BANKING ON THE MARGINS

BY K. DANIEL GLOVER

The current congressional debate over bankruptcy reform encompasses a classic American tug-of-war between creditors and debtors.

During the Senate debate in March, Sen. Jeff Sessions, R-Ala., spoke for creditors when he chastised debtors for using bankruptcy laws to avoid paying their bills. Sen. Richard Durbin, D-Ill., countered on behalf of "ordinary" Americans by blasting credit card companies for trying to "squeeze every last dollar out of decent, hardworking, play-by-the-rules people" who have been devastated by events like catastrophic illness, job loss, and divorce.

The pointed rhetoric no doubt sounds familiar to students of bankruptcy policy; such oratory is as old as the law itself. More precisely, the current debate harks back to the late 1800s, the era of the first long-term bankruptcy statute in U.S. history.

Bankruptcy is one of the few issues specifically mentioned in the Constitution, with Article I granting Congress the right to pass "uniform laws on the subject." But lawmakers were reluctant to seize that power. Economic upheaval, such as that created by the Panic of 1837 or the Civil War, sometimes moved them to act, but only for limited purposes and for brief times. Congress wrote bankruptcy acts in 1800, 1841, and 1867, only to repeal them in 1803, 1843, and 1878.

The tide began to shift in the 1880s. In his 2001 book, *Debt's Dominion: A History of Bankruptcy Law in America*, University of Pennsylvania law professor David Skeel attributed the change in part to the rise of trade associations. The National Convention of Boards of Trade and the National Convention of Representatives of Commercial Bodies were formed to lobby for bankruptcy legislation, and Jay Torrey, a St. Louis lawyer and the president of the latter group, became a driving force.

Yet even with merchant groups lobbying hard for a law, success took more than a decade to achieve. Modern-day proponents certainly are familiar with that problem: The financial services industry has been pushing for the currently pending bankruptcy reform legislation—and consumer groups have been fighting it—for the past eight years.

In 1890, the House first passed the "Torrey bill," but it died in the Senate. Westerners who had risked much in the nation's expansion suffered great economic losses when the post-Civil War boom collapsed in the 1880s, and they did not like the call for creditor-friendly "involuntary" bankruptcy. Southerners also opposed the measure.

When a version was resurrected in 1893, Rep. William Denson, D-Ala., called it an "infernal engine of ruin, slavery, and destruction to the masses, another cruel and destructive instrumentality employed by the demon Money to crush out the farmers, the laborers, and the masses of the country." Retorted Rep. Nelson Dingley Jr., R-Maine, "Let us have done with this class talk about the money power and the poor man."

But Democrats controlled the House, and they voted the bill down. In 1894, they pushed a measure that would have allowed only "voluntary" bankruptcies initiated by debtors. Although the House passed it, the legislation went no further.

The dynamics changed after the 1894 midterm elections swept Democrats out of power in both chambers. In 1896, the Republican-dominated House rejected the voluntary-only approach to bankruptcy and passed the latest version of the Torrey bill. Rep. William Terry, D-Ark., decried it as "the grasping greed of the creditor classes of the North and the East reaching out to gather in and devour the substance of the debtors of the West and the South." The measure died again in the Senate, where the GOP had just a slim 44-40 majority.

Only when Republicans controlled both the White House and Capitol Hill, as they do now, did the bankruptcy-law backers finally prevail. And even then, the clash between creditors and debtors complicated the process.

After William McKinley captured the White House for Republicans in the 1896 election, the Senate quickly passed a "much liberalized" Torrey bill in April 1897. The House approved a competing bill nearly a year later. But Sen. William Stewart, R-Nev., stood in the way of a conference committee. The Westerner characterized the Torrey bill as "the legislation of the creditor class for the oppression of the debtor class." He was so determined to block that "perfectly iniquitous" and "heartless" bill that he kept the Senate from appointing negotiators for days.

"It is most incongruous, cunning, double-dealing from beginning to end," Stewart said of the legislation. "No man can take it and come nearer prophesying what may happen under it than he could tell the history of Egypt by looking at a blank wall of one of the pyramids. You cannot understand what may be done under it."

The bill ultimately became law on July 1, 1898. The statute faced numerous repeal efforts during the next decade, and it endured multiple amendments through the years designed to ease the burden on debtors; but it remained on the books until 1978.

That year proved to be a turning point triggered by an explosion in bankruptcies that is continuing today, leading creditors to again flex their political muscle, Skeel said in an interview. "Through 1898," he said, "bankruptcy was really seen as a creditors' issue … and we are kind of back to where the creditors are pushing." ■

IT TOOK GOP CONTROL TO ENACT THE FIRST BANKRUPTCY LEGISLATION IN 1898.

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