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## Foreword

Frank R. Kennedy

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# A Tribute to Stefan A. Riesenfeld: A Discussion of the Proposed Bankruptcy Acts

FOREWORD

Frank R. Kennedy†

The law of bankruptcy and reorganization in this country,<sup>1</sup> as in other countries,<sup>2</sup> is undergoing a sea change. Professor Stefan Riesenfeld has been deeply engaged in this movement and has brought to it abiding philosophical commitment, historical insight, and a mastery of the law of bankruptcy and reorganization and those legal fields which are inextricably related.

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† Professor of Law, University of Michigan. A.B. 1935, Southwest Missouri State University; LL.B. 1939, Washington University (St. Louis); J.S.D. 1953, Yale University. Reporter, Advisory Committee on Bankruptcy Rules, Judicial Conference of the United States, 1960-1975; Executive Director, Commission on Bankruptcy Laws of the United States, 1971-1973.

1. See, e.g., S. RIESENFELD, *CREDITORS' REMEDIES AND DEBTORS' PROTECTION* 473 (2d ed. 1975), referring to the following recent developments: (1) the new Rules of Bankruptcy Procedure went into effect for straight bankruptcy and Chapter XIII cases on October 1, 1973 and for Chapter XI cases on July 1, 1974; (2) the Commission on Bankruptcy Laws of the United States in July of 1973 proposed a thorough revision of the Bankruptcy Act, which was introduced into the 93d Congress, and shortly thereafter the National Conference of Bankruptcy Judges made a counterproposal, also introduced into the 93d Congress. Since the publication of Professor Riesenfeld's course-book, *Rules of Bankruptcy Procedure for Chapter X and Chapter XII cases* became effective on August 1, 1975. 43 U.S.L.W. 4513 (May 6, 1975). The bill proposed by the Commission has been introduced as H.R. 31 and S. 236, 94th Cong., 1st Sess. (1975) [hereinafter cited as the Proposed Act], and the bill proposed by the bankruptcy judges has been introduced as H.R. 32 and S. 235, 94th Cong., 1st Sess. (1975) [hereinafter cited as the Judges' Bill]. Hearings on the bills are being held by subcommittees of the Senate and House Judiciary Committees throughout the term of the 94th Congress.

2. On May 5, 1975, Bill C-60, proposing a comprehensive new Bankruptcy Act for Canada, was tabled in the Canadian House of Commons and given its first reading. In an address to the Ontario Division of the Canadian Bar Association in Toronto on June 18, 1975, the Honorable Andre Ouellet, Minister of Consumer and Corporate Affairs of Canada, discussing the salient features of the new bill, referred to new bankruptcy legislation being readied for presentation to the British Parliament, to new bankruptcy legislation passed in France in March of 1974, to a bankruptcy treaty being negotiated between the countries of the Common Market and Great Britain, and to the recent developments in this country. The E.E.C. Preliminary Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings is discussed in K. NADELMANN, *The Common Market Bankruptcy Convention Draft: Foreign Assets*

The scope of Professor Riesenfeld's interests and competence in fields related to bankruptcy is indicated by the diversity of the courses he has taught during his extended academic career at the Universities of Minnesota and California: Credit Transactions, Creditors' Rights, Corporate Reorganization, Commercial Law, Property, Social Legislation, Antitrust, Government and Business, Administrative Law, Comparative Law, Conflicts, International Transactions, International Law, and Admiralty. These interests have led him beyond teaching to research and reflections that have been reduced to writings published throughout the world.<sup>3</sup> Professor Riesenfeld's law review articles on garnishment and bankruptcy,<sup>4</sup> jurisdiction in bankruptcy,<sup>5</sup> creditors' rights in life insurance<sup>6</sup> and conflict of laws in creditors' rights<sup>7</sup> are classics to which courts, lawyers, scholars and students constantly refer.<sup>8</sup>

Riesenfeld likewise possesses the historian's passion to know how and why the law has developed as it has, and his published historical studies<sup>9</sup> have enriched the understanding of bankruptcy and the underlying law of debtors' and creditors' rights. His two articles tracing the development of creditors' remedies among the several states are enormously illuminating<sup>10</sup> and unique in their scope and content.

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*and Related Problems*, in CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 340-59 (1972); Hunter, *The Draft Bankruptcy Convention of the European Economic Communities*, 21 INT. & COMP. L.Q. 682 (1972). In a paragraph entitled "World Wide Concern in Bankruptcy and Insolvency Law Reform," the REPORT OF THE STUDY COMMITTEE ON BANKRUPTCY AND INSOLVENCY LEGISLATION at 62 (Canada 1970), also refers to bankruptcy studies underway in Scotland, Ireland, Japan, and Scandinavia.

3. This is amply illustrated by the extensive bibliography published in this symposium.

4. Mussman & Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1 (1942).

5. Mussman & Riesenfeld, *Jurisdiction in Bankruptcy*, 13 LAW & CONTEMP. PROB. 88 (1948).

6. *Life Insurance and Creditors' Remedies in the United States*, 4 U.C.L.A. L. REV. 583 (1957).

7. *Creditors' Remedies and the Conflict of Laws—Individual Collection of Claims*, 60 COLUM. L. REV. 659 (1960).

8. The value of the study on jurisdiction of the bankruptcy courts, cited in note 5 *supra*, to the Commission on Bankruptcy Laws is suggested by the number of times it is cited in the notes to Chapter 4 of Part I of the Report of the Commission on Bankruptcy Laws of the United States, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess. 85-103 (1973) [hereinafter cited as REPORT: PART I]. Part II of the Report of the Commission on Bankruptcy Laws of the United States contains the text of the Proposed Act with commentary by the Commission.

9. *Evolution of Modern Bankruptcy Law: A Comparison of the Recent Bankruptcy Acts of Italy and the United States*, 31 MINN. L. REV. 401 (1947); *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155 (1957); *Enforcement of Money Judgments in Early American History*, 71 MICH. L. REV. 691 (1973).

10. Cited note 9 *supra*. In *Wandschneider v. Bekeny*, 75 Misc.2d 32, 35, 346 N.Y.S.2d 925, 928-29 (Sup. Ct. 1973), a New York court recently found Professor Rie-

But Riesenfeld's contributions to the understanding and development of bankruptcy and reorganization law are not merely those of an academician. He has forcefully expressed his views concerning the direction of desirable change in meetings of the National Bankruptcy Conference<sup>11</sup> and the Advisory Committee on Bankruptcy Rules<sup>12</sup> where he has been an articulate and effective participant in the process of bankruptcy reform for more than a decade. On August 1, 1975, Rules of Bankruptcy Procedure for Chapter X and Chapter XII cases, promulgated by the Supreme Court of the United States, became effective. Rules of Bankruptcy Procedure, also promulgated by the Supreme Court, had previously become effective for cases involving straight bankruptcy and Chapter XIII on October 1, 1973, and for Chapter XI cases on July 1, 1974. Rules of Bankruptcy Procedure for cases under Chapter VIII (railroad reorganizations pursuant to section 77) and Chapter IX (compositions of taxing agencies and instrumentalities) have been approved for transmission to the Judicial Conference of the United States and thereafter, with the approval of the Conference, to the Supreme Court of the United States. This formidable body of rules, which, together with accompanying notes, runs to over 800 pages in Matthew Bender's 1975 Pamphlet Edition of the *Bankruptcy Act and Rules*, is the product of the extended labors of the Advisory Committee on Bankruptcy Rules over a period of 15 years.

Professor Riesenfeld is one of the four original appointees of Chief Justice Warren to this Advisory Committee who have served throughout its entire existence,<sup>13</sup> and he has left his imprint on the Rules of Bankruptcy Procedure. His comments on drafts and proposals came to the Reporters from across the Atlantic and the Pacific and from both sides of the equator. He has been the member most insistent on internal

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senfeld's 1973 *Michigan Law Review* article immensely helpful in resolving a novel issue.

11. The National Bankruptcy Conference is a voluntary organization of persons interested in the improvement of the Bankruptcy Act and its administration. Its origin and role in bankruptcy reform over the course of the last 40 years are discussed in *Hearings on S.J. Res. 100 Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 84-85 (1968).

12. The Advisory Committee on Bankruptcy Rules was established by the Judicial Conference of the United States in 1960 pursuant to 28 U.S.C. § 331 (1970). Gignoux, *A Progress Report on the New Bankruptcy Rules*, 44 *REF. J.* 13 (1970).

13. Another of Warren's four original appointees is the Committee's extraordinary chairman, Judge Phillip Forman of the Third Circuit. Professor Riesenfeld bespoke the sentiment of all the members and reporters who participated in the study and deliberations of the Advisory Committee when he dedicated the two editions of his casebook to "Senior Circuit Judge Phillip Forman, Wise and patient chairman of the Advisory Committee on Bankruptcy Rules." S. RIESENFELD, *CREDITORS' REMEDIES AND DEBTORS' PROTECTION* ix (1st ed. 1967); S. RIESENFELD, *CREDITORS' REMEDIES AND DEBTORS' PROTECTION* xi (2d ed. 1975).

consistency of form and content in the Rules, often asking, "Why do we say this in Rule 100 and that in Rule 200?" He was less fearful that the bankruptcy judges might be given too much discretion than that the Rules might tie the judges down too tightly, thereby precluding the best adjustment in situations that could not be envisioned in advance. While inclined to favor generality over specificity in the drafting of Rules, Professor Riesenfeld frequently voiced concern that the Advisory Committee Notes contain ample illustrative references and commentary to inform courts and counsel what the drafters had in mind.

The Rules of Bankruptcy Procedure, promulgated pursuant to section 2075 of title 28 of the United States Code, supersede a considerable part of the Bankruptcy Act. It remains for Congress, however, to delete the obsolete language and to revise the Bankruptcy Act to eliminate the discrepancies between it and the Rules. As noted earlier,<sup>14</sup> Congress is holding hearings on proposed legislation which, if enacted, will profoundly affect the structure of the bankruptcy system and the substantive law applied by the courts established under the Bankruptcy Act. The proposals have been prepared by the Commission on Bankruptcy Laws of the United States, established by Congress in 1970,<sup>15</sup> and by the National Conference of Bankruptcy Judges. The proposals of the Bankruptcy Judges follow closely those of the Commission insofar as the substantive law of bankruptcy is concerned, but contemplate less drastic alterations in the structure that would administer the provisions of the Commission Bill.<sup>16</sup>

The Commission's proposals, too, have been strongly influenced by Professor Riesenfeld's contributions. The concept of the administration of consumer bankruptcy and administration of plans of debtors with regular income as embodied in the Commission Bill comes close to that described by Professor Riesenfeld in a valuable comparative study of the features of other systems.<sup>17</sup> In particular, the Commission and its staff were impressed by Professor Riesenfeld's favorable accounts of the New Zealand system of administering small estates.

The extension of the "fresh start" policy of American bankruptcy laws proposed by the Commission owes much to the effective presentation at its first hearing by representatives of the National Consumer Law Center, who had consulted with Professor Riesenfeld in the preparation

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14. Note 1 *supra*.

15. The origin and work of the Commission are discussed in Kennedy, *Foreword: Bankruptcy Reform—1973*, 21 U.C.L.A. L. REV. 381-87 (1973). The charge and major recommendations of the Commission are set out in REPORT: PART I, *supra* note 8, at 1-31 and are reprinted in 29 BUS. LAW. 75 (1973).

16. The Judges' Bill is discussed in Cyr, *Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898*, 49 AM. BANKR. L.J. 99 (1975).

17. See REPORT: PART I, *supra* note 8, at 106-08.

of their testimony.<sup>18</sup> The Commission's new approaches to exemptions and community property were formulated after careful study of Professor Riesenfeld's published writings and a study especially prepared by him for the Commission.<sup>19</sup> The Commission's proposed revision of the preference section was substantially based on the recommendations of a committee chaired by Professor Grant Gilmore, on which Professor Riesenfeld served during its 4-year study.<sup>20</sup> Professor Riesenfeld's role on the committee was that of an articulate defender of the interests of the unsecured creditors. Indeed, he has consistently and zealously sought to protect the unsecured creditors against the efforts of secured creditors and priority claimants to take all or the lion's share of estates undergoing administration.<sup>21</sup>

Professor Riesenfeld was a helpful consultant to the Commission in connection with the evolution of the innovative provision proposed in section 4-103 of the bankruptcy bills pending in Congress. This provision confers capacity on a representative appointed in a foreign bankruptcy or proceeding for the financial rehabilitation of a debtor to initiate a bankruptcy or other case under the American Proposed Act, to seek dismissal or suspension of a case previously commenced under the bankruptcy legislation, to seek equitable relief in a United States court, or to seek delivery of property of a debtor's estate or its proceeds. Dr. Kurt Nadelmann views the proposal as fraught with hazard for the conduct of our foreign relations insofar as they may involve or be affected by the administration of estates subject to the jurisdiction of another country as well as this one. The Commission, having considered the caveats and fears expressed by Dr. Nadelmann, was not dissuaded by them, and Professor Riesenfeld's favorable views of the proposal afforded the Commission helpful advice and reassurance in an area of special sensitivity and difficulty.

This issue of the *California Law Review*, assembled as a tribute to Professor Riesenfeld, provides a wide, yet penetrating view of these recent developments in bankruptcy and reorganization law.

Professor Vukowich, a former student of Professor Riesenfeld, has

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18. The witnesses for the National Consumer Law Center were Richard A. Hesse, its Director, and Blair C. Schick, Deputy Director. They appeared at the Commission's hearing in Washington, D.C., on March 3, 1972. The transcript of the hearing is filed with the National Archives under Accession Number NN-373-186, Record Group 148.

19. REPORT: PART I, *supra* note 8, at xvi, 170-73, 195-97.

20. REPORT: PART I, *supra* note 8, at 206-13; S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 630-31 (2d ed. 1975).

21. One of the few disagreements that Professor Riesenfeld and I have had involves his willingness to allow the trustee in bankruptcy to subrogate himself to the priority of a security creditor over another secured creditor under section 70e of the present Bankruptcy Act. See S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 602 (2d ed. 1975).

contributed a critique of the Commission's proposals for uniform exemptions in the new Proposed Act. His commentary contains reflections and conclusions resulting from an extended study of exemptions, undertaken in partial fulfillment of the requirements for the degree of Doctor of the Science of Law at Columbia University.<sup>22</sup> The subject of Professor Vukowich's dissertation is one that has long been of deep interest to Professor Riesenfeld.

Professor Vukowich points out that the availability of federal exemptions in the Bankruptcy Act that diverge from state exemptions creates an incentive for invocation of the Bankruptcy Act: debtors in states with lesser exemptions will seek the larger allowances available in bankruptcy, whereas creditors in states with more generous exemptions will precipitate bankruptcy involuntarily in order to reach property not subject to levy under state law. The Commission was initially troubled by this issue. It considered recommending preemption of the field of exemptions in order to eliminate the artificial stimulus to resort to the bankruptcy court, but became convinced that the risk that filings under the Proposed Act would be significantly affected by discrepancies between the federal and state exemptions was not sufficiently serious to justify a recommendation for preemption, at least as a matter of bankruptcy policy. The discrepancies would rarely be so great that debtors or creditors would regard them as critical factors in choosing to assume the burdens imposed or the benefits obtainable under the Proposed Act. Empirical studies show that most bankrupts do not come close to the ceilings imposed by state exemption laws,<sup>23</sup> and a federal exemption law that raises the ceiling above that prescribed by the exemption law of the debtor's state would be inconsequential to most debtors and their creditors in such a state. If a debtor has property that could be claimed as exempt in bankruptcy but not under state law, the likelihood that creditors would levy on it would be substantially diminished by the availability of relief against such a levy in the bankruptcy courts.

Congress has relied, at least in part, on its constitutional power to enact uniform bankruptcy laws by imposing on the states a limitation on the ability to levy wages.<sup>24</sup> If this limitation is constitutional, as it is generally acknowledged to be,<sup>25</sup> it can hardly be doubted that Congress

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22. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779 (1974).

23. Comment, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1504-06, 1515-16 (1959). A member of my seminar at the University of Michigan in Selected Problems in Debtors' and Creditors' Rights during the Spring Semester, 1975, examined 100 randomly selected bankruptcy files in the United States District Court for the Eastern District of Michigan and found confirmation of the statement in the text with respect to individual bankrupts who had filed petitions in that court.

24. Consumer Credit Protection Act, 15 U.S.C. § 1671 (1970).

25. See Felsenfeld, *Competing State and Federal Roles in Consumer Credit Law*,

could preempt the field of exemptions from creditor process by dealing comprehensively with this subject in the present Bankruptcy Act. While the Commission considered the advisability of recommending preemption in its report, it ultimately decided not to make such a recommendation for several reasons: (1) preemption did not appear to be necessary in order to avoid a significant increase in resort to the bankruptcy courts by either debtors or creditors; (2) if experience with uniform federal exemptions under the Bankruptcy Act shows that discrepancies between federal and state exemptions do generate a significant increase in filings under the Act, Congress could amend the Bankruptcy Act to preempt the field, either by prescribing particular categories of exemptions and leaving states free to grant or deny others, or by imposing maximums or minimums, or both;<sup>26</sup> (3) the existence of a catalogue of federal exemptions available in bankruptcy cases would exert pressure on state legislatures to give attention, long overdue in most states, to their state exemption laws and to make such adjustment of discrepancies between the federal and state provisions as experience might dictate;<sup>27</sup> (4) leaving the states free to pursue their own exemptions policies in regulating the adjustment of debtors' and creditors' rights outside of the bankruptcy setting permits the continuation of state diversity and experimentation unless and until overriding federal interests are perceived to require national uniformity.

Professor Vukowich makes the valid point that the several federal laws that deal with exemptions ought to be harmonized, and possible conflicts and ambiguities resolved. The objective is more easily stated and agreed to than realized, however. Bankruptcy legislation is the responsibility of the Judiciary Committees of the Senate and House of Representatives. The Internal Revenue Code and laws that affect the federal fisc, including the limitations on the reach of the federal tax collector, are the responsibility of the Senate Finance Committee and the House Ways and Means Committee. The panoply of consumer credit legislation, including the limitations on wage garnishment contained in

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45 N.Y.U. L. REV. 487, 495-98 (1970); Moran, *Garnishment Restrictions Under Federal Law*, 56 A.B.A.J. 678 (1970); Note, *Restrictions of Wage Garnishments: Title III of the Consumer Credit Protection Act*, 44 IND. L.J. 267, 269-76 (1969).

26. Congress can, of course, choose any of these options without awaiting the lessons to be gained from experience under a federal exemption limited in its operation to administration of debtors' estates under the Bankruptcy Act. The Commission did not make any recommendation against preemption, should Congress find that option politically feasible.

27. The Commissioners on Uniform State Laws are considering a proposed Uniform Exemptions Act, which underwent its first reading in August, 1975. The draft considered at this reading is derived from an adaptation of section 4-503 of the Bankruptcy Act of 1973, proposed by the Commission on the Bankruptcy Laws of the United States.

the Consumer Credit Protection Act, 15 U.S.C. §§ 1671-77 (1970), emanated from the committees of the Senate and the House of Representatives having jurisdiction over banking legislation. Legislation affecting veterans' benefits, federal welfare assistance, and other federal dispensations involves other congressional committees. Experience in seeking changes in those bankruptcy laws that may have an adverse impact on the collection of federal revenue from any source shows that such efforts require inexhaustible persistence and patience to counter the influence of spokesmen for the Treasury Department, who steadfastly oppose any such legislative proposals and whose defense of the federal tax collector evokes sympathetic responses from the committees that have cognizance of tax legislation.<sup>28</sup> It appears predictable that any liberalization of the Internal Revenue Code resulting from a reconciliation between the exemptions suggested in the Proposed Act and those now prescribed in the Internal Revenue Code, will require herculean efforts. The process of reconciliation does not tend to produce elegant or even intelligible language.<sup>29</sup> Despite the difficulties inherent in obtaining consistency between bankruptcy and other federal legislation, however, the goal of consistency should certainly be sought and achieved where possible.

In the next article, Mr. Patrick Murphy undertakes an analysis of one of the most critical and controversial proposals of the Commission, section 7-203, which deals with the use of leased or encumbered property during the pendency of a reorganization. The proposed new section assumes both that the prospects for successful reorganization hinge on the debtor's ability to continue using such property and that the bankruptcy laws should explicitly authorize such use, subject to appropriate safeguards of the interests of the secured creditor or lessor.

Mr. Murphy has recently published a comprehensive and perceptive study of the case law developments under Chapters X and XI that constitute the background of the Commission's proposals.<sup>30</sup> That article was a revealing description of the realities confronting the courts and counsel for secured creditors when enterprises carrying a heavy burden of secured debt find themselves in financial distress because of a temporary interruption or diminution of cash flow. Although some of those who speak for the interests of secured creditors have suggested that proposed section 7-203 is subversive of constitutional principles and

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28. Kennedy, *The Bankruptcy Amendments of 1966*, 1 GA. L. REV. 149, 150-51, 171-73 (1967).

29. See Marsh, *Triumph or Tragedy? The Bankruptcy Act Amendments of 1966*, 42 WASH. L. REV. 681 (1967).

30. Murphy, *Restraint and Reimbursement: The Secured Creditor in Reorganization and Arrangement Proceedings*, 30 BUS. LAW. 15 (1974).

must be opposed with unflagging energy,<sup>31</sup> Mr. Murphy, an attorney with a considerable experience in representing secured creditors in reorganization cases, has found the proposal a reasonable approach to the problem of reconciling the needs of debtors and secured creditors or lessors. His article in this symposium, however, makes a number of suggestions that accept the Commission's basic approach yet mitigate its impact on secured creditors and clarify the proposed statutory language. Many of Mr. Murphy's ideas have already been approved by the National Bankruptcy Conference,<sup>32</sup> of which he is a member, and are certain to receive the careful attention of the Judiciary Committees of the Senate and the House, to which the proposed bankruptcy legislation has been referred.

The Canadian system of bankruptcy administration, aptly described by John Honsberger in the third article in this issue, presents interesting analogies for law reform in this country. The Commission on Bankruptcy Laws of the United States was favorably impressed by the principal features of the Canadian system,<sup>33</sup> which appears to have avoided burdening judges with many administrative responsibilities associated with bankruptcies and reorganizations.<sup>34</sup> The unseemly scramble by lawyers for control of liquidations and operations of businesses in trouble seems not to have plagued the Canadian system.<sup>35</sup> The recommendations of the Canadian Bankruptcy Study Committee respecting administration as set forth in its 1970 Report<sup>36</sup> made eminent good sense, and the members of the Commission staff were in frequent communication with John Honsberger in the course of the drafting of the portions of the Commission Report concerned with administration and structure. I should like to take the opportunity here to acknowledge the extraordinary generosity of Mr. Honsberger in responding to our inquiries. I write this foreword in advance of any reading of his evaluation of the Commission's proposal in the light of the Canadian experi-

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31. See, e.g., Moore, *The Proposed Bankruptcy Act of 1973 and its Impact on Secured Lenders* in ADDRESSES AT FALL MEETING OF BANKING, CORPORATION AND BUSINESS LAW SECTION OF THE NEW YORK STATE BAR ASSOCIATION 39-45 (1974); cf. Coogan, Broude, & Glatt, *Comments on Some Reorganization Provisions of the Pending Bankruptcy Bills*, 30 BUS. LAW. 1149, 1166-80 (1975).

32. Summary of Proceedings of 1974 Mid-Year Meeting of National Bankruptcy Conference, Chicago, Ill., April 26-27, 1974, at 3.

33. REPORT: PART I, *supra* note 8, at 65-66, 107-08.

34. REPORT OF THE STUDY COMMITTEE ON BANKRUPTCY AND INSOLVENCY LEGISLATION at 151-53, 158-62 (Canada 1970).

35. Carignan, *Devices Which Tend to Assure the Administrative Autonomy of Creditors in Canadian Bankruptcy Law*, 17 AM. J. COMP. L. 24 (1969); Honsberger, *Bankruptcy: A Comparison of the Systems of the United States and Canada*, 45 AM. BANKR. L.J. 129, 134-37, 147 (1971).

36. REPORT OF THE STUDY COMMITTEE ON BANKRUPTCY AND INSOLVENCY LEGISLATION at 153-62, 182-85 (Canada 1970).

ence, and I am indeed anxious to discover how well the Commission succeeded in adopting and adapting the lessons of the Canadian experience, as perceived by a uniquely qualified observer.

Professor Girth's comments provide a comparative analysis of the legislative proposals of the Commission on Bankruptcy Laws and the National Conference of Bankruptcy Judges and the earlier proposals of a study team organized under the aegis of the Brookings Institution. Accepting as a premise that the bankruptcy process is and ought to be essentially a matter of administration, the Brookings Institution's team recommended that the bulk of the bankruptcy caseload be transferred from the courts to an administrative agency.<sup>37</sup> The Commission on Bankruptcy Laws agreed in considerable part with the Brookings report<sup>38</sup> but saw no reason for requiring disputes to be resolved by an administrative agency rather than the courts. The Commission thus envisioned a bifurcation of the bankruptcy structure so that administrative functions would be assigned to and discharged by an administrative agency, but disputes and certain determinations of special sensitivity would be handled by the bankruptcy courts.<sup>39</sup> The bill of the National Conference of Bankruptcy Judges accepts the necessity of separating judicial and administrative functions and of relieving the bankruptcy judges of the responsibility for handling most of the matters categorizable as administrative.<sup>40</sup> The bankruptcy judges, however, disagreed with the Commission as to the appropriateness of relegating a number of responsibilities to an administrator and insisted that in any event the administrative as well as the judicial functions should be performed by personnel within the judicial department.<sup>41</sup>

Professor Girth makes some telling and timely observations about the difficulties besetting efforts to achieve structural changes in the bankruptcy system. Similar obstacles have delayed and dictated compromises of desirable legal reforms in other fields. Law reform is not a venture for the short-winded or faint-hearted.

Mr. Allen Corotto of the staff of the Securities and Exchange Commission contributes a careful review of the reporting, proxy and anti-fraud provisions of the federal securities laws in their relation to reorganizations and arrangements under the bankruptcy laws. He argues that the actions required to rehabilitate a business or to protect its creditors often require compliance with federal securities laws, and he

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37. D. STANLEY, M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 196-218 (1971).

38. REPORT: PART I, *supra* note 8, at chs. 3-4.

39. Proposed Act, *supra* note 1, §§ 2-201, 3-202, and 4-301.

40. See Cyr, *Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898*, 49 Am. Bankr. L.J. 99, 121-22 (1975).

41. *Id.* at 121, 124-25, 128-50.

examines the role of the SEC in enforcing these laws. Mr. Corotto also notes the changes which the proposed Bankruptcy Act may effect in securities law compliance during Chapter proceedings. This is an area of the law in need of illumination by an expert of Mr. Corotto's credentials.

Mr. Alan Pedlar, a member of the third-year class at Boalt Hall, has undertaken the challenging assignment of examining the implications of recently enacted community property acts for the law of debtors' and creditors' rights, with particular reference to those proposals of the Commission on Bankruptcy Laws that affect community property. His contribution will be welcomed, especially by the staff of the Commission, which devoted many hours to the effort to rationalize the treatment of creditors' rights in respect to community property under the Bankruptcy Act. This objective was enormously complicated by the diversity of the rules governing debtors' and creditors' relations among the eight states recognizing community property, compounded by the diversity and uncertainty of the rules followed within these eight states. The Commission concluded that a debtor's estate in a community property state should include, in addition to his separate property, the community property of the debtor and his spouse which is generally liable for the debtor's postnuptial contractual debts and the other community property of the debtor and his spouse to the extent of its liability for any allowable claim in the case. Excluded from the community property coming within the debtor's estate, however, would be such property as would be liable only for debts incurred for necessities or as agent for the debtor's spouse. These exclusions, as Mr. Pedlar explains, would have saved community property from coming within the debtor's estate on the bankruptcy of the wife under the former community property law of California and probably under the laws of other states.

Since the publication of the Commission's proposals in July 1973, however, seven of the eight community property states have significantly revised their laws. The thrust of this recent legislation is to subject community property to joint or equal control of the two spouses and to allow creditors of each spouse to have access to the community property. Mr. Pedlar's conclusion is that a petition by or against either spouse under the new laws would bring all the community property, along with the debtor's separate property, into the debtor's estate. In view of the liability of the community property to the creditors of the non-bankrupt spouse, Mr. Pedlar argues for allowing them to file their claims in the bankruptcy of the filing spouse but limiting such creditors to distributions from the community property. This proposal would require administration of community property and the separate property

of the bankrupt spouse as different estates in order to avoid payment of one spouse's creditors out of the separate property of the other in derogation of the policy of the community property laws. The marshaling entailed would be comparable to that traditionally employed by bankruptcy courts in administering the estates of partnerships and partners.<sup>42</sup> Mr. Pedlar's proposals deserve—and will surely receive—careful consideration by the Judiciary Committees of the Senate and the House as they prepare the final versions of the bills to be reported out in the Second Session of the 94th Congress.<sup>43</sup>

The editors of the *California Law Review* have wisely invited a panel of contributors to this symposium on the proposed bankruptcy legislation who have not been identified with any of the drafts. The result is a series of critiques by knowledgeable authors who have no occasion to defend any of the drafts pending in Congress, but who, on the other hand, are not animated by a desire to defeat the proposals for reform.

It is fitting that this festschrift is assembled for Professor Riesenfeld, whose seminal and meticulous scholarship in the field of bankruptcy constituted a major contribution to the draftsmen of the proposed legislation. The sponsors of the legislation have fixed 1976 as the proposed date of enactment. This symposium should be a substantial contribution toward the effort to perfect the proposed legislation. All the authors, I am sure, join me and the editors of the *California Law Review* in saluting Professor Riesenfeld and wishing for him a rewarding retirement. We know that he will neither cease his vigorous search for new knowledge nor waver in his rigorous scrutiny of that which his search reveals.

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42. Under the present Bankruptcy Act, which follows the "jingle rule," the partnership estate and the partners' separate estates have been segregated and administered as separate estates, unless and until a surplus materializes. The Commission has proposed, in section 4-405(f) of the pending bill, the abandonment of the "jingle rule"; but it will remain necessary under the bill for the partnership property, which is subject only to the claims of the partnership creditors until they are fully paid, to be segregated from the separate property of each partner. The separate property of each individual partner will be subject to the claims of the partnership creditors and the creditors of that partner but not of the creditors of any other partner.

43. See Klee, *Congress and the Bankruptcy Act of 1976*, 61 A.B.A.J. 1268 (1975). Since the Commission's life was terminated on the submission of its Report in 1973, the Commission is unable to consider or respond to any suggestions for revision of its recommendations.