UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 50 | Number 3 Article 8

4-1-1972

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Sidney L. Cottingham

each and every activity the dealer undertakes, and the sale and repair of a used vehicle would seem to be on the borderline. Likewise, sending the passenger's (Giaccio's) case to the jury without any showing of reliance on his part seems unjustified under traditional approaches to apparent authority. Whatever the jury outcome on remand (assuming *Gizzi* is not later overturned), the Third Circuit has now cracked the door that had barred from the jury plaintiffs suing oil companies under theories of apparent authority and agency by estoppel. In so doing, it has removed the greatest obstacle to recovery from the oil companies under those long dormant theories.

CHARLES R. BRITT

Bankruptcy—Filing Fee Subjected to Constitutional Test

In 1892 Congress faced "the question whether this Government, having established courts to do justice to litigants, will admit the wealthy and deny the poor entrance to them."[1] Congress responded by enacting an in forma pauperis statute granting indigents access to federal courts without prepayment of fees or costs.[2] When Congress later adopted the present Bankruptcy Act in 1898,[3] it made specific provision for an in forma pauperis proceeding.[4] This allowed an indigent debtor[5] to file a voluntary petition in bankruptcy and receive a discharge from his debts without payment of the filing fee. In 1946, however, Congress

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[1]H.R. REP. NO. 1079, 52d Cong., 1st Sess. 1 (1892).

[2]Act of July 20, 1892, ch. 209, 27 Stat. 252 (now 28 U.S.C. § 1915(a) (1970)). For a general discussion of this statute, see Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966).

[3]Bankruptcy Act of 1898, ch. 541, 30 Stat. 544.

[4]Bankruptcy Act of 1898, ch. 541, §§ 40a, 51(2), 30 Stat. 556, 558; General Order 35(4), 172 U.S. 665 (1898). The General Orders in Bankruptcy, adopted by the Supreme Court in 1898 pursuant to § 30 of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 554, are designed to explain, amplify, and apply the provisions of the Bankruptcy Act and have the full force of law except as they conflict with the Act. The General Orders may be found as amended to December 31, 1970, in the appendix to 11 U.S.C. (1970).

[5]The in forma pauperis provision in the Bankruptcy Act from the beginning seems to have been generally interpreted as meaning that a pauper is one totally without assets and available credit. *See, e.g., In re* Medearis, 291 F. 709 (W.D. Tex. 1923); *In re* Collier, 93 F. 191 (W.D. Tenn. 1899). However, somewhat different standards of indigency were applied in Sellers v. Bell, 94 F. 801 (5th Cir. 1899), and *In re* Plimpton, 103 F. 775 (D. Vt. 1900). *See* 2 COLLIER ON BANKRUPTCY ¶ 51.04, at 1876-77 (14th ed. 1971). For a general discussion on in forma pauperis petitions in bankruptcy, see Shaeffer, *Proceedings in Bankruptcy in Forma Pauperis*, 69 COLUM. L. REV. 1203 (1969).

abolished these pauper petitions in bankruptcy[6] and added a provision allowing the petitioner to pay the filing fee in installments over a six- to nine-month period.[7] Congress further provided that all installments must be paid in full before the bankrupt is eligible for a discharge.[8] In a recent district court case, *In re Kras*,[9] the validity of this mandatory fee scheme was successfully challenged on due process grounds.[10]

At present, a filing fee of fifty dollars must accompany each voluntary bankruptcy petition. This figure represents the sum of three separate filing-fee provisions found in the Bankruptcy Act: section 40c(1)[11] provides that a thirty-seven dollar filing fee shall go into the Referees' Salary and Expense Fund;[12] section 48c[13] provides that a filing fee of ten dollars shall be paid to the trustee of the bankrupt's estate for the

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[6]Act of June 28, 1946, ch. 512, 60 Stat. 323. Congress abolished the pauper petitions in bankruptcy by deleting § 51(2) of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 558; General Order 35(4), 172 U.S. 665 (1898).

[7]Act of June 28, 1946, ch. 512, 60 Stat. 323. Provisions for paying the filing fee in installments are now found in the Bankruptcy Act § 40c(1), 11 U.S.C. § 68(c)(1) (1970); General Order 35(4). Although § 40c(1) does not even mention in forma pauperis petitions, it is sometimes cited as support for the contention that Congress intended to abolish the informa pauperis procedure in bankruptcy proceedings. *See, e.g.*, S. REP. No. 959, 79th Cong., 2d Sess. 6-7 (1946).

[8]Bankruptcy Act §§ 14b, 14c(8), 40c(1), 59g, 11 U.S.C. § 32(b), 32(c)(8), 68(c)(1), 95(g) (1970); General Order 35(4). The preceding sections have been collectively interpreted as making the payment of the filing fee a prerequisite to receiving a discharge, even in the case of an indigent who is unable to pay such a fee. Some of the sections were amended after 1946 so to provide.

[9]331 F. Supp. 1207 (E.D.N.Y. 1971), *prob. juris. noted*, 92 S. Ct. 955 (1972) (No. 71-749).

[10]The actual holding in *In re Kras* was that the mandatory fee scheme deprived the indigent petitioner of "his Fifth Amendment right of due process, including equal protection." *Id.* at 1212. Three other decisions involving the same issue as *In re Kras* have made similar reference to "equal protection" even though a federal statute—the Bankruptcy Act—was involved. In *In re* Smith, 323 F. Supp. 1082, 1088 (D. Colo. 1971), the court noted that

> [b]y characterizing the problem presented in this case as one of equal protection, we do not mean to suggest that fifth amendment due process takes in all of fourteenth amendment equal protection. It is enough to note that fifth amendment due process does include an equal protection principle . . . .

In *In re* Garland, 428 F.2d 1185 (1st Cir. 1970), *cert. denied*, 402 U.S. 966 (1971), the court noted that although the petitioner alleged a denial of due process, it would consider this allegation in terms most favorable to the petitioner by regarding it as a "claim of lack of equal protection." *Id.* at 1186. And in *In re* Naron, 334 F. Supp. 1150 (D. Ore. 1971), the court simply based its holding on equal protection principles without referring to the fifth amendment. *Id.* at 1151. For Supreme Court cases suggesting the existence of equal protection principles in the fifth amendment, see Shapiro v. Thompson, 394 U.S. 618, 624-42 (1969); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[11]Bankruptcy Act § 40c(1), 11 U.S.C. § 68(c)(1) (1970).

[12]See text accompanying note 23 *infra*.

[13]Bankruptcy Act § 48c, 11 U.S.C. § 76(c) (1970).

services the trustee renders;[14] and section 52a[15] provides that a filing fee of three dollars shall be paid to the clerk of the bankruptcy court.[16] This substantial filing fee is in keeping with the traditional and continued congressional expectation that the federal bankruptcy system be entirely self-supporting.[17]

Until the Bankruptcy Act was amended in 1946 by the passage of the Referees' Salary Bill,[18] referees were not paid for their services from public funds but rather were directly compensated by their statutory share of this filing fee. Under this so-called fee system, a debtor was permitted to file a voluntary petition without the payment of the usual filing fee if his petition was accompanied by an affidavit stating that he was without and could not obtain the money to pay such a fee. However, he could ultimately be ordered to pay the filing fee if later there were satisfactory proof that he could pay or obtain the money to pay.[19] This

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[14]General Order 15 provides that a trustee need not be appointed in no-asset cases. In the districts where this is followed, the fee would be only $40 in no-asset cases. Bankruptcy Act § 48c, 11 U.S.C. § 76(c) (1970); General Order 15. In some jurisdictions, the $10 is simply refunded to the bankrupt. Silverstein, *A Proposal to Waive Bankruptcy Fees in Certain No-Asset Cases*, 52 A.B.A.J. 649 (1966).

[15]Bankruptcy Act § 52a, 11 U.S.C. § 80(a) (1970).

[16]Bankruptcy law is administered by the federal district courts which sit as "courts of bankruptcy." Bankruptcy Act § 1(10), 11 U.S.C. § 1(10) (1970). The filing of a voluntary petition operates as an automatic adjudication of bankruptcy, Bankruptcy Act § 18f, 11 U.S.C. § 41(f) (1970), and as an application for a discharge (although a formal application for a discharge is required for corporate debtors, it is not required for individual petitioners), Bankruptcy Act § 14a, 11 U.S.C. § 32(a) (1970). Traditionally, federal bankruptcy proceedings have served two principal purposes: (1) the equitable distribution of the debtor's assets among his general creditors, and (2) the release of the honest but unfortunate debtor from his debts, in order to afford the debtor a fresh start in life. *See* Note, *Discharge Provisions in Consumer Bankruptcy: The Need for a New Approach*, 45 N.Y.U.L. REV. 1251 (1970). This latter purpose is accomplished by means of a discharge, a term defined in the Bankruptcy Act § 1(15), 11 U.S.C. § 1(15) (1970). The court will grant a discharge to a petitioner unless a creditor of the bankrupt, the trustee, or a representative of the United States Attorney General, Bankruptcy Act § 14b(2), 11 U.S.C. § 32(b)(2) (1970), raises a timely objection and establishes one of the eight exclusive statutory reasons for denying a discharge that are found in the Bankruptcy Act § 14c, 11 U.S.C. § 32(c) (1970).

[17]Sheaffer, *supra* note 5, at 1206.

[18]Act of June 28, 1946, ch. 512, 60 Stat. 323. For a general discussion of the bill see Horsky, *The Referee Salary Bill of 1946*, 52 COM. L.J. 7 (1947). Before 1946 the referee's compensation consisted of his share of the filing fee and a percentage of the bankrupt's assets, if any, that were to be distributed to creditors. Herzog, *The Referee in Bankruptcy: A Judge in Search of a Name*, 75 COM. L.J. 37 (1970). Also, an indemnity fund provided reimbursement to the referees for actual expenditures in operating their offices; however, this fund was often depleted and some referees were forced to finance their offices with personal funds. H.R. REP. NO. 1937, 79th Cong., 1st Sess. 1-2 (1945).

[19]Bankruptcy Act of 1898, ch. 541, § 51(2), 30 Stat. 558; General Order 35(4), 172 U.S. 665 (1898). It was also recognized that the filing fee might be waived altogether in an appropriate case. *E.g.*, Sellers v. Bell, 94 F. 801, 817 (5th Cir. 1899).

latter procedure was intended to prevent abuse of the pauper petition by the bankrupt. In practice, however, it was used by many referees to demand payment of their fees before they would grant a discharge,[20] whether the bankrupt was able to pay or not. But in all cases the old fee system placed a referee in the unfair position of having to make a decision—whether to demand or waive the filing fee—that would directly affect his own compensation.[21]

The Referees' Salary Bill of 1946 abolished this fee system[22] and provided that as of 1947 all filing fees that formerly went directly to individual referees would go instead into a centrally operated fund[23] out of which each referee would be paid an annual salary. Thus the total fees collected by each referee became unrelated to his individual income.[24] This bill did not, however, alter the well-established self-supporting aspect of the bankruptcy system; it simply shifted the financing from the unit of the individual referee's office to a central fund that would operate on a nationwide basis.

In the same legislation, Congress noted the deficiencies of the pauper petition provision and decided that in lieu of the "widespread practice of [referees] demanding payment ultimately," it would be more appropriate to abolish pauper petitions and "to provide for installment

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[20]*See* S. REP. No. 959, 79th Cong., 2d Sess. 7 (1946). One may often encounter the phrase "the judge may order," when in fact statutory amendments to the Bankruptcy Act now allow either the referee or the judge of the district court to make such an order. For an interesting discussion of both the history and the present roles of the judge and referee in bankruptcy, see Herzog, *supra* note 18.

[21]H.R. REP. No. 1037, 79th Cong., 1st Sess. 1-2 (1945).

[22]Mr. Royal E. Jackson, the Chief of the Division of Bankruptcy in the Administrative Office of the United States Courts, has noted:

> Is there any logical reason why the expense of a protracted antitrust case shall be paid out of general funds of the Treasury, yet a bankruptcy . . . proceeding, large or small, must pay its own way? There is none. But it was the only system the Congress would buy in 1946. The proponents of the Act recognized this, and they designed a system that would work well in normal (non-inflationary) times.

Jackson, *Bankruptcy Administration Then and Now*, 45 AM. BANKR. L.J. 249, 275 (1971).

[23]The 1946 bill actually established two centrally operated funds that were consolidated into the Referees' Salary and Expense Fund by a 1959 amendment, Act of July 28, 1959, Pub. L. No. 86-110, 73 Stat. 259. *See* H.R. REP. No. 242, 86th Cong., 1st Sess. 1-3 (1959).

[24]One writer has observed that even though the referees were placed on annual salaries, the self-supporting system still burdened the referee with a pecuniary interest in every case coming before him. He is never permitted to forget that the bankrupts' filing fees and the assets of the bankrupt estate are paying his salary; and he is reminded by the Judicial Conference that unless he collects what is due the Referees' Salary and Expense Fund, he will be regarded as personally liable for the omission.

Jackson, *supra* note 22, at 274-75.

payments in meritorious cases."[25] Although Congress may have anticipated that providing for payment by installments would help some "meritorious" bankrupts, today most referees dislike the prospect of collecting fees in installments and therefore restrict the availability of this method of payment as much as possible.[26] But even the bankrupt who is allowed to pay in installments runs the risk that if for any reason he misses a payment on one of the scheduled dates, his petition will be dismissed.[27]

With these 1946 congressional changes, bankruptcy courts became the only federal courts in which filing fees could not be waived upon a showing of poverty.[28] Moreover, because they are unique as the only federal courts required by Congress to operate on a financially self-sustaining basis,[29] the filing fee exacted of the bankruptcy petitioner greatly exceeds that charged for instituting any other type of proceeding in the federal courts,[30] despite the fact that bankruptcy proceedings exist primarily for the purpose of affording relief to those who are insolvent or unable to pay their debts as they mature.

Three federal courts[31] have recently been confronted with the statutory argument that by its own language the general federal in forma pauperis statute should apply to bankruptcy proceedings. Further, it

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[25]S. REP. No. 959, 79th Cong., 2d Sess. 7 (1947). This reasoning has been criticized because "it ignores the fact that with the fee system gone, there would be no reason for a 'widespread practice of demanding payment ultimately.'" Shaeffer, *supra* note 5, at 1209.

[26]Fullerton, *Filing Fees in Installments*, in PROCEEDINGS OF THE FIFTH SEMINAR FOR REFEREES IN BANKRUPTCY 527 (1968).

[27]Bankruptcy Act § 59g, 11 U.S.C. § 95(g) (1970); General Order 35(4). A referee has no discretion to extend the time for installment payments beyond the nine-month maximum period as provided in General Order 35(4)a. *See, e.g., In re* Barlean, 279 F. Supp. 260, 261 (D. Mont. 1968).

[28]The general federal in forma pauperis statute, 28 U.S.C. § 1915(a) (1970), applies to all other types of proceedings in the federal courts.

[29]A recent Brookings Institute study on bankruptcy has noted:

> Bankruptcy alone among [federal judicial] proceedings is self-supporting of salaries and other administrative expenses . . . .
>
> The general pattern of financing court proceedings in the United States since about 1800 has been to have the public assume the costs of maintaining the courts. . . . We can only conclude that, as long as bankruptcy is a judicial process and as long as other judicial processes are conducted at public expense, it is manifestly unfair for the parties in bankruptcy to bear the costs.

D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEMS, PROCESS, REFORM 192-93 (1971).

[30]The typical filing fee in civil cases is set at $15 by 28 U.S.C. § 1914(a) (1970).

[31]*In re* Garland, 428 F.2d 1185 (1st Cir. 1970), *cert. denied*, 402 U.S. 966 (1971); *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971), *prob. juris. noted*, 92 S. Ct. 955 (1972) (No. 71-749); *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971).

was argued, the Bankruptcy Act should be liberally construed because of its broad remedial purpose. And since the Bankruptcy Act fails to provide for those who are unable to pay the filing fee and also nowhere expressly prohibits in forma pauperis proceedings, the courts should construe the general in forma pauperis statute as being applicable in bankruptcy.[32] All three courts rejected this argument, concluding that both the intention of Congress[33] and a reading of the Bankruptcy Act itself[34] dictate that the filing fee must be paid in full before any bankrupt is eligible for a discharge.

These same three courts next considered the constitutionality of this mandatory fee scheme as applied to indigents seeking a discharge in bankruptcy. *In re Kras*[35] is the latest in this recent series of federal court rulings on this constitutional question. *In re Garland*,[36] a court of appeals decision, came first, followed by a district court opinion in *In re Smith*.[37] Each case came from a different judicial circuit.[38] The essential facts and arguments presented in *Garland, Smith,* and *Kras* are identical. In each an indigent petitioner stated that he presently did not have the requisite filing fee and that he could not honestly promise to pay it in installments over a nine-month period.

The court in *Garland* noted that it regarded bankruptcy as being basically an administrative rather than a judicial proceeding and that the filing fee was a reasonable expenditure for the financial services rendered the petitioner in bankruptcy. The court rejected the petitioner's due process argument[39] and held that a bankruptcy discharge was not a fundamental right but rather a privilege[40] Congress had chosen to

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[32]Arguments along this same line have also been suggested in Shaeffer, *supra* note 5, at 1203 n.5; 2 COLLIER ON BANKRUPTCY ¶ 51.01, at 1873-74 (14th ed. 1971).

[33]H.R. REP. No. 1037, 79th Cong., 1st Sess. 6 (1945); S. REP. No. 959, 79th Cong., 2d Sess. 7 (1946).

[34]Bankruptcy Act §§ 14b, 14c(8), 40c(1), 59g, 11 U.S.C. §§ 32(b), 32(c)(8), 68(c)(1), 95(g) (1970); General Order 35(4). See note 8 *supra.*

[35]331 F. Supp. 1207 (E.D.N.Y. 1971), *prob. juris. noted, 92 S. Ct. 955 (1972) (No. 71-749).*

[36]428 F.2d 1185 (1st Cir. 1970), *cert. denied,* 402 U.S. 966 (1971).

[37]323 F. Supp. 1082 (D. Colo. 1971).

[38]Since *In re Kras* was decided, another district court from still a different judicial circuit was confronted with the same constitutional attack on the mandatory filing fee in bankruptcy proceedings. That court, relying heavily on the reasoning of *Smith* and *Kras,* ruled that the filing fee, as applied to the indigent petitioner before it, "violates the principles of equal protection of the laws." *In re* Naron, 334 F. Supp. 1150, 1151 (D. Ore. 1971).

[39]428 F.2d at 1187. The court indicated that it would have reached the same result had the caes been argued on equal protection grounds. *Id.* at 1186. See note 10 *supra.*

[40]In several cases the Supreme Court has rejected the right-privilege dichotomy as a significant factor for determining the constitutionality of a statute. *E.g.,* Goldberg v. Kelly, 397 U.S. 254,

bestow on those willing to "experience some slight burden in return."[41]

The *Smith* court pointed out that the main purpose of our bankruptcy system is to enable debtors to obtain a judicially approved discharge from their obligations. Noting that the fifth amendment includes an equal protection principle, the court expressly rejected *Garland's* reasoning and held that the mandatory filing fee as applied to an indigent petitioner was a violation of equal protection.[42] The court conceded that although bankruptcy, standing alone, may not be a fundamental right, "what is at stake here is not simply bankruptcy, but access to court. So viewed, the question takes on a greater significance, at least for those of us who are trained in the law and who regard the legal system as fundamental to our way of life."[43] Continuing, the court noted that

> if a state or the federal government were to condition the enforcement of all statutory and common law rights upon the payment of a $5,000 filing fee, access to court as we now conceive it would be severely impaired. . . . Since to a person without funds, $50 may foreclose access as surely as $5,000 [,] the amount of the fee is of no particular meaning unless *de minimus* [*sic*].[44]

Kras, which reached the same result as *Smith,* has special significance in this series of three cases because only it was decided after *Boddie v. Connecticut.*[45] In *Boddie* the Supreme Court ruled that it was a denial of due process for a state to deny indigents access to the state's divorce courts solely because of their inability to pay filing fees and

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262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

[41]428 F.2d at 1188. The *Garland* decision seemed to be grounded on what the First Circuit apparently considers to be at stake in a bankruptcy proceeding:

> The primary question must be why an individual admitting no assets has need for a discharge. If he has nothing . . . it would seem that his creditors would find it pointless to pursue him. If they should pursue, one would wonder what the debtor could have to be concerned about. We can think of only two classes of seemingly assetless persons who might want a discharge: those who in fact have assets, but hope to conceal them, and those who have none, but . . . expect future assets, and wish to be rid of their creditors first. The first category deserves, of course, no consideration. We do not think the claim of the second so compelling that they must be constitutionally entitled to a free discharge.

Id. at 1187-88.

[42]323 F. Supp. at 1086-89. See note 10 *supra.*

[43]*Id.* at 1087.

[44]*Id.* at 1089.

[45]401 U.S. 371 (1971).

process costs. Justice Harlan, writing for the majority, observed that "this court has seldom been asked to view access to the court as an element of due process."[46] But, he added, due process requires "that absent a countervailing state interest of overriding significance," a state must grant access to its courts to persons who are forced to resort to the judicial process for resolution of their claims.[47]

Although the court in *Kras* was free to make its own assessment of what a proper interpretation of *Boddie* would require with respect to the indigent petitioner before it, the court was nevertheless confronted with the Supreme Court's post-*Boddie* refusal to review *In re Garland*.[48] The *Kras* court simply stated that the Supreme Court's denial of certiorari was not to be taken as a decision of *Garland* on the merits[49] and that it remained "free to chart its own course." The court in *Kras* noted, however, that this course was not "without guideposts, particularly in view of the statements"[50] of Justices Black and Douglas, who had dissented (along with Justice Brennan) from the denial of certiorari in *Garland*.[51]

Justice Black suggested that the Supreme Court's unwillingness to review *Garland* only two months after *Boddie* had been handed down perhaps was prompted by a desire to proceed "slowly step by step, so that the country will have time to absorb [*Boddie*'s] full import."[52] But both Justice Black and Justice Douglas were for reversing *Garland*'s holding outright, Justice Black noting that *Boddie* was grounded on the sole premise that no person should be denied access to any court solely because of his inability to pay a fee.[53] Justice Douglas expressed his approval of the majority's conclusion in *Boddie* that marriage and its dissolution were so fundamental as to require the states to allow indi-

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[46]*Id.* at 375.

[47]*Id.* at 377. Justice Brennan, in a concurring opinion, disagreed with that part of the majority opinion which attempted to limit the holding in *Boddie* to similar divorce actions. He noted that such a limitation would not withstand analysis, because "[i]f fee requirements close the courts to an indigent he can no more invoke the aid of the courts for other forms of relief than he can escape the legal incidents of marriage." *Id.* at 387. *See also The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 104, 113 (1971).

[48]402 U.S. 966 (1971).

[49]*Accord*, C. WRIGHT, HANDBOOK OF THE LAW of FEDERAL COURTS 495 (2d ed. 1970) (a denial of certiorari "means [only] that, for whatever reason, there were not four members of the Court who wished to hear the case").

[50]331 F. Supp. at 1211.

[51]Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971).

[52]*Id.* at 956.

[53]*Id.* at 955-56.

gents access to divorce courts without paying costs, but he expressly disavowed establishing a "hierarchy of interests" when indigency is involved. Thus Justice Douglas concluded that *Garland* should have been reversed, since obtaining a fresh start in life through bankruptcy is an equally fundamental interest that should come under the shelter of the equal protection clause.[54]

The court in *Kras* agreed with the above reasoning of Justices Black and Douglas and with the *Smith* court's proposition that the interest at stake was the fundamental one of access to court, and concluded "that a proper interpretation of *Boddie* requires that, as applied to petitioner herein, the statutory requirement of prepayment of a filing fee to obtain a discharge in bankruptcy violated his Fifth Amendment right of due process, including equal protection."[55]

The appellants seeking a divorce in *Boddie* were allowed to proceed without payment of any fees. The courts in *Kras* and *Smith* granted the petitioner the same relief but with the qualification that the referee below should provide for the survival of the petitioner's obligation to pay the filing fee since indigency is not necessarily a permanent condition. The court in *Smith* thought that this continuing obligation to pay not only was appropriate and constitutionally permissible "but [also would] further the congressional purpose of making the bankruptcy system, insofar as possible, self-supporting."[56]

Although *Kras* and *Smith* represent a partial departure from the expectation of Congress that the bankruptcy system be self-supporting, it should be noted that since 1965 the system has not in fact supported itself. It was predicted that in the fiscal year of 1971 the deficit in the Referees' Salary and Expense Fund would amount to 4,750,000 dollars, twice that of the 1969 fiscal year.[57] The Judicial Conference of the United States recently advocated the abolition of the self-financing system in bankruptcy, noting that this aspect of bankruptcy is "outdated

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[54]*Id.* at 961.

[55]331 F. Supp. at 1212. Although another district court in *In re* Naron, 334 F. Supp. 1150 (D. Ore. 1971), agreed that access to court was a fundamental interest and based its similar holding on equal protection, it noted that even though *Boddie* had been grounded on due process, it could "think of no relevant due-process reason for attempting to distinguish between the right to be judicially freed from an unwanted spouse and the right to be judicially liberated from harassment by general creditors." *Id.* at 1152. See notes 10, 38 *supra.*

[56]323 F. Supp. at 1093.

[57]REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 24, 201 (1970).

and that it is no longer possible to maintain adequate payments into the [Referees' Salary and Expense Fund] without placing an inordinate burden upon bankrupts and the assets of bankrupt estates."[58] Given the obvious circumstance that bankruptcy, by its very nature, is the least likely among the types of civil proceedings to be able to take on any additional "burden," the steps taken by the courts in *Kras* and *Smith* seem desirable in that this burden is shifted to society in general, bringing bankruptcy in line with other civil actions in which the smaller fees collected only begin to cover the cost of operating the federal courts.[59]

Congress presently has before it legislation that would abolish the self-financing aspect of bankruptcy.[60] Enactment of this legislation could possibly open the door to future congressional action aimed at alleviating the indigent petitioner's plight in bankruptcy proceedings. If, however, Congress refuses to change the already faltering self-supporting policy of the present bankruptcy system, it seems reasonable that this policy could be adequately served by statutorily excluding the government's claim for these administration costs from the scope of a discharge without making nonpayment a ground for denying the bankrupt relief from his other obligations. The government already protects its own interest in certain taxes owed it by the bankrupt by including these taxes in section 17a's list of "exceptions" to a discharge—debts that remain outside of and thus not affected by a discharge.[61] In sharp contrast to the treatment afforded taxes, nonpayment of the filing fee is presently included in section 14c's list of "objections" to a discharge—the effect of a valid objection being that the petitioner is not entitled to a discharge at all.[62] The government's interest in taxes is analogous to its interest in the administration costs in bankruptcy that are provided by the filing fee. Since the government already protects its interest in taxes by providing that taxes remain outside a discharge, it seems reasonable that it could similarly protect its interest in these administration costs. Thus the government's claim for the filing fee could be treated simply as an additional exception to a discharge under

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[58]*Id.* (1969), at 23-24.

[59]Silverstein, *supra* note 14, at 650.

[60]H.R. 4816, 92d Cong., 1st Sess. (1971); S. 1394, 92d Cong., 1st Sess. (1971); *see* Jackson, *supra* note 22, at 275.

[61]Bankruptcy Act § 17a, 11 U.S.C. § 35(a) (1970).

[62]Bankruptcy Act § 14c, 11 U.S.C. § 32(c) (1970). See note 16 *supra*. If any *one creditor* prevails with a § 14c objection to a discharge, the debtor will not get any discharge at all. In contrast, a § 17a exception to a discharge affects *only* that creditor whose claim qualifies under § 17a, and the debtor is given a discharge from all his other creditors.

section 17a rather than as a section 14c objection to a discharge. This is, in effect, what the courts in *Kras* and *Smith* have done, and these two cases are an important step toward making the bankruptcy discharge the substantial debtor remedy it was intended to be.

SIDNEY L. COTTINGHAM

Communications—The Fairness Doctrine: A Continuing Advance into Product Advertising

The fairness doctrine, a product of administrative regulation and judicial decision, has long served to guarantee full discussion of public issues in the nation's communications media.[1] Briefly stated, the doctrine imposes an affirmative obligation upon licensed radio and television stations to present information advocating all points of view in the discussion of controversial issues of public importance.[2] A salient force for many years, the fairness doctrine has acquired increasing relevance and expanded meaning during the past decade.

In *Friends of the Earth v. FCC*[3] the Court of Appeals for the District of Columbia Circuit[4] recently continued this judicial trend by holding the fairness doctrine applicable to the presentation of television commercials advertising high-powered automobiles and leaded gasoline. The petitioning environmentalists[5] contended that the advertisements advanced the opinion that use of these products leads to a richer and more enjoyable life. Facing undisputed scientific evidence of the environmental dangers resulting from this use, the court overturned a decision of the Federal Communications Commission (FCC) and held that the commercials presented one point of view upon a controversial public issue and therefore called for application of the fairness doctrine. The case was then remanded to the Commission for a determination of whether the particular television station[6] under attack had met its

[1]See text accompanying notes 19-37 *infra*.

[2]Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 369, 380 (1969); Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C.2d 27 (1970); Editorializing Report, 13 F.C.C. 1246, 1251 (1949).

[3]449 F.2d 1164 (D.C. Cir. 1971).

[4]47 U.S.C. § 402(b) (1970) provides for the direct appeal of most decisions of the Federal Communications Commission to the District of Columbia Circuit.

[5]Petitioners included Friends of the Earth, a national organization dedicated to environmental protection, and its executive director. 449 F.2d at 1164.

[6]The station challenged in the action was New York City's WNBC-TV. 449 F.2d at 1164.