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BOOK REVIEW: WILL CREDITORS QUIT PLAYING BLIND MAN'S BLUFF NOW THAT THEY HAVE THE ABILITY TO SEE THE LIGHT?

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Winton E. Williams, *The Games Creditors Play: Collecting from Overextended Consumers* (Carolina Academic Press 1998)

Winton E. Williams, a professor of law at the University of Florida with an extensive background in debtor-creditor law, focuses on two major themes in the area of consumer collection practices in his book *The Games Creditors Play*.¹ The majority of the book focuses on the potential benefit that would accrue to consumer creditors if they could understand the role consumer credit counselors play in reducing the transaction costs associated with acquiring information about individual consumer debtors.² Williams utilizes data from the work of game theorists to suggest that, in certain instances, cooperation by a creditor with the debtor and other creditors would benefit all creditors.³ This benefit depends upon the creditors achieving a common understanding about their shared interests.⁴ The second theme developed in the book addresses the desire of some entities to limit a consumer creditor's remedies against a defaulting debtor with appropriate legislation.⁵ Considering the book in reverse order, the following theme arises: debtors need to be pressured by creditors to face reality.⁶ Once debtors face this and understand they have the ability to avoid bankruptcy they will propose a workout of their debts with a certified credit counselor. Creditors should cooperate with the workout and cease employing pressure tactics because it will benefit them collectively.⁷

Williams' first focus is on the counterintuitive increase in coercive actions taken by consumer creditors in situations where a workout, involving all of the debtor's creditors, would yield better results for all creditors as a whole.⁸ The problem is that a consumer workout will yield a better result for all creditors only if every creditor cooperates.⁹ However, as both Williams' data shows, and common sense suggests, if one creditor refuses to cooperate in the workout and continues to apply coercive collection measures against the debtor, the financial return to that creditor will exceed what would have been obtained through cooperation.¹⁰ Therefore, according to Williams, it is in the interest of creditors to realize the potential overall gain they would receive by cooperating in all cases where workouts are possible.¹¹ The transaction costs associated with determining what cases qualify for a workout historically have been so high that creditors simply relied on the proven recovery method of increased coercive measures.¹² Now, thanks to the availability of consumer credit counseling, transaction costs for creditors have been reduced, creating an environment in which increased creditor cooperation may be possible.¹³

The heroes of this book are the credit counseling agencies, particularly those affiliated with the National Foundation for Consumer Credit ("NFCC"). These agencies have the ability to nurture goodwill among creditors (through their affiliation with the NFCC) and narrow the information gap that Williams believes is the key to understanding the unproductive application of coercive creditors' remedies.¹⁴

Williams goes to great lengths in making the case for cooperation among consumer creditors by citing game theory data to support his argument.¹⁵ In particular, Williams analogizes the position of creditors in a consumer case to that of the "Prisoner's Dilemma."¹⁶ In the Prisoner's Dilemma, two crime suspects are caught by the police and placed in separate cells where they cannot communicate. There is not enough

evidence to bring anything but a relatively minor charge against either suspect. The prosecutor offers each suspect freedom in exchange for testimony implicating the other suspect, but only as long as the implicated accomplice does not in turn implicate the turncoat. The prosecutor separately tells the suspects that if they maintain their silence and are implicated by their accomplice, they will receive the harshest possible sentence (five years); if both suspects incriminate one another, each receives an intermediate sentence (two years); if both suspects maintain their silence, each receives a light sentence (one year). ¹⁷

The analogy between the classic Prisoner's Dilemma and the position of a creditor in a consumer case is as follows: a creditor, in a case where a workout is possible, will receive the best outcome when all other creditors are cooperating with the debtor and the creditor continues to use coercive collection methods. ¹⁸ The next best outcome occurs when the creditor agrees to cooperate with the other creditors. ¹⁹ The worst outcome occurs when the creditor agrees to cooperate but some other creditor(s) continues to use coercive collection methods. ²⁰ Williams calls this model a "Creditor's Dilemma," ²¹ and he provides the reader with ample game theory material to support his conclusions in a readable approach that will be familiar to anyone who has been exposed to the writings of the Law and Economics Movement. ²² However, as Williams indicates, there is reason to suspect the validity of these behavioral conclusions drawn from extending the game theory to consumer collection cases. This is due to the high transaction costs that impede cooperation by creditors in bankruptcy. He states:

Judge Posner attributes high transaction costs to two primary factors: (1) a large number of parties to the transaction and (2) the inability of the parties to the transaction to deal with others, a condition economists term a bilateral monopoly. He observes that 'costs of transacting are highest where elements of bilateral monopoly coincide with a large number of parties to the transaction—a quite possible conjunction.' Both elements are normally present in workouts. ²³

To Williams' credit, the book consistently indicates weaknesses that exist in the application of game theory to the Creditor's Dilemma as it makes the case for creditor cooperation. ²⁴ Given the varying conditions of distressed consumers, it may be a considerable period of time before the transaction cost barrier to consumer creditor cooperation is overcome. ²⁵

Williams also focuses on the restrictions being advocated to limit a creditor's remedies against a defaulted consumer. ²⁶ He analyzes the lost value premise that historically has been advocated as the reason for curtailing creditors' remedies. ²⁷ As he states, "[s]imply put, the lost-value problem is that the injury to debtors caused by the use of various creditors' remedies 'frequently seemed greater than the corresponding benefits to creditors.'" ²⁸

The book discusses the assertions made by commentators on the lost value premise. ²⁹ In so doing, it visits the reasoning behind the 1984 Federal Trade Commission ("FTC") ban on: 1) confessions of judgment; ³⁰ 2) waivers of exemptions; ³¹ 3) the taking of a blanket security interest in household goods when the credit did not arise from the acquisition of goods in a credit sale or from proceeds of a loan that was used to acquire the good; ³² and 4) wage assignments. ³³ In addition, the book discusses proposed creditors' remedies that the FTC considered but ultimately rejected including: 1) election of remedies (requiring creditors with security interests in household goods to elect the remedy of a suit on their claims or the return of their collateral); ³⁴ 2) the valuation of collateral other than household goods at the retail price for purposes of calculating deficiencies; ³⁵ and 3) the use of cross-collateral terms in credit-purchase contracts (giving a security interest to a creditor in both prior and subsequent items purchased by a consumer from the creditor). ³⁶

In making the case for the retention of creditors' remedies that some deem excessive, Williams points to two arguments. ³⁷ First, the utility of creditors' remedies should focus on the time at which parties enter into a credit contract as opposed to the effect of the remedy when a debtor defaults on the contract. ³⁸ From Williams viewpoint, the limitation of creditors' remedies is an overly paternalistic safeguard that restricts credit to consumers who often need it. ³⁹ Second, the informational deficit is responsible for the counterproductive use of creditors' remedies, which has been overcome through the increased role of

consumer counseling agencies. ⁴⁰ This situation should lead to increased creditor forbearance in applying these remedies in potential workout cases (cases that do not justify the use of a remedy). ⁴¹

This does not mean that Williams is opposed to any restriction on creditors' remedies. At the end of his book he cites an Ohio statute that allows a debtor to avoid a wage garnishment by entering into an agreement with a credit counseling service for "debt scheduling" as an example of a positive restriction on creditors' remedies.

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This book provides a useful analysis of potential cooperation among creditors when informational transaction costs are reduced. What remains to be seen is the extent to which credit counseling services work within the model of the "Creditors Dilemma." If laws like the Ohio garnishment statute, which restrict creditors' remedies, provide increased pre-bankruptcy shelters for debtors (which also delay a debtor's financial wake-up call), we may soon see books entitled "The Games Debtors Play."

FOOTNOTES:

¹ Winton E. Williams, *The Games Creditors Play: Collecting from Overextended Consumers* (1998).[Back To Text](#)

² See *id.*

; see also [Todd Trierweiler, When In Debt . . . : Chapter 13 Bankruptcy Is Better For Some Clients](#), 54 *Or. St. B. Bull.* 15, 15 (1994) (noting that cooperation with consumer credit counselors can benefit creditors).[Back To Text](#)

³ See

[Williams, supra note 1, at 77](#) (analogizing Prisoner's Dilemma with "Creditor's Dilemma" and concluding that greatest total recovery exists when creditors cooperate); see also [Wendy J. Gordon, Presentation By Professor Wendy J. Gordon](#), 17 *U. Dayton L. Rev.* 871, 874–77 (1992) (discussing application of game theory to bankruptcy analysis). See, e.g., [In re Detrono](#), 222 B.R. 685, 688–89 (Bankr. E.D.N.Y. 1998) (discussing game theory).[Back To Text](#)

⁴ See

[Williams, supra note 1, at 139](#) (observing that creditors must recognize their shared interests to benefit from services of credit counselors).[Back To Text](#)

⁵ See

[id. at 158](#) (noting FTC's criticism of some creditor's remedies that hurt debtor).[Back To Text](#)

⁶ For an interesting and very entertaining fictional account of a large commercial debtor being introduced to financial reality in a workout see Tom Wolfe, *A Man In Full* 34–58 (1998).[Back To Text](#)

⁷ See

[Williams, supra note 1, at 117](#) (stating that creditor cooperation with credit counselor yields greater aggregate recovery than coercion tactics); see also [Robert E. Scott, Rethinking the Regulations of Coercive Creditor Remedies](#), 89 *Colum. L. Rev.* 730, 730–32 (1989) (discussing coercive creditor remedies and regulations governing their use); [William A. Reilly, Note, Debt Collection Practices: Iowa Remedies For Abuse of Debtor's Rights](#), 68 *Iowa L. Rev.* 753, 753–57 (1983) (analyzing remedies used by consumer creditors to collect bad debts).[Back To Text](#)

⁸ See

Williams, *supra* note 1, at 21 (noting that full creditor cooperation with workout leads to more recovery than coercion).[Back To Text](#)

⁹ See

[supra note 2](#) and accompanying text (stating every creditor must cooperate in workout to attain best result).[Back To Text](#)

¹⁰ See

Williams, *supra* note 1, at 77 (illustrating that under Creditor's Dilemma, individual creditor's return is highest when one creditor uses coercion and others cooperate).[Back To Text](#)

¹¹ See *id.*

at 25 (noting that to benefit from credit counseling, creditors must have assured cooperation of other creditors).[Back To Text](#)

¹² See

Williams, *supra* note 1, at 40.[Back To Text](#)

¹³ See *id.*

at 116–18 (noting increased use of credit counseling leads to reduced costs and better creditor cooperation).[Back To Text](#)

¹⁴ See *id.*

at 116–139.[Back To Text](#)

¹⁵ See *id.*

at 73–99 (utilizing Prisoner's Dilemma, zero–sum games, and no contests); *see also* Douglas G. Baird et al., Game Theory and the Law 39 (1994) (analyzing game theory); [Gordon, supra note 3, at 874–77](#) (1992) (discussing game theory); [Martin Shubik, Game Theory, Law, and the Concept of Competition, 60 U. Cin. L. Rev. 285, 285–90 \(1991\)](#) (discussing application of game theory to law).[Back To Text](#)

¹⁶ See

Williams, *supra* note 1, at 73–76.[Back To Text](#)

¹⁷ See *id.*

at 73–75 (stating all possible outcomes from model). *See, e.g.,* [Page v. United States, 884 F.2d 300, 301 \(7th Cir. 1989\)](#) (explaining Prisoner's Dilemma and illustrating model in action as co–conspirators in armed robbery separately agree to implicate one another); [United States v. Roman, No. 94–00017–C, 1994 WL 723066, at *1 \(W.D. Va. 1994\)](#) (discussing Prisoner's Dilemma).[Back To Text](#)

¹⁸ See

Williams, *supra* note 1, at 77.[Back To Text](#)

¹⁹ See

[id.](#)[Back To Text](#)

²⁰ See

[id.](#)[Back To Text](#)

²¹ See *id.*

at 75.[Back To Text](#)

²² See

A. Mitchell Polinsky, *An Introduction to Law and Economics* 18–19 (2d ed. 1989) (discussing strategic behavior in text discussing law and economics); Richard A. Posner, *Economic Analysis of Law* 62 n.4 (4th ed. 1992) (discussing game theory in context of law and economics analysis); [Douglas G. Baird, The Future of Law and Economics: Looking Forward](#), 64 *U. Chi. L. Rev.* 1129, 1133 (1997) (discussing law and economics as history, including behavioral analysis and future).[Back To Text](#)

²³ See

Williams, *supra* note 1, at 87–88 (quoting Richard A. Posner, *Economic Analysis of Law* 54–55 (3d ed. 1986)).[Back To Text](#)

²⁴ See *id.*

at 77.[Back To Text](#)

²⁵ See

Williams, *supra* note 1, at 85–90 (discussing effect of transaction costs on cooperation). Of course, debtors who have used the system in the past contribute to these barriers. *See id.* at 86 & 129; *see also* [United States v. Harris](#), 960 F.2d 74, 77 (8th Cir. 1992) (dismissing chapter 7 case where debtor would have filed under chapter 13 and paid 56% of their unsecured debts in three years); [In re Rodriguez](#), 228 B.R. 601, 605 (Bankr. W.D. Va. 1999) (discussing situation where debtor attempted to avoid converting his case into chapter 13 case which would have allowed creditors to be repaid in full within three years, but would force debtor to delve into his 401(k) plan).[Back To Text](#)

²⁶ See

Williams, *supra* note 1, at 141–88. *See, e.g.,* [FTC Credit Practice Rule](#), 16 C.F.R. § 444.2 (1995) (prohibiting remedies such as confessions of judgment and waivers of exemptions).[Back To Text](#)

²⁷ See

Williams, *supra* note 1, at 142–44; *see also* [Peter Letson, The Political Economy of Consumer Credit Regulation](#), 44 *Emory L.J.* 587, 596–97 (1995) (explaining why lost value limits creditor's remedies); [Winton Williams, Resolving the Creditor's Dilemma: An Elementary Game Theoretic Analysis of the Causes and Cures of Counterproductive Practices in the Collection of Consumer Debt](#), 48 *Fla. L. Rev.* 607, 614 (1996) (discussing lost value).[Back To Text](#)

²⁸ See

Williams, supra note 1, at 142–43 (quoting Robert A. Scott, Rethinking the Regulation of Coercive Creditor Remedies, 89 Colum. L. Rev. 730, 734 (1989)).[Back To Text](#)

²⁹ See

[id.](#)[Back To Text](#)

³⁰ See

[id. at 158](#) (describing FTC's concern regarding absence of notice and hearing prior to judgment, which cause significant injury to consumers). In balancing the cost with the benefit to creditors of avoiding thirty day delay for default judgment, this remedy is shown to be vulnerable. *See id. at 158* (citing to FTC, Trade Regulation Rule: Credit Practices, 49 Fed. Reg. 7740, 7753–54 (1984)).[Back To Text](#)

³¹ See

Williams, supra note 1, at 158–59 (noting FTC's case against waivers of exemption is built upon effect of waiver on household goods, but also describing opposition to these waivers because of lost value).[Back To Text](#)

³² See

[id. at 159–61](#) (noting this might have been most prevalent practice). The FTC was concerned with the disparity between value of goods in resale market as compared with "replacement, sentimental and emotional value to debtors." *Id. at 160*. The FTC seemed concerned that creditors were able to achieve repayment arrangements by use of this tactic, which would have proved impossible otherwise. *See id.*[Back To Text](#)

³³ See

Williams, supra note 1, at 158–168. Williams states the differences between garnishment, post judicial action and assignment. *See id.* Assignment only requires the creditor to give notice to debtor's employer. *See id.* Therefore, assignment is disfavored because it happens "without the procedural safeguards of a hearing and an opportunity to assert defenses or counter claims." *See id.*[Back To Text](#)

³⁴ See

[id. at 168–69](#) (noting creditor must choose collateral that is worth less than claim in full satisfaction thereof, or proceed as unsecured creditor unnecessarily forfeiting interest in collateral).[Back To Text](#)

³⁵ See

Williams, supra note 1, at 169 (stating FTC's reasons for rejection include insufficient evidence of prevalent problem, which could be handled case-by-case due to UCC's requirement of "commercially reasonable" disposition).[Back To Text](#)

³⁶ See

[id. at 168–171](#) (explaining little evidence of consumer injury can possibly cause significant reduction in purchase money security interests).[Back To Text](#)

³⁷ See

[id. at 177.](#)[Back To Text](#)

³⁸ See

Williams, supra note 1, at 177–78 (describing benefits of reducing cost and increasing credit by providing debtor with incentive to perform contract); *see also* Scott, supra note 7, at 740 (suggesting focus on *ex ante* relationship of debtor and creditor, thus making it "cooperative bargaining opportunity").[Back To Text](#)

³⁹ See

Williams, supra note 1, at 183–85 (stating restrictions on those best able to protect themselves must be balanced with special needs of creditors who lend to high risk debtors).[Back To Text](#)

⁴⁰ See

id. at 177–78 (noting that lack of cooperation leads to destructive coercion, which is remedied by credit counseling).[Back To Text](#)

⁴¹ See

id. at 177–79 (describing benefits of counselor assisted workout to debtor and problems which debtor and creditor both faced prior to easier access to these agencies). Additionally, ready access to counseling agencies has allowed debtors to forego filing a bankruptcy petition in order to avoid lost value. *See id. at 178*.[Back To Text](#)

⁴² See

id. at 189 (describing statute's requirement that creditor serve written demand to debtor before garnishment will be allowed); Ohio Rev. Code Ann. §§ 2716.02, 2716.03(A)(3) (Anderson 1996) (explaining demand that is required prior to proceeding for garnishment).[Back To Text](#)