FROM GOLDEN YEARS TO BANKRUPT YEARS

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On April 13, 1998, the Eighth Circuit Court of Appeals reconsidered Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, (8th Cir. 1996), vacated and remanded, 117 S. Ct. 2501 (1997), in light of City of Boerne v. Flores, 117 S. Ct. 2157, 138 L. Ed.2d 624 (1997). 114 F. 3d 854 (8th Cir 1998). In its 1996 decision, the Eighth Circuit held that bankruptcy recovery of church contributions substantially burdened a debtor's free exercise of religion without furthering a compelling governmental interest and therefore violated the Religious Freedom Restoration Act (RFRA).

In Boerne, the Supreme Court held (6-3) that RFRA is unconstitutional. Two days after deciding Boerne, the Supreme Court vacated the Eighth Circuit's decision and sent it back for further consideration in light of Boerne.

On reconsideration, two judges of the Eighth Circuit narrowly read Boerne as having found RFRA unconstitutional only as applied to state law, leaving RFRA available as a defense to federal bankruptcy actions to recover church contributions. Over a strong dissent, the majority reinstated the Eighth Circuit's earlier decision. The majority believed it should limit Boerne to its facts (a state law zoning decision denying a church building permit) and presume that RFRA is otherwise constitutional. This approach steered around several plain statements in Boerne suggesting that RFRA is dead, constitutionally speaking.

If the Eighth Circuit's sidestep holds up, RFRA can be argued as a defense in fraudulent transfer actions under Bankruptcy Code Section 548. Whether the Eighth Circuit's reasoning would stretch to revive RFRA as a defense to fraudulent transfer actions grounded in state law, but filed under Section 544(b), remains to be seen.; Editor's note: On Friday, June 19, 1998, the President signed into law the Religious Liberty and Charitable Donation Protection Act which will sheild certain charitable donations from avoidance and recovery by a trustee in bankruptcy.; --

TEXT:

In their continuing analysis of how the consumer bankruptcy system functions as a social safety net, the authors explore how the relatively best off, economically most stable portion of the population uses bankruptcy. They examine the incidence of bankruptcy among Americans 50 and older, with a special focus on those older than 65. The authors demonstrate that even with more wealth and economic security as a group, older Americans are vulnerable to job loss, medical problems, family problems, and difficulties with credit issuers that push them into bankruptcy. The specific study of older Americans expands the authors' thesis developed in their book, The Fragile Middle Class, that systematic economic fractures in an otherwise robust population subject individuals to economic collapse, and that consumer bankruptcy is a limited social safety net available to these vulnerable individuals. Preliminary evidence presented in this paper suggests that as successive cohorts of Americans age, they may be more economically insecure and vulnerable to bankruptcy, fueling a prediction that older Americans will use bankruptcy at an increasing rate.

Introduction

Older Americans should be the most financially secure demographic group in the population. As a group, they have substantial assets, controlling a significant fraction of the nation's wealth that is held in private hands. Americans aged

55-64 have the highest net worth from all sources of any age group, followed closely by Americans aged 65-74.5 The age group 50-64 constitutes 13 % of the population, but it collectively controls one-third of the nation's net worth.6 Older Americans have years of experience in handling personal finances, and their perspectives are tempered by having seen both boom times and bust times. About 80% are homeowners.7 Many have equity built up over decades in homes that are often fully paid off, and most have profited from a long-term rise in the real estate market. For many older Americans, the expenses of rearing children are behind them. The likelihood of a divorce and the need to establish two households declines. The rising stock market has enhanced the value of their private retirement funds, giving them wealth on paper that they never imagined. Low inflation has spared them erosion of the value of their fixed incomes. In fact, many Americans face the years after 50 with more economic security than they have known in their lives.

To be sure, not all older Americans are prosperous. In 1995, 10.5% of those Americans 65 and older lived below the poverty line.8 While this figure is high by the measure of any person living in poverty, the proportion of Americans 65 and older in poverty has been cut sharply since 1970 when nearly 25% of Americans 65 and older were in poverty. Today, even older Americans who have not been economically successful are the beneficiaries of substantial economic support. For those 62 and older, social security is available as an income supplement. After 65, medicare provides a nearly-universal health insurance program. With income and health insurance, they have a stronger public safety net than many younger families.

A story about bankruptcy should be a story about younger families, buffeted by lost jobs, lack of health insurance, divorce, the costs of rearing children, and the inability to handle credit. But a complete story of bankruptcy is a story about older Americans as well.

The bankruptcy courts provide the opportunity to explore Americans' economic vulnerability. In a rising economy when all boats seem to be floating ever higher, many people ask how bankruptcy filings can increase. For rates to rise in times of prosperity, some suggest, means that the system must be rife with abuse. But what the data about older Americans suggest is that even among groups that are collectively prosperous, economic security is not evenly spread. For many, financial stability remains elusive even after many economic pressures have been relieved.

In this article, we use data from the Consumer Bankruptcy Project II to explore the economic pressures on older Americans that cause them to file for personal bankruptcy.9 We also use 1997 data collected by the Honorable Barbara Sellers to provide a dynamic view of bankruptcy at a later time in the 1990s.10 With these data, we examine the economic vulnerability of older Americans and explore how they use bankruptcy to deal with a variety of economic problems and thus expand the picture of how a collectively prosperous, experienced, financially conservative cohort could nonetheless experience high rates of economic failure.

How Many Older Americans Are in Financial Trouble?

In the Consumer Bankruptcy Project Phase II, we asked debtors in sixteen judicial districts a number of demographic questions, including their ages. For married couples filing jointly, we asked the ages of both the first and second listed debtors.

From these data, we determined that about 18.5% of the cases involved one or both debtors who were over the age of 50. The breakdown among older Americans is weighted toward those in the 50 to 64 age range, with 17.2% of the total sample involving a debtor in that age range and 2.5% of the total sample involving a debtor 65 or older. (For readers who observe that 17.2% and 2.5% add up to more than 18.5%, we note that there was some overlap; that is, a number of joint cases had one spouse in the 50-64 age group and the other spouse in the 65 and over group, thus accounting for a higher proportion of the total cases that included at least one person in each group.)

In order to determine how many people in bankruptcy--not just cases--were 50 or older, we counted the petitioners separately. By adding up all the people, counting husbands and wives in joint cases separately, we determined that 14.4% of the people in our sample in 1991 were 50 or older. Again, the 50-64 age group predominates: debtors aged 50-64 were 12.2% of the sample, and debtors 65 and older were 2.2% of the sample.

If those same proportions held for 1997, and we counted human beings and not just petitions, we would estimate that about 280,000 people aged 50 and older filed for personal bankruptcy.11 About 237,200 were in the 50-64 age group, and about 42,800 were 65 or older.

These data demonstrate that older Americans are less likely to file for bankruptcy than their younger cohorts. Among all Americans, those aged 50 and older comprised about 35.8% of the adult population at the time these data

were collected.12 With about 14.4% of the people in bankruptcy from the same age group, it is clear that older Americans are at less risk for bankruptcy than their younger counterparts.

The age breakdown suggests that the vulnerability is not uniform among the age groups. The 50-64 age group was 20.8% of the adult population generally at the time the sample was drawn, while the 65 and older group was 18.2%. The bankrupt debtors aged 50-64 were 14.4% of the debtor population, somewhat less than their national proportions. Americans 65 and older were only 2.2% of the bankrupt sample.

In 1991, the year in which our data were gathered, the national bankruptcy filing rate was about 8.6 per one thousand households. We used the age distribution of debtors in 1991 to estimate the rates of filing bankruptcy at each age. For households whose householder was aged 35-44, the rate was 11.8 per 1,000. For householders aged 45-49, the rate dropped to 9.9 per 1,000. For householders aged 50 to 64, the rate was 5.5 per thousand, and for the oldest householders over age 65, the rate was 0.9 per thousand.13 The data demonstrate that people aged 50 and older file less frequently than those younger than 50, but they add other important information. The best-off age group in terms of wealth, the people aged 50-64, are nevertheless filing bankruptcy at relatively high rates; their 1991 filing rate exceeded the rate for the entire population just a few years earlier. At the same time, a group that is not as well off, those aged 65 and older, had much lower rates of filing.

It is possible that we are observing a direct demonstration of a stronger public safety net. Not yet eligible for Medicare and social security supplements, Americans in the 50-64 age group may be learning that while as a group they control substantial personal assets, as individuals they remain vulnerable to powerful economic shocks. As Americans get older, they remain at risk for failure, as about 42,800 last year will attest, but more of them can rely on a public safety net to avoid personal economic catastrophe. These data do not prove the efficacy of social safety nets, but they support the view that the need for bankruptcy and the strength of the social safety net are related.

Other explanations for the data can be eliminated. Oldest Americans may have somewhat fewer assets as a group than Americans in the 50-64 age group, but they might hold assets in a package that makes them more invulnerable to economic dislocations. If, for example, older Americans held fewer real estate investments but more cash in savings, their higher liquidity might insulate them from the financial problems that lead to bankruptcy. The data demonstrate, however, that older Americans have more of their assets concentrated in real estate and fewer other financial assets than their under-65 counterparts, suggesting less -not more- insulation.

It is possible that the lower bankruptcy filing rates among Americans 65 and over could be related to their low levels of credit card debt, which would make them more able to withstand other economic shocks without economic collapse. Oldest Americans are more resistant to using short term, high interest credit card debt. The proportion of Americans who report paying off their credit cards in full each month goes up with age. Americans 75 and older are least likely to have a credit card, and when they do have cards, they carry the fewest credit cards (only one) and are most likely to pay off their outstanding balances (85.8% pay in full each month).14 The meaning of these statistics is, however, somewhat ambiguous. It may be that the refusal to take on short-term, high-interest debt leaves oldest Americans more invulnerable to economic shocks. It may also be that a strong social safety net reduces their need to take on short-term, high-interest debt. For some Americans, credit card debt may reflect medical losses and income supplements during periods of unemployment rather than persistent consumption patterns.

There is also a non-financial story that is consistent with the observation that Americans aged 50-64 are more likely to file bankruptcy than those 65 and older. If oldest Americans resisted bankruptcy filings no matter what their economic conditions, while their younger (age 50-64) counterparts were willing to file in similar or even more favorable circumstances, then the lower bankruptcy rate among oldest Americans would suggest simply a generational difference in attitudes. Much as the credit card industry and other pundits have charged, these data might suggest bankruptcy filing rates are rising because attitudes are changing.

The difficulty with the generational difference story is that it requires a fairly sharp division between generations for people only a few years apart in age. There is a sharp difference between the filing rates for those 50-64 and those 65 and older. Moreover, the "different attitude" story is inconsistent with other data about the debtors who file for bankruptcy. We know, for example, that the median income for debtors in bankruptcy has fallen significantly from 1981 to 1997, while their debts have remained steady or climbed.15 As a group, the debtors who filed in 1997 were four times in number those who filed in 1980, but, as a group, they were also in worse financial shape. The data support the conclusion that debtors are more--not less--reluctant to file for bankruptcy, and that the attractiveness of the bankruptcy system to middle income Americans is more imagined than real.

There are important differences between younger-older Americans and older-older Americans, perhaps because of their access to better social safety nets or perhaps for other reasons. But, as we noted at the outset, collectively Americans age 50 and over control more wealth and have stronger social safety nets, which means that the puzzle is not why there are somewhat fewer older Americans in bankruptcy, but why there are so many who find themselves in bankruptcy. With an estimated 280,000 older Americans filing for bankruptcy during 1997 alone, and an estimated million Americans aged 50 and older in bankruptcy in just the last five years, the troubling question is why so many older Americans are in financial collapse.

Why Are Older Americans in Financial Trouble?

The questionnaire distributed at 341 meetings asked the debtors to explain in their own words why they had filed for bankruptcy. The question was open-ended, giving the debtors the blank back-side of a page and offering no hints, suggestions, or alternatives.16 This approach had its disadvantages. We did not systematically survey debtors to determine how many had a medical problem or how many would admit that gambling or alcoholism led them to bankruptcy.

But the open-ended approach had a very real advantage: the reasons listed were those framed exclusively by the debtors themselves. We learned about reasons that would have been unlikely to occur to us if we had constructed a closed-ended questionnaire, such as the impact of an overseas military assignment or the pressures brought on by trying to deal with a grown daughter with lymphoma. The open-ended questionnaire also had the advantage of letting debtors lead the discussion. Rather than giving them a menu of identified reasons, from which they could choose the most socially acceptable, they told us about their troubles. They expressed anger, sadness, humiliation--a range of emotions and reasons that would have been lost with a more confined response form. We believe that this approach gave us the best view of what the debtors believed was really important in explaining their financial collapse.

The reasons older Americans give for their economic failures are reproduced in Figure 1.

Jobs

The most frequent explanation of their financial problems for debtors aged 50 and over is a problem related to employment. Specific responses differed, but they centered around the point that the incomes they had once enjoyed were interrupted and, in some cases, gone forever. Sometimes the debtors explained that they had been unemployed, and, although they were now working, they had missed too many payments and they could not catch up without bankruptcy. For some the unemployment period had dragged on too long, so that even modest uses of credit cards and other short-term, high-interest debt used to tide them over while they looked for work ballooned out of control.

Many of the debtors explained that they continued to work, they just no longer had the jobs they once held. The bankruptcy files are replete with stories about bank managers who, after a merger, became bank tellers and about full-time employees who were downsized into independent contractor status--with no benefits and, some months, no income. The data show how hard older Americans are hit by job losses. They strongly suggest that when a thirty-year worker loses a job at age 54, the worker's economic survival is severely threatened.

We disaggregate the responses among the two groups of older Americans, those 50-64 and those 65 and older in Figure 2. In it, the job picture comes into even sharper relief. Among older Americans still in their primary working years, 50-64, job problems are mentioned in more than half of all the filings (50.6%). This is the part of the picture that shows the effects of job location on older workers.

Perhaps the surprising finding is that job problems remain an important reason for bankruptcy filings for debtors 65 and older. More than a third of all Americans who have passed the traditional retirement birthday of 65 explain their subsequent economic collapse in terms of trouble with a job. Some may be adjusting to being forced out of their full-time jobs, while others are feeling the effects of losing marginal jobs they have picked up post-retirement, such as part-time jobs at fast food places and shopping malls.

The jobs information for older Americans causes us to reconsider our initial characterization about the strength of the social safety net for Americans 65 and older. While the safety net is stronger here than it is for younger families, the bankrupt debtors demonstrate that many older Americans cannot live without supplementing their social security incomes. For those who were unable to put away substantial assets during their working years, a minimum wage part-time job may mean the difference between economic survival and complete collapse.

Medical Problems

For older Americans, jobs constitute the single largest reason for their bankruptcy filings, but medical problems are close behind. Among the 50 and over crowd, nearly 30% of all the debtors describe a medical problem that landed them in bankruptcy. For many, the explanation centered on medical bills that were beyond their capacity to repay. For some, the medical bills were those of other family members, such as adult children not yet secure in jobs with their own health insurance. For others, medical problems created other financial problems. An older American with declining health may discover that standing up for a four-hour shift at a cash register becomes impossible, so that a health limitation becomes a job problem. The translation of medical problems into financial problems is directly traceable to about a third of the bankruptcy filings among older Americans.

Once again, the differences among the age groups are striking. Figure 3 illustrates how often different age groups list a medical problem as the reason for their bankruptcy filings.

As Figure 3 illustrates, older Americans are far more likely to list a medical problem as leading to their bankruptcy than are their younger companions. What is particularly striking, however, is the peak in medical reasons among debtors in their early 50s, followed by a decline, then a later rise. The debtors fill in some possible explanations.

For Americans in the 50-54 age group, the pressures may be greatest. Their own health is beginning to decline, but they are not yet eligible for medicare. They may be helping grown children who have not yet settled into permanent jobs with health insurance. The 50-54 age group may be helping their elderly parents as well, paying for nursing homes or medical care that is not covered by medicare. The combination makes these particularly difficult years financially, with more than 30% of debtors aged 50-54 identifying a medical problem--theirs or someone else's--as the reason for their filing. As they age, their children are more likely to get settled and their own elderly parents die, reducing the proportion of the sample listing a medical reason for filing. But starting at age 60, their own deteriorating health becomes the principal reason for filing. It climbs until, by age 65, more than a third list medical problems as a reason for filing bankruptcy.

It is interesting that medical reasons continue to climb and are highest even among the Americans who already receive medicare. While medicare provides important security and undoubtedly reduces the number of Americans who would otherwise be in bankruptcy, the protection it provides is incomplete. With co-pay obligations that are often 20% or more of a medical bill and with each hospital admission costing the patient several hundred dollars before medicare coverage applies, even Americans 65 and over are subject to significant financial dislocations from a medical problem. In addition, the fact that medicare coverage does not extend to prescription drugs means that for some older Americans, the relentless effects of overspending their monthly income to take necessary drugs will land some in the bankruptcy courts.

Again, these data show the effects of a thin social safety net. The effects of the unavailability of automatic health care for those under 65 shows up in these data, with their increasing use of bankruptcy to deal with medical debts and other financial setbacks caused by medical problems. In addition, the incompleteness of the safety net even for recipients of medicare is illustrated by the bankruptcy data.

Creditor Actions

More than one in ten older Americans who filed for bankruptcy explained their filings in terms of actions taken by their creditors. These reasons include creditors who threaten the debtors with collection proceedings and those who actually bring lawsuits hoping to garnish checking accounts or seize personalty. Many debtors give a general description that is hard to identify; they write that they had explained that they were unable to pay but that their creditors would not work with them or that their creditors collection efforts were sufficiently disturbing that they went into bankruptcy to make them stop. Older debtors are substantially more likely than younger debtors to identify this cause.17

Some debtors identified specifically that they were cheated, scammed or otherwise defrauded, and that bankruptcy was their only recourse to deal with these debts. The American Association of Retired Persons has issued a report on older Americans as victims of fraudulent credit practices and other scams designed to steal their assets and leave them with debts they cannot pay. The bankruptcy files offer some support for this problem, as older Americans, especially those 65 and older, are more likely to explain their bankruptcies in terms of creditor actions and creditors' scams.

The codes for creditor actions exclude specific mention of credit cards. Instead, we coded that response separately. As Figure 1 shows, about 7.5% of older Americans in bankruptcy specifically mention problems associated with credit cards. They identify charging items on credit cards and then getting behind in their bills, with interest rates mounting

steadily, as the source of their troubles. When the credit card problems are combined with the other creditor actions, the total jumps to 17.3%.18

Family Reasons

Debtors discuss a host of family problems that put them into bankruptcy. For some, a son or daughter in financial trouble means that an older person is financially pressed as well. Nearly one in ten debtors 50 or over describes a bankruptcy filing in terms of trying to help a child or another family member.

The family reasons listed are exclusive of divorce. Many debtors describe marital dissolution as the reasons for their financial collapse. If those reasons were included in this category, the "family reasons" would swell to 14% for the debtors 50 and older. Not surprisingly, the divorce answer is greater among the 50-64 cohort (4.5%). There were no debtors 65 or older who identified a divorce as the reason for their financial problems.

Some of the tales are harrowing, such as the couple who posted bond for their son and spent their life savings to put him into a fancy rehabilitation program--only to see him leave the program, steal their credit cards and car, and disappear. Others tell about taking in a daughter, her children, and even her grandchildren--and trying to provide for all of them on social security and a part-time job.

Others are the expected stories of age. The death of a spouse is listed not just because it is a heart-breaking event, but because it also means a reduction in social security and, in some cases, losing an employer's or a union's retirement benefits. Sometimes one older person is caring for an elderly sibling, and there is not enough money to cover the expenses for both.

The family stories are mostly stories of older people doing what they believe is right, sharing their resources with those they love--or just feel responsible for. If they were economically rational actors, carefully plotting their best financial options, they would not have made themselves so vulnerable. Many of them would have escaped the humiliation of personal bankruptcy.

Homes

As we noted at the beginning of this article, the proportion of homeowners in the population is highest among those 50 and older. Among Americans over 50, homeownership rates hover around 80%.19 Homes, often paid off and benefitting from appreciating real estate markets, can be an older person's hedge against an uncertain economic future. The bankruptcy files suggest, however, that for 7.8% of older Americans, homes are not an economic haven. Instead, these people are struggling to hang onto them as they collapse into bankruptcy.

Here the difference between Americans in the 50-64 age group and those 65 and older is stark: Not a single person in the 65 and older group identified a need to save a home as the reason for filing. But among the debtors in the 50-64 age group, 9.1% specifically identified the potential loss of a home as the reason for filing. The vulnerability of the 50-64 age group is particularly striking when compared with younger debtors. Among the debtors under 50, 5.7% identified saving their homes as the reasons for their bankruptcies.

It is important not to draw stronger inferences than the data support. About half the families in bankruptcy are homeowners, and, in some sense, nearly all of them are trying to save their homes. All we know from the responses of the debtors is how many specifically identified saving their homes in their characterization of their difficulties. The same older Americans (65 and over) who do not identify saving their homes specifically, report a higher percentage of problems with their creditors generally, including more allegation of having been cheated or otherwise scammed. It is possible that older Americans are subject to losing their homes to aggressive creditor actions, but that their focus is more on the creditor and less on the home. Once again, without guided, systematic questions about the reasons for filing, we cannot be sure.

In any case, it appears that bankruptcy is an important route for many older Americans to save their homes. Of course, bankruptcy provides only limited help for homeowners. Debtors in bankruptcy must pay their home mortgage debts in full, plus interest and penalties, and all second, third and fourth mortgages, or face losing their homes. Bankruptcy provides an opportunity for homeowners to deal with other debts that absorb their incomes, including credit card and medical debts. When those debts are discharged, homeowners can concentrate all future income on house payments.

According to their own descriptions, the home problems facing older Americans often relate to their job problems or medical problems. A period of unemployment puts them behind on their home mortgage, and they need bankruptcy

to clear out their other debts and focus their remaining incomes on getting the arrearage caught up. Sometimes a medical problem forces them to take out a second mortgage to cover costs, and they can't manage both higher mortgage payments and the strain of other debts. They do not describe their problems in terms of homes that were foolish purchases. Instead, they explain that other financial hits leave them at risk for losing their homes, and they are struggling to hang on.

The Social Safety Net

Collectively, the reasons older Americans give for their bankruptcies tell us a great deal about how well the social safety net works. In the years encompassed by the strongest net--65 and older--Americans file for bankruptcy in the lowest numbers. In the years just before the safety net becomes available, they file in roughly the same proportions as their presence in the population generally--notwithstanding the fact that they are the most prosperous age cohort of Americans generally.

These data suggest that a social safety net that encompasses both income supplements and medical care sharply reduces the need for personal bankruptcy among the population. At the same time, the reasons cited by older Americans when they file for bankruptcy demonstrate that a social safety net would not provide complete protection from financial collapse. Although about two-thirds of the older Americans cite job or medical reasons for their bankruptcies, they also list a host of their problems that would not be avoided by income and medical supports. Just as families in real life may face multiple problems that combine to put them at financial risk, the respondents to our surveys could list as many problems as they wanted. More than half explained problems that were not income or health related.

The data also show that the safety net, even at its strongest, is tattered. The oldest Americans have the fewest bankruptcy filings per capita, but when they file they identify the holes in the net. Even those Americans 65 and older give as their principal reasons for filing job and medical problems. The twin problems of income and health care plague even those who have the best protection we offer, suggesting that our protection is less than complete.

The data suggest that bankruptcy works interactively with a social safety net. For younger Americans, protection against job loss and medical bills is thin--and the bankruptcy rate is high. For older Americans, as the net strengthens the need to file bankruptcy decreases. The comparison between Americans in the 50-64 age group with those 65 and older strongly suggests that the differences are not just accumulated wealth for the cohort since these are the two wealthiest cohorts in the country, but that other factors such as the social support may be powerfully implicated.

Are Older Americans Becoming More Financially Vulnerable?

Data from the Consumer Bankruptcy Project II were collected in recession year 1991. Judge Sellers's data, collected in the more prosperous year 1997, gives us a picture of how the age structure in bankruptcy might be changing. These data must be interpreted with caution, because the 1997 data represent only one district and thus are more susceptible to local circumstances than the 16-district sample for 1991. See Figure 4.

Among the most elderly, the proportion aged 65 and older declines from 2.4% in 1991 to only 2% of the 1997 sample, a relatively small change that might reflect the somewhat random (but constant) impact of economic shocks to the oldest Americans. In the next category, people aged 50-64 declined from 13% of the 1991 sample to 8.1% of the 1997 sample, a function perhaps of the improved job situation in 1997.20

What is especially interesting, however, is the next group of the population, those who will soon reach their fifties. The Baby Boomers aged 35-45 in 1991 constituted 31% of our sample. By 1997, this same age group (but six years older) accounted for 34% of the Sellers's sample. Instead of their representation in bankruptcy decreasing as they age, it seems to stay relatively steady or even grow somewhat. This finding is not hard to believe: the Boomers are, after all, the largest adult age group. What is interesting to consider, however, is whether their propensity for bankruptcy will remain high as they enter their fifties--a "cohort" effect--or whether it will subside to the previously observed lower levels (the "age" effect). If the cohort effect persists, then a larger fraction of all bankruptcies will be filed by older Americans in coming years. Indeed, the years from 1997 to 2022--the time period in which the Boomers occupy the still vulnerable age groups of 50-64--may bring about a noticeable graying of bankruptcy.

Conclusion: Bankruptcy as Part of the Extended Safety Net

We try in this piece, as we do in all our work, to expose the data and offer alternative explanations of the data. Different readers may draw different political conclusions. For some, these data suggest another reason to support universal

health care and stronger employment security. The data also support a call for a closer look at how downsizing and unemployment play out for families sliding down the job ladder, especially for older families.

Others will look at these data and see that individual families have made individual decisions for which they should be held responsible. For them, bankruptcy is a kind of safety valve, a way to let the least successful who are decision makers--whether by inability or by bad fortune--socialize some of their risk through a bankruptcy discharge.

In either political case, however, the data establish some boundary points in the discussion: First, bankruptcy and social safety nets are interactive. More medical support means fewer bankruptcies; more income support means fewer bankruptcies. Second, social safety nets will never eliminate the need for a bankruptcy system so long as people make foolish decisions or have bad luck. Not all problems that lead to bankruptcy begin with an income or a medical problem.

These two points are undergoing a great test in Europe where countries with stronger income supports and subsidized medical insurance have long offered little bankruptcy protection and have had low rates of bankruptcy filings. But as their consumer debt loads have begun to grow, in part as American companies have peddled credit cards and other financial products that permit people to make more foolish choices, the need for bankruptcy has risen. In Europe, consumer bankruptcy laws are rapidly undergoing revision to provide more consumer protection for families caught in impossible financial circumstances.

The United States stands out as a wealthy country that asks its citizens to bear extraordinary risks on a personal level. Unemployment insurance provides some help, but few middle class Americans believe they could sustain their lives--home mortgages, utilities, credit cards, groceries, car payments, insurance, gasoline, etc.--on an unemployment check for more than a few weeks. Many Americans purchase health insurance, and others are lucky enough to have it provided by their employers. But no one who reads a newspaper believes that any American family is more than one bad illness or accident away from a financial as well as a health catastrophe.

Americans also enjoy extraordinary freedom. Since the mid-1980s, consumer credit markets have become effectively deregulated.21 Credit is available to those without jobs, without credit histories, and, quite possibly, without any intent to repay. And yet, consumer credit flourishes. Credit card lending is twice as profitable as any other banking activity,22 suggesting that creditors do well with this unregulated market--bankruptcies and all.

Whether we have accomplished the right balance between safety nets, socialized risk, and bankruptcy is not answered exclusively by these data. For the families who had to struggle with creditors for months and finally file for bankruptcy rather than pass on a medical bill to a government insurance company, the answer might be a resounding "no." For the families that just got into financial trouble one "charge it" at a time, the answer might be more affirmative. These data provide some fuel for continuing the debates, suggesting that a more encompassing view of safety nets is necessary to understand how they function and where they fail.

APPENDIX

The 1997 Database:

Judge Sellers selected the first 100 Chapter 13 cases and the first 50 Chapter 7 cases assigned to her during 1997. Every case in that group was studied. Assignment of cases in the Southern District of Ohio is random among the judges. Judge Sellers used only her own cases in order to eliminate any differences in outcomes that might be influenced by the judge.

Judge Sellers recorded about 75 pieces of information for each case. We received her handwritten sheets of information in June, 1997. Following the same protocols that were used to code and report data from the Consumer Bankruptcy Project Phase I and Phase II, we coded the data into machine-readable form. The codes for the reasons for bankruptcy appear at the end of the Appendix because Judge Sellers's selection of cases produced a disproportionate share of Chapter 13 cases, analysis of the data from this district was weighted in the 75-25 proportion of Chapter 7 to Chapter 13 cases that existed in 1997 in her district. In order to enhance the accessibility of our data for other researchers, we did not sample the Chapter 13 cases, employing instead a straightforward weighting process.

Judge Sellers inferred the reasons for bankruptcy from her reading of the cases; she did not interview the debtors. Age data were available for only 25% of the sample. The Consumer Bankruptcy Project II data came from direct written responses by the debtors. The CBP II data then could be seen as more subjective first-person responses and the Ohio data as third-person inferences from a knowledgeable observer. We know that the Ohio data report relatively more credit card debt and relatively less job loss than the CBP II data, for example.

In other respects, the two samples appear similar. In terms of age, the focus of this study, the median age in both samples is 38 with standard deviation of 11 years.

CBP II Study:

Supported by a research grant from the Educational Endowment of the National Conference of Bankruptcy Judges, we set out in 1991 to collect demographic data on the debtors in bankruptcy. We studied individuals filing bankruptcy in Chapter 7 or Chapter 13 in sixteen federal judicial districts (all four districts of California and Texas, all three districts of Illinois and Pennsylvania, and the Middle and Western Districts of Tennessee). These states vary in the levels of exemptions available to debtors in bankruptcy and in the types of non-bankruptcy collection devices available to creditors. During the study, debtors were asked to complete a questionnaire that provided information on age, education, occupation, marital status, race or ethnicity, and citizenship, and to explain in their own words why they filed for bankruptcy. The demographic questions were modeled on the 1990 U.S. Census questionnaire and were available in both English and Spanish language versions. A copy of the questionnaire is included in the Appendix.

The study was made possible by the extraordinary cooperation of the U.S. Trustee's Office and a number of local trustees and bankruptcy clerks. In some districts, the questionnaire was given to the attorney or the debtor at the time of filing and collected by the clerk of the court with the petition papers. In most districts, however, questionnaires were distributed to the debtors at the time of the Section 341 meeting and collected by the Chapter 7 or Chapter 13 Trustees. Because Section 341 meetings are often held some months after the initial filing, we continued to collect data in most districts throughout calendar 1991 and several months into 1992, even though cases filed during the first half of the year constituted our universe in 15 districts. In the sixteenth district, the Southern District of California, we had a low response rate and so we collected data for cases filed throughout 1991. The debtors were advised that completion of the form was voluntary and that their responses would be kept anonymous. We report data for primary filers, whom we define as single filers and the first-named petitioner on a joint case. We also collected data on the secondary filer in a joint petition.

We were forced to sample responses because of the large numbers of questionnaires that were returned. We received, for example, 6,528 forms from the Northern District of California, an estimated response rate of 68%. From the Northern District of Illinois we received 9,606 forms, an estimated response rate of 72%. From the Eastern District of Pennsylvania we received 4,318 forms, an estimated return of 88%. And from the Western District of Texas we received 3,110 forms, an estimated response rate of 52%. These response rates are based on one-half the non-business filings in each district for the fiscal year ending in June 1991, to represent the six months' interval within the sampling frame.

Because literally thousands of questionnaires were received from each district, we systematically sampled about 150 cases from each district. (We used the formula I=N/n, where I is the sampling interval, N is the number of questionnaires we had in hand, and n=150.) The initial case was a random start within the first I cases. For a justification of 150 as a suitable sample size, see Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, As We Forgive Our Debtors: Bankruptcy and consumer Credit in America 345 (1989). Although the districts we studied constituted a large fraction of all the bankruptcies filed in the United States in 1991, readers should note that even our large sample may not be completely representative of national data.

People who completed our questionnaires, however, may systematically differ from those who did not, creating the potential for what is termed "non-response bias." To estimate non-response bias, we compared the bankruptcy petitions filed by a sample of non-respondents with the petitions of a sample of respondents in the Eastern District of Pennsylvania. These data indicated a limited response bias that we have described elsewhere. See Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-91, *68 Am. Bankr. L.J. 121,132 n. 35 & 150-54 (1994).*

The sample of 150 questionnaires was enriched with selected financial data from the bankruptcy petitions in five districts: the Eastern District of Pennsylvania, the Western District of Texas, the Northern District of Illinois, the Middle District of Tennessee, and the Central District of California.

Most questionnaire data and the financial data were coded discretely with the addition of codes for non-response or missing data. The information on the reasons for bankruptcy was content coded by an attorney with several years' experience in bankruptcy research. The content codes were developed through a process of simultaneous coding by the three investigators and the coder. Once we had reached a reliability of 90% (that is, our coding agreed with one another in 90% of all cases) the coder read all responses and assigned them codes. Up to four codes were recorded for each case,

and they were coded in the order in which they were mentioned by the debtor-respondent.<>(see questionnaire on next page)

INDIVIDUAL DEBTOR QUESTIONNAIRE

Directions: This form should be completed for any person filing for bankruptcy in any chapter. In the case of a joint filing, the questions should be answered for both petitioners. Completion of this form is voluntary.

NAME(S) of PETITIONER(S): CASE NUMBER:QuestionFirst or Principal PetitionerSecond Petitioner (if joint)<>1. Sex q maleq male q femaleq female2. Age (print each person's age at last birthday.)3. Marital statusq now marriedq now married (check one box for each person.)q separatedq separated q widowedq widowed q divorcedq divorced q never marriedq never married3a. Has this person experienced a q yesq yes change in marital status since q noq no 1 Jan. 1989?4. Education q no schoolq no school (check one box for highest level of q 8th grade or lessq 8th grade or less school COMPLETED.)q 9th, 10th, or 11th gradeq 9th, 10th, or 11th gradeq 12th grade, no diplomaq 12th grade, no diplomaq high school graduateq high school graduate q some collegeq some college q bachelor's degreeq bachelor's degree q advanced degreeq advanced degree5. Is this person a citizen of the U.S.?q yes, by birth or parentageq yes, by birth or parentage q yes, by naturalization q yes, by naturalization q no q no6. Since 1 Jan. 1989, has this person q yesq yes experienced an interruption of at q noq no least two weeks in work-related q not employed during this timeq not employed during this time income? (For example, through layoff or illness)7. If not currently holding a job, did this q yes, sought workq yes, sought work person actively SEEK work during q noq no the past four weeks?q has a job nowq has a job now8. [optional] What is this person's ancestry, racial or ethnic origin?9. On the back, in your own words, please indicate what you believe to be the reasons for your bankruptcy.

Reason Codes Consumer Bankruptcy Project II

00 no reasons given or no additional reasons

01 uncodable reason given; reason not elsewhere classified

02 economy is poor, recession, business cycle downturn

03 petitioner was cheated, scammed, victimized

04 I'm sorry, ashamed, humiliated by bankruptcy

05 sought debt counseling, consumer credit counseling

06 undertook other specific actions to pay bills or avoid bankruptcy (e.g., consolidation loan)

07 moving

08 fresh start, new life

09 I want to repay

10 income interruption, unspecified

11 primary petitioner layoff, job loss, job ended; includes unemployed, not working, retired

12 spouse laid off, job loss, job ended; includes unemployed, not working, retired (code even if not a joint filing)

13 petitioner or spouse resigned job

14 employer's business failed, or trouble in business

15 petitioner's business failed, or trouble in business

20 decline in income, unspecified or not separately coded

21 lower-paying job or pay cut for primary petitioner

22 lower-paying job or pay cut for spouse

23 reduced hours of work, could only find part-time, lost second job, lost overtime

24 commissions declined or inadequate

30 poor household management, unspecified or not separately coded

31 general financial strain; not enough money, too many debts, can't make payments

32 rent, eviction

33 high interest rates

34 I used up all my savings

35 bad investments

36 things are getting better now

40 creditor action, unspecified or not separately coded

41 creditors would not work with petitioner

42 judgments or lawsuits against petitioner

43 garnishment of wages, bank accounts, etc.

44 repossession

45 saving my home; can't make payments

46 foreclosure of mortgage (if specifically mentioned; see also 45); deficiency judgments

47 loss of or damage to home, home repairs

48 could not sell home

49 other specific actions of creditors mentioned

50 car wrecks, accidents

51 car problems, car needs, car insurance, car loss, car repair or damage other than wrecks

52 auto repossession

60 casualty losses, unspecified or not separately coded

70 specified debt caused problem, not explained or not separately coded

71 education loan mentioned

72 credit card debt

73 IRS, taxes specifically mentioned

80 family problems, unspecified or not separately coded

81 divorce (includes left with bills, child support, alimony)

82 single parent

83 birth of baby

84 expenses of rearing children, parent cannot work to care for children

85 expenses of maintaining two households, family separation

86 death of family member

87 supporting extended family member, friends, or others

88 wedding expenses

90 medical problems, not specified or otherwise coded

91 medical insurance problems

92 illness, injury, disability of primary petitioner

93 illness, injury, disability of spouse

94 illness, injury, disability of other family member

95 medical debts

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We gratefully acknowledge Judge Sellers's work and her willingness to share it with us in order to enhance the empirical reports of the bankruptcy system and make possible the comparisons over time. Judge Sellers has been unstinting in her time and unfailingly generous in her enthusiastic support of empirical work.2. Dr. Sullivan is Professor of Sociology and Vice President and Dean of Graduate Studies, The University of Texas at Austin.3. Professor Warren is the Leo Gottlieb Professor of Law, Harvard Law School.4. Professor Westbrook holds the Benno C. Schmidt Chair of Business Law at The University of Texas School of Law.The authors are co-principal investigators in the studies discussed in this paper, and their names are listed in the customary alphabetical order to indicate equal contribution to the work.5. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1997, tbl. 747 (1997) (hereinafter "1997 Statistical Abstract"). The third age group with the greatest assets was that aged 75 and older.6. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 1992, 15 tbl. 13 (1992). Fraction of net worth is interpolated from Arthur B. Kennickell and Martha Starr-McCluer, Household Saving and Portfolio Change: Evidence from the 1983-89 SCF Panel, Review of Income and Wealth, 3, 43, 381, 390 tbl. 4 (Dec. 1997).7. 1997 Statistical Abstract, supra note 5, at tbl. 1200.8. 1997 Statistical Abstract, supra note 5, at tbl. 740.9. Collection and analysis of the data from the Consumer Bankruptcy Project II are described in greater detail in Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-91, *68 Am. Bankr. L.J. 121 (1994).* Additional explanations of the data and details on the demographic questionnaires are in Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, Bankruptcy and the Demographic 'Curse of Job,' presented to the Population Association of America, May, 1992. Additional detail on coding the reasons data are available in Teresa Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, If Bankruptcy is the Answer, What was the Question? presented to the Law and Society Association, Philadelphia, May, 1992. Both papers are available on request from any of the authors. In addition, an earlier analysis of the age data and details regarding analysis of the demographic data are presented in Teresa Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, Baby Boomers and the Bankruptcy Boom, 4 Norton Bankr. L. Adviser 1 (1993). The 1997 data come from the efforts of the Honorable Barbara Sellers, Bankruptcy Judge for the Southern District of Ohio. She provided detailed raw data from a sample of 150 cases filed in 1997 in the Southern District of Ohio, which were analyzed for this comparison.10. The Sellers's data are described in greater detail in Elizabeth Warren, The Bankruptcy Crisis, 73 IND. L.J.1079 (forthcoming summer 1998).11. Calculated from the filing data of the Administrative Office of the United States Courts, reporting 1,350,118 non-business bankruptcy filings during calendar year 1997. We multiplied the estimated number of joint cases by two in order to determine a total number of individuals in bankruptcy in 1997 of 1,944,170.12. 1997 Statistical Abstract, supra note 5, at tbl. 14.13. Estimates calculated from CBPII data and from Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Population Characteristics, Series P-20, No. 458, Household and Family characteristics: March 1991 153 tbl. 17 (1992).14. 1997 Statistical Abstract, supra note 5, at tbl. 800.15. Warren, The Bankruptcy Crisis, supra note 10; Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, Consumer Debtors Ten Years Later, supra note 9, at 121.16. A sample questionnaire is reproduced in the Appendix. Also in the Appendix is a technical explanation of how the reasons data were coded and a copy of the coding list.17. Among debtors 50 and older, 11.4% report specific problems with creditors in dealing with the debts, while only 7.2% of the debtors younger than 50 give the same responses. Similarly, about 7.5% of debtors 50 and over specifically identify credit card problems, while 5.2% of debtors under 50 give the same responses.18. Again there is some overlapping; for example, some debtors have mentioned that they were cheated and mentioned a specific credit card problem and so are counted in both categories. When the categories are combined, these debtors are counted only once. For younger debtors, the combined proportion is 12.4%.19. 1997 Statistical Abstract, supra note 5, at tbl. 1200.20. Judge Sellers was much less likely to attribute a bankruptcy in

1997 to job loss, compared with our 1991 data, but the methods she used for determining the reasons for filing were also different. See Appendix.21. Diane Ellis, The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-offs, and the Personal Bankruptcy Rate, 98-05 Bank Trends 3 (Feb. 1998) (official publication of the Federal Deposit Insurance Corporation). The FDIC paper demonstrates a correlation between the deregulation of consumer interest rates and the rise in consumer bankruptcy filing rates.22. In the third quarter of 1997, credit card banks showed a 2.59% return on assets, compared with a 1.22% return on assets reported by all commercial banks. FDIC Quarterly Banking Profile, Third Quarter 1997. Credit card profitability has outstripped the profitability of other lending activities for more than a decade. Federal Reserve Board, The Profitability of Credit Card Operations of Depository Institutions (Aug. 1997), Lawrence Ausubel, Credit Card Defaults, Credit Card Profits, and Bankruptcy, *71 Am. Bankr. L.J. 249 (1997).*

UPDATE: Eighth Circuit Upholds RFRA As Fraudulent Transfer Defense

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