National Bankruptcy Conference History 1927-2021

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"*The more things change the more they remain the same*". That was true in 1843 when first written by Alphone Samuel-Adams Solomon and equally true in a slightly different version of the sentence in Richard Condon's 1974 novel "Winter Kills". It was also true in 1927 when a Detroit Bankruptcy "Referee" Paul King started thinking about deficiencies in bankruptcy administration in the United States, and in 1932-1933 when the Great Depression gave momentum to small, private working groups of lawyers, judges, Congressional members, and credit representatives who had concluded that the United States needed a comprehensive national bankruptcy system. And it remained true in 1971-1978 when the political system

coalesced on an expanded system and reform of substantive law that resulted in the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code.

THE EARLY YEARS 1927-1938

The National Bankruptcy Conference members were instrumental in the passage of The Chandler Act of 1938 which was a major step forward in the establishment of a Federal system of Bankruptcy Administration and established procedures for adjusting the unsecured debts of businesses in what was then known as Chapter X (Reorganization of publicly held corporations), Chapter XI (arrangement of unsecured debts of businesses), Chapter XII (real estate reorganizations) and Chapter XIII (Wage Earner Plans). Members of the National Bankruptcy Conference conceived of and drafted the essential provisions of much of that legislation,

and the subsequently enacted 1970s Non-Dischargeability provisions which, for most commercial debts, required creditors to assert their non-dischargeability claims in the Bankruptcy Court or waive them.

The formation of The National Bankruptcy Conference as an institution can be traced to a meeting of a few individuals in 1927 organized by a Detroit Bankruptcy Referee in Bankruptcy, Paul King. That initial meeting was followed by more informal meetings, "on their own nickel", to see if the working group could devise some kind of federal system for the administration of bankruptcy proceedings to replace the myriad of haphazard federal and state insolvency procedures. Referee King, the Solicitor General of the United States James Thacher, Lloyd Garrison, soon to become Dean at Wisconsin, Professor James MacLachlan of Harvard, and Randolph Montgomery of the New York Credit Men's Association, constituted the core of this

informal group which continued to expand leading eventually to four Conferences in 1932-1933 in St. Louis, Washington, D.C., Harvard and finally in April of 1933, Northwestern Law School, culminating in a Report of the Conference's Drafting Committee (Professor MacLachlan, Chair) to be shared with Congress. Charles Horsky, who was Chair of The Conference in 1956, and again in the late 1970s, put it this way in discussing how the Conference Members conducted themselves during this process: "There is only one thing, I think, which members have in common—a sincere interest in having the best bankruptcy law and the best bankruptcy administration that can be had", a principle that governs our deliberations today. This Report of the Conference led to the passage of The Chandler Act of 1938, which remained as the foundation of our bankruptcy laws until 1978.

THE POST WAR YEARS—1956-1969

The period of 1938 to the late 1960s, was a period of relatively little public activity for the Conference but under the leadership of Chairs Charles Horsky (Covington and Burling) and Charles Seligson, the Conference experienced the rise of the influence of the Academics and the development of relations with Congress. George Treister (private practice and Professor at USC), Professor Vern Countryman (Yale and Harvard), Professor Frank Kennedy (Iowa and Michigan), Professor Charles Seligson (Rutgers and NYU) and Professor Lawrence P. King (NYU), continued to stimulate 60 or so lawyers, Referees and academics to suggest tinkering with the 1938 Chandler Act through private study groups of Conference members. As these Conferees, acting either alone or in informal small working groups, concluded American bankruptcy law was deficient in lacking a court structure (the Referees were simply special

master adjuncts of the United States District Courts), lacking a comprehensive Individual Debtor Bankruptcy Law, having cumbersome procedures for business bankruptcies, having no anti-forfeiture substantive law provisions and lacking any systematic way of treating the pervasive personal property security interests authorized by the new Article 9 of the Uniform Commercial Code. But, on the positive side, Professor Lawrence P. King established and nourished a relationship with Congress to the extent that almost no bankruptcy bill got out of Committee until Professor King and the Conference had a chance to opine on its merits.

The focus of the Conference during this period was on coordinating Article 9 of the UCC with bankruptcy law. The ease with which a creditor could obtain a pervasive security interest on all personal property of a debtor was being subjected to challenge under the bankruptcy laws avoiding powers, and members of the

Conference who were active in the formulation of the UCC, such as Peter Coogan of the Boston Bar, and the Conference's academics, worked on countless proposals to coordinate the two bodies of law. Rumblings of dissatisfaction with the Reorganization procedures of the 1938 Chandler Act led to studies that would bring over some of the powers of the Chapter X Reorganization Trustee to the Chapter XI Arrangement scheme in proposals under the heading of Chapter X ½.

During this same period, and still today, Membership in the Conference was by Invitation Only. Asked once by a prominent lawyer while walking on Michigan Avenue in Chicago "how do I go about getting in the Conference", a very prominent Conferee responded, "Don't do what you just did". Unlike today's Membership process, admission to the Conference was "ad hoc" and the Conference leadership relied on the wisdom

and character of the Conferees and the Leadership and The Executive Committee. The evening before the Conference began, over drinks and dinner, the Executive Committee considered new names and the next day the selections were approved by the Conference by voice vote. So long as potential Conferees had the support of their peers and could accept the principle of being able to "check your clients at the door" (Professor Charles Alan Wright's formulation for membership in the American Law Institute), Conferees were admitted, but limiting the total number to about 60.

MAJOR REFORM 1970-1978

No doubt the 1970s decade produced the most significant bankruptcy reforms in United States history. And the National Bankruptcy Conference members were all over the Reform process, whether in their private capacity or as members of the Conference. Two

developments in 1970 foreshadowed what was to come. At the urging of the Conference and Professor Countryman, in 1970 Congress enacted legislation requiring that most, but not all, issues of non-dischargeability litigation be brought in the bankruptcy "courts". Then, Senator Quentin Burdick of North Dakota, persuaded the Senate to pass a Resolution establishing the Commission on the Bankruptcy Laws of the United States to review and propose a comprehensive revision of that group of laws. The Chair of the Commission, Harold Marsh of Los Angeles, its Executive Director Professor Frank Kennedy and his second in command, Gerald Smith of Phoenix, as well as several consultants, were Members of the Conference. At about the same time The Supreme Court appointed several lawyers and Bankruptcy Referees to write The Rules of Bankruptcy Procedure and, again, Professors Frank Kennedy, Vern Countryman and Lawrence P. King, were Reporters and several

other Conferees were either members of the Rules Committee or informally participated in its work, including, notably, George Treister. The nascent "Rules Committee" was emboldened in the scope of its work by a Supreme Court decision in a non-bankruptcy case, *Hannah v. Plumber.* Under 28 USC section 2075, which established the power of the United States Supreme to promulgate Rules of Procedure, a Supreme Court Rule that was deemed "procedural" overruled statutory bankruptcy law and *Hannah* authorized the federal courts to have wide discretion in what was deemed "procedural". (The 1978 Bankruptcy Code changed section 2075 so that in matters of practice and procedure conflict bankruptcy statutory law trumped Bankruptcy Rules Provisions and that is why there are not many procedural provisions in the Code.)

Going "Big" the Rules Committee accepted two significant proposals of the National Bankruptcy Conference members. First, the new Bankruptcy Rules provided for an Automatic Stay of all enforcement actions against the Debtor, including state and federal litigation, unless the bankruptcy court vacated or modified the Stay, a concept included in the 1978 Bankruptcy Code without controversy. Second, in a nominal but very important change, the Rules changed the name of the Bankruptcy Referee to Bankruptcy Judge which had the effect of enhancing the prestige of the office and consequently the calibre of the bankruptcy judges themselves.

So, at the start of the 1970s Decade, there were several big Bankruptcy Ideas floating around. Providing for an independent bankruptcy court with jurisdiction of all aspects of bankruptcy cases, modernizing Consumer Reform, coordination with Article 9, simplifying

Business Reorganization Law and incorporating many anti-forfeiture provisions in a comprehensive Bankruptcy Law were ideas that gained considerable traction. Once the Commission submitted its Report to Congress, work began in earnest on all of these issues in a totally new Bankruptcy Code. At this time there was no American College of Bankruptcy, there was no American Bankruptcy Institute; there was the National Bankruptcy Conference, the National Conference of Bankruptcy Judges and two Congressional Committees, each with recent law school graduates Kenneth Klee of Harvard and Richard Levin of Yale. And any number of lawyers of the kind that worked on establishing a bankruptcy system in 1927-1933.

And it would be fair to say that the National Bankruptcy Conference and its 60 members were heavily involved in this work. There were competing bills in Congress, the Judges' and the Commission's bills, and Congressman Don

Edwards candidly told representatives of both parties that unless they could come to an agreement on one piece of legislation there would be no bankruptcy bill. There were conferences of interested parties at Harvard, Williamsburg, numerous meetings in Washington, D.C. and finally a small group of lawyers, judges and academics, all under the sponsorship of the National Bankruptcy Conference, convened in Atlanta in the late 1970s for the purpose of forging an agreement on the principles of a new bankruptcy law. And to the extent views collided, there would be no Majority and Minority Reports but personal views were to be modified to reach consensus. When that meeting opened the first words spoken were by a well-regarded bankruptcy judge from Kentucky, Joe Lee, and were directed to Professor Countryman, who in the past had advocated for an Administrative Agency to handle all bankruptcy proceedings. Judge Lee, turning to Professor Countryman,

said: *"Where is the Petition [declaring bankruptcy] to be filed?"* Those 6 words carried a lot of freight and the Chair of the meeting called a recess so that we could all have a cup of coffee. The issues generated by these words were the same that had consumed Referee King and his comrades in 1932. After much deliberation the group unanimously agreed that The Petition was to be filed with the Bankruptcy Court. In the Spring of 1976, the Chair of the Bankruptcy Conference and a representative of the Bankruptcy Judges sent a letter to Congressman Edwards setting forth a unanimous agreement on the basic principles of the new legislation. The resulting Bankruptcy Reform Act of 1978 was enacted by Congress and signed by President Carter, and the Bankruptcy Code became effective October 1, 1979.

POST 1978

There were many studies and conferences, and even a second Bankruptcy Commission (1996-1997), that studied how the 1978 Bankruptcy Code was working, and members of the Conference were instrumental in conducting this far reaching examination. First, in conjunction with a working group from the American Law Institute and American Bar Association (ALI-ABA), the NBC convened a Conference of over 200 interested parties at Williamsburg, Virginia to consider an NBC Working Group memorandum addressing what changes, if any, were suggested by 10 years' experience under the Code, the so-called NBC Code Review Project. Further work by the NBC and interested parties, led to another meeting of the NBC and some 100 invited guests at Atlanta, Georgia in June of 1993. Then Congress created another Commission to study the operation of the Bankruptcy Code. Its

Chair (after some shuffle) was Brady Williamson, an NBC member, and its Reporter was a Harvard Professor, Elizabeth Warren, also an NBC Member. The 1995 Bankruptcy Commission issued its Report about the same time as the NBC, in May 1997, issued its final report "Reforming The Bankruptcy Code". Congress, having a mind of its own, in 2005 generated creditor oriented amendments to the 1978 Bankruptcy Code.

A RICH HISTORY

Almost 100 years ago a Detroit Bankruptcy Referee conceived of the idea that it was possible for people of good will and a zest for changing an archaic, helter skelter United States insolvency system, and who were willing to check their clients at the door, could make a difference. And over a 94 year period, what these 4 or 5 people planted was the idea that a small body of the private sector could help

Congress reform an entire system. That working group led to the formation of the National Bankruptcy Conference, which has grown organically and continued its mission of assisting Congress in maintaining and enhancing our bankruptcy laws.

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Author's Note

In preparing the History of the National Bankruptcy Conference, I decided that it was not necessary to describe my own involvement in the Reform Movement of the 1970s. But, for historical perspective, in this Author's Note I am setting forth what I did. I had the privilege of serving as the Conference's Chair from 1996 to 2004, during which time the current Conference Chair served as Vice Chair.

I was an active participant in the Bankruptcy Reform Movement during the 1970s Decade. While Professors Kennedy, Countryman and L. King, and George Treister (and others too many to mention) were formulating the new Bankruptcy Rules for promulgation by The Supreme Court, I ran cross the Supreme Court's decision in *Hannah v. Plummer*, and called Treister, who was meeting with the Rules Committee in Washington, and thermofaxed a copy of the decision to him. Following the adoption of the Bankruptcy Rules by the Supreme Court, I, together with Leon Forman, Treister and others, conducted multiple Continuing Legal Education programs for ALI-ABA throughout the United States. When the Commission on Bankruptcy Laws was organized, I served as a Consultant writing memoranda, principally on business reorganization topics, that recommended changes such as elimination of the SEC's Role in Chapter X corporate reorganizations,

elimination of the mandatory appointment of a Trustee, and modifying and relaxing the Absolute Priority Rule. After the Commission filed its Report with Congress, I chaired a Conference (one of many) at Williamsburg, Virginia, of some 100 lawyers, academics and judges to examine the commission's recommendations. During the period from 1975 to 1978, when the National Bankruptcy Conference undertook a thorough discussion and analysis and was representing the Commission's Bill in Congress, I was an active participant in negotiating a resolution of the Competing Judges Bill and chaired the joint task force meeting in Atlanta that resolved those outstanding differences and so reported to Congress. Following passage of the 1978 Bankruptcy Code, I was involved in numerous ALI-ABA Continuing Education Programs on the new Bankruptcy Law. And over the next 10 years, I led the Conference's study of how the Bankruptcy Code was working, chaired two

additional Conferences on the subject, and organized a critical review of the 10 year old Bankruptcy Code. In this effort, I was joined by many others and but for their participation history of Bankruptcy Reform might have ended up much differently.

A brief note about President Carter's signing of the 1978 Bankruptcy Legislation. The President had not signed the bill and we were coming up on the pocket veto deadline. Around 11:00 p.m. P.S.T. on the last pocket veto day, I received a call from a former CEO of a client, and a close friend of Senator Dennis Diconcini of Arizona, one of the Senate Managers of the legislation, that President Carter had signed the bill. And at 3:00 a.m. E.S.T., I telephoned Professors Countryman, Kennedy and King along with Treister with the news. When I apologized to Professor Countryman for waking him up, he replied: "Are you kidding?"