Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Gene Sperling and Sarah Rosen Wartell to the President re: Bankruptcy Legislation (3 pages)	05/05/2000	P5
001b. memo	Gene Sperling et al. to the President re: Decision on Bankruptcy Reform Legislation (7 pages)	06/22/2000	P5
001c. fax	Ben Lawksy to Sara Rosen Wartell re: phone number (partial) (1 page)	06/23/2000	P6/b(6)
001d. memo	Betsy Cavendish to Sarah Rosen re: phone number (partial) (1 page)	06/24/2000	P6/b(6)
001e. memo	Chuck Brain to the President re: Senator Biden (partial) (1 page)	06/23/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21195

FOLDER TITLE:

Bankruptcy - Schumer Abortion Legislation Letter to Congress

2012-0254-S
rc655

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Heather Howard's Files
Archived by Eric Morse
Office of Policy Development, Domestic Policy Council, First Lady's issues

Box 1 of 4

Reproductive Rights
- Bankruptcy-Schumer abortion legislation
- Child Custody Protection Act (CCPA)
- Choice Votes
- Colorado v. Hill (Bubble Bill)
- Comstock
- DC appropriations contraceptive coverage
- Emergency Contraception Ideas
- Emergency Contraception E.O.
- EPIC
- Helms amendment emergency contraception in school clinics
- Fetal tissue
- Executing pregnant
- Global Gag Rule- UNRPA
- Hyde amendments
- Overseas military hospitals
- "See change" Vatican and the UN
- Title VII- contraceptive coverage
- Unborn victims
- April 7 intl. Family planning
- RU-486
- RU- 486 memos
- RU- 486 use abroad and future issues domestically
- RU- 486 lifting import bar
- RU- 486 FDA approval
- Stem cell research

Budget

Budget and SOTU

CPSC- Kids in Danger- Safety of Kids Products
- 5/12/00 CPSC Event
- Final Remarks CPSC
- Articles CPSC
- HRC and CPSC
- CPSC event and notes
- Campaign CPSC
- Victims CPSC
- Proposed legislation CPSC
- CPSC Memos
- Press paper CPSC
- CPSC - Statistics

Enclosures filed in 21195
Oversize Attachments #
NARA # 18379

- POTUS transmittal letter
- CPSC general

Child abuse

- Parents anonymous

Children's health bill
Children's hospitals (GME)
Add health
Pediatric labeling
Gay/lesbian
EO nondiscrimination on sexual orientation in federal contracting
RLPA
Taxing damage awards
Single sex education
Summer jobs
FMLA
Health

- AIDS
- Breast cancer
- Breast and cervical cancer treatment act
- Breast and cervical guidance
- Breast cancer and environment
- Breast implants
- Cancer
- Campbell bill - Antitrust Exemption for Doctors
- Women and clinical trials
- Tobacco
- Organ donation
- Nurse anesthetists
- Gulf war
- Colon cancer

November 9, 2000 Please Post

Get the Facts

Women Hit Hardest by Bankruptcy Reform

On Oct. 12 the U.S. House of Representatives passed (297-114) a bankruptcy reform bill (HR 2414) that would make it more difficult for divorced women to obtain child support and alimony payments from former spouses declaring bankruptcy. It would also make it harder for recently divorced women and others facing economic crises to regain their financial stability by filing for bankruptcy. The Senate is expected to consider the bill after Nov. 14.

HR 2414 will hurt women and families economically:

- **Women will be forced to compete with credit card companies for their child support and alimony payments.** Women trying to collect money from former spouses who have declared bankruptcy will find that their child support and alimony would no longer be paid before credit card debt. Women will be hard pressed to compete with big business creditors for limited funds.

- **Women are often forced to file for bankruptcy after divorce to stabilize their income.** Traditional bankruptcy legislation enables these women to pay rent and buy food for their families by postponing or erasing credit card and other debt payment they cannot afford. HR 2414 will deny many of these women economic relief.

In addition to harming women financially, HR 2414 eliminates a provision that would further reduce violence against abortion clinics. The provision, approved by the Senate (80-17), would prevent anti-choice clinic terrorists from filing for bankruptcy to avoid paying fines levied against them for clinic-related violence.

Here's What You Can Do!

✓ Help spread the word; work with friends and family to distribute this alert in your community.

The Senate will soon consider HR 2414. Call your Senators at 202/224-3121 and urge them to protect women and families by opposing HR 2414.

WOMEN'S NETWORK FOR CHANGE ~ American Association of University Women ~ Advocates for Youth ~ American College of Nurse-Midwives ~American College of Obstetricians and Gynecologists ~ American Jewish Congress ~ American Medical Women's Association ~ Business and Professional Women/USA ~ Center for the Child Care Workforce ~ Center for Ethics in Action ~ Center for Policy Alternatives ~ Coalition of Labor Union Women ~ Federally Employed Women ~ Feminist Majority ~ Fifty plus One ~ Girls Incorporated ~ Gray Panthers ~ Hadassah ~ MANA, A National Latina Organization ~ Ms. Foundation for Women ~ 9to5, National Association of Working Women ~ National Abortion and Reproductive Rights Action League ~ National Abortion Federation ~ National Association of Social Workers ~ National Council of Jewish Women ~ National Council of Negro Women ~ National Hook-Up of Black Women, Inc. ~ National Network of Abortion Funds ~ National Organization for Women ~ National Partnership for Women and Families ~ National Political Congress of Black Women, Inc. ~ National Women's Law Center ~ National Women's Political Caucus ~ New Girl Times ~OWL The Voice of Mid-Life and Older Women ~ Planned Parenthood Federation of America ~ ProChoice Resource Center ~ Religious Coalition for Reproductive Choice ~ United States Student Association ~ Wider Opportunities for Women ~ Women Work! ~ Women's Campaign Fund ~ Women's Environment and Development Organization ~ Women's International League for Peace and Freedom ~ YWCA of the U.S.A.

FOR MORE INFORMATION ON THESE ALERTS, CALL 800/608-5286

THE WHITE HOUSE

WASHINGTON

October 12, 2000

The Honorable J. Dennis Hastert
Speaker of the
House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

I understand that the House will take up today the conference report on H.R. 2412, which apparently incorporates the text of S. 3186, a recently filed version of bankruptcy legislation. If this bankruptcy legislation is sent to the President, he will veto it.

Over the last few months, this Administration has engaged in a good faith effort to reach agreement on a number of outstanding issues in the bankruptcy legislation. The President firmly believes that Americans would benefit from reform legislation that would stem abuse of the bankruptcy system by, and encourage responsibility of, debtors and creditors alike. With this goal in mind, we have pursued negotiations with bill proponents on a few key issues, notwithstanding the President's deep concern that the bill fails to address some creditor abuses and disadvantages all debtors to an extent unnecessary to stem abuses by a few.

An agreement was reached in those negotiations on an essential issue – limiting homestead exemptions – with compromises made on both sides. Unfortunately, H.R. 2415 ~~2412~~ fails to incorporate that agreement, instead reverting to a provision that the Administration has repeatedly said was fundamentally flawed. The central premise of this legislation is that we must ask debtors, who truly have the capacity to repay a portion of their debts, to do so. This would benefit not only their creditors but also all other debtors through lower credit costs. Unlimited homestead exemptions allow debtors who own lavish homes to shield their mansions from their creditors, while moderate-income debtors, especially those who rent, must live frugally under a rigid repayment plan for five to seven years. This loophole for the wealthy is fundamentally unfair and must be closed. The inclusion of a provision limiting to some degree a wealthy debtor's capacity to shift assets before bankruptcy into a home in a state with an unlimited homestead exemption does not ameliorate the glaring omission of a real homestead cap.

Moreover, the President has made clear that bankruptcy legislation must require accountability and responsibility from those who unlawfully bar access to legal health services. Yet the conference report fails to address this concern. Far too often, we have seen doctors, health professionals and their patients victimized by those who espouse and practice violence. Congress and the States have established remedies for those who suffer as a result of these tactics. However, we are increasingly seeing the use of the bankruptcy system as a strategic tool by those who seek to promote clinic violence while shielding themselves from personal liability and responsibility. It is critical that we shut down this abusive use of our bankruptcy system and prevent endless litigation that threatens the court-ordered remedies due to victims of clinic violence. The U.S. Senate was right in voting 80-17 to adopt an amendment that would effectively close down any potential for this abuse of the Bankruptcy Code. We fail to understand why the bill's proponents refuse to include this provision and shut down the use of bankruptcy to avoid responsibility for clinic violence.

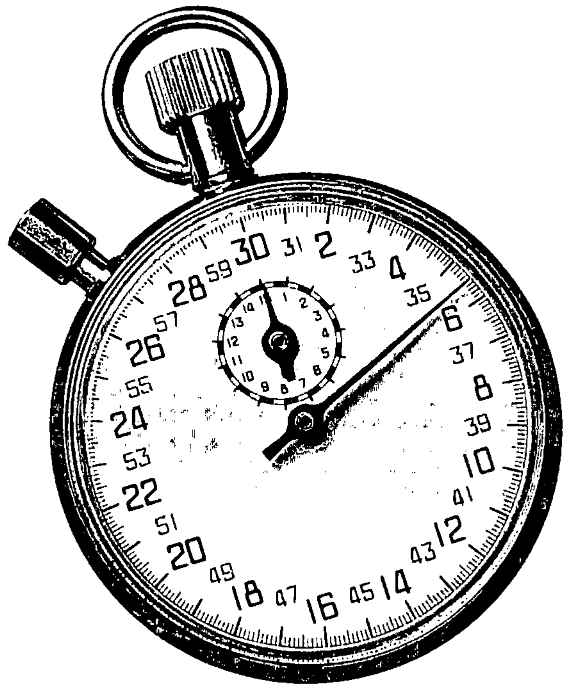
I repeat President Clinton's desire to see balanced bankruptcy reform legislation enacted this year. The President wants to sign legislation that addresses these known abuses, without tilting the playing field against those debtors who turn to bankruptcy genuinely in need of a fresh start. He will veto H.R. ~~2412~~ 2415 because it gets the balance wrong.

Sincerely,

John Podesta
Chief of Staff to the President

STOP

THE PER-MINUTE CHARGES ON CALLS TO THE INTERNET!



Some companies are exploiting a regulatory loophole and collecting per-minute charges on calls to the Internet for every minute consumers are online. They are pocketing billions of dollars.

Congress can stop the per-minute charges by passing H.R. 4445

Let's close the loophole and keep the Internet affordable.

USTA
UNITED STATES
TELECOM
ASSOCIATION

Dustbin

Continued from page 6

But sources believe that Republicans remain intent on making sure Clinton will be given the opportunity this year to either sign—or veto—a bankruptcy bill.

Meanwhile, on another business-related issue, House and Senate sponsors of legislation to provide relief for small and mid-sized businesses from federal scrutiny of their mergers remain hopeful that their legislation will be acted on by the year's end, and believe the measure has a shot at being moved as part of the FY2001 Commerce-Justice-State spending bill.

Medicare Drug Benefit Fizzles; Patients' Rights Seeks Vehicle

■ While efforts by a conference committee to reach a compromise on patients' rights to sue their insurance carriers appears practically dead, managed care reform is a prime issue for year end negotiations and may turn up as part of an omnibus spending bill.

A current version of the broader House bill, sponsored by **Reps. Charles Norwood**, R-Ga., and **John Dingell**, D-Mich., was floated in late August; it attempts to clarify some of the legislation's most contentious issues on liability and scope. But it has been met with the expected criticism from employers and managed care organizations, which say the new version could create even broader liability for these groups.

And **House Speaker Hastert**, who would like to give his members another chance to vote on the issue, has so far been unable to convince the Senate.

While there appears no chance of an accord on the issue of Medicare prescription drug benefits, the issue of drug reimportation remains alive.

As a potential response to rising drug prices, a version of language is in both the House and Senate Agriculture appropriations bills, which are currently in conference.

The measure is opposed by pharmaceutical companies — currently the only ones who can bring the products in legally — and many in the healthcare community. But if the popular measure is not in the final Agriculture appropriations bill, "there will be a lot of explaining to do," said one GOP source supportive of the measure.

Another health issue still moving is a measure to approve Medicare payment adjustments to healthcare providers who suffered cutbacks under the 1997 Balanced Budget Act. An open question is how much will Congress agree to spend.

The projected surplus and the House Republicans' offer to devote 90 percent of next year's surplus to reducing the debt makes the giveback issue particularly interesting.

While the final BBA adjustment package will likely be rolled up into an omnibus spending bill, speculation circulated last week about potential markups of freestanding bills in both the House Commerce Committee and the Ways and Means Committee, which share jurisdiction.

A bill dealing with Oregon's assisted suicide remains alive mainly because **Senate Majority Whip Nickles** and **Sen. Ron Wyden**, D-Ore., reached a deal this year to allow it to come to the floor. But there is no firm timetable and consideration of the measure still could slip.

The bill, the Pain Relief Promotion Act, passed the house last October and would create more oversight on physicians treating terminally ill patients. While personally opposed to assisted suicide, Wyden has concerns because the bill would essentially overturn Oregon's assisted suicide law.

Drunk Driving Standard, Amtrak Bonds Are Transportation Possibilities

■ A push by **Sen. Frank Lautenberg**, D-N.J., and others to pass a nationwide 0.08 percent blood alcohol limit on drivers is strongly opposed by the alcohol, restaurant and hotel lobbies, but still has a glimmer of hope because the administration could support it in a year-end deal. It is currently an amendment to the Senate's FY2001 Transportation appropriations bill.

Meanwhile, **Senate Finance Chairman Roth**, **ranking member Daniel Patrick Moynihan**, D-N.Y., and Lautenberg are pushing to keep a provision to allow Amtrak to access private bonds to fund rail projects for faster trains attached to a community renewal bill. This is another potential omnibus item if an agreement is not reached among the senators to take it through committee.

Rural Television Loan Program Remains A High Telecom Priority

■ House and Senate leaders have instructed backers of a popular rural television bill to craft a compromise measure that can be attached to a year-end appropriations measure.

The message — delivered personally by **Senate Majority Leader Lott** and **House Majority Leader Armey** — could pump new life into the legislation. The bill overwhelmingly passed both chambers earlier this year, but has languished below the radar screen for months as Congress focused on more pressing issues.

The legislation would create a $1.25 billion federal loan guarantee to help companies carry local television service to remote parts of the country.

Several telecommunications issues remain afloat that supporters believe they can tuck into spending bills in the closing days of the session.

They include bills to end the so-called reciprocal compensation system, to limit FCC merger reviews, to ban foreign government-owned telecommunications firms from buying U.S. companies, to ban Internet gambling and to reduce the amount of violent programming on television.

Commodity Exchange Act Reform Session's Top Remaining Ag Issue

■ Although legislation to reform the Commodity Exchange Act and provide over-the-counter derivatives with "legal certainty" appears to have gained momentum recently, the legislation still seems hampered by a late start in both the House and Senate, as well as jurisdictional battles.

House leaders could attempt to move the CEA bill to the floor next week, according to sources. However, Monday Campaign Update

Political Chickens And Eggs

By Chris Cillizza

■ WITH JUST A SIX SEAT MARGIN separating Democrats from recapturing control of the House, both parties are focusing their energies on a handful of highly competitive open seats where the incumbent legislator is either retiring or seeking higher office. Open seats are the most volatile in terms of party switching and usually wind up swinging to one side or the other based on two major factors: the quality of the candidates in the race and the partisan nature of the district where the race is taking place. Although this seems like a simple formula, countless hours of study are spent each cycle trying to understand which of the two factors is more important in deciding who wins these all important open seat contests.

Two open seat races this year in Florida and Pennsylvania illustrate the difficulties in trying to solve the political equivalent of the chicken and the egg argument.

Florida's 8th District is by almost any measure a Republican district. The district's population center is Orlando — although the city's African American communities have been drawn out and placed in the adjacent 3rd District — and extends southward into the northern tip of Osceola County where the city of Kissimmee is located.

Conservative GOP **Rep. Bill McCollum** has held the seat easily for the past 20 years, winning with well over 60 percent of the vote on average. On the statewide level, Jeb Bush won here even while losing the governorship in 1994 and also carried the state when he rebounded to win the gubernatorial race in 1998. Both former President Bush and GOP presidential nominee Bob Dole carried the 8th in 1992 and 1996.

Looking at these numbers, it is easy to understand why House Republicans were not very concerned when McCollum announced he would run for the open seat created by GOP **Sen. Connie Mack**'s decision to retire. The recruiting process, which should have been a walk in the park for Republicans, turned disastrous as a number of their big name candidates decided against a run.

While Republicans were left with three second-tier candidates, Democrats scored perhaps their biggest recruiting coup of the cycle in former Orange County Commissioner Linda Chapin. Chapin served for eight years as the top elected official in the county, which covers 80 percent of the district and as a result had very high name recognition.

Chapin has consistently outraised both of her potential opponents combined and also led in every public poll released thus far. The two GOP candidates are embroiled in a messy Oct. 3 runoff just 36 days from the general election.

Even so, national Republicans are far from handing this seat over to the Democrats. They have run three issue ads attacking Chapin on her record as county chairman while Democrats are running an issue ad of their own attempting to insulate Chapin from the attacks. Chapin is up with her own ad doing much the same.

■ A similar situation developed in western Pennsylvania's 4th District vacated when Democratic **Rep. Ron Klink** decided to pursue a run for the Senate. From the get-go, Republicans have been enthusiastic about their candidate, state Sen. Melissa Hart, while national Democrats saw their endorsed candidate lose in the primary to state Rep. Terry Van Horne.

Soon after Van Horne's win, Republicans released evidence of racially insensitive comments that he had made on the floor of the state House concerning an African-American colleague. Despite this spate of bad press the race has quieted considerably and Democrats are expressing optimism about their chances here.

The primary reason for their optimism seems to be the Democratic nature of the district. President Clinton carried this district by a whopping 17 points in 1992 and a more humble 7 points in 1996. The district is largely blue collar and traditionally has supported Democrats on the local level. Both parties are spending large amounts of money in issue ads here hoping to boost their respective candidates.

According to Gary Jacobson, a political science professor at University of California at San Diego who studies election trends, the "advantage to the superior candidate is on average just a couple of percentage points." Jacobson emphasizes that the strength of the candidate is typically not enough to put one party over the top unless the race is extremely close.

In Florida's 8th District, Jacobson is skeptical that a strong Democratic candidacy can overcome the Republican nature of the district while in Pennsylvania's 4th District he believes that "a superior Republican candidate picking up a few points could make the difference."

Jacobson's conclusions, however, are based less on the actual candidates than on a prototypical Democrat or Republican running in these districts. Clearly candidates do matter. These next six weeks may show us just how much.

CHRIS CILLIZZA IS A STAFF WRITER FOR THE COOK POLITICAL REPORT

Dustbin

Continued from page 1

non-appropriations measures still moving are the landmark Conservation and Reinvestment Act, a bill to address World Trade Organization findings against U.S. Foreign Sales Corporations; reauthorization of the Commodity Exchange Act; reauthorization of the Grain Standards Act and a handful of others.

Following is a rundown of the issues still moving in the remaining weeks of the session:

GOP Abandons Tax Priorities, But Many Issues Still Possible

■ Republicans abandoned the crown jewels of their tax cutting agenda — estate and marriage penalty tax relief — following the failure to override two presidential vetoes. However, they still want to repeal the telephone excise tax and need to find a vehicle.

More important policy changes in the tax area remain alive this session, including the renewal package for spurring growth in struggling communities; brownfields reclamation; and low-income housing development.

Also, major changes in pension rules and expansion of Individual Retirement Accounts and other tax-preferred savings vehicles are high enough priorities to emerge as part of the second tax reconciliation bill this year.

The Senate, in fact, was so excited about the idea that the Finance Committee embraced it as its reconciliation bill before the House even had a chance to act. While the package is expensive, a 401-25 vote in the House should help sweep away partisan carping about the details.

Ironically, one tax-related item likely to be put off for now is crafting a national tax policy to deal with electronic commerce — the economic engine that knows no tax jurisdiction boundaries. The chaotic and sometimes unfair tax regime will stay in place for now, accompanied by a moratorium – due to last another year — on any new Internet access taxes.

Finally, Medical Savings Accounts are likely to appear in some form, although they are strongly opposed by most Democrats and the White House. **House Ways and Means Chairman Archer** announced that MSAs, which allow people to set aside tax free dollars for healthcare costs, were one of his top priorities when Congress resumed in September.

Minimum Wage, H-1B Visas Remain As Employment Issues

■ In a national election year with the highest stakes in a generation, few on Capitol Hill think Congress will leave town without raising the minimum wage.

But Republicans may be in the driver's seat on a package of tax cuts that could accompany a wage boost.

The tax component that the GOP wants could cost the federal treasury $76 billion — much more the than the White House wants — but administration officials have signaled some tax cuts for business are fine.

There are strong differences about GOP backed changes in the Fair Labor Standards Act and deductions for health insurance costs for people who lack insurance through their employer. But with middle America up for grabs in November, these differences will likely be resolved.

Besides the minimum wage bill being pushed by Kennedy and **House Minority Whip Bonior**, key employment issues still moving involve immigration matters.

Legislation to increase the number of H-1B visas granted to skilled foreign professionals is supported by the increasingly influential high technology community and has fans among members across the political spectrum. But the bill remains stalled as the two political parties and the White House clash over immigration proposals primarily affecting Hispanics.

Democrats have sought to attach to the H-1B bill provisions that would help Hispanics – in addition to Haitians and Liberians — already living in the United States become citizens. Senate Republicans appear determined not to allow a vote on those measures, however.

Senate Minority Leader Daschle suggested last week that his caucus eventually would support a clean H-1B bill, and sources believe the measure will pass easily once it is put to a final vote.

But Daschle also said his party would continue to press for the other immigration proposals to be included as part of an omnibus budget package or some other vehicle. A cloture vote is expected on the Senate H-1B bill this week.

Other than immigration, a provision to block OSHA from implementing rules relating to repetitive-motion type injuries incurred on the job is still in the FY2001 Labor-HHS appropriations bill. But the White House is threatening to veto the bill unless the ergonomics provision comes out.

Ignoring White House Rebuff, GOP Pushes On Bankruptcy

■ A defiant Republican party is continuing to seek a path for bankruptcy overhaul legislation — notwithstanding a number of presidential veto threats and rejections of GOP counteroffers.

The Senate Republican leaders' latest strategy involves making the White House an offer it may not be able to easily refuse. Specifically, Republicans have proposed adding the Democrats' long-sought Violence Against Women Act to the bankruptcy measure and ~~attaching~~ the combined package to the FY2001 Transportation appropriations bill.

Women's groups have attacked the move as a "cynical" ploy on the part of Republicans. And some Democratic leaders have said they do not think the addition of the Violence Against Women Act is sufficient to offset adverse effects they feel the bankruptcy measure would have for workers and women.

The White House made clear its stand late last week, telling Hill leaders in a letter it was rejecting the latest offer because it "still fails to meet President Clinton's tests of fairness and balance."

continued on page 8

Breaking News FROM A.P.

The New York Times ON THE WEB

Home | Site Index | Site Search | Forums | Archives | Marketplace

September 25, 2000

E-Mail This Article

Clinton Faults Bankruptcy Laws

A.P. INDEXES: TOP STORIES | NEWS | SPORTS | BUSINESS | TECHNOLOGY | ENTERTAINMENT

By THE ASSOCIATED PRESS

Filed at 4:49 p.m. ET

WASHINGTON (AP) -- President Clinton remains unsatisfied with legislation to rewrite the bankruptcy laws, believing that recent revisions are unfair to ordinary debtors, a Clinton adviser told lawmakers.

The bipartisan measure's proponents, backed by millions in campaign money from banks and credit card companies, have only a few weeks left to push it through Congress this year. Months ago, the House and Senate passed differing versions of the legislation intended to make it harder for people to sweep away debts in bankruptcy courts.

Clinton, who supports the principle of bankruptcy overhaul, threatened twice in June to veto the legislation as written. Changes made since then by lawmakers meeting privately still don't overcome ''the president's continued concern with the imbalance ... between the interests of creditors and debtors,'' Gene Sperling, Clinton's national economic adviser, said in a letter sent to congressional leaders Friday.

Sen. Charles Grassley, R-Iowa, a major sponsor of the legislation, called Sperling's letter ''outdated.'' He said lawmakers decided to drop two provisions opposed by the White House.

When Clinton sees the proposal, ''with all the concessions we've made and the level of support we have'' among Democratic lawmakers, ''I think he'll see that it's fair and balanced,'' Grassley said in a statement.

As a sweetener, Senate Republican leaders are floating the idea of attaching legislation to the bill that would renew money for the 1994 Violence Against Women Act. That law has channeled federal money to women's shelters and into domestic violence programs.

The twinned legislative proposals would themselves be appended to one of the 11 appropriations bills that Congress must enact to keep the government in operation, under a last-ditch GOP plan circulated Monday.

''It's not a sweetener, it's extortion,'' Joan Entmacher, vice president of the liberal National Women's Law Center, said in a telephone interview.

Women's groups fiercely support renewal of the act, but many of the same groups oppose the bankruptcy legislation because they contend it disproportionately harms women and children. They maintain that as written, the legislation's bars against using bankruptcy to erase certain credit card debts would force single mothers and children to compete with big banks in collecting child support payments owed by bankrupt fathers.

In his letter, Sperling said Clinton is ''deeply troubled'' that the latest bankruptcy proposal does not include a Senate-passed provision that would prohibit people found to have violated laws protecting abortion clinics from using bankruptcy proceedings to escape fines and civil judgments.

''The president will not sign any legislation that does not contain an effective measure to ensure accountability and responsibility of perpetrators of clinic violence,'' Sperling wrote.

Sperling's letter said that in addition to specific provisions, Clinton also objected to the overall legislation as written.

^----

Bill numbers for the original House and Senate versions are H.R.833 and S.945.

On the Net: Bills available: http://thomas.loc.gov

Grassley site: http://grassley.senate.gov

E-Mail This Article

NATIONAL WOMEN'S LAW CENTER

National Partnership for Women & Families

September 17, 1999

Re: **S. 625, The "Bankruptcy Reform Act of 1999"**

Dear Senator:

The undersigned women's and children's organizations write to urge you to oppose S. 625, the "Bankruptcy Reform Act of 1999."

Hundreds of thousands of women and their children are affected by the bankruptcy system each year as debtors and creditors. Indeed, women are the fastest growing group in bankruptcy. In 1999, over half a million women are expected to file for bankruptcy by themselves -- more than men filing by themselves or married couples. About 200,000 of these women filers will be trying to collect child support or alimony. Another 200,000 women owed child support or alimony by men who file for bankruptcy will become bankruptcy creditors.

S. 625 puts both groups of economically vulnerable women and children at greater risk. By increasing the rights of many creditors, including credit card companies, finance companies, auto lenders and others, the bill would set up a competition for scarce resources between parents and children owed child support and commercial creditors both during and after bankruptcy. And single parents facing financial crises -- often caused by divorce, nonpayment of support, loss of a job, uninsured medical expenses, or domestic violence -- would find it harder to regain their economic stability through the bankruptcy process. The bill would make it harder for these parents to meet the filing requirements; harder, if they got there, to save their homes, cars, and essential household items; and harder to meet their children's needs after bankruptcy because many more debts would survive.

Contrary to the claims of some, the domestic support provisions included in the bill would not solve these problems. The provisions only relate to the collection of support during bankruptcy from a bankruptcy filer; they do nothing to alleviate the additional hardships the bill would create for the hundreds of thousands of women forced into bankruptcy themselves. And even for women who are owed support by men who file for bankruptcy, the provisions fail to ensure that support payments will come first, ahead of the increased claims of the commercial creditors. Some improvements were made in the domestic support provisions in the Judiciary Committee. However, even the revised provisions fail to solve the problems created by the rest of the bill, which gives many other creditors greater claims -- both during and after bankruptcy -- than they have under current law. The bill does not ensure that, in this intensified competition for the debtor's limited resources, parents and children owed support will prevail over the sophisticated collection departments of these powerful interests.

This Bankruptcy Reform Act will reduce the ability of parents to pay their most important debt -- their debt to their children. It is for these reasons that we strongly oppose S. 625 and urge you to oppose it as well.

Very truly yours,

National Women's Law Center
National Partnership for Women & Families

ACES, Association for Children for Enforcement of Support, Inc.
American Association of University Women
American Medical Women's Association
Business and Professional Women/USA
Center for Law and Social Policy
Center for the Advancement of Public Policy
Center for the Child Care Workforce
Church Women United
Coalition of Labor Union Women (CLUW)
Equal Rights Advocates
Feminist Majority
Hadassah
International Women's Insolvency & Restructuring Confederation ("IWIRC")
National Association of Commissions for Women (NACW)
National Black Women's Health Project
National Center for Youth Law
National Council of Jewish Women
National Council of Negro Women
National Organization for Women
National Women's Conference

DRAFT VERSION #8

The Honorable Trent Lott
Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Majority Leader:

I write in response to your request for the President's views on how we might proceed to complete bankruptcy reform legislation this year. The President believes that the public interest would be well served by balanced bankruptcy reform that encourages responsibility of, and reduces abuses by, debtors and creditors alike. We would like to reach agreement on legislation that meets that test.

The President appreciates your significant movement on the homestead issue. We realize that the offer goes against strongly held views of some members of your caucus, and we are grateful for the effort. While we had proposed placing a cap of $250,000 on the size of state homestead exemptions, we could accept a homestead cap of $500,000, were we to reach agreement on other issues.

The President also appreciates the constructive step you took by adding a means-test safe harbor for below-median income debtors. As you know, we strongly support inclusion of this provision in the bill to reduce unnecessary reviews of bankruptcy filings by debtors who have little if any capacity to repay their debts. There is a technical problem with the safe harbor language that you forwarded, which we assume was unintentional and should be fixed.

The President is deeply troubled that your offer fails to address the problem of abusive bankruptcy filings by those who seek to avoid the legal consequences of violence, vandalism, and harassment used to deny access to legal health services. Our society should not tolerate those who develop a strategy to first threaten and intimidate doctors, health care professionals, or their patients and then turn to the bankruptcy courts to avoid legal liability for their actions. We reiterate that the President will not sign any legislation that does not contain an effective means to ensure accountability and responsibility of perpetrators of clinic violence.

The Administration also cannot accept the inclusion of two special interest provisions that work to the detriment of consumers and were not in either the House or Senate bills. The President has previously stated his concerns about the amendment eliminating existing protections under the Fair Debt Collection Practices Act against inappropriate check collection practices. We are also troubled by the addition of a new proposal on the treatment of rent-to-own agreements in bankruptcy. This proposal was rejected during the bipartisan negotiations of the informal conferees. Critics have raised serious questions about its implications for debtors and other creditors. Both of these provisions require significant public scrutiny. The President will not sign bankruptcy legislation that includes them this year.

These serious issues are coupled with the President's continued concern with the imbalance in the underlying bill between the interests of creditors and debtors. The addition of the means test safe harbor is a constructive step; however, we fear that too many of the bill's provisions, while aimed at bankruptcy abuses, will place unnecessary barriers before those who genuinely need bankruptcy protection when faced with the most difficult situations life has to offer – unemployment, uninsured medical expenses, and divorce.

We also could accept the additional language you proposed creating a broad "interests of justice" exception to the homestead cap. I note, however, that it would be as reasonable to give judges discretion to vary from a rigid application of the means test to moderate-income debtors as it is to give judges discretion to take into account the individual circumstances of debtors that may have more than half a million dollars in equity in their home.

In light of these concerns, the President would veto the bill described in your offer.
The Administration urges Congress to send the President a balanced bankruptcy reform measure that addresses the concerns raised above. We appreciate your consideration of these views.

Sincerely,

John Podesta

Cc: The Honorable Thomas Daschle
The Honorable Dennis J. Hastert
The Honorable Richard A. Gephardt

NATIONAL ABORTION FEDERATION

September 8, 2000

President William J. Clinton
White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear President Clinton:

On behalf of the membership of the National Abortion Federation, I would like to thank you for your continuing leadership and support of the Schumer clinic-violence amendment to S. 625, the Bankruptcy Reform Act.

This amendment is crucial for health care professionals who routinely risk their lives in order to provide women with safe reproductive health care. Since 1993, seven people have died as a result of anti-choice violence. With over 2,500 reported occurrences of violence and disruption this year, including an attempted murder, two attempted bombings, two arsons, and four incidents of stalking, this amendment is key to protecting the safety of the providers and their patients. Without this amendment, violent convicted anti-choice extremists will continue to circumvent the law by declaring bankruptcy.

We very much appreciate your letters to the Senate in June. We ask that you continue to make certain that this amendment is part of the final bankruptcy legislation.

Thank you for your continued commitment to preserving women's ability to access safe and legal abortion care. Your leadership and support will once again provide a critical tool that will help prevent violence against abortion providers and their patients.

Sincerely,

Vicki Saporta

Vicki Saporta,
Executive Director

1755 Massachusetts Ave., NW Suite 600 Washington, DC 20036 Telephone: 202.667.5881 Fax: 202.667.589(

Am 1 update

Bankruptcy: Following up on the President's conversation with Senator Lott (R-MS), Chuck Brain met with his staff to explain how they could address the concerns the President raised in his June 29th letter. They provided them with language that would: (1) drop the Fair Debt Collection Practices Act (FDCPA) amendment; (2) include a cap on homestead exemptions of $250,000; and (3) include a revised version of the Schumer (D-NY) amendment without specific reference to reproductive health or abortion. On Tuesday, Senator Lott's staff called to say that they were proposing to: (1) agree to drop the FDCPA amendment; (2) include a homestead cap of $500,000; (3) drop the Schumer amendment and the Hyde (R-IL) alternative language currently in the conference report (i.e., maintain current law; this is a small step backward from even the Hyde language); and (4) include a "means test safe harbor" that would provide that below median income debtors would not be subject to the means test analysis. The safe harbor provision would make a modest difference in streamlining the bankruptcy process for these debtors (few if any of whom will be found to have sufficient income to repay any debts), but this does not address the administration's fundamental concerns with the inflexibility of the means test. However, it is a significant symbolic move. Since Senator Hatch (R-UT), the proponent of the FDCPA amendment, has made numerous press statements noting that he has not agreed to drop his amendment, we have asked the Republicans to outline their offer on paper. Until we receive such a paper offer, we do not intend to formally respond. The response to the Republican counteroffer on the Hill has been mixed. Senators Leahy (D-VT), Schumer, and Kennedy (D-MA) continue to urge the President to oppose the bankruptcy bill, because the Republicans have not addressed the clinic violence issue. On the other hand, Senator Johnson (D-SD) is circulating a letter for his colleagues' signature urging the Congress and the President to support the counteroffer. Senator Johnson's staff claims that they have five Senators who have thus far signed that letter.

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

Ann — Call Sarah for update 65386 Gd

July 18, 2000

Mr. Gene B. Sperling
Assistant to the President
Old Executive Office Building
Washington, D.C. 20500

Dear Mr. Sperling:

The so-called clinic violence issue appears to be one of the final remaining issues holding up the overdue reform of our bankruptcy laws. Attached is a letter Sen. Hatch recently sent to Sen. Schumer regarding this issue.

In his letter to Sen. Schumer, Sen. Hatch notes that, notwithstanding the statements of some to the contrary, there has not been a single case reported or presented where the current bankruptcy laws were held to allow a perpetrator of clinic violence to seek shelter in the nation's bankruptcy courts. On the contrary, when those who have committed violence have tried to hide behind the bankruptcy laws, they have found their debts were non-dischargeable under current bankruptcy law. The letter goes on to point out that the abortion rights group NARAL recognized in a 1999 publication that "[c]oncluding that clinic violence-associated debts are non-dischargeable under section 523(a)(6) is consistent with the Supreme court's interpretation of [current bankruptcy law's] "willful and malicious injury." Therefore such true debts are non-dischargeable.

To date, Sen. Hatch has received no response to his letter. Nor has anyone adequately explained why the neutral, alternative language we have crafted is insufficient. I send this letter to you in the hope that, given the relative importance of this issue to the White House, you might be willing to explain the need for the so-called clinic violence amendment.

Sincerely,

Manus Cooney
Chief Counsel & Staff Director

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 13, 2000

The Honorable Charles Schumer
313 Hart Senate Office Building
Washington, DC 20510

Dear Chuck:

I am writing you regarding your clinic violence amendment to the bankruptcy reform legislation. This amendment appears to be one of the final remaining issues holding up the overdue reform our bankruptcy laws truly need to both stop the abuse of the system by those who are able to pay back a portion of their debts and to implement new consumer protections such as enhanced credit card disclosures, which you played a major role in drafting.

I respect your views and the general objective of your amendment to prevent criminals from paying their debts to society or to others by using our bankruptcy laws. Furthermore, I am committed to addressing any legitimate abuse of our bankruptcy laws. However, I am concerned that some who oppose the broadly supported proposed reforms have capitalized on the issue of abortion clinic violence and have spread some misconceptions regarding this issue. Such misconceptions, unfortunately, appear to be jeopardizing passage of the important bankruptcy reform legislation.

For example, in a document circulated by one of our colleagues, it was represented that "[t]he Schumer amendment prevents a documented abuse of the bankruptcy system . . . ." and the compromise language that is in the conference report "would continue to allow many perpetrators of clinic violence to seek shelter in the nation's bankruptcy courts."

There has not been a single case reported or presented where the current bankruptcy laws were held to allow a perpetrator of clinic violence to "seek shelter in the nation's bankruptcy courts," nor is this a "documented abuse" of the system. On the contrary, when those who have committed violence have tried to hide behind the bankruptcy laws, they have found their debts were non-dischargeable under current bankruptcy law. Given this, I do not think that the amendment you offer is necessary.

Indeed, the abortion rights group NARAL recognized in a 1999 publication that "[c]oncluding that clinic violence-associated debts are non-dischargeable under section 523(a)(6) is consistent with the Supreme court's interpretation of [current bankruptcy law's] "willful and malicious injury." Therefore such true debts are non-dischargeable.

Even given such interpretation of current law, and though the House-passed bill had no abortion-related provision, the current reform legislation goes further and incorporates compromise language that would expand current law and further make debts arising from willful and malicious *threats* also non-dischargeable. This is done in a politically neutral manner and protects debts from *all* threats of injury irrespective of the political message of the protestors. In addition, knowing that one of your biggest concerns regarding this subject is the ability of perpetrators to avoid debts arising from settlement or contempt orders, the compromise language specifically covers debts from settlement orders and violations of other orders of the court.

I appreciate your consideration of these points and would welcome any response you might have.

Sincerely,

Orrin G. Hatch
Chairman

NARAL
Reproductive Freedom & Choice

Another "Nuremberg Files" Defendant Files for Bankruptcy!

To: Reproductive Health Staff
From: Allison Herwitt, Director of Government Relations
Donna Crane, Legislative Representative
Date: June 9, 2000
Subject: Schumer Clinic-Violence Amendment

Just days ago, another defendant in the notorious "Nuremberg Files" case, Joseph Foreman, filed for bankruptcy. In the "Nuremberg Files" case, two anti-abortion groups and 12 individuals were ordered to pay more than $107 million for threatening providers through a Web site and posters. The "Nuremberg Files" Web site collected personal information about abortion providers, clinic staff, law enforcement officials, judges, and politicians. The site listed and sought personal information such as photos of individuals, their families, their friends, their houses, and their cars; driving records; license plate numbers; and names and birth dates of the individuals and their family members. The legend that accompanied this list of names contained simulated body parts and dripping blood. This legend indicated Black font (working); Greyed-out Name (wounded); Strikethrough (fatality). When the verdict was rendered, one of the "Nuremberg Files" defendants admitted: "Many of us have divested ourselves of assets in order they [pro-choice supporters] – they can't take them away. I will not give any money to people who kill babies for a living." To date, six of the 12 individual "Nuremberg Files" defendants have filed for bankruptcy.

This latest development further highlights the essential importance of retaining the Schumer clinic-violence amendment – in its full strength – in any final bankruptcy legislation. It is precisely this type of evasion of the law that would be halted under the Schumer amendment.

The *New York Times* agrees, as evidenced by today's editorial, a copy of which is enclosed.

Although approved by a bi-partisan Senate vote of 80-17, the Schumer amendment is at risk of being dropped or weakened to the point of meaninglessness in the negotiations currently underway. Although conferees have never been officially named on this bill, it is our understanding that negotiations are entering the final phase. **It is critical that senators continue to assert the importance of retaining the Schumer amendment in any final bill.**

As always, thank you for your consideration. Please contact Allison Herwitt at 973-3003 or Donna Crane at 973-3047 with any questions.

1156 15th Street, NW
Suite 700
Washington, DC 20005
202 973 3000
202 973 3096 fax

10951 West Pico Boulevard
Suite 100
Los Angeles, CA 90064
310 234 2805
310 234 8806 fax

http://www.naral.org
naral@naral.org

The New York Times

Friday, June 9, 2000

Bankruptcy Law and Violence

Congressional leaders are busily trying to cobble together a compromise measure that combines the differing bankruptcy law changes passed by the House and Senate. Regrettably, there are indications that the compromise will preserve some of the worst elements of the original versions — giving unsophisticated lower- and middle-income debtors less protection than they need and wealthier debtors more protection than they deserve.

Now, to make matters worse, there is a danger that Republicans may succeed in eliminating one of the positive aspects of the Senate bill. This is an amendment added by an 80-to-17 margin in the Senate that would prevent those who engage in intimidation and violence at abortion clinics from hiding behind the Bankruptcy Code to escape court-imposed financial penalties for their crimes.

Senator Charles Schumer of New York offered the amendment to strengthen the 1994 Freedom of Access to Clinic Entrances Act. It is intended to close an increasingly popular loophole by making it plain that violators cannot escape legal judgments by concealing their assets and filing for bankruptcy, much as defendants have done in several recent cases. Unless it is quickly closed, Mr. Schumer warns, the loophole will inevitably undermine the effectiveness of a federal law that has proved useful in deterring and punishing clinic violence.

NARAL
Reproductive Freedom & Choice

NARAL FAX

TO Heather Howard

ORGANIZATION 456-2878

FAX NUMBER

SENDER Allison Herwitt

DATE

TIME OF TRANSMISSION

NUMBER OF PAGES (INCLUDING THIS PAGE)

PROJECT NAME

NOTES Wanted to make sure you saw today's NYT editorial on Bankruptcy & the memo we sent up to pro-choice and mixed Senators.

1156 15th Street, NW
Suite 700
Washington, DC 20005
202 973 3000
202 973 3096 fax

10951 West P[illegible] Boulevard
Suite 100
Los Angeles, CA 90064
310 234 2805
310 234 8806 fax

http://www.naral.org
naral@naral.org

Bankruptcy Bill

In an informal conference, Republican and Democratic House Members and Senators continue to narrow down their issues of disagreement. Currently, the most contentious issue of disagreement is the Schumer clinic-violence amendment. Schumer is working directly with Hyde to try to develop a compromise on this issue. Hyde's counter proposal on this issue, however, sets a very high standard that would prohibit discharge of debts only if perpetrators had an "intent" to harm and were "willfill and malicious" in their actions. If these standards could not be proved, perpetrators would continue to be able to discharge their debts related to clinic-violence. This issue is proving to be the most difficult to resolve and the Administration would consider vetoing over this issue. Currently, Senator Lott is considering attaching the bankruptcy bill to the electronic signature bill that is expected to move to the Senate floor in the next two weeks.

Hispanic Education

As a follow-up to your Hispanic Convening, Maria Echaveste has planned a White House Strategy Session on Hispanic Education. This event will take place on June 15th and is intended to bring together the public and private sectors to improve education for Hispanics. Originally, this meeting was intended to be a small working group, but it is now a large meeting in the East Room. At the meeting, five goals will be presented to help focus the group on improving education from early childhood to college access and completion (see attached goals and agenda). At the event, the President will release a report from the Council of Economic Advisors on the state of Hispanic Education and a report card produced by the Department of Education.

Bankruptcy Bill

In an informal conference, Republican and Democratic House Members and Senators continue to narrow down their issues of disagreement. Currently, the most contentious issue of disagreement is the Schumer clinic-violence amendment. Schumer is working directly with Hyde to try to develop a compromise on this issue. Hyde's counter proposal on this issue, however, sets a very high standard that would prohibit discharge of debts only if perpetrators had an "intent" to harm and were "willfill and malicious" in their actions. If these standards could not be proved, perpetrators would continue to be able to discharge their debts related to clinic-violence. This issue is proving to be the most difficult to resolve and the Administration would consider vetoing over this issue. Currently, Senator Lott is considering attaching the bankruptcy bill to the electronic signature bill that is expected to move to the Senate floor in the next two weeks.

Hispanic Education

As a follow-up to your Hispanic Convening, Maria Echaveste has planned a White House Strategy Session on Hispanic Education. This event will take place on June 15th and is intended to bring together the public and private sectors to improve education for Hispanics. Originally, this meeting was intended to be a small working group, but it is now a large meeting in the East Room. At the meeting, five goals will be presented to help focus the group on improving education from early childhood to college access and completion (see attached goals and agenda). At the event, the President will release a report from the Council of Economic Advisors on the state of Hispanic Education and a report card produced by the Department of Education.

To: Joel K. Wiginton/WHO/EOP

cc:

Subject: The Latest Republican "Proposal" Remains Inadequate

SCHUMER CLINIC VIOLENCE AMENDMENT STILL UNDER NEGOTIATION

NARAL urges Senators to communicate the importance of retaining the Schumer amendment in any final bill to Senate leaders. Saving the Schumer clinic-violence amendment must be assured as negotiators move to wrap-up the "shadow" bankruptcy conference!

The Latest Hyde "Proposal" Exacerbates the Inadequacies of Prior Proposals and Fails to Preserve the Intent of the Schumer Amendment

1. This language largely duplicates existing law by requiring "willful and malicious" conduct and would further only allow discharge of debts arising from threats of serious bodily injury. By imposing a "willful and malicious" standard, the Hyde proposal would necessitate relitigation of intent issues because not all violations of clinic violence laws must be proved under this standard. As a result, this language continues to allow perpetrators of clinic violence to seek shelter in the nation's bankruptcy courts and continues to force victims of clinic violence to litigate their claims over and over again to enforce court-imposed judgments.

a. This "willful and malicious" standard would require findings of intent not commonly found in settlement agreements.
b. Contempt fines would generally not be dischargeable under this standard. Many clinic violence perpetrators rack up debts by violating injunctions. Depending on the underlying injunction, contempt citations do not require a finding of willful and malicious conduct, and not all contempts involve threats of serious bodily injury.
c. Some clinic violence laws, such as those in Massachusetts and Washington, have mere "knowing" or "reckless" standards for their intent requirements. Thus, violations of these laws may not be encompassed by the Hyde proposal.
d. Judgments typically do not parcel out amounts for each component of the violation. That is, a FACE judgment of $500,000 would not typically set forth amounts arising from willful and malicious conduct threatening serious bodily injury, and other violations. Thus, this proposal would compel extraordinary litigation.

2. The proposal divides lawless conduct into that which threatens serious bodily injury and that which threatens only "minor" bodily injury. All violations of laws protecting against clinic violence should be bolstered by disallowing debtors from seeking refuge in bankruptcy laws. Would threatening to club someone entering a clinic with a sign constitute serious bodily injury, or only minor bodily injury? Bankruptcy courts should never have to adjudicate such questions.

3. The language is unclear, in that in seems to cover only threats of

violence, not violence itself. This in itself is a perverse defect.

4. The Hyde proposal fails to clearly cover property damage, so persons who glue locks, commit arson, or close clinics by filling them with putrid butyric acid could escape the consequences of their actions.

5. This language also fails to clearly address intimidation or other acts of clinic harassment that may not meet the Hyde proposal's definition of acts of violence. Those who telephone women who have visited abortion clinics, their parents and their ministers, follow women and doctors in their cars and call them murderers should not have their debts discharged.

6. By expanding the Schumer clinic violence carve-out to cover all threats of serious bodily harm, the proposed language fails to recognize the important public policy rationale behind a clinic violence-specific exception to dischargeability. Unlike the Schumer amendment, the Hyde proposal will not put perpetrators of clinic violence on notice that there is no financial safe-harbor for their criminal behavior. The "Nuremberg Files" web site case exemplifies the concerted efforts of perpetrators of clinic violence to avoid paying court-imposed financial penalties for clinic violence. In late 1999/early 2000 five "Nuremberg Files" defendants filed for bankruptcy, seemingly in fulfillment of their promise never to pay a dime for their judgment.

For these and other reasons, the Hyde language wholly fails to address the problem redressed by the Schumer Amendment

Message Sent To:

Sarah Rosen Wartell/OPD/EOP@EOP
Joel K. Wiginton/WHO/EOP@EOP
Martha.Davis@usdoj.gov @ inet
Douglas.Elmendorf@do.treas.gov @ inet
lucy.huffman@do.treas.gov @ inet
Ethan.M.Posner@usdoj.gov
karen.l.wilson@usdoj.gov
Broderick Johnson/WHO/EOP@EOP
Taneesha J. Johnson/WHO/EOP@EOP
Ann O'Leary/OPD/EOP@EOP
Frank.Toohey@do.treas.gov
Christopher M. Wanken/OPD/EOP@EOP

The Senate bill ensures that mandatory credit counseling can be provided by telephone or over the Internet. It also applies an appropriate and more reasonable standard to the effort to deter abusive use of Chapter 7, allowing the trustee to recover reasonable costs from the debtor's attorney if filing under Chapter 7 was "frivolous." It also would allow courts to waive filing fees for indigent debtors, but would limit the courts' option to waive the fees only to debtors with incomes below 125% of the poverty level. We think no such cap is needed.

The Senate bill does require a debtor's counsel to attest under oath to the accuracy of any adjustments to income and expenses that the debtor provides (also under oath). This requirement will chill even the most responsible and scrupulous of attorneys from representing financially distressed debtors.

Prevent Abuse of Bankruptcy To Facilitate Clinic Violence

Principle: The abuses of the bankruptcy system must be stemmed, including abuse by those who would use bankruptcy to avoid penalties for violence against family planning clinics. The Administration is deeply concerned by the incidents of violence, vandalism, and harassment committed against family-planning clinics, some of which have resulted in the deaths and maiming of innocent people. The Administration believes that these unlawful activities must not be tolerated, and that when they are committed, those found liable should be held accountable. In 1994, Congress made clear its disapproval for those who would use unlawful means to deny citizens access to legal clinic services by enacting the Freedom of Access to Clinic Entrances Act (FACE).

Unfortunately, there is evidence that those found liable have been making strategic use of bankruptcy to avoid the penalties for their actions established by Congress and the States. This abuse of the bankruptcy system to facilitate unlawful behavior must not be tolerated. Senator Schumer's amendment, passed by the Senate by a margin of 80 to 17, would make court-ordered and other fines and debts resulting from family-planning clinic violence nondischargeable. The Administration opposes the expansion of categories of nondischargeable debt unless there is an overriding public policy objective and no other way to achieve that objective. The Schumer amendment meets that test, providing a necessary tool to ensure that bankruptcy is not used strategically to avoid the legal consequences of clinic violence and intimidation. It should be included in the final legislation.

Privacy Of Personal Financial Records In Bankruptcy

Principle: The financial and personal privacy of those who seek protection in the bankruptcy system must be protected.

The electronic aggregation and availability of public and non-public bankruptcy information could serve at least two important purposes: (1) it could lower costs for participants in the bankruptcy system; and (2) it could improve our understanding of bankruptcy trends and the impact of policy changes. The Administration strongly supports these goals. At the same time, however, disseminating bankruptcy information electronically could threaten the security and privacy of debtors in bankruptcy by making sensitive information (including account numbers, social security numbers, balances, income sources, and payment histories) widely available to curious neighbors, employers, marketers, and predators looking for those most likely to be lured by scams.

Far too little attention has yet been given to complicated questions such as: who needs what information and under what circumstances? Does new technology change our perception of what information should be in the public domain? And what kinds of information in bankruptcy records could be used to prey upon debtors and their families?

These questions have been raised as private trustees explore the development of a national database of bankruptcy information to answer creditor inquiries about the status of payments under Chapter 13 plans. The database may contain material obtained independently by the private trustees in the administration of the case, as well as records from the public court file. Though such a database would provide creditors with one location to obtain information about their claims, important decisions must be made about privacy and the commercial use of this information. The private trustees appear interested in performing this function responsibly, and the Executive Office for U.S. Trustees is working with the private trustees to explore ways to safeguard the privacy of this information. However, legislative language in both the Senate and House bills designed to facilitate efforts by the private trustees without taking into account privacy considerations is, at best, premature.

The House bill would protect the private trustees from liability for dissemination of information unless a trustee has actual knowledge that the information is false. This provision provides no safeguards against misuse; and no compelling argument has been presented as to why the normal liability rules should not apply. We strongly recommend that this provision be removed from the final bill. In addition, the House bill also expresses the "sense of the Congress" that all public record data held by bankruptcy clerks shall be released in electronic form to the public, subject to privacy safeguards that the Judicial Conference may determined. The privacy issues regarding bankruptcy information should be fully explored before the Congress makes any determinations in this area.

The Senate bill contains language (in a section regarding collection of child support) that would require Chapter 13 trustees to provide non-public information about their cases to any not-for-profit entity that shall provide such information to parties in interest. The bill also contains "sense of the Congress" language about dissemination of bankruptcy information. The possible implications of these provisions, in particular the risk to personal privacy, have not been adequately explored, so these provisions should be dropped.

OTHER ISSUES

New Provisions

The Administration understands that consideration is being given to including, in the conference report, additional provisions that were not in either the House or Senate versions of the bankruptcy bill.

First, the Administration would strongly oppose the inclusion of provisions, under the bankruptcy law or other law, that would alter the police and regulatory exception or the legal principles that allow governmental units to enforce regulatory programs with regard to debtors who may hold interests in licenses, permits, franchises or entitlements issued by the Government.

Second, the Administration understands that some are urging adoption of an amendment that would exclude collection of bad checks from the provisions of the Fair Debt Collection Practices Act (FDCPA). The Administration would oppose such a provision. Courts have repeatedly found that check collection is covered by the FDCPA, which protects consumers from invasion of privacy, harassment, abuse, false or deceptive representations, and unfair collection methods. No compelling argument has been made explaining why these protections provided by the Congress are not as appropriate to collection of checks as they are to collection of other debts. In any event, before any such important consumer protections are weakened or eliminated, the case for the change should be subjected to sunlight and public scrutiny.

Certain Contract for Electric Power Voided

The Senate bill contains a provision that would void a power supply contract between Hydro Quebec and a consortium of Vermont utilities. While the intent of this provision appears to be to protect Vermont utilities that may be facing bankruptcy, the legislative abrogation of a contract between two commercial entities raises troubling policy issues, as more fully set out in a letter, dated March 3, 2000, to Senator Jeffords from Assistant Secretary for Fossil Energy Robert W. Gee. The Department of Justice has also raised concerns that the provision could give rise to a "taking" of private property for which just compensation would be required under the Fifth Amendment of the Constitution. It is also possible that a claim for money damages could be brought to international arbitration under NAFTA on the theory that NAFTA affords comparable protections to investments through the investment chapter's expropriation provision (Article 1110).

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 12, 2000

The Honorable Patrick J. Leahy
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

The Administration understands that, although conferees have not been named, congressional staff are discussing ways to reconcile the House and Senate versions of H.R. 833, the Bankruptcy Reform Act. The enclosure to this letter outlines the Administration's views on these two versions of the bill. As you and your staff develop an agreement on this bill, your consideration of these views would be appreciated.

The President supports balanced consumer bankruptcy reform that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. He believes that we can eliminate abuse without hurting those forced to turn to bankruptcy, the vast majority of whom are faced with some of the hardest circumstances that life has to offer -- divorce, unemployment, illness, and uninsured medical expenses. Although we should not countenance people using bankruptcy to escape bills they can afford to repay, we also should not enact punitive legislation that places insurmountable barriers before the people who file for bankruptcy as a last resort. We must remember that too often those who need bankruptcy's "fresh start" are single mothers or divorcing spouses, displaced workers, low-income households (many of whom are minorities), victims of predatory lending, or those who faced unexpected illness that reduced their income and burdened them with expensive medical bills.

To meet the test of balance, the bill that emerges from conference should be consistent with the key principles that have been set forth by the President. The President was disappointed that the House once again failed to produce balanced bankruptcy legislation that he could support. As we stated when H.R. 833 came to the House floor last spring, the President's senior advisors would recommend that he veto the House bill if it were presented to him. The bankruptcy provisions of the Senate bill generally do a better job of meeting the President's principles, although the Administration has serious concerns about some provisions. The detailed enclosure describes the President's principles, the Senate bill provisions that should be preserved, the Senate bill provisions that raise concerns, and our strong objection to various provisions of the House bill.

The Administration notes that certain non-relevant amendments have been included in the Senate version of the bill. The President has made clear on a number of occasions that he strongly supports an increase in the minimum wage of $1 over the next two years. However, as the Administration has stated previously, if Congress sends him a bill delaying the increase, repealing overtime protections for certain workers, adding costly and unnecessary tax cuts that threaten fiscal discipline and direct benefits away from working families, thwarting ongoing efforts to enforce pension law, and including an objectionable private school voucher provision, he will veto it.

Thank you for your consideration of the Administration's views on these bills. We would be happy to discuss any of these concerns with you or your staff.

Sincerely,

Jacob J. Lew
Director

Enclosure

Identical Letter Sent To The Honorable Orrin G. Hatch
The Honorable Henry J. Hyde, and The Honorable John Conyers, Jr.

ADMINISTRATION VIEWS ON H.R. 833 – THE BANKRUPTCY REFORM ACT

NON-RELEVANT AMENDMENTS

The Senate version of the bankruptcy bill includes non-relevant amendments on the subjects described below.

Minimum Wage and Tax Amendment

The President strongly supports an increase in the minimum wage of $1 over two years. Working families across this country deserve this increase, which would restore the real value of the minimum wage to what it was in 1982, helping more Americans share in our current economic prosperity. But the Senate bill would delay the increase. The Senate bill also includes a provision that would repeal overtime protections for certain workers, and a tax and pension package that would direct benefits away from working families and reduce Federal unemployment taxes without addressing needed system reforms. These tax and pension provisions are regressive, could lead to cuts in retirement and health benefits for moderate- and lower-income workers, would not significantly increase plan coverage or national savings, and would hamper efforts to enforce pension law. Moreover, we must establish a proper framework for paying down the debt, strengthening Social Security and Medicare, and funding key priorities before we consider major new tax cuts. If the Congress sends the President a bill delaying the minimum wage increase, creating regressive, costly, and unnecessary tax cuts that threaten fiscal discipline, repealing protections for certain workers, hampering the enforcement of pension law, directing benefits away from working families and potentially reducing their retirement and health benefits, he will veto it.

Drug Amendment

The Administration also opposes the provisions that would reduce the current disparity between crack and powder cocaine sentences solely by increasing powder cocaine penalties dramatically instead of addressing both crack and powder cocaine penalties. Decreasing the threshold amount of powder cocaine that an individual must possess to receive 5- and 10-year mandatory minimum sentences may be counterproductive because it could significantly redirect Federal law enforcement resources from the most serious offenders. In addition, this amendment would actually exacerbate the disproportionate impact of cocaine sentencing on minorities because, according to U.S. Sentencing Commission statistics, approximately 31% of defendants sentenced at the Federal level for powder cocaine offenses in 1998 were African American, 48% were Hispanic, and only 19% were white. Please note, however, that the Administration supports many of the provisions contained in the amendment to combat the spread and abuse of methamphetamine and hopes that the Congress will consider them outside of bankruptcy legislation.

Private School Vouchers Amendment

The drug amendment discussed above also contains an objectionable school voucher provision that is unrelated to the underlying bill. The Administration's opposition to private school vouchers is well known. Rather than improving and reforming public schools, private school vouchers drain scarce resources from public schools and are a distraction from the serious work of education reform. Instead, the President is committed to a comprehensive agenda to improve our schools by investing more in them and demanding more from them. The Administration also opposes the provision to require States to mandate the expulsion of students who bring a "felonious" quantity of drugs onto school property. A similar provision was defeated in a bipartisan House vote during consideration of the juvenile justice bill last year, and we oppose the inclusion of this type of measure in bankruptcy legislation. Finally, the Administration objects to the inclusion of any provisions affecting elementary and secondary education in the bankruptcy bill, because the Elementary and Secondary Education Act of 1965 (ESEA) is currently being reauthorized in the House and Senate. Congress should continue to address elementary and secondary education issues through the ESEA reauthorization process.

CONSUMER BANKRUPTCY PROVISIONS

The President supports balanced consumer bankruptcy reform that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. To meet the test of balance, the bill that emerges from conference should be consistent with the key principles set forth by the President. The President was disappointed that the House once again failed to produce balanced bankruptcy legislation that he could support. As the Statement of Administration Policy said when H.R. 833 came to the House floor last spring, the President's senior advisors would recommend that he veto the House bill if it were presented to him. The bankruptcy provisions of the Senate bill generally do a better job of meeting the President's principles, although the Administration has serious concerns about some provisions.

Means Test

Principle: **Access to Chapter 7 should not be governed by an arbitrary means test, but by reasonable guidelines that take into account individual circumstances.** The goal of the means test is to identify those debtors who genuinely have the capacity to repay a portion of their debts under a Chapter 13 plan. Many debtors who now enter Chapter 13 fail to complete their plans. To ensure positive outcomes instead of higher failure rates and greater hardships, we should ensure that debtors' specific circumstances are considered in a meaningful way. Neither creditors nor debtors are helped by wasting scarce resources establishing and overseeing repayment plans that will quickly fail. The House bill fails to meet the President's principle (despite valuable efforts by Chairman Hyde to bring some balance to its provisions). Because it limits access to Chapter 7 through a tight, inflexible, and arbitrary means test, it would force into Chapter 13 repayment plans many debtors who are unlikely to succeed. Specifically, the House bill would:

-- allow exceptions to the means test only to those demonstrating "extraordinary circumstances" that require additional exceptional expenses or income adjustments -- a nearly insurmountable burden of proof that would deny bankruptcy judges the appropriate discretion in the application of the means test.

-- not allow for expenses related to the long-term care of family members, including the elderly and disabled. Such assistance may be essential to enable these family members to avoid institutionalization and maintain their quality of life, yet may not qualify the family member as a legal dependent of the debtor.

-- not allow for expenses that debtors may incur in protecting themselves against domestic violence. These expenses could include relocation expenses to move away from the violent spouse, transportation expenses to get to work from a new location or to work removed from the spouse's knowledge, legal costs to get and enforce a protective order, security costs, and income gaps associated with unavoidable absences from work.

-- rigidly use IRS guidelines that were designed for a different purpose – collecting taxes -- where they are applied far more flexibly than the means test would allow. We urge the Conferees to adopt Chairman Hyde's proposal to authorize the creation of standards specific to bankruptcy, using the IRS guidelines as a starting point.

-- not incorporate payments for arrearages on secured debt for necessary property, which must be paid under a Chapter 13 plan. Thus, the means test could leave some debtors in bankruptcy "no-man's land": unable to file under Chapter 7, but unable to get a Chapter 13 plan confirmed because they cannot pay these arrearages.

-- subject many debtors to burdensome paperwork that is not needed for bankruptcy determinations, including the collection of back tax returns regardless of their relevance at a cost of millions per year.

The House bill does take into account required administrative expenses under a Chapter 13 plan in calculating whether the debtor has the capacity to repay. (This important provision, which is not in the Senate bill, should be retained in the final bill.) It also contains both essential safe harbors: (1) protecting below-median income debtors from 707(b) "abuse" motions by creditors that could be the basis for threats or coercion; and (2) protecting below-median income debtors from 707(b) means-test motions by bankruptcy trustees. It includes a proposal by Chairman Hyde to allow adjustments for reasonable food and clothing expenses to take into account regional differences in costs. Finally, it clarifies sensibly the definition of household goods that a debtor can claim as exempt property (and thus upon which the debtor can void a non-purchase money, non-possessory lien), by limiting household goods to those "normally" found in or around a residence. These provisions should be retained.

The Senate bill uses a more reasonable means test, which provides more-appropriate relief to debtors, although improvements could be made. The Senate bill would:

-- allow exceptions to the means test to debtors who can show "special circumstances."

-- use a more appropriate threshold for access to Chapter 7.

-- provide a means test that includes expenses for the long-term care of elderly and other family members, and for protection of victims of domestic abuse and their families.

Certain provisions of the Senate bill, however, are also problematic.

-- The Senate bill also uses IRS guidelines for the means test, but includes a Congressional finding that the Treasury Secretary can modify the guidelines for bankruptcy purposes. Because this interpretation of existing Treasury authority is subject to legal challenge, we prefer Chairman Hyde's approach described above.

-- The Senate bill's means test calculation includes arrearages on secured debt for necessary property; however, it does leave some debtors in bankruptcy "no-mans' land" because it does not include the important provision, included in the House bill by Chairman Hyde, incorporating the required administrative expenses of a Chapter 13 plan in calculating the means test.

-- The Senate bill avoids needless filing of back tax returns and streamlines the means test for debtors between 100% and 150% of median income. However, further reductions in the paperwork burden on low-income debtors could be achieved at no cost to the effectiveness of the means test.

-- The Senate bill's motions safe harbor would protect below-median income debtors from 707(b) motions by creditors that could be the basis for threats or coercion. It fails, however, to provide a "safe harbor" for low-income debtors from means test calculations and paperwork or a full safe harbor from means test motions by United States trustees. Including both safe harbors would improve both the efficiency and fairness of the means test. If low-income debtors are abusing the process for other reasons, they would still be subject to general 707(b) motions by the court, the United States Trustee or the Chapter 7 trustee.

-- The Senate bill's definition of household goods is so narrowly drawn that the debtor may be deprived of reasonable or even vital household items that would be exempt under the House bill's definition.

Finally, we note that both bills contain inconsistent references to median income standards (State, Regional, and National). Administration of the new law will be eased by use of consistent standards.

Homestead Exemption and Other Loopholes for the Wealthy

Principle: **It is fundamentally unfair to ask low- and moderate-income debtors to devote future income to repay the debts that they can, while leaving loopholes that allow the wealthy to shield income and assets from their creditors.** High or unlimited homestead exemptions allow people with expensive homes to avoid their responsibility to repay a significant portion of their debts. Similarly, some wealthy debtors can file under Chapter 11 where they can shield their future income from creditors.

The House bill provides a $250,000 cap on homestead exemptions, but allows the states to opt out of the cap. With the opt-out, the provision is effectively the same as having no cap at all. Moreover, the bill does nothing to close the Chapter 11 loophole for wealthy debtors.

The Senate bill provides a meaningful cap of $100,000 on homestead exemptions. It also closes the Chapter 11 loophole for wealthy debtors. These provisions should be retained.

Protection Against Coercive Reaffirmations and Practices

Principle: **There must be appropriate safeguards against coercive creditor practices that compel debtors to forgo their rights and that disadvantage more scrupulous creditors.** Debtors often reaffirm debt on unfavorable terms, sometimes when they demonstrably cannot afford the future payments. These new commitments put their future, as well as their payments to socially more important debts (e.g., child support, alimony, and taxes), at risk. These reaffirmations are frequently the result of insufficient or misleading information and sometimes the result of intimidation or outright coercion. Unfortunately, such practices have been all too frequent, and the new legislation may increase the risk of such coercion by giving creditors new opportunities to challenge debtors' actions. In light of these new opportunities for abuse, the Administration cannot countenance weakening existing protections; in fact, enhanced safeguards are essential.

The House bill gives debtors the right to a hearing on a reaffirmation of wholly unsecured, non-credit union debt, but allows represented debtors to waive the hearing, which effectively does little to change current law and might inadvertently bolster arguments that courts have no authority to review agreements filed by represented debtors. The bill expressly provides a private right of action for failure to comply with reaffirmation agreements or willful violations of a discharge, but it precludes use of class actions to bring such claims. This eliminates the most effective approach -- used in the Sears case among others -- to remedy widespread coercive practices. The private right of action should be retained, but the bar on class actions should be dropped.

The Senate bill does not ban class action remedies. Moreover, it requires disclosure of the terms of debt being reaffirmed and creates a new presumption of undue hardship if the debtor does not have the capacity to repay debts that he or she is reaffirming. These mechanisms will go a long way toward preventing debtors from reaffirming debts because of creditor threats or intimidation or because of simple confusion. The bill proposes a form of disclosure, although it is not as comprehensive as the one developed by the Administrative Office of the U.S. Courts now in use in a few districts; Congress could provide districts discretion to use the more extensive form. The new Subsection 524(j) in the Senate bill codifies existing practice by providing that creditors can accept payments before and after a reaffirmation agreement is filed with the court; however, if debtors exercise their right to rescind a reaffirmation agreement or the agreement is found to be invalid, subsections (j)(2) and (j)(3) may raise issues in litigation and should be clarified or struck. Specifically, Congress should clarify that nothing therein is intended to preempt any Federal or State law or eliminate remedies available under current Federal or State law, including disgorgement of funds collected under invalid agreements.

Finally, the Senate bill includes a provision that would allow debtors to waive in advance bankruptcy protection for their retirement assets. We fear that those of limited means or sophistication could easily be compelled, perhaps even as a condition of receiving credit, to put these critical assets at risk. As the Department of Labor recently testified before the Senate Health, Education, Labor and Pensions Committee, this provision should be struck.

Improving Credit Card Practices

Principle: Both debtors and creditors must be required to be responsible. Bankruptcy reform should be balanced by including provisions that address credit-card practices that may lead to bankruptcies. Creditors should give consumers the information they need to manage their credit card debt successfully. Doing so would allow more consumers to make informed decisions and give many households better control of their finances, reducing the number of bankruptcies.

The House bill requires that consumers receive a generic description of the impact of making only minimum payments on the duration of the debt. However, it provides no way for a consumer to obtain more specific information about the impact of making the minimum payment in his or her own circumstance. The House bill requires conspicuous disclosures of "teaser" rates, but it does not require that the rates be labeled "introductory" or that the permanent interest rate be disclosed in close proximity to the teaser rate.

The Senate bill provides more-useful provisions though it could be further improved. It requires most lenders to provide an 800 number for consumers who want specific information about the impact of minimum payments in their situation. (The information provided could be more valuable, if it included the cost as well as the duration of debt when only the minimum payment is made.) It also requires that consumers be given clear and conspicuous notice of teaser rates by labeling them as introductory each time they appear in a solicitation, as well as disclosure of the permanent interest rate in close proximity to the teaser rate. Lastly, the bill includes new disclosures on high loan-to-value home equity loans so consumers are not misled about their tax implications.

Non-Dischargeable Debts and "Cram Downs"

Principle: **The goal of repaying creditors must be balanced with the need to protect social priorities, such as payment of child support, alimony and taxes, and to preserve a meaningful opportunity for a fresh start.** The Bankruptcy Code makes debts nondischargeable only where there is an overriding public purpose to protect those debts. To the extent that the bills make more credit-card debt nondischargeable and preserve secured claims regardless of the value of their collateral, these societal priorities will compete for scarce resources and the fresh start will become ephemeral.

The House bill gives secured creditors in bankruptcy unprecedented rights to collect amounts in excess of the value of their collateral. It precludes "cramming down" debt to the collateral value for any debt secured by personal property purchased within five years of the bankruptcy filing. Were these provisions to become law, societal priorities would suffer, unsecured creditors would be placed at a disadvantage, and secured creditors would have less incentive to evaluate properly lending risk. The House bill also makes nondischargeable all cash advances above $250 and all debts incurred to pay nondischargeable debts, both if within 90 days of bankruptcy. This rule endangers societal priorities and may trap debtors who are trying to feed their families or meet debt obligations before they realize that bankruptcy is inevitable.

The Senate bill is preferable because it protects under-secured debt other than for automobiles for only six months before filing; nonetheless, the ban for car loans should be far shorter than five years. Similarly, the Senate bill has a shorter window before bankruptcy in which cash advances (with a higher threshold) and debts incurred to pay nondischargeable debts become nondischargeable. An even better approach would be to limit the new nondischargeability provisions to above-median income debtors, as Senator Moynihan has proposed.

Barriers to Entry or Representation in the Bankruptcy System

Principle: **Inappropriate barriers should not be created to entry into or effective representation in the bankruptcy system.** Filing fees, fee-shifting provisions, and inflexible pre-filing hurdles can unfairly deny access to the bankruptcy system to people who do not have the ability to repay their debts.

The House bill would require mandatory credit counseling before a bankruptcy filing, but does not make clear that the requirement can be met by telephone or over the Internet, creating a barrier for those without convenient access to counseling. It also would require a debtor's attorney to pay a trustee's attorney's fees if the debtor is not "substantially justified" in filing for Chapter 7. Fear of such sanctions may deter attorneys from representing debtors with bona fide claims. However, the bill does allow courts to waive filing fees for debtors unable to pay, for the first time removing this important barrier to entry for indigent debtors.

Ann O'Leary
04/04/2000 11:04:50 AM

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP

cc:
Subject: Bankruptcy Conf Call

Do you want to get on this call and listen in?

---------------------- Forwarded by Ann O'Leary/OPD/EOP on 04/04/2000 11:04 AM ---------------------------

Rachael F. Goldfarb
04/03/2000 07:07:43 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Bankruptcy Conf Call

Sarah would like to conduct a brief conf call on bankruptcy to review status on assignments from Ed Pagano. Please dial into 757-2104 code 3939 this Friday, April 7th at 2:00 pm.

Thanks.

Message Sent To:

Sarah Rosen Wartell/OPD/EOP@EOP
Joel K. Wiginton/WHO/EOP@EOP
Martha.Davis@usdoj.gov @ inet
Douglas.Elmendorf@do.treas.gov @ inet
lucy.huffman@do.treas.gov @ inet
Ethan.M.Posner@usdoj.gov
karen.l.wilson@usdoj.gov
Rachael F. Goldfarb/OPD/EOP@EOP
Broderick Johnson/WHO/EOP@EOP
Taneesha J. Johnson/WHO/EOP@EOP
Ann O'Leary/OPD/EOP@EOP

Sarah Rosen Wartell
03/28/2000 06:49:21 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP

cc:

Subject: Re: bankruptcy

that's right. letter hasn't gone for two reasons -- number 1 reason is I have been swamped. Also, some argue we are better off not sending until issues are front and center and we'd get attention. Also -- unclear what to say re minimum wage/tax amendment -- drop it or fix it? The next draft I will circulate will be ambiguous but not clear that works with bigger stragegy.

Sarah Rosen Wartell
03/28/2000 06:42:16 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP

cc:
Subject: Re: bankruptcy

letter not sent. Conferees not yet appointed.

Senate bill cannot go to conference with the House in its current form because it includes a tax/minimum wage package; tax legislation must originate in the House. The Senate Republican leadership hopes to separate the tax/mininimum wage package from the bankruptcy bill. They would then send the tax/minimum wage package to Conference with the minimum wage/tax bill the House passed earlier this year and the bankruptcy bill to a separate conference. However, they do not want to have another vote on the Senate floor on minimum wage. Senator Kennedy will not agree to separate the two unless there is a commitment to consider at least a sense of the senate resolution on the benefits of a two-year minimum wage increase. Thus far the Republicans have refused. Thus there is an impasse and conferees have not been named. House and Senate staff have been discussing the bankruptcy provisions in advance of the conference and some progress has been made. Senate Republicans and Democrats appear prepared to insist, at least initially, on most of the marginally better provisions of the Senate bill.

Heather H. Howard
03/22/2000 11:13:23 AM

Record Type: Record

To: Sarah Rosen Wartell/OPD/EOP@EOP

cc:
Subject: Re: Bankruptcy letter

I know you are swamped and trying to get this letter out, but I have two corrections that need to be made to the section about clinic violence:

2nd Paragraph, first sentence (beginning with "Unfortunately, we have seen evidence . . . "): **Instead of "other states" it should read "the states"**

Same paragraph, third sentence (beginning with "Senator Schumer's amendment . . . "):
Take out "court ordered" (because the amendment covers settlements as well as court orders).

Thanks a lot. Call me if you have any questions (6-7263).

Heather

Congressional Record article 1 of 50 *Full Display* - 2,683 bytes.[Help]

SCHUMER (AND OTHERS) AMENDMENT NO. 2763 (Senate - November 05, 1999)

[Page: S14191] *GPO's PDF*

(Ordered to lie on the table.)

Mr. SCHUMER (for himself, Mrs. **Feinstein**, Mr. **Leahy**, Mrs. **Murray**, Mr. **Lautenberg**, and Mr. **Durbin**) submitted an amendment to be proposed by them to the bill, S. 625, supra; as follows:
On page 124, between lines 14 and 15, insert the following:

SEC. 322. NONDISCHARGEABILITY OF DEBTS INCURRED THROUGH THE COMMISSION OF VIOLENCE AT CLINICS.
Section 523(a) of title 11, United States Code, as amended by section 224 of this Act, is amended--

(1) in paragraph (18), by striking `or' at the end;

(2) in paragraph (19)(B), by striking the period and inserting `; or'; and

(3) by adding at the end the following:

`(20) that results from any judgment, order, consent order, or decree entered in any Federal or State court, or contained in any settlement agreement entered into by the debtor, including any damages, fine, penalty, citation, or attorney fee or cost owed by the debtor, arising from--

`(A) an actual or potential action under section 248 of title 18;

`(B) an actual or potential action under any Federal, State, or local law, the purpose of which is to protect--

`(i) access to a health care facility, including a facility providing reproductive health services, as defined in section 248(e) of title 18 (referred to in this paragraph as a `health care facility'); or

`(ii) the provision of health services, including reproductive health services (referred to in this paragraph as `health services');

`(C) an actual or potential action alleging the violation of any Federal, State, or local statutory or common law, including chapter 96 of title 18 and the Federal civil rights laws (including sections 1977 through 1980 of the Revised Statutes) that results from the debtor's actual, attempted, or alleged--

`(i) harassment of, intimidation of, interference with, obstruction of, injury to, threat to, or violence against any person--

`(I) because that person provides or has provided health services;

`(II) because that person is or has been obtaining health services; or

`(III) to deter that person, any other person, or a class of persons from obtaining or providing health services; or

`(ii) damage or destruction of property of a health care facility; or

`(D) an actual or alleged violation of a court order or injunction that protects access to a health care facility or the provision of health services.'.

THIS SEARCH	THIS DOCUMENT	THIS CR ISSUE	GO TO
Next Hit	Forward	Next Document	New CR Search
Prev Hit	Back	Prev Document	HomePage
Hit List	Best Sections	Daily Digest	Help
	Doc Contents		

From: Ronald E. Jones on 03/09/2000 01:08:15 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: See the distribution list at the bottom of this message

Subject: OMB Report to Conferees on HR833 Bankruptcy Reform Act of 1999

AGENCIES: You will receive a fax of this LRM and the attached nine-page document.

EXOP REVIEWERS: No hard copy of this LRM will be sent to your office.

COMMENTS ARE DUE BY 10 AM, MONDAY, MARCH 13TH.

conferees3-9.doc

talking to Judiciary Cmte-

motion to instruct conferees to accept Schumer lng.

- ~~they~~ Cmte may want to include another issue instead

--------------------- Forwarded by Ronald E. Jones/OMB/EOP on 03/09/2000 01:01 PM ---------------------------

LRM ID: REJ282

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Thursday, March 9, 2000

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: Richard E. Green (for) Assistant Director for Legislative Reference
OMB CONTACT: Ronald E. Jones
PHONE: (202)395-3386 FAX: (202)395-3109
SUBJECT: **OMB Report to Conferees on HR833 Bankruptcy Reform Act of 1999**

DEADLINE: **10 AM Monday, March 13, 2000**
In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: The attached letter was drafted by NEC staff for Director Lew's signature. In addition to standard bankruptcy provisions, the Senate version of HR 833 contains abortion-, drug-, minimum wage-, and tax-related amendments.

DISTRIBUTION LIST

AGENCIES:
61-JUSTICE - Robert Raben - (202) 514-2141
62-LABOR - Robert A. Shapiro - (202) 219-8201
118-TREASURY - Richard S. Carro - (202) 622-0650
7-AGRICULTURE - VACANT - (202) 720-1516
25-COMMERCE - Michael A. Levitt - (202) 482-3151
30-EDUCATION - Jack Kristy - (202) 401-8313
32-ENERGY - Bob Rabben - (202) 586-6718
54-HOUSING & URBAN DEVELOPMENT - Mike Moran - (202) 708-1793
59-INTERIOR - Jane Lyder - (202) 208-4371
52-HEALTH & HUMAN SERVICES - Sondra S. Wallace - (202) 690-7760
129-VETERANS AFFAIRS - John H. Thompson - (202) 273-6666
114-STATE - Paul Rademacher - (202) 647-4463
128-US Trade Representative - Carmen Suro-Bredie - (202) 395-3475
35-Farm Credit Administration - Eileen McMahon - (703) 883-4056
34-Export-Import Bank of the United States - Sandra Jackson - (202) 565-3216
107-Small Business Administration - Jane P. Merkin - (202) 205-6700
27-Consumer Product Safety Commission - Robert J. Wager - (301) 504-0515
80-National Labor Relations Board - John E. Higgins Jr. - (202) 273-2910
89-Office of National Drug Control Policy - Ross Deck - (202) 395-6727

EOP:
Sarah Rosen Wartell

John C. Williams
Joseph J. Minarik
Cynthia A. Rice
Joel K. Wiginton
Broderick Johnson
David W. Beier
Leanne A. Shimabukuro
Deanne E. Benos
Rachael F. Goldfarb
Peter P. Swire
Lauren B. Steinfeld
Martin L. Yeung
Ann O'Leary
Taneesha J. Johnson
Lauren K. Gillespie
Steven D. Aitken
Anil Kakani
Adrienne C. Erbach
Brooke B. Livingston
James Boden
Alice Veenstra
Alan B. Rhinesmith
John E. Thompson
Toni S. Hustead
Wayne Upshaw
Ellen J. Balis
Pamula L. Simms
Neil Lobron
Janet E. Irwin
Michele Ahern
Mary C. Barth
Francis S. Redburn
Larry R. Matlack
Debra J. Bond
Clarisa Y. Rodrigues-Coelho
Lauren M. Supina

LRM ID: REJ282 **SUBJECT:** OMB Report to Conferees on HR833 Bankruptcy Reform Act of 1999

RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: Ronald E. Jones Phone: 395-3386 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: ______________________ (Date)

______________________ (Name)

______________________ (Agency)

______________________ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _________

_____ Other: ______________________

_____ FAX RETURN of _____ pages, attached to this response sheet

Message Sent To: ______________________

justice.lrm@usdoj.gov @ inet
dol-sol-leg@dol.gov @ inet
llr@do.treas.gov @ inet
usdaobpaleg@obpa.usda.gov @ inet
clrm@doc.gov @ inet
ogc_legislation@ed.gov @inet
HUD LRM@hud.gov @ inet
lrm@os.dhhs.gov @ inet
valrm@mail.va.gov @ inet
rademachpr@state.gov @ inet
laffairs@ustr.gov @ inet
mcmahone@fca.gov @ inet
helpdesk@exim.gov@inet
cla@sba.gov @ inet
kkopsidas@cpsc.gov @ inet
jhiggins@nlrb.gov @ inet
OPBRE_E-Mail_-_EDITORS@OA.EOP.GOV

Message Copied To:____

Sarah Rosen Wartell/OPD/EOP@EOP
Joseph J. Minarik/OMB/EOP@EOP
Cynthia A. Rice/OPD/EOP@EOP
Joel K. Wiginton/WHO/EOP@EOP
Broderick Johnson/WHO/EOP@EOP
David W. Beier/OVP@OVP
Leanne A. Shimabukuro/OPD/EOP@EOP
Deanne E. Benos/OPD/EOP@EOP
Rachael F. Goldfarb/OPD/EOP@EOP
Peter P. Swire/OMB/EOP@EOP
Lauren B. Steinfeld/OMB/EOP@EOP
Martin L. Yeung/OMB/EOP@EOP
Ann O'Leary/OPD/EOP@EOP
Taneesha J. Johnson/WHO/EOP@EOP
Lauren K. Gillespie/WHO/EOP@EOP
Steven D. Aitken/OMB/EOP@EOP
Anil Kakani/OMB/EOP@EOP
Adrienne C. Erbach/OMB/EOP@EOP
Brooke B. Livingston/OMB/EOP@EOP
James Boden/OMB/EOP@EOP
Alice Veenstra/OMB/EOP@EOP
Alan B. Rhinesmith/OMB/EOP@EOP
John E. Thompson/OMB/EOP@EOP
Toni S. Hustead/OMB/EOP@EOP
Wayne Upshaw/OMB/EOP@EOP
Ellen J. Balis/OMB/EOP@EOP
Pamula L. Simms/OMB/EOP@EOP
Neil Lobron/OMB/EOP@EOP
Janet E. Irwin/OMB/EOP@EOP
Michele Ahern/OMB/EOP@EOP
Mary C. Barth/OMB/EOP@EOP
Francis S. Redburn/OMB/EOP@EOP
Larry R. Matlack/OMB/EOP@EOP
Debra J. Bond/OMB/EOP@EOP
Clarisa Y. Rodrigues-Coelho/OMB/EOP@EOP
Lauren M. Supina/WHO/EOP@EOP
karen.dorsey@do.treas.gov @ inet
karen.l.wilson@usdoj.gov@inet
tom.mcgivern@do.treas.gov @ inet
vera.connolly@hq.doe.gov @ inet
Carlos A. Dublin/ONDCP/EOP@EOP
Frederick_E._Block@HUD.gov @ inet
Jennifer M. Baffi/OMB/EOP@EOP
Brian V. Kennedy/OPD/EOP@EOP
John C. Williams/CEA/EOP@EOP

[LEG AFFAIRS: Please check spelling and provide addresses.]

The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy
The Honorable Henry J. Hyde
The Honorable John Conyers Jr.

Dear ____:

Although conferees have not yet been named, we understand that your staffs are beginning to discuss how to reconcile the House (H.R. 833) and Senate (H.R. 833 EAS) versions of bankruptcy reform legislation. To assist in this process, I would like to share the Administration's views.

NON-RELEVANT AMENDMENTS

First, the Senate has attached two non-relevant amendments to their version of the bankruptcy bill. They both should be struck before the bill is sent to the President.

Minimum Wage and Tax Amendment. The President strongly supports an increase in the minimum wage of $1 over two years; but the amendment attached to the Senate bill would delay the increase, hurting millions of Americans who are struggling to get by and deserve a raise. **[Brian Kennedy – Better standard language here?]** The attached amendment also includes a tax and pension package that would repeal overtime protections for workers, thwart efforts to enforce pension law, and direct tax benefits away from working families. Moreover, we must establish a proper framework for paying down the debt, strengthening Social Security and Medicare, and funding critical initiatives before we consider major new tax expenditures. If the Congress sends the President a bill delaying the increase, repealing protections for certain workers, adding costly and unnecessary tax cuts that threaten fiscal discipline, directing benefits away from working families, and thwarting efforts to enforce pension law, he will veto it.

Drug Amendment. The Administration also opposes the provisions that would reduce the current disparity between crack and powder cocaine sentences solely by increasing powder cocaine penalties dramatically instead of addressing both crack and powder cocaine penalties. Decreasing the threshold amount of powder cocaine necessary to obtain 5- and 10-year mandatory minimum sentences may be counterproductive because it could significantly redirect Federal law enforcement resources from the highest level offenders. [In addition, this amendment would actually exacerbate the disproportionate impact of cocaine sentencing on minorities because, according to U.S. Sentencing Commission statistics, approximately 31% of defendants sentenced at the Federal level for powder cocaine offenses in 1998 were African American, 48% were Hispanic, and only 19% were white.] **Also, should we note, as Leahy did in his floor statement, that the bipartisan Methamphetamine legislation included in the amendment also passed separately at the end of the last session and should be considered separately? Do we support it as he does? Note ACLU concerns re free speech. Is that in the Metamphetimine provisions that Leahy endorses?]]**

School Vouchers Amendment. The same drug amendment also contains an objectionable school voucher provision that is unrelated to the underlying bill. The Administration's opposition to school vouchers is well known. Rather than improving and reforming public schools, vouchers drain scarce resources from the public schools and are a distraction from the serious work of education reform. Rather than quick fixes, the President is committed to a comprehensive agenda to improve our schools by investing more in them and demanding more from them.

GENERAL VIEWS OF BANKRUPTCY PROVISIONS

The President supports bankruptcy reform that would reduce abuses of the bankruptcy system and would require debtors and creditors alike to act responsibly. The President was disappointed that the House once again failed to produce balanced bankruptcy legislation that he could support. The bankruptcy provisions of the Senate bill generally do a better job of meeting the key principles set forth by the President, although we have serious concerns about some of its provisions. To meet the test of balance, the bill that emerges from conference should satisfy these key principles.

Means Test

Access to Chapter 7 should not be governed by an arbitrary means test, but by reasonable guidelines that take into account individual circumstances. The goal of the means test is to identify those debtors who genuinely have the capacity to repay a portion of their debts under a Chapter 13 plan. [LUCY -- ADD PERCENTAGE OF DEBTORS WHO FAIL CHAPTER 13 PLANS TODAY.] Debtors should be given a meaningful opportunity to have their specific circumstances considered. Neither creditors nor debtors are helped by wasting scarce resources to pay the administrative costs of setting up and overseeing repayment plans that will quickly fail.

- The House bill fails this test (despite laudatory efforts by Chairman Hyde to bring some balance to its provisions) because it limits access to Chapter 7 through a tight, inflexible, and arbitrary means test.
  - Its low threshold would deny access to Chapter 7's discharge to too many debtors, even though they are unlikely to succeed under a Chapter 13 repayment plan.
  - It allows only those demonstrating "extraordinary circumstances" to gain relief from the rigid means test. This could impose a nearly insurmountable burden of proof upon debtors with special circumstances.
  - It subjects many debtors to burdensome paperwork that will produce information that is not needed for bankruptcy determinations. Similarly, it requires the collection of back tax returns in every case regardless of whether needed, costing $25 million [a year] in administrative costs. [CONFIRM ESTIMATE FROM LEAHY.]
  - It fails to take into account important expenses for long-term care of family and domestic

abuse.

- It uses IRS guidelines that were designed for a different purpose and are applied in collecting taxes far more flexibly than the means test here would allow. We urge the Conferees to adopt Chairman Hyde's proposal to authorize the creation of standards specifically crafted for bankruptcy purposes, using the IRS guidelines as a starting point.
- It fails to consider payments for arrearages on secured debt for necessary property – expenses that must be repaid under a Chapter 13 plan. Without this adjustment, the means test could deny access to Chapter 7 to people who will be unable to get a Chapter 13 plan confirmed because they cannot repay arrearages on their secured debt.
- However, unlike the Senate bill, it does take into account required administrative expenses under a Chapter 13 plan in calculating whether the debtor has the capacity to repay under the means test. (This provision is important to ensure that the means test does not deny access to Chapter 7 to debtors who, once the additional administrative expenses are taken into account, do not have the capacity to repay any significant portion of their debts. It should be retained in the final bill.)
- It also includes a proposal by Chairman Hyde to allow adjustments for reasonable food and clothing expenses to take into account regional differences in costs. This provision also should be retained in the final bill.
- The House bill does contain both essential safe harbors: (1) protecting below-median income debtors from 707(b) "abuse" motions by creditors that could be the basis for threats or coercion; and (2) protecting below median income debtors from 707(b) means test motions by bankruptcy trustees. [MARTY – CONFIRM.]

[NOTE: DOESN"T MENTION SOCIAL SECURITY OR PRIVATE SCHOOL TUITION.]

- <u>The Senate bill</u> uses a more reasonable means test, although improvements could be made.
    - It uses a higher and more appropriate threshold for access to the means test to better identify those with the capacity to repay.
    - It provides relief from the means test to debtors who can show "special circumstances."
    - It expressly provides that, in calculating the means test, various categories of important expenses must be taken into consideration. Specifically, it makes clear that no debtor in bankruptcy is required to sacrifice payments needed for the long term care of their elderly parents and other family members; similarly, its means test recognizes that victims of domestic violence may have additional expenses necessary to protect their families and rebuild their lives.
    - It requires that the means test calculation take into account arrearages on secured debt for necessary property. (However, the Senate bill does not include the important provision, included in the House bill by Chairman Hyde, incorporating the required administrative expenses of a Chapter 13 plan in calculating the means test.)
    - Like the House bill, it also uses IRS guidelines for the means test, although it includes a Congressional finding that the Treasury Secretary can modify the IRS standards to set guidelines for bankruptcy purposes. We prefer the approach once urged by Chairman Hyde to authorize expressly the creation of standards specifically crafted for bankruptcy

purposes, using the IRS guidelines as a starting point, since the Senate interpretation of existing Treasury authority is subject to legal challenge.

- It avoids needless filing of back tax returns in cases where the information is not at issue and streamlines the means test for debtors between 100% and 150% of the median income, although it would benefit from further streamlining of paperwork requirements that would eliminate unnecessary burdens on low-income debtors at no cost to the effectiveness of the means test.
- It would protect below-median income debtors from 707(b) motions by creditors that could be the basis for threats or coercion; however, it fails to provide a "safe harbor" for low-income debtors from application of the means test by bankruptcy trustees. The law should exclude these debtors from the means test for both efficiency and ____ reasons, [DOUG – CAN"T READ NOTES], as few if any of these filers will be found to have the capacity to repay any significant level of their debts. The trustees would still be able to bring general 707(b) motions for the unusual circumstances where low income debtors are abusing the process. [BETTER WAY TO MAKE THE ARGUMENT WHY THIS IS BAD? WE ARGUED FOR DISCRETION GENERALLY.]

- Finally, we note that both bills contain inconsistent references to median income standards, with the House referring to regional and national medians and the senate to state and national medians. Administration of the new provisions will be dramatically eased by use of clear and consistent standards.

  [WHERE TO STICK REFERENCE TO HOUSEHOLD GOODS DEFINITION?

Homestead Exemption and Other Loopholes for the Wealthy

It is fundamentally unfair to ask low- and moderate-income debtors to repay the debt that they can, while leaving loopholes that allow the wealthy to shield income and assets from their creditors. High or unlimited homestead exemptions allow people with expensive homes to avoid their responsibility to repay a significant portion of their debts. Similarly, some wealthy debtors can to file under Chapter 11 where they can shield their future income from creditors, while moderate-income debtors, under these bills, must devote much of their future income to repay their creditors.

- The House bill provides a $250,000 cap on homestead exemptions, but allows the states to opt out of the cap. With the opt-out, the provision is effectively the same as having no cap at all. Moreover, the House bill does nothing to close the Chapter 11 loophole for wealthy debtors.

- The Senate bill provides a meaningful cap of $100,000 on homestead exemptions. It also closes the Chapter 11 loophole for wealthy debtors.

Protection Against Coercive Reaffirmations and Practices

We must ensure that there are appropriate safeguards against coercive creditor practices that compel debtors to forego their rights and that disadvantage more scrupulous creditors. Unfortunately, such practices have been uncovered all too frequently. Debtors often reaffirm debt on unfavorable terms, sometimes when they demonstrably cannot afford to fulfill the commitments they are assuming, thus putting payment on other socially more important debts (e.g., child support and alimony or taxes) at risk. These reaffirmations are frequently the result of insufficient or misleading information and sometimes the result of intimitation or outright coercion. Unfortunately, the new legislation may unintentionally create new opportunities for such coercion, as it gives creditors many new opportunities to challenge debtors' actions. In this environment, we cannot countenance weakening existing protections; in fact, enhanced safeguards are essential.

- <u>The House bill</u> gives debtors the right to a hearing, but makes the hearing waiveable by represented debtors, which effectively does little to change current law. The House bill expressly provides for a private right of action to recover damages for failure to comply with reaffirmation agreement requirements or willful violations of a discharge, but the bill precludes use of class actions to bring such claims. This eliminates the most effective mechanism to remedy widespread coercive practices – a mechanism used in the <u>Sears</u> case among others. The private right of action should be retained, but the bar on class actions should be dropped.

- <u>The Senate bill</u> does not have the ban on class action remedies. Moreover, it provides for mandatory disclosure of the terms of debt being reaffirmed and creates a new presumption of undue hardship if the debtor does not have the capacity to repay debts that he or she is reaffirming. These mechanisms should go a long way to prevent creditors from coercing debtors to reaffirm debts through threats or intimidation or simple confusion. However, a clarification is important. The bill provides that creditors who accept payments under a reaffirmation agreement in good faith need not be penalized if the agreement is subsequently found to be invalid. To avoid lengthy litigation, it should be clarified that the bill's intent is not to eliminate effective remedies under current law, including disgorgement of funds collected under invalid agreements. [MARTY – THIS WORK?]

<u>Improving Credit Card Practices</u>

We must require that both debtors <u>and</u> creditors be responsible. Bankruptcy reform should be balanced by including provisions that address abusive credit card practices. The rising level of consumer debt is strongly correlated with the number of personal bankruptcies. One way to reduce the number of bankruptcies is to require that creditors give consumers the information they need to manage their credit card debt successfully. Important advances should be made in this legislation to inform consumers about credit card solicitations received over the Internet, the true cost of credit that comes with attractive "teaser" rates, and the impact of making only minimum payments on the duration and cost of repaying credit card debt.

- The House bill requires merely that consumers be provided once a year with a generic description of the consequences of making only the minimum payment. It provides no way for a consumer to obtain more specific information about the impact of making the minimum payment in his or her own circumstance, nor does it require the information to be sent with the billing statement when the information might be most relevant. It provides no improvement over current law in dealing with teaser rates and puts the burden on the consumer to obtain accurate and updated information concerning an Internet credit card solicitation. **[Last sentence from consumer group critique – Treasury please review – credit card protections are treasury not doj.]**

- The Senate bill could be further improved, but it provides far more useful provisions on each of these issues. In addition to a generic example of the impact of making only minimum payments, it requires most lenders to provide an 800 number for consumers who desire specific information about the impact of minimum payments in their situation. (The information provided under the Senate bill could be more specific. Moreover, on the generic disclosure and when a borrower calls the information provided would be more valuable if it included not only the time it would take to repay but also how much the debtor would pay if only the minimum payment were made each month.) Under the Senate bill, this information must be disclosed conspicuously on the front of the billing statement. It also requires prominent disclosure of the permanent interest rate in immediate proximity to the first disclosure of any teaser rate for credit cards. It requires clear disclosure of late payment deadlines and penalties, and it extends to Internet solicitations the requirements for credit card solicitations sent by mail. And the Senate bill includes new disclosures on high loan-to-value home equity loans so consumers are not misled about the tax implications of home equity lending.

Non-Dischargeable Debts and Cram Downs

We must balance the goal of creditor repayment against ensuring that social priorities, such as payment of child support and alimony, are protected and a meaningful opportunity for a fresh start is preserved. Historically, the Bankruptcy Code has made debts nondischargeable only where there was an overriding public purpose to protect those debts. To the extent that we make more credit card debt nondischargeable and preserve secured claims regardless of the value of their collateral, higher priority debts (child support and alimony, taxes, and educational loans) will be forced to compete for scarce resources and the fresh start will become emphemeral.

- The House bill provides unprecedented rights for creditors to collect amounts in excess of the value of their collateral in bankruptcy. It precludes "cramming down" debt to the value of the collateral for any debt secured by personal property purchased within five years of the bankruptcy filing. As a result, the additional debt repayment that this bill is designed to spur may not materialize for many unsecured creditors, who will be placed at a serious disadvantage. Other societal priorities will also suffer. And secured creditors will have far less incentive to properly evaluate lending risk. The House bill also makes nondischargeable all cash advances above $250 and all debts incurred to pay nondischargeable debts, both if within 90 days of bankruptcy. This rule may trap unsuspecting debtors who are trying to feed their families or meet some debt obligations before they realize that bankruptcy is inevitable. It also puts at risk the repayment of other societally important debt post-bankruptcy.

- The Senate bill is preferable because it protects undersecured debt other than for automobiles only for six months before filing; nonetheless, the ban on cram downs of undersecured car loans for five years should be far shorter. Similarly, the Senate bill allows a higher level of cash advances in the period before bankruptcy and has a shorter window before bankruptcy in which higher cash advances and debts incurred to pay nondischargeable debts become nondischargeable. [An even better approach would be to limit the new nondischargeability to provisions to above median income debtors, as Senator Moynihan has proposed. WORTH TRYING?]

Other Barriers to Entry or Representation in the Bankruptcy System

We should not create inappropriate barriers to entry or effective representation in the bankruptcy system. Unfortunately, filing fees, fee shifting provisions, and inflexible pre-filing hurdles can keep people out who do not have the ability to repay their debts.

- The House bill would require mandatory credit counseling before a bankruptcy filing, but provides no opportunity to fulfill meet the requirement by telephone or over the Internet, creating a barrier for those without convenient access or transportation to counseling. It also would require a debtor's attorney to pay a trustee's attorney's fees if the debtor is not " substantially justified" in filing for Chapter 7. Fear of such sanctions may deter attorneys from representing debtors with bona fide claims and may keep them from participating in the system altogether. However, the bill does allow courts to waive filing fees for debtors unable to pay, for the first time removing this important barrier to entry for indigent debtors.

- The Senate bill contains an important amendment that allows mandatory credit counseling to be provided by telephone or over the Internet. The requirement that a debtor's attorney pay a trustee's attorney's fees was eliminated in the Senate bill. And the Senate bill also would allow courts to waive filing fees for debtors. These provisions should be retained.

Prevent Abuse of Bankruptcy To Facilitate Clinic Violence

[NOTE: SHOULD THIS MOVE UP IN ORDER?]

We must stem abuses of the Bankruptcy system, including abuse by those who would use bankruptcy to avoid penalties for clinic violence. The Administration is deeply concerned by the incidents of violence, vandalism, and harassment committed against family planning clinics. Some of these acts have resulted in the deaths and maiming of innocent people. The Administration believes that these unlawful activities must not be tolerated, and that when they are committed, those found liable should be held accountable. In 1994, Congress made clear its intolerance for those who would use unlawful means to deny citizens access to legal clinic services by enacting the Freedom of Access to Clinic Entrances Act (FACE).

Unfortunately, we have seen evidence that those found liable ~~have been~~ making strategic use of bankruptcy to avoid the penalties established by Congress and ~~other states~~ for their actions. We cannot tolerate this abuse of the bankruptcy system designed to facilitate unlawful behavior. Senator Schumer's amendment, passed by the Senate by a margin of 80 – 17, would make court ordered fines and debts resulting from family planning clinic violence nondischargeable. The Administration generally opposes the expansion of categories of nondischargeable debt unless there is an overriding public policy objective and no other way to achieve that objective. This amendment meets that test. The Schumer amendment provides a necessary tool to ensure that bankruptcy is not used strategically to avoid the legal consequences of clinic violence and intimidation. It should be included in the final legislation.

Privacy Of Personal Financial Records In Bankruptcy

Debtors who seek protection from the bankruptcy system should not be compelled to forego all expectations of privacy.

The Administration is a strong proponent of improving the collection of bankruptcy statistics to allow better analysis of trends and the impact of policy changes. We also recognize that technology presents opportunities to lower costs and increase efficiency for all those in the bankruptcy system. However, these considerations must be balanced by concern for the security and personal privacy of participants. The bankruptcy system relies on public and non-public personal financial information, including account numbers, balances, payment histories, and other sensitive information. Far too little attention has yet been given to who needs what information, how, and when; does the electronic aggregation and availability of information change our perception of what should and should not be in the public domain; and what kinds of information in bankruptcy records can be used to prey upon debtors and their families, creditors, or others involved in these cases. These are complicated issues with which the relevant parties are only beginning to wrestle.

These questions have been presented specifically by preliminary plans of some private Chapter 13 trustees to develop a national database of non-public information that trustees maintain about repayment under Chapter 13 plans. While such a database would ease oversight of these plans for trustees, courts, and creditors, important decisions have to be made about privacy and the commercial exploitation of this information. The trustees appear interested in performing this function responsibly and the Executive Office of the U.S. Trustees is working with the trustees to explore these privacy issues. However, legislative language in both the Senate and House bills designed to facilitate this plan is, at best, premature.

- The House bill contains a provision that would protect the trustees from liability for dissemination of information unless a trustee has actual knowledge that the information is false. This provision fails to take into account the debtor's interest in the sensitivity of the information and provides no safeguards against misuse. No compelling argument has been made that the normal rules of liability should not apply. This provision should not be included in the final bill. In addition, the House bill recites the "sense of the Congress" that all public record data held by bankruptcy clerks shall be released in electronic form to the public, subject to privacy safeguards that the Judicial Conference may determined. Perhaps the privacy issues implicated should be fully explored before the Congress determines its sense that "all" such records should be made public electronically.

- The Senate bill contains language (amidst a section regarding collection of child support) that would make it an express duty of Chapter 13 trustees to provide information regarding administration of these cases to any not-for-profit entity that shall provide such information to parties in interest. Again, this language appears to be in furtherance of a plan whose implications for the privacy of debtors has not been adequately considered and should not be included in the final bill. The Senate bill also contains the sense of the Congress language that we believe to be premature.

* * * *

Thank you for your consideration of the Administration's views on these bills. We would be happy to discuss any of these concerns with you or your staff.

Sincerely,

Jacob J. Lew

Bankruptcy

THE WHITE HOUSE

WASHINGTON

THE FIRST LADY'S PRESS OFFICE

PHONE: (202) 456-2960
FAX: (202) 456-7805

TO: Ruby

FAX: 6-2878 **PHONE:**

DATE: **TIME:**

PAGES (INCLUDING COVER): 3

****

FROM:

COMMENTS:

BANKRUPTCY
February 2, 2000

The President supports responsible bankruptcy reform that is balanced, would reduce abuses of the bankruptcy system, and would require debtors and creditors alike to act responsibly.

It appears that the Senate will shortly complete its consideration of the bill and send the bill to a conference with the House.

During Senate floor consideration, some important improvements were made so that the Senate bill is now somewhat better than the flawed and unbalanced House bill. While we still have some serious reservations, the Senate is sending a signal that balance is important. We hope that that signal will be respected in conference and that we get – from the conference – a product that reflects the key improvements in the Senate bill. For example:

- The Senate bill would cap the homestead exemption – to ensure that the wealthy don't benefit from a large loophole to avoid their creditos while we ask middle income families to repay the debts that they can.
- We understand that the Senate bill will include a provision sought by Senator Schumer that would protect low-income debtors from motions brought by creditors that too often might be used to threaten or coerce debtors to forego their rights (so-called "motions safe harbor").
- Similarly, the Senate bill has some (albeit too limited we think) new important credit card disclosures for consumers sought by Senator Torrecelli.
- Finally, the Senate bill has a new "reaffirmation" provision that require courts to look closely for coercion when a debtor says they want to reaffirm a debt (that they are entitled to discharge) but it is clear they do not have the income to repay. (However, here there is an important technical improvement on filing deadlines that Senator Sessions and Reed have agreed to work together to fix during conference.)

- Note also that there are some aspects of the House bill that are better too, and we will work to preserve those improvements in final bill.

Given that President has a veto threat on the House bill, will the president veto the bill that returns from conference?

I won't answer a hypothetical. We strongly hope that we won't be presented with the need for that. We want balanced bankruptcy reform. The Senate has taken some important steps here to achieve balance. Not all our concerns have been resolved but it is getting better. We strongly hope that the Conference will produce a bill that maintains that balance and that the President could sign. (Of course, also we hope that the bill contains no extraneous and controversial other amendments – like the minimum wage/tax package now attached).

Fr. Brfg. Today:

Q Do you have any reaction to the bankruptcy bill, minimum wage increase that was passed today?

MR. LOCKHART: Well, we oppose the provisions in the minimum wage bill. We don't think the actual rise in the minimum wage goes up quickly enough, and we find that the tax cuts that are put in there are not paid for and are skewed to those who don't necessarily need tax cuts at this time.

I think what is important here is, if you look at the evidence, the last time we raised the minimum wage, various academic institutions looked at this, studied the issue and found that there was no negative effect on economic growth and there was no drag on the economy by the minimum wage. So I think the minimum wage, as 45 Democratic senators wrote to the leaders today, needs to be raised, needs to be raised quickly over a two-year period, and does not need a bevy of unpaid-for tax cuts for the special interests as the Republicans have tried to push through today.

Q So is that a veto threat?

MR. LOCKHART: I think we have made very clear and we made very clear last year and we reiterate today that that is not the kind of legislation the President can sign with the minimum wage provision in it.

We think on the merits of the bankruptcy bill, per se, the Senate has made a lot of progress. The House bill is unacceptable, we have made that very clear over the last several years. The Senate bill has made a lot of progress. We want to make sure that the protections for consumers that are embodied in the Senate bill get protected in conference overall what comes out -- when that bill comes out of conference, we'll have to make a decision on it. But the minimum wage provision at this point is unacceptable.

219

Barbara Chow
06/26/2000 02:22:42 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP

cc:
Subject: Clinic Violence and Bankrutpcy -- Issue for POTUS

---------------------- Forwarded by Barbara Chow/OMB/EOP on 06/26/2000 02:24 PM ---------------------------

Sarah Rosen Wartell
06/26/2000 11:22:35 AM

Record Type: Record

To: Barbara Chow/OMB/EOP@EOP

cc:
Subject: Clinic Violence and Bankrutpcy -- Issue for POTUS

Barbara -- I don't know who does abortion for DPC now. As I wrote to counsel's office below, the clinic violence amendment on bankrutpcy is turning into a key issue. Is there someone at DPC who you want to get up to speed on the issue?

---------------------- Forwarded by Sarah Rosen Wartell/OPD/EOP on 06/26/2000 11:21 AM ---------------------------

Sarah Rosen Wartell
06/26/2000 11:19:14 AM

Record Type: Record

To: Michelle M. Aronowitz/WHO/EOP@EOP, William Marshall/WHO/EOP@EOP

cc:
Subject: Clinic Violence and Bankrutpcy -- Issue for POTUS

Michelle -- I understand that you do abortion rights issues for counsel's office now. The clinic violence amendment that schumer offered to the bankrutpcy bill is looming larger and larger as a major issue that may determine whether or not POTUS signs the bankrutpcy bill. Senator Biden called POTUS over the weekend. They didn't talk but he sent a letter that hits on this issue among others. POTUS called Gene and wanted more background (and the attached memo provides it on the clinic violence issue as well as a number of others). I have a stack of background info on the clinic violence issue in my office if you want to get up to speed. We'd welcome the assistance and involvement by your office.

Bill -- I left you a message to update you on this same thing.
---------------------- Forwarded by Sarah Rosen Wartell/OPD/EOP on 06/26/2000 11:12 AM ---------------------------

From: Melissa G. Green on 06/26/2000 09:46:43 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Biden Bankruptcy Memo to POTUS

This was submitted last night to POTUS per a POTUS request to Gene. Rosen Wartell worked with Wiginton on it and Sperling spoke with Johnson and Podesta about it

bk00potusmemo.624.fnl.do

Message Sent To:

Karen Tramontano/WHO/EOP@EOP
Maria Echaveste/WHO/EOP@EOP
Carolyn T. Wu/WHO/EOP@EOP
Jennifer L. Dewitt/WHO/EOP@EOP
Michele Ballantyne/WHO/EOP@EOP
Fern Mechlowitz/WHO/EOP@EOP
Rachael F. Goldfarb/WHO/EOP@EOP
Sarah Rosen Wartell/OPD/EOP@EOP
Joel K. Wiginton/WHO/EOP@EOP
Rebecca Hunter/WHO/EOP@EOP
Rochelle G. Thompson/WHO/EOP@EOP
Joel Johnson/WHO/EOP@EOP
Ellen Mellody/WHO/EOP@EOP

Sarah Rosen Wartell
06/26/2000 07:48:10 PM

Record Type: Record

To: Heather H. Howard/OPD/EOP@EOP

cc: Barbara Chow/OMB/EOP@EOP
Subject: Clinic Access

I mostly want to make sure that DPC is aware of where we are and make sure you are comfortable with the advice we are giving the president on this issue. We had to do the memo responding to Biden on 24 hours this weekend, but since it increasingly looks like this could be one of, or the one, issue upon which his veto might rest (even though other stuff is clearly coloring our distaste for the bill) I want to make sure you all are on board.

It might be a good idea to get Melanne the memo we sent to POTUS on sunday. She has been feeding those to the first lady also so she is up to date. I would also let Melanne know about the letter from the 3 female Democratic Senators from Friday about the clnic access issue. (it's in the package below.)

I have a package of background stuff on the clinic access issue. Ann gets most of it, but not sure anyone has the recent stuff (while she is away) and I wasn't sure if she was the abortion person for DPC. Let me know where to send the package or you can send someone to 219 to pick it up.

the white house

June 25, 2000

MEMORANDUM TO THE PRESIDENT

FROM: GENE SPERLING
SARAH ROSEN WARTELL

SUBJECT: RESPONSE TO BIDEN LETTER ON BANKRUPTCY

CC: JOHN PODESTA

Below is a brief summary of four basic issues that relate to Senator Biden's letter to you. Following the brief summary is more a detailed analysis of each issue.

I. Brief Summary

1. **Fair Debt Collection Practices Act Amendment:** Senator Biden asserts that Senator Lott intends to drop this provision, if it will avoid a veto. While we have heard similar rumors, we have no assurance that it will happen. Moreover, if the rumor is true, it seems necessary for you to indicate that you will veto over the issue to get Senator Lott to drop the amendment. As we wrote in our earlier memo, this is an especially pernicious provision that has not received any public scrutiny, as it was in neither bill and only added in conference. All the major consumer groups wrote Congress on Friday to express their strong opposition to its inclusion.

2. **Homestead Exemption:** Senator Biden acknowledges that the homestead exemption language in the final bill is not all that we would have sought. He suggests that, because Senator Kohl -- the amendment's original sponsor -- is satisfied, we should be too. The final provision does make it more difficult to move to Texas or Florida on the eve of bankruptcy to benefit from their uncapped homestead exemptions, but it does nothing to prevent a wealthy longtime Texan or Floridian from shielding assets from their creditors in the form of extravagant homes. Under the bill, both moderate-income debtors and their wealthier counterparts will be required to devote a portion of their future earnings for five years to repay their debts; but some will be able to do so while retaining great wealth in their homes. Others (in other states or renters) will be left penniless, liquidating whatever assets they have. That seems fundamentally unfair.

3. **Clinic Violence:** Senator Biden argues that the additional language of the Schumer amendment is not needed. It is true that some judgments that result from clinic violence may be nondischargeable under current law; but there is no doubt that the Schumer amendment would address "a far wider range of potential debtor liability than is currently covered" (Congressional Research Service) and would reduce the litigation barriers that are now being placed before those seeking to collect multi-million dollar judgements against clinic violence defendants. Moreover, the new language that Chairman Hyde offered and the Republicans intend to include will give rise to new questions about what standard of proof Congress intended before a victim can block the discharge of such debts, miring clinic violence victims in yet more litigation.

Whatever legal ambiguity may exist, there is none in the minds of the abortion rights community. They are deeply offended that so many of those who have been found liable for acts of clinic violence and intimidation have repeatedly sought refuge in the bankruptcy system. Similarly, anti-abortion activists and Chairman Hyde have starkly refused any meaningful compromise on the issue, signifying its growing symbolic importance to the broader abortion rights fight. If you signed a bill that failed to include some language to accomplish the goals of the Schumer amendment, the pro-choice community would harshly criticize your decision.

4. **Overall Balance in the Bill:** While we have focused on outstanding amendments, most of your advisors find the basic underlying bill to be unbalanced and unsatisfactory. We agree that requiring debtors with the capacity to repay their debts to do so could lower interest rates, benefiting many Americans, and would be consistent with your emphasis on personal responsibility; however, most of the debtors filing for bankruptcy do not have the capacity to repay and are not abusing the system. A far more balanced bill could have been drafted to accomplish our shared goals without slanting the playing field in many small ways against all debtors. While the improvements that Biden and we achieved in the Senate and conference make this bill better than the flawed House bill, we made significant compromises and lost as often as we won. (See details below.) The lack of balance in the underlying bill remains deeply troubling to the majority of your advisors. (We should note that Secretary Summers has a slightly different view. He agrees that this is not the bill that we would have written and that you should threaten veto pointing to the clinic violence, debt collection, and homestead issues. But he also believes that the remainder of the bill is not sufficiently flawed to justify a veto on the merits, attentive as he is to the economic benefit of lower interest rates that may result from somewhat lower debt write-offs by creditors.)

Finally, we note that Senator Biden has long pressed for bankruptcy reform, perhaps in part because of the strong interest of credit card companies headquartered in Delaware. In fact, the final bill that we now face is the product of an intense lobbying campaign by the credit industry. Many in Congress support or feel compelled to support this bill.

II. Further Analysis

1. **Fair Debt Collection Practices Act (FDCPA):** The FDCPA provides essential protections for consumers from abusive practices by debt collectors including: invasions of privacy, harassment, false or deceptive representations, and unconscionable collection methods. For example, it precludes late night and repetitive phone calls, leaving a message with your employer that you are delinquent on your debts, and false threats of legal action. There was nothing about the FDCPA in either the House or Senate bill, but in Conference Senator Hatch has insisted on a provision that would eliminate attorneys fee awards for violations of the FDCPA, if the defendant is collecting bounced checks rather than other defaulted debt.

   This is a pernicious provision because it could give check collectors de facto rein to intimidate and harass lower-income debtors, knowing that their financial position would prevent them from hiring counsel. The FTC has made clear that there is no policy justification for treating check collectors and other debt collectors differently. Abuses occur in both areas. Moreover, private remedies are an essential aspect of the enforcement scheme under the FDCPA. If a debtor, in financial difficulty, is unable to recover the cost of legal representation from those who are grossly abusing their rights, they will never be able to vindicate those rights. Senator Torricelli suggested a minor change, which the Republicans accepted, that limits attorneys' fees to cases where the debtor can prove that he or she had no intent to defraud. But we agree with Senators Leahy and Sarbanes that such a standard is impossible to prove.

2. **Homestead Exemption:** Senator Biden is largely correct that the language in the bill would prevent a galling form of abuse -- the "last-minute sheltering of assets through the purchase of expensive homes." (Consumer activists believe that, in fact, wealthy debtors will be able to use various techniques to postpone bankruptcy long enough so that the two-year window will not prevent, only limit, the sheltering of assets by wealthy debtors moving their residence to a State with an unlimited homestead exemption.) The language in the final bill does not address our more fundamental concern: does the bill treat moderate-income debtors and wealthy debtors equitably?

   The Washington Post recently ran an editorial entitled "The Rich Win." They wrote:

   > "Bankruptcy reform involves balancing two principles. Debtors must not be allowed to use the law to avoid repaying loans when they can actually afford to do so; on the other hand, debtors should not be forced into serious hardship. The reform in Congress probably will increase hardship: It toughens the rules for ordinary debtors, most of who declare bankruptcy not out of irresponsibility but because of catastrophic medical bills, unemployment, or divorce. At the same time, the reform does too little to clamp down on an egregious loophole known as the homestead exemption, which is used by wealthy debtors."

   The editorial goes on to argue that the minor limitations in the bill on homestead exemptions "won't have much effect." The Post is largely right. A debtor, who has resided in a $10 million, mortgage-free estate in Florida for more than two years, can file for bankruptcy. The wealthy debtor will be allowed to continue to live in that lavish home. However, a moderate-income, Florida resident who rents her home and files for bankruptcy to discharge overwhelming credit card or medical debts, may be forced to move, if her rent is more than allowed under the new formula, based on median area housing costs, that will determine how much of her debt she must repay over the next five years.

3. **Clinic Violence:** Senator Bidden asserts that current law prevents the discharge of judgements stemming from violations of the FACE Act and the Schumer amendment is not needed. While he is arguably right about the former point, the goals of the Schumer amendment were broader and are not fully accomplished by current law or new language proposed by Chairman Hyde.

   The Problem: Under current law, a debtor cannot discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." The Supreme Court has interpreted this "willful and malicious" standard strictly. It held in Kawaauhau v. Geiger, 118 S. Ct. 974 (1998), that the "willful and malicious injury" exception is limited to intentional torts and does not include liability for claims attributable to "negligent or reckless" conduct. Specifically, the Court held that the word "willful" modifies "injury" so that intentional behavior that was not intended to cause injury is not sufficient. Id. at 977. For example, imagine that an activist were to bomb a clinic at night, thinking the facility were vacant, but a security guard was killed. The activist's liability for the physical property damage would be nondischargeable, under current law, but not their liability for the wrongful death of the guard.

   This is not merely a theoretical question for the abortion rights community. Numerous anti-abortion activists found liable for clinic violence and intimidation have filed for bankruptcy and sought to discharge their debts. Six of the 12 "Nuremberg Case" defendants (who posted abortion doctors' names on a website and then crossed out the names of those who were murdered) have now filed for bankruptcy. Each was jointly and severally liable for a judgement of over $100 million. Each filed on the eve of efforts to identify their assets or garnish wages, so as to collect on that judgement. (These cases are still in litigation, so the outcome is not yet clear.) Similarly, Operation Rescue's Randall Terry said, after a judgement was entered against him:

"I cannot in good conscience permit the National Organization [for] Women, Planned Parenthood and others who have profited from abortion to harass my wife and family and possibly get money from me to continue their crusade against unborn life.... Hence I have filed a Chapter 7 petition to discharge my debts to those who would use my money to promote the killing of the unborn."

Schumer's Proposal: The Schumer amendment, adopted by the Senate by a vote of 80-17, would have made nondischargeable any debt that resulted from a judgement, order, consent decree, or settlement agreement (including damages, fines, penalties, costs, or attorneys fees) arising from: (a) FACE Act actions; (b) violations of Federal, State or local law designed to protect access to health care facilities and the provision of health services; (c) violations of any law resulting from actual or attempted harassment, intimidation, interference with, obstruction of, injury to, threat to, or violence against any person who provides or receives health services or that deters a person from obtaining or providing health services; (d) violations of any law resulting in damage to a health care facility; or (e) violation of a court order or injunction protecting access to health care facilities.

The Hyde Alternative: Chairman Hyde proposed an alternative that would make nondischargeable debts "that arise from any judgement, order, or decree entered by a Federal or State court for a willful and malicious threat of serious bodily injury against an individual." Abortion rights activists believe this adds little to current law, because it reiterates the high "willful and malicious" mental state requirement and only involves threats of serious bodily injury.

Analysis:

(1) ***It is true that FACE Act violations would likely be found nondischargeable under current law.*** The FACE Act also has an intent standard. It imposes liability on those who "by force or threat of force or by physical obstruction, <u>intentionally</u> injures, intimidates, or interferes with" the provision of reproductive health services. Therefore, as the Congressional Research Service (CRS) concludes, it is likely that liability under the FACE Act would only be found, if there was an intentional tort of the kind that existing law already covers.

(2) ***The Schumer amendment, however, would make it easier to prevent discharge of FACE Act judgements and reduce litigation:*** CRS also found that it would be "easier" for the clinic violence victim to establish that FACE Act liability should be nondischargeable under the Schumer amendment than under current law. Under current law, they must make a special request for a court determination of nondischargeability and prove that the conduct underlying the liability was actually "willful and malicious."
Neither would be required under Schumer. Abortion rights advocates argue that beleaguered clinics and victims should not have to endure yet more litigation and cost when trying to assert their lawful claims.

(3) ***The Schumer amendment would cover many other types of clinic access judgements not nondischargeable under current law.*** The Schumer amendment sought to address discharge of a range of penalties that would not meet the "willful and malicious" standard of current law or the Hyde proposal. In fact, the CRS analysis to which Biden refers says that Schumer's amendment "is far broader in scope and would encompass a far wider range of potential debtor liability than is currently covered by [current law]." For example:

(a) *Injunctions:* Many clinic access debts accrue as a result of violations of injunctions. Such violations are strict liability offenses. If a court tells a protestor to stay away from a clinic, fines accrue for each day he or she protests without further inquiry into intent. The Schumer amendment would have made such debts nondischargeable.

(b) *State Clinic Access Laws:* Similarly, the Schumer amendment would have made nondischargeable debts under those State clinic protection laws that have no intent standard or one that is not as high as "willful and malicious."

(c) *Violations Meeting Only a Lower Standard for State of Mind:* The Schumer amendment also would have made nondischargeable judgements for "harassment of, intimidation of, interference with, obstruction of, [and] injury to" clinic health service providers. CRS concluded "the state of mind necessary to cause "interference" or "injury" may be short of the "willful and malicious" intention to cause injury or damage required under current law."

Political Environment: Abortion rights activists argue that Chairman Hyde, who testified as a character witness in a 1998 clinic violence trial, was adamantly opposed to the FACE Act from the outset. They believe he is working now with anti-abortion forces to let perpetrators escape liability for the very same types of acts that the FACE Act was intended to address. They view this as a major battle in the fight to preserve reproductive freedom.

4. **Balance in the Underlying Bill:** Senator Biden cites four provisions that are included in the final bill. Each is an important improvement over earlier versions, but none represents the balanced approach that your Administration sought for three years.

(a) *Protections for Low-Income Debtors:* The final bill includes a "safe harbor" that protects those under median income from motions by creditors alleging their use of Chapter 7 is abuse. It is not, however, complete protection from the means test. The below-median income debtors must still provide the detailed financial information on income and expenses and an analysis of their capacity to repay their debts. Moreover, U.S. bankruptcy trustees are required to scrutinize their capacity to repay under the means test. While the trustees believe that they will find few of these low-income debtors must be moved to Chapter 13, it is not the complete "safe harbor" from the means test that the Administration (and even Chairman Hyde) sought. Moreover, there are new filing and counseling requirements that apply to all debtors that are intended to create disincentives for debtors to file for bankruptcy.

(b) *Clearer Disclosure of the Terms of Credit Card Loans:* The disclosures required will tell a debtor that: "Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance." The disclosure also will include a generic example, although the numbers in the example will not relate to their individual circumstances. They also will be advised of an 800 number that they can call to find out how long it will take to repay their debt making only the minimum payment. We had supported a Durbin amendment that was included in the Senate bill from the previous Congress, which would have required the credit card company to calculate for each debtor not only the duration of payments but also what they would pay over time based on their particular situation. (For example: "If you make only the 2% minimum monthly payment on your balance of $____ [debtor's actual balance] at an interest rate of __% [debtor's actual interest rate] it would take __months to repay the balance in full and you would pay in total $____.") Creditors resisted calculating the precise period for each debtor, complaining about the programming costs, and fought any effort to have the debtor advised (even the few who will call the 800 number) of the total amount they would repay.

(c) ***Stronger Protections against Coercive Reaffirmations:*** The Administration did fight for and win inclusion of a new disclosure that all debtors must receive before they can reaffirm a debt. However, the form we proposed (used in about 10% of districts today) was rejected and a far less comprehensive form was substituted. Thus, while we won broader use of mandatory disclosures, we compromised significantly on the information provided. In addition, we had initially sought judicial scrutiny of all such reaffirmations; we eventually had to agree to scrutiny only of those where analysis suggests that the debtor has no capacity to repay the debt reaffirmed. Thus, courts may not find other debtors who are being coerced into reaffirming their debts, where the debtor has some limited capacity to repay but a legal right to discharge that debt. Moreover, to get any judicial scrutiny, we had to agree to language that consumer advocates believe will provide many new defenses to creditors whose collection practices are being challenged.

(d) ***Protection for Family Support Payments:*** In response to the First Lady's powerful arguments two years ago, this bill does contain provisions that should provide greater protection for child support and alimony in bankruptcy than does current law. However, she raised the issue because the bill made a wider class of credit card debts nondischargeable and those new nondischargeable debts would compete with child support and alimony. While child support and alimony is now largely although not completely protected), the new classes of nondischargeable credit card debts also survived (although somewhat narrower than initially proposed. Thus, for example, any debtor filing for bankruptcy will be unable to discharge credit card cash advances above $750 incurred in the final 70 days before bankruptcy, even if those advances were used to feed, clothe, or shelter a family juggling overwhelming debts. While the goal of the change is to target those who abuse the system by running up debts before a bankruptcy filing, it will actually reach many debtors innocent of such intent.

In addition to the provisions that Senator Biden mentions, there are other provisions in this bill that are a far cry from the provisions that we thought fairly balanced competing equities. For example:

(e) ***Judicial Discretion to Consider Individual Circumstances in Applying the Means Test:*** Under current law, a court can deny a person access to Chapter 7 discharge if they find that the debtor's filing constituted substantial abuse. The presumption is in favor of the debtor's filing. If it is abuse, the debtor must file under chapter 13 and repay what they can for 3 years. Under the final bill, if a debtor has the capacity to repay 25% of their debts or $10,000, which ever is lower, over 5 years, they must file under Chapter 13 and repay for 5 years before the remainder of their debt is discharged. Allowable expenses are determined by rigid allowances that specify how much one can spend for housing, food, clothing, transportation, etc. (The IRS previously developed these formula expenses to be used as "guidelines" – not caps -- for tax collection. Even Chairman Hyde agreed with us that we should develop bankruptcy specific standards.) The court can only vary from those allowances if they find "special circumstances that justify additional expenses with no reasonable alternative." The Administration had sought far greater judicial discretion to determine where abuse existed and where a person's existing pattern of spending was reasonable. For example, a debtor may choose to live in a more expensive area in order to be close to a family member who provides free and safe daycare for young children. However, the formula allowances will not pay for such high housing costs, but would pay for actual day care expenses. Thus, the rigid formula could have the unreasonable effect of forcing someone to move away from family to lower housing costs and put their children in unfamiliar, more expensive day care, and actually could result in less money available to repay creditors.

(f) ***Household Goods Protected from Creditor Seizure:*** Under current law, creditors who take a blanket lien in goods purchased with their credit (e.g., Sears) can seize or threaten to seize their collateral to compel repayment; however, debtors may avoid liens on, inter alia, "household goods." The final bill spells out precisely what goods one can protect from seizure. For example, it specifies one radio, one television, and one personal computer only if used primarily for the education or entertainment of minor children. It seems to many that such a precise list is unnecessary. A court can determine when a debtor wants to protect luxury goods and when they want to protect the reasonable contents of their family's home. But creditors argued that pro-debtor bankruptcy judges could not be trusted. We also argued that such goods rarely retain significant resale value. The primary reason for a creditor to threaten to seize such goods is to compel the debtor to find the resources to repay or to reaffirm a debt that otherwise they would be legally entitled to discharge. Consumer advocates fear that creditors will use the new limitation to intimidate debtors.

United States Senate

WASHINGTON, D.C. 20510

June 23, 2000

Clinic Violence

Dear Colleague:

We are writing because of our very serious concerns regarding the Bankruptcy Reform Act (S. 625) conference. We are concerned that a key provision ensuring those who commit acts of clinic violence cannot discharge their debt through bankruptcy may be removed or weakened to the point of meaninglessness.

You may remember the notorious "Nuremberg Files" website which collected personal information about abortion providers, clinic staff, law enforcement officials, judges, and politicians. The site chillingly listed the names of those who had been wounded in grey type, and the names of those who had been murdered were crossed out. The site also included many Members of Congress. The FBI and the U.S. Marshal's Service advised the plaintiffs that these were serious threats to their lives and offered to provide 24-hour protection.

Just weeks ago, another defendant in the "Nuremberg Files" case, Joseph Foreman, filed for bankruptcy. Foreman was one of the 12 individuals and two anti-abortion groups ordered to pay more than $107 million as a result of their activities.

When the verdict was rendered, one of the "Nuremberg Files" defendants admitted: "Many of us have divested ourselves of assets in order they [pro-choice supporters] - they can't take them away." To date, six of the 12 individual "Nuremberg Files" defendants have filed for bankruptcy.

This latest development further highlights the essential importance of retaining the clinic-violence provision in its full strength in any final bankruptcy legislation. The Bankruptcy Code currently allows some perpetrators of clinic violence to discharge their debts. This provision would halt such evasions of the law.

We may have different views about abortion, but this issue is not about being pro-choice or pro-life. This issue is pro-law and pro-women's health. Preventing bankruptcy from being used to escape accountability for acts of clinic violence will strengthen the enforcement of the law, and will help vindicate the purposes of the Freedom of Access to Clinic Entrances Act.

Sincerely,

Patty Murray — Senator Patty Murray

Barbara A. Mikulski — Senator Barbara Mikulski

Mary L. Landrieu — Senator Mary Landrieu

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 12,2000

THE DIRECTOR

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Administration understands that, although conferees have not been named, congressional staff are discussing ways to reconcile the House and Senate versions of H.R. 833, the Bankruptcy Reform Act. The enclosure to this letter outlines the Administration's views on these two versions of the bill. As you and your staff develop an agreement on this bill, your consideration of these views would be appreciated.

The President supports balanced consumer bankruptcy reform that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. He believes that we can eliminate abuse without hurting those forced to turn to bankruptcy, the vast majority of whom are faced with some of the hardest circumstances that life has to offer -- divorce, unemployment, illness, and uninsured medical expenses. Although we should not countenance people using bankruptcy to escape bills they can afford to repay, we also should not enact punitive legislation that places insurmountable barriers before the people who file for bankruptcy as a last resort. We must remember that too often those who need bankruptcy's "fresh start" are single mothers or divorcing spouses, displaced workers, low-income households (many of whom are minorities), victims of predatory lending, or those who faced unexpected illness that reduced their income and burdened them with expensive medical bills.

To meet the test of balance, the bill that emerges from conference should be consistent with the key principles that have been set forth by the President. The President was disappointed that the House once again failed to produce balanced bankruptcy legislation that he could support. As we stated when H.R. 833 came to the House floor last spring, the President's senior advisors would recommend that he veto the House bill if it were presented to him. The bankruptcy provisions of the Senate bill generally do a better job of meeting the President's principles, although the Administration has serious concerns about some provisions. The detailed enclosure describes the President's principles, the Senate bill provisions that should be preserved, the Senate bill provisions that raise concerns, and our strong objection to various provisions of the House bill.

The Administration notes that certain non-relevant amendments have been included in the Senate version of the bill. The President has made clear on a number of occasions that he strongly supports an increase in the minimum wage of $1 over the next two years. However, as the Administration has stated previously, if Congress sends him a bill delaying the increase, repealing overtime protections for certain workers, adding costly and unnecessary tax cuts that threaten fiscal discipline and direct benefits away from working families, thwarting ongoing efforts to enforce pension law, and including an objectionable private school voucher provision, he will veto it.

Thank you for your consideration of the Administration's views on these bills. We would be happy to discuss any of these concerns with you or your staff.

Sincerely,

Jacob J. Lew
Director

Enclosure

Identical Letter Sent To The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy, and The Honorable John Conyers, Jr.

ADMINISTRATION VIEWS ON
H.R. 833 -- THE BANKRUPTCY REFORM ACT

NON-RELEVANT AMENDMENTS

The Senate version of the bankruptcy bill includes non-relevant amendments on the subjects described below.

Minimum Wage and Tax Amendment

The President strongly supports an increase in the minimum wage of $1 over two years. Working families across this country deserve this increase, which would restore the real value of the minimum wage to what it was in 1982, helping more Americans share in our current economic prosperity. But the Senate bill would delay the increase. The Senate bill also includes a provision that would repeal overtime protections for certain workers, and a tax and pension package that would direct benefits away from working families and reduce Federal unemployment taxes without addressing needed system reforms. These tax and pension provisions are regressive, could lead to cuts in retirement and health benefits for moderate- and lower-income workers, would not significantly increase plan coverage or national savings, and would hamper efforts to enforce pension law. Moreover, we must establish a proper framework for paying down the debt, strengthening Social Security and Medicare, and funding key priorities before we consider major new tax cuts. If the Congress sends the President a bill delaying the minimum wage increase, creating regressive, costly, and unnecessary tax cuts that threaten fiscal discipline, repealing protections for certain workers, hampering the enforcement of pension law, directing benefits away from working families and potentially reducing their retirement and health benefits, he will veto it.

Drug Amendment

The Administration also opposes the provisions that would reduce the current disparity between crack and powder cocaine sentences solely by increasing powder cocaine penalties dramatically instead of addressing both crack and powder cocaine penalties. Decreasing the threshold amount of powder cocaine that an individual must possess to receive 5- and 10-year mandatory minimum sentences may be counterproductive because it could significantly redirect Federal law enforcement resources from the most serious offenders. In addition, this amendment would actually exacerbate the disproportionate impact of cocaine sentencing on minorities because, according to U.S. Sentencing Commission statistics, approximately 31% of defendants sentenced at the Federal level for powder cocaine offenses in 1998 were African American, 48% were Hispanic, and only 19% were white. Please note, however, that the Administration supports many of the provisions contained in the amendment to combat the spread and abuse of methamphetamine and hopes that the Congress will consider them outside of bankruptcy legislation.

Private School Vouchers Amendment

The drug amendment discussed above also contains an objectionable school voucher provision that is unrelated to the underlying bill. The Administration's opposition to private school vouchers is well known. Rather than improving and reforming public schools, private school vouchers drain scarce resources from public schools and are a distraction from the serious work of education reform. Instead, the President is committed to a comprehensive agenda to improve our schools by investing more in them and demanding more from them. The Administration also opposes the provision to require States to mandate the expulsion of students who bring a "felonious" quantity of drugs onto school property. A similar provision was defeated in a bipartisan House vote during consideration of the juvenile justice bill last year, and we oppose the inclusion of this type of measure in bankruptcy legislation. Finally, the Administration objects to the inclusion of any provisions affecting elementary and secondary education in the bankruptcy bill, because the Elementary and Secondary Education Act of 1965 (ESEA) is currently being reauthorized in the House and Senate. Congress should continue to address elementary and secondary education issues through the ESEA reauthorization process.

CONSUMER BANKRUPTCY PROVISIONS

The President supports balanced consumer bankruptcy reform that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. To meet the test of balance, the bill that emerges from conference should be consistent with the key principles set forth by the President. The President was disappointed that the House once again failed to produce balanced bankruptcy legislation that he could support. As the Statement of Administration Policy said when H.R. 833 came to the House floor last spring, the President's senior advisors would recommend that he veto the House bill if it were presented to him. The bankruptcy provisions of the Senate bill generally do a better job of meeting the President's principles, although the Administration has serious concerns about some provisions.

Means Test

Principle: **Access to Chapter 7 should not be governed by an arbitrary means test, but by reasonable guidelines that take into account individual circumstances.** The goal of the means test is to identify those debtors who genuinely have the capacity to repay a portion of their debts under a Chapter 13 plan. Many debtors who now enter Chapter 13 fail to complete their plans. To ensure positive outcomes instead of higher failure rates and greater hardships, we should ensure that debtors' specific circumstances are considered in a meaningful way. Neither creditors nor debtors are helped by wasting scarce resources establishing and overseeing repayment plans that will quickly fail. The House bill fails to meet the President's principle (despite valuable efforts by Chairman Hyde to bring some balance to its provisions). Because it limits access to Chapter 7 through a tight, inflexible, and arbitrary means test, it would force into Chapter 13 repayment plans many debtors who are unlikely to succeed. Specifically, the House bill would:

- allow exceptions to the means test only to those demonstrating "extraordinary circumstances" that require additional exceptional expenses or income adjustments -- a nearly insurmountable burden of proof that would deny bankruptcy judges the appropriate discretion in the application of the means test.

- not allow for expenses related to the long-term care of family members, including the elderly and disabled. Such assistance may be essential to enable these family members to avoid institutionalization and maintain their quality of life, yet may not qualify the family member as a legal dependent of the debtor.

- not allow for expenses that debtors may incur in protecting themselves against domestic violence. These expenses could include relocation expenses to move away from the violent spouse, transportation expenses to get to work from a new location or to work removed from the spouse's knowledge, legal costs to get and enforce a protective order, security costs, and income gaps associated with unavoidable absences from work.

- rigidly use IRS guidelines that were designed for a different purpose -- collecting taxes -- where they are applied far more flexibly than the means test would allow. We urge the Conferees to adopt Chairman Hyde's proposal to authorize the creation of standards specific to bankruptcy, using the IRS guidelines as a starting point.

- not incorporate payments for arrearages on secured debt for necessary property, which must be paid under a Chapter 13 plan. Thus, the means test could leave some debtors in bankruptcy "no-man's land": unable to file under Chapter 7, but unable to get a Chapter 13 plan confirmed because they cannot pay these arrearages.

- subject many debtors to burdensome paperwork that is not needed for bankruptcy determinations, including the collection of back tax returns regardless of their relevance at a cost of millions per year.

The House bill does take into account required administrative expenses under a Chapter 13 plan in calculating whether the debtor has the capacity to repay. (This important provision, which is not in the Senate bill, should be retained in the final bill.) It also contains both essential safe harbors: (1) protecting below-median income debtors from 707(b) "abuse" motions by creditors that could be the basis for threats or coercion; and (2) protecting below-median income debtors from 707(b) means-test motions by bankruptcy trustees. It includes a proposal by Chairman Hyde to allow adjustments for reasonable food and clothing expenses to take into account regional differences in costs. Finally, it clarifies sensibly the definition of household goods that a debtor can claim as exempt property (and thus upon which the debtor can void a non-purchase money, non-possessory lien), by limiting household goods to those "normally" found in or around a residence. These provisions should be retained.

The Senate bill uses a more reasonable means test, which provides more-appropriate relief to debtors, although improvements could be made. The Senate bill would:

-- allow exceptions to the means test to debtors who can show "special circumstances."

-- use a more appropriate threshold for access to Chapter 7.

-- provide a means test that includes expenses for the long-term care of elderly and other family members, and for protection of victims of domestic abuse and their families.

Certain provisions of the Senate bill, however, are also problematic.

-- The Senate bill also uses IRS guidelines for the means test, but includes a Congressional finding that the Treasury Secretary can modify the guidelines for bankruptcy purposes. Because this interpretation of existing Treasury authority is subject to legal challenge, we prefer Chairman Hyde's approach described above.

-- The Senate bill's means test calculation includes arrearages on secured debt for necessary property; however, it does leave some debtors in bankruptcy "no-mans' land" because it does not include the important provision, included in the House bill by Chairman Hyde, incorporating the required administrative expenses of a Chapter 13 plan in calculating the means test.

-- The Senate bill avoids needless filing of back tax returns and streamlines the means test for debtors between 100% and 150% of median income. However, further reductions in the paperwork burden on low-income debtors could be achieved at no cost to the effectiveness of the means test.

-- The Senate bill's motions safe harbor would protect below-median income debtors from 707(b) motions by creditors that could be the basis for threats or coercion. It fails, however, to provide a "safe harbor" for low-income debtors from means test calculations and paperwork or a full safe harbor from means test motions by United States trustees. Including both safe harbors would improve both the efficiency and fairness of the means test. If low-income debtors are abusing the process for other reasons, they would still be subject to general 707(b) motions by the court, the United States Trustee or the Chapter 7 trustee.

-- The Senate bill's definition of household goods is so narrowly drawn that the debtor may be deprived of reasonable or even vital household items that would be exempt under the House bill's definition.

Finally, we note that both bills contain inconsistent references to median income standards (State, Regional, and National). Administration of the new law will be eased by use of consistent standards.

Homestead Exemption and Other Loopholes for the Wealthy

Principle: **It is fundamentally unfair to ask low- and moderate-income debtors to devote future income to repay the debts that they can, while leaving loopholes that allow the wealthy to shield income and assets from their creditors.** High or unlimited homestead exemptions allow people with expensive homes to avoid their responsibility to repay a significant portion of their debts. Similarly, some wealthy debtors can file under Chapter 11 where they can shield their future income from creditors.

The House bill provides a $250,000 cap on homestead exemptions, but allows the states to opt out of the cap. With the opt-out, the provision is effectively the same as having no cap at all. Moreover, the bill does nothing to close the Chapter 11 loophole for wealthy debtors.

The Senate bill provides a meaningful cap of $100,000 on homestead exemptions. It also closes the Chapter 11 loophole for wealthy debtors. These provisions should be retained.

Protection Against Coercive Reaffirmations and Practices

Principle: **There must be appropriate safeguards against coercive creditor practices that compel debtors to forgo their rights and that disadvantage more scrupulous creditors.** Debtors often reaffirm debt on unfavorable terms, sometimes when they demonstrably cannot afford the future payments. These new commitments put their future, as well as their payments to socially more important debts (e.g., child support, alimony, and taxes), at risk. These reaffirmations are frequently the result of insufficient or misleading information and sometimes the result of intimidation or outright coercion. Unfortunately, such practices have been all too frequent, and the new legislation may increase the risk of such coercion by giving creditors new opportunities to challenge debtors' actions. In light of these new opportunities for abuse, the Administration cannot countenance weakening existing protections; in fact, enhanced safeguards are essential.

The House bill gives debtors the right to a hearing on a reaffirmation of wholly unsecured, non-credit union debt, but allows represented debtors to waive the hearing, which effectively does little to change current law and might inadvertently bolster arguments that courts have no authority to review agreements filed by represented debtors. The bill expressly provides a private right of action for failure to comply with reaffirmation agreements or willful violations of a discharge, but it precludes use of class actions to bring such claims. This eliminates the most effective approach -- used in the Sears case among others -- to remedy widespread coercive practices. The private right of action should be retained, but the bar on class actions should be dropped.

The Senate bill does not ban class action remedies. Moreover, it requires disclosure of the terms of debt being reaffirmed and creates a new presumption of undue hardship if the debtor does not have the capacity to repay debts that he or she is reaffirming. These mechanisms will go a long way toward preventing debtors from reaffirming debts because of creditor threats or intimidation or because of simple confusion. The bill proposes a form of disclosure, although it is not as comprehensive as the one developed by the Administrative Office of the U.S. Courts now in use in a few districts; Congress could provide districts discretion to use the more extensive form. The new Subsection 524(j) in the Senate bill codifies existing practice by providing that creditors can accept payments before and after a reaffirmation agreement is filed with the court; however, if debtors exercise their right to rescind a reaffirmation agreement or the agreement is found to be invalid, subsections (j)(2) and (j)(3) may raise issues in litigation and should be clarified or struck. Specifically, Congress should clarify that nothing therein is intended to preempt any Federal or State law or eliminate remedies available under current Federal or State law, including disgorgement of funds collected under invalid agreements.

Finally, the Senate bill includes a provision that would allow debtors to waive in advance bankruptcy protection for their retirement assets. We fear that those of limited means or sophistication could easily be compelled, perhaps even as a condition of receiving credit, to put these critical assets at risk. As the Department of Labor recently testified before the Senate Health, Education, Labor and Pensions Committee, this provision should be struck.

Improving Credit Card Practices

Principle: Both debtors and creditors must be required to be responsible. Bankruptcy reform should be balanced by including provisions that address credit-card practices that may lead to bankruptcies. Creditors should give consumers the information they need to manage their credit card debt successfully. Doing so would allow more consumers to make informed decisions and give many households better control of their finances, reducing the number of bankruptcies.

The House bill requires that consumers receive a generic description of the impact of making only minimum payments on the duration of the debt. However, it provides no way for a consumer to obtain more specific information about the impact of making the minimum payment in his or her own circumstance. The House bill requires conspicuous disclosures of "teaser" rates, but it does not require that the rates be labeled "introductory" or that the permanent interest rate be disclosed in close proximity to the teaser rate.

The Senate bill provides more-useful provisions though it could be further improved. It requires most lenders to provide an 800 number for consumers who want specific information about the impact of minimum payments in their situation. (The information provided could be more valuable, if it included the cost as well as the duration of debt when only the minimum payment is made.) It also requires that consumers be given clear and conspicuous notice of teaser rates by labeling them as introductory each time they appear in a solicitation, as well as disclosure of the permanent interest rate in close proximity to the teaser rate. Lastly, the bill includes new disclosures on high loan-to-value home equity loans so consumers are not misled about their tax implications.

Non-Dischargeable Debts and "Cram Downs"

Principle: **The goal of repaying creditors must be balanced with the need to protect social priorities, such as payment of child support, alimony and taxes, and to preserve a meaningful opportunity for a fresh start.** The Bankruptcy Code makes debts nondischargeable only where there is an overriding public purpose to protect those debts. To the extent that the bills make more credit-card debt nondischargeable and preserve secured claims regardless of the value of their collateral, these societal priorities will compete for scarce resources and the fresh start will become ephemeral.

The House bill gives secured creditors in bankruptcy unprecedented rights to collect amounts in excess of the value of their collateral. It precludes "cramming down" debt to the collateral value for any debt secured by personal property purchased within five years of the bankruptcy filing. Were these provisions to become law, societal priorities would suffer, unsecured creditors would be placed at a disadvantage, and secured creditors would have less incentive to evaluate properly lending risk. The House bill also makes nondischargeable all cash advances above $250 and all debts incurred to pay nondischargeable debts, both if within 90 days of bankruptcy. This rule endangers societal priorities and may trap debtors who are trying to feed their families or meet debt obligations before they realize that bankruptcy is inevitable.

The Senate bill is preferable because it protects under-secured debt other than for automobiles for only six months before filing; nonetheless, the ban for car loans should be far shorter than five years. Similarly, the Senate bill has a shorter window before bankruptcy in which cash advances (with a higher threshold) and debts incurred to pay nondischargeable debts become nondischargeable. An even better approach would be to limit the new nondischargeability provisions to above-median income debtors, as Senator Moynihan has proposed.

Barriers to Entry or Representation in the Bankruptcy System

Principle: **Inappropriate barriers should not be created to entry into or effective representation in the bankruptcy system.** Filing fees, fee-shifting provisions, and inflexible pre-filing hurdles can unfairly deny access to the bankruptcy system to people who do not have the ability to repay their debts.

The House bill would require mandatory credit counseling before a bankruptcy filing, but does not make clear that the requirement can be met by telephone or over the Internet, creating a barrier for those without convenient access to counseling. It also would require a debtor's attorney to pay a trustee's attorney's fees if the debtor is not "substantially justified" in filing for Chapter 7. Fear of such sanctions may deter attorneys from representing debtors with bona fide claims. However, the bill does allow courts to waive filing fees for debtors unable to pay, for the first time removing this important barrier to entry for indigent debtors.

The Senate bill ensures that mandatory credit counseling can be provided by telephone or over the Internet. It also applies an appropriate and more reasonable standard to the effort to deter abusive use of Chapter 7, allowing the trustee to recover reasonable costs from the debtor's attorney if filing under Chapter 7 was "frivolous." It also would allow courts to waive filing fees for indigent debtors, but would limit the courts' option to waive the fees only to debtors with incomes below 125% of the poverty level. We think no such cap is needed.

The Senate bill does require a debtor's counsel to attest under oath to the accuracy of any adjustments to income and expenses that the debtor provides (also under oath). This requirement will chill even the most responsible and scrupulous of attorneys from representing financially distressed debtors.

Prevent Abuse of Bankruptcy To Facilitate Clinic Violence

Principle: The abuses of the bankruptcy system must be stemmed, including abuse by those who would use bankruptcy to avoid penalties for violence against family planning clinics. The Administration is deeply concerned by the incidents of violence, vandalism, and harassment committed against family-planning clinics, some of which have resulted in the deaths and maiming of innocent people. The Administration believes that these unlawful activities must not be tolerated, and that when they are committed, those found liable should be held accountable. In 1994, Congress made clear its disapproval for those who would use unlawful means to deny citizens access to legal clinic services by enacting the Freedom of Access to Clinic Entrances Act (FACE).

Unfortunately, there is evidence that those found liable have been making strategic use of bankruptcy to avoid the penalties for their actions established by Congress and the States. This abuse of the bankruptcy system to facilitate unlawful behavior must not be tolerated. Senator Schumer's amendment, passed by the Senate by a margin of 80 to 17, would make court-ordered and other fines and debts resulting from family-planning clinic violence nondischargeable. The Administration opposes the expansion of categories of nondischargeable debt unless there is an overriding public policy objective and no other way to achieve that objective. The Schumer amendment meets that test, providing a necessary tool to ensure that bankruptcy is not used strategically to avoid the legal consequences of clinic violence and intimidation. It should be included in the final legislation.

Privacy Of Personal Financial Records In Bankruptcy

Principle: The financial and personal privacy of those who seek protection in the bankruptcy system must be protected.

The electronic aggregation and availability of public and non-public bankruptcy information could serve at least two important purposes: (1) it could lower costs for participants in the bankruptcy system; and (2) it could improve our understanding of bankruptcy trends and the impact of policy changes. The Administration strongly supports these goals. At the same time, however, disseminating bankruptcy information electronically could threaten the security and privacy of debtors in bankruptcy by making sensitive information (including account numbers, social security numbers, balances, income sources, and payment histories) widely available to curious neighbors, employers, marketers, and predators looking for those most likely to be lured by scams.

Far too little attention has yet been given to complicated questions such as: who needs what information and under what circumstances? Does new technology change our perception of what information should be in the public domain? And what kinds of information in bankruptcy records could be used to prey upon debtors and their families?

These questions have been raised as private trustees explore the development of a national database of bankruptcy information to answer creditor inquiries about the status of payments under Chapter 13 plans. The database may contain material obtained independently by the private trustees in the administration of the case, as well as records from the public court file. Though such a database would provide creditors with one location to obtain information about their claims, important decisions must be made about privacy and the commercial use of this information. The private trustees appear interested in performing this function responsibly, and the Executive Office for U.S. Trustees is working with the private trustees to explore ways to safeguard the privacy of this information. However, legislative language in both the Senate and House bills designed to facilitate efforts by the private trustees without taking into account privacy considerations is, at best, premature.

The House bill would protect the private trustees from liability for dissemination of information unless a trustee has actual knowledge that the information is false. This provision provides no safeguards against misuse; and no compelling argument has been presented as to why the normal liability rules should not apply. We strongly recommend that this provision be removed from the final bill. In addition, the House bill also expresses the "sense of the Congress" that all public record data held by bankruptcy clerks shall be released in electronic form to the public, subject to privacy safeguards that the Judicial Conference may determined. The privacy issues regarding bankruptcy information should be fully explored before the Congress makes any determinations in this area.

The Senate bill contains language (in a section regarding collection of child support) that would require Chapter 13 trustees to provide non-public information about their cases to any not-for-profit entity that shall provide such information to parties in interest. The bill also contains "sense of the Congress" language about dissemination of bankruptcy information. The possible implications of these provisions, in particular the risk to personal privacy, have not been adequately explored, so these provisions should be dropped.

OTHER ISSUES

New Provisions

The Administration understands that consideration is being given to including, in the conference report, additional provisions that were not in either the House or Senate versions of the bankruptcy bill.

First, the Administration would strongly oppose the inclusion of provisions, under the bankruptcy law or other law, that would alter the police and regulatory exception or the legal principles that allow governmental units to enforce regulatory programs with regard to debtors who may hold interests in licenses, permits, franchises or entitlements issued by the Government.

Second, the Administration understands that some are urging adoption of an amendment that would exclude collection of bad checks from the provisions of the Fair Debt Collection Practices Act (FDCPA). The Administration would oppose such a provision. Courts have repeatedly found that check collection is covered by the FDCPA, which protects consumers from invasion of privacy, harassment, abuse, false or deceptive representations, and unfair collection methods. No compelling argument has been made explaining why these protections provided by the Congress are not as appropriate to collection of checks as they are to collection of other debts. In any event, before any such important consumer protections are weakened or eliminated, the case for the change should be subjected to sunlight and public scrutiny.

Certain Contract for Electric Power Voided

The Senate bill contains a provision that would void a power supply contract between Hydro Quebec and a consortium of Vermont utilities. While the intent of this provision appears to be to protect Vermont utilities that may be facing bankruptcy, the legislative abrogation of a contract between two commercial entities raises troubling policy issues, as more fully set out in a letter, dated March 3, 2000, to Senator Jeffords from Assistant Secretary for Fossil Energy Robert W. Gee. The Department of Justice has also raised concerns that the provision could give rise to a "taking" of private property for which just compensation would be required under the Fifth Amendment of the Constitution. It is also possible that a claim for money damages could be brought to international arbitration under NAFTA on the theory that NAFTA affords comparable protections to investments through the investment chapter's expropriation provision (Article 1110).

THE WHITE HOUSE

WASHINGTON

June 9, 2000

Dear Mr. Leader:

I write to urge a fair resolution of the open issues in discussions on bankruptcy reform. I have long made clear my support for legislation that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. We also must ensure that a reasonable fresh start is available for those who turn to bankruptcy as a last resort when facing divorce, unemployment, illness, and uninsured medical expenses. Bankruptcy reform legislation should strike the right balance.

The House-passed bill was so one-sided that I would have vetoed it. The Senate-passed bill's bankruptcy provisions represented a better attempt to balance legitimate debtor and creditor interests, although I had serious concerns about some aspects. My Administration has watched carefully as the staff and informal conferees have sought to reconcile these two bills. While there appears to be some informal progress on some outstanding issues, it is very important that the resolution of these issues be fair and that we ensure that we do not erode protections for <u>all</u> debtors -- when targeting the few who abuse the system. The outcome will help determine whether the final bill tips the scales.

I am concerned, for example, that the final bill:

- may not adequately address the problem of wealthy debtors who use overly broad homestead exemptions to shield assets from their creditors;

- may weaken important credit card disclosure provisions that will help ensure consumers understand the implications of the debt they are incurring;

- may eliminate protections for reasonable retirement pensions that reflect years of contributions by workers and their employers; and

- may include an anti-consumer provision eliminating existing law protections against inappropriate collection practices when collecting from people who bounce a check.

Finally, I am deeply disturbed that some in Congress still object to a reasonable provision that would end demonstrated abuse of the bankruptcy system. We cannot tolerate abusive bankruptcy filings to avoid the legal consequences of violence, vandalism, and harassment used to deny access to legal health services. An effective approach, such as the one offered by Senator Schumer's amendment, should be included in the final legislation.

I sincerely hope that balanced, bipartisan bankruptcy reform will be completed this year, but I will not hesitate to veto unfair legislation that fails the test of balance.

Sincerely,

Bill Clinton

The Honorable Trent Lott
Majority Leader
United States Senate
Washington, D.C. 20510

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Gene Sperling and Sarah Rosen Wartell to the President re: Bankruptcy Legislation (3 pages)	05/05/2000	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21195

FOLDER TITLE:
Bankruptcy - Schumer Abortion Legislation Letter to Congress

2012-0254-S
rc655

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

APPENDIX A

[Date]

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Hatch:

The Administration understands that, although conferees have not yet been named, your staff are discussing ways to reconcile the House and Senate versions of H.R. 833, the Bankruptcy Reform Act. The attachment to this letter outlines the Administration's views on these two versions of the bill. As you and your staff develop an agreement on this bill, your consideration of these views would be appreciated.

The President supports balanced consumer bankruptcy reform that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. To meet the test of balance, the bill that emerges from conference should be consistent with the key principles set forth by the President, as described in the enclosure. The President was disappointed that the House once again failed to produce balanced bankruptcy legislation that he could support. As we stated when H.R. 833 came to the House floor last spring, the President's senior advisors would recommend that he veto the House bill if it were presented to him. The bankruptcy provisions of the Senate bill generally do a better job of meeting the President's principles, although the Administration has serious concerns about some provisions.

The Administration notes that certain non-relevant amendments have been included in the Senate version of the bill. The President has made clear on a number of occasions that he strongly supports an increase in the minimum wage of $1 over the next two years. However, as the Administration has stated previously, if Congress sends him a bill delaying the increase, repealing overtime protections for certain workers, adding costly and unnecessary tax cuts that threaten fiscal discipline and direct benefits away from working families, thwarting ongoing efforts to enforce pension law, and including an objectionable private school voucher provision, he will veto it.

Thank you for your consideration of the Administration's views on these bills. We would be happy to discuss any of these concerns with you or your staff.

Sincerely,

Jacob J. Lew

Enclosure

Identical letters sent to The Honorable Patrick J. Leahy,
The Honorable Henry J. Hyde, and The Honorable John Conyers, Jr.

APPENDIX B

SUBSTANTIVE CONCERNS WITH THE HOUSE AND SENATE BILLS

Homestead Exemption: The Senate bill includes a $100,000 cap on the amount of home equity that states can allow debtors to shield from their creditors. The House bill has a cap of $250,000, but allows a state to opt-out, effectively eviscerating the cap. We have argued that it is fundamentally unfair to ask moderate-income debtors to repay what they can, while wealthy debtors can shield their resources in expensive homes. Most expect that the Senate cap will be dropped in conference, although rhetoric on this issue has the greatest potential to embarrass bill proponents.

Credit Card Protections: Although the provisions in both bills are weak, the Senate is somewhat stronger, providing new disclosures on teaser rates and the impact of making only the minimum payment on the length of time one will be repaying debt. Senate Democrats, including the leading Democratic bill proponent Senator Torrecelli, say they will oppose a conference report that further weakens these provisions, so the Senate provisions are likely to survive intact.

Means Test for Chapter 7 Discharge: Both bills use IRS tax collection guidelines to establish tests to determine whether a debtor has the capacity to repay a portion of their debt under a Chapter 13 repayment plan. If so, filing for a Chapter 7 discharge is deemed abuse. The House test is very rigid; the Senate bill has a bit more flexibility. We have argued unsuccessfully that various changes are needed to build more discretion into the system to determine whether, in the debtor's individual circumstances, they really have the capacity to repay (like the IRS has when it used the guidelines for tax collection). We also sought less stringent thresholds and various technical changes to prevent unfairness in the application of the test. Some provisions from each bill are better, but neither bill would address our fundamental concern. We expect a compromise with some of the better and worse features of each.

Protection of Child Support and Alimony: In the last Congress, the First Lady wrote of her concern with provisions that made additional credit card debt nondischargeable in bankruptcy, thus leaving it to compete with higher societal priorities that also are nondischargeable – especially payment of child support and alimony. In response, the bill's proponents added numerous provisions to clarify that child support and alimony are the highest priority. We believe that these provisions will work in many cases to improve the payment of child support and alimony in bankruptcy; however, in a small portion of cases after bankruptcy discharge, where there is no court supervision of child support and alimony payments or wage garnishment, these credit card debts could crowd out child support or alimony. Our argument is very technical; rhetorically, they have neutralized our criticism.

Debtor Protections Against Coercion: During bankruptcy, too many debtors are misled or tricked into agreeing to repay debts that they cannot afford and have a legal right to discharge. The Senate bill contains provisions that make it significantly more difficult to mislead or deceive debtors who cannot afford to reaffirm their debts, although the provisions could be significantly improved to strengthen the hand of debtors seeking remedies when the bill's requirements are not observed. (Certain consumer groups actually oppose the stronger Senate provisions, even though they would prevent many more abusive reaffirmations, because they also may provide creditors with new legal arguments in defending litigation.) The House bill has far weaker provisions and, most notably, a ban on class actions when seeking remedy for abuse of these requirements. We expect the class action ban to be dropped and the Senate provisions to be retained largely intact, but without the desired improvements. If the class action ban is retained, newfound opposition to the bill may arise.

Clinic Violence: Recently, anti-abortion protesters have used personal bankruptcy to avoid penalties for violence against family planning clinics, some even strategically sending protestors who are judgment proof. Senator Schumer offered an amendment in the Senate that would make court-ordered and other debts resulting from such violence nondischargeable. We strongly supported the amendment. The Vice President was present in the Senate Chamber when they voted on the amendment to break a tie, if needed. To avoid embarrassment, Republicans urged their members to vote for the amendment and it passed by a vote of 80-17. The House has no comparable provision. In conference, they are expected to modify the amendment so that it covers debts from acts of violence generally, so they can avoid special protection for clinic violence debts. There may be technical flaws in their drafting of the broader amendment, so it will not protect all clinic-related debts. Abortion rights groups are not sure whether they want to fix these flaws, preferring to have the issue. If the Republicans drop the provision, Senate Democrats will likely rally; but if they simply broaden it to cover other violence, those eager to vote for the bill will likely concur.

Pension Benefit Protections: The Senate bill also included a provision that would allow debtors to waive in advance bankruptcy protections for certain retirement assets (IRAs and non-ERISA plans). Senator Grassley had earlier offered a provision that would have capped the pension assets that debtors could shield from creditors in bankruptcy, but facing labor opposition to that he instead opted for this. We fear that those of limited means and sophistication could be compelled (perhaps in the boilerplate of a credit card or loan application) to waive protections for the retirement assets. As awareness of this provision has grown, it has provoked a firestorm. We expect it to be modified or eliminated.

6/15

MEMORANDUM TO JOHN D. PODESTA

FROM: CHUCK BRAIN
GENE SPERLING
JOEL WIGINTON
SARAH ROSEN-WARTELL

SUBJECT: BRIEFING FOR MEETING WITH SENATORS KENNEDY AND SCHUMER REGARDING BANKRUPTCY

When and Where

You are scheduled to meet with Senators Kennedy and Schumer, at their request, regarding the pending bankruptcy bill at 2:30 on Thursday, June 15th in Senator Schumer's personal office (SH-313). Senator Daschle is not interested in attending. However, since he will be meeting with Senator Lott and other interested Senators on the Bankruptcy bill at 5:30pm he would like his staff to participate.

General Background

The House bankruptcy bill, on which we have a Senior Advisors level veto threat, passed by a vote of 313 to 108. The Senate bill, which is better but about which we also have serious concerns, passed by a vote of 83 to 14. The Senate bill contained tax provisions designed to offset the Republican three-year minimum wage amendment. As a consequence, the Senate and House versions of the bill could not be formally conferenced. If they tried, the House Ways and Means Committee would be compelled to "blue slip" the bill, because it contains revenue-raising provisions, even though parties have now agreed to drop those issues in conference.

The would be conferees have been meeting in a "shadow conference" for the last few months in attempt to reach a bipartisan compromise. A couple of weeks ago, the negotiators announced that the staff had reached agreement on all but six outstanding "member level" issues: (1) the homestead exemption; (2) a small bank exemption for the consumer credit card disclosures; (3) Hyde's safe harbor amendment; (4) Kennedy's retirement savings amendment; (5) Hatch's Fair Debt Collection Practices Act (FDCPA) amendment; and (6) Schumer's clinic violence amendment. Since that time, the Democrats abandoned efforts to get Hyde's safe harbor amendment, reached agreement on a modest small bank provision on the credit card disclosures, and Kohl essentially conceded the key issue on the homestead amendment, leaving the Hatch FDCPA amendment, the Schumer clinic violence amendment, and the Kennedy retirement saving amendment. Senators Kennedy and Grassley also are reportedly getting closer to an agreement on the last of these issues.

There has not been much movement on the bill in the past week. Although there are press reports that Senator Lott may call another member level meeting of the purported conferees, Senator Leahy's office has assured us that they have not been notified of such a meeting.

The Purpose of the Meeting

Senators Kennedy and Schumer originally requested this meeting prior to the Presidential veto letter we released last Friday, which highlighted five key issues on which the President has concerns (all the open "member" issues except the Hyde safe harbor that the Senate Democrats abandoned). They had wanted to discuss how the White House and the Senators who oppose the bankruptcy bill could work together to create an environment in which we would feel comfortable issuing a veto threat (i.e., how we would have gone about getting 34 Senators to sustain a veto). Given that we have already issued a veto threat, the Senators would now like to focus on where we go from here.

The Senators are likely to inquire whether the White House's current plan is to: (1) negotiate with the informal conferees to achieve some improvement on our five areas of concern; (2) sit back and allow the Congress to reach whatever resolution they will and then judge whether the bill merits the President's signature; or (3) ultimately veto the bill based on one or some combination of the most politically salient of the five main issues (i.e., the homestead exemption, the Schumer clinic violence amendment, and/or the Hatch FDCPA amendment).

Background on the President's Five Areas of Concern

The Homestead Exemption

Senator Sessions and Kohl, the sponsors of the amendment that would have capped the homestead exemption at $100,000 and which passed by a vote of 77 to 22, have reached a deal with the House Republican leadership on the homestead exemption (although there are some reports that Senator Kohl is rethinking his position).

Under the deal, there would be a $100,000 homestead exemption cap for two years. In other words, a debtor could not keep more than $100,000 in the equity she possess in her home, if she purchased the home within two years of her bankruptcy filing date. If the debtor owned the home longer than two years prior to her bankruptcy filing date, she could keep all the equity she possesses in her home. In addition, there is a seven-year "look-back" provision. That is, if the court finds evidence that the debtor attempted to defraud her creditors through the homestead exemption within seven years of her bankruptcy filing date, she would not be entitled to the exemption. The look-back provision, however, does not differ significantly from current law.

The primary objection is that this cap only applies if you try to put equity into a home within two years of bankruptcy. If you are a wealthy Texan with a home worth $10 million, you can keep the entire home, while a moderate income renter in Texas must devote a significant portion of her future earnings toward repaying the debts that she is determined to have the capacity to repay.

Moreover, there is a potential loophole in even the narrow scope of the limitation. Take for example, a debtor who owned her home in Texas, a state with no homestead cap, prior to two years before her bankruptcy filing date, but who has little to no equity in her home. If this debtor has a significant amount of other assets (e.g., cash), she can, even on the eve of her bankruptcy filing date, pay down the debt she owns on her home and shield those assets as part or her homestead exemption.

Consumer Credit Card Disclosures

Senator Torricelli sponsored an amendment that would require credit card companies to make some minimal disclosures to their consumers. One of these disclosures was a toll-free number on the consumer's credit card statement that the consumer could call to learn approximately how long it would take that consumer to repay her balance if she makes only the minimum payments. Senator Gramm advocated strongly for an exemption from the toll-free number requirement for "small banks." (Recall that he previously had argued for a small bank exemption from CRA.) Senator Gramm defines small banks as those with less than $250 million in assets; a definition that would include roughly 80 percent of American banks.

Senator Torricelli and Gramm reached a compromise that would require the Federal Reserve Bank to provide the toll-free number service for small banks for two years. It is somewhat unclear what happens at the end of that two year period, but our best reading of the language is that, at the conclusion of their two year exemption, small banks would be have to provide the toll-free number service themselves.

Retirement Savings

Senator Kennedy sponsored an amendment that would clarify that a debtor can exclude almost all forms of retirement/pension savings from their bankruptcy estate to be distributed to creditors. Senator Grassley has consistently argued that the amount that the debtor is allowed to keep in pension assets should be capped. While Grassley lost this battle in the Senate, he succeeded in adding a provision that would allow consumers to waive the protection for the pension assets in agreements with individual creditors. The amendment was later harshly criticized. Critics complained that such waivers would become boilerplate in credit agreements and Grassley backed down on the waiver, but has revived his interest in capping exempt pension assets.

Senator Kennedy made his "final offer" to Senator Grassley last week. The Kennedy offer was for a $1 million cap (indexed) on assets in Individual Retirement Accounts, not including those used for small business pension plans, and excluding any amounts in the IRA rolled over from employer sponsored pension plans. Senator Grassley said he would agree only if either: (1) the exclusion for roll-overs was dropped or (2) the cap was set at $500,000. Kennedy has rejected (1) and plans to reject (2). Senator Grassley's staff indicate that he is open to negotiating a higher cap.

The Hatch Fair Debt Collection Practices Act Amendment

Senator Hatch continues to insist upon his amendment that would eliminate the possibility for a plaintiff to receive attorney's fees for violations of the Fair Debt Collections Practice Act, if the defendant is a check collector. This provision is particularly pernicious, because it would prevent a debtor/plaintiff from collecting attorney's fees (and make it quite difficult for her to retain counsel in the first place) no matter how egregious the check collector's actions were. Senators Leahy and Sarbanes are leading the effort to strip this amendment, and recently proposed a counteroffer that would prevent the debtor/plaintiff from collecting attorney's fees, only when she has been convicted of a felony for passing bad checks.

Although there is no way of confirming this, both Democratic and Republican staff have told us that Senator Lott will ask Senator Hatch to drop his amendment if all the other remaining issues are resolved.

Schumer's Clinic Violence Amendment

Senator Schumer sponsored an amendment that would make debts arising from violations of State and Federal access to women's health clinic laws nondischargeable (also referred to as the "FACE amendment"). This amendment passed by a vote of 80 to 17. The Vice President made an appearance in the Senate to be available in case there was a tie vote.

The Democrats have given Senator Schumer their proxy and the Republicans have given theirs to Representative Hyde, and both have been directed by their respective party to negotiate a compromise. At this point, the Schumer/Hyde negotiations have reached an impasse. Originally Senator Schumer had suggested a compromise – reportedly supported by Senator Grassley – which would cover all "health clinics," not specifically "reproductive" health clinics. Representative Hyde countered with an offer to make all debts arising from "willful and malicious" acts of violence nondischargable. Senator Schumer quickly rejected the Hyde counteroffer and correctly noted that the Hyde language basically restates current law. Advocacy groups argue that few of the actual judgements against, or settlements reached with, defendants who harassed clinic patients include a finding of willful and malicious. Moreover, harassment and intimidation does not always include violence.

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001b. memo	Gene Sperling et al. to the President re: Decision on Bankruptcy Reform Legislation (7 pages)	06/22/2000	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21195

FOLDER TITLE:
Bankruptcy - Schumer Abortion Legislation Letter to Congress

2012-0254-S
rc655

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Memorandum

To: Senate Democratic Legislative Directors
From: Senator Leahy's Judiciary Committee Staff
Date: June 21, 2000

Subject: Bankruptcy Informal Conference – Summary of Outstanding Issues

---

Although a conference report has not been filed and final legislative language has not been shared with the minority, it appears the House and Senate Republican leadership have agreed to end negotiations on the Bankruptcy Reform Act. Based on our understanding of the Republican leadership's agreement, we have attached a summary of how they have chosen to deal with the five outstanding issues. We have also attached President Clinton's letter from last Friday, which expressed the Administration's views on these five issues.

Given the current information available, Senator Leahy would oppose this Republican bill because of its provisions regarding the discharge of penalties for violence against family planning clinics and the unjustified undercutting of the Fair Debt Collection Practices Act. In addition, Senator Leahy would recommend that President Clinton veto this bankruptcy reform legislation in its present form.

Bankruptcy Informal Conference – Summary of Outstanding Issues
June 21, 2000

1. Fair Debt Collection Practices Act (FDCPA).
It appears the Republican leadership agreement includes Senator Hatch's amendment to severely restrict the FDCPA's attorney's fees reimbursement provisions for the collection of dishonored checks. The FDCPA protects consumers from invasion of privacy, harassment, false or deceptive representations, unfair or abusive collection methods, and illegal fees by debt collectors. Because statutory damages are capped at $1,000 per individual under the FDCPA, the reimbursement of attorney's fees for a successful case is critical to its effective enforcement. The Hatch amendment was not in the House-passed or Senate-passed bill.

2. Discharge of penalties for violence against family planning clinics.
The Schumer amendment prevents a documented abuse of the bankruptcy system and passed the Senate by a vote of 80-17. The Republican leadership's agreement appears to impose a new "willful and malicious" standard proposed by Congressman Hyde. Many violations of clinic violence laws are not proven under this high standard. As a result, the new language would continue to allow many perpetrators of clinic violence to seek shelter in the nation's bankruptcy courts.

3. Homestead Exemption.
The Senate passed the Kohl-Sessions amendment to create a $100,000 nationwide cap any homestead exemption with 73 votes. It would eliminate one of the most flagrant abuses of the bankruptcy laws – debtors moving to expensive homes in a handful of states with unlimited exemptions, declaring bankruptcy, and then keeping their expensive homes. The Republican leadership's agreement appears to cap homestead exemptions at $100,000 for any home purchase within two years of a bankruptcy filing while not capping home equity before this two year period.

4. Cap on retirement assets.
The Republican leadership's agreement appears to include a cap of $1 million (indexed for future inflation) on protecting a debtor's individual retirement account or Roth IRA. This cap may be waved by a judge in the interests of justice and excludes small business pension plans and IRA rollovers.

5. The Senate-passed credit card disclosure reforms.
The Republican leadership's agreement appears to permit banks with fewer than $250 million in assets to have the Federal Reserve provide its customers with a toll-free phone number to review their credit card balances for the next two years.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release June 9, 2000

TEXT OF A LETTER FROM THE PRESIDENT
TO THE SPEAKER AND DEMOCRATIC LEADER OF THE
HOUSE OF REPRESENTATIVES AND THE
MAJORITY AND DEMOCRATIC LEADERS OF THE SENATE

June 9, 2000

Dear Mr. Speaker: (Dear Mr. Leader:)

I write to urge a fair resolution of the open issues in discussions on bankruptcy reform. I have long made clear my support for legislation that would encourage responsibility and reduce abuses of the bankruptcy system on the part of debtors and creditors alike. We also must ensure that a reasonable fresh start is available for those who turn to bankruptcy as a last resort when facing divorce, unemployment, illness, and uninsured medical expenses. Bankruptcy reform legislation should strike the right balance.

The House-passed bill was so one-sided that I would have vetoed it. The Senate-passed bill's bankruptcy provisions represented a better attempt to balance legitimate debtor and creditor interests, although I had serious concerns about some aspects. My Administration has watched carefully as the staff and informal conferees have sought to reconcile these two bills. While there appears to be some informal progress on some outstanding issues, it is very important that the resolution of these issues be fair and that we ensure that we do not erode protections for all debtors -- when targeting the few who abuse the system. The outcome will help determine whether the final bill tips the scales.

I am concerned, for example, that the final bill:

o may not adequately address the problem of wealthy debtors who use overly broad homestead exemptions to shield assets from their creditors;

o may weaken important credit card disclosure provisions that will help ensure consumers understand the implications of the debt they are incurring;

o may eliminate protections for reasonable retirement pensions that reflect years of contributions by workers and their employers; and

o may include an anti-consumer provision eliminating existing law protections against inappropriate collection practices when collecting from people who bounce a check.

Finally, I am deeply disturbed that some in Congress still object to a reasonable provision that would end demonstrated abuse of the bankruptcy system. We cannot tolerate abusive bankruptcy filings to avoid the legal consequences of violence, vandalism, and harassment used to deny access to legal health services. An effective approach, such as the one offered by Senator Schumer's amendment, should be included in the final legislation.

I sincerely hope that balanced, bipartisan bankruptcy reform will be completed this year, but I will not hesitate to veto unfair legislation that fails the test of balance.

Sincerely,

WILLIAM J. CLINTON

# # #

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001c. fax	Ben Lawksy to Sara Rosen Wartell re: phone number (partial) (1 page)	06/23/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21195

FOLDER TITLE:

Bankruptcy - Schumer Abortion Legislation Letter to Congress

2012-0254-S
rc655

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

UNITED STATES SENATE

Office of United States Senator

CHARLES E. SCHUMER

Senator *for* New York State

Washington
13 Hart Senate Office Building
Washington DC 20510
(202) 224-6542
(202) 228-4562/fax

Long Island (opening 2/16)
Two Greenway
45 Pine Lawn Road
Melville NY 11747

Albany
Room 420
Leo O'Brien Building
Albany NY 12207
(518) 431-4070
(518) 431-4076/fax

New York
Suite 1702
757 Third Avenue
New York NY 10017
(212) 486-4430
(212) 486-7693/fax

Binghamton
Room B6
Federal Office Building
Binghamton NY 13901
(607) 772-8109
(607) 772-8124

Rochester
Room 3040
100 State Street
Rochester NY 14614
(716) 263-5866
(716) 263-3173/fax

Buffalo
Room 620
111 West Huron Street
Buffalo NY 14202
(716) 846-4111
(716) 846-4113/fax

Syracuse
Room 841
100 South Clinton Street
Syracuse NY 13261
(315) 423-5471
(315) 423-5185/fax

Fax Transmission

To: Sarah Rosenworcel

Of: WH

Fax: 456-2223

(w) 224-7425 (cell) P6/(b)(6) [001(c)]

From: Ben Lawsky (H) P6/(b)(6)

Pages: 6 + cover

Date: 6/23/2000

Comments: Joel asked me to send this to you. It is entirely incorrect to say that FACE debts are covered by existing law (or the Hyde language). FYI – many money judgments are from findings of contempt, which have no scienter requirement. In addition, many state laws don't have a willful and malicious requirement. I have talking points galore on why existing law and the Hyde language are insufficient. Call me any time if you want more info or if you want to discuss. Ben

CRS

Congressional Research Service • Library of Congress • Washington, D.C. 20540

Memorandum

June 8, 1999

TO : Hon. Charles Schumer
Attention: Glen Shor

FROM : Robin Jeweler
Legislative Attorney
American Law Division

SUBJECT : Proposed amendment to S. 625 dealing with debts incurred through the commission of violence at clinics

---

This responds to your request for an analysis of language proposed as an amendment to S. 625, 106th Cong., 1st Sess. (1999), the Bankruptcy Reform Act of 1999. The proposal, not yet introduced, is entitled "Nondischargeability of debts incurred through the commission of violence at clinics." The apparent intent of the provision is to render nondischargeable in bankruptcy a wide array of liabilities which a debtor may incur from participating in specified antiabortion activities at reproductive health clinics.

Specifically, you have asked, to what extent, if any, this amendment would be encompassed by or is duplicative of the current provisions governing nondischargeability at 11 U.S.C. § 523(a)(6) which prohibits discharge of debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." We conclude, for the reasons discussed below, that the proposal, which would add a new subsection 19 to § 523(a), is far broader in scope and would encompass a far wider range of potential debtor liability than is currently covered by § 523(a)(6).

The new subsection 19 would add a new category of nondischargeable debt:

> that results from any judgment, order, consent order, or decree entered in any Federal or State court, or contained in any settlement agreement entered into by the debtor, including any damages, fine, penalty, citation, or attorney fee or cost owed by the debtor, arising from—
>
> (A) an actual or potential action under section 248 of title 18;
>
> (B) an actual or potential action under any Federal, State, or local law, the purpose of which is to protect—
>
> (i) access to a health care facility, including a facility providing reproductive health services, as defined in section 248(e) of title 18 (referred to in this paragraph as a 'health care facility');or
>
> (ii) the provision of health services, including reproductive health services (referred to in this paragraph as a 'health services');

(C) an actual or potential action alleging the violation of any Federal, State, or local or statutory or common law, including chapter 96 of title 18 and the Federal civil rights laws (including section 1977 through 1980 of the Revised Statutes) that results from the debtor's actual, attempted, or alleged —

(i) harassment of, intimidation of, interference with, obstruction of, injury to, threat to, or violence against any person —

(I) because that person provides or has provided health services;

(II) because that person is or has been obtaining health services; or

(III) to deter that person, any other person, or a class of persons from obtaining or providing health services; or

(ii) damage or destruction of property of a health care facility; or

(D) an actual or alleged violation of a court order or injunction that protects access to a health care facility or the provision of health services.

The new exception to discharge would cover federal and state judgments, orders, decrees and settlement agreements that create debt for a violation of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248; a violation of any federal, state, or local law designed to protect access to health care facilities and/or provision of reproductive health services; a violation of any law, including federal civil rights laws, which results from harassment or intimidation of individuals attempting to provide or receive health services, or causes damage to a health care facility; or, a violation of a court order or injunction issued to protect access to a covered facility.[1]

Clearly, many of the activities that may be the source for nondischargeable liability under the proposed amendment need not have the specific intent required for nondischargeability under 11 U.S.C. § 523(a)(6). Indeed, the scope of the intent requirement under § 523(a)(6) was narrowed significantly by the U.S. Supreme Court's decision in *Kawaauhau v. Geiger*,[2] which held that the "willful and malicious injury" exception is limited to intentional torts, and does not include liability for claims attributable to "negligent or reckless" conduct, such as those involved in the medical malpractice case before it:

> The word "willful" in [523](a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury". Or, Congress might have selected an additional word or words, *i.e.*, "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences* of an act," not simply "the act itself." Restatement (Second) of Torts § 8A, comment a, p. 15 (1964) (emphasis added).[3]

---

[1] The new category would cover actions or "potential actions" or "potential action alleging the violation" of specified laws. Although it is unclear how judicial judgments establishing liability would arise from potential or alleged violations of a law, you indicated in a phone conversation that these factors may be relevant to a settlement agreement. Nevertheless, the implication of establishing nondischargeable liability for potential or alleged violation of law is not considered in this memorandum.

[2] 118 S. Ct. 974 (1998).

[3] Id. at 977 (emphasis in original).

Prior to the Court's decision in *Kawaauhau*, several circuit courts of appeal had found liability for damages for acts of medical malpractice to be nondischargeable under § 523(a)(6).[4] Likewise, before the adoption of § 523(a)(9)[5] rendering nondischargeable liability for damages resulting from a debtor driving while intoxicated (DWI), there was a split among courts as to whether DWI damages were nondischargeable as "willful and malicious."[6]

Nevertheless, *Kawaauhau* instructs that the courts are to limit nondischargeability under § 523(a)(6) to instances where a debtor has committed an "intentional tort," or more specifically, where he or she intended the consequences of the act, not just the act itself. However, the creditor's burden of proof may be further complicated when the underlying judgment establishing the debt does not expressly find the existence of "willful and malicious" injury. A creditor may have to relitigate the "intent" question before the bankruptcy court and address issues such as whether collateral estoppel establishes intent from the underlying judgment,[7] the appropriate degree of intent, and application of state or federal law. All of these issues were raised in *Miller v. J.D. Abrams, Inc. (In re Miller).*[8] There, a judgment creditor brought an adversary proceeding to obtain a determination that a state court judgment against a chapter 7 debtor for misappropriation of proprietary information or misuse of trade secrets was nondischargeable under § 523(a)(6):

> Before we can determine whether the findings of the jury in the state court conclusively determine whether Miller inflicted a "willful ... injury," we must grasp the Supreme Court's insistence on "actual intent to cause injury." The Supreme Court's disposition in *Kawaauhau* certainly eliminates the possibility that "willful" encompasses negligence or recklessness. See *Kawaauhau,* 523 U.S. at ----, 118 S.Ct. at 978 ("We hold that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6).").
>
> At least three remaining readings are possible. The standard might be met by any tort generally classified as an intentional tort, by any tort substantially certain to result in injury, or any tort motivated by a desire to inflict injury. We hold that the label "intentional tort" is too elusive to sort intentional acts that lead to injury from acts intended to cause injury. Rather, either objective substantial certainty or subjective motive meets the Supreme Court's definition of "willful ... injury" in § 523(a)(6). If "actual intent to cause injury" and intentional torts were parallel terms, issue preclusion with respect to willfulness would apply in favor of Abrams. This is because misappropriation of proprietary information and misuse of trade secrets are generally considered to be intentional torts. See, e.g., Micro Data Base Sys., Inc. v. Dharma Sys., Inc., 148 F.3d 649, 653-54 (7th Cir.1998) (Posner, C.J.) ("The misappropriation of a trade secret is an intentional tort."); Restatement (Third) Unfair Competition S 40(b) (defining the scienter requirement for misuse of trade secrets); see also Hyde Corp. v. Huffines,

---

[4] Id. at 976 citing Perkins v. Schargge, 817 F.2d 392 (6th Cir.), *cert. denied*, 484 U.S. 853 (1987); and In re Franklin, 762 F.2d 606 (10th Cir. 1984).

[5] P.L. 98-353, § 371, 98 Stat. 364 (July 10, 1084).

[6] *See* Farmer Ins. Group v. Compos (In re Compos), 768 F.2d 1155 (10th Cir. 1985)(Damages caused by debtor driving while intoxicated are not excepted from discharge under 11 U.S.C. § 523(a)(6). *But see* In re Adams, 761 F.2d 1422 (9th Cir. 1985).

[7] *See* Grogan v. Garner, 111 S. Ct. 654 (1991).

[8] 156 F.3d 598 (5th Cir. 1998), *cert. denied* 119 S. Ct. 1249 (1999).

158 Tex. 566, 314 S.W.2d 763, 769 (1958) (relying on a similar predecessor Restatement definition in defining misuse of trade secrets); American Derringer Corp. v. Bond, 924 S.W.2d 773, 777 (Tex.App.-- Waco 1996, no writ) (following Hyde).

The category of intentional torts, however, is broader. The Supreme Court did specifically refer to intentional torts, noting that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts." *Kawaauhau*, 523 U.S. at ----, 118 S.Ct. at 977. This acknowledgment of a logical association, however, avoids equating 523(a)(6) torts and intentional torts, and with good reason.

Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful. This case illustrates the distinction, since misappropriation of proprietary information and misuse of trade secrets are wrongful regardless of whether injury is substantially certain to occur. See, e.g., Restatement (Third) Unfair Competition § 40(b) cmt. c ("[A]ny exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a 'use' under this section."). Misuse of trade secrets is not precisely like stealing funds from a till, because the tortfeasor's gain is not inevitably a loss to the legal owner of the secret.

Most often, an intentional tort requires either objective substantial certainty of harm or subjective motive to do harm. Indeed, the presence of one of these factors is both necessary and sufficient for a tort to be classified as an " intentional tort" under the traditional modern definition. See Kenneth J. Vandevelde, A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort, 19 Hofstra L.Rev. 447, 447 (1990) (describing "intentional torts" as those where "the defendant acted with the intent to injure the plaintiff or with substantial certainty that his action would injure the plaintiff").

....

Applying this test, we find that willful injury was not decided in the state court suit. If the subjective standard alone were the standard, issue preclusion would give Miller victory because the jury found that he did not act with "malice," defined by the court to include "evil motive." Miller's conduct, however, could still be "willful" under the objective standard, if his acts were substantially certain to result in injury to Abrams. The state court jury determined only that injury was proximately caused by Miller's acts, a less demanding standard than "substantial certainty."[9]

The *Miller* case illustrates the many collateral issues that may come into play when a creditor challenges dischargeability under § 523(a)(6). For this reason alone, even when there may arguably be an overlap between nondischargeability under (a)(6) and another subsection of 523(a), the creditor may benefit from a more broadly defined category by having a substantially lighter burden of proof.[10]

The proposed amendment, at subsection 19(A), appears to address liability derived from a far broader range of activities than intentional torts. First, it renders nondischargeable liability arising under the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. §

---

[9] Id. at 603-4.

[10] This is magnified by the fact that exceptions to discharge are to be construed against a creditor, in favor of the debtor to promote the "fresh start." *See* Grogan v. Garner, *supra*.

248. This federal law protecting access to reproductive health clinics and places of religious worship is narrowly drafted and has a specific intent requirement. It establishes penalties and civil liability, among other things, against whomever "by force or threat of force or by physical obstruction, *intentionally* injures, intimidates or interferes with..." people receiving reproductive health services.[11] As a consequence of the specific intent requirement in order to establish a violation of the FACE Act, it is likely that civil liability incurred thereunder would arise from behavior comparable to an intentional tort and would be nondischargeable under 11 U.S.C. § 523(a)(6). However, by virtue of the specific reference to FACE in the proposed amendment, a creditor would not have to make a special request for a court determination of nondischargeability, as is required pursuant to 11 U.S.C. § 523(c)(1). Nor would the creditor have to prove that the conduct underlying the liability was actually "willful and malicious." Hence, the creditor's burden of establishing nondischargeability for FACE liability would be easier under proposed § 523(a)(19) than under current § 523(a)(6).

Second, proposed subparagraph (19)(B) would make nondischargeable liability for violation of "any Federal, State, or local law, the purpose of which is to protect access to" a specified health care facility, or the provision of reproductive health services. A brief examination of selected clinic access legislation indicates that, in many cases, the standard for violation of a state clinic access statute is less than "willful and malicious injury" as defined by the Court in *Kawaauhau*. For example, Colorado law prohibits a person from "knowingly" approaching within eight feet of another person without his or her consent within 100 feet of a health care facility;[12] in the District of Columbia, it is prohibited for any person to "willfully or recklessly" interfere with access to or from a facility;[13] in Kansas, clinic interference may be "criminal trespass."[14] In many cases, the standard for violation of a clinic protection law does not require the specific intent required for nondischargeability under 11 U.S.C. § 523(a)(6). In other cases, the applicability of (a)(6) will not be clear and may require judicial clarification through litigation.

The third category under subsection (19)(C) addresses various violations of civil rights laws for "harassment of, intimidation of, interference with, obstruction of, injury to," etc. specified health service providers and patients. Again, the state of mind necessary to cause "interference" or "injury" may be short of "willful and malicious" intention to cause injury or damage.

The final category under the proposed amendment covers liability for a violation of a court order or injunction that protects access to a health care facility. No reference is made to intent of the debtor.[15]

---

[11] Emphasis added.

[12] Colo. Rev. Stat. § 18-9-122 (1997).

[13] D.C. Code Ann. § 22-11141.2 (1998).

[14] Kan. Stat. Ann.§ 21-3721 (1997).

[15] *See* Bundy American Corp. v. Blankfort (In re Blankfort), 217 B.R. 138 (Bankr.S.D.N.Y. 1998)(contempt judgment entered against debtor for repeatedly ignoring injunction orders conclusively established "willful and malicious" nature of debtor's acts.)

Proposed subsection (19) would be an action-based, not an intent-based, category of nondischargeable debt based on liability arising from a wide variety of activity in connection with the obstruction of access to reproductive health facilities. A creditor asserting nondischargeability under subsection (19) would have a substantially lesser burden than that of demonstrating that the debtor subjectively "intended" to cause injury, which is required to establish nondischargeability under current subsection (6). Whether the debtor's liability arose from an "intent to cause injury," or was based on "reckless" or "negligent" action will not be germane to a court's determination of nondischargeability under the proposed subsection.

The proposed provision also includes any "fine, penalty, citation, or attorney fee or cost owed by the debtor" among nondischargeable debt in connection with the clinic obstruction. Application of the Supreme Court's reasoning in *Cohen v. De La Cruz,*[16] which interprets nondischargeability of debts arising from obtaining property by fraud under § 523(a)(2)(A), suggests that attorney's fees and punitive damages *should* be included within the ambit of nondischargeable debt under (a)(6). However, to the extent that Congress is creating a new class of nondischargeable debt that is not restricted to intentional torts, there may be value in clarifying that these costs are properly encompassed. On the other hand, express inclusion of these elements under new 19 may be interpreted by the courts to indicate that fines and attorney's fees are *not* encompassed within *other* subsections of § 523(a). Hence, an express articulation in legislative history for the reason for their inclusion and the relationship to other subsections may provide useful guidance for future judicial interpretation of § 523(a).

In summary, proposed section §523(a)(19) would:

- include activity that is not "willful and malicious" under current § (a)(6) as interpreted by the Supreme Court;
- not require a special judicial determination of nondischargeability under § 523(c)(1);
- in cases where there could be an overlap with § 523(a)(6), the creditor would not be required to establish "wrongful intent" by having the court apply principles of collateral estoppel to review the underlying state or federal court judgment.

[16] 118 S. Ct. 1212 (1998).

new Schumer language

Sec. ____ Non-dischargeability of Debts Incurred Through the Commission of Violence at Health Care Facilities:

Section 523(a) of Title 11, United States Code, as amended by section 224 of this Act, is amended –

(1) in paragraph (18), by striking "or" at the end;

(2) in paragraph (19)(B), by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(20) that results from any judgment, order, consent order, or decree entered in any Federal or State court , or contained in any settlement agreement entered into by the debtor, including any damages, fine, penalty, citation, or attorney fee or cost owed by the debtor, arising from –

"(A) an actual or potential action alleging the violation of any Federal, State, or local statutory or common law, including but not limited to violations of section 248 of title 18, that results from the debtor's actual, attempted, or alleged –

(1) harassment of, intimidation of, interference with, obstruction of, injury to, threat to, or violence against any person –

(I) because that person provides or has provided health services;

(II) because that person is or has been obtaining health services; or

(III) to deter that person, any other person, or a class of persons from obtaining or providing health services; or

(ii) damage or destruction of property of a health care facility; or

"(B) an actual or alleged violation of a court order or injunction that protects access to a health care facility or the provision of health services."

CQ MONITOR NEWS

ABORTION PROVISION LIKELY KEY TO SETTLING *BANKRUPTCY* DEBATE

By Sumana Chatterjee, CQ Staff Writer

June 14, 2000 - A bipartisan group of senators will meet Thursday afternoon with Senate leaders to hammer out the last remaining issues on ***bankruptcy*** overhaul legislation, said Senate Majority Leader Trent Lott, Miss.

The legislation (HR 833) is intended to make it more difficult for debtors to use ***bankruptcy*** to walk away from their bills and to force more individuals to work out repayment plans.

Its fate, however, appears to hinge on a provision concerning abortion.

The Senate adopted, 80-17, a provision that would prevent those convicted of violence against abortion clinics or clinic workers from using ***bankruptcy*** filings to escape debts, including civil damages, fines or attorney's fees.

But during conference negotiations, Republicans omitted references to abortion clinics, choosing instead to prohibit the discharge of debts by individuals who make a "willful and malicious threat of serious bodily injury."

Democrats, led by Sen. Charles E. Schumer, D-N.Y., are insisting that the intent of the provision remain in the bill. They are willing to drop references to abortion clinics and broaden it to include violence at all health care facilities. The White House highlighted the Schumer provision as a key factor in preventing a possible veto.

One option a Republican leadership aide suggested was that both provisions be included in the final compromise. That way, Republicans retain their tougher standard, which would cover, for example, environmentalists who target the Northwest lumber industry, and Democrats are able to keep their version, the aide said. Democrats had no comment on the proposal.

· **Other issues.** Negotiators exchanged proposals and counterproposals Wednesday on other outstanding issues.

Two key Democrats offered proposals to change a provision on collecting money for bounced checks. Added to the Senate bill by Judiciary Committee Chairman Orrin G. Hatch, R-Utah, the provision would limit the ability of some debtors to collect attorney fees in lawsuits accusing debt collectors of harassment.

The committee's ranking Democrat, Patrick J. Leahy, Vt., suggested a prohibition on attorney fees in cases where individuals have been convicted of presenting bad checks, said his spokesman David Carle. It is "in keeping with senator Hatch's argument that intends to go after bad actors."

Democratic bill cosponsor Robert G. Torricelli, N.J., offered his own similar proposal that focuses on whether a person writes a bad check "knowingly and with criminal or bad intent."

Republicans are unclear which proposal to consider as the Democratic offer, said a GOP Judiciary aide. They are waiting to see what Minority Leader Tom Daschle, S.D., says about the issue.

On another front, Charles E. Grassley, R-Iowa, and Edward M. Kennedy, D-Mass., have been trading proposals over Republican language to cap at $1 million the amount of Individual Retirement Account or Roth IRA savings that a debtor could shelter from creditors.

Kennedy wants to "specifically target people who have acted fraudulently," his aide said, adding he does not want to discourage people from saving for retirement.

ENFORCING CLINIC PROTECTION LAWS TO THEIR FULLEST POTENTIAL: Amending the Bankruptcy Code to Ensure that Clinic Violence-Related Debts are Non-Dischargeable in Bankruptcy

THE REASONS AN AMENDMENT IS NECESSARY

! Operation Rescue's founder Randall Terry has attempted to use bankruptcy proceedings to avoid paying debts arising from clinic violence -- setting a dangerous precedent that others may follow. After filing for bankruptcy, Terry explained:

$16 mil still in litigation RICO

> I cannot in good conscience permit the National Organization [for] Women, Planned Parenthood and others who have profited from abortion to harass my wife and family, and possibly get money from me to continue their crusade against unborn life. . . . Hence, I have filed a Chapter 7 petition to discharge my debts to those who would use my money to promote the killing of the unborn.

FACE RICO state law

! In late 1999/early 2000, five defendants in the "Nuremberg Files" web site case – Michael Bray, David Crane, Charles Roy McMillan, Donald Treshman, and Charles Wysong – filed for bankruptcy. Each anti-choice activist filed for bankruptcy in the days/hours immediately prior to scheduled depositions in which they would have had to reveal information regarding their assets.

over $100 million

! Anti-choice activists Reverend Robert Behn and Bonnie Behn filed for bankruptcy in March of 1999. Due to her violation of a temporary restraining order, Bonnie Behn owes $35,260 to Buffalo GYN Womenservices -- the clinic of slain abortion provider Dr. Barnett Slepian. The Behns attempted to argue that these debts resulting from clinic violence were dischargeable in bankruptcy. The court, however, refused to discharge the debts.

relitigation

! Ensuring that any judgment or settlement agreement resulting from clinic violence is non-dischargeable is central to enforcing clinic protection laws to their fullest potential. Moreover, such an amendment would be consistent with the Bankruptcy Code's central purpose of providing an "unencumbered new beginning to the 'honest but unfortunate debtor.'" Individuals owing clinic violence-associated debts are *not* honest debtors -- they would not owe such monies were it not for their violations of the law and their harassment, threats, intimidation, and violence against abortion providers and patients attempting to exercise their constitutionally protected rights.

! The Bankruptcy Code's existing exceptions to discharge may not cover all clinic violence-associated debts. Without a specific carve-out for clinic violence-related debts, the bankruptcy proceedings could become extremely protracted, as each individual debt would have to be evaluated for dischargeability. Thus, although some clinic violence-related debts may qualify for non-dischargeability under 11 U.S.C.A. §□□ 523(a)(6) and (a)(7) of the Bankruptcy Code -- which respectively provide that debts resulting from "willful and malicious injury" and fines and penalties payable to the government are non-dischargeable -- *a specific exception to discharge for clinic violence-related debts remains necessary.*

! First, the "willful and malicious injury" exception of □§ 523(a)(6) of the Bankruptcy Code has been the subject of considerable and confusing litigation, and it could allow some clinic-violence associated debts to be discharged. In *Kawaauchau v. Geiger*, the U.S. Supreme Court recently attempted to clarify the intent requirement of this exception. Using the common understanding of "willful" to mean "deliberate or intentional," the Court explained that, in the Bankruptcy Code, the word "willful" "modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. . . . Intentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.'" Thus, for example, if someone bombed a clinic at night believing no one would be there and killed someone inadvertently, damages arising from the unintended death might not qualify under the "willful and malicious injury" exception, although damages arising from the intended harm to the building would come under the exception.

! Second, not all state clinic protection laws track the intent requirements of the "willful and malicious injury" exception as defined by the Supreme Court. The recent Supreme Court opinion on §□ 523(a)(6) construes the intent requirement to mean a "*deliberate or intentional injury*." Massachusetts's clinic violence law has a *knowingly* requirement, while laws in the District of Columbia and Washington require "*willful or reckless*" action. Those guilty of clinic violence under Massachusetts, the District of Columbia, or Washington law should not be able to have their clinic violence-associated debts discharged, nor should victims have to re-litigate the issue of intent.

! Third, some clinic violence-associated debts may arise in the context of settlement agreements, which typically do not include an admission of liability. Without an admission, such debts would likely fail to meet the intent requirement of the "willful and malicious injury" exception, thereby necessitating additional litigation.

! The complexity of some clinic violence cases makes a clinic violence-specific exception to discharge necessary. A single case against an individual may encompass a variety of illegal acts committed over a length of time. A complaint or judgment could involve criminal and civil penalties and fines, punitive and compensatory damages, additional fines resulting from contempt charges, and attorney's fees resulting from the various stages of the case. Moreover, petitioners may face multiple claims under both state and federal law, all with differing intent requirements. Under the existing Bankruptcy Code, parceling out the individual debts and determining whether they fit within the variety of existing exceptions can be a time-consuming process. A single creditor, already overburdened by the litigation created by the debtor's repeated and flagrant violation of the law, could be forced to endure seemingly endless bankruptcy litigation, without the guarantee that such debts ultimately would be non-dischargeable. A specific statutory carve-out would make it easier to exclude such debts from discharge.

! The deterrent effect of clinic violence laws is undermined greatly if bankruptcy provides violent offenders with refuge from payment of damages, fines, and penalties. Criminal laws and civil remedies are created, at least in part, to deter the conduct that they punish. The hope is that, by punishing violence, violence is deterred. However, if awards of damages, fines, and penalties are erased simply by filing for protection under the Bankruptcy Code, the law's deterrent effect is gutted. The Code never was intended to be a safe haven for those who wish to avoid the penalties that the law imposes for violent and illegal acts.

! In cases such as that of Randall Terry, the creditors who would litigate the dischargeability issue for clinic violence-associated debts are the same individuals who, because of the debtor's repeated violations of the law and repeated refusals to cooperate with asset assessment, have been forced to engage in continuous litigation against the debtor. In these instances, a clinic violence-specific exception to dischargeability would provide welcome relief.

! The creation of a specific exception to discharge of debts resulting from clinic violence will not undermine the public policy concerns that motivated the creation of similar protection afforded to other debts, but, instead, will strengthen the Bankruptcy Code's protections for issues directly affecting women. Without in any way minimizing the profoundly important public policy interests that are served by helping individuals collect alimony and spousal or child maintenance or support, it is important to address the similarly important public policy rationales that support a clinic violence-associated debts exception. A clinic violence-related exception to discharge would serve the following public policy interests:

< helping the victims of clinic violence prevent the perpetrators from easily escaping their debts;

< sending a clear message that such debts are not avoidable through bankruptcy

proceedings;

< augmenting the deterrent effect of the federal Freedom of Access to Clinic Entrances Act (FACE) and other clinic protection laws; and

< enhancing the ability of millions of American women to seek abortions free from violence and harassment.

! Amending the Bankruptcy Code to prevent the dischargeability of clinic violence-related debts -- many of which may result from actions under FACE -- will not infringe on any constitutional rights. FACE is constitutional. It *does not* prohibit the free expression of ideas but, rather, prohibits force, threats of force, and physical obstruction -- acts that are not protected by the First Amendment. In fact, FACE explicitly protects expressive conduct, including peaceful picketing or other peaceful demonstration, that is shielded by the First Amendment. In constitutional challenges to FACE, courts repeatedly have upheld the constitutionality of the law. In fact, a November 1998 report by the U.S. General Accounting Office (GAO) identified 24 reported court cases in which the constitutionality of FACE was challenged. *In all 24 of these cases, the courts ultimately found FACE to be constitutional.* Moreover, the U.S. Supreme Court repeatedly has refused to review rulings upholding FACE as constitutional. Thus, the creation of a specific exception to discharge for debts resulting from clinic violence serves the additional purpose of enhancing the effectiveness of a constitutional law -- FACE -- by preventing debtors from escaping debts imposed for violating FACE simply by filing for bankruptcy.

1/19/00

ENFORCING CLINIC PROTECTION LAWS TO THEIR FULLEST POTENTIAL: Amending the Bankruptcy Code to Ensure that Clinic Violence-Related Debts are Non-Dischargeable in Bankruptcy

Many Perpetrators of Clinic Violence Actively Seek to Avoid Paying Fines and Penalties.

! **Perpetrators of Clinic Violence Often Take Actions to Make Themselves Judgment-Proof.** After a verdict of more than $107 million was rendered against the defendants in the "Nuremberg Files" web site case, one defendant admitted: "Many of us have divested ourselves of assets in order they [pro-choice supporters] -- they can't take them away. I will not give any money to people who kill babies for a living."

! **Randall Terry Has Filed for Bankruptcy to Avoid Payment of Over $1.6 Million in Legal Fines and Related Fees Owed as a Result of his Unlawful Activities.** Upon filing Terry explained, "I cannot in good conscience permit the National Organization [for] Women, Planned Parenthood and others who have profited from abortion to harass my wife and family, and possibly get money from me to continue their crusade against unborn life."

! **Five Defendants in the "Nuremberg Files" Case Filed for Bankruptcy in Late 1999/Early 2000 Just Before Scheduled Depositions Regarding their Assets.** By filing for bankruptcy, Michael Bray, David Crane, Charles Roy McMillan, Donald Treshman, and Charles Wysong set a dangerous precedent that others may follow.

Amending the Bankruptcy Code to Ensure that Clinic Violence-Associated Debts are Non-Dischargeable is Both Consistent with the Purpose of the Code and Necessary.

! The Bankruptcy Code provides a fresh start to the "honest but unfortunate debtor." Debtors whose debts arise from clinic violence are *not* honest debtors and they should not be able to escape the financial liabilities incurred by their illegal conduct.

! Although the Bankruptcy Code contains several exceptions to dischargeability which may prevent some clinic violence-related debts from being discharged, existing exceptions may not cover all clinic violence-associated debts.

! A single individual may owe a single creditor a multitude of clinic violence-related debts -- including fines, damages, penalties, and contempt fines -- arising from a variety of illegal activities. Without a specific clinic violence-related debts carve-out, the bankruptcy proceedings could become an extremely protracted and litigious process in which each debt would have to be evaluated for dischargeability.

! The creation of a specific clinic violence-associated exemption would clearly signal Congress's intent that clinic violence debts may not be discharged while providing relief for victim-creditors already pushed to the limit by continuous litigation.

Amending the Bankruptcy Code to Ensure that Clinic Violence-Related Debts are Non-Dischargeable is Vital in Ensuring the Effectiveness of the Freedom of Access to Clinic Entrances Act (FACE).

1/19/00

DO SOMETHING! **Call 1-877-YOU-DECIDE (1-877-968-3324) or log-on to www.naral.org.**
For a complete fact sheet on Enforcing Clinic Protection Laws to Their Fullest Potential: Amending

the Bankruptcy Code, please contact the NARAL information line at (202) 973-3018.

MEMORANDUM

To: Interested Parties
From: Allison Herwitt, NARAL Government Relations Director
Elizabeth Cavendish, NARAL Legal Director
Re: Why Amending the Bankruptcy Code to Ensure that Clinic Violence-Related Debts are Non-Dischargeable in Bankruptcy is Necessary
Date: January 19, 2000

The Bankruptcy Code's existing exceptions to discharge may not cover all clinic violence-associated debts. Without a specific carve-out for clinic violence-related debts, bankruptcy proceedings could become extremely.protracted, as each individual debt would have to be evaluated for dischargeability. Thus, although some clinic violence-related debts may qualify for non-dischargeability under 11 U.S.C.A. §§ 523(a)(6) and (a)(7) of the Bankruptcy Code -- which respectively provide that debts resulting from "willful and malicious injury" and fines and penalties payable to the government are non-dischargeable -- *a specific exception to discharge for clinic violence-related debts is necessary.*

First, the "willful and malicious injury" exception of § 523(a)(6) of the Bankruptcy Code has been the subject of considerable and confusing litigation, and it could allow some clinic-violence associated debts to be discharged. In *Kawaauchau v. Geiger*, the U.S. Supreme Court recently attempted to clarify the intent requirement of this exception. Using the common understanding of "willful" to mean "deliberate or intentional," the Court explained that, in the Bankruptcy Code, the word "willful" "modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. . . . Intentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.'" Thus, for example, if someone bombed a clinic at night believing no one would be there and killed someone inadvertently, damages arising from the unintended death might not qualify under the "willful and malicious injury" exception, although damages arising from the intended harm to the building would come under the exception.

Second, not all state clinic protection laws track the intent requirements of the "willful and malicious injury" exception as defined by the Supreme Court. The recent Supreme Court opinion on□ § 523(a)(6) construes the intent requirement to mean a "*deliberate or intentional injury*." Massachusetts's clinic violence law has a *knowingly* requirement, while laws in the District of Columbia and Washington require "*willful or reckless*" action. Those guilty of clinic violence under Massachusetts, the District of Columbia, or Washington law should not be able to have their clinic violence-associated debts discharged, nor should victims have to re-litigate the issue of intent.

Third, some clinic violence-associated debts may arise in the context of settlement agreements, which typically do not include an admission of liability. Without such an admission, the debts would likely fail to meet the intent requirement of the "willful and malicious injury" exception.

Fourth, many debts resulting from clinic violence are civil contempt fines issued against those who continually violate court orders protecting clinics. Civil contempt fines can be imposed without a finding of willfulness. In fact, courts can levy these fines based on knowing, or even reckless or negligent, violations of court orders. Therefore, some compensatory civil contempt fines currently may be dischargeable in bankruptcy because the exception to dischargeability in 11 U.S.C.A. § 523(a)(6) provides only for non-dischargeability of debts resulting from "willful and malicious" injuries, as opposed to, for example, knowing actions. Because civil contempt fines can be imposed without a finding of willfulness, the contempt allegations would have to be litigated a second time in Bankruptcy Court to determine if, in fact, the conduct underlying the contempt fine caused "willful and malicious" injuries and, therefore, are non-dischargeable under § 523(a)(6). In order to avoid the time-consuming, expensive and uncertain outcome of this needless litigation, the Bankruptcy Code should be amended to ensure that all clinic violence-related debts, regardless of the perpetrators' mental state, are non-dischargeable.

The complexity of some clinic violence cases makes a clinic violence-specific exception to discharge essential. A single case against an individual may encompass a variety of illegal acts committed over a length of time. A clinic violence-related debt could involve criminal and civil penalties and fines, punitive and compensatory damages, additional fines resulting from contempt charges, and attorney's fees resulting from the various stages of the case. Moreover, petitioners may face multiple claims under both state and federal law, all with differing intent requirements. Under the existing Bankruptcy Code, parceling out the individual debts and determining whether they fit within the variety of existing exceptions can be a time-consuming process. A single creditor, already overburdened by the litigation created by the debtor's repeated and flagrant violation of the law, could be forced to endure seemingly endless bankruptcy litigation, without the guarantee that such debts ultimately would be non-dischargeable. A specific statutory carve-out would make it easier to exclude such debts from discharge.

In sum, despite the protections of the Bankruptcy Code, it remains imperative that Congress close these potential loopholes, especially in light of the contumacious statements by perpetrators of clinic violence that they have no intent ever to pay their debts.

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001d. memo	Betsy Cavendish to Sarah Rosen re: phone number (partial) (1 page)	06/24/2000	P6/b(6)

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21195

FOLDER TITLE:
Bankruptcy - Schumer Abortion Legislation Letter to Congress

2012-0254-S
rc655

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

PLEASE DELIVER IMMEDIATELY.

P6/(b)(6) [001d]

TO: Sarah Rosen, NEC
FR: Betsy Cavendish (cell)
Re: Bankruptcy amendment questions
6/24/00

Per your R...

Q: (A) Does current law prevent discharge of these debts?

A: Perhaps some, but not all. Current law allows for discharge of debts acquired through wilful + malicious conduct.

Not all the debts covered by the Schumer Amendment would satisfy this standard, and satisfying it in other cases would require relitigation of intent.

For example, many clinic violence debts accrue as a result of violations of injunctions. Such violations are basically strict liability offenses -- no level of intent is required. That is, once a judge says to a convicted clinic blockader "stay away from that clinic or I'll fine you $100/day" + the protester goes daily, the fines accrue.

Other examples – the Schumer language would cover violations of state clinic protection laws. Not all state laws have an intent standard that is equal to or greater than wilful – malicious.

The Supreme Court has interpreted wilful – malicious in the context of bkrtcy so as to cover a narrow class of cases – not that the bankruptcy petitioner wilfully engaged in the conduct leading to the debt, but wilfully & maliciously intended the harm that ensued. Kawaauhau v. Geiger. So imagine an incident where someone bombs a clinic at night, thinking erroneously that the facility would be vacant, but a guard is killed. Only the debts arising from the arson, & not the death, would be dischargeable under current law.

Finally, to give one more example of probs w/ current law, not all judgments are disaggregated into all their constituent pieces, with specific findings regarding intent each component. Therefore, relitigation of intent & lack of res judicata would be the rule, not the exception, under current law.

(B) Q: Did CRS issue an opinion that current law covers the debts identified in Schumer/Nadler?

A: It issued an opinion finding loopholes, like the ones I described above, in current law. I believe it came out shortly before the House Judiciary M/U where the amendment was considered, but maybe it was shortly before Senate M/U. CRS is on NARAL/Schumer/WH side of this one in the

(C) I believe the case you're referring to was that of the Bennys, who were unable to discharge their debts under current law.

Still, the wilful + malicious language has generated satellite litigation, litigation beleaguered clinics + victims shouldn't have to endure. Congress should once for all put a stop to perpetrators trying to evade their debts by seeking discharge through bankruptcy.

Thanks for checking in — this is so important. You know that six of 12 Nuremberg Files case defendants have now declared bankruptcy — each on the eve of asset depositions or before execution of garnishment. These are the characters who brought us the website where murder victims' names were crossed out.

Henry Hyde is trying to strip out Schumer or render his amendment meaningless. Hyde testified as a character witness in the clinic terrorism trial in Chicago in 1998 on behalf of Joseph Scheidler. Hyde was adamantly opposed to FACE from the outset + he wants to render it toothless by letting the perps escape their debts. After all his yammering about the rule of law during impeachment, we can't let him get away with shielding these lawbreakers.

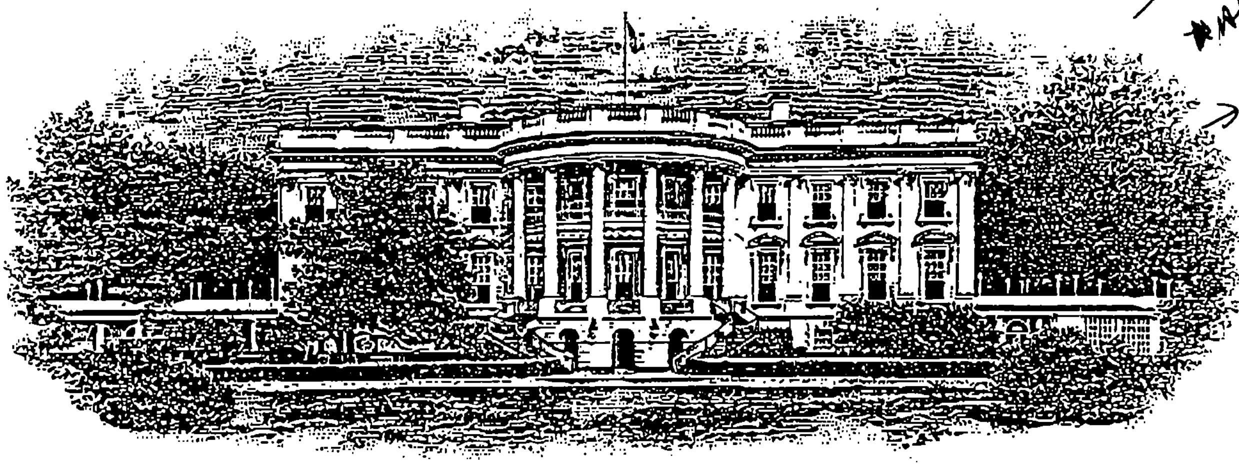
THE WHITE HOUSE

WASHINGTON

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF THE CHIEF OF STAFF

Hyatt
312-567-1234
lobby 1/2
Alcon Hernita
973-3012



Please Deliver To: Gene Sperling / Sarah Rosen Wartell

Fax Number: 6-2878, 6-2223

Sender: Rachael Goldfarb

Date: 6/23/00

Pages Including Cover: 5

Message: John asked Sarah for an analysis of Biden's arguments. He'd like a 1-2 pg. memo by Sunday PM on it.

NOTE: The information contained in this facsimile message is CONFIDENTIAL and intended for the recipient ONLY. If there is any problem with this transmission or you mistakenly received this facsimile, please call (202) 456-6798. Thank You.

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001e. memo	Chuck Brain to the President re: Senator Biden (partial) (1 page)	06/23/2000	P6/b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Heather Howard (Subject Files)
OA/Box Number: 21195

FOLDER TITLE:

Bankruptcy - Schumer Abortion Legislation Letter to Congress

2012-0254-S
rc655

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE

WASHINGTON

'00 JUN 23 PM2:45

June 23, 2000

MEMORANDUM TO THE PRESIDENT

FROM: **CHUCK BRAIN** CMB

SUBJECT: SENATOR BIDEN

Senator Biden has called for you several times and wishes to speak to you regarding the bankruptcy reform bill. Senator Biden has significant concerns with the possibility of you sending a veto message for this bill. Please find attached a copy of a letter that he sent to you yesterday outlining his concerns with your possible veto.

The Senator can be reached at home today at the following number: P6/(b)(6) [001e] P6/(b)(6) or through his Chief of Staff, Alan Hoffman, at (202) 224-0123 (office number) or P6/(b)(6) (home number).

JOSEPH R. BIDEN, JR.
DELAWARE

United States Senate

WASHINGTON, DC 20510-0802

June 22, 2000

William Jefferson Clinton
The White House
Washington, D.C.

Dear Mr. President,

I know that you are considering sending a veto message on the bankruptcy reform bill. I assume that you have been told a number of things to justify sending such a message. I hope that you will consider a few facts that I would like to point out. In addition, I have attached a rebuttal, that I delivered on the Senate floor, of the recent Time Magazine that has been widely discussed.

1) I opposed the House bill, and told the credit industry that unless they agreed to four substantive changes, I would work to defeat the Senate bill. These items were among the very points that you have consistently raised regarding the bill. I told them the Senate bill must have:

a) PROTECTIONS FOR LOW-INCOME FAMILIES: A strong safe harbor protects those under median income from the means test that will determine access to Chapter 7. The Safe Harbor includes an additional protection -- at the insistence of the White House -- for filers between 100 and 150 percent of the median income.

b) CLEARER DISCLOSURE OF THE TERMS OF CREDIT CARD LOANS: The amendment I cosponsored survived in conference; it imposes new requirements on credit card issuers to inform their customers of the real impact of making minimum payments.

c) STRONGER PROTECTIONS AGAINST ABUSIVE REAFFIRMATIONS: White House staff negotiated the version that prevailed, although credit unions were granted an exemption in conference.

d) PROTECTIONS FOR FAMILY SUPPORT PAYMENTS: Under the conference agreement, child support and alimony payments are the highest priority debts to be paid in bankruptcy. Family support payments must be paid before a bankruptcy can be discharged. These are much stronger protections than under current law.

In the Judiciary Committee, and in amendments on the Senate floor, I joined with my Democratic colleagues to get those changes in the bill that passed the Senate at the beginning of this session by the strong bipartisan margin of 83 - 14.

... reduce interest cost.

2) I support – and I think you should support – this bill, because, as Larry Summers has said, it has the potential to remove billions of dollars in waste in our financial system. Removing this burden – and, I might add, raising the standard of personal responsibility – is good public policy. It can free up resources and make credit more widely available and more prudently used.

3) In addition to those primary changes that we accomplished in the original Senate bill – and that were preserved in the informal conference – you identified, in your letter of June 9, five remaining issues that you wanted to see adequately resolved. The status of these issues is:

a) HOMESTEAD EXEMPTION: The conference agreed – with the support of the chief Democratic advocate of homestead reform, Senator Kohl – on a two-year residency requirement that would eliminate the worst form of abuse, that has been the focus of the most concern: the last-minute sheltering of assets through the purchase of an expensive home. Senator Kohl also succeeded in eliminating a loophole in that requirement that was under debate at the time of your letter. This is not all that we sought in the Senate bill, but it closes the most widely criticized loophole in the current system.

b) CREDIT CARD DISCLOSURE: The conference retained the Senate provision, that requires credit card issuers to provide additional notice and to maintain a 1-800 number for their customers to get information on the amount of time it will take to pay off their account if they make only the minimum payment. The conference provided that institutions with under $25 million in assets would, for two years, have the Federal Reserve maintain that service. For customers, that provision would have no effect on their ability to learn about the implications of making minimum payments.

c) PENSION PROTECTIONS IN BANKRUPTCY: Under the same logic that argues against unlimited exemptions for homesteads in bankruptcy, the conference agreement includes a cap of $1 million on the amount of an IRA that is exempt from creditors in bankruptcy. That amount is indexed for inflation and the cap can be waived by a judge in the interest of justice. At the request of Senator Kennedy, small business pensions, 401(k)'s, and rollovers into IRA's are exempt from the cap. I know that many people think that pensions should be treated differently from all other assets, but this is a much higher and more flexible cap than was imposed on homesteads – a cap that most critics of the current code support.

d) FAIR DEBT COLLECTION PRACTICES: This is an issue that was not in either House or Senate bill, and would weaken current protections against abusive collection practices by limiting a defendant's ability to collect attorney's fees in an action against an abusive debt collector. While this objectionable provision remains in the conference at this time, Senator Lott has said that he would insist on its removal if that would prevent a veto.

e) SCHUMER AMENDMENT ON CLINIC VIOLENCE: The conference has accepted language that would prohibit the discharge of debts in bankruptcy that were incurred in settlements against perpetrators of "willful and malicious" acts against family planning clinics. I do not want to second guess your judgement on this issue, but I firmly believe that the additional language of the Schumer amendment is not needed. The fact is that current law prevents the discharge of such settlements. Our legal staff at the Congressional Research Service has informed us that any violations of the FACE Act would not be dischargeable. And finally, in a recent case our of the Bankruptcy Court for the Western District of New York it was ruled that even a settlement that was the result of the violation of a restraining order, which was not violent and did not result in direct harm, was not dischargeable. As important as this issue is for many people, I do not agree that family planning clinics will be without protection or without recourse if the Schumer amendment is not part of the final agreement.

One last fact needs stressing, Mr. President. The key changes in this bill affecting access to Chapter 7 will affect less than 10 percent of bankruptcy filers. This is not a root-and-branch rejection of the current code. Like most legislation that is the product of a protracted bipartisan process, it makes small changes.

Mr. President, this is not perfect legislation. In some areas, it leans too hard on debtors; in others, it is too easy on creditors. But it is not the punitive, draconian measure that some of its detractors have misleadingly portrayed. It is an attempt to restore some balance to a bankruptcy code in which the debtor is currently granted the benefit of almost every doubt. As someone who supported your historic welfare reforms, I ask you to consider the need for tightening, at the margins, the requirements for personal responsibility in this area, as well.

Thank you for considering my opinions on this important legislation. I am confident that if this legislation gets a fair and objective hearing, it will have the strong support of Congressional Democrats, and your approval, as well.

Sincerely,

JB Biden

Joseph R. Biden, Jr.
United States Senator

SEC. 326. NONDISCHARGEABLE DEBTS FOR THREATS OF SERIOUS BODILY INJURY.

Section 523(a) of title 11, United States Code, is amended—

(1) in paragraph (18), by striking "or" at the end;

(2) in paragraph (19B), by striking the period and inserting "; or"; and

(3) by adding at the end the following—

"(20) that arises from any judgment, order, or decree entered by a Federal or State court for ~~an intentional~~ a willful and malicious threat of serious bodily injury against an individual~~, or violence against an individual by a debtor~~".

SEC. 327. SHARING OF COMPENSATION.

Section 504 of title 11, United States Code, is amended by adding at the end the following:

"(c) This section shall not apply with respect to sharing, or agreeing to share, compensation with a bona fide public service attorney referral program that operates in accordance with non-Federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals.".

SEC. 328. FAIR VALUATION OF COLLATERAL.

Section 506(a) of title 11, United States Code, is amended by adding at the end the following:

the white house

June 25, 2000

MEMORANDUM TO THE PRESIDENT

FROM: GENE SPERLING
SARAH ROSEN WARTELL

SUBJECT: RESPONSE TO BIDEN LETTER ON BANKRUPTCY

CC: JOHN PODESTA

Below is a brief summary of four basic issues that relate to Senator Biden's letter to you. Following the brief summary is more a detailed analysis of each issue.

I. Brief Summary

1. **Fair Debt Collection Practices Act Amendment:** Senator Biden asserts that Senator Lott intends to drop this provision, if it will avoid a veto. While we have heard similar rumors, we have no assurance that it will happen. Moreover, if the rumor is true, it seems necessary for you to indicate that you will veto over the issue to get Senator Lott to drop the amendment. As we wrote in our earlier memo, this is an especially pernicious provision that has not received any public scrutiny, as it was in neither bill and only added in conference. All the major consumer groups wrote Congress on Friday to express their strong opposition to its inclusion.

2. **Homestead Exemption:** Senator Biden acknowledges that the homestead exemption language in the final bill is not all that we would have sought. He suggests that, because Senator Kohl -- the amendment's original sponsor -- is satisfied, we should be too. The final provision does make it more difficult to move to Texas or Florida on the eve of bankruptcy to benefit from their uncapped homestead exemptions, but it does nothing to prevent a wealthy longtime Texan or Floridian from shielding assets from their creditors in the form of extravagant homes. Under the bill, both moderate-income debtors and their wealthier counterparts will be required to devote a portion of their future earnings for five years to repay their debts; but some will be able to do so while retaining great wealth in their homes. Others (in other states or renters) will be left penniless, liquidating whatever assets they have. That seems fundamentally unfair.

3. **Clinic Violence:** Senator Biden argues that the additional language of the Schumer amendment is not needed. It is true that some judgments that result from clinic violence may be nondischargeable under current law; but there is no doubt that the Schumer amendment would address "a far wider range of potential debtor liability than is currently covered" (Congressional Research Service) and would reduce the litigation barriers that are now being placed before those seeking to collect multi-million dollar judgements against clinic violence defendants. Moreover, the new language that Chairman Hyde offered and the Republicans intend to include will give rise to new questions about what standard of proof Congress intended before a victim can block the discharge of such debts, miring clinic violence victims in yet more litigation.

Whatever legal ambiguity may exist, there is none in the minds of the abortion rights community. They are deeply offended that so many of those who have been found liable for acts of clinic violence and intimidation have repeatedly sought refuge in the bankruptcy system. Similarly, anti-abortion activists and Chairman Hyde have starkly refused any meaningful compromise on the issue, signifying its growing symbolic importance to the broader abortion rights fight. If you signed a bill that failed to include some language to accomplish the goals of the Schumer amendment, the pro-choice community would harshly criticize your decision.

4. **Overall Balance in the Bill:** While we have focused on outstanding amendments, most of your advisors find the basic underlying bill to be unbalanced and unsatisfactory. We agree that requiring debtors with the capacity to repay their debts to do so could lower interest rates, benefiting many Americans, and would be consistent with your emphasis on personal responsibility; however, most of the debtors filing for bankruptcy do not have the capacity to repay and are not abusing the system. A far more balanced bill could have been drafted to accomplish our shared goals without slanting the playing field in many small ways against all debtors. While the improvements that Biden and we achieved in the Senate and conference make this bill better than the flawed House bill, we made significant compromises and lost as often as we won. (See details below.) The lack of balance in the underlying bill remains deeply troubling to the majority of your advisors. (We should note that Secretary Summers has a slightly different view. He agrees that this is not the bill that we would have written and that you should threaten veto pointing to the clinic violence, debt collection, and homestead issues. But he also believes that the remainder of the bill is not sufficiently flawed to justify a veto on the merits, attentive as he is to the economic benefit of lower interest rates that may result from somewhat lower debt write-offs by creditors.)

Finally, we note that Senator Biden has long pressed for bankruptcy reform, perhaps in part because of the strong interest of credit card companies headquartered in Delaware. In fact, the final bill that we now face is the product of an intense lobbying campaign by the credit industry. Many in Congress support or feel compelled to support this bill.

II. Further Analysis

1. **Fair Debt Collection Practices Act (FDCPA):** The FDCPA provides essential protections for consumers from abusive practices by debt collectors including: invasions of privacy, harassment, false or deceptive representations, and unconscionable collection methods. For example, it precludes late night and repetitive phone calls, leaving a message with your employer that you are delinquent on your debts, and false threats of legal action. There was nothing about the FDCPA in either the House or Senate bill, but in Conference Senator Hatch has insisted on a provision that would eliminate attorneys fee awards for violations of the FDCPA, if the defendant is collecting bounced checks rather than other defaulted debt.

   This is a pernicious provision because it could give check collectors de facto rein to intimidate and harass lower-income debtors, knowing that their financial position would prevent them from hiring counsel. The FTC has made clear that there is no policy justification for treating check collectors and other debt collectors differently. Abuses occur in both areas. Moreover, private remedies are an essential aspect of the enforcement scheme under the FDCPA. If a debtor, in financial difficulty, is unable to recover the cost of legal representation from those who are grossly abusing their rights, they will never be able to vindicate those rights. Senator Torricelli suggested a minor change, which the Republicans accepted, that limits attorneys' fees to cases where the debtor can prove that he or she had no intent to defraud. But we agree with Senators Leahy and Sarbanes that such a standard is impossible to prove.

2. **Homestead Exemption:** Senator Biden is largely correct that the language in the bill would prevent a galling form of abuse -- the "last-minute sheltering of assets through the purchase of expensive homes." (Consumer activists believe that, in fact, wealthy debtors will be able to use various techniques to postpone bankruptcy long enough so that the two-year window will not prevent, only limit, the sheltering of assets by wealthy debtors moving their residence to a State with an unlimited homestead exemption.) The language in the final bill does not address our more fundamental concern: does the bill treat moderate-income debtors and wealthy debtors equitably?

   The Washington Post recently ran an editorial entitled "The Rich Win." They wrote:

   > "Bankruptcy reform involves balancing two principles. Debtors must not be allowed to use the law to avoid repaying loans when they can actually afford to do so; on the other hand, debtors should not be forced into serious hardship. The reform in Congress probably will increase hardship: It toughens the rules for ordinary debtors, most of who declare bankruptcy not out of irresponsibility but because of catastrophic medical bills, unemployment, or divorce. At the same time, the reform does too little to clamp down on an egregious loophole known as the homestead exemption, which is used by wealthy debtors."

   The editorial goes on to argue that the minor limitations in the bill on homestead exemptions "won't have much effect." The Post is largely right. A debtor, who has resided in a $10 million, mortgage-free estate in Florida for more than two years, can file for bankruptcy. The wealthy debtor will be allowed to continue to live in that lavish home. However, a moderate-income, Florida resident who rents her home and files for bankruptcy to discharge overwhelming credit card or medical debts, may be forced to move, if her rent is more than allowed under the new formula, based on median area housing costs, that will determine how much of her debt she must repay over the next five years.

3. **Clinic Violence:** Senator Bidden asserts that current law prevents the discharge of judgements stemming from violations of the FACE Act and the Schumer amendment is not needed. While he is arguably right about the former point, the goals of the Schumer amendment were broader and are not fully accomplished by current law or new language proposed by Chairman Hyde.

   The Problem: Under current law, a debtor cannot discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." The Supreme Court has interpreted this "willful and malicious" standard strictly. It held in Kawaauhau v. Geiger, 118 S. Ct. 974 (1998), that the "willful and malicious injury" exception is limited to intentional torts and does not include liability for claims attributable to "negligent or reckless" conduct. Specifically, the Court held that the word "willful" modifies "injury" so that intentional behavior that was not intended to cause injury is not sufficient. Id. at 977. For example, imagine that an activist were to bomb a clinic at night, thinking the facility were vacant, but a security guard was killed. The activist's liability for the physical property damage would be nondischargeable, under current law, but not their liability for the wrongful death of the guard.

   This is not merely a theoretical question for the abortion rights community. Numerous anti-abortion activists found liable for clinic violence and intimidation have filed for bankruptcy and sought to discharge their debts. Six of the 12 "Nuremberg Case" defendants (who posted abortion doctors' names on a website and then crossed out the names of those who were murdered) have now filed for bankruptcy. Each was jointly and severally liable for a judgement of over $100 million. Each filed on the eve of efforts to identify their assets or garnish wages, so as to collect on that judgement. (These cases are still in litigation, so the outcome is not yet clear.) Similarly, Operation Rescue's Randall Terry said, after a judgement was entered against him:

"I cannot in good conscience permit the National Organization [for] Women, Planned Parenthood and others who have profited from abortion to harass my wife and family and possibly get money from me to continue their crusade against unborn life.... Hence I have filed a Chapter 7 petition to discharge my debts to those who would use my money to promote the killing of the unborn."

Schumer's Proposal: The Schumer amendment, adopted by the Senate by a vote of 80-17, would have made nondischargeable any debt that resulted from a judgement, order, consent decree, or settlement agreement (including damages, fines, penalties, costs, or attorneys fees) arising from: (a) FACE Act actions; (b) violations of Federal, State or local law designed to protect access to health care facilities and the provision of health services; (c) violations of any law resulting from actual or attempted harassment, intimidation, interference with, obstruction of, injury to, threat to, or violence against any person who provides or receives health services or that deters a person from obtaining or providing health services; (d) violations of any law resulting in damage to a health care facility; or (e) violation of a court order or injunction protecting access to health care facilities.

The Hyde Alternative: Chairman Hyde proposed an alternative that would make nondischargeable debts "that arise from any judgement, order, or decree entered by a Federal or State court for a willful and malicious threat of serious bodily injury against an individual." Abortion rights activists believe this adds little to current law, because it reiterates the high "willful and malicious" mental state requirement and only involves threats of serious bodily injury.

Analysis:

(1) ***It is true that FACE Act violations would likely be found nondischargeable under current law.*** The FACE Act also has an intent standard. It imposes liability on those who "by force or threat of force or by physical obstruction, <u>intentionally</u> injures, intimidates, or interferes with" the provision of reproductive health services. Therefore, as the Congressional Research Service (CRS) concludes, it is likely that liability under the FACE Act would only be found, if there was an intentional tort of the kind that existing law already covers.

(2) ***The Schumer amendment, however, would make it easier to prevent discharge of FACE Act judgements and reduce litigation:*** CRS also found that it would be "easier" for the clinic violence victim to establish that FACE Act liability should be nondischargeable under the Schumer amendment than under current law. Under current law, they must make a special request for a court determination of nondischargeability and prove that the conduct underlying the liability was actually "willful and malicious."
Neither would be required under Schumer. Abortion rights advocates argue that beleaguered clinics and victims should not have to endure yet more litigation and cost when trying to assert their lawful claims.

(3) ***The Schumer amendment would cover many other types of clinic access judgements not nondischargeable under current law.*** The Schumer amendment sought to address discharge of a range of penalties that would not meet the "willful and malicious" standard of current law or the Hyde proposal. In fact, the CRS analysis to which Biden refers says that Schumer's amendment "is far broader in scope and would encompass a far wider range of potential debtor liability than is currently covered by [current law]." For example:

(a) *Injunctions:* Many clinic access debts accrue as a result of violations of injunctions. Such violations are strict liability offenses. If a court tells a protestor to stay away from a clinic, fines accrue for each day he or she protests without further inquiry into intent. The Schumer amendment would have made such debts nondischargeable.

(b) *State Clinic Access Laws:* Similarly, the Schumer amendment would have made nondischargeable debts under those State clinic protection laws that have no intent standard or one that is not as high as "willful and malicious."

(c) *Violations Meeting Only a Lower Standard for State of Mind:* The Schumer amendment also would have made nondischargeable judgements for "harassment of, intimidation of, interference with, obstruction of, [and] injury to" clinic health service providers. CRS concluded "the state of mind necessary to cause "interference" or "injury" may be short of the "willful and malicious" intention to cause injury or damage required under current law."

Political Environment: Abortion rights activists argue that Chairman Hyde, who testified as a character witness in a 1998 clinic violence trial, was adamantly opposed to the FACE Act from the outset. They believe he is working now with anti-abortion forces to let perpetrators escape liability for the very same types of acts that the FACE Act was intended to address. They view this as a major battle in the fight to preserve reproductive freedom.

4. **Balance in the Underlying Bill:** Senator Biden cites four provisions that are included in the final bill. Each is an important improvement over earlier versions, but none represents the balanced approach that your Administration sought for three years.

(a) ***Protections for Low-Income Debtors:*** The final bill includes a "safe harbor" that protects those under median income from motions by creditors alleging their use of Chapter 7 is abuse. It is not, however, complete protection from the means test. The below-median income debtors must still provide the detailed financial information on income and expenses and an analysis of their capacity to repay their debts. Moreover, U.S. bankruptcy trustees are required to scrutinize their capacity to repay under the means test. While the trustees believe that they will find few of these low-income debtors must be moved to Chapter 13, it is not the complete "safe harbor" from the means test that the Administration (and even Chairman Hyde) sought. Moreover, there are new filing and counseling requirements that apply to all debtors that are intended to create disincentives for debtors to file for bankruptcy.

(b) ***Clearer Disclosure of the Terms of Credit Card Loans:*** The disclosures required will tell a debtor that: "Making only the minimum payment will increase the interest you pay and the time it takes to repay your balance." The disclosure also will include a generic example, although the numbers in the example will not relate to their individual circumstances. They also will be advised of an 800 number that they can call to find out how long it will take to repay their debt making only the minimum payment. We had supported a Durbin amendment that was included in the Senate bill from the previous Congress, which would have required the credit card company to calculate for each debtor not only the duration of payments but also what they would pay over time based on their particular situation. (For example: "If you make only the 2% minimum monthly payment on your balance of $____ [debtor's actual balance] at an interest rate of __% [debtor's actual interest rate] it would take __months to repay the balance in full and you would pay in total $____.") Creditors resisted calculating the precise period for each debtor, complaining about the programming costs, and fought any effort to have the debtor advised (even the few who will call the 800 number) of the total amount they would repay.

(c) ***Stronger Protections against Coercive Reaffirmations:*** The Administration did fight for and win inclusion of a new disclosure that all debtors must receive before they can reaffirm a debt. However, the form we proposed (used in about 10% of districts today) was rejected and a far less comprehensive form was substituted. Thus, while we won broader use of mandatory disclosures, we compromised significantly on the information provided. In addition, we had initially sought judicial scrutiny of all such reaffirmations; we eventually had to agree to scrutiny only of those where analysis suggests that the debtor has no capacity to repay the debt reaffirmed. Thus, courts may not find other debtors who are being coerced into reaffirming their debts, where the debtor has some limited capacity to repay but a legal right to discharge that debt. Moreover, to get any judicial scrutiny, we had to agree to language that consumer advocates believe will provide many new defenses to creditors whose collection practices are being challenged.

(d) ***Protection for Family Support Payments:*** In response to the First Lady's powerful arguments two years ago, this bill does contain provisions that should provide greater protection for child support and alimony in bankruptcy than does current law. However, she raised the issue because the bill made a wider class of credit card debts nondischargeable and those new nondischargeable debts would compete with child support and alimony. While child support and alimony is now largely although not completely protected), the new classes of nondischargeable credit card debts also survived (although somewhat narrower than initially proposed. Thus, for example, any debtor filing for bankruptcy will be unable to discharge credit card cash advances above $750 incurred in the final 70 days before bankruptcy, even if those advances were used to feed, clothe, or shelter a family juggling overwhelming debts. While the goal of the change is to target those who abuse the system by running up debts before a bankruptcy filing, it will actually reach many debtors innocent of such intent.

In addition to the provisions that Senator Biden mentions, there are other provisions in this bill that are a far cry from the provisions that we thought fairly balanced competing equities. For example:

(e) ***Judicial Discretion to Consider Individual Circumstances in Applying the Means Test:*** Under current law, a court can deny a person access to Chapter 7 discharge if they find that the debtor's filing constituted substantial abuse.
The presumption is in favor of the debtor's filing. If it is abuse, the debtor must file under chapter 13 and repay what they can for 3 years. Under the final bill, if a debtor has the capacity to repay 25% of their debts or $10,000, which ever is lower, over 5 years, they must file under Chapter 13 and repay for 5 years before the remainder of their debt is discharged. Allowable expenses are determined by rigid allowances that specify how much one can spend for housing, food, clothing, transportation, etc. (The IRS previously developed these formula expenses to be used as "guidelines" – not caps -- for tax collection. Even Chairman Hyde agreed with us that we should develop bankruptcy specific standards.) The court can only vary from those allowances if they find "special circumstances that justify additional expenses with no reasonable alternative." The Administration had sought far greater judicial discretion to determine where abuse existed and where a person's existing pattern of spending was reasonable. For example, a debtor may choose to live in a more expensive area in order to be close to a family member who provides free and safe daycare for young children. However, the formula allowances will not pay for such high housing costs, but would pay for actual day care expenses. Thus, the rigid formula could have the unreasonable effect of forcing someone to move away from family to lower housing costs and put their children in unfamiliar, more expensive day care, and actually could result in less money available to repay creditors.

(f) ***Household Goods Protected from Creditor Seizure:*** Under current law, creditors who take a blanket lien in goods purchased with their credit (e.g., Sears) can seize or threaten to seize their collateral to compel repayment; however, debtors may avoid liens on, inter alia, "household goods." The final bill spells out precisely what goods one can protect from seizure. For example, it specifies one radio, one television, and one personal computer only if used primarily for the education or entertainment of minor children. It seems to many that such a precise list is unnecessary. A court can determine when a debtor wants to protect luxury goods and when they want to protect the reasonable contents of their family's home. But creditors argued that pro-debtor bankruptcy judges could not be trusted. We also argued that such goods rarely retain significant resale value. The primary reason for a creditor to threaten to seize such goods is to compel the debtor to find the resources to repay or to reaffirm a debt that otherwise they would be legally entitled to discharge. Consumer advocates fear that creditors will use the new limitation to intimidate debtors.