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Proceedings of the Academy for Studies in Business Law

**October 25-28, 1998
Las Vegas, Nevada**

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Co-Editors
Western Carolina University**

**The Proceedings of the
Academy for Studies in Business Law
are published by the
Allied Academies, Inc., PO Box 2689, Cullowhee, NC, 28723.**

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Proceedings of the Academy for Studies in Business Law

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LABOR FORCE FLEXIBILITY AND THE CONTINGENT WORKER: LEGAL AND POLICY ISSUES FOR THE JUST IN TIME WORKPLACE

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ABSTRACT

Flexibility and efficiency have been two very popular concepts driving strategic human resource management decision making over the last ten years. Responding to the complex dynamics of the competitive environment many firms are facing, more and more firms are utilizing contingent workers to achieve the flexibility and cost savings necessary to survive in today's just in time environment.

Estimates of the percent of the total U.S. workforce that are contingent workers varies from the 5 percent estimates of the Bureau of Labor Statistics (BLS) to some private studies that estimate that contingent workers make up from 25 to 30 percent of the total workforce. According to the BLS, the number of workers employed by temporary and leasing agencies has doubled in the last decade and quintupled since 1982. Manpower Inc., a temporary-help firm, is now considered the largest employer in the United States. Other surveys report that more and more companies are currently using contingent workers and even more plan to use them in the future. One study projected that by the year 2000 35 percent of all firms will staff at least ten percent of their work units with contingent workers.

The consistent rise in the use of contingent workers over the past decade has not come without a price. While using contingent workers offers numerous advantages for employers, numerous legal issues and employee relations questions have arisen. Proper classification of workers as independent contractors or regular employees, responsibility for taxes, benefits, labor relations, and compliance with anti-discrimination legislation are among the legal issues that have surfaced. The use and misuse of the independent contractor status has become increasingly troublesome for employers and the Internal Revenue Service (IRS), with the IRS stepping up efforts to collect an estimated \$1.5 billion lost annually in withholding taxes. Employee relations concerns include the lack of commitment, turnover, the impact on training and morale of both the contingent worker and regular staff.

This paper will examine the rationale behind the use of contingent workers and review the numerous legal issues and employee relations questions with which employers have had to address. Is the increasing use of the just in time work force the latest in a long line of "management fads"? Or is it an integral step in the move toward the "virtual workplace" of the future? In addition, policy and practice suggestions for effective legal use of contingent workers will be addressed.

BROKEN PROMISES: WHEN SHOULD AN INDIVIDUAL BE ABLE TO DECLARE BANKRUPTCY?

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A Midwest town council was in session during an earthquake one year. When the shock hit, everyone rushed out of the building. According to an item in *Party Line*, publication of the Republican State Central Committee, the clerk later wrote in the minutes: On motion of the city hall, the council adjourned.¹

When should an individual be able to declare bankruptcy? Congress, through its creation of the National Bankruptcy Review Commission and subsequent bills pending has decided to reexamine that issue. Bankruptcy filings are at an all time high. According to the American Bankruptcy Institute, bankruptcy filings for calendar year 1997 increased by 19.1 percent to a record high of 1,404,145 filings, compared to 1,178,555 in 1996.² With a robust economy and low unemployment and interest rates, why are record numbers of Americans choosing bankruptcy? Should limits be placed on who can file bankruptcy and what is disturbing about this information? Or is the furor over the record number of bankruptcies an overreaction--a claim that "the sky is falling?" after an acorn fell on the chicken's head?

In 1994, Congress created the National Bankruptcy Review Commission to review the bankruptcy laws to address the concerns that bankruptcy filings were increasing too significantly. No additional action by Congress occurred until the Commission submitted its report in October 1997.³ The House rejected the Commission's report as too consumer oriented and a House version has passed which adopted a needs-based test for consumer bankruptcy petition. The House was concerned that the bankruptcy petitions filed in 1997 resulted in erasure of an estimated \$40 billion in consumer debt and that the losses passed on to every consumer were \$400 for every American household.⁴ The House members were concerned that consumers in the United States used to have a sense of responsibility for repayment of debts and that now individuals do not feel a sense of responsibility or incur no disgrace or embarrassment at filing bankruptcy. Creditors were eventually paid one way or another. According to Representative Gerkas:

Harry S. Truman. . .spent the better part of the 1920s in debt due to the collapse of his clothing business in 1922. Truman was both a man and a President of the highest moral character with a tremendous sense of responsibility, which was reflected in the motto that sat on his desk in the Oval office-- 'The buck stops here.' Truman eventually paid off all of his creditors by working out deals and payment schedules, thereby keeping himself out of bankruptcy court and ensuring that he lived up to bills he amassed.⁵

The members of the House who spoke in support of the bill echoed the sentiments presented by Representative Gerkas. The concern is that United States consumers have a decreased sense of responsibility for their debts and feel no obligation to repay debts they have incurred.

Representative Gerkas illustrated his point by pointing to examples of bankruptcy filings by individuals who would not be considered to be destitute. Representative Gerkas noted that bankruptcy became viewed more as a financial planning tool, government debt forgiveness program, and a first choice, rather than a last resort. Representative Gerkas stated that "bankruptcy has even become fashionable" and that Willie Nelson, Burt Reynolds, Kim Basinger, M.C. Hammer, former Baseball Commissioner Bowie Kuhn, Arizona Governor Fife Symington, former Philadelphia Eagles owner and Pennsylvania trucking magnate Leonard Tose and Grammy Award winning singer Toni Braxton have declared bankruptcy.

The House version made nondischargeable any credit card bill incurred within 90 days of a bankruptcy filing, putting creditors in competition with child support and alimony payments which have been nondischargeable for most of this century. The House bill created a needs-based test based on the income of the debtor filing bankruptcy. An individual whose income is below the median family income would be permitted to file a Chapter 7 without question. An individual whose income was above the median would have to file a Chapter 13 or 7, depending on other expenses. Under the House version, an individual would be required to file a Chapter 13 petition if certain conditions were met. If the individual had more than \$50 per month after taking monthly gross income and subtracting secured credit payments, child support and living expenses as calculated by the IRS and could still pay 20% of the unsecured debt within five years, then the individual must file a Chapter 13. The purpose of the proposed bill, as noted by various Representatives, was to hold individuals responsible for repaying their debts and to reduce the cost of bankruptcy borne by those individuals who do pay their debts.

The House bill contained other provisions designed to make it more difficult to commit fraud when filing bankruptcy. The Bill proposed random audits of bankruptcy schedules submitted by debtors and claims filed by creditors. The bill proposed a study of bankruptcy petitions to obtain clearer statistical information on the profile of the individuals filing bankruptcy. However, the key provisions of the legislation would make it harder to seek bankruptcy protection from creditors, particularly for those who appear able to pay their debts.

Opponents claim the legislation would unfairly oppress many people lured into burdensome debt. This point of view was represented by the Senate's actions. The Senate debate focussed on the role of credit card companies in the burgeoning debt. The Senate thus rejected the key provision of the House bill and proposed that the decision to file a Chapter 13 instead of Chapter 7 rest with the judge in individual cases, not mandated by Congress. Senator Feinstein noted that the typical family filing bankruptcy in 1997 owed more than 150% of its annual income in short-term, high interest debt.⁶ Senator Feinstein said that various studies linked the rise of personal bankruptcies directly to the rise in consumer debt. According to Senator Feinstein, there are over a billion credit cards in circulation and that three quarters of all households have at least one credit card and carry credit card debt from month to month. She also noted that credit card usage among lower income families has almost doubled. Senator Feinstein indicated that total credit card profitability has risen at the same time the number of bankruptcies has increased. For example, in the third quarter of 1997, credit card banks showed a 2.59% return on assets compared to a 1.22% return on assets reported by all

commercial banks. Further, credit card issuers earned approximately 75% of their revenues from the interest paid by borrowers who do not pay in full each month. The Senate's conclusion as demonstrated by its rejection of the needs-based bankruptcy test was that the credit card issuers engaged in practices which resulted in the increase bankruptcy filings and that discharge decisions should be left to the discretion of bankruptcy judges.

The National Bankruptcy Review Commission appointed by Congress studied current law and practice for two years. Five of its nine members found no major abuses of the bankruptcy system and only two recommended proposals like those being considered by the House.⁷ Credit-industry-supported studies suggest last year that \$4 billion in discharged debts could have been repaid and estimated that all bankruptcies cost the economy \$44 billion. Further studies estimate that debtors who pay their debts pay an additional \$400 per year because of the bankruptcies. Those studies do not discuss any positive economic aspects of the bankruptcy system, such as moving property into more productive hands and providing a rational way for those with unmanageable debt to seek relief without becoming destitute or wards of the state.

“Who is ‘at fault’ for the rise in consumer bankruptcies?”⁸ The National Bankruptcy Review Commission could not decide. The Commission concluded that there is a correlation between consumer debt and consumer bankruptcy but could not determine why. Interestingly, however, the Commission concluded that the profile of consumers who file bankruptcy today is similar to the profile of those who filed earlier. The Commission noted that the average bankruptcy family in 1981 had short-term, non-mortgage debt that was twice their total yearly income. Studies of average bankrupt families in 1997 reveal a similar proportion of debt to income.⁹ The Commission referred to several media and finance industry analyses of the factors that affect bankruptcy filings. These analyses referred to state garnishment laws, gambling, loss of medical insurance, rate of divorce, whether the legal system encourages or discourages bankruptcy, reduced stigma toward filing bankruptcy, changing credit practices, and the changing debt picture of consumers as contributing to the increase in bankruptcy filings.¹⁰

PROMISE-KEEPING

A key principle underlying creditor-debtor relationships is promise keeping. The House debate demonstrated concern that individual consumers who borrowed money based on promises to repay the debt were not keeping those promises. The reference to President Truman showed that the obligation to keep promises was an important quality which, the House believed, was not followed by those consumers who declare bankruptcy but who could repay at least twenty percent of their debt. Promise keeping has been analyzed here from a Kantian, utilitarian and justice perspective.

Immanuel Kant's key moral principle is the concept of a good will.¹¹ The good will exists beyond intelligence, power, wealth, and happiness. Although intelligence, power, wealth and happiness can be evidence of a good will, these qualities are not intrinsically good will because they can be perverted. The good will is pure and incorruptible. It is the good “character” which helps determine whether someone's actions are moral or not. Duty is the objective manifestation of good will and an action is moral if it is done because of this duty, regardless of the consequences. Kant's analysis then includes a determination that when an individual acts from principle that individual is acting because of a duty and has thus acted morally regardless of the consequences of that action.

The ultimate good is the individual's decision to act consistently with the principles that help to obtain the ultimate goal, a good will, which is valuable in and of itself. This analysis leads to one of the key maxims of Kant's philosophy--the categorical imperative. The categorical imperative is that "I must act in such a way that I can at the same time will that my maxim should become a universal law."¹² It is here that Kant analyzes the principle of promise keeping and determines that it is immoral to make a promise one has no intention of keeping. To do so would render an individual's promises meaningless--no one would believe that the individual was trustworthy and as a universal law, society could not function were everyone to make promises he or she had no intention of keeping. Instead, one's duty, in order to have a good will, is to keep promises made, regardless of the consequences in an individual situation.

Based on this brief summary of Kant's philosophy, a follower of Kant would determine that failure of a creditor or a debtor to honor the promises made as part of the credit agreement would be immoral conduct. The refusal to honor such promises would be immoral conduct under the categorical imperative. Under the categorical imperative the question would be whether **refusing** to honor promises made as part of a credit agreement should have the force of universal law applying to everyone. So a Kantian would determine whether society could function efficiently if every individual who made a promise could refuse to honor it. Under Kant's reasoning, the answer would be no, because the effect would be to have a society where individuals would not be able to rely on promises because promises would be meaningless.

If refusing to honor one's promises were a universal principle, business transactions would be impossible without requiring collateral for every transaction. Even then, there could be a problem if the collateral was not delivered as promised. Further, even if the collateral were not delivered as promised or if the arrangement to transfer the collateral were reneged upon, then that would be acceptable in this society where promises were made to be broken. Similarly, the individual seeking the loan could not rely on the promise of the creditor that upon delivery of the collateral, the loan would be made on the terms specified. Now, to some extent, if a creditor continued to refuse to honor promises, there could be some repercussions in society that might discourage the creditor from continuing that practice. For example, other prospective borrowers might not seek obtain loans from that creditor and that creditor's business might eventually fail. However, the basic problem, under this Kantian analysis, is that a society filled with individuals making meaningless promises for personal and business transactions would not be an effective or efficient society. Thus the principle of refusing to honor promises made could not be universalized. False promise making cannot be a principle of universal law and the creditor and debtor must honor their promises. Honoring one's promises because one has a duty to do so and not for any other reason would be considered moral conduct.

Utilitarian philosophy requires analyzing an action or a principle to determine whether that action maximizes the good for society. Jeremy Bentham and his student John Stuart Mill, defined the principle of utility as relating to the issue of maximizing the pleasure or good for the individual and thus for society.¹³ The principle of utility focuses on determining whether an action is moral or right based on the consequences in terms of the maximization of good. As Bentham noted, "By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good or happiness . . . or . . . to prevent the happening of mischief, pain, evil or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community; if a particular individual, then the happiness of that individual."¹⁴ Bentham defines the community as

the sum of the interests of the individuals who make up the community. Thus, it is the interest of the individual that becomes the key to determining whether an action is morally right or not. Under this philosophy, actions or concepts that will bring pleasure may be instrumentally good, i.e. because they help to accomplish the ultimate good--pleasure. There are no true intrinsic goods except the maximization of happiness.

This philosophy has frequently been incorporated as part of the study of business ethics, where the morality of an action is to be determined by whether it accomplishes the best interests of the corporation (individual) or the society. One key difference between this philosophy and Kantian philosophy is that the focus in utilitarian philosophy is upon consequences of each action whereas the focus in Kantian philosophy is upon the good will or duty despite the consequences of an individual action.¹⁵ There is no universal law or principle that must be followed. Each law or principle must be evaluated to determine whether it results in maximization of good. Thus, the issue of promise keeping arises. Generally, as noted in the discussion of Kant's philosophy, promise keeping serves to permit society to function in that there is trust and integrity of individuals and entities. In the context of this paper, the question is whether the greatest good is accomplished by adopting a rule that permits individuals to declare bankruptcy and thus break their promises.

Under a utilitarian analysis, the question would be which of several actions would result in the most net good. The task here is to identify the good and bad consequences of each of the alternative, figure out the net good of each and select the alternative which results in the most net good (or least net bad) for society. To simplify this analysis, two alternatives will be examined: (1) promises made in a creditor-debtor relationship cannot be broken and (2) promises made in a creditor-debtor relationship may be broken if the debtor is unable to pay the debt.¹⁶

What are the good consequences of adopting a principle that promises made in a creditor-debtor relationship cannot be broken? One apparent good consequence is that a debtor (or creditor) may depend on the promises of the other because of the binding nature of those promises. A creditor who extends credit can be assured (in as much as is possible) that the debtor will repay the loan as agreed. Theoretically, therefore, the creditor can be assured that he or she will have use of that money as it is repaid and can plan affairs based on the assurance of repayment. A debtor who has repaid as agreed can also be sure that this creditor or others will be likely to make credit available to that debtor as the debtor wants or needs (assuming that the debtor and/or creditor make a realistic assessment of his or her ability). The House debate reflected the concern that one consequence of repaying debts is that an individual will be viewed as honorable and moral. Further, individuals who have repaid their debts on time will not be obligated to bear the costs (noted as \$400 per households) of those who default.

On a societal level, extension of credit helps the economy in that individuals who do not have the funds to make immediate purchases can obtain credit to make those purchases.¹⁷ For example, because of credit availability, consumers may buy cars and durable goods and invest in education. Production of those goods and services then provides jobs and keeps the economy growing. It permits individuals to improve their lifestyles and provide more for themselves, their families and friends than they might otherwise be able to if there was no credit available. Creditors would also be obligated to continue extending credit to those individuals who had paid according to the terms of the credit agreement. Debtors who paid their balances in full could not be removed from the credit roles, unless, of course, the agreement so provided. A blanket rule would prohibit consumer

bankruptcy filings and thus reduce judicial and legislative involvement in this private transaction between a creditor and debtor. Individuals bent on trying to obtain credit with no intention of attempting to repay would be obligated to pay the debt. Thus the likelihood of successfully defrauding of a creditor would be reduced.

What are the bad consequences of adopting a principle that promises made in a creditor-debtor relationship cannot be broken? One negative consequence is that individuals who had honestly incurred debts but who, due to circumstances beyond their control, could not pay the debt would continue to be forever obligated to pay the debt. An individual who had obtained credit, then subsequently became ill and could not work would continue to be obligated to pay the debt. Similarly, an individual who incurred uninsured medical expenses for himself or a family member would continue to be forever obligated to pay. Another negative consequence is that an unscrupulous creditor would have no disincentive to discourage debtors from “getting in over their heads.” Although there is an issue here of individual responsibility which will be addressed later, the creditor who could “trick” a consumer into entering into a credit arrangement would be able to hold the debtor liable (unless there was an exception made for fraud). At this point, a utilitarian would have to weigh the good and bad consequences of obligating the parties to the promises made in the creditor-debtor relationship and arrive at a “net good” amount for this alternative. This analysis as applied to the House bill must be tempered by the definition of who would actually be able to declare bankruptcy. Under the House version, those who were at poverty level would continue to be able to declare bankruptcy. Only those who were above poverty level, or whose median income had reached a certain level, would have to repay a portion of the debts rather than filing a Chapter 7.

A similar analysis of the second alternative must occur in order to perform a valid utilitarian analysis. This second alternative is that promises made in a creditor-debtor relationship may be broken if the debtor is unable to pay the debt. In reviewing this alternative the key issue is defining when a debtor is unable to pay a debt. The bankruptcy laws evidence a public policy determination of what constitutes an inability to pay. The Bankruptcy Commission concluded that inability to pay is not determined by whether the consumer has future income with which to pay the debt but whether the debtor is so “troubled” that bankruptcy is the only alternative.¹⁸ Whether the debtor is so troubled is determined by a bankruptcy judge’s determination based on the individual debtor’s circumstances. Defining inability to pay using a “means” test of examining whether the debtor has sufficient future income to pay the debts is the test advocated by the banking industry and embodied in the bill passed by the house. As noted earlier, the House proposed a means test that is determined by the debtor’s median income and amount of disposable income left after payment of secured debts and child support. The House debate reflected a concern that to the extent that the debt is due to choices made by a debtor to “live beyond his or her means, “ or to “keep up with the Joneses” the obligation to fulfill the promises made to the creditor should continue. To prevent disregard of the creditor’s interests, inability to pay should include some analysis of whether the debtor has additional means by which to pay the debt. To prevent disregard of the debtor’s interests, there should be some consideration of the causes of the debt. To the extent that the debt is due to circumstances beyond the debtor’s control (illness, medical expenses and divorce) then the obligation to keep the promise could be abrogated. Assuming that this alternative applies to the situation where the debtor is unable to pay, what would be the good and bad consequences of such an alternative?

There are several good consequences of a rule permitting debtors to break promises when they are unable to pay debts due to circumstances beyond their control. Debtors who make promises are, on the whole, obligated to pay their debts. The good consequences outlined in the first alternative, i.e. a debtor (or creditor) may depend on the promises of the other; a creditor who extends credit can be assured that the debtor will repay the loan and that the creditor would have use of that money would apply. A debtor who has repaid as agreed could be sure that credit could be obtained, the economy would be helped, production of goods and services would continue, and most individuals could improve their lifestyles. In addition, those who experienced serious changes in their circumstances could discharge their debt and not unduly burden society. If they could not discharge that debt, they might be a burden to society while they tried to repay the debt.

Part of determining the extent to which a non-promise-keeping debtor would be a burden to society is whether the debtor would be allowed to keep any property or assets. If the debtor was allowed to exclude all life insurance (and could thus convert all his or her assets to life insurance policies) then the debtor may not be a burden to society. This is because the debtor could either obtain a loan or cash in the policy once the bankruptcy proceeding was completed. If the debtor were allowed to keep the tools of the trade, then similarly, the debtor would be less of a burden to society. If, on the other hand, the debtor were stripped of all assets, then the debtor would probably be more of a burden to society, especially if substantially all the debtor's future income was also committed to pay the creditors.

The Bankruptcy Review Commission recommendations include several points that relate to determining what the debtor should be able to retain in order to qualify as being "unable to pay debts." The debtor would be able to exempt equity in a residence between \$20,000 and \$100,000 depending on the state or \$20,000 in any form plus \$15,000 if the debtor had no residence. The debtor may exempt medical devices and health aids, certain benefits (e.g. social security) and crime victim's reparations and personal injury reparations.¹⁹ The proposed policy reflects an effort to reduce the likelihood that an individual who has declared bankruptcy would be unable to provide for him or her. In addition, the commission tried to address the "fairness" issue of different exemptions depending on location by recommending blanket exemptions with the exception of providing flexibility for states to determine the value of the homestead exemption.²⁰

What are some negative consequences of permitting debtors to break their promises to repay debts because of an inability to pay? One negative consequence might be the reduction of credit availability for that individual and possibly for others similarly situated. Another would be that the creditor couldn't be completely assured that a debt would be paid as agreed. This in turn might negatively impact the economy because consumers might not be able to make purchases. Debtors who had not defaulted would have to pay the debts for those who had defaulted. That was a point brought up several times during the House debate. Some debtors who began experiencing problems might defraud creditors by "loading up" their credit card and other debt prior to declaring bankruptcy. The House bill addressed this by declaring nondischargeable all credit card debt incurred within 90 days of filing the bankruptcy petition. The debtors might also attempt to defraud creditors by hiding assets or converting assets to exempt form.²¹ The Commission addressed this issue by requiring attorney certification of the accuracy of the petition and imposing penalties for filing false claims. Both the House and Senate bills proposals seek to discourage such filings using similar methods.

To fully evaluate the negative and positive consequences of this perspective, defining “inability to pay” is critical. The majority of the members of the Bankruptcy Commission had determined that there were not significant numbers of individuals abusing the bankruptcy laws. Members of the house disagreed. For example, Senator McInnis (R. Co.) referred to a study by Ernst & Young that showed that 15 percent of those who filed for a discharge of their debts under Chapter 7 could have repaid 64 percent of their unsecured debts. At the same time, Senator McInnis noted that those who ran into unintended consequences should have a chance to declare bankruptcy. To do a more complete utilitarian analysis, there should be more data about the causes of bankruptcy and the profile of those who file bankruptcy.

One difficulty with the utilitarian analysis is measuring the value of each net good and bad consequence. While some are measurable in dollars (e.g. the amount of money non-bankrupt debtors must pay for those who declare bankruptcy), others are not quantifiable. But in order to apply utilitarian philosophy properly, some unit of measurement must be devised and applied to each consequence to determine which alternative results in the most net good or the least net bad. Public policy supports the second alternative that of permitting promises to be broken because of an inability to pay. To that extent, then, public policy is consistent with utilitarian philosophy. However, the disagreement is in what circumstances the debtor is unable to pay. The House as a body determined that there should be a means test for determining whether a debtor is able to pay.

FREEDOM OF CHOICE AND FAIRNESS—WHERE DOES THE BUCK STOP?

If only bankers didn't send the solicitations for pre-approved credit cards to consumers. That's the cause of the rise in the number of bankruptcy filings. If only consumers would refuse to apply for credit cards if they are getting in over their heads. Consumers should assess whether they have enough money to pay off additional credit card debt and if they don't, they shouldn't incur that debt. This is unfair to the consumers who do pay their debt, because the cost of defaults is borne by the consumers who do pay. So what is fair?

Simply put, distributive justice theory involves determining whether the burdens and benefits of society are distributed equitably. What are the benefits of a financial system that permits easy access to credit cards? Some of those benefits have been noted earlier, in the section on utilitarian analysis. Easier access to credit permits consumers to purchase now based on future buying power. And the more purchases that are made, the more jobs are made available to produce those products or services.

The Bankruptcy Commission concluded that there were only a relatively few individuals using the bankruptcy system in a way that was fraudulent. The Commission reviewed the profiles of individuals who have filed bankruptcy and noted that studies indicated that those individuals were in similar financial straits as those who filed in 1980. Senator McInnis focussed on fairness or justice in arguing that the House version of bankruptcy reform should be adopted.²² In the House debate on its bankruptcy bill, Senator McInnis argued that there was a need for reform of the bankruptcy laws because of “bankruptcies of convenience.” The Senator noted the increase in the number of bankruptcy filings and stated that a new bankruptcy policy was needed to prevent people who are financial capable of paying their debts from discharging those debts in bankruptcy. He noted that the costs of bankruptcy include higher prices, increased credit card rates and interest rate increases. He

noted that it was unfair that “people who do pay their bills have to carry the load for those who do not pay their bills.”

Both debtors and the credit card industry bear a measure of responsibility in this debate. Restrictions on the industry and its massive mailings coupled with limits on bankruptcy filings are required to restore fairness to the system. Certainly if companies issue credit without verifying income, without verifying whether other credit liabilities are too high and without verifying whether the applicant has any income, then those companies should bear the risk of those practices. Similarly, if these companies find such practices so profitable that they can afford to pass along the losses to consumers, then they should continue to bear the costs (as they bear the benefits) of the increased extensions of credit. At a minimum, companies should verify the income of the applicants and clearly and conspicuously disclose all the terms of the credit cards they are issuing.

When Congress reconvenes in January 1999, it will work on reconciling the differences between the House and Senate bills. The compromise should reflect responsibilities of the debtor and the creditor.

ENDNOTES

1. Reader's Digest, THE READER'S DIGEST TREASURY OF AMERICAN HUMOR, (Reader's Digest Press 1972) p. 223
2. American Bankruptcy Institute, “Bankruptcies Increased by 19 Percent in 1997 to a Record High of 1.4 Million Filings” ABI Press Release Mar 2, 1998 (<http://www.abiworld.org/stats/4thqtr97pr.html>); See Appendix for a chart outlining the rate of increase in non-business bankruptcy filings.
3. ⁰See, e.g. “Recommendations from the National Bankruptcy Review Commission Final Report” ABI, Legislative Bulletin NOV 4, 1997, vol. VI, No. 2, <http://www.abiworld.org/legis/bulletins/97nov4.html>; “House Passes Chamber-Backed Bankruptcy Reform Bill, US. Chamber of Commerce News, 6/11/98, <http://www.uschamber.org/media/press%20releases/June/061198.htm>.
4. See Honorable House Representative George W. Gerkas, February 4, 1998, Introduction of H.R. 3150 Congressional Record at E87 <http://thomas.loc.gov/cgi-bin>
5. Id at E88.
6. Consumer Bankruptcy Reform Act of 1998, September 23, 1998, Introduction of S.R. 1301 Congressional Record S10744 et. seq.
7. As Bankruptcies Surge, Creditors Lobby Hard To Get Tougher Laws,” Jacob Schlesinger, Wall Street Journal, June 17, 1998, p. 1.
8. National Bankruptcy Review Commission Report at 82
9. Id at 83
10. Id at 86-94
11. Gordon H. Clark & T.V. Smith (ed.), READINGS IN ETHICS (2d ed. 1931) 253-260

12. *Id.* at 261

13. Actually, Bentham focused upon the issues of pain and pleasure, and determined that by measuring units of pain and pleasure an individual could and should maximize the pleasure and minimize the pain. The need to maximize pleasure is a basic principle of *utility*. Mill sought to redefine pleasure more explicitly (and explain the quality of pleasure) and to focus upon “universal” rather than individual pleasure as the defining character of pleasure. *Id.* at 291-310

14. *Id.* at 292

15. There is a distinction between rule utilitarianism which focuses on an analysis of the net good based on a specific principle which might be applied and act utilitarianism which focuses upon a specific act and determine how the most net good may be accomplished in a given situation. The reasoning applied in rule utilitarianism is arguably similar to that applied by Kant in determining whether a rule can be universalized or not. One distinction between rule utilitarianism and Kantian philosophy is that under Kantian philosophy once the analysis has been done, then the rule must be followed without exception and fulfilling that rule then is evidence of good will which is the ultimate moral conduct. Under rule utilitarianism, the analysis is on the consequences of adopting such a rule and the ultimate goal is to maximize good.

16. Note that the first alternative is reminiscent of the universal law concept of Kant. Many have a difficult time here distinguishing between the universal law principles of Kant and this analysis of an alternative. The key difference is that Kant uses his analysis of how society would function if such a principle becomes a universal law, and once his analysis is complete, there is no further analysis of whether the principle should be followed or not. If the principle can become a universal law, then Kant adopts that principle and from then on, one’s duty is to follow that principle. If it is rejected as a universal law, then one’s duty is to reject that principle in all situations. A utilitarian, might, however, do an analysis of this principle each time there is a situation where promise keeping is an issue, and might decide in some cases that a rule of promise keeping results in the most net bad consequences when compared to another alternative.

17. ⁰According to the report of the National Bankruptcy Review Commission, Americans who filed for bankruptcy have non-mortgage debt of slightly more than twice their annual income. National Bankruptcy Commission Report at 83-86

18. National Bankruptcy Review Commission Report at 86-94

19. National Bankruptcy Review Commission Report at 4, 125-142

20. National Bankruptcy Review Commission Report at 4, 125-142

21. The Report refers to several studies of the different effects of bankruptcy depending on the jurisdiction within which the bankruptcy petition was filed. Under current bankruptcy law, states had the option of opting out of the federal scheme of exemptions and setting their own exemptions. National Bankruptcy Review Commission Report at 122

22. The Commission also discussed the issue of “pre bankruptcy planning” as engaged in by some consumers. This involves consumers who try to shield their assets from creditors while filing bankruptcy. The Commission’s conclusion was that elimination of categories of assets and placing a maximum on the value of exempt assets minimized this type of planning. National Bankruptcy Review Commission Report at 144

23. House Debate, H.R. 3150 at H4343