2006

Legislative Messaging and Bankruptcy Law

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ESSAY

LEGISLATIVE MESSAGING AND BANKRUPTCY LAW

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This Essay grew out of many three-way conversations and multiple collaborative drafts. We began this conversation at the academic conference in 2003 celebrating the Bankruptcy Code's upcoming 25th Anniversary. Sadly, we did not have the opportunity to finish either the conversations or to finalize this Essay before Kate Heidt's untimely death in May 2005. Completed in her absence, this Essay is dedicated to the memory of our close friend and colleague, Professor Kathryn R. Heidt.

I. INTRODUCTION

Some eighteen months ago, scholars, judges and lawyers celebrated the U.S. Bankruptcy Code's 25th anniversary, remarking on its extraordinary architecture and resiliency.[1] None claimed the Code was perfect; given, however, the plethora of changes in the legal and financial markets since its

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1. To be sure, there were detractors, but they were far and few between. *See generally* Ralph Brubaker & Kenneth N. Klee, *Resolved: The 1978 Bankruptcy Code has been a Success*, 12 AM. BANKR. INST. L. REV. 273 (2004) (Debate at the American Bankruptcy Institute's U.S. Bankruptcy Law at an Economic Crossroads Symposium, Washington D.C. (presented Oct. 11, 2003)); Nicholas J. Mauro & Melanie J. Schmid, *Introduction*, 12 AM. BANKR. INST. L. REV. i (2004).

initial enactment, the theme running through many commentators' remarks was that the Code had proved itself remarkably flexible and resilient, despite repeated testing.[2] Emblematic of its successful structure is the fact that annual case filings rose from 331,264 in 1980 to more than 1.66 million in 2003, and yet the system continued to function ably.[3] As the economy floundered, the consumer bankruptcy system provided millions of people who had suffered financial distress—whether as a result of a medical crisis, a job loss, family crisis or some other woe or flawed decision-making—a necessary safety net.[4] The business bankruptcy provisions enabled thousands of small, medium and large businesses to reorganize or proceed with orderly liquidations.[5]

More recently, this same Bankruptcy Code was overhauled by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or the "2005 Amendments"),[6] with legislators commenting that changes to the Code were urgently needed and long overdue.[7] The 2005 Amendments, reflected in a bill exceeding 300 pages in length, dramatically changed or, in some instances, tweaked, almost every Code section. Moreover, a host of new provisions were added, including an entirely new chapter addressing international insolvencies.[8]

These two end-points—a 25th anniversary commemoration and a major substantive overhaul within months of each other—provide an opportunity to ask some questions that are by no means unique to bankruptcy: What messages are produced by new legislative pronouncements,[9] and how do we

2. *See generally* Brubaker & Klee, *supra* note 1; John E. Matejkovic & Keith Rucinski, *Bankruptcy "Reform": The 21st Century's Debtors' Prison*, 12 AM. BANKR. INST. L. REV. 473 (2004).

3. Annual Business and Non-business Filings by Year (1980-2005), http://www.abiworld .org/ Content/ContentGroups/Online_Resources1/Bankruptcy_statistics3/Statistics_General/ Annual_Business_and_Non-business_Filings_by_Year_(1980-2005).htm (last visited May 13, 2006) [hereinafter Statistics].

4. David U. Himmelstein et al., *Illness and Injury as Contributors to Bankruptcy*, W5 HEALTH AFF. 63, 65 (2005)(web exclusive), http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1 (last visited Jan. 19, 2006).

5. Statistics, *supra* note 3 (finding there were 43,694 business bankruptcy filings in 1980, 82,446 in 1987 and 34,317 in 2004).

6. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

7. F. JAMES SENSENBRENNER, H. COMM. ON THE JUDICIARY, BANKRUPTCY ABUSE AND CONSUMER PROTECTION ACT OF 2005, H.R. REP. NO. 109-31, pt. 1, at 3-4 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 90-91 [hereinafter SENSENBRENNER REPORT].

8. 11 U.S.C.A. §§ 1501-1532 (West 2005).

9. In this paper, we do not address the immensely complex issue of how to interpret legislation

decode them? How does one come to understand both the need for and the meaning of new legislation, particularly if the surface meanings seem to mask deeper political, social or cultural influences and beliefs? Even when we can fully and accurately identify the proffered messages, is newly created legislation always the best response to the events that precipitated the change?

These questions dovetail the long-standing jurisprudential debate concerning the meaning of legislative pronouncements. Out of this debate, two dominant conceptions of the meaning of legislation emerge. One school of thought views the process of creating legislation as a true communicative enterprise.[10] As such, legislation performs a signaling function, and the emitted signal is to be read in accordance with the "accepted standards of communication in effect in the given environment."[11] This perspective suggests that the meaning of the legislation is reflected within the legislation itself—as a stand-in for the legislature's intentions and the direct means by which those intentions are manifested. Stated most simply, understanding legislation's signals has wide-ranging implications for how one interprets the meaning of statutes. How one divines those intentions, whether the intentions are overt or not, and whose actual intentions are implicated are complexities raised by this approach.

A contrasting view rejects the idea that legislation comes about as a result of an intentional communicative process.[12] Adherents to this position believe that statutes fail to meet the requirements for communicative signaling because in order to find communication, the communicator must actually "intend" the communication, and the audience must be receptive to the intended message.[13] Proponents of this approach note that gleaning the "intent" of a legislative body is an implausible exercise because a legislature is comprised of a disparate group of individuals, likely holding both majority and minority ideas.[14] Thus, identification of the "intent" behind a compromised pronouncement is folly.[15] Accordingly, statutes are not

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enacted years, decades or even centuries ago. Our focus, instead, is on understanding newly enacted laws. While there is some overlap to be sure, the introduction of legislation—as opposed to interpreting existing law—raises important different issues, including why the new legislation was needed in the first instance and how it will be implemented within the existing frameworks.

10. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 10 (1975).

11. *Id.*

12. Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 956-57 (1990).

13. *Id.* at 960.

14. *Id.* at 971-72.

15. The challenges made to the idea of legislative intent are many: Realist Model, Interpretive Model, Majoritarian Model, Nature of Mental States, Anthropomorphic Model, Delegation Model, and

"authoritative communications" of the legislature,[16] but rather "empirical descriptions of optimal legal arrangements."[17] This approach advocates that legislation does not function as a signal of the legislature's intention, but rather as a sign possessing natural, self-contained meaning.[18] A sign is a symptom of a condition to which it has a causal relationship.[19] The goal is to identify and understand the condition and thus discern the meaning of that sign.[20]

Each of these perspectives has merit and adds much to the thinking about new legislation and its meaning. Looking for interpretive guidance may turn on the persuasive impact of each respective argument. The contribution this debate makes to resolving the issues addressed in this Essay is the shared recognition that both communicative and descriptive expressions in legislation convey messages. It is the identification and unpacking of the meaning of these messages that interests us. Whether the messages are communicative or descriptive, they speak volumes about the climate in which legislation is enacted and how it will be implemented. For those concerned with the transparency and functionality of legal regimes, the central and important question is what messages legislative enactments convey.

Given that legal, social, cultural and economic landscapes are dynamic and ever-changing, it is only natural to ask whether the messages sent by the legislative pronouncement are an accurate reflection of and response to current environmental circumstances. Certainly in the bankruptcy context—where first we were lauding and then, within months, dramatically changing the same law—profound and compelling questions have surfaced concerning the messages conveyed by BAPCPA. These messages can best be understood in the context of the political process, the dominant cultural and social norms, and the economics of the marketplace. In recent years, this context has included major galvanizing events—environmental disasters, occurrences of terrorism, and the Enron and WorldCom debacles to name but a few. Such events generated not only media attraction, but also legislative responses.[21]

Constructive Model. *See id.* at 968-76.

16. *Id.* at 950.

17. *Id.* at 951.

18. *Id.* at 953-54.

19. *Id.*

20. *See supra* note 9. This Essay does not address the interpretation of existing statutes.

21. *See* Bruce Grohsgal, *New Law Deals Severe Blow to KERPS, Severance Programs*, J. CORP. RENEWAL, Aug. 2005, *available at* http://www.turnaround.org/print/articles.asp?mode=issue&issue=164 (last visited Jan. 19, 2006); *see also* Amy Borrus, *Creditors Will Crack the Whip: Tough New Rules Will*

Moreover, the messages can only be fully understood and appreciated in the context of how the system was perceived to be and how it was actually operating before the amendments—as well as in the context of how the system, post-amendment, will work when it is operationalized. Once the law begins to operate, the real and practical impact of the 2005 Amendments on the bankruptcy system and its participants will be evident. We see messaging as a phenomenon that can only be untangled by a complex and deliberate contextualizing of the 2005 Amendments.

Related to the question of what messages are conveyed by legislative enactments is the matter of the nature of the enacted legislation itself. If legislation is warranted, how should that legislation be crafted? Should it be targeted to a particular problem or issue or should it be broader in its orientation? The issue is when and what type of legislation (or legislative amendment), if any, is needed to respond to changed and changing conditions. Consideration must also be given to whether pausing and permitting more gradual but perceptible market responses or judicial decisions (or some combination of the two) are better ways to address the actual and perceived problems. In other words, legislating—whatever its message—may not always be the best solution, despite our predisposition to its employment. This very tendency to legislate too freely has led to a condition known as hyperlexis.[22]

To be sure, none of these are simple questions and there are no easy answers—in bankruptcy or any other substantive field of law. The newly enacted amendments to the Bankruptcy Code, however, offer a prime illustration of embedded legislative messaging. In this Essay, we explore the meaning of at least one of the major messages we believe is conveyed by the bankruptcy legislation. In so doing, we address the factors that assist us in divining this message, and we also address the larger issue of how embedded messages manifest themselves. We further consider a related interesting question which has surfaced in the bankruptcy context, namely the failure to legislate. We ask specifically whether failing to legislate is also a message, and, if so, what that message of silence means—at least in the bankruptcy

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Make Corporate Bankruptcies "Quicker and More Brutal," BUS. WK., July 4, 2005, at 82.

22. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 767 (1977) (coining the term "hyperlexis" to describe "American's national disease—the pathological condition caused by an overactive law-making gland. Measured by any and every index, our law is exploding. New statutes, regulations, and ordinances are increasing at geometric rates at all levels of government. The same is true of reported decisions by courts and administrative agencies."). We do not mimic Manning's broad use of the term and, thus, we are taking liberties in applying it in a narrower context.

arena. Hopefully, some of the insights with respect to bankruptcy law—both with respect to what was and was not changed—are transportable as others contemplate the messages inherent in new legislation in other substantive fields.

To this end, this Essay begins with a discussion of messaging in bankruptcy and then turns to examine examples drawn from the Bankruptcy Code in terms of instances in which changes were made and other instances in which amendments were not enacted. We focus our attention on four emblematic issues—two involving changes made to the Bankruptcy Code (namely, the addition of requirements for approving key employee retention plans (known as KERPS) and the pre-bankruptcy consumer credit counseling mandate)[23] and two involving instances where amendments could have been, but were not, made (the definition of future claims and the Code's treatment of limited liability companies (LLCs)).[24]

II. MESSAGES SENT

If one looks holistically at the 2005 Amendments to the Bankruptcy Code, a common thread runs through many of the amended provisions: a movement away from flexible guidelines or standards that are malleable enough to respond to a variety of situations—one of the hallmarks of the pre-amendment Bankruptcy Code. These standards have largely been replaced by rigidly constructed rules with detailed timetables, procedures and requirements. The move from a standards-based to a rule-based approach is achieved through what we refer to as "particularization."[25]

Most fundamentally, a particularized statute is designed to address a myriad of specific circumstances, instance by instance. It has the capacity to target either selected players in the bankruptcy process or specific actions or circumstances. If someone or something is so targeted, a particularized Code dictates results or at least mandates choices. Such detailed targeting must anticipate a plethora of contexts and, not surprisingly, often results in the dramatic expansion of the literal length of the Code. Thus, a statute that has been particularized is transformed from a set of standards that apply to all parties impacted or affected by the law to a detailed—often exquisitely—set

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23. 11 U.S.C.A. §§ 109(h), 503(c), 111 (West 2005).

24. Future claims is not included in the definition of "claim" in the Bankruptcy Code. Moreover, the definition of corporation in Section 101(g) includes no reference to limited liability companies. 11 U.S.C.A. § 101(g) (West 2005).

25. *See* Manning, *supra* note 22, at 767.

of specific, targeted dictates. In eliminating or substantially curtailing judicial discretion, the particularized rules, rather than case law, become authoritative.

To understand fully the move toward particularization in the context of bankruptcy law, one needs to step back and broadly reflect upon the changes made to the Code and the rhetoric that accompanied their enactment. Many proponents of the 2005 Amendments—Republicans and Democrats alike—articulated that the changes were an effort to curb abuses and to prevent bad actors from taking advantage of the bankruptcy system's benefits.[26] According to the bill's "history," the 2005 Amendments were an attempt to "improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair to both debtors and creditors."[27]

Among the provisions that evidence this objective is the amended Section 707(b).[28] This section, relating to the dismissal of cases, now contains the widely and popularly discussed "means test."[29] As a general matter, it is hard to argue against legislation that attempts to derail abusers and eliminate cheating. Few would take issue with the idea that people who can readily pay all of their legitimate debts in full should do so. And even for those of us who believe that former Section 707 addressed that very issue fairly and effectively, legislation designed to achieve integrity and fairness is, at the meta level, a positive development. So, if there is a direct correspondence between the harm the legislation is designed to address and the fix, then it would seem—at least at first blush—that such a particularized provision is a warranted and appropriate response.

But—and here is the proverbial but—in looking at the 2005 Amendments as a whole, we have been struck by the disjuncture between what these changes seek to accomplish on the surface—at the level of broad generality and in the accompanying rhetoric—and what emerges from a careful contextual assessment of the particularized provision enacted to effectuate those changes. Within seven subsections and literally hundreds of words,

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26. SENSENBRENNER REPORT, *supra* note 7, at 3-4, *as reprinted in* 2005 U.S.C.C.A.N. at 89-92.

27. *Id.* at 2, *as reprinted in* 2005 U.S.C.C.A.N. at 89.

28. *See* Bankruptcy Abuse and Consumer Protection Act of 2005, ch. 1, sec. 102, § 707, 119 Stat. 23, 27-32.

29. 11 U.S.C.A. § 707(b) (West 2005); *see also* Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27 (1999); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 193-204 (2005); Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231 (2005).

Section 707(b) now includes a myriad of detailed requirements identifying which individual debtors will be permitted to remain in the Code's liquidation chapter (Chapter 7) and which debtors will have their cases dismissed.[30] The application of the means test requires a host of new forms, rules and cross-referencing to non-bankruptcy databases for information to determine whether specified thresholds are met (for example, the median family income in the debtor's state for a family of similar size).[31] It requires debtors, who are often at a crisis point, to present detailed documentation of their financial circumstances.[32] Once this cumbersome and procedurally burdensome provision is operationalized, it will not improve bankruptcy law and practice, but have the effect, we suspect, of shutting many "honest but unfortunate debtors"[33] out of the bankruptcy system. Consider, for example, the impact of the new legislation on the victims of Hurricanes Katrina and Rita.

The political, social and economic climate in which these amendments were adopted is instructive in our quest to divine their embedded messages. We are living in a time of weakening social safety nets. Individuals are increasingly being asked to look inward or to the private sector for the most basic level of subsistence. Our ownership society, despite its surface appeal, has had trouble reaching those who live in our poorest neighborhoods and in our lowest income quartiles.[34] These are observations of fact—observations about the demographic context within which the Code was amended. Regardless of one's political proclivities, the demographics are hard to deny.

In looking at the 2005 amendments to the Bankruptcy Code in the context in which they were enacted and in thinking specifically about how the bankruptcy system works in practice, we see something other than the just identified surface purposes emerging. A different and ultimately more troubling message about the bankruptcy system and its players is being advanced: distrust.

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30. 11 U.S.C.A. § 707(b).

31. U.S. TRUSTEE PROGRAM, U.S. DEPARTMENT OF JUSTICE, CENSUS BUREAU MEDIAN FAMILY INCOME BY FAMILY SIZE (IN 2004 INFLATION-ADJUSTED DOLLARS), *available at* http://www.usdoj.gov/ust/eo/bapcpa/bci_data/median_income_table.htm (last visited Jan. 19, 2006).

32. 11 U.S.C.A. § 707(b).

33. *Cf.* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (noting that a purpose of the bankruptcy act was to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh").

34. *See* President George W. Bush, President's Remarks at the 2004 Republican National Convention (Sept. 2, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/09/print/20040902-2.html (last visited Jan. 19, 2006); David Callahan, Opinion, *Bush's Ownership Society: Great Idea, If Low-Income Families Benefit*, CHRISTIAN SCI. MONITOR (Boston, MA), Sept. 21, 2004, at 9; Jill Lawrence, *Some Ask Who Belongs in 'Ownership Society,'* USA TODAY, Mar. 22, 2005, at A4.

The theme of distrust does not appear in the words of the Code; nor does it appear as a clear or articulated theme in the legislative history. But it is, we think, one of the central messages radiating from the 2005 bankruptcy amendments. The particularized amendments, when assessed in light of both their effects in practice, as well as the social, political and economic context in which they were enacted, reveal a distrust of many central participants in the bankruptcy process. Included among the distrusted groups are debtors (most particularly consumer debtors, former officers of companies that have failed due to fraud or other wrongdoing, and those in management of mega Chapter 11 cases), debtors' lawyers (specifically those representing consumers), and the judiciary (most particularly the bankruptcy bench). In essence, it is the distrust of these central participants that has led to legislation that strips these very participants of flexibility. The new particularized rules attempt to circumscribe the central participants' conduct within the bankruptcy system. Stated differently, particularized legislation is the vehicle for communicating distrust.

What is pernicious is that the message of distrust has not been raised or openly debated. As such, this means that the process of crafting the legislation did not delve into whether the distrust is or is not warranted. Instead, we have assumed its accuracy and legislated away discretion and disabled these "untrustworthy actors" from fully participating in the system. What we have now is evidence of the distrust; what we are missing is the empirical support for it. As we operationalize the new Code, we will regularly confront the evidence of distrust. How we handle that evidence affects how the Code will operate in practice—a topic we address later.

III. AMENDED SECTION 503: KEY EMPLOYEE RETENTION PAYMENTS

A prime example of a particularized amendment whose message can only be understood in light of the context in which it was enacted is found in Section 503(c).[35] Entitled "Allowance of Administrative Expenses," Section 503 has been amended to outline the terms of when and to what extent payments may be made to retain key employees of a reorganizing debtor firm (commonly known as "KERP" payments or plans).[36] To be sure, KERP

35. *See generally* Bankruptcy Abuse and Consumer Protection Act of 2005, ch. 3, sec. 331, § 503, 119 Stat. 23, 102-03. The amendment to § 503(c) was the result of a motion by Senator Kennedy (D-MA) on Feb. 17, 2005, during the Senate Judiciary Committee markup of Senate Bill 256 and proposed to limit retention bonuses, severance pay, and other payments to insiders of the debtor under certain circumstances.

36. *See id.*

payments to essential managers have historically been commonplace in large reorganization cases and the dollars distributed are often sizeable.[37] For

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The effort to revise the law affecting KERPs did not arise until late in the legislative process in an amendment added during the Senate markup of the bill, under the section "Preventing Corporate Bankruptcy Abuse." Testifying in support of the amendment during a February 10th appearance before the U.S. Senate Committee on the Judiciary, Dave McCall, a director with the United Steel Workers of America, AFLCIO, characterized retention programs as a form of corporate abuse.

Grohsgal, *supra* note 21; PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, BANKRUPTCY CODE AMENDMENTS AFFECTING BUSINESS BANKRUPTCIES 10 (Apr. 15, 2005), *available at* http://www.paulweiss.com/files/Publication/34ec8540-7c31-4020-b264-49cba945a202/Presentation/PublicationAttachment/3b487d25-e986-47f6-ad66-50348f024fdb/Bankruptcy%20Code.pdf (last visited Jan. 19, 2006) ("Clearly, these amendments are designed to reign in what has been viewed in recent years as overly generous retention, severance and other compensation-related arrangements given to members of the debtor's existing management to incentivize them to remain with the debtor during the chapter 11 case."). *See generally* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005) (discussing the evils of KERPs and a view that the U.S. bankruptcy system's corruption and breakdown has directly led to the major corporate failures of the last decade, including those of Enron, MCI, WorldCom, and Global Crossing).

37. David A. Skeel, Jr., *Employees, Pensions, and Governance in Chapter 11*, 82 WASH. U. L.Q. 1469, 1473-76 (2004); Allison K. Verderber Herriott, Comment, *Toward an Understanding of the Dialectical Tensions Inherent in CEO and Key Employee Retention Plans During Bankruptcy*, 98 NW. U. L. REV. 579, 582-83 (2004); *see also* Borrus, *supra* note 21, at 82 ("Since the 1990s, so-called key employee retention plans—offering "pay to stay" bonuses to managers—have become a staple of business bankruptcies. Critics harp that the practice is misguided, rewarding the team that steered the company into trouble. A 1989 study by Harvard Business School professor Stuart C. Gilson showing that chief executives who depart big bankrupt companies rarely land top jobs elsewhere supports the view that such managers don't deserve rewards."); Len Boselovic, *Seeing Green in the Red; Key Employees Paid Bonuses to Remain During Bankruptcies*, PITTSBURGH POST-GAZETTE, Oct. 9, 2001, at E1 ("Cash-strapped Pacific Gas & Electric was bankrupted by its inability to recover billions of dollars in fuel charges from its customers. Yet somehow, California's largest investor-owned utility could afford paying an extra $17.4 million to more than 200 of its key managers. All across America, distressed companies are paying out millions to prevent employees from abandoning what may be sinking ships."); Ann Davis, *Want Some Extra Cash? File for Chapter 11*, WALL ST. J., Oct. 31, 2001, at C1; Daniel Doyle, *Sink or Swim? Retention Payments Can Speed Reorganization By Keeping Key People, or They Can Entrench Bad Management*, ST. LOUIS POST-DISPATCH, Mar. 20, 2005, at F7 ("ATA Airlines, a low-cost carrier based at Midway Airport in Chicago, promised to double the base salary of managers if they stayed with the company through bankruptcy proceedings."); Nelson D. Schwartz et al., *Greed-Mart: Attention, Kmart Investors. The Company May Be Bankrupt, but Its Top Brass Have Been Raking It In*, FORTUNE, Oct. 14, 2002, at 139; Karen Talaski, *Kmart May Need More Recovery Time; Creditors, Adamson Concur that July 2003 Target Date to Emerge from Bankruptcy Could Be Too Soon*, DETROIT NEWS, Apr. 24, 2002, at 1B ("[Judge] Sonderby also approved employment agreements for Kmart's top five executives along with a Key Employee Retention Plan, which sets up a bonus schedule for the company's top 10,000 employees."); Chris Woodyard & Martin Kasindorf, *Enron Execs Pocket Big Bonuses*, USA TODAY, Feb. 1, 2002, at 1B; Lorene Yue, *Kmart Lines Up Cash for New Boss*, DETROIT FREE PRESS, Apr. 5, 2002, at 1A; Robert J. Keach, *The Case Against KERPS* 2 (Am. Bankr. Inst., Annual Spring Meeting, Apr. 11, 2003), *available at* http://bridgenet.bridgellc.rom/assignments/class%202%20_%20Pre-Filing%20KERPS%20+%20Directorzone%20insolvency%20090804/KERP%20Issues/Keach_Th.pdf (last visited Jan. 19, 2006) (discussing case law on KERPs and arguing for the curtailment of the use of KERPs).

example, the retention bonuses paid to executive vice presidents of Adelphia were up to 200% of their base salaries, provided certain performance goals were met.[38] In the Jacobson's bankruptcy, the bankruptcy court approved bonuses of $5.3 million to be paid to 190 of its top employees.[39] Such payments, made from a finite pool of resources, exemplify a tension familiar in Chapter 11 cases: balancing the interests of workers and other creditors in getting paid with the debtor's interest in a successful reorganization. These payments did not happen, however, outside the purview of the courts: courts regularly are presented with applications for employee retention.[40] The courts

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38. Mike Farrell, *'Definitive' Adelphia Sale Bolsters 2 Top Cable Ops*, MULTICHANNEL NEWS, Apr. 25, 2005, at 1 (discussing Adelphia gaining approval of a KERP in April 2005 that will give employees at the executive vice president level bonuses of up to 200% of their base salaries if they meet certain performance goals. This happened amidst the approval of an auction bid by Time Warner Inc. and Comcast Corp.); *see also* Kris Frieswick, *What's Wrong With This Picture? Polaroid's Passage Through Chapter 11 Exposes How Bankruptcy Can Give Debtors Too Much Power*, CFO, Jan. 2003, at 40, 43:

> In November, [Polaroid] sought the court's permission to pay top executives who had stayed through the filing . . . up to $19 million in so-called key-employee retention programs (KERPs), including some proceeds from any future sale of the company. While KERPs are common, Judge Walsh balked at the amount. He eventually capped a total package at $6 million . . . .

39. Karen Talaski, *Jacobson to Reveal Earnings; Financial Results, Monthly Updates to Show Retailer's Health Since Bankruptcy Filing*, DETROIT NEWS, Apr. 12, 2002, at 1B ("The U.S. Bankruptcy Court in Detroit agreed to allow Jacobson's to pay its top 190 employees as much as $5.3 million in bonuses if they stay . . . during its reorganization. By comparison, Kmart's bonus plan has nearly 10,000 participants and rings in at $175 million."); *see also* Doug Campbell, *Execs to Get Bankruptcy Windfalls*, BUS. J. (Greensboro/Winston-Salem, NC), Dec. 27, 2002, *available at* http://triad.bizjournals.com/triad/stories/2002/12/30/story1.html (last visited Jan. 19, 2006) (discussing the retention plans of bankrupt textile companies:

> Besides trying to lead his company out of bankruptcy protection, Galey & Lord CEO Arthur Wiener has something else to look forward to in 2003: a $1.2 million bonus. Wiener's windfall is the richest part of a $5.2 million "key employee retention program" encompassing 62 top executives at Greensboro-based Galey & Lord . . . .
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> . . . Burlington Industries, which sought bankruptcy protection in November 2001 and plans to emerge in the middle of 2003, has a $9.4 million incentive plan for 71 key employees as part of its restructuring. . . .
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> . . . .
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> Guilford Mills, which emerged from bankruptcy protection in October, had the least opulent retention plan of local firms. It covers 47 employees and is to cost $1 million . . . .).

40. *See* Campbell, *supra* note 39; George W. Kuney, *Hijacking Chapter 11*, 21 BANKR. DEV. J. 19, 77-80 (2004) (discussing how Chapter 11 debtors making transactions outside the ordinary course of business are limited in making payments out of the estate by § 363(b)(1) and must gain court approval for such transfers. Prior to Senate Bill 256 and the new § 503(c) requirements, bankruptcy courts relied on a more relaxed business judgment test: "Retention plans will be approved where (i) the debtor has formulated a plan after using proper business judgment and (ii) the court finds the retention plan to be 'fair and reasonable.'"); Talaski, *supra* note 39; *see also In re* Montgomery Ward Holding Corp., 242 B.R. 147, 151, 155 (D. Del. 1999) (affirming a 3-part employee incentive plan for over $70 million; the retention incentive portion of the plan provided for 10% of the debtors' key management employees, i.e., 500 managers

listen to testimony advocating the positions of various parties (including the committee and the United States Trustee), and each application is granted the opportunity for careful scrutiny.[41]

Amended Section 503 addressing KERP payments includes far more specific rules and particularized limitations on the circumstances under which a reorganizing debtor may pay retention bonuses to key employees.[42] Under the amended provisions, a payment cannot be made absent a finding by the court that the payment was needed to retain the individual in question based on a showing that the person had a bona fide job offer from another entity at the same or greater pay, that the person's services are essential to the survival of the business, and either the payment was not greater than ten times the payments to non-management personnel during the same calendar year or, if no such payments were made, no more than 25 percent of the amount paid to that person in the previous year.[43] It imposes an added burden on the key members of debtor's management who seek compensation for the risk of staying with a firm as it emerges from bankruptcy—the person seeking retention must actually go into the job market and secure a job offer.[44] In essence, the person or management must prove they are indispensable. The particularized provision is presupposing that the officer of the current debtor

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through vice presidents, and totaled approximately $17.6 million); *In re* Georgetown Steel Co., 306 B.R. 549, 555-56, 559 (Bankr. D.S.C. 2004) (approving a retention plan for top executives that was not to exceed $619,766.00 and certain other bonuses); *In re* Aerovox, Inc., 269 B.R. 74, 77, 81 (Bankr. D. Mass. 2001) (granting a motion to implement a KERP offering a bonus equal to three months' current salary for upper management to stay on through reorganization); *In re* Am. W. Airlines, Inc. 171 B.R. 674, 675-76, 678 (Bankr. D. Ariz. 1994) (approving a plan where the Chief Executive Officer received 125,000 shares of restricted Class B common stock that must be held for at least two years; Chief Operating Officer received $400,000 cash; 28 other officers and managers received cash bonuses totaling $1,170,706; and rank and file employees (approximately 11,000) split $9,500,000. Employees who had been with the debtor since the filing received approximately $1,000 each; employees hired post-filing received a lower amount.); *In re* Interco, Inc., 128 B.R. 229, 230-32 (Bankr. E.D. Mo. 1991) (approving a KERP that provided for 130 critical executives, and was valued between approximately $1.8 million and $5.6 million; it also approved a $2 million bonus to two executives, payable only if the Chapter 11 plan was confirmed while the individuals were still employed by the debtors); *In re* Levinson Steel Co., 117 B.R. 194 (Bankr. W.D. Pa. 1990) (approving a retention agreement and severance pay plan for the company's Chief Financial Officer, finding it to be a necessary incentive to his continued employment during the Chapter 11 reorganization, but denying the debtor company's request for a retention plan for other general and key employees).

41. For an example of the process and considerations of parties in the court approval process for KERPs, see Ass'n of Flight Attendants, Legal Discussion Regarding KERP (Feb. 6, 2003), http://www.unitedafa.org/res/b/res/kerp_legal.asp.

42. *See* Bankruptcy Abuse and Consumer Protection Act of 2005, ch. 3, sec. 331, § 503, 119 Stat. 23, 102-03.

43. *Id.*

44. *See id.*

employer wants to continue to work for a firm in bankruptcy. The capped compensation may make that untenable; how many individuals (other than those with ownership interests or stock options) would prefer uncertainty and court monitoring to a stable new job at the same or better pay? Thus, this rule is constraining a court from perhaps making a decision that is consistent with industry practices, industry experience and marketplace realities, and ultimately in the firm's (and its creditors') best interests.

It is widely understood that this provision emerged as a reaction to the outsized and highly publicized bankruptcies of Enron,[45] WorldCom[46] and Global Crossing.[47] Congress, perhaps in contrition for their acceptance of contributions from these corporate entities in flusher times, made a great show of holding hearings and introducing legislation that demonstrated their "commitment" to protecting investors from the consequences of management's corrupt behaviors. Reactive legislation, beyond the bankruptcy provisions, was enacted seemingly overnight. The Sarbanes-Oxley Act of

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45. *See generally In re* Enron Corp., No. 01-16034 (AJG), 2002 Extra LEXIS 637 (Bankr. S.D.N.Y. May 8, 2002); Memorandum of Law in Support of Debtors' Motion for Approval of a Key Employee Retention Program Pursuant to Bankruptcy Code Section 363(b) and to Authorize Administrative Expense Priority for Indemnification Claims Arising From Postpetition Services of Directors and Officers Pursuant to Sections 503(b) and 507(a) of the Bankruptcy Code, *In re* Enron Corp., No. 01-16034 (AJG) (Bankr. S.D.N.Y. Mar. 29, 2002); *Enron Executive Retention Plan Stirs Up Firestorm of Objections*, 17 ANDREWS CORP. OFFICERS & DIRECTORS LIABILITY LITIG. REP. 18 (2002) (approving $140 million retention plan for Enron on Apr. 16, 2002); Jack Naudi, *Conseco Fights to Retain Staff Bonuses Amid Strife*, INDIANAPOLIS STAR, Dec. 20, 2002, at 1A ("In the Enron case, the Securities and Exchange Commission filed a motion against a plan to give nearly 1,300 Enron employees up to $130 million. But in May, a bankruptcy judge approved the plan. The judge did grant one SEC request: No Enron employee convicted of a crime or who engaged in securities fraud would get bonuses or severance pay.").

46. *See generally* Motion of the Debtors Pursuant to Sections 363(b) and 105(a) of the Bankruptcy Code for Authorization to Establish a Key Employee Retention Plan, *In re* WorldCom, Inc., No. 02-13533 (Bankr. S.D.N.Y. Oct. 18, 2002); *In re* Worldcom, Inc., No. 02-13533 (AJG) (Bankr. S.D.N.Y. Oct. 29, 2002), *available at* http://www.elawforworldcom.com/download.asp?DocID=9162&FileID=14624&FileName=1779-O_L.pdf (last visited Jan. 19, 2006) (approving a retention program for key employees but rejected CEO plan. The KERP named 329 key employees and totaled approximately $25 million.); Borrus, *supra* note 21, at 82 ("As executive pay soared, so did retention bonuses, spurring charges of abuse. In 2002, a judge presiding over the bankruptcy of the former WorldCom Inc. approved a $25 million payout to 329 employees."); Naudi, *supra* note 45 ("In October, despite objections from virtually every major U.S. telephone company, a judge let the company pay 329 managers more than $25 million in incentives.").

47. *See generally* Motion for the Debtors for an Order Pursuant to Sections 105(a) and 363(b)(1) of the Bankruptcy Code Approving and Authorizing the Establishment of a Retention Program for Key Employees, *In re* Global Crossing Ltd., No. 02-40188 (Bankr. S.D.N.Y. Apr. 10, 2002); *In re* Global Crossing Ltd., No. 02-40188 (Bankr. S.D.N.Y. May 24, 2002) (noting KERP cost of $8,238,400 plus $5 million in discretionary funds for key employees essential to restructuring).

2002[48] is a notable example. What also grew out of the impulse to "do something" with respect to corporate management overreaching was amended Section 503.

The sizeable payments Enron made to certain key employees following its bankruptcy filing captured the public's attention and imagination. For example, the bankruptcy judge approved $140 million in retention bonuses for key managers.[49] In contrast, Enron's rank and file employees suffered substantial losses.[50] The public's outrage in response to these large retention payments was aggravated by the circumstances surrounding Enron's demise: it is alleged that massive fraud was perpetuated by Enron's management.[51]

It seems clear that this legislative amendment to Section 503 was a reaction to a specific, well-publicized problem. But was a legislative response the right one? Was there an alternative way of addressing the underlying issue? In the absence of this "legislative fix," the bankruptcy court could have approved or disapproved the terms of Enron's proposed "KERP" program based upon the common law necessity doctrine and/or Section 105(a) of the Bankruptcy Code.[52] And so, was anything gained by the imposition of a specific, particularized rule outlining when and to what extent firms in bankruptcy can pay retention bonuses? Are the benefits that flow from making new laws worth the costs?

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48. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

49. *See* Eric Berger, *Enron's Prospects for Surviving Bankruptcy May Be Improving*, HOUSTON CHRON., Apr. 22, 2002, at A1.

50. *See generally* LoPUCKI, *supra* note 36.

51. *See* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON 371 (2003).

52. 11 U.S.C. § 105(a) (2000).

> Under Code § 105(a), the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The outer limits of this broadly stated principle are tested by the "Necessity of Payment Rule," also known as the "Doctrine of Necessity." It is unclear whether the rule remains valid under the Code. In reorganization cases affected with the public interest, the Necessity of Payment Rule may permit the early *payment* of prepetition claims of critical creditors who threaten otherwise to withhold goods or services believed to be essential to the continued viability of the debtor's business and thus to the reorganization. The doctrine thus does no more than allow a DIP or trustee to succumb to economic sanctions imposed by a creditor holding a monopolistic position. It is not a rule of priority but is only recognition of compelled *payment*. Claimants have no rights pursuant to the necessity rule, which is not a rule of equity at all. Indeed, the sine qua non of the doctrine is that the claimant is acting in equitably by coercing payment.

2 NORTON BANKR. L. & PRAC. 2d § 42:11 (Supp. 2002); Jo Ann J. Brighton, *The Doctrine of Necessity: Is It Really Necessary?*, 10 J. BANKR. L. & PRAC. 107 (2000); W. Donald Boe, Jr., *Necessity, The Mother of All Excuses*, 12 NORTON BANKR. L. ADVISER 1 (Dec. 1991); Russell A. Eisenberg & Frances F. Gecker, *The Doctrine of Necessity and Its Parameters*, 73 MARQ. L. REV. 1 (1989).

The costs of Section 503 are many.[53] The Bankruptcy Code, as enacted

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53.

Already the courts have started clamping down on retention deals. For instance, a bankruptcy court judge in May rejected US Airways Group Inc.['s] request to pay up to $55 million in severance and retention plan to its 23 senior executives and 1,800 managers to prevent an exodus of managers ahead of the airline's anticipated merger with America West. That request came after the struggling airline sought to cut $1 billion annually in labor costs.

. . . .

Instead, the court only approved a plan estimated to cost between $20 million and $28 million for its management employees, not its executives.

Rachel Beck, *New Bankruptcy Law Clamps Down on Bonuses*, ASSOCIATED PRESS, Aug. 9, 2005, *available at* http://abcnews.go.com/Business/wireStory?id=1022505 (last visited May 13, 2006).

The new KERP restrictions might lessen the appearance that debtors are benefiting insiders inappropriately. Their strict requirements, however, may impair the debtor's ability to keep indispensable managers—for a KERP to be approved, after all, the debtor's key employees are forced to a undertake a job search, which could well lead them to accept a more lucrative and stable position at a competitor rather than stay with the debtor. To the extent the new rules yield this counterproductive result, the ability of the affected debtor to avoid a liquidation, to reorganize successfully and to maximize the value of the collateral will be impaired—all to the detriment of its secured creditors.

Alan M. Christenfeld & Shephard W. Melzer, *Secured Transactions; 2005 Bankruptcy Amendments: A Secured Creditor's Perspective*, N.Y. L.J., Aug. 4, 2005, at 5.

[T]he new provisions deprive bankruptcy courts of their ability to exercise discretion in determining which factors to consider and the relative weight to be given to the various factors when deciding whether to approve a retention or severance program.

. . . .

. . . [I]f a company planning to file for bankruptcy protection imminently seeks to implement a KERP or similar plan, it seems advisable to implement such a plan prior to filing bankruptcy. Doing so may prevent the need to obtain bankruptcy court approval of such a plan under the strict standards imposed by the BAPCPA, and place the burden on other parties to affirmatively seek to avoid pre-bankruptcy payments made to executives pursuant to such a plan.

Gary M. Kaplan, *Executive Compensation Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, J. REP.: L. & POL'Y 5-6 (BNA) (Aug. 2005), *available at* http://howardrice.com/uploads/content/GMK_BNA_Article.pdf (last visited Jan. 19, 2006); *see also NACM Highlights How Changes to the Bankruptcy Code Will Affect Credit Pros*, MANAGING CREDIT, RECEIVABLES & COLLECTIONS (Aug. 2005) (quoting Larry Gottlieb of Kronish Lieb Weiner & Hellman LLP: "But the burden of proof for retaining such executives at a certain rate of pay is so high that it will have the opposite of the intended effect; motivating good management to leave and bad management to stay, to the detriment of the reorganization.").

Courts are already cracking down on pay-to-stay bonuses. On June 15, the judge in Alexandria, Va., overseeing US Airways Group Inc.'s bankruptcy excluded 23 senior officers from a plan, worth up to $55 million, that aimed to keep more than 1,800 managers at the carrier during its merger talks with America West Holdings Corp. The proposal had triggered a storm of protest from US Air's unions, which already have accepted nearly $1 billion in pay and benefits cuts.

Borrus, *supra* note 21, at 82.

These restrictions could negatively impact business reorganizations by leading to the departures of management that would otherwise be critical to a successful reorganization. In particular, requiring that insiders have other comparable job offers to be eligible for retention bonuses will induce management to undertake a job search at a time when their focus is needed for reorganization in 1978, was a manageable, reasonably accessible set of rules. Courts could, and perhaps should, have reviewed applications for employee retention with a sharper eye. But what has occurred in response is a bulkier, more cumbersome and a more "impenetrable . . . jungle of special [interest] provisions."[54] As Dean Manning aptly observed in critiquing our propensity to legislate, "A significant part of the hyperlexis problem arises from the effort to deal with problems with too great particularity. Contrary to surface impression, detailed specificity in a legal provision does not reduce disputes; particularization merely changes the vocabulary of the dispute."[55]

Particularization also limits flexibility. The new rules addressing KERPs may make some sense in the context of the Enron case, but, happily, Enron was an outlier. Furthermore, the changes were not needed had a court simply denied the retention bonuses. The vast majority of business bankruptcies do not involve fraud[56] or extreme disparities in compensation between workers and management.[57] In many cases, retention payments outside the parameters

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> purposes, and may further induce them to take a new position (though not one that is necessarily more lucrative) because of the certainty of employment that a new job may provide, versus the uncertainty of staying the course in chapter 11. The restrictions on bonuses and severance packages may also dampen the enthusiasm of key personnel for continued employment with the debtor.

Craig E. Reimer & Michael P. Richman, Commentary, *Congress Overhauls the Nation's Bankruptcy Laws*, 2 ANDREWS BANKR. LITIG. REP. 2 (May 20, 2005); Skeel, *supra* note 37, at 1475 ("Prohibiting pay-to-stay could prevent firms from retaining employees they need most. In many cases the employees with bonus-laden contracts are new managers who were brought in prior to bankruptcy to oversee the restructuring effort.").

> Though arguing for less judicial discretion is now in vogue, and Congress has spent several years attempting to curtail the discretion of bankruptcy judges, there simply is no reason to legislatively dictate when bankruptcy courts can approve employee retention or severance programs. . . . If bankruptcy courts had exercised their discretion in a haphazard, unpredictable fashion or had not required debtors to demonstrate that the payments provide a valuable benefit to the estate, Congress would be justified in legislatively dictating when such payments should be allowed.

A. Mechele Dickerson, *Approving Employee Retention and Severance Programs: Judicial Discretion Run Amuck?*, 11 AM. BANKR. INST. L. REV. 93, 112 (2003).

> The more time and money a company spends replacing fleeing employees, the less it will be focused on restoring the venture's health. That's what is important to creditors, who want to be paid as much of what they are owed as possible. Creditors figure the best way to maximize their recovery is by keeping experienced workers, even if they have to pay them something extra. There may not be as much money for creditors if a company is plagued by turnover.

Boselovic, *supra* note 37.

54. Manning, *supra* note 22, at 773.

55. *Id.*

56. ECON. CRIMES UNIT, FBI, SHATTERED FAITH: WHITE COLLAR CRIME IN AMERICA—BANKRUPTCY FRAUD, *available at* http://www.fbi.gov/hq/cid/fc/ec/bf/bf.htm (last visited Jan. 19, 2006) (finding the FBI estimates that 10% of bankruptcies involve fraud).

57.

> But the amendment failed to recognize that key executives and managers are often contributing to

set forth in the amendment to Section 503 may make sense for a manufacturing company with long-term experienced management. There may be many good reasons—reasons that make business and economic sense—for parties and courts to retain existing management, even at a price.[58] But, because of the hard cases presented by Enron and similar business debtors, and some occasional judicial acquiescence without apparent support, we now have bad law.

IV. NEW SECTION 111: MANDATORY CREDIT COUNSELING FOR INDIVIDUAL DEBTORS

Another equally compelling example of particularization can be found in the new mandates with respect to consumer credit counseling.[59] Contained primarily in Sections 109(h) and 111, these were both added as part of the 2005 Amendments.[60] Section 109(h) contains the counseling requirement itself and details certain exceptions.[61] Section 111 sets forth, among other things, the requirements for those seeking to be approved providers of pre-bankruptcy budget and credit counseling.[62] The possibility of avoiding bankruptcy relief through credit counseling is not a new idea; indeed, it dates back to the mid-1960s.[63]

Until the 2005 Amendments, consumers were not required to obtain counseling as a prerequisite to bankruptcy relief. There was no analog to Section 109(h) and Section 111 in the former Bankruptcy Code.[64] Among the

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> the solutions, not the problems, of a distressed company. It's the difference between Kmart and Enron. The former reorganized successfully and gained enough strength to buy Sears. The latter had some executives indicted over pre-bankruptcy transactions.

Doyle, *supra* note 37.

58. Boselovic, *supra* note 37 ("'This is the creditors' money at this point,' says Robert Lawless, a professor at the University of Missouri's law school. 'If the creditors are willing to pay these people to stay . . . why should anybody outside the situation really care?'").

59. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, ch. 1, Sec. 106, § 109, 119 Stat. 23, 37-39.

60. *Id.*

61. *Id.*

62. *Id.*

63. CONSUMER FED'N OF AM. & NAT'L CONSUMER LAW CTR., CREDIT COUNSELING IN CRISIS: THE IMPACT ON CONSUMERS OF FUNDING CUTS, HIGHER FEES AND AGGRESSIVE NEW MARKET ENTRANTS 6 (2003), *available at* http://www.law.upenn.edu/bll/ulc/UCDC/cfa-nclcreport.pdf (last visited Jan. 19, 2006).

64. *See* Susan Block-Lieb, Karen Gross & Richard L. Wiener, *Lessons from the Trenches: Debtor Education in Theory and Practice*, 7 FORDHAM J. CORP. & FIN. L. 503, 519-23 (2002); *see also* Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunities for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549,

purposes of this new requirement are that consumers should only make the decision to seek bankruptcy relief after considering other plausible alternatives; it was perceived that many consumers, perhaps on the advice of counsel, were precipitously filing bankruptcies.[65] Moreover, there was a sense that if more consumers were channeled into pre-bankruptcy debt management plans, creditors—most especially credit card companies—would receive more money than they would receive if consumers sought relief under Chapter 7 of the Code where recoveries are limited for debtors with few exempt assets.[66]

Many would agree that thoughtful assessment of alternatives to bankruptcy is a wise idea. At the meta level, most people would agree that bankruptcy should not be the choice of first resort when there is financial strain; bankruptcy is a legal step that should not be undertaken lightly. Its consequences—both actual and perceptual—are real.[67] Forgetting for a moment the fact that, of late, the credit counseling industry has been subjected to considerable criticism for its poor and unscrupulous treatment of individuals in debt,[68] the notion of pre-bankruptcy counseling has appeal.

With that said, there are clearly individuals for whom counseling will not be beneficial—either because of the circumstances that led to their indebtedness or the quality of advice they received from their legal team. Moreover, to the extent counseling is considered as a national mandate for the almost two million individuals who access the system annually, there are some individuals who need bankruptcy relief but who cannot readily obtain the required counseling. So, any thoughtful and workable mandate needs to provide some exceptions built into the system. Some of the categories of exceptions are self-evident. If there is no counseling available in a given region, individuals living in those regions should not be denied access to bankruptcy relief. If individuals must file for relief due to exigent circumstances and there is no counseling available on an immediate basis, absence of counseling should not be grounds for denial of access to the bankruptcy process. There are also likely to be categories of individuals for whom obtaining counseling will be difficult, if not impossible. It is this category of individuals that is addressed in new Section 109(h).[69]

562-65 (2005); Colloquium, *Consumer Bankruptcy*, 67 FORDHAM L. REV. 1315 *passim* (1999).

65. SENSENBRENNER REPORT, *supra* note 7.

66. *Id.*

67. *Cf.* § 109, 119 Stat. at 37-39.

68. *See generally* KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM (1997).

69. § 109, 119 Stat. at 37-39.

Section 109(h) sets forth in detail those situations in which an exception can be made.[70] What is striking is the degree of particularization that is provided, as if courts and debtors' lawyers were not capable of singling out those individuals who should obtain a counseling exemption. It is also as if there is an assumption that whole groups of individuals will beat down the doors to fit within the counseling exception. The level of distrust is palpable when the details of Section 109(h) are unpacked.

Section 109(h) provides that consumers who are incapacitated, disabled and on active military duty can be excepted from the counseling mandate.[71] However, the definition of each of these three categories of "excepted" debtor is very limited. "Incapacity" is defined in Section 109(h)(4) as "impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities."[72] "Disability" is defined in the same subsection as a person "so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing [the means by which counseling can be delivered]."[73] The military exception requires that the debtor be on active duty "in a military combat zone."[74] Those seeking to fit within these narrow exceptions need to obtain court approval.[75]

Several things are immediately obvious from the way in which these categories of individuals are defined. They are so narrowly constructed that almost no one will fit within them. Someone who fits the definition of incapacitated would be someone who likely could not even seek bankruptcy relief without a conservator or guardian authorized to file for the relief on their behalf; this is because few, if any, courts would permit an individual so lacking in rational thought to be a debtor. Consider how disabled a person would need to be in order to be considered unable to obtain some counseling—not just in person but over the telephone or Internet. Basically, the only person who would fit the criteria would be someone in a coma, on a ventilator, or who was both deaf and blind. Arguably, a quadriplegic would not satisfy the test if someone could hold a phone to the person's ear or place the counseling call on a speaker. The only members of the military who would fit within this exception would seem to be those in Iraq or perhaps

70. *Id.*
71. *Id.*
72. *Id.* at 37-38.
73. *Id.*
74. *Id.* at 37.
75. *Id.* at 37-39.

Afghanistan, which may be the only locations we consider active military zones. Soldiers on a submarine or on an aircraft carrier would not fit within the exception.

By creating this level of specificity, judicial discretion is eliminated as if the judiciary were not capable of determining individuals who were sufficiently incapacitated or disabled to enable an exception to the counseling mandate. Indeed, the message seems to be that many debtors would claim to be incapacitated or disabled to avoid the counseling requirement, with no evidence that this category of individual was desirous of gaming the system. Indeed, one could hypothesize that those with these impairments may be seeking debt relief because their medical and custodial costs are so high and their insurance, if any, so inadequate, that they need financial relief. Indeed, given their situation, relief from financial burdens seems to be the least the legal system can provide. While debt among military personnel is a very real problem,[76] it is difficult to justify an exception for those only in a combat zone; debt can and does occur when one is serving abroad in a military but non-combat arena.[77]

One can also posit some individuals who should be excepted from counseling who do not fit within the three identified categories. The new legislation prohibits the courts from creating additional exceptions for these prospective debtors.[78] Consider someone who cannot find counseling in their native language. Consider someone with enormous caregiving obligations—for an ill child and elderly parents, for example. While the debtor him or herself is not incapacitated or disabled, those in their charge could be. So, the statutory language is delimiting in two ways: first, the categories for exception are limited and, second, within the categories, the eligible recipients are limited.

A further requirement is that if an individual fits within the required categories, there is the added hurdle that a court must approve the exception.[79] The requirement specifies that such approval is based on notice and a

76. *See generally* Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L.J. 653 *passim* (2005).

77. *See* The Center for Responsible Lending, *Predatory Lending and Its Impact on the Military and Local Communities*, Mar. 29, 2005, *available at* http://www.responsiblelending.org/pdfs/Testimony-Graves_payday-032905.pdf (last visited Jan. 21, 2006); *see also* Lorin T. Smith, *Military Attacks Vulturous Tactics of Payday Lenders*, NEWS TRIB. (Tacoma, Wash.), Jan. 18, 2006, *available at* http://www.thenewstribune.com/news/government/story/5465157p-4931371c.html (last visited Jan. 21, 2006).

78. *See* 11 U.S.C.A. § 109(h) (West 2005).

79. *See id.*

hearing—which means that a hearing need not necessarily be held under Section 102(1).[80] However, someone—whether or not they are a lawyer—would still need to prepare an appropriate request, likely in the form of a motion. Clearly, anyone who fits within the exception would not be capable of appearing in court, at least not without huge expenses and delay. So, it would require, one must assume, some sort of "paper proof."[81] How much proof must be obtained is unclear.

The perceived distrust of consumer debtors, their lawyers and the judiciary has led to a series of exceptions that are so particularized that few genuinely challenged debtors fit within them. The counseling mandate is, then, required of virtually all debtors. While on its face the information offered by quality counseling would be beneficial (who can argue with more information being bad?), the narrowness of the exceptions sends a message that all debtors—regardless of how they ended up in debt—can benefit from counseling. Indeed, it is worth observing that there are whole categories of debtors for whom bankruptcy is the right alternative because of circumstances beyond their control; the degree of "financial responsibility" of an uninsured person with cancer, burdened with medical debts, will not change with counseling. Stated differently, the mandate is so broad and the exceptions so narrow that we homogenize debtors and their problems. Whatever else it is, counseling should not be oversold as a solution to all that strikes debtors; at best, it will help some of the debtors some of the time. That message is not conveyed by the 2005 Amendments. That is legislation gone awry.

V. IS THERE A MESSAGE IN SILENCE?

Given the number of years the bankruptcy amendments were debated, the Commission that was created, and the dozens of witnesses who prepared reports and publicly testified about the bankruptcy law's virtues and failings, one would think that the near 300 pages of amendments would be, if nothing else, comprehensive. Clearly there was opportunity, over the course of eight years of discussion, to address and provide resolutions for every open, outstanding and unresolved issue that has arisen and could arise in the bankruptcy context. Unfortunately, there remain a number of important issues that Congress failed to tackle in the course of drafting the bankruptcy

80. *Id.*
81. *See id.*

amendments, leaving unanswered many compelling issues.[82] The question raised by this failure to legislate—when there was clear opportunity—is whether there was an embedded message in this silence.

One issue Congress failed to address is the bankruptcy treatment of future claims, claimants and obligations.[83] The concept of future obligations and the use of bankruptcy to deal with mass torts, product liability claims and environmental obligations was not originally addressed by the Bankruptcy Code. Accordingly, the definition of "claim" in Section 101(5) does not explicitly include these future obligations, nor does the Bankruptcy Code specify when a claim or obligation arises.[84] Courts have danced around alternative approaches in an effort to reach a resolution of these issues.[85] In the absence of an explicit Code provision, some courts have expansively read "future claims" into the definition of claim;[86] others have not been so willing to stretch the existing definition of "claim," holding that only those rights to payment which arise before the petition or during the Chapter 11 process can be considered claims under bankruptcy law.[87] Only for asbestos claims has there been a legislative amendment to the Code.[88] And yet, both the issue of when a claim arises and whether a future claim is even recognized are critical in a bankruptcy proceeding;[89] experience over the past twenty-five years has

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82. Examples include the absence of addressing limited liability companies' treatment in bankruptcy, failure to address mass tort treatment in bankruptcy, issues surrounding bankruptcy remote entities, and broader channeling injunctions.

83. *Cf.* Kathryn R. Heidt, *Products Liability, Mass Torts and Environmental Obligations in Bankruptcy: Suggestions for Reform*, 3 AM. BANKR. INST. L. REV. 117 *passim* (1995); Kathryn R. Heidt, *Future Claims in Bankruptcy: The NBC Amendments Do Not Go Far Enough*, 69 AM. BANKR. L.J. 515 *passim* (1995).

84. 11 U.S.C.A. § 101(5) (West 2005); *see also* Heidt, *supra* note 83, at 117-18. Kathryn R. Heidt, *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 FLA. L. REV. 153 (1992); Frederick Tung, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 CASE W. RES. L. REV. 435, 456-58 (1999).

85. KATHRYN R. HEIDT, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY ¶¶ 3-30, 3-85 to -90 (West 2002).

86. Grady v. A.H. Robins Co., 839 F.2d 198, 202-03 (4th Cir. 1988); *In re* Emons Indus., Inc., 220 B.R. 182, 193-94 (Bankr. S.D.N.Y. 1998).

87. Epstein v. Official Comm. of Unsecured Creditors, 58 F.3d 1573, 1577 (11th Cir. 1995); *In re* M. Frenville Co., 744 F.2d 332, 337 (3d Cir. 1984). While not a mass tort case, the Third Circuit has departed with other circuits in holding that a claim not yet fully cognizable under state law could not be dealt with in bankruptcy. *Id.*

88. 11 U.S.C. § 524(g) (2000).

89. Generally, only those holding "claims" that "arose" pre-petition (or pre-confirmation in a Chapter 11 case) are allowed to participate in the bankruptcy process, vote on a Chapter 11 plan and receive a distribution. 11 U.S.C. § 726(a). Only those claims that arose before the specified time are discharged. 11 U.S.C. §§ 727(b), 1141.

demonstrated that if future obligations cannot be addressed in a Chapter 11 case, the value of a bankruptcy filing will be impaired significantly.[90]

Another issue the Code and the 2005 bankruptcy amendments fail to address is the treatment of LLCs: there is no explicit mention of LLCs in the text of the Bankruptcy Code and no provision in the amendments remedying this omission. Particularly in recent years, the Code's application to and intersection with LLCs has raised myriad issues ripe for resolution.

Since their initial introduction in 1977,[91] LLCs have increasingly been used as traditional business entities, largely due to their inherent flexibility and liability limiting features.[92] LLCs have also been the entity of choice for special purpose entities used in connection with structured finance transactions.[93] When LLCs have been involved in a bankruptcy case, in the face of the Code's silence, transaction parties have sought to characterize them as, and draw analogies to, corporations as well as partnerships.[94] The quest has been to fit LLCs into the Bankruptcy Code's rubric. There are credible arguments supporting alternative characterizations—arguments all grounded in the Code. Multiple Code provisions—the section on involuntary cases,[95] the definitional provisions,[96] the provisions on executory contracts,[97] the definition of property of the estate—and comparisons and analogies to other questions[98]—can be cited to in support of one position or the other. Rating agencies and transaction parties, as well as influential treatises such as

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90. Kathryn R. Heidt, *Undermining Bankruptcy Law and Policy:* Torwico Electronics, Inc. v. New Jersey Department of Environmental Protection, 56 U. PITT. L. REV. 627, 650-53 (1995).

91. Laura Castañeda, *Structuring Your Company? Look at the Benefits of LLCs*, BUS. WK., Apr. 6, 1999, *available at* http://www.businessweek.com/smallbiz/news/date/9904/e990406.htm (last visited Jan. 19, 2006) ("LLCs were introduced in 1977 in Wyoming, which aimed to become a more business-friendly state by eliminating double taxation and creating a business structure that, unlike an S corporation, allows for foreign investors. Today, you can form an LLC in all 50 states and the District of Columbia.").

92. LLCs are eligible for "check-the-box" or pass-through taxation, meaning that their profits are taxed at the member-level, not the entity level. *See* 26 C.F.R. § 301.7701-2 (2005); *see also* Report by the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York, *New Developments in Structured Finance*, 56 BUS. LAW. 95 (2000) (referring to the use of Delaware LLCs as "ubiquitous in the structured market").

93. Simeon Gold, *Choice of Business Entity for Commercial Transactions*, N.Y. L.J., Mar. 16, 1995, at 1; Richard M. Graf, *Use of LLCs as Bankruptcy-Proof Entities Widens*, NAT'L L.J., Apr. 10, 1995, at B16.

94. *See In re* ICLNDS Notes Acquisition, LLC, 259 B.R. 289, 292-93 (Bankr. N.D. Ohio 2001) (discussing how to categorize LLCs).

95. 11 U.S.C.A. § 303 (West 2005).

96. *Id.* § 101.

97. *Id.* § 365.

98. *Id.* § 541.

Colliers,[99] have all taken the position that LLCs ought to be treated as corporations under the Code. Yet, the rating agencies recognize the uncertainty in connection with certain transactions engaged in by LLCs and require legal opinions to conclude as much.[100] Notwithstanding the thousands of transactions involving LLCs that have gone forward in reliance on the position that, under bankruptcy law, LLCs are most aptly characterized as corporations, there remain strong arguments that LLCs are more like partnerships, and thus should be treated as such under the Bankruptcy Code.[101] The few courts addressing issues related to LLCs are divided in their approaches.[102] Because of the Bankruptcy Code's silence on this issue, organizers are faced with uncertainty as to how to minimize many bankruptcy- and insolvency-related risks.

In light of the absence of a definitive resolution of how LLCs ought to be treated in bankruptcy, the risks LLCs and their members are subject to are many: (i) the risk a transaction originator, as the sole LLC member, will compel the LLC to file a voluntary bankruptcy petition; (ii) the risk that the LLC will fail to survive the originator/sole member's bankruptcy or dissolution; (iii) the open question of whether an LLC member can file an involuntary bankruptcy petition against the LLC;[103] and (iv) the uncertainty

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99. *See, e.g.*, COLLIER ON BANKRUPTCY ¶ 303.07[6], at 303-63 to -64 (Lawrence P. King, Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006).

> An important feature of an LLC is that it is owned by members, rather than partners or shareholders, and the members enjoy the same general limited liability protection as that afforded to shareholders of a corporation. Though a few bankruptcy courts have analogized members of an LLC to partners of a partnership in certain contexts, such as when considering the effect of a member's bankruptcy on its continued exercise of membership rights, LLCs are not partnerships and members are not general partners. Therefore, section 303(b)(3) of the Bankruptcy Code, which provides that fewer than all general partners may file an involuntary petition against a partnership, should not be available to members of an LLC. Moreover, it would not further the purpose of section 303(b)(3), which is to protect general partners who are personally liable for debts of the partnership, to make it available to LLC members who have limited liability protection similar to that afforded shareholders of a corporation.

Id. (citations omitted).

100. Alexander Dill et al., Special Report, *Handle With Care: Single Member LLCs in Structured Transactions*, MOODY'S INVESTORS SERV., Mar. 19, 1999, at 1; Michael D. Fielding, *Preventing Voluntary and Involuntary Bankruptcy Petitions by Limited Liability Companies*, 18 BANKR. DEV. J. 51 (2001).

101. This is the position taken by the National Bankruptcy Review Commission. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 418 (1997).

102. *See In re* ICLNDS Notes Acquisition, LLC, 259 B.R. 289, 292-93 (Bankr. N.D. Ohio 2001) (stating that, unlike in some states which view LLCs as either corporations *or* partnerships, Ohio employs a hybrid approach).

103. Since LLCs cannot be definitively characterized as either partnerships or corporations, the question of whether an LLC member can file an involuntary bankruptcy petition against the LLC remains

surrounding the effect of a sole member's bankruptcy on an LLC. Moreover, LLCs risk a judicial characterization, and thus an outcome in bankruptcy that is inconsistent with the intent of the LLC and its transaction's counterparties.

The market has been functioning in reliance on the terms pursuant to which LLCs are organized as being enforceable in bankruptcy. If a bankruptcy court fails to enforce a particular term in an LLC statute or operating agreement because it has characterized the LLC as akin to another entity for bankruptcy purposes, the markets in which LLCs operate, including the near $2.5 trillion dollar structured finance market, may experience a seismic tremor.

And so the gaps in the laws with respect to future claims and LLCs are wide. At times it seems as if the law's silence with respect to these issues is deafening. But is there a message in this silence?

The simple answer is "yes"—there is a message in this silence. But, as with messaging and new legislation, the answer is multifaceted. As previously developed, we read into the 2005 bankruptcy amendments a message of distrust. When we observe silence, however, one central explanation for the silence is the converse: trust. Trust in certain participants in the bankruptcy process, and trust in the markets in which bankruptcy plays out.

With respect to the law's treatment of LLCs and their role in the structured finance market, trust is evident in the confidence expressed in the finite pool of sophisticated players and the markets in which they operate. These players created the financial instrument, developed the market and oversee its operation. Few outside this complex market can understand it fully. When transactional risks surface, the players are agile: they can readily develop solutions or alternatives and, in so doing, they circumvent problems as, or even before, they occur.[104] In a sense, the way the structured finance market operates makes it self-contained (for better or worse), and there is an

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open in the securitization context, as well as in other contexts. In the case of partnerships, Section 303 provides that a general partner may trigger the filing of an involuntary case against the partnership. There is no comparable provision in the Code with respect to shareholders of a corporation who cannot trigger a filing unless they are creditors. So, one needs to determine whether LLCs should be treated as a partnership or a corporation for purposes of invoking an involuntary filing under Section 303. Permitting general partners to trigger an involuntary case against their partnership was intended to protect general partners who might be exposed to personal liability based on the actions of another partner in their partnership capacity. Essentially, Section 303(b)(3) protects one general partner from another partner who has bad judgment, does not act for the good of the partnership, or is just plain unscrupulous.

104. *See generally* Lois R. Lupica, *Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization*, 33 CONN. L. REV. 199 *passim* (2000) (describing how the design of securitization transactions has the potential to insulate a debtor from the claims of its creditors).

unwillingness among the market participants to let outsiders tinker—let alone change—that world. A legislative solution, then, would strip these participants of control and threaten the world they have created. As such, a hands-off approach has flourished and, by silence, legislators have acquiesced. Whether the trust given to the players and their markets is deserved is actually not our question (although it is certainly one worth pursuing). Instead what we observe is the presence of trust and that very presence accounts for the accompanying legislative silence.

The context in which environmental hazards are addressed obviously differs from the structured finance context. It is not a closed universe of sophisticated players; future claims implicate businesses of every ilk. In more obvious ways than the bankruptcy-related issues implicated in structured finance transactions, the treatment of future claims facially implicates major social issues (such as health and well-being). With that said, the failure to legislate does suggest that there is trust in non-bankruptcy solutions to these issues—thus the absence of legislation. Perhaps there is a fear that a new bankruptcy-based legislative solution—before any major tort reform legislation takes hold—will negatively impact corporate research, development, insurability and market pricing. Indeed, a new bankruptcy solution could threaten corporate longevity. With such potential risks, no solution (hence silence) may be a better solution. Whether this is an accurate perception of the impact of legislating with respect to future claims is again not our question (although thinking through tort reform is certainly worthy of discussion); our goal is to identify and explain silence.

VI. CONCLUSION

Legislation needs to be read in light of political, social and cultural influences. In the context of the 2005 Amendments to the bankruptcy laws, we set about to explain the messages embedded in this new body of law. The overarching message broadcast by the new bankruptcy legislation is one of distrust. Distrust accounts for the Code's new particularization. What is disturbing is that the deep distrust of the system's key players was not overtly discussed, and the rhetoric surrounding the Code amendments was all about helping to improve the system and root out abuse. What this means is that what the Code says and what the Code means are two different things. Legislative silence sends a similar message. Although perhaps less pernicious, we have identified trust and faith in organizations and players that may not be so deserving.

Whether sending a message of distrust or trust, the 2005 Amendments to the Bankruptcy Code should be faulted for the absence of transparency and honesty. That is a message that is clear and unequivocal.