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Consumer Bankruptcy: A Roundtable Discussion

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CONSUMER BANKRUPTCY: A ROUNDTABLE DISCUSSION

INTRODUCTION

The following Roundtable Discussion among Hon. Arthur B. Briskman, Hon. Geraldine Mund, Hon. Alexander L. Paskay, Professor Karen Gross, Professor Janice E. Kosel, Mr. Ford Elsaesser, Esq., Mr. Gary Klein, Esq., and Mr. Marion A. Olson, Jr., Esq., was moderated by the Hon. Leif M. Clark. Judge Clark is a Director of the American Bankruptcy Institute, and is also a member of the Advisory Board of the *American Bankruptcy Institute Law Review*. The editors express their appreciation to the participants and Judge Clark for their donation of time and effort to this project.

JUDGE CLARK: The purpose of our gathering here today is to discuss some of the issues that some of the authors will be looking at in greater detail in this issue of the *American Bankruptcy Institute Law Review*.[1]

I. PRO SE FILINGS

To start things off, I thought we would talk about a relatively noncontroversial topic—pro se filings. There are some judges in Los Angeles who I understand are somewhat upset about pro se filings and who believe that somehow or another it is a problem for the system.[2] There are probably two schools of thought on pro se filings and I thought maybe we would start by hearing from Judge Mund about how it looks to her since she is on the ground in Los Angeles.

JUDGE MUND: I am not sure it is all that controversial. First of all, let me just give a little background and statistics so we know the scope of the problem we're talking about. I am only talking about the Los Angeles division of the Central District when I give statistics; not the entire district because each division is somewhat unique in what is happening, although pro se filings are a major problem throughout all divisions.

In the Los Angeles division, approximately fifty percent of our Chapter 7 and 13 cases are filed without an attorney.[3] That means that we're getting over 23,000 of these cases each year. The sheer weight of the cases is causing a problem.

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[1] The theme of this issue of the *American Bankruptcy Institute Law Review* is consumer bankruptcy.

[2] *See* Laura Mansnerus, *Declaring Bankruptcy: Not Easy and Not Cheap*, N.Y. TIMES, May 8, 1993, at 35. "It is possible to operate without a lawyer, or pro se, but this is 'not a good idea,' said Judge Samuel L. Bufford of the Bankruptcy Court in Los Angeles. Those who do, he said, generally 'fare very poorly.'" *Id.*

[3] *Compare id.* Stuart Gelberg, a bankruptcy trustee serving in New York, indicated that pro se filings constitute twenty per cent of the filings he receives and approximately two percent of the cases that are confirmed. *Id.*

About twenty percent of all cases, which I include in the fifty percent pro se category, are being prepared by paralegals. When I say "paralegals," I mean a person who is assisting somebody to file but who is not a licensed attorney. These non-lawyers prepare about 6500 cases a year. This means that each Los Angeles judge gets 2000 cases per year in which there is no legal representation. Many of these papers are incomplete or inaccurate; in some places it is intended and in some places it is not.[4]

Another problem is that many of the pro se filers do not speak English and, therefore, are not able to communicate to the court or understand communications from the court. They don't understand the bankruptcy process. Many of them filed because they need bankruptcy relief. They have a heavy debt load. They have been ill. They have been out of work. For whatever reason, they need bankruptcy relief.

A large percentage of them, however, are filing because they need to stop eviction and the only reason that they are filing is to get that extra two, three, four, or six months without paying rent.

Some of them are filing because somebody has told them that that is what they should do. In other words, "gee, you are getting harassed by a debt collector, file bankruptcy." They are filing even though they may only owe a few thousand dollars and they are discharging $3000. Then a month later the primary wage earner gets sick and all of a sudden there are huge medical bills and they are not going to be able to discharge them. So, there are problems with that.

JUDGE CLARK: Why is this a problem for the court?

JUDGE PASKAY: That's what I am asking, to what extent is the court involved in a consumer Chapter 7?

JUDGE MUND: In the case of landlord-tenant, almost every one of them has a motion for relief from the automatic stay (the "Stay").

JUDGE PASKAY: That is not defendable in most instances.

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[4] *See* Eric J.R. Nichols, Note, *Preserving* Pro Se *Representation In An Age of Rule 11 Sanctions*, 67 TEX. L. REV. 351, 351 (1988). "Unrepresented litigants may clutter up cases with rambling, illogical reams of what purport to be pleadings, motions, and briefs. They may seek out courtrooms as forums to vent strongly held but legally unfounded social and political theories or as battlegrounds to satisfy private, legally unredressable vendettas." *Id.* (footnotes omitted). *See also* Haines v. Kerner, 404 U.S. 519, 520, (1972) (pleadings submitted by pro se complainants are held to less stringent standard than those submitted by lawyers); Donald H. Zeigler & Michelle G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 176 (1972) (legal documents submitted by pro se litigants range from typewritten papers with legal backing to illegible, handwritten, tattered sheets).

JUDGE MUND: With a pro se debtor, we have to have a hearing on it. Approximately twenty-five percent of the pro se debtors do not file an answer or a response to a motion but do show up in court.[5] So I am running relief from stay calendars of 100 matters in an hour with many people showing up, having no idea why they are there, unable to speak English. We cannot communicate with them; we have no translators in the court; we're opening masses of files; we're dealing with masses of paperwork.

JUDGE PASKAY: There are clerks.

JUDGE MUND: If the clerks are very tied up doing these types of things, they are not closing asset cases, they are not even closing no-asset cases. They are not out there dealing with the public. They are not getting me the files. It puts a burden on personnel and on file space.[6]

JUDGE CLARK: Most of your pro se cases should have a relatively short life in the bankruptcy system; don't they?

JUDGE MUND: They do, but you are talking 23,000 a year in a twelve judge division.

JUDGE PASKAY: Why do you have to have a hearing if there is a default or a motion to direct a response, no response?

JUDGE MUND: This is a decision that we have made in trying to give due process. We have people who cannot respond. That's the problem with the pro se. They get something—a piece of paper—it has a date, time and place on it. It says a response is required. But they don't or can't put it in writing. So they show up to find out what is going on and to "tell their story to the judge." You have two choices. You either turn them away at the courthouse door by saying you didn't put it in writing or you give them a chance to come in and tell you their story.

MR. ELSAESSER: Why couldn't you use the notice and hearing process? If they don't file an objection to the motion within a shortened time period for landlords, then no hearing is necessary.

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[5] *See* Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 659 (1988) (describing typical situation in which civil pro se plaintiff does not respond to defendant's motion for summary judgment in mistaken belief that it can be addressed at trial).

[6] *Cf. Proceedings of the Forty-Seventh Annual Judicial Conference of the District of Columbia Circuit*, 114 F.R.D. 419, 427 (1986) (Operating hours of Bankruptcy Court's Clerk's office for United States District Court for the District of Columbia had to be shortened due to large increase in the amount of bankruptcy filings and exceedingly large number of pro se filings, which require great deal of attention).

JUDGE MUND: Again, this is just a policy decision that we have made. We decided that we want them to have the opportunity to see a judge, to make their statement.

JUDGE PASKAY: Why is that? I mean you decided, that's fine.

JUDGE MUND: We decided. The question is are we a court that is going out to the people, and if we are going to allow access, access has to be meaningful.

JUDGE PASKAY: Why is it not meaningful if they received the papers? You can't send with each paper you mail out an interpreter.

JUDGE MUND: The papers are in English and they speak Korean.

JUDGE PASKAY: Maybe make a decision that each paper should be processed in English and Korean.

JUDGE MUND: And Spanish and Vietnamese and each of the fifty languages being spoken in the public schools in Los Angeles. When do you stop? We simply have made the decision that notice and opportunity doesn't work in these cases. Therefore, we're going to make the courthouse accessible and available to them.

MR. ELSAESSER: But, in a landlord-tenant case, what possible defense could there be?

JUDGE MUND: Well, what happens is that ninety-nine percent of the time, I grant relief from the stay.

JUDGE PASKAY: If they haven't paid the rent for four months, what are you going to do?

JUDGE MUND: One of the things that happens when they come to court is that I ask them to give me information about the paralegal mills—the bankruptcy mills—because that's the only way we're going to be in contact with the people who are being victimized. I ask them who filed this on your behalf and how much did you pay?

JUDGE CLARK: Let me stop you there for a second. I want to pursue this for a bit and, Professor Kosel, I would like your input as well.

Is that in fact a victimization? Is that an abuse? I think there may be more than one view on this.

PROFESSOR KOSEL: Well, I think so. I guess I am wondering how typical Judge Mund's experience is. She certainly has a lot of anecdotal evidence that lay practitioners and pro se consumer bankruptcies are not working, but the only study that I am familiar with was prepared by Professor Debra L. Rhode of Stanford University.[7] She conducted an empirical study nationwide. She surveyed a decade of complaints that had been filed before each of the state bar associations' committees on the unauthorized practice of law. Her finding was that there was no convincing evidence that lay practitioners who prepare standardized forms are less competent than attorneys.[8] I suspect maybe her findings are not really all that surprising if you sit back a minute and contemplate the nature of a consumer bankruptcy law practice.

Professor Gary Neustadter at the University of Santa Clara did exactly that.[9] He surveyed a number of bankruptcy practitioners.[10] His conclusion is that consumer bankruptcy practice is a very routinized practice.[11] The lawyer generally makes very little effort to explore nonbankruptcy alternatives or even to explore all of the bankruptcy options that would be available to the individual.[12]

It is a style of practice that is pretty much dictated by the simple reality that the client cannot afford to pay very much and therefore the lawyer cannot afford to spend much time with the client.

My hunch is that even if we had the people that Judge Mund is complaining about, represented by lawyers, the results for the individual debtor would not be dramatically different simply because they do not have the funds to pay for what she would like them to have, namely a lawyer addressing each of their individual concerns.

MR. ELSAESSER: Judge Clark, I disagree. What the data does not show is that not only the judges, but the panel trustees end up doing the legal work for these people just by the fact that they are in the first meeting room or that they are in the courtroom and they want to either get their job done or provide an opportunity for

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[7] Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

[8] *Id.* at 89-90 (advocating bankruptcy may be discipline in which lay specialists might provide services on professional level equal to attorneys due to routine nature of paperwork).

[9] Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177 (1986); *see also* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 501 (1993) (reporting results of study of "attitudes and practices" of bankruptcy attorneys).

[10] Neustadter, *supra* note 9, at 180. "[T]he sample of lawyers observed and the sample of observations for each lawyer are small in comparison to typical social science research." *Id.*

[11] *Id.* at 254. "Some of this routinized behavior is similar, probably because of the constraints of the relevant system and because of the commonality to the types of client problems that they encounter." *Id.*

[12] *Id.* at 254. "Each lawyer provides a standard package of service that invokes an option under the Bankruptcy Code, and none invite discussion of different types of service (such as resisting wage garnishment) that they theoretically could provide." *Id.*

these debtors to get through the process. When I conduct a first meeting of creditors, and I think this is true with any panel trustee, I could sit there and wait for a moment of silence while the pro se debtor figures out what they are supposed to do (which will never happen), or I can do the lawyer's work and lead them through the examination.

That would not show up on the data. Likewise, the attempts by the courts to provide due process to pro se litigants would not show up in any kind of empirical study, which would probably focus on how many dischargeability proceedings, how many denials of discharge and so on. What is happening is the courts and the trustees are put to all the extra work.

JUDGE CLARK: I would like to give Professor Kosel a chance to respond and then I would like to get a chance to hear from Mr. Al Olson, who is a standing Chapter 13 Trustee in the Western District of Texas, for his experience.

PROFESSOR KOSEL: The usual complaint that most people have about pro se litigants is that the litigants themselves suffer—they are not getting as good a service as if they had been represented by a lawyer.[13] What you are providing is really an unusual kind of twist—the whole system is suffering because of the pro se litigants.[14]

I guess if they are breaking the back of the system—it is a perspective I haven't really focused on too much. I look at it more from the perspective of the individual consumer and whether the individual consumer is being served. The system should adjust to fulfill the needs of the pro se litigant.

JUDGE CLARK: It's a balancing act, plainly.

MR. OLSON: There is no question that Chapter 13 trustees and their staffs are put to much greater burdens by pro se debtors.[15] Most pro se debtors who file a petition do not even know they have to file schedules. We try not to dismiss them immediately since most of these debtors do not understand what is happening to them.

Normally we invite these debtors into our office and we attempt to provide them with an understanding of what they need to do to accomplish a confirmed plan without giving them legal advice. This can be a very difficult task.

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[13] Faretta v. California, 422 U.S. 806, 845 (1975) (Burger, C.J., dissenting) (self-representation will add "congestion in the courts and . . . the quality of justice will suffer."); United States v. Kelley, 539 F.2d 1199, 1202 (9th Cir. 1976), *cert. denied*, 429 U.S. 963 (1976) (Self-representation "runs counter to the competing institutional interest in seeing that justice is administered fairly and efficiently with the assistance of competent lawyers.").

[14] *See* Horsey v. Asher, 741 F.2d 209, 212 (8th Cir. 1984) ("*[P]ro se* prisoner complaints filed in forma pauperis add to the work of the courts.").

[15] *See supra* note 4.

The other problem that you touched on, Judge Mund, is that many of these debtors have been duped. They have been brought into the system by unscrupulous typing services who charge them $600 to $800 to help them keep their homes. These services inform the debtors that their actions will stop a foreclosure for at least four to six months, which gives the debtor time to get caught up on their delinquent house payments. Further, these services advise the debtors that if they catch up, they could come back and continue with step two of the process, which requires the filing of additional papers. Most of these debtors never knew they were filing bankruptcy. They do not know what they are doing. That is the problem I see with pro se filings.

In San Antonio, over the last five years, we have had 191 pro se cases filed. Seventy percent of those cases were dismissed and most were dismissed prior to confirmation. Eight percent were converted to Chapter 7. Only eight percent have been completed and thirteen percent are still active. Obviously, we have a very low percentage of cases that are completed, and most are dismissed prior to confirmation.

MR. KLEIN: Those numbers are fairly consistent with the data we have on pro se Chapter 13 cases in Massachusetts. Pro se filers, though, have far greater success rates in Chapter 7.

JUDGE PASKAY: The first question, of course, is whose problem are they—members of the bar or the courts? If you want to look after the public at large and the pro se people, I believe we should focus on that proposition. That's one reason, not to protect the turf of the bar but to chase them out of business.[16] In some districts they charge an exorbitant amount of money for a so-called simple typing service, which is not a typing service at all.

I have a brand new situation which just developed that appalls me. It occurs when an attorney files a 2016 statement.[17] The attorney signs the petition as counsel of record for the debtor, whom the attorney has never seen, never spoken to, had absolutely no contact with, and the attorney has never been retained by the debtor. This is now a new twist to assure that these "pro se" debtors are receiving proper legal advice because this person is reviewing the papers typed up by the paralegal service.

JUDGE CLARK: I want to get another perspective.

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[16] *See* James Podgers, *Legal Profession Faces Rising Tide of Nonlawyer Practice*, A.B.A.J., Dec. 1993, 51, 54 (primary reason to regulate independent paralegals is competence). Lawyers do not want severe regulation of independent paralegals, because they believe that prosecutions for the unauthorized practice of law will only serve to further tarnish the negative image of the law profession. *Id.* at 53.

[17] *See infra* Appendix A, at 34.

PROFESSOR GROSS: I think we confuse three issues and groups of people in this conversation. One is pro se filers who are not being duped. This is a group who cannot afford counsel and have no opportunity to get counsel ("Group One"). I think we have to be very concerned about getting Group One access to the bankruptcy system. What are our responsibilities to them? How can we help them and what should happen to them in the system?

Then, I think we have the second group, individuals who are in one fashion or another duped ("Group Two"). These are people who did not realize they were filing bankruptcy. They thought they were doing something else, and they ended up in bankruptcy.

Then, I think there is a third group. These individuals want to go into the bankruptcy system, and they want to do it through a filing service ("Group Three").

I think we have to sever it into these three groups because I think they raise different issues. It's easy to commingle the three. For example, as to Group Three, what do we think about preparers when the debtor knows and is aware of what is happening and wants to use nonlegal advice for purposes of accessing the bankruptcy system? Then, what do we think about Group One, the pure pro se filers who will use the kind of material you produce, Professor Kosel?[18] These are people who will go out and buy what they can, if they can even afford that; then, they go into court and manage as best as they are able. And, then there is Group Two which I think is actually the least problematic. These are individuals who get duped.

JUDGE PASKAY: Should there not be really, Professor Gross, a highlight or talk about the role of the bar to give in proper instances pro bono services, which in many bars has almost become compulsory for the first category of the people you are talking about, who do not go to the preparers or the typing services. I think the bar association has a legal responsibility to render that kind of service.[19]

PROFESSOR GROSS: I think we have to talk about each group. However, I would like to suggest that, as a matter of social policy, at least as to Group One and perhaps Group Three, we have to think about a process that should be open to all. I appreciate that we have had no in forma pauperis[20] and there are pros and cons with respect to that issue. But, I think we have to give long and hard thought

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[18] *See infra* note 35.

[19] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1992). Rule 6.1 states:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Id.

[20] *See* United States v. Kras, 409 U.S. 434, 440 (1973).

to why should we not permit people to have access to the bankruptcy process. In fact, I think that in some situations we should encourage people to utilize the bankruptcy system.[21]

MR. KLEIN: I agree. We have to be careful to separate the issues here. Petition preparers and attorneys who mislead consumers deserve to be condemned. We need remedies and aggressive enforcement to drive them out of business and when appropriate, to punish them. These remedies, however, should not punish innocent debtors who have been deceived and they should not restrict access to the courts.

JUDGE CLARK: This leads to another question that was raised in one of the presentations as part of the National Conference of Bankruptcy Judges (NCBJ) in Orlando. We're doing this roundtable at the NCBJ and one of yesterday's presentations included an interesting discussion of Chapter 11.

One comment made at that presentation, by one of the presenters, was that bankruptcy judges are not in the business of making social policy, they are simply in the business of applying the law. That was in the context of Chapter 11. It seems to me that the rules might be a little different in Chapter 13. Is it appropriate in Chapter 13 for judges to be making social policy, or is it not the judge's problem? The judge doesn't have a responsibility for the system, or for making social policy.[22] The judge just has a responsibility to decide the case as it comes before them. We have three judges here. I would be interested in your comments.

JUDGE BRISKMAN: I don't think we have responsibility for social policy but I think we have responsibility for implementation of public policy and I think that comes in Chapter 13s.

JUDGE PASKAY: I certainly agree with what Judge Briskman is saying because there is the feature or the concept of Chapter 13 representing a congressional determination of social policy to encourage repayment of debts versus Chapter 7 and to that extent, we carry out the public policy; there is nothing wrong with

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[21] Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506, 1508, 1516-17 (1990) (book review).

[22] *See* Reed Dickerson, *The Legislative Process: Statutory Interpretation Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1125 (1983) (One of the responsibilities of the legislative branch is the "statutory management of social policy in the substantive areas allocated to it under the applicable constitution.").

it.[23] Now, I don't believe that there is such public policy or social policy concern appropriate in Chapter 7. There is no constitutional right to file Chapter 7.[24]

JUDGE MUND: What happened to Article I, Section 8 of the Constitution?[25]

JUDGE PASKAY: That is the power to legislate on a subject.

JUDGE CLARK: It gives Congress the authority to do it; it doesn't create a right.

PROFESSOR GROSS: I think it is fair to say that the old distinction between right and privilege is a very troubling one.[26] While historically people have said bankruptcy is a privilege, not a right,[27] there is an increasing body of scholarship noting that privileges in essence cannot be taken away once they are granted.[28] And, if they are accorded to a certain group of people, they should be accorded to everybody. In other words, certain people shouldn't be denied access to a privilege.

JUDGE CLARK: There is a respected body of authority that says that once a set of privileges is given on a broad enough basis for a long enough time it takes on the quality of a right and in withdrawing that right, you have to comply with the same sort of due process concerns.

JUDGE PASKAY: But, going back to the proposition that the courts should be promoters of social policy, which I don't perceive to exist in a Chapter 7.

JUDGE CLARK: I am not sure that is what Professor Gross said.

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[23] *See* Ravenot v. Rimgale (*In re* Rimgale), 669 F.2d 426, 427 (7th Cir. 1982) (purpose of Chapter 13 is to provide an incentive to debtors to reorganize); United States v. Lee (*In re* Lee), 71 B.R. 833, 844 (Bankr. N.D. Ga.) (purpose of Chapter 13 is to provide an incentive for debtors to repay their debts), *aff'd in part and rev'd in part*, 89 B.R. 250 (Bankr. N.D. Ga. 1987), *aff'd sub nom. In re* Hochman, 853 F.2d 1547 (11th Cir. 1988).

[24] *Kras*, 409 U.S. at 444-47. *See also* Fonder v. United States, 974 F.2d 996, 999 n.4 (8th Cir. 1992).("There is no constitutional right to bankruptcy protection.") (citing *Kras*, 409 U.S. at 446-47).

[25] U.S. CONST. art. I, § 8, cl. 4. Article I, Section 8, Clause 4 of the Constitution provides, in pertinent part: "The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." *Id.*

[26] Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 169 (1990).

[27] *Kras*, 409 U.S. at 445 (bankruptcy relief is a privilege and not a right); Scarfia v. Holiday Bank, 129 B.R. 671, 675 (Bankr. M.D. Fla. 1990) (same).

[28] *See* Ann R. Gough, *Quality of Care, Staff Privileges, and Antitrust Law*, 64 U. DET. L. REV. 505 (1987) ("Privileges, once granted, cannot be taken away from or denied to an individual . . . .").

JUDGE PASKAY: There is no social policy that I understand in Chapter 7.

PROFESSOR GROSS: I think you mischaracterize a bit what I say. But, I would tell you that I do think that for individual debtors who are appearing pro se in a court, a very legitimate question is raised. If these individuals have no counsel, does the judge have some responsibility to help that person through the process?

MR. ELSAESSER: But, they do help.

PROFESSOR GROSS: Perhaps these individuals don't belong in a Chapter 7. Maybe they belong in Chapter 13. Or, not even in bankruptcy.

MR. ELSAESSER: The pro se problem, which I think Judge Mund touched on before, ninety percent plus in any district, not just southern California, is that the people shouldn't be there because they are not discharging enough debt to make it worth their while or they are doing it for a single purpose like a landlord-tenant situation that again serves no useful purpose for anybody; not for them.[29]

It puts the landlord through additional legal expense, serves no useful function,[30] and there is nothing under the Bankruptcy Code that really permits the judge to do much in that situation except to help them through the hearing process.[31]

PROFESSOR GROSS: But, that is confusing the issue again. There is Group One. For me, this is a group that is entitled to access to the bankruptcy process and yet cannot pay for representation. Then, there is a group of people who are "abusing" the process; they are not in Group One. I am concerned about the people in Group One who have financial trouble and are legitimately entitled to bankruptcy relief.

JUDGE CLARK: It is the group that Professor Kosel is writing forms for.[32]

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[29] *See generally* Josh Meyer, *A Plague Visits the Landlords; "Petition Mills" Flood the Courts with Fraudulent Filings that Help Tenants Delay Eviction or Withhold Rent. Apartment Owners, Losing Millions, Face Foreclosure - And Renters End Up Paying a Price Too*, L.A. TIMES, Jan. 9, 1993, at A1 (discussing activities of mills).

[30] *Id.* at A20.

> Landlords pay thousands in court costs for each tenant ultimately evicted. And although the mills often promise that the tenant will never have to pay the rent and that their credit rating will never suffer, the tenant ends up evicted, owing back rent and court costs, and with a credit rating marred by a bankruptcy filing, which can take 10 years to erase.

Id.

[31] *Id.* ("Nearly all landlords are granted such permission [to evict], but the courts are so clogged that it can take weeks or months just to get a hearing.").

[32] *Infra* note 35

PROFESSOR GROSS: I would like to know what Professor Kosel thinks about whether there should be any kind of regulation of the lay advisor.

PROFESSOR KOSEL: Traditionally that regulation has been minimal through the bar, which focusses on the unauthorized practice of law. I think the question becomes whether we want the marketplace to regulate lay advisors or whether we want to have some kind of state consumer protection agency that regulates the education, training, and licensing of the lay advisor, and perhaps imposes a bonding requirement so that their clients are protected against malpractice.

MR. ELSAESSER: Well, the U.S. Trustee, if you are a Chapter 11 debtor's lawyer, can take your dollar a page fax fee and make you pay fifty cents of it back. They actually are charged with the regulation of professionals providing these services before the court but they are not getting involved as much as they should.

I would suggest that the unauthorized practice of law committees have not done anything and never will.

MR. OLSON: In San Antonio, the people of Group One, who just decide they want to file for Chapter 13 and purchase forms on their own, still cannot function without a lot of help.

PROFESSOR GROSS: Right. So who gives this help to individual debtors?

MR. OLSON: Most of the lawyers who practice Chapter 13 consumer bankruptcy law will charge the debtor throughout the life of the plan.[33] Therefore, if they are not filing a 100 percent pay out plan, the creditors are actually paying for that service. Most of these lawyers do not charge much prior to the filing. There are some lawyers who will handle these cases pro bono and Legal Aid files quite a number of cases in San Antonio.

The problems for debtors who choose to buy the forms and file pro se is that they do not know national and local bankruptcy rules, they do not get advice on whether they should file for relief under Chapter 7 or 13, they do not get advice on what exemptions they should take, and what is and is not exempt property. Consequently, most of these cases could easily have been dismissed because the debtors simply did not do it right in the first place.

Even if the debtors do obtain a confirmed plan, what happens when they miss a payment and I am obligated to file a motion to dismiss? How do they defend themselves? What kind of modifications will they make in their plan when

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[33] *See* C. William Schlosser, Jr., *Chapter 13 Bankruptcy as an Alternative to Chapter 7*, 18 COLO. LAW. 2089 (1989) (In Chapter 13 cases, "counsel must charge for three years of ongoing representation under the plan.").

something unforeseen happens? They need help in the process from someone trained in all aspects of bankruptcy law.

I do not disagree with you, Professor. I think these debtors need help, but at least in San Antonio, there are legal services available and affordable for these debtors, and by not using these services, the debtors are put in a disadvantaged position.

JUDGE CLARK: It is very interesting that if you look around the country, I have heard straw polls amongst judges in a number of different contexts in which they are asked what fee they would approve in a Chapter 13 case, the routine Chapter 13 case. The range is extraordinary and it seems to be a range unrelated to the cost of living in the particular city.

In San Antonio, Texas, for example, it is not at all uncommon for an average fee of $1400 to $1600 to be paid to the Chapter 13 attorney in a typical Chapter 13 case, yet I have heard attorneys and judges from Chicago tell me that if you get any more than $800 in a Chapter 13 case, you should consider yourself lucky. It seems that in the Chapter 13 situation at least, one of the reasons that a fee of even as much as $1500 can be tolerated is because it is stretched out over such a long period of time.

MR. OLSON: Stretched out over time, the attorneys do not take too much up front, and they perform more routine services than in other parts of the country where the initial fee might be $600 to $800. Therefore, it may even out.

JUDGE PASKAY: Charge or they file an application for allowance?

MR. OLSON: They have to get it allowed.

JUDGE MUND: A few things. I think Professor Gross is right, you have to divide this into at least two, and I think three, areas. One is the bad faith filings, which I started with, and the problem handling these paralegals who are defrauding people.

I am sitting here looking at an advertisement about being evicted; "Can't pay? Won't pay? Landlord problems . . . We guarantee to keep you in your home for three months. Our average client stays between five and seven months, without paying rent."[34]

JUDGE CLARK: I think that's an abuse.

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[34] Hon. Geraldine Mund, *A Report from the Central District of California on Pro Se and Paralegal-Assisted Filings*, *in* 67TH ANN. MEETING OF THE NAT'L CONF. OF BANKR. JUDGES, Oct., 1993, at 7-9, 7-12 (1993) (on file with the *American Bankruptcy Institute Law Review*).

JUDGE MUND: That's an abuse.

JUDGE PASKAY: That's a bargain.

JUDGE MUND: Putting these people out of business is a real problem, a different type of problem. But, I think you can divide the proper filing into two different areas and not so much by who prepares it. The first question is the filing issue in the just plain old basic Chapter 7 or 13 and the second is what happens if there is something special about the case: the objection to a claim that needs to be made, the adversary, the dischargeability claim?

PROFESSOR GROSS: What about the appeal?

JUDGE MUND: The appeal, so you really got your two different things. This week the governor of California signed the Bankruptcy Petition Preparer Act, which is going to require non-attorneys who prepare bankruptcy petitions and any documents to be filed in a bankruptcy court, which would include, I assume motions and everything else, to be bonded and to be licensed. It requires that they give certain copies of documents to people, that there be certain disclosures with certain point typesettings on them and it has criminal and civil penalties in it. We don't know how it is going to work.

Legal Aid does not provide any bankruptcy benefits in Los Angeles. They simply won't handle a bankruptcy case so there is nothing like that. Personally, I think that the bar has been over protective in terms of trying to deal with nonlawyers providing legal services. In Los Angeles, to file a Chapter 7 is minimally $700 to $1000 for attorney's fees. If you go to a lawyer, a Chapter 13 is $1500 to $2000. And the lawyers try to get it up front if they can. They will stretch it over time if they are forced.

People can't afford this. So if you don't give them a system of alternatives at a price that they can in fact afford, then they are simply going to make their own alternatives and their own alternatives are creating a massive burden.

I am one of the Chapter 13 judges. There are four of us in Los Angeles and I sit there with my Chapter 13 trustee at the confirmation hearings and there is a pro se debtor with a plan that needs a lot of work. In fact the Chapter 13 trustee has already worked with the debtor at the section 341(a) hearing, has probably had the debtor come up to the office to try to do some things, but there is more left to do before I have a confirmable plan.

And, I will say, "Ms. Dowell, can you handle this one" and she will say, "sure, here is my card, make an appointment, be sure to ask for me." And we'll continue it and they will come back and effectively they have gotten themselves an attorney. Her name is Edwina Dowell, Chapter 13 trustee. They have gotten themselves an attorney, but that is taking away time from all the other debtors who are in the

Chapter 13 system. The system itself is bearing the expense. I become the attorney in many of these cases, which is very uncomfortable for the judge.

JUDGE PASKAY: Should be.

JUDGE MUND: We're all suffering because low cost high quality services are not available.

JUDGE CLARK: Let me ask a question here. Professor Kosel, in light of the new law in California, what happens to your book?[35]

PROFESSOR KOSEL: Actually my book is out of print now so nothing happens. Under the new law I would not be considered a bankruptcy preparer. In effect, what the book does is provide general advice for a lay person about bankruptcy and bankruptcy alternatives. Because it is not specifically related to any particular individual's problem, I do not think it would be covered by the new law.

PROFESSOR GROSS: Actually, your book contains sample forms.

PROFESSOR KOSEL: That's right

PROFESSOR GROSS: It has the forms filled in; there are various examples.

JUDGE MUND: But, that would not be covered. This is for human beings that are actually sitting and meeting with somebody. It would not be covered in the new law.

One of the things that we have done in the Central District to try to deal with the large pro se filings is we have our forms project. With our United States Trustee we have prepared some twenty or thirty different forms for everything from filing an unlawful detainer relief from stay, to answering such a motion, to a relief from stay in a real property case, to relief from stay in a personal property case. You just check the boxes. We sell the forms in court and they are sold at the local bookstores.

PROFESSOR GROSS: You sell them; how much do they cost?

JUDGE MUND: One dollar per form.

JUDGE CLARK: Well, do not wait for it to happen in the Western District of Texas.

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[35] *See* JANICE KOSEL, CHAPTER 13: THE FEDERAL PLAN TO REPAY YOUR DEBTS (1984).

JUDGE MUND: They are not required to use these. These are not mandatory but they are available. If you get 100 motions for relief from stay that you are hearing at 9:00 A.M. and another hundred at 10:00, it is a lot easier if they come in on a form than if somebody has to work his way through each individualized motion.

We have forms for motions to avoid liens. There is quite a long list of these things. This is what you have to do when you are dealing with pro se debtors and if you want to make it user friendly. It's a way to make it a little more user friendly.

JUDGE CLARK: Is that what we're about?

JUDGE PASKAY: Yes, you have to be a friendly user.

PROFESSOR GROSS: One of the things that strikes me is it is not at all infrequent in Chapter 11 cases for a judge who notices that one side is very ably represented and the other side having trouble to step in and try to help out the lawyer that is not doing very well. I have seen it done. I appreciate all the judges on this panel saying, "That is not my job." But, it does happen. Helping to level out the playing field so that both sides get their opportunity and one side is not harmed because of a poor lawyer is acceptable. If that is acceptable from a judge in a Chapter 11 case, why is it unacceptable suddenly in a pro se case?

JUDGE PASKAY: Is that acceptable in Chapter 11?

JUDGE MUND: No, but it happens.

JUDGE PASKAY: People rob banks, it happens, but it does not make it right.

JUDGE MUND: More often than not the judge is trying to protect the client from his own attorney.

PROFESSOR GROSS: Yes.

JUDGE MUND: And more often than not I have said to the client, "your attorney is incompetent, get somebody else." You do feel an obligation to try to protect the parties and not the attorneys involved, but it's very uncomfortable for the judge. We do it, at least I do it, but I don't do it willingly and I do it with great embarrassment and a great deal of discomfort.

MR. ELSAESSER: But, we missed the initial question—the LA experience—the unlawful detainer situation.[36] Isn't that an abuse right from the start and shouldn't there be something—instead of them having to design forms and sell them for a buck a form in the bookstores, shouldn't there be some legislative help.[37] What unlawful detainer situation or landlord-tenant situation would not be an abuse?[38] They are doing it because they can tie up the state court system and the bankruptcy system at the same time, they force the landlord to spend $2000, $3000, $4000 for legal assistance that they shouldn't have to spend and a lot of these landlords are very poor themselves.

JUDGE MUND: They come in themselves.

MR. ELSAESSER: Half of the landlords in some districts are pro se themselves and then the courts have to do the lawyering for both sides.

JUDGE CLARK: An argument that could be made in favor of—I say an argument that could be made, as a practical matter, Congress may be changing this rule anyway. Congress is talking about raising the filing fees all across the board. In fact, Congress will raise the filing fees all across the board for all chapters. That of itself will chase some of these pro se folks away from the system, won't it.

MR. ELSAESSER: A thousand dollars a month for rent.

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[36] *See, e.g.*, Marquand v. Smith (*In re* Smith), 105 B.R. 50, 50-51 (Bankr. C.D. Cal. 1989). In *Marquand*, the debtor failed to pay the monthly rent to the landlord, who subsequently filed a complaint for unlawful detainer. *Id.* at 51. The landlord obtained a judgment to regain possession, but prior to enforcement, the debtor filed for Chapter 7 relief. *Id.* Judge Vincent P. Zurzolo indicated that this was one of many cases "filed solely for the purpose of staying enforcement of unlawful detainer." *Id.*

[37] In *Marquand*, Judge Zurzolo, after holding that the Stay does not preclude a landlord from repossessing the premises, concluded that:

> This opinion may be viewed by some as judicial legislation. I observe that this abuse of the bankruptcy court system has been communicated to Congress. Congress has failed to address the problem, perhaps because landlords of residential real property do not have as loud a lobbying voice as commercial landlords who have been able to effect large and significant revisions in the Bankruptcy Code in order to protect their interests.
>
> I further observe that this opinion will have absolutely no effect on this problem unless residential landlords, and the attorneys who represent them, call it to the attention of the state courts that issue unlawful detainer judgements and convince those state courts to order the proper state law enforcement officials to evict debtor/tenants without first requiring residential landlords to obtain relief from the Stay. If this chain of events results, there is a chance that this widespread and daily abuse of the Bankruptcy Court system and the shameless defrauding of thousands of tenant victims will cease.

Id. at 55-56 (citation omitted) (footnote omitted).

[38] *See id.* at 51. A majority of the more than 39,000 Chapter 7 bankruptcy cases filed every year in the Central District of California are filed in order to delay the landlord from evicting a debtor/tenant from residential premises under an unlawful detainer action. *Id.*

JUDGE MUND: You are talking about a city where rent for an apartment the size of this room is $500 a month.

JUDGE CLARK: Well, then I take it back.

MR. ELSAESSER: They can get $5000 worth of rent.

JUDGE PASKAY: Easy five, six months.

MR. ELSAESSER: In exchange for the filing fee plus whatever they pay the service.

JUDGE PASKAY: It is my understanding, correct me if I am wrong, that experience is unique to LA?

JUDGE MUND: We don't know. All I know is that we have a bankruptcy fraud task force which is comprised of one Assistant United States Attorney, two attorneys in the United States Trustee's Office and some investigators that are working on it. They say that they are finding this in other places but they are finding it more in the foreclosure areas than the eviction areas.

JUDGE PASKAY: That's true.

JUDGE MUND: The same thing has happened. Consumers are being solicited effectively by these legal assistants; "we can stop the foreclosure, we can give you an extra four to six months, no mortgage payments, no this, no that, no anything."

JUDGE CLARK: Is that an abuse?

JUDGE MUND: It depends. It depends upon whether it is merely to stop everything with no hope of being able to solve the problem.

As Mr. Elsaesser was saying in passing a long time ago, it is a disservice to the debtor also because one of the things that we find in this case, and you are going to find the same thing in the foreclosure situation, is that people are promised time and they think tomorrow will never come and tomorrow does come. One day the marshall comes out to evict, be it from the home that they have lived in for thirty years or from the apartment that they lived in for one month, they are not prepared. They place their money into somebody else's pocket that is taking it out of the system and it has burdened the system and the debtor ends up on the street.

The other thing that is happening is that in many cases there are actual defenses prior to eviction or foreclosure.

JUDGE PASKAY: I would not put the two together. Foreclosure is ownership interest; landlord-tenant there is none.

JUDGE MUND: There are actual defenses that should be brought forward. If an attorney was involved or somebody trained to find these things, they could be brought forward when the debtor has legal rights that they should be pursuing.

And, what is happening is, as was said before, they don't even know a bankruptcy has been filed. They are being told, "we'll file a federal action on your behalf." They never get the legal advice or when they get to it, it is too late.[39] And people are being badly damaged in the bad faith situations as well.

So, I don't think that we can simply ignore them and say well, they are getting what they deserve. It is not true, they are being taken advantage of.

MR. KLEIN: A couple of points: First, I do think it is troubling to generalize an awful lot from the California experience. I do not think that these problems have the same dimensions across the country. Second, I worry that the system's problem with sham petition preparers and bad bankruptcy lawyers will be resolved in a way that keeps poor people out of the bankruptcy court. The scams are a symptom of a real problem; legitimate debtors cannot afford either the filing fee or the attorney's fee and they turn to petition preparers because it is the only option they really have. Third, what we really need to do is look at the petition preparers and look at bad bankruptcy lawyers and try to find very directed remedies that improve the practice or put them out of business.

MR. ELSAESSER: What would those remedies be besides sanctions from the judge or action by the U.S. Trustee or some sort of Justice Department task force? I mean, state law or bar association.[40]

JUDGE PASKAY: Forget about that.

MR. ELSAESSER: Neither of those things will ever happen in our lifetime.

MR. KLEIN: Actually I am not convinced that that is right. You know, I go around the country talking to bankruptcy lawyers and every one always complains about petition preparers in their jurisdiction. My response is always that the tools are in place to do something about the problem, you have unfair trade practice laws.

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[39] *See* Susan D. Kovac, *Judgement-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675, 682 (consumer debtors who contact attorney are usually not advised as to their full range of options).

[40] *See* Rhode, *supra* note 7, at 45 (noting many states have made unauthorized practice of law a misdemeanor or contempt of court).

There was a very successful case that I was involved in in Philadelphia attacking petition preparers and we got a half million dollar judgment against them and effectively put them out of business—we collected most of the judgment too, by the way, as well as costs and fees.[41]

There also are opportunities to go to the judge on behalf of individual clients and have fees revoked.[42] I think that's a particularly good remedy as to the lawyers who are out there and not doing a very good job for their clients.

The problem is that somebody needs to go in and actively police the system. I think the bankruptcy bar has a responsibility to do that.[43] Bankruptcy lawyers see clients all the time who have been through a bankruptcy that didn't work for them, clients come in for a second bankruptcy or they come in for a debt collection problem and it is painfully obvious that the first case was improperly prepared. When those cases walk in the door, good bankruptcy lawyers should pursue remedies on their behalf.

I am as concerned as Judge Mund about the whole problem of people being abused by petition preparers and bad bankruptcy lawyers but I don't think the answer is to do anything that would effectively punish them or create new barriers to the courthouse.

JUDGE MUND: But for the automatic stay including month-to-month tenancies and tenancies at will, clearly there would be no incentive to filing, since it would not stop eviction. But Congress has been unwilling to act on this.

The bad player thing, we cannot control that through any means at all because they are not there, they are gone, they are history.[44] They already are committing fraud on everybody. What happens is that these debtors, many of whom do not speak English and are illegal or both,[45] are not about to go to law enforcement. If we find out that they went to ABC Tenant Services, which is on this corner and that they talked to Chuck, when we go to find ABC Tenant Services, they are gone

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[41] Fleet v. United States Consumer Council, Inc. (*In re* Fleet), 95 B.R. 319, 340 (E.D. Pa. 1989).

[42] *See, e.g.*, *In re* Evans, 153 B.R. 960, 970-72 (Bankr. E.D. Pa. 1993) (limiting amount petition preparer could charge for services and requiring company to refund fees in excess of amount stipulated by court); *In re* Calzadilla, 151 B.R. 622, 628 (Bankr. S.D. Fla. 1993) (requiring typing service engaged in unauthorized practice of law to return $355 to debtor).

[43] *See Fleet*, 95 B.R. at 338 (concluding that "11 U.S.C. § 329 provides this court with alternative, plenary authority to regulate, enjoin, and impose monetary sanctions against lay persons as attorneys who bilk debtors . . . .").

[44] Michael Connelly, *Petition Mills Dupe Many into False Bankruptcies*, L.A. TIMES, May 8, 1989, at 1. Petition mill operators often move their business or change the name of the service when threatened by law enforcement. *Id.*

[45] The victims of the petition mills are often immigrants with a poor understandings of the English language and sometimes do not understand the legal ramifications of bankruptcy or even know that they are declaring bankruptcy. *Id.*; *see also* Stephanie O'Neill, *Tenants from Hell*, L.A. TIMES, Aug. 8, 1993, at K1 (noting that many debtors do not speak English and may have had legitimate defenses that would help avoid bankruptcy).

and across the street is BCD Tenant Services and gee, there is no one here named Chuck.

JUDGE PASKAY: They don't even know Chuck.

JUDGE MUND: That's right, so we have some serious problems, which may be unique to Los Angeles and may not. I have to tell you, there is too much money involved here for it to stay within southern California.

JUDGE CLARK: I don't think it has.

JUDGE MUND: You are talking millions of dollars, millions of dollars.

MR. OLSON: In San Antonio we have had three large and two small volume services try the same thing. Fortunately, we have been able to find them and get them before the court and have them barred from continuing the practices. In addition, these services have been ordered to repay the money they have taken from debtors.

Nevertheless, this practice is spreading. Some of the services we have had in San Antonio started in Dallas and Fort Worth and we know that one of the services did business in Houston. Unfortunately, it appears that these services will continue to be a big problem until there is something done to try to stop them.

MR. KLEIN: I think Senate Bill 540,[46] when it is passed will be a big piece of that, by creating some additional disclosure requirements and remedies against petition preparers.

JUDGE MUND: That will help us to identify the preparers.

JUDGE PASKAY: They have to disclose what they charge, what they have done, but I put one out of business so successfully that he himself filed a Chapter 7.

MR. KLEIN: There you go. Good work. That's another illustration that it can be done even without changes in the law.

JUDGE MUND: I think we have identified 120 of them in Los Angeles. I mean, you are not talking twelve or eight, you are talking one Assistant United States Attorney, who is going to handle these things. We don't have the resources.

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[46] S. 540, 103rd Cong., 1st Sess. (1993) ("Bankruptcy Amendments Act of 1993," Section 304, "Bankruptcy Petition Preparers").

PROFESSOR GROSS: Suppose you do eliminate all of those preparers.

JUDGE MUND: Of the bad ones.

PROFESSOR GROSS: Now what do you do? Assume that you get rid of all the bad preparers—the ones who lie to the debtors, the ones who file papers for the debtors and the debtors have no idea what is happening. Now, what is left? You have a group of debtors entitled to exercise, in my judgment, their rights under our bankruptcy system and no opportunity to do it. Now, how are they going to make it in the system unless Gary Klein goes around the country and divides himself into eight hundred thousand little pieces.

JUDGE CLARK: Or unless Janice makes sure her book is available nationwide.

JUDGE MUND: I want the good paralegals—I happen to think that there is a place in our system for nonlawyers to be assisting people. In many states, lawyers do everything involved with the purchase and sale of real property. When you are going to buy a house, you get a lawyer. The lawyer looks at the documents, goes to the closing, and makes sure you sign all the papers.

We don't use lawyers for that in California; we use real estate brokers. They are nonlawyers who are licensed.[47] There are educational requirements. They have to pass an examination. They have to serve an apprenticeship and I doubt that we have more problems in real estate transactions than any other state. But the lawyers are not in that business anymore.

MR. ELSAESSER: To answer Professor Gross's question, and Mr. Klein and Professor Kosel will be better to speak on it, there is no reason why a competent filing service, lawyer supervised, in any population area couldn't make a good profit doing it the right way if the bad guys were off the street. There is no way you could not make money at $200, $300 a case with the lawyer's overall supervision. In other words, something akin to Judge Paskay's example but done

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[47] *See* Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 214 N.E.2d 771 (Ill. 1966) (permitting filling in of blanks by real estate brokerage firms on standard form preliminary contracts). Since *Chicago Bar Ass'n*, real-estate brokers have been recognized as an efficient and cost-effective means of effectuating real-estate transactions. *See* Andrea F. Lowenfield, *Book Review: Foreign Investment in the United States*, 76 AM. J. INT'L L. 441 (1982) (reviewing BRUCE ZAGARIS, FOREIGN INVESTMENT IN THE UNITED STATES (1981)). "A real estate broker is an individual who not only finds property, but also negotiates on behalf of one or more of the parties. In most states an individual is not authorized to act as a real estate broker without a license from a state in which he or she does business." *Id.* at 443. While courts have permitted a more expansive role of real-estate agents, they have also identified accompanying liability. *See* Brown v. Coates, 253 F.2d 36, 41 (D.C. Cir. 1957) (affirming award of punitive damages against real estate broker for fraud); Menzel v. Morse, 362 N.W.2d 465, 472-74 (Iowa 1985) (holding high ethical standard is appropriate for real estate brokers because of licensing requirements).

properly could make a good profit and charge a reasonable amount which would be in the $200 to $300 range.

JUDGE PASKAY: Except in Florida, paralegals have to be certified. They have to have courses, educational requirements and they have to be certified.

JUDGE BRISKMAN: They deal with the public without being supervised by a lawyer.

JUDGE PASKAY: Yes.

JUDGE BRISKMAN: A paralegal can.

JUDGE PASKAY: Yes.

MR. KLEIN: It sounds like we have decided that this is not an unremediable problem. There are three things we can do to solve the problem: First, create ways to make people accountable. I believe Senate Bill 540 is a big piece of that.

Second, create some enforcement mechanism. There may be a problem in some parts of the country that U.S. Attorneys don't want to get involved. I think we have to do something to turn that around. Threats of criminal prosecution together with civil enforcement by the bankruptcy bar would do wonders.

Third, we need to create an alternative for people so that they don't need the petition preparers, because they have some other service that works better for them.

II. IN FORMA PAUPERIS

JUDGE CLARK: As long as we're talking about access to the system, legitimate access to the system,[48] for persons who cannot afford high priced lawyers, let us talk about the problem of in forma pauperis ("IFP").[49]

On October 27, 1993, the President signed into law a bill that provides for a study of whether filing fees in bankruptcy should be waived. The bill mandates that

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[48] A nationwide survey of legal needs performed in 1989 by the American Bar Association revealed that there were 29 million civil problems (including bankruptcies) in 1987 for which there was no legal assistance. *Poor's Legal Needs not Being Met: Increased Funding Needed for Legal Services Corporation, American Bar Association Says*, PR Newswire, Apr. 19, 1990, *available in* LEXIS, News Library, PRNEWS File.

[49] *See generally* United States v. Kras, 409 U.S. 434 (1973) (holding that due process does not require a waiver of filing fees for indigents seeking discharge).

a three year pilot program be established in which fee waivers will be provided for individual debtors who file for Chapter 7.[50]

JUDGE PASKAY: IFP creates a tremendous problem for the courts and I hate to see it because you will have to have in most districts, as in Los Angeles, a judge who does nothing but peruse and pass on the IFP application and nothing else.

MR. KLEIN: In forma pauperis is in almost every nonbankruptcy court in the country; courts learn how to deal with them efficiently.

JUDGE PASKAY: The district court doesn't have ten thousand cases filed a month.

MR. KLEIN: There are state court systems that have ten times as many.

JUDGE CLARK: Is it quite the same, however? There are very few systems, state or federal, that have both the volume and the power of the Bankruptcy Code. As long as there is an Automatic Stay, there is a free injunction. If there is no filing fee it is truly a free injunction. That is a very valuable thing and they don't have that in the state court system.

MR. KLEIN: My understanding is that the intention is to create some experimental standards that would be self-policing. For example, a debtor would be allowed to file in forma pauperis only if the attorney fell below some income threshold and only if no attorney fee or petition preparer fee is paid. A form certification could easily be drawn up. Judges will not have to review each certification. I think the bankruptcy court is a good forum for a self-policing system, because there are a whole set of schedules filed. People are going to be examining the debtor's finances. If the debtor committed fraud in getting the IFP relief, someone will notice. Creditors are going to have an incentive to look for fraud and report it.

PROFESSOR GROSS: With all due respect to Judge Paskay, it seems to me that to make the judgment we should have no in forma pauperis because it will lead to a large number of cases and create an administrative nightmare is not a justifiable reason for denying people access to the legal system. What that response tells me

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[50] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, § 111(d)(3), 107 Stat. 1153 (1993). The act provides that:

> [T]he Judicial Conference of the United States shall carry out in not more than six judicial districts . . . a program under which fees payable under section 1930 of title 28, United States Code, may be waived in cases under chapter 7 of title 11, United States Code, for debtors who are individuals unable to pay such fees in installments.

Id.

is that we have got to find a way to make the system work for the potential influx. No one knows how big the influx of new filings will be. What it also suggests to me is that if we are finally going forward with in forma pauperis, people should have the opportunity to access that system whether bankruptcy is a right or a privilege. That point was made by Justice Thurgood Marshall.[51] He also stated, the denial of that right, even for one person, is enough to warrant filings in forma pauperis.[52] Therefore, I am not convinced that form should govern substance.

JUDGE PASKAY: Professor Gross, I fully agree with you to the extent that I would be delighted to have 50,000 in forma pauperis filed in one month if they will give me 30,000 clerks and one or two extra judges to look at it.

JUDGE CLARK: And enough of a budget to fund it all.

JUDGE PASKAY: That would be just fine, I won't worry about it.

MR. ELSAESSER: Professor Gross or Mr. Klein, when would it arise that a person would not have exempt property that could create $160 and need the relief—what judgment-proof person would be in that circumstance? I would be afraid that what you would have are people who would file who do not need it and are using up their one shot in six or seven years to get the discharge.

MR. KLEIN: The answer for me is no different than looking at divorce or any other legal system we have. There are people who are poor and they are just as entitled to the relief that is available in the courts as anyone else. Everyone should be entitled to make their own decision; the determining factor shouldn't be whether that person is rich or poor. No one would seriously argue that we shouldn't have in forma pauperis divorce because poor people might make the wrong choice about splitting up their family.

JUDGE BRISKMAN: That's not the point. We may be encouraging people that it's the appropriate relief.

MR. ELSAESSER: If you are going to have people filing if they have no exempt property that they can't convert to at least $160, what purpose is being served by the filing, for them, what benefit?

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[51] United States v. Kras, 409 U.S. 434, 461-63 (1973) (Marshall, J., dissenting). *See also* Karen Gross, *Justice Thurgood Marshall's Bankruptcy Jurisprudence: A Tribute*, 67 AM. BANKR. L.J. 447, 465 (1993) ("[T]he discharge is a legislatively—not constitutionally—created benefit.").

[52] *Kras*, 409 U.S. at 463 (Marshall, J., dissenting).

PROFESSOR KOSEL: You probably will not have as many in forma pauperis petitions as you are expecting. If people don't have a filing fee they are generally not selecting bankruptcy as the option for them because they don't have anything to protect.

MR. KLEIN: I agree with that. I can give you some examples that are fairly compelling. Take, for example, people with AIDS, who may be judgment-proof and are using all of their income (because we don't have a whole lot of support systems) to pay for medications, housing, and all their other needs. If they would like to get relief from debts that they can no longer afford to pay, why is it that they should be kept out of the system entirely? These people are my clients and I can't get them through the courthouse door.

MR. ELSAESSER: But, if they have the income to pay for medication and housing, they are probably not going to meet the IFP standards; are they?

PROFESSOR GROSS: I have to turn to Justice Thurgood Marshall's statement. "It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are."[53] I can think of a number of people who would not be able to pay the filing fee that could benefit from bankruptcy. Let me give you one example.

JUDGE PASKAY: What do they need the relief for?

JUDGE CLARK: Discharge.

PROFESSOR GROSS: In addition to the general discharge and fresh start, in certain areas of the country, the public utilities shut off their service unlawfully. A debtor can go into bankruptcy and get the utility turned on.[54] It is not insignificant to lose light and heat in the middle of the winter.

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[53] *Id.* at 460 (Marshall, J., dissenting).

[54] *See, e.g.*, Whittaker v. Philadelphia Elec. Co., 92 B.R. 110 (E.D. Pa. 1988) (holding that section 366 of Bankruptcy Code protects debtor's right to restoration of utility service when it has been denied solely because debtor filed bankruptcy or had pre-petition debt), *aff'd*, 882 F.2d 791 (3d Cir. 1989).

MR. ELSAESSER: A debtor would never get a section 366[55] order from a judge without an attorney in most districts because the debtor would not have the skills to obtain it.[56]

JUDGE CLARK: A section 366 order, that is the order that has to do with setting utility deposits.[57]

MR. KLEIN: In many jurisdictions, there is no requirement of a deposit—I think it varies very much from place to place—no requirements for a deposit because the utilities don't ask for them.

JUDGE MUND: You are asking for abuse, you are making incentive for abuse. Now you can come in totally free. Many of our abusive filers do not want to pay the filing fee. Paying it in installments means not paying it at all because by the time the first installation is due, the case has already been dismissed or a relief from stay has been granted. So, they are not going to pay it anyway.

We have had to put in a system to work around Bankruptcy Rule 1006 so that they can't get their case number and stop the eviction before we have a chance to look at the bona fides of the filing, which is probably the same system that would be used in forma pauperis in many ways.

The problem is that it is staff and judge intensive to look at these. The figures that I have seen on in forma pauperis are predicting huge numbers of applications and we're at 79 percent staffing in the clerk's office and in some courts well below that because of the hiring freeze.

JUDGE CLARK: This is a really interesting crunch because this last round on the budget, one of the reasons for raising the filing fees was to help cover the staffing costs of the additional judgeships that are needed to respond to the increase in bankruptcy filings in places like the Central District of California. This is a rubber band that stretches to the point of breaking.

JUDGE MUND: The problem I have is that there is only one of me and if I am spending even an hour a day—five hours a week, which is minimal—dealing with in forma pauperis petitions, there is still only one of me and that's five hours a week that I am not hearing Chapter 11s, Chapter 13s, and all the other things that I am required to hear.

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[55] 11 U.S.C. § 366 (1988). Section 366(b) provides that a "utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date." *Id.*

[56] *But see* Whittaker v. Philadelphia Elec. Co. (*In re* Whittaker), 84 B.R. 934, 943-44 (Bankr. E.D. Pa.) (pro se debtor received remedy under § 366), *aff'd*, 92 B.R. 110 (E.D. Pa. 1988), *aff'd*, 882 F.2d 791 (3d Cir. 1989).

[57] *See supra* note 55 and accompanying text.

MR. KLEIN: Then we need to set up a system in which the judge is not required to rule on every application. I also agree with what Professor Kosel said earlier—I really suspect there are going to be many fewer filings than people expect. We're talking about this as a demonstration project.

JUDGE CLARK: It's proposed on a pilot basis and I think that's sensible.

MR. OLSON: I cannot imagine that it would be available in Chapter 13 cases. The debtor has to show that he has enough income over expenses to pay a plan payment so hopefully it won't go that far and I won't have to deal with it. I do not think it would be right.

I have never had a Chapter 13 debtor who could not pay his filing fees in installments propose a plan. But, I also believe, and you touched on it, Judge Mund, that it is going to create a new round of abusive filings and a new round of these types of services we have identified as the bad guys out there. They are going to be able to tell prospective debtors that now they can file without even having to pay a filing fee. These services will tell debtors to pay them and lie on their petitions concerning their ability to pay the filing fee.

MR. ELSAESSER: I think more poor people are ripped off by filing bankruptcy when they shouldn't—as opposed to waiting until they have something to protect—than there are poor people that are being kept out of the system by the filing fee. I see, as a panel trustee, people discharging $1000 or $2000 in debt. They have wasted their time and effort. They have been foolishly advised by friends and family. This is going to increase. That's the problem you have in bankruptcy court, not the other way around when they are being denied access.

MR. KLEIN: We're crossing over issues here. It seems to me that you don't take those poor people who have been abused by bad advice and use them as an excuse to keep all poor people out of the system. One thing has nothing to do with the other.

MR. ELSAESSER: They are not abusing the system, they are abusing themselves because they are getting a discharge they don't need.

MR. KLEIN: That's too paternalistic. They should still have the opportunity for access. I hope they would get good counseling to help them make the right choice.

JUDGE CLARK: We don't have nearly enough time to explore all the issues that we would like to explore here. There were a number of other things that I would have liked to have discussed. We really have not had a chance to explore the parameters of Chapter 13. For example, I know that Mr. Olson has one of the

two or three programs in the country that is doing a credit restoration or a credit re-establishment program, a very interesting program.[58] There are a lot of issues that we haven't had a chance to explore but I guess what this demonstrates more than anything else is that if people think that consumer bankruptcy law is quiet and tame and not very interesting compared to Chapter 11, they just haven't taken a close enough look. Thank you all.

[58] *See infra* Appendix B, at 35.

APPENDIX A

The following is a sample Bankruptcy Rule 2016 form, which is based on an actual form filed in Chief Judge Alexander L. Paskay's Chambers:

United States Bankruptcy Court

In re John Doe,	)	Case No. 93-12345
Debtor	)	
	)	

BANKRUPTCY RULE 2016 STATEMENT

The undersigned attorney, John Smith, is retained by Dolittle & Stahl and Telhum Little & Blufum, paralegal companies located at 1234 Main Street, Ocean City, Utopia. My basic responsibility is to review the documents that the customers of these two companies will file in one or the other of these two types of cases:

1) Individual Chapter 7 Bankruptcy; and
2) Uncontested Petitions for Dissolution of Marriage.

I receive five hundred dollars ($500) per week from Dolittle & Stahl and Telhum Little & Blufum for my services.

John Doe, the debtor in this instant case, is one of numerous debtors whose court papers I review in the course of my work for these two companies. I have received no compensation from this debtor and shall receive none from him in the future.

Date:_____ Signature:_____

APPENDIX B

The Texas Debtor Rehabilitation/Credit Re-establishment Program

A program is now available through some Chapter 13 Trustee offices to assist former debtors and interested creditors in the renewed credit process. The Debtor Rehabilitation Credit Re-establishment Program is really a very simple concept. It is a program whereby creditors in a community, whether they be national, regional or local credit grantors, commit to consider granting credit to former Chapter 13 debtors who have completed their plans without holding these debtors' prior credit history or the Chapter 13 filing against them. In other words, the credit grantors are considering these former debtors for loans as if they have no blemishes on their credit record. To implement this program, there must be a person in the Chapter 13 Trustee's office to act as a liaison between former debtors who need reasonable amounts of credit, and credit grantors who have agreed to participate in this program. In addition to helping former debtors receive reasonable amounts of credit, the liaison person tries to help these debtors understand whether or not they will be able to repay their new debts through consumer debtor educational programs. In San Antonio we have had a debtor's school for many years in which we teach credit management and budgeting skills, and inform consumers about the possible renewed credit opportunity available through the Credit Rehabilitation Program.

Chapter 13 Trustees have worked with national and local credit grantors for the past several years in an attempt to explain the benefits of Chapter 13 to them. We have tried and I think succeeded in explaining to creditors that a policy of rewarding Chapter 13 debtors who have completed their plans is in the creditors' best interest. The growing support of creditors for the Credit Re-establishment programs which have been initiated shows that our efforts to explain the need to reward the successful Chapter 13 debtor have been successful. The first Chapter 13 Trustee who attempted to correct this problem on a local level is Mr. Frank Pees, the Chapter 13 Trustee in Columbus, Ohio. The Columbus program is the model we used in San Antonio and in the other areas of Texas where credit re-establishment has been implemented. The Ohio program began as an Ad Hoc Creditor Committee which held many meetings resulting in a formalized system wherein creditors agreed to screen credit applications from Chapter 13 debtors who had successfully completed plans without holding prior credit history or the Chapter 13 filing against those debtors.

Initiated in 1986, the Columbus program has proven highly successful. From 1986 to the present, former Chapter 13 debtors in Frank Pees's district have received approximately 23 million dollars in new loans and the default rate is far less than one percent. Much of this credit has been granted to debtors who have completed one hundred percent, or at least, high percentage, payout plans,

encouraging the use of this type of plan in Columbus. It was the success of the Ohio program and a feeling that San Antonio debtors deserved this Credit Re-establishment Program that made me decide to initiate the second Credit Re-establishment Program about four years ago. Although a few loans were made in the fall of 1989, our program really began in January of 1990. During the past four years, we have assisted many former Chapter 13 debtors with successfully completed plans through the Program. These debtors have obtained 856 loans totalling 7.2 million dollars and the default rate on these loans is also far less than one percent. Additionally, the ratio of Chapter 13s to Chapter 7s in Frank Pees' and my district have increased significantly. In San Antonio in 1986, one out of every four consumer bankruptcy filings was a Chapter 13 case, and the other three were Chapter 7s. Today about 53% of the consumer bankruptcy filings in San Antonio are Chapter 13 cases. This significant shift toward Chapter 13 has occurred in a relatively short period of time.

When the success of these programs became common knowledge in the credit granting community, many credit grantors started contacting Mr. Pees and my offices about developing the program in other cities. About 2 years ago the Texas Retail Credit Executives Group (TRCEG) invited Chapter 13 Trustees Tim Truman (Dallas), Bill Heitkamp and Dan O'Connell (Houston), and me to a meeting in Austin. At the meeting, this group proposed to sponsor and promote a Credit Re-establishment Program in every Texas Trustee's office. After considering this group's offer, all of the active Chapter 13 Trustees in Texas agreed to implement local programs, which combined effort we call the "Texas Experiment." This program is coordinated somewhat through the San Antonio office where we have assisted the Trustees in other parts of the state in the development of their own Credit Re-establishment Programs. To date there are 25 statewide creditors who have signed up for or joined the Texas Experiment specifically and many others that are joining the local programs in individual cities. Texas Trustee programs are in different stages of development but do exist in San Antonio, Austin, Corpus Christi, Dallas/Ft. Worth, Abilene, Amarillo, San Angelo, Lubbock, Houston, and El Paso.

One of the important goals of the Texas Experiment is to insure that accurate Chapter 13 plan data is given to credit reporting agencies so that creditors across the state can get a true picture of what has happened in an individual debtor's Chapter 13 case. Specifically, the credit grantors need to know that the bankruptcy filing was a Chapter 13 instead of a Chapter 7, whether the Chapter 13 plan was completed and the ultimate percentage of debt paid by the Chapter 13 debtor to his unsecured creditors. It is becoming increasingly important since there are more and more creditors who have been educated about the benefits of Chapter 13 completions and the rewards they need to give a Chapter 13 debtor who has successfully completed his plan. Currently, TransUnion, TRW, and Equifax are in the process of developing a program to reflect what has specifically happened in a Chapter 13 debtor's case.