

# THE IMPACT OF STATE LAW ON BANKRUPTCY†

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During the first century of its independent national existence, the United States had no permanent, uniform bankruptcy law,<sup>1</sup> although the Constitution explicitly conferred upon the Congress the power to enact such legislation.<sup>2</sup> Since nature, as the ancient philosophers have told us, abhors a vacuum, and in light further of the pressing social need for authoritative guidance in this area, the gap in our jurisprudence that resulted from this congressional default was predictably filled—albeit somewhat haphazardly and imperfectly—by

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† In the autumn of 1965, the Brookings Institution, of Washington, D.C., supported by a grant from the Ford Foundation, undertook a comprehensive study of bankruptcy as a legal, administrative, economic, and social process [hereinafter referred to as the Brookings study]. Over the next two years, the project staff supplemented its more conventional library-based research with extensive field surveys in eight representative federal court districts that were selected to reflect the wide range of national variation in not only type and volume of bankruptcy caseload, bankruptcy costs, and nonbankruptcy insolvency-related proceedings, but geographic and demographic characteristics as well. Within each of these districts—Northern Alabama, Southern California, Northern Illinois, Maine, Southern New York, Northern Ohio, Oregon, and Western Texas—the staff observed court proceedings, interviewed persons with a direct interest in the problems of the financially distressed debtor, and abstracted a random sampling of every significant kind of bankruptcy case filed. Upon these data, *inter alia*, this paper heavily draws. To Professor Vern Countryman, of the Harvard Law School, a fellow member of the project staff, who painstakingly read and criticized an earlier draft of this paper, the writer acknowledges his deep appreciation. Responsibility for the final product, however, is the writer's alone.

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1. In response to cyclical financial crises, three short-lived national bankruptcy acts were passed during the early and middle parts of the nineteenth century. The panics of 1792 and 1797, which generated an epidemic of imprisonment for debt, led to the 1800 Act, Act of April 4, 1800, ch. 19, 2 Stat. 19; but abuse of its remedial provisions by the rich, as well as other shortcomings, culminated in its repeal after barely three years of life, Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. A crash precipitated by widespread overspeculation in government land and its consequent economic distress led to the 1841 Act, Act of Aug. 19, 1841, ch. 9, 5 Stat. 440; but it too was repealed less than two years later, at least partly owing to the general view that debtor relief was "immoral," Act of March 3, 1843, ch. 82, 5 Stat. 614. Post-Civil War economic dislocations led to the 1867 Act, Act of March 2, 1867, ch. 176, 14 Stat. 517; but, although it remained in force longer than its predecessors—buoyed up providentially by the panic of 1873—it also eventually was repealed after eleven years, because of administrative defects and almost universal unpopularity, Act of June 7, 1878, ch. 160, 20 Stat. 99. For an historical treatment of these primeval bankruptcy acts, see generally C. WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935).

2. "The Congress shall have Power. . .

To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

a developing body of statutory and decisional law in each of the several states. Growing dissatisfaction with this jerry-built and uncoordinated system of insolvency administration, however, culminated in the passage of the Bankruptcy Act of 1898,<sup>3</sup> which purported to superimpose upon existing state practice definitive federal procedures for the orderly and equitable assembling, liquidation, and distribution of insolvent debtors' estates. The intervening years have witnessed not only refinements of these procedures dictated by experience, but also an expansion of the original scope of the Bankruptcy Act and a shift in its primary focus from debtor dissolution to debtor rehabilitation.<sup>4</sup>

The result of this awakened federal interest and legislative activity has been a relative decline in both the importance and the effectiveness of state law in this area. In some respects, the Bankruptcy Act has entirely superseded parallel provisions of state law or sharply circumscribed the scope of their operation; in others, its impact has been less severely restrictive; but in all, it constitutes a constantly relevant and limiting factor that cannot prudently be ignored whenever state-sanctioned remedies in this area are being considered. This, however, is only one side of the coin, and it does not adequately convey the true nature and dimensions of the relationship between bankruptcy and state law. Indeed, their interaction is reciprocal rather than unilateral—that is, bankruptcy proceedings not only affect, but also are affected by proceedings that may be initiated under the aegis of state law.

The effect that state law has upon bankruptcy is, in fact, a somewhat ambivalent one—it is, at once, both complementary and antithetical. Rooted in a common legal tradition and responding to the same social stimuli, state law, on the one hand, not only shares with bankruptcy certain basic policy objectives, but also exhibits many similar implementing features. Thus, both bodies of law seek to insure the fullest satisfaction of each creditor's claim consistent with the relative equities of all interested parties, and both likewise recognize the need at least minimally to protect the debtor and perhaps secure for him an opportunity to make a fresh start in life.

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3. Act of July 1, 1898, ch. 541, 30 Stat. 544.

4. The most far-reaching of these changes were introduced by the so-called Chandler Act, June 22, 1938, ch. 575, 52 Stat. 840, which introduced, *inter alia*, the now-familiar chapter X (corporate reorganization), chapter XI (arrangement of unsecured debts), and chapter XIII (wage earners' plans) proceedings.

To these ends, cognate procedures are prescribed for the fair and orderly subjection of the debtor's property to seizure, liquidation, and distribution among his creditors; the rehabilitation of the economically viable debtor; and the exemption from creditor claims of so much of the debtor's property as is deemed indispensable to the maintenance of a decent standard of life. In a real sense, then, state law may be said to offer a range of alternatives that, if invoked, would serve the same broad purposes of and avert the need for bankruptcy.

On the other hand, despite this over-all harmony of spirit and rough congruence of operative details, state law runs counter to bankruptcy in several signal respects. Thus, recourse by the debtor, his creditors, or both to state-sanctioned modes of debt collection or insolvency administration may constitute an "act of bankruptcy" that can directly precipitate the debtor involuntarily into bankruptcy.<sup>5</sup> Moreover, a creditor's legal pursuit—or even the threat of such pursuit—of the delinquent debtor may conduce so intolerably oppressive a situation as virtually to compel him voluntarily to seek the sanctuary of bankruptcy. Viewed in this light, then, state law may as accurately be characterized a precursor of bankruptcy as an alternative to bankruptcy. The details of this somewhat paradoxical body of law, therefore, would seem to merit closer examination.

#### STATE LAW AS AN ALTERNATIVE TO BANKRUPTCY

What nonbankruptcy options are open to the distressed debtor and his creditors for the resolution of his financial difficulties?

*Composition and Extension.* The oldest, simplest, and perhaps the most satisfactory state-sanctioned technique for comprehensively resolving the insolvent debtor's difficulties with his creditors is the informal, out-of-court settlement, which may take the form of either of two common law contractual devices: the composition or the extension. Requiring the concurrence of the debtor and no more than

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5. Among the safeguards designed to protect the debtor against arbitrary and inappropriate invocation of bankruptcy administration of his estate by his creditors, the Bankruptcy Act requires that the petitioning creditors allege and be prepared to prove that the debtor committed one or more of six enumerated "acts of bankruptcy," each of which presumptively manifests a state of his affairs so prejudicial to creditor interests as to warrant his involuntary submission to bankruptcy proceedings. Bankruptcy Act § 3, 11 U.S.C. § 21 (1970). For a more detailed description, discussion, and evaluation of "acts of bankruptcy," see I W. COLLIER, BANKRUPTCY ¶¶ 3.01 - .801 (14th ed. J. Moore 1970).

two of his creditors—although ideally it should embrace them all, and this may be exacted as a condition of participation by the assenting creditors—the composition is an agreement that binds the parties to make and accept, respectively, a specified partial payment in full satisfaction of claims owed by the debtor to these creditors. Alternatively, under the extension, the parties may agree only to a variation or extension of the time scheduled for payment of the assenting creditors' claims. In either event, these creditors are barred from the pursuit of other remedies against the debtor until the stipulated or a reasonable time for his modified performance has elapsed, and once the debtor has complied with the newly agreed-upon terms, the underlying claims are discharged.<sup>6</sup>

This procedure is relatively quick and inexpensive, and its attraction is strongest in those cases where the debtor's financial distress is of a temporary and nonrecurrent nature and his creditors expect that a partial remission or a temporary postponement of their claims against him will insure his survival and the continuation of their favorable business relations with him. But the composition and the extension are, it should be emphasized, entirely consensual devices—which means that they affect only those parties who subscribe to them—and hence they lose their effectiveness and their appeal as insolvency—administration techniques to the extent that creditors do not or will not participate in them.

Since the principles of contract law that govern the composition and the extension obtain uniformly throughout the Anglo-American jurisprudential world, no distinctive variations in the form or incidents of these devices were discovered among the eight states that comprised the sample for the Brookings study. Interviews with persons intimately involved in and concerned with the phenomenon of insolvency, furthermore, have tended to confirm their expected popularity. Indeed, the composition and the extension have found wide favor among not only debtors and those with debtor-oriented perspectives, but also among creditors and their coterie. Thus, major creditors ascribed to the composition an almost unparalleled efficacy as a debt-collection technique, placing it virtually in a class by itself

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6. For a more detailed description, discussion and evaluation of the common law composition and extension, see G. GLENN, *LIQUIDATION* ch. 1X (1935); C. NADLER, *THE LAW OF DEBTOR RELIEF* chs. II & III (1954). See also 6 A. CORBIN, *CONTRACTS* § 1283 (1962) for a brief, but lucid and authoritative discussion of the legal basis of the common law composition.

in terms of cost and speed, as well as size of return—particularly when used against delinquent business debtors.<sup>7</sup> In the judgment of their attorneys, too, this device was clearly regarded as the most promising tack to take against such debtors:<sup>8</sup> in fact, in one state—New York—it was so characterized by 100 percent of these respondents. Against delinquent individual debtors, however, creditors' attorneys generally rated the composition as somewhat inferior a device to proceedings under chapter XIII of the Bankruptcy Act for the collection of their client's claims, especially in those states—like Alabama, Illinois, and Maine—where these latter proceedings are more commonly used and presumably more familiar to the bar.<sup>9</sup>

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7. Between one-half and two-thirds of all classes of major creditors interviewed regarded the composition as less costly than any other state-created debt-collection technique, and none regarded it as more costly; it was approached most closely in this comparison by chapter XIII proceedings under the Bankruptcy Act, which were regarded as less costly by less than one-fifth of these creditors—one-half of whom, it may be significant to note, came from Alabama, whence chapter XIII proceedings may be said originally to have sprung and to have received their strongest initial impetus, see *Hearings on H.R. 8046 Before the House Comm. on the Judiciary, 75th Cong., 1st Sess., ser. 9, at 247-64 (1937); HOUSE COMM. ON THE JUDICIARY, REVISION OF THE NATIONAL BANKRUPTCY ACT, H.R. REP. NO. 1409, 75th Cong., 1st Sess. 52-55 (1937);* and where they continue to play an unexampled role. See 1969 AD. OFFICE OF THE U.S. COURTS ANNUAL REP. app. 1, table F2, at 296-300. Roughly one-half of these creditors regarded the composition as speedier than any other debt-collection technique, and only one out of almost one hundred of these respondents regarded it as less speedy; it was approached most closely in this comparison by straight bankruptcy liquidation, which was regarded as speedier by less than one-quarter of these creditors—who seemed largely to be concentrated in Maine. With respect to size of return, there was a significant difference in response between those creditors who had individuals among their debtors and those who did not. About 40 percent of the former regarded the composition as more rewarding than any other debt-collection technique, and none regarded it as less rewarding; but these creditors were exceeded in number by the 46 percent who in this comparison regarded chapter XIII proceedings as more rewarding. Over one-half of those creditors who had no individuals among their debtors, however, regarded the composition as more rewarding than any other debt-collection technique, and none regarded it as less rewarding; it was approached most closely in this comparison by chapter XI proceedings under the Bankruptcy Act, which were regarded as more rewarding by only between one-fifth and one-quarter of these respondents. For a more detailed description, discussion, and evaluation of chapter XIII and XI proceedings, respectively, see 10 W. COLLIER, *supra* note 5, ¶ 20.01-33.05, and 8 & 9 *id.* ¶¶ 1.01-13.01.

8. Over 40 percent of the creditors' attorneys interviewed regarded the composition as the best device for the collection of claims against delinquent business debtors available to their clients; it was approached most closely in this comparison by chapter XI proceedings under the Bankruptcy Act, which were favored by 27 percent of these respondents, and the assignment for the benefit of creditors, which was favored by 26 percent of them. For a more extended consideration of the assignment for the benefit of creditors, see notes 18-28 *infra*, and accompanying text.

9. Between one-fifth and one-quarter of the creditors' attorneys interviewed regarded the composition as the best device for the collection of claims against delinquent individual debtors

*Debt-pooling.* Distantly related to the extension, in that it relies on creditor acquiescence for its effectiveness, is an insolvency administration technique that has recently enjoyed some vogue—or notoriety—among consumer-debtors and that is variously known as debt-pooling, debt-adjustment, debt-prorating, debt-management, debt-counseling, debt-liquidating, debt-consolidation, debt-lumping, financial management, or budget-planning—to mention some of the more usual designations. Under this arrangement, the financially distressed debtor undertakes regularly to pay a specified part of his salary or wages to an agent who, generally for a fee, promises to try to persuade his creditors to accept ratable shares of this payment until their claims against the debtor are fully satisfied. Not uncommonly this agent purports to counsel the debtor in matters of money management as well, with an eye to preventing the recurrence of similar episodes of financial stringency.

Like the more conventional and familiar extension, debt-pooling suffers from the fact that creditor cooperation cannot be compelled. The gravity of this weakness has been compounded by the fact that the debtor is frequently neither aware nor sufficiently apprised of it and may, accordingly, in reliance upon deceptive advertising, be detrimentally misled in dealings with his creditors. Nor does this exhaust the debtor's possible debt-pooling woes. Since only rarely are professional or ethical standards prescribed for those who proffer debt-pooling services, the debtor-client commonly has found himself between Scylla and Charybdis—either legal advice tendered by a not-completely-disinterested layman, or lack of counsel concerning the validity of his creditors' claims and the availability and desirability of alternative modes of debt settlement. Moreover, since the fees charged usually have been uncontrolled as to amount or application and the safeguards against misuse of the collected funds have been few, the debtor's financial burden not infrequently has been increased by debt-pooling rather than diminished. And creditors, too, have had no assurance that they will be treated fairly.<sup>10</sup>

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available to their clients; but one-third of these respondents so favored chapter XIII proceedings. In Alabama, Illinois, and Maine, the respective figures were 11 percent and 56 percent, 11 percent and 22 percent, and 10 percent and 80 percent. In all other states, however, the composition appeared to hold its own—or better—with chapter XIII proceedings. For a broad summary of the differential use of chapter XIII proceedings across the country, see 1969 AD. OFFICE OF THE U.S. COURTS ANNUAL REP. app. 1, table F2, at 296-300.

10. Empirical surveys have reinforced the suspicion that the business community views debt-pooling with considerable misgivings. Typical are the results of such a survey conducted by

Disturbed by these and other reported and potential shortcomings and abuses, many states have begun to look askance at debt-pooling and take appropriate remedial measures. Thus, some twenty-eight jurisdictions have by statute absolutely prohibited or drastically curtailed debt-pooling, except as an adjunct of legal counseling or banking practice or as a nonprofit community service.<sup>11</sup> At least

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the Better Business Bureau of Kansas City, Missouri. A questionnaire was sent to 205 Bureau members whose clientele reasonably might be assumed to be among those who would avail themselves of debt-pooling services (e.g., banks, small loan companies, sales finance companies, department stores, and retail merchants who sold goods on credit) soliciting opinions of and practices with respect to these services. One hundred and forty-two responses were received, of which 33 indicated an inability to answer the questions owing to lack of experience with debt-poolers. Of the 109 Bureau members who completed the questionnaire, however, 95 percent replied that debt-pooling served no useful purpose; 96 percent stated that they did not acquiesce in debt-pooling arrangements; 70 percent felt that payments were not made as promptly under a debt-pooling arrangement as when they were collected directly from the debtor; and 98 percent observed that the debt-pooling payment schedule was usually not completed. See Berkhead, *Debtors Misled and Deceived by Pro-Raters, Kansas City Better Business Bureau Finds*, 16 PERS. FIN. L.Q. REP. 116 (1962); cf. Backman, *Debt Adjustment Abuses*, 9 PERS. FIN. L.Q. REP. 44 (1955) (reporting a strikingly similar response to a similarly constructed and administered questionnaire in St. Louis, Missouri). For an evaluation of the comparative efficacy of debt-pooling arrangements and chapter XIII proceedings under the Bankruptcy Act, see Kennedy, *Debt-Pooling Arrangements vs. Chap. XIII Proceedings*, 32 REP. J. 109 (1958).

11. ARK. STAT. ANN. §§ 41-4612 to -4616 (Supp. 1969); DEL. CODE ANN. tit. 11, § 469 (Supp. 1970); Act of May 22, 1970, Pub. L. No. 91-266, 84 Stat. 264, reprinted in 1970 D.C. CODE LEG. & AD. SERV. 8 (laws affecting the District of Columbia); FLA. STAT. ANN. §§ 559.10-.13 (1962); GA. CODE ANN. §§ 84-3601 to -3603 (1970); HAWAII REV. STAT. §§ 446-1 to -4 (1968); KAN. STAT. ANN. § 21-4402 (Supp. 1969); KY. REV. ANN. §§ 380.010-.990 (Supp. 1970); ME. REV. STAT. ANN. tit. 17, §§ 701-03 (Supp. 1970); MD. ANN. CODE art. 27, § 79A (1971); MASS. ANN. LAWS ch. 221, § 46c (Supp. 1970); Miss. H.B. No. 9 (Jan. 25, 1971); MO. ANN. STAT. §§ 425.010-.040 (Supp. 1970); MONT. REV. CODES ANN. §§ 18-401 to -403 (Supp. 1969); N.J. STAT. ANN. §§ 2A:99A-1 to -4 (1969); N.M. STAT. ANN. 50-17-1 to -4 (Supp. 1969); N.Y. GEN. BUS. LAW §§ 455-57 (McKinney 1968); N.C. GEN. STAT. §§ 14-423 to -426 (1969); OHIO REV. CODE ANN. §§ 4710.01-.03, .99 (Page Supp. 1970); OKLA. STAT. ANN. tit. 24, §§ 15-18 (Supp. 1970); PA. STAT. ANN. tit. 18, §§ 4897, 4899 (1963); R.I. GEN. LAWS ANN. §§ 5-42-1 to -2 (Supp. 1970); S.C. CODE ANN. § 56-147 (Supp. 1970); TENN. CODE ANN. §§ 39-3411 to -3415 (Supp. 1970); TEX. REV. CIV. STAT. ANN. arts. 5069-9.02 to -9.04 (1971); VA. CODE ANN. § 54-44.1 (1967); W. VA. CODE ANN. § 61-10-23 (Supp. 1971); WYO. STAT. ANN. §§ 33-190 to -192 (1959). Massachusetts, South Carolina, and Virginia prohibit debt-pooling by laymen as the unauthorized practice of law. Cf. *Home Budget Serv. v. Boston Bar Ass'n*, 335 Mass. 228, 139 N.E.2d 387 (1957), in which debt-pooling is demonstrated to be a species of law practice. In most, but not all (e.g., Ohio, Oklahoma) of the other enumerated states, lawyers are specifically exempted from the statutes' coverage; somewhat less frequently this exemption is extended to nonprofit or charitable organizations—such as Legal Aid Societies, Better Business Bureaus, religious and fraternal groups, welfare agencies, and retail merchants' trade associations—and to financial institutions—such as banks, trust companies, and savings and loan associations—as well. Perhaps the most distinctive of these statutes is West Virginia's, which does not flatly prohibit

sixteen other states have circumscribed and regulated its practice with statutory provisions regarding licensing, inspection, posting of surety bonds, accounting, record-keeping, and service fees, the violation of which has been made punishable by fine or imprisonment or both.<sup>12</sup> And without the benefit of direct legislative sanction, some states have, additionally or alternatively, judicially imposed restraints that render debt-pooling operations difficult, if not impossible.<sup>13</sup>

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debt-pooling per se, but does so in fact by sanctioning such activity only where there is no solicitation and the fee does not exceed 2 percent of the money collected. Nor has prohibition of debt-pooling been confined exclusively to state legislatures. Thus, after Maryland's lawmakers failed to enact such legislation, the City of Baltimore passed a prohibitory ordinance, BALTIMORE, MD., CITY CODE art. 19, § 16 (1966); and in Indiana, the City of Indianapolis followed suit, INDIANAPOLIS, IND., MUNICIPAL CODE § 10-531(2) (1969). That the problems created by debt-pooling are not peculiar to this country alone is evidenced by the fact that the Province of Quebec has also passed a statute prohibiting the practice. Quebec Stat., 2 & 3 Eliz. 2, c. 59, §§ 95, 100, 102 (1954). The Supreme Court has unanimously rejected the contention that prohibition of debt-pooling activities by laymen violates the due process clause of the fourteenth amendment, in upholding the constitutionality of the Kansas statute. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

12. ARIZ. REV. STAT. ANN. §§ 6-701 to -716 (Supp. 1970); CAL. FIN. CODE §§ 12200.2 & .5, 12314-31 (West 1968); COLO. REV. STAT. ANN. §§ 11-3-1 to -16 (Supp. 1965); CONN. GEN. STAT. ANN. §§ 36-364 to -381 (1969); IDAHO CODE ANN. §§ 26-222 to -2249 (Supp. 1970); ILL. ANN. STAT. ch. 16 ½, §§ 251-72 (Smith-Hurd Supp. 1971); IOWA CODE ANN. §§ 533A.1 -15 (Supp. 1970); Act No. 423, [1970] La. Acts 1025-32; MICH. STAT. ANN. §§ 23.630(1) -.630(18) (Supp. 1971); MINN. STAT. ANN. §§ 332.12 -.29 (Supp. 1971); NEB. REV. STAT. §§ 69-1201 to -15 (Supp. 1969); N.H. REV. STAT. ANN. §§ 399-D:1 to D:19 (Supp. 1970); ORE. REV. STAT. §§ 697.610 -.992 (1969); UTAH CODE ANN. §§ 58-30-1 to -15 (1953); WASH. REV. CODE §§ 18.28.010 -.910 (Supp. 1970); WIS. STAT. ANN. § 218.02 (Supp. 1971).

13. Thus, for example, in *Hall's W. Auto Supply Co. v. Brock*, 80 Ore. 351, 400 P.2d 5 (1965), an assignment of future wages by a public employee to a debt-pooling agency was held to be contrary to public policy and, therefore, invalid. The court's rationale was that a public employee who assigns the benefit of his labor prior to its performance is not likely to be diligent in his work, and the efficiency of public service is impaired as a result. Another restrictive tack was taken in Iowa, where the Attorney General, in the absence of legislation either prohibiting or regulating debt-pooling—a deficiency since remedied, *see* note 12 *supra*—invoked the fraud provisions of the state's Consumer Protection Act, IOWA CODE ANN. § 713.24 (Supp. 1971), against a debt-pooling agency, charging it with making false and misleading representations in the sale of its services. The case never came to trial; instead, a consent decree was entered by the terms of which the defendant not only was enjoined from engaging in the practices that gave rise to the suit, but also submitted to conditions and limitations at least as rigorous as those normally imposed in states that statutorily regulate debt-pooling. *See Wargo, Iowa Debt Adjuster Enjoined from Making False Representations*, 21 PERS. FIN. L.Q. REP. 28 (1966).

For a more detailed description, discussion, and evaluation of debt-pooling—albeit slightly dated in some respects—see U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, SUMMARY OF STATE LAWS PROHIBITING OR REGULATING THE BUSINESS OF DEBT POOLING (1967); Bench, *Commercial Debt Adjustment: An Alternative to Consumer Bankruptcies?*, 9 B.C. COM. & IND. L. REV. 108 (1967).

The eight states that constituted the subject of the Brookings study run almost the entire debt-pooling gamut. Four of these states—Maine, New York, Ohio, and Texas—take a jaundiced view of the practice and prohibit it generally. Three of them—California, Illinois, and Oregon—regard the practice more charitably and countenance it, subject to varying degrees of limitation and regulation, both statutory and judicial. And one of them—Alabama—apparently permits debt-pooling operations without official hindrance.

Interviews with welfare authorities in these states—a group with no ostensible axe to grind in this area and, therefore, arguably quite objective in its observations and evaluations—have revealed substantial misgivings about debt-pooling and doubts as to its effectiveness in rehabilitating insolvent debtors.<sup>14</sup> Nowhere was the practice given an unequivocal clean bill-of-health—even in those states in which it is not prohibited, it was quite roundly condemned. Thus, in Illinois and Oregon, not a single respondent perceived any merit at all in debt-pooling; and at best, in California, where over 40 percent of the respondents took a more sanguine view of the practice, almost 30 percent of them characterized it as useless. Critics further cited the high fees and the unethical conduct of practitioners as conspicuous evils of debt-pooling.

By way of contrast, however, it should be noted that these same respondents clearly recognized the rehabilitative value of credit-counseling as a general proposition, presumably when it is offered on a community-service basis<sup>15</sup>—as has been done increasingly in recent years in many parts of the country.<sup>16</sup> This attitude, moreover, was shared, albeit somewhat less emphatically, by the major creditors

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14. While almost 15 percent of the welfare authorities interviewed thought debt-pooling served a socially useful function, more than twice as many—over 35 percent of them—thought it did not.

15. Almost two-thirds of the welfare authorities interviewed regarded nonprofit credit-counseling as a helpful rehabilitative technique, with only one-sixth to one-fifth of them expressing pronounced reservations as to its utility.

16. Customarily sponsored and underwritten by creditor groups and interests—but supported by Legal Aid Societies, family service agencies, and such governmental programs as OEO, Model Cities Administration, and state university cooperative extension services as well—such services, largely patterned after the plan devised and recommended by the National Foundation for Consumer Credit, have been made available over the past ten years in 112 communities in 32 states (plus 10 in Canada), and their number appears rapidly to be growing. See NATIONAL COUNCIL FOR CONSUMER CREDIT, CONSUMER CREDIT COUNSELING SERVICE, DIRECTORY UNITED STATES AND CANADIAN PROVINCES (1971). Illustrative of the generally favorable and encouraging public response that has met this development are the specific

interviewed<sup>17</sup>—a group whose approach to the matter, it can safely be assumed, is cautious, practical, and unsentimental. But unfortunately services of this kind are not universally available, nor are they utilized as extensively as they might be even where found.

*Assignment for the Benefit of Creditors.* The resemblance of state-sanctioned techniques of insolvency administration to bankruptcy is most pronounced where creditor acquiescence is not left to the vagaries of free choice, but rather is coerced. The most significant of these techniques in terms of extent of use is the assignment for the benefit of creditors. Stemming doctrinally from the law of trusts, the assignment effects a transfer of all of the debtor's nonexempt assets to an assignee in order that they may be promptly liquidated and their proceeds distributed among his creditors. Despite its tendency incidentally to hinder and delay particular creditors in the collection of their claims, the assignment, because it redounds to the benefit of creditors in general, historically has enjoyed universal judicial approbation, absent demonstrable fraud.

The common law recognized in the debtor an unqualified right

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legislative authorizations of such services, e.g., ILL. ANN. STAT. ch. 32, §§ 360.1-12 (Smith-Hurd 1970); TEX. REV. CIV. STAT.; ANN. arts. 5069-9.01 to -9.04 (1971); and the commendation of the National Foundation for Consumer Credit by the Ohio Senate for sponsoring them, Ohio S. Res. 19 (1967). Perhaps most significant is the reservation of article seven of the recently promulgated Uniform Consumer Credit Code for provisions currently being framed by the Special Committee on Retail Installment Sales, Consumer Credit, Small Loans and Usury of the National Conference of Commissioners on Uniform State Laws concerning the organization and regulation of nonprofit consumer credit-counseling agencies. For a national study of such credit-counseling services, conducted under the auspices of the Family Service Association of America with an eye to evaluating existing modes of debt adjustment and credit management and developing specific proposals to enhance their effectiveness, see P. HALL, FAMILY CREDIT COUNSELING—AN EMERGING COMMUNITY SERVICE (1968).

17. Almost 30 percent of the major creditors interviewed regarded these credit-counseling services favorably, while a little more than 10 percent of these respondents regarded them unfavorably (Not quite 10 percent of these creditors thought that it was still too early to make any judgment, and more than one-half of them had no opinions or thoughts about these services at all—possibly owing to the fact that they had as yet had no experience with them.). It may fairly be inferred that positive response is at least partially a function of major creditor familiarity with such credit-counseling services. Thus, in states in which at least two-thirds of the respondents ventured their views—e.g., Illinois and California—between two-thirds and three quarters of them reacted affirmatively, and only between one-fifth and one-quarter reacted negatively. It was only—but not uniformly—in states in which the majority of the respondents professed no acquaintance with these services—e.g., Alabama and Oregon—that affirmative reactions ever failed substantially to outweigh negative ones. And owing to the meager volume of any sort of judgmental response in these latter states, conclusions should be drawn therefrom only very tentatively—if, indeed, at all—and should be viewed most critically and with the greatest circumspection.

not only to designate the assignee, but also to dictate virtually all the terms of the assignment. Thus, if he wished, the debtor could, among other things, execute but a partial transfer of his assets, prefer certain of his creditors and exclude others, condition participation upon release by creditors of the unpaid balance of their claims against him, and endow a friendly assignee with broad latitude in the administration of the assignment. Although such free-wheeling principles have continued in some states exclusively to determine the validity and incidents of the assignment, they have, owing to their susceptibility to abuse, been supplemented or superseded in forty-one jurisdictions by statutory regulations that may not only prescribe prophylactic formal standards and affect dispositive provisions, but introduce a measure of judicial control as well.<sup>18</sup> Thus, detailed rules rather than the debtor's predilections may now govern such matters as the execution and recordation of the assignment; the appointment of the assignee and his duties; permissible fees; the posting of surety bonds; the filing of schedules of assets and liabilities; the notification of interested parties; the proof and allowance of claims; the collection, liquidation, and distribution of the estate; the dischargeability of unpaid obligations; fees; and the keeping of records and rendering

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18. ALA. CODE tit. 58, §§ 8-29 (1960); ARIZ. REV. STAT. ANN. §§ 44-1031 to -1047 (1967); ARK. STAT. ANN. §§ 36-301 to -308 (1962); CAL. CIV. CODE §§ 3449-73 (West 1970); COLO. REV. STAT. §§ 11-1-1 to -55 (1963); CONN. GEN. STAT. ANN. §§ 45-124 to -159 (1960); DEL. CODE ANN. tit. 10, §§ 7381-87 (1953); D.C. CODE ENCYCL. ANN. §§ 28-2101 to -2110 (1967); FLA. STAT. ANN. §§ 727.01 -.08 (1969); GA. CODE ANN. § 28.301 -.320 (1969); IDAHO CODE ANN. § 68-201 (1949); IND. ANN. STAT. §§ 17-10 to -123 (1964); IOWA CODE ANN. §§ 681.1 -.31 (1946), *as amended*, §§ 681.11, .16 -.19, .24 -.25, .29 -.30 (Supp. 1971); KY. REV. STAT. ANN. §§ 379.010 -.170 (1969); LA. REV. STAT. ANN. §§ 9:2641 to :2674 (1964); MASS. ANN. LAWS ch. 216, §§ 20-128 (1955); MICH. STAT. ANN. §§ 27A.5201 -.5261 (1962), *as amended*, § 27A-5231 (Supp. 1971); MINN. STAT. ANN. §§ 577.01 -.10 (1947); MISS. CODE ANN. §§ 298-306 (1956); MO. ANN. STAT. §§ 426.010 -.410 (1949); MONT. REV. CODES ANN. §§ 18-301 to -330 (1967); N.H. REV. STAT. ANN. § 569:1 (1955); N.J. STAT. ANN. §§ 2A:19-1 to -50 (1952); N.M. STAT. ANN. §§ 27-1-1 to -55 (1953); N.Y. DEBT. & CRED. LAW §§ 1-291 (McKinney 1945), *as amended*, §§ 4, 12-16, 18, 22-24, 30, 57, 66, 69, 85, 126, 138, 150-51, 166, 189, 208, 231-40, 243, 250, 254, 260-61, 273-2 (McKinney Supp. 1970); N.C. GEN. STAT. §§ 23-1 to -17 (1965); N.D. CODE ANN. §§ 32-26-01 to -06 (1960); OHIO REV. CODE ANN. §§ 1313.01 -.52 (Page 1962); OKLA. STAT. ANN. tit. 24, §§ 31-50 (1955); PA. STAT. ANN. tit. 39, §§ 1-327 (1954); R.I. GEN. LAWS ANN. §§ 10-4-1 to -13 (1969); S.C. CODE ANN. §§ 57-351 to -366 (1962); S.D. COMP. LAWS §§ 54-9-1 TO -22 (1967), *as amended*, §§ 54-9-4, -5, -13, -15, -16 (Supp. 1971); TENN. CODE ANN. §§ 47-13-101 to -120 (1964); TEX. BUS. & COM. CODE §§ 23.01 -.33 (1968); UTAH CODE ANN. §§ 6-1-1 to -20 (1953); VT. STAT. ANN. tit. 9, §§ 2151-58 (1958); VA. CODE ANN. §§ 55-156 to -167 (1969); WASH. REV. CODE ANN. §§ 7.08.010 -.200 (1961); W. VA. CODE ANN. §§ 38-13-1 to -16 (1966), *as amended*, §§ 38-13-5, -9 (Supp. 1971); WIS. STAT. ANN. §§ 128.01 -.20 (1957), *as amended*, §§ 128.01, .05 -.08, .14, .17 (Supp. 1970).

of reports—all of which may be scrupulously enforced by a watchful court.<sup>19</sup>

The salient advantage of the assignment, common law and statutory alike, vis-à-vis consensual insolvency administration techniques lies in its capacity to immunize the debtor's assets against individual creditor process and thus diminish the likelihood of their inequitable disposition or dissipation. Its principal shortcoming, on the other hand, lies in its incapacity—as a rule—to release the debtor of the unpaid balance of his creditors' claims against him. This failing is not universal, however, and where a discharge provision can effectively be incorporated, the assignment begins closely to approach functional equivalency with bankruptcy and seems to be the insolvency—liquidation technique of choice where recourse to the Bankruptcy Act's avoiding provisions are not strongly indicated.<sup>20</sup>

The eight states whose methods of insolvency administration were explored in the Brookings study reflect quite fully the assignment spectrum. At one end, in three of these states—Illinois, Maine, and Oregon—the common law assignment still rules the roost, substantially unchallenged and unchanged by statutory regulation. Next, in one state—Alabama—only minimal restraints, touching almost entirely on routine formal matters, have been statutorily prescribed for what still remains essentially the common law assignment. Farther along, in another state—California—a comprehensive statute governing assignment has been enacted; but this has largely been rendered a dead letter, owing to the fact that the common law assignment has specifically been preserved as an alternative technique<sup>21</sup> and, indeed, has been used almost to the exclusion of the statutory version.<sup>22</sup> Continuing on, in yet another

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19. For a more detailed description, discussion, and evaluation of the assignment for the benefit of creditors, see G. GLENN, *supra* note 6, ch. X; C. NADLER, *supra* note 6, ch. IV; Weintraub, Levin & Sosnoff, *Assignments for the Benefit of Creditors and Competitive Systems for Liquidation of Insolvent Estates*, 39 CORNELL L.Q. 3 (1953).

20. For a critical analysis of the judicial reception accorded efforts to combine the best features of the common law composition and the general assignment in a single device, see V. COUNTRYMAN, *CASES AND MATERIALS ON DEBTOR AND CREDITOR* 319-24 (1964). See also Mulder & Solomon, *Effect of the Chandler Act Upon General Assignments and Compositions*, 87 U. PA. L. REV. 763, 768-72, 781-86 (1939); Weintraub, Levin & Sosnoff, *supra* note 19, at 19-24.

21. CAL. CIV. CODE § 3448 (West Supp. 1970).

22. Cf. Comment, *A Proposal for Strengthening the California Statute Concerning Assignments for the Benefit of Creditors*, 36 CALIF. L. REV. 586, 587 n.6 (1948), where, on the basis of communications with the business community, it is reported that representative creditor organizations apparently had not used the statutory assignment for at least the preceding thirty years.

state—Ohio—the statutory assignment appears to have preempted the area and displaced its common law ancestor. Advancing farther, in one state—Texas—a statutorily approved discharge feature of the assignment has survived constitutional attack and been validated by the Supreme Court.<sup>23</sup> And finally, at the far end, in the one remaining state—New York—the assignment has assumed its most sophisticated form: regulated extensively and intensively by statute, under close judicial surveillance, the assignment has become in practice—if not strictly in law—a state bankruptcy proceeding.<sup>24</sup>

Interviews with interested and knowledgeable persons in these states have disclosed a comparatively high degree of satisfaction with the assignment. Thus, among creditors' attorneys, it was regarded less favorably than only the composition, and about on a par with proceedings under chapter XI of the Bankruptcy Act, as a device for the collection of their clients' claims against business debtors<sup>25</sup>—although not against individual debtors.<sup>26</sup> And among major creditors themselves, although the assignment did not recommend itself significantly in terms of cost, speed, or size of return, such mention as it did receive in these respects was generally positive—particularly in Texas and California.<sup>27</sup> It may be worthy of note that the assignment was cited as a source of difficulty in

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23. *Johnson v. Star*, 287 U.S. 527 (1933), discussed extensively in the authorities cited in note 20 *supra*.

24. For a comparison of New York's general assignment law and the Bankruptcy Act, see Krause, *Insolvent Debtor Adjustments Under Relevant State Court Statutes as Against Proceedings Under the Bankruptcy Act*, 12 *Bus. Law.* 184, 186-89 (1957).

25. See note 8 *supra*.

26. Only one-eighth of the creditors' attorneys interviewed regarded the assignment as the best device for the collection of claims against delinquent individual debtors available to their clients, as compared with between one-fifth and one-quarter of these respondents and one-third of them who so favored the composition and chapter XIII proceedings under the Bankruptcy Act, respectively. *Cf.* note 9 *supra*.

27. About the same number of all classes of major creditors interviewed regarded the assignment as less costly than any other debt-collection technique as regarded it as more costly. Somewhat more than 5 percent of these creditors regarded the assignment as speedier than any other debt-collection technique—indeed, in Texas, it was rated as favorably in this respect as was the composition—while only one out of almost 100 of these respondents regarded it as less speedy. With respect to size of return, there was a significant difference between those creditors who had individuals among their debtors and those who did not. About 5 percent of the former—all from Texas and California—regarded the assignment as more rewarding than any other debt-collection technique, and none regarded it as less rewarding. Almost one-fifth of those creditors who had no individuals among their debtors, however, regarded the assignment as more rewarding than any other debt-collection technique—rating it as favorably as the composition in California, and even more favorably in Texas—while only one of these respondents—from New York—regarded it as less rewarding. *Cf.* note 7 *supra*.

insolvency administration that should be legislatively corrected by the federal district judges of but two of the states—Illinois and California—in which statutory controls are either nonexistent or ineffectual.<sup>28</sup>

*Receivership.* An ancillary equitable remedy that has long been employed in aid of both the dissolution and the rehabilitation of insolvent corporations is the general receivership. Envisaged initially as a means of forestalling an uneconomic creditors' "race of diligence" and substituting in its stead methodical procedures for liquidating and distributing the insolvent debtor's estate, this technique came eventually to be the principal vehicle for corporate reorganization. Now largely superseded in this latter function by section 77 and chapter X of the Bankruptcy Act, the equity receivership, commonly codified in or regulated by statute, is almost completely confined to its original role, in which its utility as an insolvency-administration device seems directly to be related to both the quality and the quantity of the judicial supervision that it is accorded.<sup>29</sup>

All eight of the states embraced by the Brookings study statutorily authorize the judicial appointment and supervision of a receiver for an expiring corporation.<sup>30</sup> Nevertheless, the receivership does not appear to be a widely popular or well regarded liquidation device. Thus, it was mentioned with notable infrequency by creditors' attorneys who were asked in interviews to list the devices used by their clients in collecting claims against business debtors.<sup>31</sup> Indeed, in only one state—Maine—did the receivership seem clearly to enjoy more than nominal vogue and be viewed with anything approaching

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28. In Illinois, one-third of the federal judges interviewed (two out of six) so responded; only the deficiency judgment and the garnishment of wages, among state law-generated sources of difficulty—both cited by one-half of them—drew stronger fire. In California, one-fifth of these respondents (two out of ten) so responded; only tax exemption laws, among state law-generated sources of difficulty—cited by 40 percent of them—were more severely condemned.

29. For a more detailed description, discussion, and evaluation of the general equity receivership, see G. GLENN, *supra* note 6, chs. XIV & XIX; C. NADLER, *supra* note 6, ch. V. Similarly, for section 77 and chapter X proceedings, respectively see 5 W. COLLIER, *supra* note 5, at ¶¶ 77.01-.30, and 6 & 6A *id.* ¶¶ 8.01-16.01.

30. ALA. CODE tit. 7, §§ 1156-67 (1958); CAL. CIV. PROC. CODE §§ 564-70 (West 1964); ILL. ANN. STAT. ch. 32, §§ 157.86-.94 (Smith-Hurd Supp. 1971); ME. REV. STAT. ANN. tit. 13, §§ 542-48 (Supp. 1970); N.Y. GEN. CORP. LAW §§ 160-92 (McKinney Supp. 1970); OHIO REV. CODE ANN. §§ 1701.89-.90 (Page 1964); ORE. REV. STAT. §§ 57.595-.630, 31.010-.050 (1969); TEX. REV. CIV. STAT. ANN. arts. 2293-319 (1964).

31. Only about one-fifth of these attorneys cited the receivership in this connection—a rate of response lower than that elicited by any other mode of liquidation.

general favor.<sup>32</sup> It may be significant to recall, in this connection, that Maine is one of those states in which the assignment has not been subjected to statutory control and in which the assignment appears to play a relatively inconsequential role in debtor-creditor relationships.<sup>33</sup>

*Wage-Earner Trusteeship.* To answer the peculiar needs of the insolvent wage earner for rehabilitative relief, a few states have innovated a distinctive species of voluntary statutory personal receivership—the so-called wage-earner trusteeship.<sup>34</sup> Typically the enabling statutes require the debtor regularly to remit the nonexempt portion of his earnings to a court-designated and supervised trustee for ratable distribution among his creditors until their claims are fully satisfied. Although somewhat reminiscent of chapter XIII proceedings under the Bankruptcy Act, in that their most dramatic effect is the immunization of the debtor's property—primarily his wages—from creditor process, these proceedings are by no means identical. On the positive side, the wage-earner trusteeship is locally administered and, therefore, probably more convenient for the debtor; furthermore, it is less costly than chapter XIII proceedings,<sup>35</sup> and,

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32. Quite distinctively different from the over-all trend manifested, see note 31 *supra*, 70 percent of the creditors' attorneys interviewed in Maine mentioned the receivership as a technique used by their clients in collecting claims against business debtors—a rate of response equal to or greater than that elicited by any other mode of liquidation in that state. Moreover, 44 percent of these same attorneys regarded the receivership as the best device for the collection of claims against delinquent business debtors available to their clients—a characterization that they accorded no other mode of liquidation more emphatically, and one that was accorded the receivership by no creditors' attorney interviewed in any other state. Impressive, too, is the fact that almost 90 percent of the debtors' attorneys interviewed in Maine mentioned the receivership when asked to list state liquidation procedures available as alternatives to bankruptcy—a rate of response far exceeding that elicited by any other procedure cited, and one not even closely approached in Texas and California (25 percent and 23 percent, respectively), the only other states in which the receivership was mentioned by debtors' attorneys in this connection.

33. This may fairly be inferred from the fact that none of the creditors' attorneys interviewed in Maine regarded the assignment as the best device for the collection of claims against delinquent business debtors available to their clients, and the further fact that only 22 percent of the debtors' attorneys interviewed in the state mentioned the assignment when asked to list state procedures available as alternatives to bankruptcy—a rate of response substantially lower than the 36 percent elicited on this item from all debtors' attorneys interviewed. Cf. note 32 *supra* for the responses of these attorneys when similarly queried about the receivership.

34. MICH. STAT. ANN. §§ 27A.5301 -.5371 (Supp. 1971); MINN. STAT. ANN. § 488A.69 (1971) (City of Duluth and enumerated towns in St. Louis County only), *as amended*, ch. 340, [1971] Minn. Laws 517; OHIO REV. CODE ANN. § 2329.70 (Page Supp. 1970); WIS. STAT. ANN. § 128.21 (1957), *as amended*, § 128.21(1), (3) (Supp. 1971).

35. If a debtor invokes chapter XIII proceedings, he must pay an initial filing fee of \$15; thereafter, 5 percent of all monies paid under the plan may be retained by the trustee as his

finally, it does not depend on creditor consent for its effectiveness. Contraposed to these advantages for the debtor, however, the trusteeship is less flexible—in that it cannot in theory embrace less than all of the debtor's nonexempt earnings; moreover, it confers a narrower measure of relief—in that it neither permits the debtor to reject onerous contracts, nor spares him the burden of further defending debt-collection actions, nor stops the running of interest on claims against him, nor permits the discharge of his unpaid obligations under any circumstances.<sup>36</sup>

Among the eight states of which the Brookings study's microcosm consisted, only one—Ohio—has enacted legislation sanctioning the wage-earner trusteeship. Administered sensitively and flexibly—albeit perhaps not strictly in conformity with the letter of the law<sup>37</sup>—the trusteeship has been extensively and effectively used not only to help the debtor discharge his obligations, but also to advise him, through its ancillary budget-counseling service, how to live prudently within his means.<sup>38</sup> Its appeal to the debtor is self-evident, but it is well regarded by creditors too. Thus, major creditors who were interviewed were unanimous in hailing the wage-earner trusteeship as less costly

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fee, plus a 3 to 5 percent increment to defray his expenses, and \$15 (\$10 if his liabilities do not exceed \$200) plus 1 percent will be withheld from these monies for the Referees' Salary and Expense Fund; and the attorney who works out the plan and files the petition for the debtor will usually charge a fee of \$75-\$250 for his services. If, on the other hand, the debtor invokes wage-earner trusteeship proceedings in, say, Ohio, he must pay an initial filing fee of only \$2.50; thereafter, only 2 percent of all monies collected may be retained by the trustee as his fee; and the attorney (and normally none is employed) who refers the debtor to the Trusteeship Division is limited by the Bar Association's recommended fee schedule to a \$5 consultation fee for his services.

36. For a more detailed examination of the relative advantages and disadvantages of Ohio's statutory wage-earner trusteeship vis-à-vis chapter XIII proceedings, see Shanker, *Comparison of Chapter XIII Proceedings and State Wage Earner Relief Plans*, 19 PERS. FIN. L.Q. REP. 153 (1965).

37. Although Ohio law requires that the debtor remit to the trustee all of his nonexempt earnings, the Trusteeship Division in the Office of the Clerk of the Cleveland Municipal Court exercises discretion in the matter, and where this would impose great hardship on the debtor, it exacts a lesser payment. Despite the absence of any legal sanction for this practice and its complete vulnerability to challenge in the courts, creditors have acquiesced in it without complaint, probably recognizing that it makes the best of a bad situation for all concerned. Interestingly, however, no one has advocated statutory confirmation of this de facto authority asserted by the Division, apparently since it is felt that this formalization might invite intervention by attorneys for the debtors who would seek to draft the payment plans and negotiate their terms.

38. The Trusteeship Division in the Office of the Clerk of the Cleveland Municipal Court illustrates the development of this institution. After a slow start, the jurisdiction of the Division has been invoked with growing frequency in recent years. Thus, from 1933 (when the Division

and speedier than any other insolvency-administration technique, and one-half of them further felt that it also compared well in terms of the size of return.<sup>39</sup> It is questionable, however, whether the trusteeship would have burgeoned as it has absent both Ohio's recently Draconian wage garnishment laws and the disapproving attitude of Ohio employers towards invocation of these laws by creditors.<sup>40</sup>

#### STATE LAW AS A PRECURSOR OF BANKRUPTCY

As described earlier, the involuntary adjudication of a debtor as a bankrupt requires, among other things, his commission of an "act of bankruptcy," as defined in the Bankruptcy Act.<sup>41</sup> These acts consist largely, although not exclusively, of the debtor's having initiated or submitted to a debt-collection or insolvency-

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was first set up) to 1955, 9,000 trusteeships were initiated; from 1956 to 1970, almost 26,000 were. As of January 1971, the Division was administering 997 active accounts. The following data, although somewhat truncated, may better illuminate this growth:

| Year | Trusteeships Filed | Disbursements to Creditors |
|------|--------------------|----------------------------|
| 1948 | 303                | \$ 36,300                  |
| 1949 | 458                | 68,372                     |
| 1950 | 531                | 121,130                    |
| 1951 | 358                | 110,178                    |
| ***  | ***                | ***                        |
| 1956 | 1,217              | 229,731                    |
| 1957 | 1,290              | 375,424                    |
| 1958 | 1,944              | 454,854                    |
| 1959 | 1,329              | 469,922                    |
| 1960 | 1,872              | 475,766                    |
| 1961 | 2,432              | 561,143                    |
| 1962 | 2,009              | 704,013                    |
| 1963 | 1,939              | 675,858                    |
| 1964 | 1,912              | 691,238                    |
| 1965 | 1,998              | 752,898                    |
| 1966 | 1,972              | 777,123                    |
| 1967 | 1,894              | 825,960                    |
| 1968 | 1,422              | 818,452                    |
| 1969 | 1,274              | 765,333                    |
| 1970 | 1,213              | 717,802                    |

Interview with Walter A. Burks, Deputy Clerk Trustee, Cleveland Municipal Court, in Cleveland, Ohio, Dec. 8-9, 15, 1965; letter from Walter A. Burks to David T. Stanley, Brookings Institution, March 11, 1968; letter from George Lane, Deputy Clerk Trustee, Cleveland Municipal Court, to Jay E. Moyer, Esq., Cleveland, Ohio, June 16, 1971.

39. Significantly, however, of the major creditors interviewed in Ohio, a larger percentage regarded no other insolvency-administration technique more favorably in this respect.

40. Cf. notes 43-65 *infra* and accompanying text.

41. See note 5 *supra*.

administration procedure authorized under state law. All of the above-enumerated alternatives to bankruptcy—and other modes of disposition of the debtor's property as well—are, therefore, actually or potentially, subsumable under at least one of the "acts of bankruptcy." Accordingly, the invocation of state-sanctioned remedies in this area may well augment rather than relieve the pressures pointing to bankruptcy.

But however central and explicit may be this direct role of state law in precipitating bankruptcy, it plays a less visible role in this regard that is considerably more significant. In recent years particularly, voluntary personal petitions have come to comprise an ever-enlarging percentage of the ever-swelling number of bankruptcy filings,<sup>42</sup> and this phenomenon appears substantially to be a function of the legal climate surrounding debtor-creditor relations. More specifically, the volume of consumer bankruptcies in any jurisdiction, absolutely and comparatively, seems to be closely related to both the rigor of its debt-collection practices and the laxity of its credit controls. Some of these matters bear more detailed scrutiny.

*Wage Garnishment.* After a creditor has reduced his claim to judgment—and possibly even before<sup>43</sup>—he may levy upon or judicially

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42. From 1946 to 1967, total annual bankruptcy filings rose in an almost unbroken curve from 10,196 to a peak of 208,329, from which they have fallen to 184,930 in 1969 (the latest year for which such data are currently available)—an increase of more than 1,800 percent; and during this same 1946-69 period, voluntary nonbusiness filings have risen even more sharply from 8,564 to 169,440—an increase from 83.9 percent to 91.6 percent of the total annual bankruptcy filings. See the AD. OFFICE OF THE U.S. COURTS ANNUAL REP. bankruptcy tables for the years 1946-69 for a compilation of these data.

43. In *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), the Supreme Court struck down as offensive to the due process clause of the fourteenth amendment a Wisconsin statute that authorized the summary prejudgment garnishment of a debtor's wages. Relying on what they have perceived to be the broad rationale underlying this decision, several lower courts have since gone on to elaborate and extend *Sniadach*. Thus, they have similarly stricken down as unconstitutional not only a statute that surrounded prejudgment wage garnishment with substantial procedural safeguards for the debtor, *McCallop v. Carberry*, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); but also statutes that have authorized summary prejudgment garnishment of a debtor's nonwage monies, such as his bank account, *Larson v. Fetherston*, 44 Wis. 712, 172 N.W.2d 20 (1969); summary enforcement of a landlord's lien, *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970); summary enforcement of an innkeeper's lien, *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); and summary replevin of a chattel security, *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D.N.Y. 1970). Cf. UNIFORM CONSUMER CREDIT CODE § 5.104, which bars wage garnishment by a creditor who has not yet reduced his claim to judgment. Indeed, *Sniadach* has even been invoked to strike down a statute that authorized summary imprisonment of a debtor who failed to obey a subpoena to appear and be examined at a disclosure hearing, *Desmond v. Hackey*, 315 F. Supp. 328 (D. Me. 1970). Other courts, however, have suggested that *Sniadach* must be interpreted more narrowly and

seize the debtor's nonexempt property, have it sold, and procure the application of its proceeds to the satisfaction of his judgment. The law of each state defines the kinds of property that are leviable,<sup>44</sup> and of vital concern to the consumer-debtor is the treatment that is accorded wages and salaries due and owing him from his employer. Not only does this probably constitute his principal free asset, without the regular receipt of which he would be unable to maintain himself and his family, but its garnishment<sup>45</sup> in the hands of his employer may very likely result in the loss of his job. Accordingly, where earnings are not exempted from creditor process, even the threat of their garnishment may suffice to nudge the debtor into voluntary bankruptcy.

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be confined to its own peculiar factual configuration. See, e.g., *Terplan, Inc. v. Superior Ct.*, 105 Ariz. 270, 272, 463 P.2d 68, 70 (1969). See also *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), *prob. juris. noted*, 401 U.S. 906 (1971), *argued sub nom.* *Fuentes v. Shevin*, 40 U.S.L.W. 3235 (U.S. Nov. 9, 1971) (No. 70-5039), in which it is intimated that the constitutional protection of the debtor recognized in *Sniadach* may be susceptible of contractual waiver. For a more comprehensive critical analysis of the possible ramifications of *Sniadach*, see Comment, *Limitations on Prejudgment Attachment: Reverberations of Sniadach v. Family Finance Corp.*, 13 B.C. IND. & COM. L. REV. 700 (1971); Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Sniadach Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986 (1970); Note, *Attachment in California: A New Look at an Old Writ*, 22 STAN. L. REV. 1254 (1970).

44. For a more detailed description, discussion, and evaluation of current exemption laws—as well as an examination of possible alternatives to their use, particularly in bankruptcy, in which they are incorporated by reference, Act of July 1, 1898, ch. 541, § 6, 30 Stat. 548, *as amended*, 11 U.S.C. § 24 (1970)—see Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678 (1960); Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289 (1950); Joslin, *Debtors' Exemptions Law: Time for Modernization*, 34 IND. L.J. 355 (1959); Karlen, *Exemptions from Execution*, 22 BUS. LAW. 1167 (1967); Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445 (1960); Riesenfeld, *Life Insurance and Creditors' Remedies in the United States*, 4 U.C.L.A.L. REV. 583, 588-604 (1957); Note, *Bankruptcy Exemptions: A Full Circle Back to the Act of 1800?*, 53 CORNELL L. REV. 663 (1968); Comment, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459 (1959).

45. RESTATEMENT, JUDGMENTS § 36, special note (1942) states:

A proceeding by which the plaintiff is enabled to reach and apply to the satisfaction of his claim a debt owing to the principal defendant is ordinarily called garnishment, and the principal defendant's debtor is called the garnishee. The word "garnish" means "warn"; the garnishee is warned that he is not to pay his debt to the defendant, his creditor, but to the plaintiff. In some of the New England states [e.g., Maine] the proceeding is called "trustee process," and the defendant's debtor is called the "trustee."

In other states, when used to reach earnings due and owing, the proceeding may be called "execution on wages" (e.g., Connecticut), "attachment of wages" (e.g., Delaware, District of Columbia, South Carolina), "wage deduction procedure" (e.g., Illinois), "attachment and execution of wages" (e.g., New Jersey), "income execution" (e.g., New York), or "sugestee execution" (e.g., West Virginia). The term "garnishment," however, is used here generically to embrace all of these proceedings.

The range of variation in the treatment of wage garnishment across the country—especially before the passage of the Federal Consumer Credit Protection Act<sup>46</sup>—defies facile description and neat categorization.<sup>47</sup> At one extreme, in some states, the debtor's wages have been virtually defenseless against creditor process.<sup>48</sup> At the other extreme, in one state—Texas—they have been garbed with absolute immunity.<sup>49</sup> And between these poles, in the bulk of the states, their vulnerability has been a function of many factors, including their amount and when they were earned; the number of importunate creditors, the frequency of their levies, the nature and size of their underlying claims, and the stage of their litigation against the debtor; and the familial status of the debtor and *sui generis* considerations affecting his life situation.<sup>50</sup> Some generalizations of perhaps passing

46. 15 U.S.C. §§ 1671-77 (1970).

47. Nor does the Federal Consumer Credit Protection Act purport to define and prescribe comprehensive, absolutely uniform standards to govern wage garnishment. Subject to enumerated exceptions, it rather simply proscribes the garnishment of more than 25 percent of a debtor's disposable weekly earnings or the amount by which such earnings exceed thirty times the federal minimum hourly wage—whichever is less. In practical effect, however, this legislation supersedes the more niggardly wage-exemption provisions that have heretofore obtained in many states, although it does not at all affect the more liberal ones. *Cf.* UNIFORM CONSUMER CREDIT CODE § 5.105(2), which is derived from the Act, *id.* comment 1; and which faithfully reflects its spirit, if not its every detail.

48. *E.g.*, IDAHO CODE ANN. § 11-205(7) (1948) (\$100 per month), *as amended*, § 11-207 (Supp. 1970) (minimum prescribed in Federal Consumer Credit Protection Act, see note 47 *supra*); ME. REV. STAT. ANN. tit. 14, § 2602.6 (1965) (\$30 per month), *as amended*, (Supp. 1970) (\$40 per month); TENN. CODE ANN. §§ 26-207 to -209 (1955) (\$60 per month for head of family, plus \$5 per month for each dependent child under 16; \$30 per month for nonhead of family), *as amended*, §§ 26-207 to -208 (Supp. 1970) (\$50 per week for head of family, plus \$2.50 for each dependent child under 16; \$17.50 per week for non-head of family); VT. STAT. ANN. tit. 12, § 3020(5) (1958) (\$25 or one-half wages due, whichever is less), *as amended*, (Supp. 1970) (\$30 plus one-half of wages exceeding \$60 per week).

49. TEX. CONST. art. 16, § 28; TEX. REV. CIV. STAT. ANN. art. 4099 (1966).

50. ALA. CODE tit. 7, § 630 (1958); ALASKA STAT. § 09.35.080(1) (1966), *as amended*, (Supp. 1970); ARIZ. REV. STAT. ANN. §§ 12-1594A, 33-1126 (1956); ARK. STAT. ANN. § 30-207 (1962), *as amended* (Supp. 1969); CAL. CIV. PROC. CODE §§ 542-43, 690.10 -.11 (West 1955); COLO. REV. STAT. ANN. §§ 77-2-4 to -5 (1963); CONN. GEN. STAT. ANN. §§ 52-361 to -362 (Supp. 1966), *as amended*, (Supp. 1971); DEL. CODE ANN. tit. 10, § 4913 (1953), *as amended*, (Supp. 1970); D.C. CODE ENCYCL. ANN. §§ 16-571 to -573 (1967); FLA. STAT. ANN. § 222.11 (1961); GA. CODE ANN. § 46-208 (1965), *as amended*, (Supp. 1970); HAWAII REV. STAT. §§ 652-53 (1968), *as amended*, § 652-1 (Supp. 1970); ILL. ANN. STAT. ch. 62, § 73 (Smith-Hurd Supp. 1971); IND. ANN. STAT. §§ 2-3501(d), 3-504 to -505 (1968); IOWA CODE ANN. §§ 627.10 -.12 (1966), *as amended*, § 627.10 (Supp. 1971); KAN. STAT. ANN. § 60-2310 (1964), *as amended*, (Supp. 1970); KY. REV. STAT. ANN. §§ 427.010(2)-(3) (1969); LA. REV. STAT. ANN. §§ 13:3881(1), 13:4732 (1968), *as amended*, § 13:3881(1) (Supp. 1971); MD. ANN. CODE art. 9, § 31, art. 81, § 322 (1957), *as amended*, art. 9, § 31 (Supp. 1970); MASS. ANN. LAWS ch. 246, § 28 (1956), *as amended*, (Supp. 1970); MICH. STAT. ANN.

significance can, however, be made: recent years have witnessed an increasing liberalization of wage exemptions with respect to their size, the manner in which they are defined (the trend is from dollar to percentage amounts), and the flexibility of their application—which probably can fairly be said to have both foreshadowed and, in turn, been accelerated by the Federal Consumer Credit Protection Act.<sup>51</sup>

The eight states surveyed in the Brookings study exhibited a fairly representative collection and combination of different characteristics. The most primitive approach was seen in Maine, where only \$30<sup>52</sup> of the debtor's monthly earnings were exempted from garnishment. Another state—Alabama—flatly exempts 75 percent of the debtor's earnings from garnishment. In two states—Oregon and Illinois—the wage exemption is couched in terms of a percentage of the debtor's earnings, but with minimum and maximum dollar amounts specified. Thus, Oregon exempts from garnishment 50 percent of the debtor's earnings, but in no event less than \$25 or more than \$250 per month;

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§§ 27A.7511(2)-(4) (1962); MINN. STAT. ANN. §§ 290.48 subd. 1, 550.37 subds. 13-14 (1962), *as amended*, §§ 290.48 subd. 1, 550.37 subds. 13-15 (1971); MISS. CODE ANN. § 307(10) (1942), *as amended*, (Supp. 1970); MO. ANN. STAT. §§ 452.140, 513.425, 513.465, 525.030 (1949), *as amended*, § 452.140 (Supp. 1970); MONT. REV. CODES ANN. §§ 93-5816 to -5817, -5819 (1964); NEB. REV. STAT. §§ 25-1555, -1557 to -1558 (1965), *as amended*, § 25-1558 (Supp. 1969); NEV. REV. STAT. § 21.090(h) (1969); N.H. REV. STAT. ANN. §§ 80:50, 512:21 (1955), *as amended*, § 512.21 (Supp. 1970); N.J. STAT. ANN. §§ 2A.17-50 to -57 (1952), *as amended*, §§ 2A.17-50, -52-53, -56-57 (Supp. 1970); N.M. STAT. ANN. § 36-14-7 (Supp. 1971); N.Y. CIV. PRAC. LAW § 5205(e) (McKinney 1963); N.C. GEN. STAT. § 1-362 (1969); N.D. CENT. CODE §§ 28-25-11, 32-09-02 (1960); OHIO REV. CODE ANN. §§ 2329.62, 2329.66, 2333.21, 5719.08 (Page 1953), *as amended*, §§ 2329.62, 2329.66 (Page Supp. 1970); OKLA. STAT. ANN. tit. 31, § 1 (1953), *as amended*, § 4 (Supp. 1970); ORE. REV. STAT. § 23.185 (1969); PA. STAT. ANN. tit. 12, § 1005 (1953), tit. 42, § 886 (1966), tit. 62, § 2043.39 (1968); R.I. GEN. LAWS ANN. § 9-26-4 (1969); S.C. CODE ANN. §§ 10-1731, 34-41 (1962); S.D. COMP. LAWS ANN. § 15-20-12 (1967); UTAH CODE ANN. §§ 78-23-1(7), (12) (1953), *as amended*, (Supp. 1969); VA. CODE ANN. §§ 34-3, 34-29 (Supp. 1968); WASH. REV. CODE ANN. § 7.33.280 (Supp. 1970), W. VA. CODE ANN. § 38-5A-3 (1966); WIS. STAT. ANN. §§ 304.22 (1958), 267.18(2), 272.18(15) (Supp. 1971); WYO. STAT. ANN. § 1-422 (1957).

51. For a general description, discussion, and evaluation of wage garnishment proceedings, see CCH HANDBOOK ON ASSIGNMENT AND GARNISHMENT OF WAGES 25-50 (1966); Abrahams & Feldman, *The Exemption of Wages from Garnishment: Some Comparisons and Comments*, 3 DE PAUL L. REV. 153 (1954); Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965); Grosse & Lean, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 742 (1968); Jablonski, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759; Sweeney, *Abolition of Wage Garnishment*, 38 FORD. L. REV. 197 (1969); Wilson & Alexander, *Wage Garnishment in Kentucky*, 57 KY. L.J. 92 (1968); Comment, *Garnishment of Wages in Pennsylvania: Its History and Rationale*, 70 DICK. L. REV. 199 (1966).

52. Since raised to \$40. ME. REV. STAT. ANN. tit. 14, § 2602.6 (Supp. 1970), *amending id.* § 2602 (1965).

and Illinois similarly exempted from garnishment 85 percent of the debtor's earnings, but in no event less than \$45<sup>53</sup> or more than \$200 per week. Illinois, moreover—as does New York as well—permits only one creditor to levy execution against the debtor's earnings at a time, and makes the initial garnishment a continuing one until the underlying claim is satisfied. Ohio limits the benefit of its wage-exemption provisions to its residents, and further differentiates between family heads and unmarried debtors—immunizing from garnishment 80 percent of the first \$300 and 60 percent of the balance of the monthly earnings of the former, but in no event less than \$150, and \$100 of the monthly earnings of the latter.<sup>54</sup> Not part of the exemption statute, but related to it, is the wage-earner trusteeship procedure, described above,<sup>55</sup> which, when properly invoked by the debtor, bars garnishment of his earnings. In two states—California and New York—the courts are invested with considerable discretion to vary wage exemptions in particular cases in order best to serve the ends of justice. Thus, California exempts from garnishment 50 percent of the debtor's earnings, and all such earnings if necessary for the use of the debtor's family, unless the levying creditor's claim was incurred in supplying "the common necessities of life"; and New York similarly exempts from garnishment 90 percent of the debtor's earnings, but in no event less than \$30 per week if he resides or works in a city with a population of 250,000 or more—otherwise \$25 per week—or so much as the court may find necessary. Finally, one state—Texas—absolutely exempts current earnings from garnishment.

Interviews with persons qualified accurately to assess the impact of collection techniques on the debtor have tended to confirm the a priori hunch that wage garnishment is a major immediate cause of bankruptcy and other formal insolvency proceedings. Thus, wage garnishment more commonly than any other state-sanctioned individual creditor's remedy was believed by both debtors' and

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53. Since raised to \$65 for heads of families and \$50 for other employees. ILL. ANN. STAT. ch. 62, § 73 (Smith-Hurd Supp. 1971), *amending* H.B. No. 462, § 3, [1961] Ill. Laws 1470.

54. These provisions have since been revised to confer exempt status on any debtor's wages earned within the next preceding thirty days in an amount not exceeding 175 times the federal minimum hourly wage—or 82.5 percent of his disposable earnings due from the garnishee—whichever is greater. OHIO REV. CODE ANN. §§ 2329.62, 2329.66 (Page Supp. 1970), *amending id.* (Page 1953). *Cf.* note 47 *supra* for cognate provisions of the Federal Consumer Credit Protection Act.

55. See notes 34-40 *supra* and accompanying text.

creditors' attorneys to contribute to the distressed debtor's financial collapse.<sup>56</sup> Welfare authorities ranked it second only to creditor harassment in this respect;<sup>57</sup> and referees in bankruptcy almost universally viewed it as by far the most significant precipitant of chapter XIII proceedings.<sup>58</sup> Federal judges in significant numbers, too, regarded wage garnishment as the single facet of state law that introduces most problems into insolvency administration.<sup>59</sup>

These interviews have further established that it is the mere possibility of wage garnishment, together with its probable effect on the debtor's continued employment, rather than the stringency of its terms, that is really crucial in this context. Thus, the frequency with which wage garnishment was cited as a harbinger of bankruptcy and other formal insolvency proceedings varied not with the degree of burden it might impose on the debtor's earnings—indeed, it was so mentioned less regularly in flinty Maine than in states with more

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56. About 85 percent of the debtors' attorneys and almost 60 percent of the creditors' attorneys interviewed ascribed to wage garnishment such an effect; only to attachment did a substantial number of these respondents—about one-half of each group—ascibe a similar effect. Apart from Texas, where wage garnishment is constitutionally prohibited, see note 49 *supra* and note 61 *infra*, and New York, where only business bankruptcies were studied, this general pattern was reflected in every state except Maine, where one-half of the creditors' attorneys interviewed regarded attachment as a common trigger of bankruptcy proceedings, but only 30 percent of them so regarded wage garnishment—no more than so regarded the *capias* writ (civil imprisonment for debt). *Cf.* notes 58, 59 and 65 *infra*.

57. More than three out of every ten welfare authorities interviewed cited wage garnishment as the *bête noire* in this context, while close to four out of every ten of them so cited creditor harassment. Among other possibly common immediate causes of formal insolvency proceedings, only attachment and execution levy, which were cited by about one out of every ten, received more than barest mention from these respondents.

58. Two-thirds of the referees interviewed regarded wage garnishment or the threat of it as the most common immediate cause of chapter XIII proceedings; it was most closely approached in this respect by severe collection pressures, a factor that was cited by less than one-quarter of these respondents; but no other debt-collection technique was accorded consequential mention by them. *Cf.* HEARINGS ON H.R. 11,601 BEFORE THE SUBCOMM. ON CONSUMER AFFAIRS OF THE HOUSE COMM. ON BANKING AND CURRENCY, 90th Cong., 1st Sess., pt. 1, at 419 (1967) (testimony of Estes Snedecor, Referee in Bankruptcy, D. Ore.); Snedecor, *Why So Many Bankruptcies in Oregon?*, 40 REF. J. 78 (1966). Again, excluding both Texas and New York, departure from this general pattern was seen only in Maine, where severe collection pressures and repossession or the threat of it were cited by the referees as bellwethers of chapter XIII proceedings as frequently as was wage garnishment. *Cf.* note 56 *supra* and notes 59 and 65 *infra*.

59. About one-quarter of the federal judges interviewed advanced this opinion, a larger proportion of them than so characterized any other facet of state law; next closest in this respect was tax exemption laws, which one-sixth of them mentioned in this connection. Here, too, Maine distinguished itself, in that alone among the states in which wage garnishment is available as a creditors' remedy and/or was inquired into, its judge did not perceive the practice as giving rise to any serious difficulties. *Cf.* notes 56 and 58 *supra* and note 65 *infra*.

liberal wage-exemption laws<sup>60</sup>—but with whether it might impose on them any burden at all—for only in Texas was the response distinctively and dramatically different.<sup>61</sup>

Corroboration was also supplied for the assumption that most employers find wage garnishment irksome<sup>62</sup>—chiefly owing to the added bookkeeping burden it creates<sup>63</sup>—and that they will discharge employees whose wages chronically are so tied up.<sup>64</sup> Employers' responses seemed further to support the conclusion that the rigor with which this discharge sanction is imposed importantly affects the harried debtor's decision whether or not to institute bankruptcy or other insolvency proceedings. Otherwise, there is no ready explanation of why wage garnishment appears to be less seriously regarded as a forerunner of bankruptcy in Maine—whose wage-exemption laws are niggardly, but whose employers tend to regard wage garnishment rather tolerantly—than in other states—whose wage-exemption laws

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60. See notes 56, 58, and 59 *supra*; *cf.* note 65 *infra*.

61. Almost universally, none of the Texas interviewees, in marked contrast with those in other states, even mentioned wage garnishment in listing the major immediate causes of bankruptcy and other formal insolvency proceedings and in discussing state law provisions that complicate insolvency administration. *Cf.* notes 56, 58, and 59 *supra*. An exception was seen among debtors' attorneys interviewed, however, 37.5 percent of whom cited wage garnishment in this regard. Since they could not have been commenting on the actual Texas scene (where the prohibition against wage garnishment presumably is enforced), one can only assume that they were referring to their own—or others' reported—out-of-state experiences. In any event, comparatively low as it may be, this statistic is surprising and not easy completely satisfactorily to explain.

62. About one-half of the employers interviewed characterized the garnishment of their employees' wages as at least a nuisance, and almost one-sixth of them regarded it as a very troublesome problem.

63. More than 60 percent of the employers interviewed singled out the bookkeeping problem created as the basis for their objection to garnishment of their employees' wages—and, indeed, one knowledgeable informant in Cleveland reported that the processing of each wage garnishment order cost a large industrial employer \$14-\$18 in added clerical expense. Other less frequently voiced complaints focused on the consequent lowered productivity of and greater possibility of theft by the affected employee—mentioned by about one-fifth of these respondents—and the preemption of the time of the legal and supervisory staffs entailed—mentioned by about one-tenth and one-sixth of them, respectively.

64. Although none of the employers interviewed admitted to the practice of discharging an employee after the first wage garnishment, 12 percent of them did so after the second, 9 percent after the third, 12 percent after any higher number, and 6 percent after a specified number in a defined time period. Furthermore, almost one-quarter of these respondents acknowledged that wage garnishment was at least one element considered in evaluating an employee's performance. Only one-fifth of them claimed never to discharge or otherwise discipline an employee for this reason, or claimed to try to help him with his problem. Nor does organized labor appear to regard these management policies as worthy of its serious concern. Thus, among the employers interviewed who ventured to assess labor union attitudes in the matter, all agreed that wage garnishment-inspired discharge was not an issue for which

are more liberal, but whose employers tend to regard wage garnishment with a more jaundiced eye.<sup>65</sup>

*Wage Assignment.* In some respects, the same considerations that render wage garnishment menacing to the debtor also obtain with regard to wage assignment. Thus, where state law does not adequately protect the debtor against his own weakness, ignorance, or improvidence and validates a wage assignment given as security by the debtor to a creditor with little or no limitation as to minimal formalities that must be observed, the character of the assignee, the nature of the wages assignable, the amount that may be demanded, or the time period covered, the consequent incentive to voluntary bankruptcy may be powerful when the underlying obligation becomes delinquent.<sup>66</sup>

Again, the regulation of wage assignment rings the changes from categorical prohibition to virtually complete *laissez faire*. Thus, in five jurisdictions, wage assignments are—for all practical

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a union vigorously would take up cudgels in behalf of its members—either because it assigns higher priority to other issues, for which this issue is sacrificed, or because it feels no interest or responsibility in the matter, or because it sympathizes with the employer's position. And although welfare authorities interviewed took a somewhat more sanguine view, their general assessment of labor union attitudes in the matter was quite consistent with that of the employers interviewed—less than 14 percent of them perceived employee debt problems as an important issue in collective bargaining negotiation, and only one-half of these felt that the union would make it a fighting issue. Some legislative recognition of and attempt to mitigate the social problems engendered by this state of affairs, however, is reflected in recently enacted legislation that circumscribes an employer's freedom to discharge an employee because of wage garnishment. *See, e.g.,* Federal Consumer Credit Protection Act § 304, 15 U.S.C. § 1674 (1970) (discharge prohibited for wage garnishment for any one debt); CONN. GEN. STAT. ANN. § 52-361(h) (Supp. 1971) (discharge for wage garnishment prohibited, unless it has occurred more than seven times in one calendar year); HAWAII REV. STAT. § 378-32 (Supp. 1970) (discharge for wage garnishment absolutely prohibited); N.Y. CIV. PRAC. LAW § 5252 (McKinney Supp. 1970), (discharge for wage garnishment absolutely prohibited); VT. STAT. ANN. tit. 12, § 3165 (Supp. 1970) (discharge for wage garnishment prohibited, unless it has occurred previously five or more times for separate debts); UNIFORM CONSUMER CREDIT CODE § 5.106 (discharge prohibited for wage garnishment arising out of consumer transaction)—now adopted in six states, see note 91 *infra*.

65. One-half of the employers interviewed in Maine reported that they never discharged or otherwise disciplined an employee whose wages were garnished, and the balance sanctioned up to three wage garnishments within a twelve-month period. The employers interviewed in no other state even closely approached this level of permissiveness. Thus, among perhaps the next most benign group of employers interviewed—those in Oregon—while one-third of them denied discharging or otherwise disciplining an employee whose wages were garnished, one-third of them at least considered wage garnishment a factor in evaluating an employee's performance, and one-third of them discharged an employee after the second or third wage garnishment.

66. For a general description, discussion, and evaluation of state laws governing wage assignment, see CCH HANDBOOK, *supra* note 51, at 11-24.

purposes—quite unenforceable.<sup>67</sup> In thirty others, they are permitted, but at the same time are surrounded—to a greater or lesser extent—by a multiplicity of safeguards designed to frustrate creditor overreaching.<sup>68</sup> Finally, in the remaining sixteen jurisdictions, restrictions on wage assignments are either nonexistent or patently unresponsive to the debtor's critical needs.<sup>69</sup>

Here, too, the eight-state sample canvassed in the Brookings study reflects quite comprehensively the heterogeneity of state law governing wage assignment. Of these states, Maine is the most relaxed and permissive, imposing no statutory restrictions on the practice, other than purely formal ones. Both New York and Oregon sanction wage assignment, but countenance demands thereunder for no more than

67. ALA. CODE tit. 39, § 201 (1959) (future wages); CONN. GEN. STAT. ANN. § 52-361(g) (Supp. 1971); D.C. CODE ENCYCL. ANN. § 28-2305(a) (1967); MO. ANN. STAT. §§ 408.210, 432.030 (1952) (future wages); OHIO REV. CODE ANN. §§ 1321.31-.32 (Page 1962).

68. ARIZ. REV. STAT. ANN. § 6-631C (Supp. 1970); CAL. CIV. CODE § 1804.1(c) (West Supp. 1971); CAL. LABOR CODE § 300 (West 1955); COLO. REV. STAT. ANN. §§ 80-15-1 to -7 (1963); ch. 299, §§ 2.410, 3.403 [Regular 1971] IDAHO LAWS 1152, 1178; ILL. ANN. STAT. ch. 48, §§ 39.1-.8 (Smith-Hurd 1969); IND. ANN. STAT. §§ 40-202 to -215 (1965) (and also the recently enacted statute, P.L. 366, §§ 2-410, 3-403, [1971] Ind. Acts 1601-02, 1632, enacted March 5, 1971, effective Oct. 1, 1971 (apparently to be codified as title 24, art. 4.5, §§ 1-101 to 6-202 of the INDIANA CODE), noted in 1 CCH CONSUMER CREDIT GUIDE ¶ 4770, at 5005, 2 *id.* ¶ 5701, at 21,511 (1971)); IOWA CODE ANN. §§ 536.17, 539.4 (Supp. 1971); KAN. STAT. ANN. § 16-419 (1964); KY. REV. STAT. ANN. §§ 288.570(2), 371.110-.150 (1969); LA. REV. STAT. ANN. §§ 6:587-88 (1964), 23:731 (Supp. 1971); MD. ANN. CODE art. 8, §§ 6-12 (1968), art. 58A, § 19 (Supp. 1970); MASS. ANN. LAWS ch. 154, § 2 (1970); MICH. STAT. ANN. §§ 23.667 (17) (1957), 27.3178(598.18b) (Supp. 1970); MINN. STAT. ANN. §§ 181.04-.07 (1966); MONT. REV. CODES ANN. § 47-220 (1961); N.J. STAT. ANN. § 17:10-17 (Supp. 1970); N.Y. PERS. PROP. LAW §§ 46-49 (McKinney Supp. 1970); N.C. GEN. STAT. §§ 1-55, 95-31 (1969); OKLA. STAT. ANN. tit. 14A, §§ 2-410, 3-403 (Supp. 1970); ORE. REV. STAT. §§ 83.670(1), 725.350 (1969); R.I. GEN. LAWS ANN. §§ 19-25-32 to -34, 28-15-2 to -6 (1968); S.D. COMP. LAWS ANN. §§ 54-6-23 to -25 (1967); TENN. CODE ANN. § 50-315 (1966); TEX. REV. CIV. STAT. ANN. art. 5069-3.20(1), -4.04(1), -5.05(1), -6.05(2), -7.07(2), art. 5159c (1971); UTAH CODE ANN. §§ 70B-2-410, -3-403 (Supp. 1969); VT. STAT. ANN. tit. 8, §§ 3027-29 (1959), *as amended*, § 3027 (Supp. 1970); VA. CODE ANN. §§ 6.1-289 to -390 (1966), 34-29, 40.1-31 to -32 (1970); W. VA. CODE ANN. §§ 21-5-3, 47-7A-17 (1966); WIS. STAT. ANN. § 214.15 (1957); WYO. STAT. ANN. §§ 27-201 to -203 (1959); ch. 191, §§ 2.410, 3.403 [1971] Wyo. Sess. Laws 303, 323. *Cf.* UNIFORM CONSUMER CREDIT CODE §§ 2.410, 3.403.

69. Alaska, Georgia, and Pennsylvania in no way statutorily limit the terms or the use of the wage assignment. Thirteen additional states, moreover, impose limitations that are largely formal in nature only and do not circumscribe either the amount or time period for which a debtor's wages can effectively be assigned. ARK. STAT. ANN. §§ 81-316 to -317 (1960); DEL. CODE ANN. tit. 5, § 2115 (1953); FLA. STAT. ANN. §§ 516.17, 519.11 (1962); HAWAII REV. STAT. §§ 373-11(9), 409-20, 476-13 (1968); ME. REV. STAT. ANN. tit. 9, § 3085, tit. 26, § 627 (1964); MISS. CODE ANN. § 275 (1956); NEB. REV. STAT. §§ 36-213, 45-142, 45-144 (Supp. 1969); NEV. REV. STAT. §§ 608.170, 675.340 (1967); N.H. REV. STAT. ANN. § 506:3 (1968); N.M. STAT. ANN. § 43-1-12 (1966); N.D. REV. CODE §§ 13-03-17, 13-03-22 (Supp. 1969); S.C. CODE ANN. § 40-103 (1962); WASH. REV. CODE ANN. §§ 49.48.090-.100 (Supp. 1970).

10 percent of the debtor-assignor's earnings (although this limitation is inapplicable in New York when the underlying claim exceeds \$1,000 or is based on a court order to support a wife and children) and invalidate the practice when used to secure retail instalment sales contracts (and debt-pooling agency charges in Oregon). In California, the debtor may not assign more than 50 percent of his future earnings—and not more than 25 percent where they are necessary for the support of dependents—and the underlying claim must have been incurred in supplying necessities of life. Illinois is even more solicitous of the debtor-assignor, forbidding the assignment of more than 15 percent of his earnings, avoiding the assignment three years after its execution (as against a future employer, two years), and nullifying the assignment if the debtor-assignor files a timely affidavit stating only that he has a bona fide defense to the claim. Texas adopts a somewhat more protective stance toward the debtor-assignor, invalidating wage assignments made to secure regulated and instalment loans and retail instalment sale contracts. Alabama flatly invalidates the assignment of future earnings, but not current earnings due and owing, for which it prescribes no formalities to be followed. Finally, Ohio refuses statutorily to recognize any wage assignment, except one made in compliance with a court order to support a spouse (25 percent limit) or minor children (no limit).

Whatever its potential for mischief may be, however, wage assignment no longer appears to figure prominently as a cause of acute financial distress.<sup>70</sup> In some states, this may be attributable to statutory provisions designed to prohibit or inhibit its use; in others, however, it may signal a growing sophistication among debtors and a manifestation of their instinct to survive.

*Cognovit Clause.* On occasion, a note—or, indeed, any debt instrument—may contain a so-called cognovit or warrant-of-attorney clause, which authorizes the holder to confess judgment on the obligation against the debtor-maker, as his agent, in the event of default, without service upon or other notice to the debtor-maker. In practice, the judgment may not uncommonly be taken at a time or place or in such a manner as to render the interposition of a defense by the debtor exceedingly difficult. Furthermore, the subsequent reopening and vacation of an improper judgment is unlikely, owing

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70. Not a single person interviewed cited the wage assignment as a major immediate cause of bankruptcy or other formal insolvency proceedings. *But cf.* Fortas, *Wage Assignment in Chicago*, 42 *YALE L.J.* 526 (1933).

to the fact that the debtor usually lacks the information and the means necessary to seek appropriate relief. Accordingly, when the threat of such a judgment—and the grief it customarily entails—becomes imminent or is actually realized, voluntary bankruptcy may appear to the debtor to be at least a somewhat more tolerable alternative.<sup>71</sup>

Although originally a creature of the common law, the cognovit clause has come almost universally to be governed by state constitutional or statutory provisions. In only five states does this positive law specifically permit or recognize substantially unrestricted use of such a clause.<sup>72</sup> In fourteen other states, on the other hand, this clause has been unequivocally avoided by the legislature.<sup>73</sup> And

71. For a more detailed description, discussion, and evaluation of the cognovit clause, see Hopson, *Cognovit Judgments: An Ignored Problem of Full Faith and Credit*, 29 U. CHI. L. REV. 111, 114-32 (1961); Hunter, *The Warrant of Attorney to Confess Judgment*, 8 OHIO ST. L.J. 1 (1941); Note, *Confessions of Judgment*, 102 U. PA. L. REV. 524-28 (1954).

72. DEL. CODE ANN. tit. 10, § 2306 (1953); ILL. ANN. STAT. ch. 110, § 50(4) (Smith-Hurd 1968); KAN. STAT. ANN. § 60-2601(2) (1964); OHIO REV. CODE ANN. § 2323.13 (Page Supp. 1970); PA. STAT. ANN. tit. 12, § 739 (Supp. 1971). Although not specifically sanctioned by statute, the cognovit clause also appears to enjoy unconditional judicial approbation in the District of Columbia. See *Costin v. Hollywood Credit Clothing Co.*, 140 A.2d 696 (D.C. Mun. Ct. App. 1958); *Newman v. Universal Enterprises*, 129 A.2d 696 (D.C. Mun. Ct. App. 1957). But see *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), a class action attacking Pennsylvania's confession-of-judgment procedure, in which individual parties to leases and consumer financing transactions earning less than \$10,000 per year were granted relief on the ground that they had not intentionally waived their constitutional rights to notice and a hearing, and in which the court further said that an irrebutable presumption to that effect would obtain in similar cases in the future. *Quaere*: Would a clear and conspicuous explanation and warning to the debtor cure the asserted constitutional infirmity in such cases? Cf. OHIO REV. CODE ANN. § 2323.13(D) (Page Supp. 1970):

A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other evidence of indebtedness . . . is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the signature of each maker, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document: "Warning—By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause."

73. ALA. CODE tit. 20, § 16 (1958); ARIZ. REV. STAT. ANN. § 44-143 (1967); FLA. STAT. ANN. § 55.05 (1969); GA. CODE ANN. § 110-601 (1959); IND. ANN. STAT. §§ 2-2904 to -2906; P.L. 366, §§ 2-415, 3-407, [1971] Ind. Acts 1603, 1633; KY. REV. STAT. ANN. §§ 372.140 -990 (1969); MASS. ANN. LAWS ch. 231, § 13a (1956); MICH. STAT. ANN. § 27A.2906(1) (1962); MISS. CODE ANN. § 1545 (1956); MONT. REV. CODES ANN. § 13-811 (1967); N.J. STAT. ANN. § 2A:16-9 (1952); N.M. STAT. ANN. §§ 21-9-16 to -18 (1970); TENN. CODE ANN. § 25-201 (1955); TEX. REV. CIV. STAT. ANN. arts. 2224 (1964), 5069-3.20(3), -4.04(3), -5.05(2), -6.05(2), -7.07(2) (1971). Indiana, Kentucky, and New Mexico go even further and make execution or enforcement of a cognovit clause a misdemeanor punishable by fine or imprisonment.

between these poles are arrayed the balance of the states, in which the cognovit clause is tolerated, but circumscribed in use by procedural prerequisites or excluded from particular transactions—typically small loan and retail instalment sale contracts—in which its susceptibility to abuse is deemed to be most compelling.<sup>74</sup>

The eight states on which the Brookings study focused exhibit a diverse pattern of attitudes toward the use of the cognovit clause. Seemingly most permissive is Ohio, whose statutes broadly validate the practice and, even following recent, more restrictive amendments,<sup>75</sup> pose no serious legal obstacles to its effective employment. A similar situation generally obtains in Illinois as well—although a rather distinctive procedural constraint does somewhat limit the creditor's ability simply to garnish the debtor's wages under a cognovit judgment.<sup>76</sup> In all of the other states in which

74. ALASKA CIV. R. 57(c) (1963); ARK. STAT. ANN. §§ 29-301 to -303 (1962); CAL. CIV. CODE § 1804.1(c) (WEST SUPP. 1971); CAL. CIV. PROC. CODE §§ 1132-35 (West 1955); CAL. FIN. CODE § 24468 (West 1968); COLO. REV. STAT. ANN. § 13-16-6(1)(b) (1963); CONN. GEN. STAT. ANN. §§ 36-236 (1969), 42-88 (1960); HAWAII REV. STAT. § 409-15 (1968); IDAHO CODE ANN. §§ 10-901 to -904 (1948); ch. 299, §§ 2.415, 3.407, [Regular 1971] Idaho Laws 1153-54, 1179; IOWA CODE §§ 536.12, 676.1-4 (1950); LA. CONST. art. 7, § 44 (WEST 1955); LA. REV. STAT. ANN. § 6.585 (1951); ME. REV. STAT. ANN. tit. 9, § 3084 (1964); MD. ANN. CODE art. 58A, § 19 (1968), art. 83, § 130(b) (1969); MD. R. Pr. & P. 645, appearing in volume 9 MD. ANN. CODE (1963); MINN. STAT. ANN. §§ 56.12 (1970), 168.71(a)(2) (1960); MO. ANN. STAT. §§ 511.070-100 (1952); NEB. REV. STAT. §§ 25-1309 to -1312 (1964); NEV. REV. STAT. §§ 17.090-110 (1969), 675.350 (1967); N.H. REV. STAT. ANN. § 399-A:5-11 (1961); N.Y. BANKING LAW § 353 (McKinney 1950); N.Y. CIV. PRAC.-LAW §§ 3201, 3218 (McKinney 1970); N.Y. PERS. PROP. LAW § 302(14) (McKinney 1962); N.C. GEN. STAT. § 1A-1, Rule 68.1 (1969); N.D. CENT. CODE § 51-13-02(13) (1960); N.D.R. CIV. P. 68(c) (1960); OKLA. STAT. ANN. tit. 12, §§ 689-95 (1960), tit. 14A, §§ 2-415, 3-407 (Supp. 1970); ORE. REV. STAT. §§ 83.670(1), 725.050(2) (1969); R.I. GEN. LAWS ANN. § 19-25-24 (1968); S.C. CODE ANN. §§ 8-800.13 (Supp. 1970), 10-1535 to -1538 (1962); S.D. COMP. LAWS ANN. §§ 21-26-1 to -7 (1967); UTAH CODE ANN. §§ 70B-2-415, -3-407 (Supp. 1969); UTAH R. CIV. P. 58A(e) (1953); VT. STAT. ANN. tit. 8, § 3022 (1958); VA. CODE ANN. § 6.1-283 (1966); WASH. REV. CODE ANN. §§ 4.60.010 -070 (1962); W. VA. CODE ANN. § 47-7A-12 (1966); WIS. STAT. ANN. §§ 214.14(1) (1957), 270.69 (1958); WYO. STAT. ANN. §§ 1-309 to -312 (1959); ch. 191, §§ 2.415, 3.407, [1971] Wyo. Laws 304, 324. Cf. UNIFORM CONSUMER CREDIT CODE §§ 2.415, 3.407.

75. Reflecting amendments adopted in 1967 and 1970, OHIO REV. CODE ANN. § 2323.13 (Page Supp. 1970) now requires that the debtor's attention be firmly directed to the significance of the cognovit clause when he signs the instrument, see note 72 *supra*, and that, on default, judgment be taken only in a court presumably conveniently located to the debtor, and also that the debtor immediately be notified, by personal service or a registered or certified letter mailed to his last known address, of the entry of any judgment against him.

76. ILL. ANN. STAT. ch. 62, § 82 (Smith-Hurd Supp. 1970) provides that before the debtor's wages can be garnished under a cognovit judgment, it must be "confirmed" by a trial de novo of which the debtor must have been given prior notice. For a critique of this innovative procedure, see Satter, *An Argument for Abolition of Wage Attachment*, 52 ILL. B.J. 1026-31 (1964).

the practice is sanctioned, however, it has legislatively been surrounded with at least some formal safeguards and/or other operative limitations. Thus, two states—California and Oregon—require verification of the sum owed and the facts out of which the underlying debt arose, and like two other states—Maine and New York—they further prohibit the practice in some situations. More specifically, Oregon bans the inclusion of a cognovit clause in retail instalment contracts for the sale of motor vehicles, while California and New York ban it more broadly in retail instalment contracts for the sale of any goods. In a similar vein, Maine and New York forbid licensed small lenders from inserting such a clause in their contracts with borrowers. Finally, assuming the most disapproving view are the two remaining states—Alabama and Texas—where the practice is statutorily proscribed altogether.

Interviews with attorneys for both debtors and creditors have suggested that the cognovit clause has substantial import for insolvency administration in but one state—Illinois. There alone does it appear to be regarded as a major precipitant of bankruptcy and other formal insolvency proceedings—eclipsed in this respect perhaps only by wage garnishment.<sup>77</sup> Nevertheless, in Ohio, too, despite the somewhat inconclusive responses elicited from attorneys,<sup>78</sup> a knowledgeable court official included cognovit notes and the consequent summary judgments taken thereunder among the most significant causes of the acute financial distress that characteristically precedes and conduces bankruptcy.<sup>79</sup> In any event, the cognovit clause can hardly be dismissed as an inconsequential factor in insolvency

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77. Almost one-half of the debtors' attorneys and 70 percent of the creditors' attorneys interviewed in Illinois ascribed such an effect to the cognovit clause. *Cf.* note 56 *supra*. In no other state was this response even remotely approximated—indeed, in the state that over-all seemed to approach Illinois most closely in this respect—California—only 15 percent of the debtors' attorneys and 19 percent of the creditors' attorneys interviewed so regarded cognovit clauses.

78. About 17 percent of the debtors' attorneys and none of the creditors' attorneys interviewed in Ohio ascribed such an effect to cognovit clauses. This latter figure must be discounted, however, since the interview questionnaire used in Ohio—the pilot state surveyed—contained no item specifically designed to elicit this datum.

79. Mr. Walter A. Burks, who supervised the Trusteeship Division in the Office of the Clerk of the Cleveland Municipal Court, see notes 37-40 *supra* and accompanying text, asserted that cognovit judgments constituted 70 percent of the claims paid through the Division. Interview with Walter A. Burks, Deputy Clerk Trustee, Cleveland Municipal Court, in Cleveland, Ohio, Dec. 8-9, 15, 1965. This tends to confirm the conclusion reached in another empirical study in which Ohio was identified as one of the three states (Illinois and Pennsylvania were the other two) that produced the overwhelming bulk of cognovit judgments in this country. Hopson, *supra* note 71, at 115.

administration, and at least tentatively it can be hypothesized that its significance is perhaps partially a function of its free availability to the parties and partially one of history and tradition.<sup>80</sup>

*Repossession and Deficiency Judgment.* A vendor who has retained a purchase-money security interest in goods he has sold on credit may, in the event of the debtor-vendee's default, repossess and dispose of these goods in a legally prescribed manner and apply their proceeds serially to the payment of the costs of the action and the satisfaction of the indebtedness. If the proceeds are insufficient to discharge these obligations, the vendor may, in most states, further reduce his claim for the resulting deficiency to judgment and employ all the remedies available to a judgment creditor to enforce its collection.<sup>81</sup> To the debtor-vendee in such a case, who has already lost his investment in the repossessed goods and been deprived of their use and enjoyment, his continuing liability for the unpaid balance of their purchase price may seem to be an insupportable imposition. Feeling exploited and resentful, he may be drawn to bankruptcy in his attempts to secure the relief to which he believes he is fairly entitled.

Although repossession and a consequent deficiency judgment are freely obtainable in seven of the eight states that were studied—in California, the latter is statutorily barred<sup>82</sup>—nowhere did they appear to loom large as an immediate cause of bankruptcy or other formal insolvency proceedings. Thus, in interviews with persons close to the scene—such as referees, attorneys for both debtors and creditors, and welfare authorities—they were generally given little more than a passing nod, where, indeed, they were mentioned at all.<sup>83</sup> Only in

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80. See Hopson, *supra* note 71, at 116-25.

81. See UNIFORM COMMERCIAL CODE art. 9, pt. 5, for the reciprocal rights and duties of the secured creditor and the debtor in the event of default. The Uniform Commercial Code has been adopted in 49 states and the District of Columbia—Louisiana, alone among the states, still has not enacted it. For an incisive analysis and discussion of these Code provisions, see 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1211-80 (1965).

82. CAL. CIV. CODE § 1812.5 (West Supp. 1971).

83. About 6 percent of the referees interviewed regarded repossession or the threat of it as a significant precipitant of chapter XIII proceedings—the same proportional response that was accorded the debtor's personal misfortune in this connection—as compared with two-thirds and almost one-quarter of them who so regarded wage garnishment or the threat of it and severe collection pressures, respectively. About 8 percent of the debtors' attorneys interviewed regarded the deficiency judgment as a state-sanctioned debt-collection technique that frequently leads to formal insolvency proceedings—a response exceeded by virtually every other technique mentioned in this connection—as compared with 84 percent, 55 percent, and 23 percent of them who so regarded wage garnishment, attachment, and creditor harassment, respectively.

Illinois, where several federal district court judges cited them as a factor adversely affecting insolvency administration,<sup>84</sup> was there possibly a suggestion that they might have more than minimal significance in the bankruptcy context. The seeming toothlessness of this debt-collection technique may be misleading, however, in that the mere threat of its invocation appears often to suffice to procure the revival of debts covered by a bankruptcy discharge.

*Credit Controls.* Recent years have witnessed an impressive rise in the volume of consumer credit.<sup>85</sup> Quite apart from whatever beneficial social and economic effects this phenomenon may import, however, where such credit is extended imprudently or on misleading or onerous terms, it may tax the debtor beyond his willingness or ability to meet his obligations. Accordingly, to the extent that state law countenances credit practices that facilitate overcommitment, deception, or exploitation of the debtor, it may reasonably be regarded as a factor tending to promote recourse to bankruptcy.<sup>86</sup>

Every state has enacted legislation regulating some facets of consumer credit, focusing on particular classes of creditors, or particular kinds of transactions, or both. The variety of forms this legislation has assumed as well as its complexity beggar

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Even fewer—under 5 percent—of the creditors' attorneys interviewed regarded the deficiency judgment as a prelude to bankruptcy—again, an almost negligible number—as compared with almost 60 percent, over 50 percent, and over 20 percent of them who so regarded wage garnishment, attachment, and the cognovit judgment, respectively. The same pattern is repeated among welfare authorities interviewed, less than 3 percent of whom regarded the deficiency judgment as the commonest immediate cause of formal insolvency proceedings—no cause mentioned ranked lower—as compared with 40 percent, 32 percent, and 11 percent of them who so regarded creditor harassment, wage garnishment, and attachment, respectively.

84. Although only 11 percent of the federal district court judges interviewed perceived repossession and a consequent deficiency judgment as a state law-created source of difficulty in insolvency administration, 50 percent of these respondents in Illinois did—a view that was shared by judges in no other state but California, where only 10 percent of them concurred. Since they could not have been commenting on the actual California scene, see note 82 *supra* and accompanying text, one can only assume that these latter judges either were referring to reported out-of-state experiences or were talking about secured lenders rather than secured vendors. Again, however, this statistic is an uncomfortable one. *Cf.* note 61 *supra*.

85. During the ten-year period, 1960-70, total consumer credit outstanding rose from a total of \$56 billion to \$126.8 billion—an average annual increase of 13 percent. During this same period, the average annual increase in population was 1.3 percent. Correlatively, the consumer asset-to-debt ratio fell during this period from 7.7:1 to 6.6:1. S.L. BOOTH, NATIONAL CONSUMER FINANCE ASS'N, FINANCE FACTS YEARBOOK 6, 45, 47 (1971).

86. For an excellent study of consumer credit abuses and their impact on lower socio-economic groups, see D. CAPLOVITZ, THE POOR PAY MORE (1963); *cf.* Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

comprehensive description here.<sup>87</sup> Suffice it to say, however, that the typical state pattern is one of several particularistic, imperfectly articulated statutes that do not systematically or satisfactorily meet the problems raised by contemporary commercial practices—and this pattern is reflected, by and large, in all of the eight states that were probed in depth in the Brookings study.

Interviews with informed observers have tended to confirm the conclusion that inadequate credit controls contribute significantly to the incidence of bankruptcy. Thus, creditors' attorneys have assigned this factor an operative weight in this regard exceeded only perhaps by wage garnishment and attachment.<sup>88</sup> And federal district court judges, too, have regularly alluded to it in enumerating the problems in insolvency administration caused by state law.<sup>89</sup> Parenthetically, it should be mentioned that recognition of the importance of this matter and the concern it has generated are reflected in the Uniform Consumer Credit Code recently promulgated by the National Conference of Commissioners on Uniform State Laws, which seeks to rationalize, coordinate, and simplify law and practice in this area.<sup>90</sup> Clearly the extent of the legislative acceptance of this Code will have a profound effect on insolvency administration in general and bankruptcy in particular.<sup>91</sup>

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87. For an exhaustive description, discussion, and evaluation of the entire range of state legislation governing consumer credit transactions, see B. CURRAN, *TRENDS IN CONSUMER CREDIT LEGISLATION* (1965). See also Spanogle, *Advantages and Disadvantages—A Comparison of the Present Maine Law and the U3C*, 22 ME. L. REV. 295 (1970), for a concise but cogent analysis and critique of the Uniform Consumer Credit Code.

88. More than one-quarter of the creditors' attorneys interviewed believed that laxity in the laws governing consumer credit—or in their enforcement—encouraged or permitted unwise financial overextension by the debtor and thus conduced his eventual bankruptcy. *Cf.* note 56 *supra*.

89. Cumulatively, about 14 percent of the federal district court judges interviewed mentioned different facets of state consumer credit legislation in this connection. They viewed only wage garnishment and lax exemption laws with greater disfavor. *Cf.* note 59 *supra*.

90. For an extensive bibliography on consumer credit, including the Uniform Consumer Credit Code, see H. KRIPKE, *CONSUMER CREDIT XXI-XXV* (1970).

91. The Uniform Consumer Credit Code has already been adopted in six jurisdictions, H.B. No. 1076, [1971] Colo. Laws, enacted June 4, 1971, noted in 1 CCH CONSUMER CREDIT GUIDE ¶ 4770, at 5005, Colorado ¶ 5701, at 12,511 (1971); ch. 299, §§ 1.101 to 9.108, [Regular 1971] Idaho Laws 1116-219; P.L. 366, §§ 1.101 to 6-203, [1971] Ind. Acts, 1558-673, enacted March 5, 1971, effective Oct. 1, 1971, noted in 1 CCH CONSUMER CREDIT GUIDE ¶ 4770, at 5005, 2 *id.* Indiana ¶ 5701, at 21,511 (1971); OKLA. STAT. ANN. tit. 14A, §§ 1-101 to 9-103 (Supp. 1969); UTAH CODE ANN. §§ 70B-1-101 to 9-103 (Supp. 1969); ch. 191, §§ 1-101 to 9-103, [1971] Wyo. Laws 274-353, and it is under legislative consideration in most of the others. See 1 CCH CONSUMER CREDIT GUIDE ¶ 4771 (1971).

## CONCLUSION

Although this may limn the broad outlines, it by no means exhaustively catalogues all of the aspects of state law that bear upon bankruptcy, as either a deterrent or a stimulus. More arcane provisions, of greater or lesser significance, abound in the jurisprudence of the several states. It should, however, be quite clear that the relationship between state law and bankruptcy is an intimate and interdependent one, and that it is impossible fully to understand and appreciate the nuances of one without considering the other.