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Creditors' Committee Prosecution of Avoidance Claims After Cybergenics: a Remedy But Not a Right
Gary D. Sesser and Roxanna D. Nazari

Who's Flying This Plane? Collective Bargaining Agreements and Other Labor Issues
Tom A. Jerman and Robert E. Winter

Termination of Defined Benefit Pension Plans and Other Retiree Benefits
Tom A. Jerman and Aparna B. Joshi

The Phantom $400
Elizabeth Warren

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The Phantom $400

ELIZABETH WARREN[1]

In late-January 2004, the New Hampshire primary and the Super Bowl seesawed back and forth as the lead story for thousands of media outlets around the country. Sandwiched between these two very public stories, the House of Representatives made a sly move: it amended the Senate's one-page proposal to extend the Family Farmer provisions in the bankruptcy bill to add the whole 400-plus page Bankruptcy Reform Act. The Reform Act is highly technical and quite controversial, and the move was designed to force the Senate to act on the bill which had passed the House but had been stalled in the Senate since early 2003.[2] Suddenly, troubled family farmers, whose bankruptcy protection had expired, were the latest hostages in an effort to make the credit industry wish-list into law.

The bill under consideration was first proposed in 1997. The consumer credit industry poured millions into campaign contributions, lobbying efforts, and a public relations campaign. Opponents of the bill pointed out that it would squeeze working families, falling especially hard on women raising children alone, on people who have lost jobs and health insurance, and on the elderly struggling to pay for prescription drugs. Proponents of the bill say reforms are needed to stem the still rising tide of bankruptcy filings that, they pointedly say, cost bill-paying families $400 a year. The bumper stickers are settled, and each side makes its point a bit more stridently.

The $400 claim is arresting, the best sound-bite in the debate. It is also demonstrably false. But the sound bite offers a reason why hard-working families should side with a multi-billion dollar credit industry in an effort to squeeze their financially-pressed neighbors for more money. No matter that the number is a phantom, the proud creation of a credit industry lobbyist. It has been so vigorously and regularly repeated that it passes for fact both on the floors of Congress and in the popular media.

The History of the $400

Six years ago, the credit industry launched its public relations campaign to amend the bankruptcy laws with a blizzard of press releases and advertisements that purported to show that bankruptcy costs every American family $400 each year.[3] In 1998, a full-page advertisement in the *Washington*

Post carried the headline: "What Do Bankruptcies Cost American Families? A month's worth of groceries" above a picture of a family with a full grocery cart. The text followed: "Today's record number of personal bankruptcies costs every American family $400 a year," then exhorted people to endorse the pending bankruptcy legislation.[4] In effect, implied the ads and press releases, change the bankruptcy laws and every American family will be $400 richer. The "fact" was widely repeated as supporters pushed the bill in the late 1990s.[5] Such luminaries as the former Secretary of the Treasury, Lloyd Bentsen made very precise, but "conservative estimate[s]" of $408 as the cost of bankruptcy for each household.[6]

Where had the figure come from? What think tank or academic researcher had conducted the research and worked out the estimate? Who would stand behind it? Credit industry lobbyist, Jeff Tassey took credit for the invention.[7] A flattering profile in the trade magazine for the American Bankers Association (ABA) appeared on the eve of what the industry believed was certain victory. The piece celebrated the then-imminent passage of the bankruptcy bill, heralding lobbyist Tassey and taking the position that by the time the article would be published the bill would be law, so it was now possible to tell-all about the lobbying strategies. Among the revelations in the ABA piece:

> [Tassey] put a price on the cost of bankruptcy and how much creditors could recover with tougher filing requirements. Bankruptcies totaled $44 billion or, put another way, the country's 100 million families were out some $400 each because someone else didn't pay their bills. With new bankruptcy laws that would make it harder for debtors to escape paying what they owe, Mr. Tassey, among others, reasoned that creditors could recover about $5 billion, or about 10% of the total. These were new ideas—and difficult to back up with hard data.
>
> SMR Research president Stuart Feldstein says: "No one really knows how much debt there is in the country. I put out the $44 billion figure, but it's a rough estimate. I didn't have anything to do with how much can be collected. There's no way you could know that."
>
> That didn't stop Mr. Tassey from trumpeting the $44 billion, $5 billion, and $400 figures and calling for consumers to develop more personal responsibility for the debts until the numbers and words became part of the Washington vocabulary. He broadcast his message in such publications as Roll Call and Congressional Quarterly to be

> picked up by the one audience he needed to impress, Congress. He also arranged for corporate chief executives to meet with representatives to tell their story.
>
> "They were really masterful," a consumer advocate says of the creditor lobby. "They had a simple, easy-to-understand message for a complicated subject and they got the jump on everyone in getting it across. They had lots of ads and made plenty of campaign contributions. The competition had to play catch-up."[8]

Tassey is not the only person to claim credit as the source of this "fact." Another consulting group hired by the credit industry also took credit for the number.[9] But the ABA's celebration of the imminent passage of the bankruptcy bill was untroubled by any questions over either the accuracy or the source of the magic number that drove support for the bill.

The lack of a factual foundation evidently troubled no one outside the ABA either, including the media sources that repeated the number, giving various attributions. From 1997 on, the $400 "fact" was cited and re-cited. The Credit Research Center (CRC) was often credited as the source of the "fact," with no notation that, like the Tobacco Institute and the tobacco industry, the CRC's money comes from the credit industry.[10] In fact, the CRC researchers never actually used the $400 figure,[11] nor had any of the other published industry studies. But neither did any of the industry research groups distance themselves from the numbers, so that the documentation of the cost imposed by bankruptcy was variously credited to "experts,"[12] "Purdue University researchers,"[13] "Georgetown researchers,"[14] a "study,"[15] "studies,"[16] a Congressman,[17] "court records,"[18] or no one at all—just a self-evident fact.[19]

The selling job was superb, or at least that was the judgment of the American Bankers Association.

> Mr. Tassey also had plenty of lobbying power working behind the scenes. He hired, among others, the firms of Verner, Liipfert, Bernhard, McPherson & Hand; and Barbour Griffith & Rogers. Verner Liipfert had a reputation as the most powerful lobbying firm in Washington. Its "rock star" lobbyists, as they were affectionately known, included such powerhouse Democrats as George Mitchell, the former Senate Majority leader, Mr. Bentsen, and former Texas Gov. Ann Richards. The AFSA paid Verner Liipfert accordingly: a total of $1.2 million in 1997 and 1998. The draw at Barbour Griffith was the first name on the door,

> Mr. Barbour, the former Republican National Committee chairman. He pulled in $1.9 million over the same period.
>
> "Haley is close to Lott," a former senior Senate staffer says of Senate Majority Leader Trent Lott. "Lott wasn't very enthusiastic about the bankruptcy bill. He thought the Democrats were trying to stack too many amendments on it. Barbour's job was to tell him to let the bill move on, while the Democrat lobbyists were supposed to tell their side to go easy with the amendments."
>
> There is no telling what Mr. Tassey got or didn't get for the AFSA's money. Representative George Gekas took over the House bill. Passages were recast. Amendments and restrictions were added. The bill eventually grew to more than 400 pages. It was no longer the legislation Mr. Tassey advanced and Mr. Wallace [another industry lobbyist] wrote, but the basic concepts remained in place, as did the means test and other features. They'd assure that the coalition would, with a bill's passage, recover from debtors many times the cost of lobbying for the legislation.[20]

The $400 figure is a number bought and paid for by the credit industry—a fact proudly proclaimed by the industry lobbyists themselves when they thought the legislative game was over.

It turned out that the game was not over. Even with millions in contributions and lobbying spread around on Capitol Hill[21] and George W. Bush taking more money from credit card executives than from any other single source—and proclaiming his complete support for the bankruptcy bill—the bill did not make it into law at the end of 2002.[22] The Senate insisted on an amendment that would make it difficult for abortion clinic protestors who were hit with civil judgments to use bankruptcy to discharge those judgments. In the House of Representatives, the provision raised the ire of strong right-to-life advocates. They joined with strong liberals who opposed the bill because of its effects on working families. Together they defeated the bill in the House. And so the credit industry tried again in the next session of Congress, pushing a bill and trotting out the same numbers that had brought them so close to victory in earlier years.

How the Numbers Add Up

There are a number of ways to assess the $400 calculation. The first is within the four corners of Tassey's own calculation. He estimated $44 billion is "lost" in bankruptcy, but that only about $5 billion could be recovered.[23] The recovery number evidently has no foundation, but if it were right, then, by his calculation, the headline number should have been that bankruptcy reform could save $49 per family, not $400. That number is not as striking, however, so it never made it into the press packages.

Indeed, much of the basic math just does not add up. In 1997, when the "$400 fact" was released, there were about 101 million American families. That same year, about 1.3 million families filed for bankruptcy.[24] In order for the 1.3 million families to repay enough to produce the $44 billion that Tassey implied would be passed on to their fellow citizens, the families in bankruptcy would have to come up with about $33,800 apiece—plus transactions costs for collection and redistribution. For bankrupt debtors with a median pre-tax income of about $21,000, this would be problematic.[25]

How about squeezing the "abusers" harder? The credit industry hired its own researchers to estimate the number of debtors who might repay *something*. The research was discredited, as the General Accounting Office (GAO) sharply questioned the assumptions and methodology of the study.[26] But even the credit industry researchers could identify only 185,000 debtors who might be able to pay anything.[27] In order to raise the $44 billion Mr. Tassey promised, these 185,000 families would need to come up with about $237,839 apiece.[28] The numbers simply do not add up.

The industry, of course, never explicitly *said* that the $44 billion it planned to recover from the bankrupt families would be passed on to its customers. History suggests that it would not. An example illustrates: a credit card issuer's biggest expense is not bankruptcy; it is the cost of the funds it borrows, which it then lends to its customers as they pay their bills over time. Between 1980 and 1992, the rate at which banks borrow money fell from 13.4% to 3.5%.[29] What happened to the rates the companies charged their customers? During that same period, the average credit card interest rate rose from 17.3% to 17.8%.[30] More recently, as interest rates have dropped again, even customers with variable rate cards have discovered "floors" on their interest rates.[31] It seems that the fine print in many credit card agreements calls for customers to pay more as interest rates climb, but not less when they fall. Interest rate cuts by the Federal Reserve have not affected most fixed rate cards and have had only modest effects on variable rate cards. In 2001, for example, the total savings from nine interest rate cuts during the year created a $10 billion windfall for credit card issuers whose cost of funds had declined sharply while the rates they charged their customers remained surprisingly steady.[32] These pricing techniques explain how it is that the credit card issuers have maintained above-market profits on their lending for two decades: they simply do not price at the margin for cost, and their extraordinary profits more than offset the "cost" of bankruptcy.[33] Competition in this industry is not based on credit price so much as on marketing strategies, brand loyalty, and other devices that permit card issuers to collect extraordinary profits.[34] Based on current evidence, if the industry can squeeze more money out of the families that otherwise would file for bankruptcy, shareholders will benefit, but not customers.

There is another problem in the industry's $400 calculation: even if debts totaling $40.4 billion were discharged in bankruptcy each year, *bankruptcy* would not be the cause of the loss. More than half of all the credit card debt listed in bankruptcy has been written off as uncollectible long before the debtor files the bankruptcy petition.[35] A large portion of the remainder probably would have been written off as well because the debtors were in financial trouble and not paying—whether they declared bankruptcy or not. Moreover, the high rate of reaffirmations in which debtors promise to repay some debts, notwithstanding the fact that they are about to be discharged in bankruptcy, means that not all debt listed in bankruptcy is ultimately discharged in bankruptcy. About one in four of all debtors agree to pay some debt notwithstanding their bankruptcy filing[36]—and that promise always has been legally enforceable. Finally, more than half of the debt listed in bankruptcy is secured by an interest in property of some kind.[37] If the debtor fails to pay, the creditor can take the property and resell it to pay the debt—or the debtor can continue to make payments even after the bankruptcy —, all of which reduces the total amount the creditor actually writes off in bankruptcy.[38]

At the request of the National Bankruptcy Review Commission, the Congressional Budget Office (CBO) reviewed the various credit industry-financed studies that were used to bolster the industry's claims that significant numbers of Americans were filing for bankruptcy when they could actually repay their debts. The CBO identified substantial methodological shortfalls in all of the work and cautioned in particular that the studies "give a misleading indication of the amount of losses that creditors could hope to recover under" the proposed legislation.[39] Subsequent reviews by the GAO reached similar conclusions about the creditor-sponsored data.[40]

The difficulties with the $400/$44 billion claim arise at so many levels that anyone with a critical eye and a rudimentary knowledge of basic arithmetic should have been deeply skeptical of the claim. For those who needed help, the CBO and GAO reports were a matter of public record. And yet not a single report of the $400 fact raised either question—whether a group of bankrupt debtors could pay back such fantastic sums, or whether the industry would share even part of their "savings" with their bill-paying customers. Instead, the "facts" were simply stated and restated, creating a seemingly irrefutable basis for bankruptcy reform. That, no doubt, was precisely the sponsors' intent.

Where the Numbers Are Now

As the CBO and GAO bore down, and as the industry studies were re-analyzed, the amount of money the industry claimed that debtors might be able to repay shrank from $40 billion to an estimated $1-4 billion. The industry's own claim of the amount that could be repaid works out to about $9 to 39 per American family. The CBO reports that even that number overestimates the amount of debt that could be repaid if bankrupt families were squeezed for every last penny they had.[41]

If the amount that might be produced from squeezing families harder is somewhere under $9, then one might expect the $400 claim to fall into disuse. After all, Professor Bruce Markell called attention to the math of the declining numbers in a scholarly article in 2001.[42] Professor Markell, however, did not have a multi-million dollar media campaign, or what the American Bankers Association proudly dubbed their "superstar lobbyists," to broadcast the message about the smaller number. The recalculated number apparently never made it into a single published report of the studies, nor did the industry-sponsored specialists ever offer the more modest number in place of the $400 "fact." Instead, both the industry and the media continue to use the $400 figure.

Just last year, the Judiciary Committee of the House of Representatives called on lobbyist George Wallace to tell them about bankruptcy losses. He explained that bankruptcy losses "are recovered in the price American consumers pay for credit, an average of $400 for each American household."[43] Interestingly, in the next sentence he repeated the claim that "$4 through 5 billion of these losses could be saved with the means test reforms in the bill." Any Congressman in the room might have done the quick math and asked how consumers would save $400 if the industry's own optimistic version of recovery was only $40-50 a family, but no one asked. Instead, the Committee hastily issued a report, citing as fact that bankruptcy losses "translate into a $400 annual 'tax' on every household in our nation."[44] The dissent challenged the numbers behind this "fact," but their challenge was never picked up or quoted again by the media.[45]

When the House of Representatives took up the bankruptcy bill again in January 2004, they returned to the claim that each American family was losing $400. Representative Ron Kind, D-Wisconsin took to the floor of the House to proclaim:

> The costs associated with discharging bankruptcy related debt, calculated at over $40 billion in 2001, hurt all consumers through increased prices on goods and services. In fact, losses associated with bankruptcies alone cost the average American family around $400 per year.[46]

Nor was he alone. Representative Chris Cannon, R-Utah, underlined the same "fact."

> In 1997 alone, more than $40 billion was discharged as a result of bankruptcy cases, This loss translates into a $400 annual tax on every household in our Nation in the form of higher prices and higher interest rates.[47]

Representative Sensenbrenner made the "fact" even more vivid:

> These losses, according to one estimate, translate into a $400 annual "tax" on every household in our Nation in the form of higher prices and higher interest rates. For the sake of our family farmers, we ought to relieve them of this $400 tax so that they can do a better job in producing food and fiber for our Nation's tables as well as for export.[48]

Later in his speech he returned to the "$400 tax" twice more, referring to bankruptcy as a financial planning tool that "ends up stiffing every family that pays their bills on time, and as agreed on, $400 a year in a hidden tax" and as a "$400 annual tax on every family in our Nation."[49]

As recently as January 29, 2004, long after the industry lobbyists created their $400 "fact," Representative James Sensenbrenner, R-Wisconsin, was quoted by a Milwaukee newspaper, picked up by the Wall St. Journal Online, as saying "bankruptcy reform would help farmers by making Chapter 12 permanent and closing loopholes in the current bankruptcy code that cost the average household $400 a year."[50] Neither news report contained any challenge to the $400 number. As the House of Representatives took up the bill, the National Retailer Federation picked up the cry—and increased the promised payoff. A public relations piece issued by the group on PR Newswire on January 28, 2004, stated as fact: "bankruptcy filings have left retailers holding an ever-increasing amount of bad debt.… The bad debt costs the average U.S. family more than $500 annually through higher consumer prices."[51]

Independent media picked up the statistic and quoted it without question. The San Francisco Chronicle, for example, quoted the number, attributing it to the industry. They then cited the debate over the bill, but left the $400 number unchallenged. "Credit card companies, banks, and retailers all back the bankruptcy overhaul, which has failed to make it through Congress numerous times since 1997. They say that American families end up paying a "hidden tax" of $400 each through higher interest rates to make up for the debts that aren't repaid."[52]

The attributions for the "fact" that bankruptcy costs every family $400 continues to elude the media. Some reporters attribute the $400 figure to the American Bankers Association[53] or the local bankers association.[54] Others cite "backers of the bill,"[55] or a local Congressman.[56] Peter Overby, one of the most thoughtful interviewers in the country, helped Congressman Sensenbrenner make his point on National Public Radio by summarizing the "facts" claimed by a pro-reform group, without raising any question about their accuracy.[57] Some of the media pieces present only the creditors' views, while others, like Mr. Overby's, present opposing views from consumer groups. In no case, however, does anyone question the $400 "fact."

To be sure, skepticism has finally reared its head. The Chicago Sun-Times was considerably less willing to accept the "fact" fed to it. In a piece about the bankruptcy bill on February 4, 2004, reporter Cindy Richards explains "That $500 figure is wrong, just as the $400 figure was" and then dissects why.[58] A few days later, Kansas City Star reporter Paul Wenske referred to the $400 number as "ridiculous," and that the "fuzzy math" required to sustain it "peels away like cheap veneer under closer scrutiny."[59] Two voices, but so far, no change in the underlying song.

Why Do the Numbers Survive?

The "fact" that bankruptcy costs every American family $400 is not the only claim without foundation that circulates through the media and passes from person to person. Urban legends whisk around the globe with no foundation in reality, accompanied by scientific misunderstandings, food fads, and advertisements that promise thinner thighs in 30 days. The difference with the phantom $400 "fact" is that it is passed on as serious news by people in Congress and by a well-respected national press.

One difficulty in counterbalancing the fact is that it takes more words. "Bankruptcy costs every family $400" will fit on a bumper sticker or in a headline. The only counter that also fits is "No it doesn't," but without more explanation the counter is not very persuasive. The lobbyists who made up the number had the right insight—say it short and punchy, and let someone else try to fix it.

But the phantom $400 "fact" lives for another reason: It has a sponsor, a parent, a group that has a large financial stake in persuading the public to believe it. The credit industry wants a bankruptcy bill, and it is hard to persuade Congress to vote for something that could easily be characterized as a bill to squeeze hard-working families down on their luck in order to improve profits for a few big corporate lenders. The phantom $400 "fact" is the perfect distraction—a way to appear to align the interests of ordinary families with billion-dollar multinational lenders. No one in Washington needs to believe it. This is a case where appearance is all, because a promise of $400 to each hard-working family in America will give politicians plenty of political cover for their votes that actually hurt the constituents the politicians claim to represent.

But advocacy alone would not weave the fact into apparent reality. If the chemical industry tried to sell a bunch of phony "facts" to the public, a group of well-organized, environmental activists would swing into action. The tobacco industry, the oil industry, the auto industry, and others may have lots of money and influence in Washington, but they are met with funded, organized resistance. The resistance may not be as well-funded, and it may not always prevail, but it is always there.

The phantom $400 "fact" is emblematic of what is wrong with the legislative process: there is no counter-weight when lobbying is lopsided. Bankruptcy is the perfect example. There are no political action committees of soon-to-be-bankrupt families—no lobbying groups or governmental affairs division of families who have lost their jobs, have no health insurance, or may be headed for divorce. Among the organized groups who often speak on behalf of working families, no group has as its *first* responsibility the protection of these families from a fast-growing, financial services industry. Instead, in the bankruptcy debates, only a loose affiliation of various groups for whom consumers or women or older Americans are a primary concern have entered the fray at all, and their interests are spread across a range of topics unrelated to financial services. With so many competing demands on their resources, the clout of these groups in the bankruptcy debates can be modest at best.

When the creditor industry began its push for a new bankruptcy bill, it cut everyone else out of the negotiations. No consumer advocates or women's groups, no bankruptcy lawyers or trustees, no academics or former judges were permitted to participate. The industry proudly acknowledged that it—and it alone—wrote the bill that was introduced in the House and Senate.[60] Members of the industry had made political contributions on both sides of the aisle,[61] and they saw no need for substantive compromise. When one side dominates the legislative process, the chance for measured and thoughtful debate evaporates. And, as the phantom $400 "fact" suggests, even the truth takes a beating.

NOTES

1. Leo Gottlieb Professor of Law, Harvard Law School. Parts of this paper and much of the underlying research were prepared for the Fairchild Lecture at the University of Wisconsin Law School, in honor of the Honorable Thomas Fairchild. I offer thanks to the University of Wisconsin Law Review for permission to republish parts of that paper. I am grateful to Brady Williamson for his detailed comments on this draft, once again proving he is a wise counselor and good friend. I also appreciate the assistance of Puja Seam, Harvard Class of 2005, who provided careful and detailed research assistance.

2. See H.R. 975 (2003).

3. For example, a full page ad in the March 30, 1998 issue of Roll Call, a newspaper widely circulated on Capitol Hill, cited the $400 fact. See ROLL CALL, Mar. 30, 1998, at 38-39; see also ROLL CALL, Apr. 2, 1998, at 16-17.

4. See WASH. POST, June 4, 1998 (presenting this advertisement).

5. E.g., Robert K. Heady, *Credit-Card Firms Would Be Winners in Reform*, SUN-SENTINEL (Fort Lauderdale), Mar. 8, 1999, at 22, Your Business (citing credit industry that bankruptcy "costs the average American Family $550 a year"); see Richard Jones, *We All End Up Paying for Unfair Bankruptcy Laws*, WASH. TIMES, Oct. 6, 1997, at A16 (letter to the editor) (Mr. Jones is identified as the Vice President of MasterCard International); see also Aaron Zitner, *Battle Brews Over Laws on Bankruptcy*, BOSTON GLOBE, Oct. 17, 1997, at A1 (citing business groups as saying creditors will be left with $40 billion in unpaid bills in 1997).

6. Bernard Dagenais, *Bankruptcy: Not Quite a Free Ride*, WASH. TIMES, May 10, 1999, at D3 (citing former Secretary of the Treasury Lloyd Bentsen as making a "conservative estimate" of $408 as the cost of bankruptcy per household). Mr. Bentsen, a former senator and former Secretary of the Treasury, failed to disclose, either in these remarks or in an article published under his name, that he was a paid lobbyist for the credit industry. See Robert Cwiklik, *Ivory Tower Inc.: When Research and Lobbying Mesh*, WALL ST. J., June 9, 1998, at B1.

7. *Top Creditor Lobbyist Tassey Goes for Broke*, AM. BANKER, May 17, 2001, at 1, 2001 WL 3911588.

8. *Top Creditor Lobbyist Tassey Goes for Broke*, AM. BANKER, May 17, 2001, at 1, 2001 WL 3911588.

9. See Bankruptcy Reform Act of 1998: Hearing on H.R. 3150, H.R. 2500, and H.R. 3146, Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 105th Cong., 298 (1998) (statement by Mark Lauritano, Senior Vice-President with WEFA Group). 1998 WL 886927 (F.D.C.H.). Mr. Lauritano sketched his estimate of the total cost of bankruptcy, then concluded that "these costs must be absorbed by the economy. How they are passed on to consumer can vary. If the costs are passed on in the form of higher prices, each American household would have to pay roughly $400 per year." *Top Creditor Lobbyist Tassey Goes for Broke*, AM. BANKER, May 17, 2001, at 1, 2001 WL 3911588. He later concludes that a change in the law could save about 5-10 percent of those losses. He does not give enough details in his report, but that would seem to be something in the range of $20 to $40 per household. The WEFA analysis, which had been commissioned

by the creditors pressing for adoption of the bankruptcy bill, was later dismissed by both the GAO and the CBO. See WEFA GROUP PLANNING SERVS., "THE FINANCIAL COSTS OF PERSONAL BANKRUPTCY" (Feb. 1998), http://www.house.gov/judiciary/5179.htm. The GAO reviewed the WEFA study, concluding that substantial questions about the data left the GAO unable to "determine whether the report's conclusion is valid" and suggesting that the claims of the study "be interpreted with caution." Letter from Richard M. Stana, Associate Director, Administration of Justice Issues, General Accounting Office, to The Honorable Martin T. Meehan, House of Representatives 5 (Apr. 22, 1998), available at http://www.gao.gov. The GAO also noted that it could not obtain further information about the data from the authors of that industry report.

The CBO conducted another detailed review. See CONG. BUDGET OFFICE, PERSONAL BANKRUPTCY: A LITERATURE REVIEW (Sept. 2000), available at ftp://ftp.cbo.gov/24xx/doc2421/bankruptcy.pdf. The report summarizes and synthesizes several studies. After a summary of the shortcomings in the WEFA study, for example, the CBO concludes: "As a result, judging the reliability of the estimate is quite difficult. WEFA's projected losses for the 1997-2000 period undoubtedly overstate actual losses." CONG. BUDGET OFFICE, PERSONAL BANKRUPTCY: A LITERATURE REVIEW 37 (Sept. 2000), available atftp://ftp.cbo.gov/24xx/doc2421/bankruptcy.pdf.

10. For a more detailed discussion of funding for the Credit Research Center, see Warren, *The Market for Data: The Changing Role of the Social Sciences in Changing the Law* (Fairchild Lecture), 2002 WISCONSIN LAW REVIEW 1 (2002).

11. See JOHN M. BARRON & MICHAEL E. STATEN, CREDIT RESEARCH CTR., GEORGETOWN SCH. OF BUS., PERSONAL BANKRUPTCY: A REPORT ON PETITIONERS' ABILITY-TO-PAY 1 (1997).

12. Editorial, *Last Resort Is Coming First; Something's Wrong: In These Good Times, Bankruptcy is Booming*, L.A. TIMES, July 28, 1997, at B4 ("Much of that debt relief is simply unwarranted. Experts say that about 45% of Americans who seek complete debt relief from their debts through Chapter 7 personal bankruptcy filings could afford to pay off an average of one-third of their debts within three years.").

13. *Lax Bankruptcy Laws Make Everyone Pay*, USA TODAY, June 12, 1997, at 14A ("Purdue University researchers found a third of debtors could pay some of their bills, but don't."); Lloyd Bentsen, *Get Tough on Bankruptcy Laws*, WASH. TIMES, Sept. 19, 1997, at A19.

According to a Purdue University study, nearly half of the people who file for bankruptcy could repay a significant amount of their outstanding obligations, but instead choose to renege. Bankruptcies of convenience now constitute a significant and rising percentage of personal bankruptcy filings, and the cost to consumers from this trend is enormous. Lloyd Bentsen, *Get Tough on Bankruptcy Laws*, WASH. TIMES, Sept. 19, 1997, at A19.

14. *Bankruptcy's Turn*, CHI. SUN-TIMES, July 27, 1998, at 23 ("According to a recent study by Georgetown University, about 25 percent of people who filed for Chapter 7 bankruptcy, which erases all debt, could have repaid a portion of their obligations.").

15. Daniel McGinn, *Deadbeat Nation*, NEWSWEEK, Apr. 14, 1997, at 50 ("[O]ne study says 45 percent of bankruptcy filers could pay back much of their debt."). The observant reader will notice that the specific number of debtors who could repay shifted. Evidently the press releases varied from time to time.

16. Leigh Jones, *Area Bankruptcy Filings Drop 8.1 Percent*, J. RECORD (Oklahoma City), Aug. 10, 1998 ("Visa cites studies indicating the economic impact to last year's bankruptcies equaled $44 billion, or $400 for every American family."), 1998 WL 11956043.

17. Mary Deibel, *Bankruptcy Bandwagon*, ROCKY MOUNTAIN NEWS, Nov. 9, 1997, at 1G. "The idea [of bankruptcy reform] is to encourage more people to repay their creditors when they file for bankruptcy rather than walk away from debt under a system that will cost the nation $40 billion this year alone." The article goes on to quote then-Congressman Bill McCollum from Florida: "That $40 billion a year translates into over $400 per household in higher costs for goods, services and

credit." Mary Deibel, *Bankruptcy Bandwagon*, ROCKY MOUNTAIN NEWS, Nov. 9, 1997, at 1G.; see also Mary Francis, *Rise in Bankruptcies Has Congress Chasing Reform*, INDIANAPOLIS STAR, July 5, 1998, at E1 (quoting then-Congressman Gekas' spokesman as saying personal bankruptcies cost the average American family $400 more per year in higher interest rates and prices).

18. Matthew S. Schwartz, *Bankruptcy Proposal Stalled*, DETROIT NEWS, June 25, 2000, at 1 ("[C]ourt records indicate that bankruptcies cost creditors $40 billion a year.").

19. See Bentsen, quoted in Bernard Dagenais, *Bankruptcy: Not Quite a Free Ride*, WASH. TIMES, May 10, 1999, at D3 ("It has been conservatively estimated that personal bankruptcies amount to a hidden tax of $408 per household annually, and it takes 15 responsible borrowers to cover the cost of one bankruptcy of convenience."). Then-Congressman Bill McCollum also explained the loss without further citation, although he cited to the Credit Research Center earlier in his article, so perhaps the citation to $400 here was intended to refer to the CRC report. See Bill McCollum, *Bankruptcy Law—Reform or Leave Whole?*, WASH. TIMES, Jan. 4, 1998, at B3 ("Last year, bankruptcies cost consumers $40 billion, amounting to a hidden tax of more than $400 per household. That $400 could buy a family of four 20 tanks of unleaded gas or more than a year's worth of disposable diapers."). This "fact" was echoed by national papers, such as the *National Law Journal*. *Senate Overwhelmingly Passes Bankruptcy Law*, NAT'L L.J., Oct. 5, 1998, at A10 ("Unpaid credit card debt is estimated at $40 billion, and companies say they are being forced to charge higher interest rates that hurt consumers who handle credit responsibly.").

20. Senate Overwhelmingly Passes Bankruptcy Law, NAT'L L.J., Oct. 5, 1998, at A10.

21. In 2000, the financial services industry was the biggest contributor in Washington. See data reported by the Center for Responsive Politics, http://www.opensecrets.org. Bruce Shapiro, *Let the Hogfest Begin*, SALON (Mar. 12, 2001), at http://www.salon.com/politics/feature/2001/03/12/bankruptcy/index.html (reporting on Federal Elections Commission figures analyzed by Public Campaign, the campaign-finance reform lobby). The group reports that this amount constitutes a 75% increase from 1998. The split was 61% for Republicans and 39% for Democrats.

22. See, e.g., Robert Zausner & Josh Goldstein, *Bush's Largest Funding Source: Employees of Credit-Card Firm*, PHILA. INQUIRER, July 28, 2000, at A1 ("By orchestrating mass contributions from its employees, the Wilmington-based company has become Bush's single largest source of campaign money. MBNA employees and their families have given more than $250,000 to the Republican's presidential bid, an Inquirer analysis found."); Christopher H. Schmitt, *Tougher Bankruptcy Laws—Compliments of MBNA?*, BUS. WK., Feb. 2001, at 43. Schmitt confirmed that MBNA was "the candidate's single biggest source of cash" and added:

> On the soft-money side, MBNA chipped in nearly $600,000). On top of that, MBNA Chairman and CEO Alfred Lerner and his wife, Norma, each kicked in $250,000 to the Republicans. Charles M. Cawley, CEO of MBNA's bank unit and a friend of Bush Sr., organized fund-raisers and gave $18,660 to Bush and the GOP.

House Bill 333 passed on Mar. 1, 2001, by a vote of 306 to108 (roll no. 25). 147 Cong. Rec. H600-H601 (daily ed. Mar. 1, 2001). Senate Bill 420 passed the Senate on March 15, 2001, by a vote of 83 to 15 (roll call vote no. 36 Leg.). 147 Cong. Rec. S2379 (daily ed. Mar. 15, 2001). President Bush's support for the bill was widely reported. E.g., Jacob M. Schlesinger, *Bush to Support Bankruptcy Bill that Clinton Vetoed Last Year*, WALL ST. J., Feb. 2, 2001, at A4.

23. See *Top Creditor Lobbyist Tassey Goes for Broke*, AM. BANKER, May 17, 2001, at 1, 2001 WL 3911588.

24. There were 1,350,118 non-business bankruptcy filings during 1997. Press Release, Administrative Office of the United States Courts, "Increase in Bankruptcy Filings Slowed in Calendar Year 1998" (Mar. 1, 1998), http://www.uscourts.gov/PressRelease/ cy98BK.pdf.

25. Ed Flynn & Gordon Bermant, *The Class of 2000*, AM. BANKR. INST. J., Oct. 2001, at 20. Flynn and Bermant collected data only for the Chapter 7 no-asset filers, the group targeted by the pro-

posed bankruptcy legislation. Median net income for this group was $20,796 for 2000, while mean income, pulled up by a few higher income debtors, was $23,340.

26. U.S. GEN. ACCOUNTING OFFICE, PERSONAL BANKRUPTCY: THE CREDIT RESEARCH CENTER REPORT ON DEBTORS' ABILITY TO PAY, GAO/GGD-98-47, at 6 (Feb. 1998).

27. JOHN M. BARRON & MICHAEL E. STATEN, CREDIT RESEARCH CTR., GEORGETOWN SCH. OF BUS., PERSONAL BANKRUPTCY: A REPORT ON PETITIONERS' ABILITY-TO-PAY 1, at 32 (1997).

28. Of course, the industry would probably be willing to offer financing, but at 18% the statistical assumptions get more bizarre. If the families identified as able to make any payments were hit with a bill for $218,000, the interest alone would be $39,240—slightly more than the median annual household income in the United States in the year of the study. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES," at 466 tbl.736 (120th ed. 2000). Table 736, "Money Income of Households—Percent Distribution by Income Level, Race, and Hispanic Origin in Constant (1998) Dollars: 1970 to 1998" identifies 1997 median household income as $37,581. In other words, if they tried to pay off enough debt to produce a savings of $400 for each American family, the interest payments alone would consume the entire annual income of a typical family before they repaid a single dollar of the outstanding debt—or used a single dollar for food or housing.

29. JAMES MEDOFF & ANDREW HARLESS, THE INDEBTED SOCIETY: ANATOMY OF AN ONGOING DISASTER 12 (1996).

30. JAMES MEDOFF & ANDREW HARLESS, THE INDEBTED SOCIETY: ANATOMY OF AN ONGOING DISASTER 12 (1996).

31. Cecily Fraser, *A $10 Billion Windfall: Credit Card Lenders Don't Pass on Full Interest-Rate Cuts*, CBS MARKETWATCH (Oct. 3, 2001) ("[A]bout 25 percent of cards offering variable interest rates have a minimum, or so-called floors, to ensure rates don't dip below a certain price."), at http://www.cbsmarketwatch.com/news.

32. Cecily Fraser, *A $10 Billion Windfall: Credit Card Lenders Don't Pass on Full Interest-Rate Cuts*, CBS MARKETWATCH (Oct. 3, 2001) at http://www.cbsmarketwatch.com/news.

33. This is the conclusion of economist Lawrence Ausubel, who argues that banks price at the margin for high-risk borrowers, not for all borrowers. See Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 261 (1997).

34. Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 263-264; see also ROBERT D. MANNING, CREDIT CARD NATION 99-124 (2000).

35. A survey produced by the American Bankers Association said between 55% and 65% of credit card loans were charged off for reasons other than bankruptcy (this calculation excludes all charge offs for fraud—these are just plain old bad debts). Amanda E. Dawsy & Lawrence M. Ausubel, Informal Bankruptcy 2 n.3 (Jan. 2001) (preliminary manuscript) (citing AM. BANKERS ASS'N, BANK CARD INDUSTRY SURVEY REPORT (1997)), at http://www.bsos.umd.edu/econ/bankruptcy/informal-bankruptcy-jan01.pdf. In addition, the 1998 Credit Collections Survey conducted by the Consumer Banker's Association estimated that 60% of all credit card accounts that were charged off for tax purposes, and 70% of charge-offs on other consumer loans, were the result of long term delinquency rather than bankruptcy. Amanda E. Dawsy & Lawrence M. Ausubel, Informal Bankruptcy 2 n.1 (Jan. 2001) (citing *Survey Shows Impact of Bankruptcy on Credit Card Collections*, CONSUMER BANKR. NEWS, Feb. 12, 1998). According to the 1996 VISA Bankruptcy Survey, some 65.2% of credit card loans were charged off for reasons other than bankruptcy, and this percentage has been relatively constant in recent years. All calculations exclude losses for fraud, which generally match the total losses for bad debts.

36. Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 713 (1999). This number was calculated before the huge scandal concerning unfiled reaffirmations came to light. Sears and a number of other creditors admit-

ted to obtaining reaffirmation agreements and collecting from their debtors, but deliberately violating the law by failing to file those agreements with the court. Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 717 (1999). It is impossible to tell how many illegal reaffirmations were also producing revenues for the creditors at the time these data were collected. Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 718 (1999).

37. For example, mean secured debt for consumer debtors in both Chapter 7 and Chapter 13 filing in 1991 was $29,879, while mean unsecured debt was $20,706. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991*, 68 AM. BANKR. L.J. 121, 128 (1994).

38. The debtors also pay for the bankruptcy system. The courts and administrative system are supported in large part by filing fees the debtors pay at the time they declare bankruptcy. Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 364-365 (1993).

39. Kim J. Kowalewski, Cong. Budget Office, *Evaluations of Three Studies Submitted to the National Bankruptcy Review Commission, in* BANKRUPTCY: THE NEXT TWENTY YEARS app. G-2.d, at 9 (1997), available at http://govinfo.library.unt.edu/nbrc/reportcont.html. The CBO was equally harsh in its assessment of the VISA report, which it cites for its "unsound method" and its use of an analytic approach that has been "roundly condemned."

40. The GAO focused an entire report on the Credit Research Center study, concluding that "the methods used in the Center's analysis do not provide a sound basis for generalizing the Center report's findings to the annual 1996 filings in each of the 13 locations nor to the national population of personal bankruptcy filings." U.S. GEN. ACCOUNTING OFFICE, PERSONAL BANKRUPTCY ANALYSIS OF FOUR REPORTS ON CHAPTER 7 DEBTORS' ABILITY TO PAY, GAO/GGD-98-47, at 6 (Feb. 1998).

In a separate report, the GAO raised a number of methodological concerns about the Ernst & Young studies, particularly with regard to their unproven assumptions and understated debtors' expenses. U.S. GEN. ACCOUNTING OFFICE, PERSONAL BANKRUPTCY: THE CREDIT RESEARCH CENTER REPORT ON DEBTORS' ABILITY TO PAY, GAO/GGD-99-103, at 1, 3, 5, 30 (June 1999). The GAO noted overall, however, that it was hampered in its analysis by the refusal of all of the study researchers and their industry sponsors to share their data, "citing VISA's proprietary interest in the data." This was in stark comparison with academic researchers Marianne Culhane and Michaela White, authors of the Creighton/ABI report, who turned their data over to the GAO for full analysis. The GAO also reviewed the WEFA study, concluding that substantial questions about the data left the GAO unable to "determine whether the report's conclusion is valid" and suggesting that the claims of the study "be interpreted with caution." Letter from Richard M. Stana, Associate Director, Administration of Justice Issues, General Accounting Office, to The Honorable Martin T. Meehan, House of Representatives 5 (Apr. 22, 1998), available at http://www.gao.gov. The GAO also noted that it could not obtain further information about the data from the authors of that industry report either.

The CBO conducted another detailed review. CONG. BUDGET OFFICE, PERSONAL BANKRUPTCY: A LITERATURE REVIEW (Sept. 2000), available at ftp://ftp.cbo.gov/24xx/doc2421/bankruptcy.pdf. The report summarizes and synthesizes several studies. After a summary of the shortcomings in the WEFA study, for example, the CBO concludes: "As a result, judging the reliability of the estimate is quite difficult. WEFA's projected losses for the 1997-2000 period undoubtedly overstate actual losses."

41. CONG. BUDGET OFFICE, PERSONAL BANKRUPTCY: A LITERATURE REVIEW at 30 (Sept. 2000), available at ftp://ftp.cbo.gov/ 24xx/doc2421/bankruptcy.pdf.

42. Bruce A. Markell, *Sorting and Sifting Fact From Fiction: Empirical Research and the Face of Bankruptcy*, 75 AM. BANKR. L.J. 145, 153 (2001) (reviewing TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000)) (citing GAO).

43. Testimony of George J. Wallace, House of Representative, Judiciary, Commercial and Administrative Law, Bankruptcy Abuse Prevention and Consumer Protection Act of 2003 (March 4, 2003).

44. Bankruptcy Abuse Prevention and Consumer Protection Act of 2003 Report Committee on the Judiciary H.R. 975, 108th Congress, 1st Session, House Report 108-40 Part 1, 108 H. Rpt. 40, Prt 1 (March 18, 2003) (dissent).

45. Bankruptcy Abuse Prevention and Consumer Protection Act of 2003 Report Committee on the Judiciary H.R. 975, 108th Congress, 1st Session, House Report 108-40 Part 1, 108 H. Rpt. 40, Prt 1 (March 18, 2003) (dissent).

46. (January 28, 2004); repeated in the Congressman's Press Release, **"**Floor Speech of Hon. Ron Kind of Wisconsin in the House of Representatives, Wednesday, January 28, 2004."

47. 150 Cong. Rec. H148-02 (daily ed. Jan. 28, 2004) (statement of Rep. Cannon, R-Utah).

48. 150 Cong. Rec. H148-02 (daily ed. Jan. 28, 2004) (statement of Rep. Sensenbrenner, R-Wis.).

49. 150 Cong. Rec. H148-02 (daily ed. Jan. 28, 2004) (statement of Rep. Sensenbrenner, R-Wis.).

50. Jeff Nelson, *Farmer Bankruptcy Bill Becomes Much Broader*, THE MILWAUKEE J. SENTINEL (January 29, 2004) (Copyright 2004 Knight Ridder/Tribune News Service, listed in Dow Jones Online) (quoting Rep. Sensenbrenner).

51. Retailers Attach Bankruptcy Reform to Ag Bill, PR NEWSWIRE (January 28, 2004).

52. Carolyn Said, Personal Bankruptcies Hit Record High, But Starting Over with a Clean Slate Could Soon Get Harder, S.F. CHRON., Nov. 15, 2003, at B1.

53. Beth Dixon, *We All Pay Note on House of Cards—Everyone Bears Tab of Financial Failures*, THE COMMERCIAL APPEAL, Guest Columnist, Dec. 14, 2003, at B3) (attributing $400 fact to "American Bankers Association figures"); Dave Flesner, *Fallout From the Economy; Bankruptcies Increase 6 Percent, Double Across Tri-State Region*, CHATTANOOGA TIMES FREE PRESS, Dec. 14, 2003, at A1 (attributing the $400 fact to the American Bankers Association); Mark Seibert, *Bankruptcy Numbers Mushroom in Iowa; Consumers Find Process Simple, Cheap*, DES MOINES REGISTER, Mar. 24, 2002, at 1A (attributing the $400 fact to the American Bankers Association).

54. Peter Schnitzler, *Filings Continue to Flow; Bankruptcy Showing No Sign of Slowdown*, 24 INDIANAPOLIS BUS. J. 21 (2003) (attributing the $400 fact to Vice-President of Government Relations for the Indiana Bankers Association).

55. Joanna Ramey, *Fourth Time's a Charm for Bankruptcy Bill*, WWD, Mar. 20, 2003, at 3 (attributing the $400 fact to unnamed backers of the bill).

56. Lee Davidson, *Cannon Airming at Debt Reform*, DESERET NEWS, Mar.5, 2003, at A01 (attributing the $400 fact to Congressman Cannon).

57. Analysis: Squabble continues on Capitol Hill over Bankruptcy Reform, (National Public Radio, Jan. 29, 2004).

PETER **OVERBY** reporting:

> Personal bankruptcies went up about 7 percent last year, but Republicans say some consumers just use the law to stiff their creditors.
>
> Representative JAMES **SENSENBRENNER** (Chairman, House Judiciary Committee): A lot of these people use the bankruptcy system as a financial planning tool.
>
> **OVERBY**: James Sensenbrenner of Wisconsin is chairman of the House Judiciary Committee. Even as he acknowledged that just 2 or 3 percent of bankruptcies are cases of abuse, he cited a figure from the pro-reform lobby, an estimate that bankruptcy abuse costs every family $400 per year.

> Rep. SENSENBRENNER: And remember every penny that's recovered this way is one less penny that has to be passed on to the 98 percent of the people of this country who pay their bills on time or as agreed to.

58. Editorial, Cindy Richard, *Bankruptcy Bill Does Zero For Us*, CHI. SUN-TIMES, Feb. 4, 2004, at 45.

59. Paul Wenske, *Bankruptcy Bill Has Atrocious Timing and Taste*, KAN. CITY STAR, Feb. 8, 2004.

60. The American Bankers Association describes the process this way:

> The [industry lobbying group] AFSA hired George Wallace, a lawyer and bankruptcy expert, who wrote a report that could serve as a model for bankruptcy legislation and was paid $100,000 in lobbying fees in 1997. That year Mr. Tassey gave the report to then-Rep. Bill McCollum, a Republican from Florida. It was no random shot—Mr. Tassey had recently hired Tom Rosenkoetter, one of Mr. McCollum's top aides. The AFSA strategist also knew the lawmaker and supported him, having held, that he can recall, at least at least one fundraiser for him.
>
> "They were shopping around their proposal. I was interested," says Mr. McCollum, now a partner at the law firm of Baker & Hostetler in Orlando.
>
> Mr. Wallace's work became Rep. McCollum's framework for a new bill.

Top Creditor Lobbyist Tassey Goes for Broke, AM. BANKER, May 17, 2001, at 1, 2001 WL 3911588.

61. See, e.g., "Top Creditor Lobbyist Tassey Goes for Broke," AM. BANKER, May 17, 2001, at 1, 2001 WL 3911588; Howard Rosenthal, "Bankruptcy Reform in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process," manuscript dated November 14, 2002 at 3.