	9.5% <sup>b</sup>
Pending	20.0%	42.8%	78.6%

<sup>a</sup> Includes 4 percent which were granted § 661 discharges and 4 percent which had proposed 70 percent plans.

<sup>b</sup> Includes 2.4 percent which were proposed as 50 percent plans.

Substantial percentages of the 1971 and 1973 samples remained pending, although the 1971 cases could have been filed for as long as six years and the 1973 cases for as long as four years.<sup>48</sup> Cases in the 1975 sample had been pending for as long as two years, and although some of these cases had been dismissed or adjudicated into straight bankruptcy,<sup>49</sup> none had as yet been successfully completed. For each sample, Table II shows the median time which elapsed before termination of the case.

<sup>47</sup> Confidential interviews with lawyers who represent Chapter XIII petitioners in the Buffalo Region of the Western District of New York (August 1976).

<sup>48</sup> The earliest filings occurred in July 1970, and July 1972 respectively.

<sup>49</sup> See notes 24-29 and accompanying text *supra*.

TABLE II

**Median Number of Months from Filing to Completion,  
Dismissal, and Adjudication, as of June, 1976, by Fiscal Years**

	1971 <sup>a</sup>	1973 <sup>b</sup>	1975 <sup>c</sup>
Successful completion	44	32	—
Low	26	11	
High	53	41	
Dismissal	38	32	8
Low	11	14	5
High	62	38	17
Adjudication	21	14	9
Low	20	5	8
High	23	35	11

<sup>a</sup>Filed for a maximum of 72 months in June, 1976.

<sup>b</sup>Filed for a maximum of 48 months in June, 1976.

<sup>c</sup>Filed for a maximum of 24 months in June, 1976.

When compared with the three-year period for eligibility for a section 661 discharge, maximum time periods exceeding four or five years suggest substantial tolerance for delays in the debtors' attempted performance. The existence of these delays was confirmed by observation of the trustees' operations. The statute's requirements for formal hearings on any modification of a confirmed plan<sup>50</sup> were being ignored, apparently because creditors had nothing to gain by either dismissal or adjudication. Instead of moving for prompt dismissal when defaults occurred, creditors allowed cases to be held open as long as any prospect of payment remained and relied on the trustees' judgment to decide when further hope was fruitless.

The reasons supporting a trustee's judgment that a particular case had no further potential were rarely explicit in the case files. The Buffalo trustees make most of their contacts by telephone and detailed written records of their conversations are not made. Ordinarily, if the debtor cannot be contacted or if the trustee decides after discussing the situation with the debtor that no more payments can be expected, he simply files a motion to dismiss the proceeding,<sup>51</sup> citing insufficient payments.<sup>52</sup> Creditors have no reason to object unless they know of sources of income which the debtor has failed to disclose to the trustee. No record of such objections appeared in these files. Similarly, the files often do not reveal the reasons for the decision to convert a wage earners' plan to a straight bankruptcy proceeding. Explanations which were noted include belated

<sup>50</sup> Bankruptcy Act, § 646(5), 11 U.S.C. § 1046(5) (1970) and RULE 13-214.

<sup>51</sup> Bankruptcy Act, § 666, 11 U.S.C. § 1066 (1970) and RULE 13-215(a).

<sup>52</sup> This description is based upon the author's observation of the Chapter XIII trustees' behavior and subsequent discussions with them concerning their procedures.

recognition of how difficult it would be to meet the obligations of the plan, illness, and layoff or reduced income.<sup>53</sup>

The extent of creditors' tolerance became even clearer when a comparison was made of the status of pending cases in both July 1975, and June 1976. As of June 1976, the median projected completion time for pending cases in fiscal 1971 was eighty-seven months; for fiscal 1973, fifty-six months; and for fiscal 1975, forty-seven months.<sup>54</sup> For individual cases from the 1971 sample, the median slippage in projected completion time between July 1975, and June 1976, was eight months.<sup>55</sup> For example, the median pending case had been projected as of July 1975, to close in January 1983. By June of 1976, however, it was expected to remain open until September 1983. Obviously, payments in the interim were erratic, and the estimated payment period of twelve years between filing in 1971 and the projected completion in 1983 could be extended further. In the 1973 sample, the median slippage was two months,<sup>56</sup> and in the 1975 sample, there was a median gain of one month in projected completion. For this latest sample, changes in completion dates were dramatic, ranging from a gain of fifty months when scheduled creditors failed to file claims to a loss of forty-five months when unscheduled creditors filed.

Since the files disclosed no evidence that creditors monitored these cases after confirmation, it is unlikely that they were aware of such dramatic changes in the likelihood of repayment. Instead they enjoyed the benefits of a low-cost collection service,<sup>57</sup> often facilitated by direct,

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<sup>53</sup> Because of the availability of dismissal or adjudication and because a discharge in straight bankruptcy affects only unsecured claims, wage earners' plans are open to abuse by debtors whose goal is only to protect their interests in property subject to valid security interests. A debtor who files a straight bankruptcy petition risks losing property which served as collateral for validly secured creditors. Under a wage earner's plan, secured creditors may be restrained from proceeding to recover their collateral if the bankruptcy judge finds that their interests are protected and that such behavior would jeopardize the plan. Bankruptcy Act, §§ 614, 652, 11 U.S.C. §§ 1014, 1052 (1970), RULES 13-401 and 13-212.

Under the wage earners' plans administered in Buffalo, secured creditors are paid in full before unsecured creditors receive any payments. Debtors might therefore pay their secured creditors in full and immediately either seek adjudication or allow dismissal to occur. The three samples each included instances of full payment to secured creditors followed by defaults in the plans. But the frequency of such occurrences was so low (12.5% in FY 1971; 12.2% in FY 1973; 2.4% in FY 1975) that it does not support a thesis of widespread manipulation of the procedures.

<sup>54</sup> The 1975 figure is obviously lower than it would have been if the earlier pattern of confirming all plans for 100% payment had been continued. See note 46 and accompanying text *supra*.

<sup>55</sup> Ranging from a gain of two months to a loss of seventeen months.

<sup>56</sup> Ranging from a gain of two months to a loss of fourteen months.

<sup>57</sup> When these samples were examined for the last time in June 1976, the median amounts paid to creditors in closed cases were consistent with the variations in the proposed plans.

	1971	1973	1975
Successfully completed .....	\$4250	\$3250	—
Dismissed .....	1750	1250	\$ 500
Adjudicated .....	2750	500	1000

For successfully completed cases in the 1971 sample, the median payments equalled the median scheduled debts, a result which reflected the fact that confirmed plans in that year

court-ordered payments of salary deductions by the debtor's employer. Whether these results were intended by the original statutory drafters may no longer be important. The proposed statutory revisions to the Bankruptcy Act should be evaluated, however, to determine whether they reflect this accumulated experience.

## II. REFORM EFFORTS

### A. *The Bankruptcy Rules*

The work of the Advisory Committee on Bankruptcy Rules of the Judicial Conference provided the first opportunity to incorporate experience with wage earners' plans into bankruptcy procedures. The Committee began the painstaking rule-drafting process after authorizing legislation was passed in 1964,<sup>58</sup> and the Chapter XIII Rules became effective October 1, 1973.<sup>59</sup>

Several factors combined to produce rules which had a minimal effect upon the extent of judicial control over wage earners' plans. Since the Bankruptcy Rules may affect only procedural matters,<sup>60</sup> it would have been inappropriate for the Advisory Committee to undertake basic substantive reforms. Commentators have noted that the Chief Reporter, Professor Frank Kennedy of the University of Michigan, was careful not to overstep the jurisdictional limits of his task.<sup>61</sup> Insofar as the proposed rules affected wage earners' plans, this professional conservatism was reinforced by two other important factors. First, the proposed rules affecting straight bankruptcy proceedings had been previously issued for comments, and the Chapter XIII Rules were closely correlated with the

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consistently required 100% payment. For the 1973 sample, the median successfully completed case totalled only \$3250, but almost one-third of these cases had either proposed 70% plans or received § 661 discharges. In all three samples, the payments in dismissed and adjudicated cases were small, as debtors failed to meet their obligations under confirmed plans.

<sup>58</sup> 28 U.S.C. § 2075 (1970). The Committee was established in 1960 and initially gave priority to a revision of the General Orders and official bankruptcy forms. Advisory Committee's Introductory Note to the Preliminary Draft to the Bankruptcy Rules, *reprinted in* COLLIER PAMPHLET EDITION OF THE BANKRUPTCY ACT AND RULES 751 (1975).

<sup>59</sup> BANKR. R. & OFFICIAL BANKR. FORMS, 415 U.S. 1003 (1973).

<sup>60</sup> 28 U.S.C. § 2075 (1975). Reported litigation challenging the substantive nature of the rules for Chapter XIII has thus far involved only RULE 13-307(d). That rule allows the court to value the collateral in allegedly secured claims as of the date of the petition. United States district courts have split on the nature of the rule. *Compare In re Moralez*, 400 F. Supp. 1352 (N.D. Cal. 1975) (holding it invalid) with *In re Wall*, 403 F. Supp. 357 (E.D. Ark. 1975) and *In re McKee*, 416 F. Supp. 652, (E.D. Ark. 1976) (sustaining its validity). Other cases have considered the same issue indirectly. See *In re Garcia*, 396 F. Supp. 518 (C.D. Cal. 1974); *In re Cassidy*, 401 F. Supp. 757 (E.D.N.Y. 1975). See also Countryman, *Partially Secured Creditors Under Chapter XIII*, 50 AM. BANKR. L.J. 269 (1976).

<sup>61</sup> Cyr, *The Abandonment of the Judicial Administration of Insolvency Proceedings: A Commitment to Consumer Disservice*, 78 COM. L.J. 37, 38 (1973); Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827, 835 (1973). Professor Kennedy later became Executive Director of the Commission on Bankruptcy Laws of the United States. The Commission's jurisdiction did include substantive matters. See note 8 *supra*.

earlier provisions.<sup>62</sup> Second, none of the participants in the rule-drafting process had substantial experience with the administration of wage earners' plans. Practicing professionals, particularly bankruptcy judges with Chapter XIII experience, were consulted in an attempt to remedy this deficiency.<sup>63</sup> It is suggested, however, that these sources were unlikely to propose reforms reducing their own roles in the administration of wage earners' plans.

The Advisory Committee did take some steps to remove judges from the detailed administration of wage earners' plans<sup>64</sup> and to reduce the number of required hearings.<sup>65</sup> The Chapter XIII Rules also recognized some of the distinctions between straight bankruptcy cases, which focus on the liquidation of nonexempt assets, and wage earners' plans, which rely upon payments from future income.<sup>66</sup>

Despite the recognition of some differences, the basic setting for administration of wage earners' plans under the rules remained adversarial,<sup>67</sup> and subsequent amendments have not affected the provisions which mandate adversary procedures.<sup>68</sup> An adversary setting maximizes judicial control, because it is based upon the theory that judicial decisions will be necessary to resolve contested issues in these cases. A study of the sample cases from Buffalo reveals that in practice creditors will waive almost all their opportunities for participation. The basic creditors' rights waived in the Buffalo cases were the right to contest modifications before confirmation;<sup>69</sup> the right to participate in a confirmation hearing;<sup>70</sup> the

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<sup>62</sup> Preliminary Draft on Proposed Bankruptcy Rules and Official Forms under Chapter XIII of the Bankruptcy Act, xvi, xviii (September 1971). The Associate Reporter of the ch. XIII rules was Professor Vern Countryman of Harvard University.

<sup>63</sup> Countryman, *New Rules for Chapter XIII*, 46 AM. BANKR. L.J. 129, 130 (1972).

<sup>64</sup> *E.g.*, RULE 13-202(a), which provides that a creditor who does not object to the proposed plan is deemed to have accepted it; RULE 13-307(b), which provides that unsecured claims which are proved be deemed allowed unless an objection is made; and RULE 13-603(b), a provision which has the effect of eliminating the requirement that the judge countersign dividend checks.

<sup>65</sup> RULE 13-204(a) allows confirmation of the proposed payment plan at the first meeting of creditors.

<sup>66</sup> The emphasis on payments from income is reflected in RULE 13-111, which authorizes spouses to file a joint petition and to have joint administration; RULE 13-403, which relieves the trustee of the necessity of setting aside exemptions in these cases, requiring only that the debtor claim his exemptions in the event that a straight bankruptcy conversion follows; and RULE 13-402(3), which relieves the trustees of the need to file a statement of executory contracts in every case, retaining the requirement only that the debtor file such a statement when required to do so by the court.

<sup>67</sup> RULE 13-701.

<sup>68</sup> Amendments effective on August 1, 1976, affected other significant interests. See RULE 13-302, a provision requiring that allegedly secured creditors file their proofs of claim before the conclusion of the first meeting of creditors, so that confirmation and distribution to all creditors could proceed without delay; RULE 13-304, a provision allowing co-debtors to file a proof of claim on behalf of their creditors, thereby permitting distribution to the creditor and providing an incentive to delay collection from the co-debtor; and RULE 13-305, a provision which allows creditors to add claims which were incurred after the debtor filed the wage earners' proceeding if they were for taxes or for "property or services needed to assure proper performance under the plan."

<sup>69</sup> RULE 13-212.

<sup>70</sup> RULE 13-213.

right to object to modifications after confirmation;<sup>71</sup> the right to object to dismissals or conversion to straight bankruptcy proceedings;<sup>72</sup> and the right to object to a discharge for failure to complete the payments of the plan.<sup>73</sup>

The combination of such waivers in actual cases provides a striking divergence from the statutory theory of creditor control and monitoring of wage earners' plans in an adversary context. The rules failed to reflect this experience, but a second opportunity to utilize it arose during revision of the bankruptcy legislation.

### *B. Legislative Developments*

The Chapter XIII Rules became effective contemporaneously with the introduction of legislation resulting from the report of the Presidential Commission on bankruptcy laws.<sup>74</sup> In the Commission Bill, the procedures for wage earners' plans appeared in Chapter VI, which provided plans for "debtors with regular income."<sup>75</sup> The Judges' Bill contained a similar proposal,<sup>76</sup> which also reflected a decision to conform the Chapter to the procedures required under the rules.<sup>77</sup> The existence of the Chapter XIII Rules had a restrictive effect on the reform proposals which the judges were willing to consider, just as the existence of the straight bankruptcy rules restricted the work of those who drafted the Chapter XIII Rules.<sup>78</sup> These limitations were reinforced by the professional conservatism of those who had a continuing impact on the developing legislation.<sup>79</sup>

Late in the congressional hearings process, the National Bankruptcy Conference presented its proposed revisions of the pending bills to the House and Senate Judiciary Subcommittees.<sup>80</sup> Subsequently, committees representing the Judges and the Conference were established to work out their continuing differences of opinion. The resulting reports were forwarded informally to the House and Senate committees so that their staffs could have the benefit of the outcome of the negotiating process while

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<sup>71</sup> RULE 13-214.

<sup>72</sup> RULE 13-215.

<sup>73</sup> RULE 13-404.

<sup>74</sup> See note 8 *supra*.

<sup>75</sup> The proposed Chapter VI coverage was broader than that presently authorized under Chapter XIII, which is limited to a petitioner "whose principal income is derived from wages, salary or commissions." Bankruptcy Act, § 606(8), 11 U.S.C. § 1006(8) (1970).

<sup>76</sup> H.R. 32, 94th Cong., 1st Sess. §§ 6-101 to 6-701 (1975).

<sup>77</sup> Synopsis of the bankruptcy legislation prepared by the National Conference of Bankruptcy Judges, mimeo, undated, p. 14.

<sup>78</sup> See text accompanying note 62, *supra*. Professor Landers had earlier predicted that those who drafted legislation might be reluctant to make the work of the Rules Committee superfluous. Landers, *supra* note 61, at 25.

<sup>79</sup> By this time, the Commission had completed its work and gone out of existence. The primary groups remaining were the National Conference of Bankruptcy Judges and the National Bankruptcy Conference, whose members are present and former bankruptcy judges, law professors, and prominent bankruptcy practitioners.

<sup>80</sup> The Bankruptcy Act of 1975, reprinted in *Bankruptcy Act Revision*, Appendix, *supra* note 3, at 333-91.

working on legislative revisions.<sup>81</sup> If the legislation<sup>82</sup> ultimately enacted as part of the overall bankruptcy law revisions incorporates the results of these reports, confirmed plans for debtors with regular income could be administered much as they have been in the past.

Initially, commentators and witnesses testifying at the hearings gave comparatively little attention to the specific legislative proposals for handling the present wage earners' plans in the Commission Bill and the Judges' Bill.<sup>83</sup> Two preliminary issues relating to lawyers' and judges' status and affecting all bankruptcy petitioners did draw considerable attention: first, the degree of assistance which petitioners would receive from the bankruptcy system in choosing between the alternative remedies of straight bankruptcy and plans for debtors with regular income; and, secondly, the proper location for filing all bankruptcy petitions.

The issue of how to provide petitioners with help in choosing among nonbusiness bankruptcy alternatives threatened both the view that private debtors' counsel were essential and the possibility that judges' preferences would affect that choice. The Commission Bill provided that bankruptcy petitions would be filed without making a choice between alternatives. Once having filed, the debtor would be advised about the existence of alternatives by agency staff.<sup>84</sup> This recommendation resulted from the Commission's finding that the preference of judges and debtors' counsel played a significant role in the very uneven use of wage earners' plans throughout the country.<sup>85</sup>

The Commission's proposal caused concern about whether personnel in the agency with responsibility for ultimately administering the case should also be providing advice about options.<sup>86</sup> It was also argued that the agency might develop a bias in favor of either of the two alternatives, even if the problems concerning confidentiality and conflict of interest could be resolved.<sup>87</sup> These concerns were reflected in the Judges' Bill, which limited assistance by administrative staff to the preparation of the petition and the schedules which reflect indebtedness.<sup>88</sup> By eliminating agency staff, H.R. 8200 leaves advice about statutory options exclusively to the private bar.

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<sup>81</sup> Letter to the Conferees from Charles A. Horsky, Chairman of the National Bankruptcy Conference (June 24, 1976).

<sup>82</sup> See H.R. 8200, 95th Cong., 1st Sess. (1977).

<sup>83</sup> These procedures appeared as Chapter VI of the earlier legislative proposals, but they appear as Chapter 13 in H.R. 8200. See note 75 and accompanying text *supra*.

<sup>84</sup> H.R. 31 and S. 236, 94th Cong., 1st Sess. § 4-203 (1975).

<sup>85</sup> COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT, Part I, 157-60 (1973), which confirmed data in D. STANLEY & M. GIRTH, *supra* note 7, at 74-76. Testimony of Professor Frank Kennedy, Executive Director of the Commission, *Bankruptcy Act Revision*, Part I, *supra* note 3, at 167-68; *The Bankruptcy Reform Act*, Part I, *supra*, note 4, at 23.

<sup>86</sup> Some witnesses before the congressional committees testified that an agency system could be structured to segregate responsibilities and to protect petitioners from the possibility of inappropriate disclosure of information concerning discussions of options. *Bankruptcy Act Revision*, Part I, *supra* note 3, at 182-83, 367-68, 542, and 588. Others felt that adequate protection for petitioners would be impossible. *Id.* at 609-10, 905-06, and 953.

<sup>87</sup> *Id.* at 571-72, 948-49, and 953.

<sup>88</sup> H.R. 32 and S. 235, 94th Cong., 1st Sess. § 4-203 (1975).

A provision that bankruptcy petitions be filed with an administrative agency<sup>89</sup> would have reduced the importance of the judicial role from the outset of the bankruptcy proceeding.<sup>90</sup> This threat to judicial status has also been eliminated by H.R. 8200, which retains a judicially controlled setting for bankruptcy cases.<sup>91</sup> The implications of that basic decision are evident in the treatment in H.R. 8200 of the procedural steps which were crucial to the administration of wage earners' plans in the Buffalo samples. H.R. 8200 assigns the highest priority to the maintenance of judicial control, although the legislation does recognize some of the economic realities which creditors face. For example, at the time a payment plan is confirmed, judicial control is maintained by requiring a hearing for confirmation.<sup>92</sup> One of the conditions for confirmation, however, is a judicial finding that unsecured creditors will not receive less than a straight bankruptcy liquidation would have produced.<sup>93</sup> Recognizing that unsecured creditors have less to lose if such payments are possible,<sup>94</sup> the statute does not require them to file formal acceptances to these plans.

In contrast, for modifications after confirmation, which were most crucial to the effective conclusion of plans in the Buffalo samples, H.R. 8200 ignores the economic realities for creditors while maintaining formalities which are consistent with continued judicial control. The data in the Buffalo samples indicate that debtors in wage earners' plans often need postconfirmation modifications because of layoffs, illness, or other unforeseen circumstances.<sup>95</sup> When these requests are made, the statute allows the trustee to proceed only "after notice and a hearing,"<sup>96</sup> a procedure which appears to involve the judge in each modification; however, the statute limits these requirements to appropriate notice and an

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<sup>89</sup> Both the Commission bill and the National Bankruptcy Conference version of the legislation recommended this approach; the Judges' Bill retained filing with a court. The provision is § 4-202(b) in all versions.

<sup>90</sup> See, e.g., *Bankruptcy Act Revision*, Part 1, *supra* note 3, at 533-34 and 628-29. Testimony at the congressional hearings focused indirectly on this status issue, with opponents of the agency alleging that filing with an agency would encourage debtors to resort to bankruptcy. *Id.* at 20, 570-71, 906, 1018-19, and 1045.

<sup>91</sup> See notes 10-12 and accompanying text *supra*.

<sup>92</sup> H.R. 8200, 95th Cong., 1st Sess. § 1324 (1977). The Commission bill would have authorized the administrator to confirm a plan, allowing objectors to appeal to a court. H.R. 31, 94th Cong., 1st Sess., § 6-204 (1975). The Judges' Bill required a judicial hearing for confirmation. H.R. 32, 94th Cong., 1st Sess. § 6-306 (1975). A similar provision in the National Bankruptcy Conference proposal was described by their spokesman as "another concession which the National Bankruptcy Conference made to the judges." Testimony of George M. Treister, Vice Chairman, National Bankruptcy Conference, before the House Judiciary Subcommittee, *Bankruptcy Act Revision*, Part I, *supra* note 3, at 595.

<sup>93</sup> H.R. 8200, 95th Cong., 1st Sess. § 1325(a)(4) (1977). Debtors have the right to modify their proposals before confirmation. H.R. 8200, § 1323.

<sup>94</sup> Earlier research revealed that successful wage earners' plans yield 90% payment to unsecured creditors and that even cases ultimately dismissed yield 19%. D. STANLEY & M. GIRTH, *supra* note 7, at 102. By contrast, straight bankruptcy is a very bleak alternative, with payments to unsecured creditors occurring in less than 15% of the cases and amounting to only seven cents on the dollar. *Id.*, at 92-93.

<sup>95</sup> See notes 44-51 and accompanying text *supra*.

<sup>96</sup> H.R. 8200, 95th Cong., 1st Sess. § 1329(a) (1977). The Judges' Bill had more closely reflected the economic reality for creditors by allowing modifications without notice unless the modification converted an extension plan to a composition which would pay creditors less than 100%. H.R. 32, 94th Cong., 1st Sess. § 6-307 (1975).



opportunity for a hearing.<sup>97</sup> If individual notice is sent to each creditor for every modification, the practice under H.R. 8200 will be much different and more costly than the practice used in the Buffalo cases. Moreover, if such notices are sent and no creditors request hearings, the additional costs will not be offset by any perceptible benefit to creditors. On the other hand, without such notices the opportunity for a hearing becomes meaningless, unless the notice requirement is creatively interpreted. For example, the confirmation order might provide that a reduced check or missed payment constitutes notice of a modification which would entitle the creditor to request a hearing. Alternatively, creditors might be asked to waive their rights to notice as long as the modified plan did not exceed the maximum time period allowed under the statute.<sup>98</sup>

When a debtor seeks a discharge after a payment plan has been confirmed, creditors might have slightly more incentive to request a hearing, because an inappropriately granted discharge could deprive them of possible payments. The statutory procedures, which again allow judges to maintain control by granting a discharge after notice and a hearing,<sup>99</sup> are more consistent with creditors' economic interests in these cases than they are when continued payments are possible. Creditors' participation is not essential, however, because the judge cannot discharge the debtor without assessing the comparative value of payments to unsecured creditors if straight bankruptcy had been chosen.<sup>100</sup>

### III. IMPLICATIONS OF MAXIMIZING JUDICIAL CONTROL

To date, the bankruptcy reform process has placed higher priority on maintaining judicial control than on reflecting the economic interests of creditors who are receiving payments from consumer debtors in a court-administered plan. Future bankruptcy judges will administer payment plans for debtors with regular income under the proposed Bankruptcy Act in ways which greatly resemble the current wage earners' plans, and the amount of creditor repayments will not be affected significantly. Debtors will continue to pay as much as their vulnerable circumstances permit if they wish to have consumer credit available for future use. Creditors will continue to waive their opportunities to participate, because participation

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<sup>97</sup> H.R. 8200, 95th Cong., 1st Sess. § 102(1) (1977).

<sup>98</sup> See notes 102-103 and accompanying text *infra*.

<sup>99</sup> H.R. 8200, 95th Cong., 1st Sess. § 1382(b) (1977). By requiring only an opportunity for a hearing in § 102(1), this legislation is closer to the Commission Bill, H.R. 31, 94th Cong., 1st Sess. § 6-207(2) (1975), than to the Judges' Bill, H.R. 32, 94th Cong., 1st Sess. § 6-501(2) (1975), which required a hearing in each instance.

<sup>100</sup> H.R. 8200, 95th Cong., 1st Sess. § 1328(b)(2) (1977). A debtor can also convert proceedings to straight bankruptcy at any time. § 1307(a). The court may also convert the case or dismiss it without a hearing, upon a finding that such a decision is in the best interests of creditors. § 1307(c) and (e). A dismissal would leave the debtor subject to creditors' collection efforts, and a conversion would allow creditors to participate in straight bankruptcy proceedings. Unless the debtors' nonexempt assets are substantial, either conversion or dismissal will mean no further payments to unsecured creditors. H.R. 8200 provides specific exemptions and allows the debtor to choose between those specified and those available under other state, federal, or local laws. 95th Cong., 1st Sess. § 522(b) (1977).

usually only increases their costs without increasing their receipts. Judges may even dispense with required formalities when creditors systematically fail to participate in the proceedings.

One possible exception to this pattern may occur if the notice requirements for postconfirmation modifications are strictly construed.<sup>101</sup> More stringent and explicit time limits for such plans might also significantly restrict the practice reflected in the Buffalo samples of allowing cases to remain open as long as any hope of further payment remains.<sup>102</sup> The statute suggests a three-year period for payments pursuant to a confirmed plan, although it allows a judge to extend that period to five years for cause.<sup>103</sup> Such a provision protects debtors against excessively burdensome plans and the taxpaying public against excessive use of the federal courts for protracted collection cases.

Experience with the Buffalo cases indicates that the five-year maximum may not appear difficult to meet at the time of confirmation. Debtors sometimes underestimate their obligations when they file such proceedings.<sup>104</sup> In addition, H.R. 8200 allows a debtor to obtain a straight bankruptcy discharge after completion of a plan paying less than 100% to creditors.<sup>105</sup> If debtors are willing to propose less than full payment,<sup>106</sup> the five-year maximum will obviously be even easier to meet at confirmation.

However, the five-year maximum also applies to postconfirmation modifications.<sup>107</sup> Experience in the Buffalo cases reveals that many plans will have to be repeatedly revised, but that payments will be successfully completed within a five-year period.<sup>108</sup> Judges are therefore likely to devise varying methods of minimizing the costs of formally testing each modification against the statutory maximum. One possibility would be to include in the confirmation order a provision that the confirmed plan will be terminated not later than five years after performance begins. Under such a procedure, debtors who wish to continue to make payments thereafter will have to do so without the assistance of the court's staff. Alternatively, the confirmation order might provide that the five-year maximum will be deemed waived until the debtor or trustee seeks a discharge, dismissal, or conversion to straight bankruptcy.<sup>109</sup>

If only minor changes occur in the administration of payment plans for debtors with regular income, the costs of such a legislative process may be calculated more in terms of opportunities missed rather than in results

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<sup>101</sup> See notes 96-98 and accompanying text *supra*.

<sup>102</sup> See notes 49-51 and accompanying text *supra*.

<sup>103</sup> H.R. 8200, 95th Cong., 1st Sess. § 1322(c) (1977). If additional payments are possible, it is unlikely that creditors will oppose a finding that inability to complete the payments within three years constitutes cause.

<sup>104</sup> See note 56 and accompanying text *supra*.

<sup>105</sup> H.R. 8200, 95th Cong., 1st Sess. § 727(a)(8) (1977).

<sup>106</sup> See note 48 and accompanying text *supra*.

<sup>107</sup> H.R. 8200, 95th Cong., 1st Sess. § 1329(c) (1977).

<sup>108</sup> The longest successfully completed case took 53 months. See Table II *supra*.

<sup>109</sup> If a primary goal of the maximum time limit is to protect the taxpaying public, such a provision would be inappropriate.

achieved. Legislation affecting nonbusiness bankrupts could have been directed toward an alternative goal: successful family functioning in a credit-oriented society, with emphasis upon financial and family counseling. Such a goal would have required more than devising a structure which maximizes the control of judges and lawyers and the consistency of their customary formalities.

Early in the bankruptcy law revision process, commentators recommended that financial counseling be available as a service to bankrupts,<sup>110</sup> but systematic financial counseling was not included in any of the legislative proposals. H.R. 8200 does authorize the Chapter 13 trustee<sup>111</sup> to "advise, other than on legal matters and assist the debtor in performance under the plan."<sup>112</sup> Although it is impossible to estimate how extensive such advice will be in individual cases, the magnitude of the trustees' caseloads suggests that counseling is more likely to involve necessary modifications of payment schedules in pending proceedings than financial counseling aimed at future performance without court assistance.

The failure of the bankruptcy reform proposals to include staff for financial counseling is consistent with a tradition of failure to deal with family financial functioning once civil cases have reached formal court proceedings.<sup>113</sup> Such staffing should nonetheless remain under consideration for possible future statutory amendments.<sup>114</sup> With nonbusiness bankruptcy petitions totalling nearly 200,000 per year in recent years,<sup>115</sup> the number of families operating under severe financial stress is substantial.<sup>116</sup>

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<sup>110</sup> Herrmann, *Families in Bankruptcy—A Survey of Recent Studies*, 28 J. MARR. & FAM. 324, 330 (1966); D. STANLEY & M. GIRTH, *supra* note 7, at 205.

<sup>111</sup> The Chapter 13 trustee can be elected by creditors or appointed by the United States trustee as the standing trustee for all Chapter 13 cases in the district. If neither method is used, the salaried United States trustee serves as the Chapter 13 trustee in addition to his duties in other bankruptcy cases. H.R. 8200, 95th Cong., 1st Sess. § 1302(a) (1977).

<sup>112</sup> H.R. 8200, 95th Cong., 1st Sess. § 1302(c) (1977). However, this responsibility is not imposed upon creditor-elected trustees.

<sup>113</sup> The counseling services have been analogized to those traditionally expected of probation staff in federal criminal proceedings. Siporin, *Bankrupt Debtors and Their Families*, 12 Soc. WORK 51, 62 (1967).

<sup>114</sup> It is more understandable that financial counseling was not provided when wage earners' plans were first included as part of the bankruptcy revisions of 1938. Consumer credit was not widely available or utilized until World War II ended seven years later. An expanded definition of needs accompanied the possibility of discretionary spending beyond subsistence levels. G. KATONA, *THE MASS CONSUMPTION SOCIETY* 6, 231 (1964). As a result, between 1945 and 1965 the consumer debt burden climbed to approximately one-fifth of disposable personal income before levelling off for the nine years ending in December 1974. See Yeager, *Personal Bankruptcy and Economic Stability*, 41 S. ECON. J. 96, 100 (1974). Prof. Yeager defined the consumer debt burden as the proportion of consumer credit outstanding to disposable personal income. His calculations were updated by the author.

<sup>115</sup> See TABLES OF BANKRUPTCY STATISTICS, *supra* note 14, at Table F3, for the respective fiscal years.

<sup>116</sup> Such stress may be especially intense for the working-class families who are predominant among the petitioners for wage earners' plans, because they are vulnerable to income fluctuations resulting from cutbacks in overtime or layoffs. Schneiderman, *The Practical and Cultural Significance of Money*, 23 PUB. WELFARE 197, 198 (1965); Hurvitz, *Marital Strain in the Blue Collar Family*, in A. SHOSTAK & W. GOMBERG, *BLUE COLLAR WORLD* 93, 101 (1964).

The impact of financial stress on family functioning is pervasive.<sup>117</sup> For this reason, some bankruptcy judges have undertaken experiments with more extensive family counseling and referrals. They report that it is possible to make existing social services available to nonbusiness petitioners in a bankruptcy setting.<sup>118</sup> By allowing status politics and appeals for procedural consistency to predominate in the current bankruptcy revisions, we have missed the opportunity to systematize the availability of counseling and to reduce societal costs over the longer term.

Such costs are diffuse and hard to estimate, and it is difficult to persuade Congress to accept staffing to facilitate cost-prevention in a bankruptcy context. If bankruptcy judges are willing to continue to improvise such programs, however, a later proposal to add staff to provide financial counseling and to coordinate referrals to available social services may be successful.

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<sup>117</sup> Money management problems emerge as a significant cause of interspousal hostility, alienation, or avoidance. Krupinski, Marshall, & Yule, *Patterns of Marital Problems in Marriage Guidance Clinics*, 32 J. MARR. & FAM. 138-42 (1970). Wives, who typically controlled expenditures in blue-collar families, reported absolute discontent with their financial status. L. RAINWATER, R. COLEMAN & G. HANDEL, *WORKINGMAN'S WIFE* 82, 145 (1959). These families often engage in compensatory consumption as a substitute for blocked social mobility. Caplovitz, *The Problems of Blue Collar Consumers*, in A. SHOSTAK & W. GOMBERG, *supra* note 116, at 110.

<sup>118</sup> These data were also ignored by the legislators who were revising the statute. Anderson, *A Digest of Broader Perspectives for Bankruptcy Court Reform*, 81 COM. L. J. 240, 241 (1976); Cyr, *Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898*, 49 AM. BANKR. L.J. 99, 155-56 (1975).

