CHAPTER 4: OTHER RECOMMENDATIONS AND ISSUES

INTRODUCTION

The fourth chapter of this report reflects the diversity of issues that must be addressed in any comprehensive review of the bankruptcy system. Some issues do not fit easily within the consumer bankruptcy / business bankruptcy / jurisdiction and procedure categories that describe much of the bankruptcy system. In this chapter, the Commission provides its recommendations for municipal bankruptcies and farm bankruptcies, as well as a more detailed view of the relationship between the Internal Revenue Code and the Bankruptcy Code. Perhaps most importantly, the Commission introduces this Chapter with a series of proposals that has far-reaching implications. It recommends procedures for better data collection and dissemination to help inform decision-making about the next 100 years of bankruptcy.

The legislation adopted late in 1994 that created the National Bankruptcy Review Commission directed it "to investigate and study issues and problems" involving the Bankruptcy Code. While the statute's legislative history pointedly notes that Congress was "generally satisfied" with the law, the U.S. Senate's Report made several specific suggestions for study, including the interaction between the Bankruptcy Code and the Internal Revenue Code. The Commission adopted that suggestion, and the result is almost certainly the most comprehensive analysis ever

done on the relationship between the tax law and the bankruptcy system. The following analysis, written by Professor Jack Williams of Georgia State University College of Law, is based on the work of the Commission's tax advisory group.

This chapter also includes the Commission's recommendations for improving Chapter 9, which permits municipalities to restructure their debts, and Chapter 12 - those provisions of the law that, for 10 years, have provided protection for family farmers. Indeed, Chapter 12 is one of the Bankruptcy Code's uncontested success stories, and the Commission recommends that Congress make it a permanent feature of the law by eliminating the "sunset" provision that will end its benefits for both farm debtors and creditors by the end of the next year. The recommendations also would change the eligibility requirements for Chapter 12 to reflect inflation since the law's enactment in 1986. For Chapter 9, municipal bankruptcy, the Commission has drawn on the experience of judges, practitioners, and others who have faced the unique problems of a local government in financial distress, whether a utility district in rural Colorado or Orange County, California. The recommendations in this area should make the process more efficient and effective.

This chapter presents the Commission's report on data compilation and dissemination. Early in the Commission's work, it became apparent that there were many important questions for which there were no ready statistical answers or no statistical answers at all. How long is the "average" Chapter 11 reorganization proceeding? How many businesses with annual revenue or debt under $5 million file for bankruptcy? In consumer bankruptcy, what is the average income of families that file for Chapter 7? What is the amount paid, on average, to unsecured creditors? How many cases involve reaffirmation agreements and to what extent?

The bankruptcy courts have an on-line computer system, called PACER, that provides electronic access to court dockets for the public, and the statistical summaries released quarterly by the Administrative Office of U.S. Courts are widely respected and reported. Yet, there remain many problems in the bankruptcy system for which the development of any "solution" lies, at least in part, in a better understanding of the impact and the operation of the system today, an understanding that should be informed by reliable statistical data.

The Commission asked Professor Lynn LoPucki of the Cornell Law School to begin looking at the question of data compilation and dissemination. His initial report, which appears in the Appendix, provided a framework for the Commission's review of the issue led by Commissioner John A. Gose and Stephen H. Case, one of the Commission's senior advisers. In addition, one of the Commission's volunteer staff attorneys had written about the accuracy of bankruptcy data. Mr. Gose met frequently with the representatives of the Administrative Office of the U.S. Courts responsible for its data compilation and with the Executive Office for U.S. Trustees, which also compiles and disseminates bankruptcy data. While each agency already

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had undertaken its own assessment of the challenges presented by bankruptcy data, collection and dissemination, their co-operation and enthusiasm helped frame the Commission's report and recommendations in this area.

It is appropriate to conclude with a thoughtful review of data collection and dissemination. Throughout this report, the Commission has paused to note that it has had inadequate information to make some assessments. Some of the Commission's recommendations -- in the area of single asset real estate cases, for example -- specifically call for more detailed study of the effects of a proposed change in the statute. Although bankruptcy policymaking involves both empirical observations and policy judgments, the two are rarely distinguished and the empirical assumptions are rarely tested. Yet, inaccurate factual assumptions can result in policies that are at best ineffective in accomplishing their policy goals and, at worst, exacerbate the problems they attempt to correct.

This Commission has proceeded, whenever possible, on a sound factual basis, but hard information has been elusive. The recommendations should be judged systematically with the best empirical data available. The final recommendations of this Commission are that Congress create the tools so that policymaking in this vital area can proceed with as much information as possible.