The Future of Bankruptcy

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Can one predict the future of bankruptcy without forecasting the health of the American economy as it enters the 21st century? It seems obvious not only that economic woes directly correlate with numbers of bankruptcy filings, numbers of lawyers who find themselves practicing bankruptcy law and amount of bankruptcy law being made, but also that during times of economic prosperity American society and America's legislators turn their backs on the few failures. Only when failures become virtually the norm do we become generally agitated about how the legal system deals with them. Thus if economic recovery is just around the corner, won't bankruptcy law return to the status of arcane specialty, while if recession lingers, bankruptcy will continue to hold us fascinated (and/or horrified) as the legal profession's growth industry?

Reflection suggests such presumptuous forecasting can be avoided. There is good reason to believe that, irrespective of whether the U.S. economy is up or down at given points in time, bankruptcy law will be an important part of our legal future. First, it is probably a mistake to assume that bankruptcy is irrelevant in periods of economic prosperity, as opposed to periods of economic stability. The long, steady growth economy of the United States from the end of World
War II through the 1960s allowed
several generations of lawyers to com-
fortably ignore bankruptcy. The much
more volatile prosperity of the roaring
80's harbored at all times significant
pockets of economic distress (such as
farming, agricultural equipment, steel,
airlines) that kept a growing bank-
rupency bar well occupied.

Second, it is extremely important
that bankruptcy has acquired a plausi-
ability, even a respectability. Little more
than a decade ago herculean efforts
were made to avoid bankruptcy by
companies in certain industries (auto-
mobilies and, however hard this may be
to believe, air travel) that, it was
thought, could not operate under
court protection and by creditor
groups who found the problems too
big for resolution through cumber-
some court processes. During the
1980s, however, a combination of
factors brought huge, household name
enterprises into and in (most cases)
through bankruptcy and so demysti-
ified the process. In part, bankruptcy
became more inevitable as the constitu-
cencies affected by an enterprise's
financial distress became more diverse.

Today a bankrupt enterprise's parties
in interest consist of many different
types of lenders where once only
banks and insurance companies were
found. Other players include "bottom
fishers," who bring claims acquired for
large discounts from par to the table,
and government agencies such as the
Pension Benefits Guaranty Corpora-
tion and Environmental Protection
Agency advocating their own complex
agendas. Such disparate players are
much less likely to reach the requisite
unanimous consensus on the princi-
pies of an acceptable out-of-court
reorganization. Perhaps even more
important, in a society less sure of
itself and its priorities, more and more
fundamental social issues tend to get
played out in the court of last resort—
bankruptcy. Witness, for example,
Manville's use of Chapter 11 to resolve
its mass tort exposure, Continental
and Eastern Airlines' resort to bank-
rupency to address labor problems,
Texaco's filing for bankruptcy to
resolve an otherwise unappealable
(because unbondable) massive judg-
ment in favor of Pennzoil; LTV's
ongoing attempts to resolve its pen-
sion and retirement benefit liabilities
in its six-year Chapter 11, and the
current flurry of environmental liabil-
ity issues being addressed in bank-
rupency courts. This developing use of
the bankruptcy law to resolve impor-
tant social policy issues will continue
until legislatures, guided by clearer
messages of society's priorities than
now exist, provide more coherent
standards or at least better
resolution mechanisms than the bank-
rupency process. And this will continue
whether the economy is in boom or
bust.

Finally, there is an element of hav-
ing let the genie out of the bottle.
Lawyers and businessmen who have
been through bankruptcy will be less
likely to ignore bankruptcy principles
in planning business ventures. For
example, in the 1960s and 70s, very
few corporate lawyers had ever used
the words, much less understood the
elements of, fraudulent conveyance. In
the post-LBO world, lawyers will, I
submit, study proposed transactions
very carefully for signs of this dread
injustice to creditors. Similarly, rating
agencies who once looked at individu-
al company balance sheets have
learned about the risks of a weak link
in an affiliate chain and the formerly
little known doctrine of substantive
consolidation has crept, if not gal-
loped, into the corporate lawyer's
lexicon.

Thus the future of bankruptcy is, I
submit, all too bright. The perhaps
harder question is what will happen to
the system as we know it today over,
say, the next twenty years? Here it is
very hard to separate prediction from
wish fulfillment—it is very human to
assume that if one perceives a serious
problem, the future will address it.

With this principle in mind, can it
be doubted that the future will resolve
the wasteful jurisdictional morass that
remains the legacy of Northern Pipe-
line Construction Co. v. Marathon Pipe
Line Co. by creating Article III bank-
rupency courts? It boggles the mind that
with over 1,100,000 cases pending in the
nation's bankruptcy courts at June 30,
1991, with each of the 291 then sitting
bankruptcy judges receiving on aver-
age 3,025 new cases during the twelve
months then ended, and with the
largest of these cases raising issues of
fundamental socio-economic policy,
we can continue to consider bank-
rupency judges as not "deserving" of
Article III status, not to mention that
it is downright lunacy to continue to
plague a wildly overburdened system
with jurisdictional gamesmanship.

Similarly, given the widespread
recognition that bankruptcy remains
an inefficient, overly long and overly
expensive process, can it be doubted
that the future will produce develop-
ments both to diminish the need for
recourse to bankruptcy and to stream-
line the process? We might anticipate a
resurgence in the appetite to resolve
financial distress through consensual
workouts, this time not because bank-
rupency is a feared unknown but pre-
cisely because it is a known, far from
perfect system. For this prediction
(wish) to eventuate would, however,
likely entail at least a significant
change in tax law which now strongly
favors in-court reorganization and
perhaps some changes in bankruptcy
law, such as to undo the effects of the
LTV decision limiting the allowabil-
ity of claims of bondholders who have
accepted pre-bankruptcy exchange
offers. We might expect to see embroi-
derings on the pre-packaged bank-
rupency concept with a view to making
its major benefit—combining out-of-
court majority consensus on the
acceptable elements of a restructuring
with bankruptcy law's ability to bind
the dissenting minority—more broadly
available.

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Surely in the absence of such developments, there will be increasing and not necessarily salutary pressures to deal with perceived inefficiencies and excessive costs. Addressing these problems is necessary and laudable but not without risk. Too often the knee-jerk reaction to perceived inefficiencies or injustices is ill-advised special interest legislation. Well-intended cost control initiatives can result in measures that drive qualified professionals from the field generally or in certain geographic areas. This practitioner, at least, believes that the generalism and flexibility of the Bankruptcy Code that has been in effect since 1979 has allowed the system to deal with issues unprecedented in number, size, and complexity more effectively than anyone would have predicted twenty years ago. If we are, as I have suggested, looking at a legal future in which bankruptcy law and practice are important elements, we should remember that the statutory and administrative framework with which we commenced the future has served us well during the recent extraordinary past.

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Law School of the Future

Tia Cudahy

The law school of the future will reflect the composition and needs of the entire community. Law schools will attempt to attract students from all backgrounds in order to ensure that important discussions about intractable social problems will include a broader range of viewpoints. Recognizing their unique relationship with law students, law schools will actively foster a sense of responsibility to the profession and society.

Law schools adhere to traditional performance indicators such as undergraduate grade point averages and LSAT scores in an effort to produce smart lawyers. Placing more emphasis on diversity of experience will create a less homogeneous community; perhaps one that is better equipped to think creatively about old problems.

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Revitalizing the intellectual inquiry in the classroom will improve the quality of discussion while also generating greater respect for legal education. The purpose of such an extension in admissions criteria is not merely affirmative action, but to reinvigorate legal scholarship by expanding the class of people equipped to think about legal issues. Some will argue that the quality of scholarship will deteriorate without rigid adherence to traditional performance indicators, but, from a student’s perspective, at the very least diversity will enrich classroom discussion. Ideally, diversity in the classroom will reflect the diversity of society so that everyone will receive representation in the exchange of ideas.

The admissions office will also consider carefully each applicant’s reasons for applying to law school. Law school too often serves as a default for intelligent but unfocused liberal arts majors who lack the imagination and inclination to figure out what they enjoy doing. These students are unhappy at law school and detract from the experience for everyone. The University of Chicago is one of the few schools that devotes the energy to conducting interviews of some applicants, and these interviews present at least one opportunity to investigate an applicant’s motivations. The model law school will interview all eligible applicants, recognizing that an applicant is more than a sheaf of papers in a file.

From a classmate’s perspective, a student’s interesting background and genuine desire to study law more than balance out a few missed questions on the LSAT.

Last, law schools will actively encourage a sense of responsibility for the profession and for society among students. The practice of law often means advising individuals in the most difficult moments of their lives, but law schools overlook the human element of a career in the law. Lawyers confront conflicts of interest and breaches of professional responsibility among colleagues far more regularly than they encounter most of the legal doctrines taught in law school, but classroom discussion is almost inevitably focused on the reasoning of the highest court to hear a case. Naturally students need to learn how judges reach decisions, but greater emphasis on legal ethics and professional responsibility will convey equally important skills and knowledge. Professional responsibility will be incorporated into every course, rather than packed neatly into one required but uninspired class. Students will gain respect for that aspect of practice and conduct themselves accordingly, and the resulting benefit to clients will enhance respect for the profession.

Law schools will also remind their captive audience that lawyers occupy a special place in society; we formulate public policy in disproportionate numbers and act as conduits between the public and justice. Although litigants realistically need lawyers to navigate the legal system for them, most Americans cannot afford to hire a lawyer. Given the importance of legal training in our society and the shortage of lawyers for the poor, lawyers have an affirmative moral obligation to return some service to the system that benefits us so much. Mandatory pro bono policies may be moot if each lawyer, encouraged by her law school, feels a personal obligation to pay this debt to society.

The renewed emphasis on the needs of those who cannot afford legal services will inevitably reshape law school curricula. Students will require more clinical education and public interest classes, as well as instruction on such far-reaching statutes as the Social