

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 I

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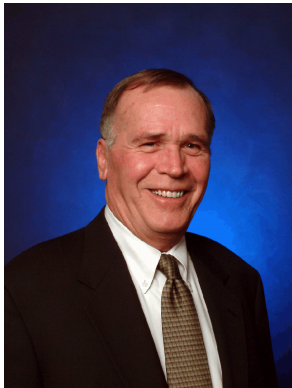
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In Honor

This issue of the United States Attorneys' Bulletin is dedicated to James R. Shively, the former First Assistant United States Attorney for the Eastern District of Washington. Mr. Shively served as an Assistant United States Attorney for over twenty years and as Interim United States Attorney from 2000 to 2001. He held the position of Chief, Criminal Division and Chief, Civil Division during his tenure. Mr. Shively retired from federal service in October 2004.

Mr. Shively also served his country in the United States Air Force as an F-105 pilot during the height of the Vietnam war. His plane was shot down on May 5, 1967 and he was captured by the North Vietnamese and held as a prisoner-of-war (POW) for over five years. He endured abuse, torture, illness, and hunger at the hands of the guards at the "Hanoi Hilton." He was released from the POW camp on February 18, 1973. Upon his return to the United States, he was awarded the Silver Star in recognition of his distinguished military service to this country.

Jim passed away on February 18, 2006 and is survived by his wife, Nancy Banta Shively, his daughters, Amy Hawk, Jane Shively, Laura Watson, and Nicole Woodland, along with their husbands, and three grandchildren.

Mr. Shively was a warm, intelligent, gentle, and compassionate man. His experiences in life taught him the true meaning and value of life as evidenced by the following quote. "It's not a person's rank or position that makes them successful in life. Instead, it's how they relate to their friends and family, and what they do for their community. That's how you truly measure success." Interview by Airman Christie Putz with former Captain James Shively, First Assistant United States Attorney, in Spokane, WA (Oct. 24, 2003).

Jim will be remembered by his family, friends, and colleagues for his firm commitment to his profession and his exemplary service to his country, both as an Assistant United States Attorney and as an Air Force pilot during the Vietnam War.

Introduction: A History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

*Judith Benderson
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In the early 1990s, many practitioners in the bankruptcy community believed that the 1978 Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2549 (1978), the most comprehensive redrafting of the bankruptcy laws of the United States since 1898, generally worked well, but had evolved into something of a "Christmas tree," with each special interest having its own exception or carve-out under title 11. In response, Congress passed the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). Congress made changes to the Code, including an Executive Office for United States Attorneys' (EOUSA) proposal to cover criminal bankruptcy schemes, 18 U.S.C. § 157. Congress indicated that it was generally satisfied with the basic framework of the Code, but established a blue-ribbon panel, the National Bankruptcy Review Commission, to study the bankruptcy laws and make recommendations for further improvements. The bipartisan Commission consisted of nine members appointed by the President, the Congress, and the Judiciary. The Commission delivered its Final Report in 1997. See NAT'L BANKR. REVIEW COMM'N, FINAL REPORT, BANKRUPTCY: THE NEXT TWENTY YEARS (Commission Print Oct. 20, 1997).

Initially, although Congress authorized the Commission, it did not appropriate the necessary funding. Its first chairman spent months getting funding, but died shortly after it was obtained. Eventually, a new chairman was appointed and the Commission got about its business. The work was divided into particular areas and expert working groups were formed to address: (1) chapter 11; (2) consumer bankruptcy; (3) government; (4) jurisdiction and procedure; (5) mass torts and future claims; (6) service to the estate and ethics; (7) small business, partnerships, and single asset real estate; and (8) transnational bankruptcies. In addition, there was a ten-member tax advisory committee comprised of federal and

state government representatives, academics, and practitioners. Input was solicited from groups across the bankruptcy spectrum, including the Department of Justice, some of which is reflected in the recent legislation.

One area, however, that was extremely controversial from the outset, and created a long and tortured path for legislative change, concerned consumer or individual bankruptcy. Before the October 1997 delivery of the Commission's Final Report to the Chief Justice, legislation in sharp disagreement with the Reports' consumer provisions was introduced. The controversy within the bankruptcy community was, and continues to be, whether or not it is too easy for individual debtors to "abuse" the bankruptcy system. Abuse is defined as discharging debts which debtors theoretically could afford, at least in part, to pay. All sides provided anecdotes, but few official statistics existed to support them.

The legislation did, however, include new requirements for gathering statistics by the Administrative Office of the U.S. Courts. The 1997 bill was unsuccessful but, like the phoenix, rose repeatedly from the ashes in some curiously creative ways. In 2000, for example, in order to get the bill directly to the floor for a vote, the Senate Judiciary Committee carved out the entire contents of an unneeded State Department bill which had already passed a committee, and inserted the language of the bankruptcy legislation. The bill made it to the President's desk, but was pocket vetoed. The bill was also stymied by controversial language inserted in response to bankruptcy being filed to avoid paying damages to doctors who were injured after their photographs and personal information was posted on a Web site protesting abortion rights. In 2005, it was felt that because of the composition of Congress, the language could be removed and the bill would pass. The President signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) on April 20 of that year.

There was a dramatic increase in the number of filings in the weeks and days leading up to the

effective date (Oct. 17, 2005). According to *The Third Branch*, the newsletter of the Administrative Office of the U.S. Courts, in October 2005, more than 600,000 bankruptcy cases were filed nationwide. *New Law Creates Rush to File in Federal Courts*, THIRD BRANCH (Fed. Courts Newsletter), Nov. 2005, at Vol. 37, No. 11, available at <http://www.uscourts.gov/ttb/nov05ttb/newlawrush/index.html>. By comparison, in October 2004, filings totaled only 130,679. *Id.* There was an equally dramatic drop-off in the weeks following the effective date. This may be due to the massive number of bankruptcy applications filed before the effective date, as well as practitioners who were in a holding pattern concerning the effect of the provisions of the new law.

In August 2005, the Bankruptcy Rules Committee issued Interim Rules because of the time constraints involved in addressing the legislative changes that corresponded with the slower moving rules process. These can be found on the U.S. Federal Courts Bankruptcy page, available at <http://www.uscourts.gov/bankruptcycourts.html>. The Committee is in the process of addressing the required changes and, until this task is accomplished, the Interim Rules are in effect.

In the meantime, most of the U.S. Attorneys' offices are busy with the case backlog under the old law and old rules.❖

ABOUT THE AUTHOR

❑ **Judith Benderson** is currently serving as the Attorney/Bankruptcy Coordinator, Office of Legal Programs and Policy at the Executive Office for United States Attorneys. Prior to being detailed to this position, she was assigned to EOUSA as the American Political Science Association Congressional Fellow. She was detailed to the National Bankruptcy Review Commission as Legislative Counsel and Press Officer.✉

Means Testing and Preventing Abuse by Consumer Debtors

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I. Introduction

One of the biggest changes made to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (BAPCPA), is the inclusion of the "means test" for consumer cases. Before BAPCPA, debtors were allowed to unconditionally discharge

certain personal debts through the liquidation and distribution of their non-exempt assets. *See* H.R. Rep. No. 109-31(I), at 10-11, *as reprinted in* 2005 U.S.C.C.A.N. 88, 96-97. In 1938, Congress recognized that individual debtors should be allowed to pay off at least some of their debt and codified a debtor's choice to pay creditors through an extended repayment plan. *Id.* This choice, however, was completely voluntary. *Id.* Today, total or partial repayment of consumer debt is done through a three or five year payment plan under chapter 13 of the Bankruptcy Code, whereas a discharge of consumer debt is accomplished by filing for relief under chapter 7 of the Bankruptcy Code.

Although a debtor's right to seek a discharge of consumer debt under chapter 7 was unfettered for many years, Congress eventually limited the consumer debtor's "unconditional" discharge through a series of amendments to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. See Eugene R. Wedoff, *Means Testing in the New § 707(B)*, 79 AM. BANKR. L.J. 231, 233-34 (2005) (discussing pre-BAPCPA bankruptcy amendments and legislative history). These amendments were aimed at curbing abuse by consumer debtors who could repay some of their personal debts, but avoided their obligations by filing for chapter 7. H.R. Rep. No. 109-31(I), at 12, 98. The amendments allowed the court to dismiss a chapter 7 case for cause, substantial abuse, or, under certain circumstances, by motion of the United States Trustee. *Id.* at 11-12, 98. Notwithstanding these amendments, the former Bankruptcy Code still favored granting discharges to individual debtors. *Id.* at 12, 98. The bankruptcy courts were also divided over what constitutes "substantial abuse," creating varying criteria for dismissing a chapter 7 case. See *id.* See also *In re Hardacre*, No. 05-95518, 2006 WL 541028 *1 (Bankr. N.D. Tex. Mar. 6, 2006) (acknowledging former § 707(b) did not define "substantial abuse"); *In re Johnson*, 318 B.R. 907, 919 (Bankr. N.D. Ga. 2005) (stating that courts given discretion to determine substantial abuse on a case-by-case basis); *In re Attanasio*, 218 B.R. 180 (Bankr. N.D. Ala. 1998) (listing cases analyzing "substantial abuse").

Consequently, Congress enacted BAPCPA to limit abuse by consumer debtors and reform the bankruptcy system. BAPCPA eliminates the presumption in favor of discharging debtors' liabilities and allows a chapter 7 case to be dismissed for abuse, rather than substantial abuse. 11 U.S.C. § 707(b)(1). Moreover, BAPCPA establishes a "means test" to determine whether a presumption of abuse exists in cases filed under chapter 7. See generally 11 U.S.C. § 707(b)(2). The "means test" is designed to identify debtors who can afford to make payments to creditors and prevent them from filing a chapter 7 bankruptcy case. See John Hennigan, *Rousey and the New Retirement Funds Exemption*, 13 AM. BANKR. INST. L. REV. 777, 798 (Winter 2005) (summarizing means test under BAPCPA). The following describes how to determine whether a presumption of abuse arises under the new chapter 7 means test, how such presumption may be rebutted, new certification requirements for

debtors' attorneys, and other additions to the Bankruptcy Code intended to curb consumer abuse.

II. Determining whether a presumption of abuse exists

Upon filing for relief under chapter 7, a debtor is now required to file a "Statement of Current Monthly Income And Means Test Calculation" (Bankruptcy Form B22A). In addition, the debtor must also file a schedule of current income (Schedule I) and schedule of current expenses (Schedule J). This statement is a worksheet used to determine whether seeking relief under chapter 7 is presumptively abusive. If, after deducting allowable expenses from the debtor's current monthly income (CMI), the debtor's disposal monthly income exceeds either (i) the greater of \$100 or 25 percent of the debtor's nonpriority unsecured claims, or (ii) \$166.67, a presumption of abuse arises. 11 U.S.C. § 707(b)(2)(A).

Determining the debtor's disposable monthly income starts by calculating the debtor's CMI. The Bankruptcy Code defines CMI as the average monthly income received by the debtor from all sources (regardless of whether such income is taxable income), for the six months prior to filing, ending on the last day of the calendar month immediately preceding the date of the commencement of the case, if the debtor filed a Schedule I. 11 U.S.C. § 101(10A)(A). If the debtor did not file a Schedule I, the date on which the court determines current income controls. *Id.* This income includes amounts paid by an entity, other than the debtor, on a regular basis for household expenses, excluding social security benefits and victim payments resulting from war crimes, crimes against humanity, and payments resulting from acts of international or domestic terrorism. 11 U.S.C. § 101(10A)(B).

Next, the debtor deducts allowable expenses from his or her CMI. Allowable expenses that may be deducted include those expenses specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as "Other Necessary Expenses," defined in the Collection Financial Standards issued by the Internal Revenue Service (IRS). 11 U.S.C. § 707(b)(2)(A)(ii)(I). The IRS' National Standards

include amounts for: (1) food; (2) housekeeping supplies; (3) apparel and services; (4) personal care products and services; and (5) miscellaneous expenses. Tables setting forth actual amounts for these expenses, as well as median income and census bureau information, can be found at: <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>.

In addition to the expenses listed by the IRS, a debtor may also deduct: (1) costs for reasonably necessary health insurance; (2) costs for disability insurance; (3) amounts for certain health savings accounts; (4) reasonably necessary costs associated with protecting the debtor and the debtor's family from acts of violence under federal law; and (5) actual amounts, up to \$1,500 a year (under certain conditions) that are not accounted for by any of the other allowable expenses for each of the debtor's minor, dependant children who attend a private or public elementary or secondary school. 11 U.S.C. § 707(b)(2)(A)(ii)(I), (IV). Other allowable deductions include reasonable and necessary: (1) costs to continue the care and support of an elderly, chronically ill or disabled household member (or member of the debtor's immediate family who is unable to pay such costs); (2) amounts for home energy costs in excess of those amounts specified in the Collection Financial Standards for which the debtor can provide documentation; and (3) additional amounts not to exceed 5 percent of the National Standards for food and clothing. 11 U.S.C. §§ 707(b)(2)(A)(ii)(II), (V). Debtors who are eligible to file under chapter 13 may also deduct from their CMI actual administrative expenses associated with administering a chapter 13 plan which do not exceed 10 percent of the projected plan payments. 11 U.S.C. § 707(b)(2)(A)(ii)(III).

Although debtors can not deduct payments for debts as a monthly expense, *see* 11 U.S.C. § 707(b)(2)(A)(ii)(I), debtors' payments for secured debts and priority debts are accounted for when determining monthly disposable income. *See, e.g., In re Nuttall*, 334 B.R. 921, 924 (Bankr. W.D. Mo. 2005); *In re Hill*, 328 B.R. 490, 502 (Bankr. S.D. Tex. 2005). Debtors are allowed to deduct their average monthly payments for secured and priority debts from their CMI before determining whether their disposable monthly income exceeds the amounts described in 11 U.S.C. § 707(b)(2)(A). *Id.* A debtor's average monthly payment for a secured debt is calculated

by taking the total of all amounts contractually due over sixty months, starting from the month the petition is filed, and dividing such amount by sixty. 11 U.S.C. § 707(b)(2)(A)(iii). Amounts for priority claims are also calculated by taking the total amount of debt entitled to priority (including priority child support and alimony claims) and dividing by sixty. 11 U.S.C. § 707(b)(2)(A)(iv). Again, if, after deducting these amounts and allowable expenses, a debtor's disposable monthly income exceeds the amounts described in 11 U.S.C. § 707(b)(2)(A), the debtor's bankruptcy case will be presumed abusive.

III. Notice of presumption of abuse

If a presumption of abuse arises under § 707(b), the clerk must give notice to all of the debtor's creditors of such presumption within ten days after the debtor files for relief under chapter 7. 11 U.S.C. § 342(d). The United States Trustee will subsequently hold a first meeting of creditors within twenty to sixty days of the filing of the petition for relief. 11 U.S.C. § 341(a); FED. R. BANKR. P. 2003(a). Within ten days after the first meeting of creditors, the United States Trustee (which, for the purposes of this article, includes bankruptcy administrators) must file a statement with the court stating that: (1) the debtor's case is presumed to be an abuse under § 707(b); (2) a presumption of abuse does not exist; or (3) the debtor failed to submit the appropriate documents to complete the means test. *See* 11 U.S.C. § 704(b)(1)(A). *See also In re Fawson*, No. 05-80244, 2006 WL 398182 *1 (Bankr. D. Utah Feb. 21, 2006) (trustee forced to file notice that debtor failed to file or transmit necessary means testing documents). If the debtor fails to provide the trustee the information required under § 521, the case will be dismissed after forty-five days. *See* 11 U.S.C. § 521(i); *Fawson*, 2006 WL 398182 at *6 (dismissing case under § 521(i) where debtor failed to request enlargement of time to file required documentation).

The court must provide a copy of the United States Trustee's statement to the creditors in the debtor's case within five days after receiving the statement. 11 U.S.C. § 704(b)(1)(B). If a presumption of abuse exists, then the United States Trustee must decide whether to file a motion to dismiss or convert the debtor's case under § 707(b), or determine whether special circumstances warrant an exception. 11 U.S.C. § 704(b)(2). The United States Trustee has thirty

days to make this decision, and if no motion is filed, the trustee must file a statement explaining why such motion would not be appropriate. *Id.* If a motion to dismiss or convert is filed and the debtor objects, the court must conduct a trial where the debtor will have to overcome the presumption of abuse. If the debtor cannot rebut the presumption, the debtor's case will be converted to a chapter 11 or chapter 13 case, or be dismissed. 11 U.S.C. § 707(b)(1).

If no presumption of abuse exists or the debtor rebuts such presumption, the court must determine whether granting the debtor relief would be an abuse of the Bankruptcy Code. 11 U.S.C. § 707(b)(3). To make this determination, the court must consider whether the debtor filed the petition in bad faith or if the totality of the circumstances demonstrates abuse. 11 U.S.C. § 707(b)(3)(A)-(B). The circumstances the court considers include whether the debtor filed for relief to reject a personal services contract and the debtor's financial need to reject such a contract. 11 U.S.C. § 707(b)(3)(B). Thus, even if a presumption of abuse does not arise, the court may still conclude that granting chapter 7 relief to the debtor is abusive. *See Hill*, 328 B.R. at 507.

Thereafter, if the court finds that granting relief in the case would be an abuse of the Bankruptcy Code, the court, on its own or by motion of the United States Trustee or any party in interest, may move to dismiss the debtor's case. 11 U.S.C. § 707(b)(1). In making such a finding, the court can not consider whether the debtor made, or continues to make, charitable contributions to any qualified religious or charitable entity or organization as those terms are defined under § 548(d) of the Bankruptcy Code. *Id.* If the court determines that the debtor's case would constitute an abuse under chapter 7, the case will be converted or dismissed. 11 U.S.C. § 707(b)(1).

IV. Rebutting the presumption of abuse

A presumption of abuse may be rebutted by showing exceptional circumstances if the circumstances justify additional expenses or an adjustment to CMI for which there is no reasonable alternative. 11 U.S.C. § 707(b)(2)(B)(i). *See Hardacre*, 2006 WL 541028 at *2. Exceptional circumstances include serious medical conditions and being called to active military duty. *Id.* For each additional

expense or adjustment to CMI, the debtor must provide supporting documentation, provide a detailed explanation of why the special circumstances make the additional expense or adjustment reasonable and necessary, and attest under oath as to the accuracy of the supporting information provided. 11 U.S.C.

§§ 707(b)(2)(B)(ii)-(iii). The presumption of abuse will only be rebutted if the additional expenses or adjustments cause the debtor's CMI to be less than: the lesser of "(I) 25 percent of the debtor's non-priority claims, or \$6,000, whichever is greater; or (II) \$10,000." 11 U.S.C. § 707(b)(2)(B)(iv).

Certain disabled veterans are exempt from means testing and do not have to rebut a presumption of abuse. Specifically, any disabled veteran (as defined in 38 U.S.C. § 3741(1)) who incurred his or her indebtedness while on active duty or while performing a homeland defense activity (as defined in 32 U.S.C. § 901(1)) is not subject to means testing or rebutting a presumption of abuse. 11 U.S.C. § 707(b)(2)(D). If the debtor qualifies for this exception, a court cannot dismiss or convert such a debtor's case based on means testing. *Id.*

V. "Safe harbors" against means testing

BAPCPA provides two "safe harbors" to protect lower income debtors from their creditors. H.R. Rep. No. 109-31, at 15, 51, 381, 485 (2005). *See Wedoff, supra* at 238. First, only a judge or the United States Trustee may file a motion to dismiss or convert a case under § 707(b) if the debtor's CMI (or the debtor's and debtor's spouse's CMI in a jointly filed case), when multiplied by twelve, at the time the order for relief is entered, is equal to or less than:

The median family income of the applicable state for one earner. . .	if the debtor is in a household of one person.
The highest median family income of the applicable state for a family of the same number or fewer individuals. . .	if the debtor is in a household of two-four individuals.
The same as a household with two-four individuals, plus \$525 per month for each individual in excess of four. . .	if the debtor is in a household exceeding four individuals.

The median family income of the applicable state for one earner. . .	if the debtor is in a household of one person.
The highest median family income of the applicable state for a family of the same number or fewer individuals. . .	if the debtor is in a household of two-four individuals.
The same as a household with two-four individuals, plus \$525 per month for each individual in excess of four. . .	if the debtor is in a household exceeding four individuals.

11 U.S.C. § 707(b)(6). For any year, median family income means the median family income both calculated and reported by the Bureau of the Census in the then most recent year. 11 U.S.C. § 101(39A). If such calculation is not done or reported in the then current year, median family income is determined by adjusting annually, after the most recent year, the increase in the Consumer Price Index (CPI) for All Urban Consumers during the period between the most recent year and the current year. *Id.*

Second, no one can file a motion to dismiss under § 707(b)(2) based on the ability of a debtor, including veterans, to repay debts if the debtor's and the debtor's spouse's CMI, when multiplied by twelve at the time the order for relief is entered, is equal to or less than:

11 U.S.C. § 707(b)(7)(A). The CMI of the debtor's spouse is not considered in this calculation if: (1) the case is not jointly filed; (2) the debtor and his or her spouse are legally separated, or living separate and apart; and (3) they are doing so for purposes other than trying to qualify the debtor for this exception. 11 U.S.C. § 707(b)(7)(B). To qualify for this exception, debtors must also file a statement, under the penalty of perjury, that they are legally separated, or living separate and apart, and disclose any aggregate amounts that they may be receiving from their spouse that contribute to their CMI. 11 U.S.C. § 707(b)(7)(B)(ii).

VI. Certifications by debtors' attorneys

Besides requiring an immediate determination whether presumed abuse exists, BAPCPA also requires more accountability on the part of debtors' attorneys. *See* 11 U.S.C. § 707(b)(3)(C). By signing a petition, pleading, or motion, an attorney is deemed to have certified that the attorney: "(i) performed a reasonable investigation into the circumstances that gave rise to the particular petition, pleading, or written motion; and (ii) determined that such document is well grounded in fact; and is warranted under existing law. . . ." *Id.* The attorney may also argue that existing law should be reversed or modified as long as such argument is made in good faith and does not constitute an abuse of the Bankruptcy Code. 11 U.S.C. § 707(b)(3)(C)(ii). Further, the

attorney's signature on the debtor's petition for relief constitutes a certification that the attorney has made an inquiry as to the information contained in the debtor's bankruptcy schedules and has no knowledge that the information contained in such schedules is incorrect. 11 U.S.C. § 707(b)(3)(D).

If a United States Trustee files a motion to dismiss or convert a debtor's case under § 707(b), the court may order that the debtor's attorney reimburse the trustee for all reasonable costs in prosecuting the motion, if such motion is successful and the court finds that, by filing the debtor's case under chapter 7, the debtor's attorney violated Rule 9011 of the Federal Rules of Bankruptcy Procedure. 11 U.S.C. § 707(b)(4)(A)(i)-(ii). On its own, or by motion of an interested party, the court may also assess an appropriate civil penalty against the debtor's attorney and order that such penalty be turned over to the United States Trustee in accordance with the procedures set forth in Bankruptcy Rule 9011. 11 U.S.C. § 707(b)(4)(B). A debtor, however, may be awarded reasonable costs in contesting a motion for sanctions brought by a party in interest (but not the United States Trustee) if the court does not grant the sanctions motion and: (1) the position of the movant violated Bankruptcy Rule 9011; or (2) the attorney did not conduct a reasonable investigation before filing the motion that complied with the requirements of 11 U.S.C. § 707(b)(3)(C)(ii) and was made solely for the purpose of coercing a debtor into waiving his or her rights under the Bankruptcy Code. 11 U.S.C. § 707(b)(5)(A).

VII. Other BAPCPA provisions curtailing abuse and fraud

BAPCPA also includes many other notable additions aimed at curbing consumer abuse and fraud. For instance, BAPCPA imposes stricter limits on a debtor's ability to file successive bankruptcy cases. *See, e.g.*, 11 U.S.C. § 727(a)(8) (extending time between filings to eight years). There are also more limits on debtors receiving discharges. *See* 11 U.S.C. § 727(a)(11) (requiring completion of an instructional course concerning personal financial management); 11 U.S.C. § 727(a)(12) (delaying discharge if there is a pending proceeding against the debtor pursuant to which the debtor could be found guilty of certain

types of felonies or liable for violations of other criminal and civil laws as described in § 522(q)(i)). *See also* 11 U.S.C. § 727(d)(4) (revoking discharge if debtor fails to satisfactorily explain material misstatement made in an audit or fails to make available information necessary for an audit). Further, the court may dismiss a debtor's chapter 7 case if: (1) the debtor is convicted of a crime of violence or convicted of a drug trafficking crime; (2) it is in the best interest of the victim; and (3) the debtor is unable to show, by a preponderance of the evidence, that his or her bankruptcy case is necessary to satisfy a claim for a domestic support obligation. 11 U.S.C. § 707(c).

BAPCPA also imposes stricter requirements for exempting homestead property. Under BAPCPA, a debtor must be domiciled in a state for at least two years before claiming a homestead exemption under state law, *see* 11 U.S.C. § 522(b)(3)(A), and may not exempt amounts exceeding \$125,000 for such homestead property unless the debtor has owned the property for at least forty months. 11 U.S.C. § 522(p)(1)(D). If the debtor transferred an interest in his or her previous principle residence to the current principle residence and the properties were located in the same state, the \$125,000 cap does not apply. 11 U.S.C. § 522(p)(2)(B). A debtor also cannot exempt an interest in his or her homestead property that exceeds \$125,000 if the court determines that the debtor has been found guilty of certain types of felonies or is liable for a debt arising from the violation of other criminal or civil laws, including debts arising from securities fraud, civil RICO actions, and acts causing serious injury to another person. 11 U.S.C. § 522(q)(1).

Additionally, BAPCPA requires that all individual debtors receive credit counseling within the six months preceding their bankruptcy filings. *See* 11 U.S.C. §§ 109(h), 521(b). Exceptions will be made if the debtor lives in a district in which the United States Trustee has determined that the approved non-profit budget and credit counseling agencies for such district are not reasonably able to provide adequate services, *see* 11 U.S.C. § 109(h)(2)(A), or the debtor is unable to complete counseling due to incapacity, disability, or active military duty in a military combat zone. 11 U.S.C. § 109(h)(4). To be considered incapacitated, the debtor must suffer some type of mental illness or deficiency that renders him or her unable to make rational decisions about his or her financial

responsibilities. *Id.* To be considered disabled, the debtor must be unable to participate in counseling after reasonable efforts are made, either in person, by telephone, or over the Internet. *Id.*

A debtor may also postpone counseling and file for bankruptcy if, after making a request, the approved agency is unable to counsel the debtor within five days and exigent circumstances exist. *See* 11 U.S.C. § 109(h)(3)(A). The debtor must file a certification that is satisfactory to the court describing the exigent circumstances, and explaining why the debtor was unable to receive counseling from an approved agency within the prescribed period of time. *Id.* The debtor, however, must still obtain credit counseling no later than thirty days after filing a petition for relief, which may be extended by an additional fifteen days for cause. 11 U.S.C. § 109(h)(3)(B). *See In re LaPorta*, 332 B.R. 879, 881 (Bankr. D. Minn. 2005) (noting that exemption under § 109(h)(3)(B) is not permanent). The certification filed with the court may also have to be signed under penalty of perjury to qualify for an extension under § 109(h)(3)(A). *See LaPorta*, 332 B.R. at 881 (finding that a "certification" under federal law must be "subscribed" and contain statements that the content of the document is true and correct under the penalty of perjury pursuant to 28 U.S.C. § 1746). *See also In re Wallert*, 332 B.R. 884, 887 (Bankr. D. Minn. 2005) (acknowledging that debtor's submission to court that met requirements of 28 U.S.C. § 1746 constituted a certification under § 109(h)(3)(A)); *but see In re Graham*, 336 B.R. 292, 296 (Bankr. W.D. Ky. 2005) (finding that plain language of § 109(h)(3)(A) does not require certification to adhere to requirements of 28 U.S.C. § 1746); *In re Cleaver*, 333 B.R. 430, 434 (Bankr. S.D. Ohio 2005) (debtor must attest only to truth of statements contained in submission to court to be considered certification under § 109(h)(3)(A)).

VIII. Conclusion

These are just some of the provisions of BAPCPA, along with the means test, intended to decrease consumer bankruptcy abuse and fraud. Whether these provisions will actually decrease consumer fraud still remains to be seen. However, BAPCPA has clearly increased administrative expenses for both the court and debtors. *See Wedoff, supra* at 277. Implementing and enforcing the means test not only requires substantially more documentation and information to be provided by debtors, but the means test involves preparing complex calculations and time-consuming review by the United States Trustees. *Id.* Courts will also continue exercising their discretion in determining whether special circumstances exist to rebut presumed abuse and whether a debtor's case should be dismissed for bad faith or under the totality of the circumstances, thus creating a lack of certainty and uniformity among the courts applying BAPCPA. *See id.* at 279; *Hill*, 328 B.R. at 506. Accordingly, irrespective of whether BAPCPA actually decreases consumer abuse, BAPCPA will not decrease bankruptcy litigation or the amount of work and time required of debtors, attorneys, and the courts. ❖

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Selected New Consumer Provisions to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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I. Introduction

When Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat 23 (2005) (BAPCPA), into law in October 2005, the focus of the legislation was to root out perceived abuses in the manner that the courts administered consumer cases. Congress found that too many debtors were discharging debt when they could pay more of their claims. Further, creditors argued that debtors filed cases repeatedly to keep them at bay, without any intention of repaying their claims. Secured creditors complained that chapter 13 debtors impermissibly bifurcated their secured claims on personal property into their secured and unsecured components, only to seek releases of liens when the secured claims were paid. This article analyzes the prior Bankruptcy Code and the changes BAPCPA made to these provisions.

II. Discharge under chapters 7 and 13

A. Chapter 7

As an initial matter, a consumer debtor generally files under one of two chapters of the Bankruptcy Code—chapter 7 (straight liquidation) or chapter 13 (reorganization of debt). Under BAPCPA, Congress sought to force debtors to file more chapter 13 cases by passing a means test and limiting the number of discharges that a debtor could obtain. Consequently, Congress amended the discharge provisions of both chapter 7 and chapter 13 by making it more difficult to obtain a discharge and limiting the number of successive cases that a person could file.

A chapter 7 discharge under 11 U.S.C. § 727 occurs in a relatively short amount of time after

the petition is filed (ninety days). It can be issued prior to the chapter 7 trustee filing his/her final report, account of moneys received, property liquidated, and debts paid. The operative statute governing discharge in chapter 7 is § 727. Although § 727 has many sub-sections, the primary components may be summarized as follows.

The court shall grant the debtor a discharge under § 727(a) unless one or more of the following facts are found.

- The debtor is not an individual (businesses such as corporations and partnerships do not receive a discharge in bankruptcy).
- The debtor defrauded a creditor or officer of the estate charged with custody of property of the estate by transferring, removing, destroying, mutilating, or concealing the property within one year prior to the petition date or after the chapter 7 petition is filed.
- The debtor falsified records regarding the debtor's financial condition or business transactions.
- The debtor failed to explain the loss or deficiency of assets to meet the debtor's liabilities.
- The debtor refused to obey a lawful order of the court, other than to respond to a material question or testify.
- The debtor had been previously issued a discharge under § 727 or § 1141, in a case commenced within the last six years of the date of filing of the petition. Under the new Act, this period has been extended to eight years.
- The debtor received: (1) a discharge under §§ 1228 or 1328 within six years of the date of the filing of the petition, unless the chapter 12 or 13 plan paid 100 percent of the allowed unsecured claims; or (2) the chapter 12 or 13 plan paid 70 percent of unsecured claims, the plan was proposed in good faith, and was the

debtor's best effort; or (3) the court approved a written waiver of discharge executed after the order for relief under this chapter.

- BAPCPA now provides that a debtor cannot get a discharge if the debtor fails to take an instructional course regarding personal financial management described in § 111, unless it is determined that there are no sufficient courses present in the district where the debtor files bankruptcy.

A new § 727(a)(12) was added. By way of background, § 522 (the section dealing with exemptions) has a new § 522(q) that provides an absolute homestead cap of \$125,000 if the debtor was convicted of a felony demonstrating that the filing of the case was an abuse of the Act or the debtor owes a debt arising from a violation of state or federal securities fraud. If there is an action under § 522(q) pending, the court will not grant a discharge under § 727(a).

B. Chapter 13

A chapter 13 debtor receives a discharge under § 1328(a) after all payments are made under the plan. A chapter 13 plan discharges all debts provided for in the plan, with the following exceptions.

- Secured debt on residential property (provided for under § 1322(b)(5)).
- Child support or alimony debts as defined under § 523(a)(5).
- Student loans debts as defined under § 523(a)(8). Student loans are not dischargeable unless it can be demonstrated that the repayment of the student loan would be an "undue hardship" on the debtor. Under the new Act, this now includes not only governmental loans, but private loans as well.
- Death or personal injury caused by the debtor's operation of a motor vehicle while intoxicated (debts under § 523(a)(9)).
- Debts for restitution or a fine included in a sentence for the debtor's conviction of a crime. *See Kelly v. Robinson*, 479 U.S. 36 (1986) (Supreme Court held that fines or conditions imposed as part of a criminal sentence are nondischargeable).

A chapter 13 discharge previously dismissed debts obtained by fraud, as defined in

§§ 523(a)(2), (a)(4), and (a)(6). The new Act changes this provision to reflect that debts related to the following factors are nondischargeable in any case.

- Section 523(a)(2) (credit obtained by false pretenses).
- Section 523(a)(3) (unscheduled debts).
- Section 523(a)(4) (fraud by the fiduciary).
- Damages awarded for willful or malicious injury resulting in a personal injury or death.
- Section 523(a)(14) debts incurred to pay nondischargeable taxes, other than federal taxes.

Section 1328(a)(2) has been amended to provide that trust fund taxes and taxes under § 507(a)(8)(C), or in paragraphs (1)(B) and (1)(C), are no longer dischargeable in chapter 13 cases.

Section 1328(b)(10) was added to allow a chapter 13 debtor to pay interest on nondischargeable taxes to the extent that the debtor has disposable income to do so. The new Act allows for interest and penalties to accrue on nondischargeable taxes during the pendency of the case.

Section 1328 was amended by new subparagraph (f) that provides that a debtor cannot get a discharge in a chapter 13 case if: (1) the debtor filed a case under chapter 7, 11, or 12 in the previous four years preceding the date of order of relief for chapter 13; or (2) the debtor filed a previous chapter 13 case in the two year period preceding the date of order of relief. This will most likely eliminate successive chapter 13 cases, and "chapter 20" cases, wherein the debtor filed a chapter 7 to discharge unsecured, nondischargeable debt, and subsequently files a chapter 13 case to pay nondischargeable debt, such as home mortgages or taxes. *See Johnson v. Home State Bank*, 501 U.S. 78 (1991).

In addition, a chapter 13 debtor, like a chapter 7 debtor, must take an instructional course concerning personal debt management as a condition of discharge, unless it is determined that no adequate course exists in the district where the debtor filed.

New § 1328(h) provides that the court cannot allow a discharge if there is a proceeding pending under § 522(q). The court is required to determine under chapters 7, 11, and 13, at least ten days

before discharge, that no § 522(q) proceeding is pending.

III. Treatment of non-residential secured claims in chapter 13 cases under the new Act

Lien stripping of personal property in chapter 13 plans has received considerable review by the bankruptcy courts over the last few years. The dispute centers on whether a chapter 13 debtor can require a creditor who has a lien on personal property to release the lien once the secured value of the claim is paid, or whether the creditor can require the debtor to complete the plan and obtain a discharge before the lien is released. The issue involved consideration of the interplay between §§ 349, 506(a), 506(d), 1325, and 1327. Courts previously adopted two distinct paths in deciding whether the debtor can compel a creditor to release a lien on personal property (usually a vehicle whose value is less than the outstanding debt) prior to discharge. The new Act changes prior case law.

Congress addressed the lien stripping issue through amendments to § 348. Section 348(f)(1) has been amended by providing that valuations in chapter 13 cases of allowed secured claims shall only apply to cases converted to chapters 11 and 12, but not chapter 7. Secured claims in chapter 13 cases converted to chapter 11 or 12 shall be reduced to the extent that the claims were paid through the chapter 13 plan. Further, the value of the creditor's secured claim continues to be that value, even if the case is converted to another chapter under the Code. In addition, unless a pre-bankruptcy default is fully cured by the time of conversion, the basis for the pre-bankruptcy default retains the legal status it would have under applicable non-bankruptcy law.

This provision resolves a long-standing division among courts as to whether a chapter 13 debtor can get a release of a lien on personal property (a vehicle) before discharge. The intent of this provision is to prohibit a debtor from retaining personal property, providing only for repayment of the secured component of the claim, and then retaining the collateral without completing a chapter 13 plan and releasing the lien before discharge. There was a split in authority as to the legitimacy of such an action. *Cf. In re Johnson*, 213 B.R. 443 (Bankr. N.D. Ill. 1999)(lien stripping permissible on personal

property) *with In re Pruitt*, 203 B.R. 134, 136-37 (Bankr. S.D. Ind. 1996)(lien stripping disallowed until all payments made under plan).

In addition, § 1325(a)(5)(B) was amended to require that the periodic payments made under the chapter 13 plan be in equal monthly amounts and that the payments at least equal the amount to which the secured creditor would be entitled as protection payments. This amendment would eliminate stair step or balloon payments on personal property and ensure an equal amortization of monthly payments on the debt.

Section 1326(a)(1) was amended to provide that plan payments be made within thirty days of the filing of the plan or the order of relief, whichever is earlier. As such, if the chapter 13 plan is not filed simultaneously with the chapter 13 petition, the debtor will have to start making plan payments thirty days after filing. The amount of the plan payment is to be determined by: (1) what the trustee proposes; (2) the amount required in a lease on personal property, paid directly to the lessor, that becomes due after the filing of relief; or (3) on a purchase money security interest in personal property, an amount that equals at least the amount the creditor would require to be adequately protected. The intention of this provision is to continue payments on personal property (most likely vehicles) with minimal interruption.

The amended provisions of §§ 1325 and 1326 continue the established practice of the trustee retaining plan payments until the plan has been confirmed or denied. In addition, proof of insurance is required on all personal property subject to a lien or lease within sixty days of filing.

IV. Conclusion

BAPCPA places more burdens on consumer debtors in obtaining a discharge. BAPCPA protects the interests of secured claims by requiring full payment of secured claims and requiring the debtor obtain a discharge, before a lien is released in a chapter 13 case.❖

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Bankruptcy Abuse Prevention Consumer Protection Act of 2005 and the "Automatic" Stay

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I. Introduction

One of the provisions of the Bankruptcy Code most affected by the Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat 23 (2005) (BAPCPA), is 11 U.S.C. § 362. Section 362 stays third parties from taking certain actions affecting the debtor, which gives the debtor time to organize its affairs. This article will focus on what is new in § 362, with an emphasis on federal practice, excluding tax issues, which are covered separately in this issue.

II. Is anything the same?

Despite Congress' liberal use of the red pen in BAPCPA, the main application of the provision has not changed. *See In re Wilson*, 336 B.R. 338 (Bankr. E.D. Tenn. 2005). Section 362 provides

that the filing of a bankruptcy petition acts as a stay to eight general categories of activities, including actions to collect pre-petition claims, enforcement of judgments against estate property, and liens. *See* 11 U.S.C. § 362(a). The eight categories remain unchanged, except for a minor clarification involving tax proceedings. 11 U.S.C. § 362(a)(8).

III. Many new exceptions

Rather than change the general categories of activities to which the stay applies, Congress chose to expand the "exceptions" to the stay from eighteen to twenty-eight. *See* 11 U.S.C. § 362(b). The following categories of exceptions, as amended by BAPCPA, cover areas most likely to be encountered by government bankruptcy attorneys.

The category of exceptions relating to family law were substantially amended. The amended provisions are found at 11 U.S.C. § 362(b)(2). They broaden the category of activities which are excepted from the stay to include all domestic support obligations, as well as proceedings to

establish paternity, custody, and visitation schedules, and those regarding domestic violence. They also make it easier for creditors in domestic cases to collect support obligations by permitting automatic collections to continue, even if they attach to estate property, and by allowing enforcement agencies to intercept tax refunds for defaulting debtors. A new provision relating to support obligations specifically permits government entities to withhold or suspend licenses, including drivers' licenses and occupational or professional licenses, as a sanction for failure to pay support. Although there is no conforming amendment to 11 U.S.C. § 525 (which prohibits the revocation or suspension of any license due to the debtor's status as a bankrupt or failure to pay a dischargeable debt), Congress may have deemed a conforming amendment unnecessary because bankruptcy courts no longer have discretion to discharge support obligations. *See* 11 U.S.C. § 523(a)(15).

Another category of exceptions which has changed significantly relates to the financial markets. BAPCPA broadened existing provisions regarding setoff under commodity contracts, repurchase agreements, and swap agreements. *See* 11 U.S.C. §§ 362(b)(6), (b)(7), (b)(17); *see also* Christopher J. Redd, *Treatment of Securities & Derivatives Transactions in Bankruptcy*, 24 AM. BANKR. INST. J. 36 (Sept. 2005). New § 362(b)(27) extends similar protections for setoff under master netting agreements. Congress also made clear that bankruptcy courts were not to usurp the authority of those who police the nation's financial markets. New § 362(b)(25) excepts from the stay investigations, orders, and other enforcement activities of a "securities self-regulatory organization," other than an order for the payment of monetary sanctions. The markets are permitted, under subsection (b)(25)(C), to delist or otherwise refuse participation to stocks which do not meet the organization's listing requirements. Apparently fearing that bankruptcy judges might attempt to use their equitable powers under 11 U.S.C. § 105 to avoid these exceptions, Congress further enacted new § 362(o), which provides that bankruptcy courts have no power to stay acts otherwise excepted from the stay under §§ 362(b)(6), (7), (17) or (27).

New § 362(b)(19) works with other amendments to the Code to permit retirement plans to automatically withhold the debtor's pay to collect a loan extended by a plan without seeking

relief from the stay. Congress likewise took steps to insulate retirement funds from creditors by providing that contributions to various retirement plans are excluded from "property of the estate," 11 U.S.C. § 541(b)(7), and by providing that debts owed to various retirement plans are nondischargeable in individual cases. 11 U.S.C. § 523(a)(18).

Another group of exceptions limits the stay's application to actions affecting real property. *See* 11 U.S.C. §§ 362(b)(20)-(23). New § 362(b)(20) is an *in rem* provision, which works in conjunction with new § 362(d)(4), to prevent abuses arising from multiple bankruptcy filings to avoid foreclosure. Subsection (d)(4) allows a creditor to obtain relief from the stay to foreclose on real property if it shows that the bankruptcy filing was part of a scheme to delay or defraud creditors. Subsection (b)(20) provides that the stay does not arise with respect to real property if a creditor obtained relief under § (d)(4) with respect to such property in a previous case within the preceding two years. The debtor may seek relief from the court in the second proceeding if it can show changed circumstances or other good cause.

Subsection (b)(21) is an *in personam* provision which permits secured creditors to enforce liens and security interests against real property if the debtor is either ineligible to file under 11 U.S.C. § 109(g) or if the debtor files its petition in contravention of an order in a prior case. Prior to BAPCPA, courts split on the question of whether the Code grants a judge the authority to enter an order prohibiting a debtor from filing another bankruptcy petition. Although § 362(b)(21) does not expressly address the issue, it adopts, by implication, the view of those courts holding that they may enter such orders.

Subsection (b)(22) relates to leaseholds. It lifts the stay to permit a landlord who has obtained a pre-petition judgment of eviction to enforce its order thirty days after the petition date. During the thirty day delay, the debtor may avoid eviction by curing the default and depositing the unpaid rent into the court. This provision may impact the application of a recent federal precedent interpreting § 525, which prohibits discrimination by governmental units. In *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002), the court held that the debtor's leasehold interest in public housing was akin to a "grant" under 11 U.S.C. § 525. *Id.* at 93-94. The government could not evict the tenant even though it had obtained a pre-

petition judgment of eviction. Title 11 U.S.C. § 362(b)(22) requires a debtor to pay arrearages to maintain possession. Courts could hold that (b)(22) overrules *Stoltz* for government lessors or that *Stoltz* remains good law because (b)(22) is silent as to government lessors and Congress made no conforming amendment to § 525.

Subsection (b)(23) lifts the stay fifteen days after the lessor files a certification that the debtor endangered the property or used controlled substances at the property within the past thirty days. If the debtor objects, the court must hear the matter within ten days.

Another new provision excepts from the stay any transfer that "is not avoidable" under §§ 544 and 549. 11 U.S.C. § 362(b)(24). Under a narrow, and probably its most likely, reading, subsection (b)(24) means that only transfers specified to be unavoidable in §§ 544 and 549 are excepted from the stay (for example, certain charitable contributions, post-petition transfers for new value in involuntary cases, or post-petition transfers of real property to good faith purchasers). It is difficult to read the provision in a manner which makes sense, however, given that § 544 applies only to pre-petition events, which are unaffected by the stay. Commentators also have remarked that making the stay inapplicable to transfers which are "not avoidable" under § 549 could mean that an illegal foreclosure would not violate the stay (or subject the lender to sanctions) once the real property was sold to a good faith purchaser. See Randolph J. Haines, *Does BAPCPA Validate Some Post-petition Foreclosure Sales That Would Otherwise Violate the Automatic Stay?*, 9 NORTON BANKR. L. ADVISER 1 (2005); Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM BANKR. L.J. 603, 634 (2005).

Other new exceptions of interest affect offsets by utilities, 11 U.S.C. § 366(c)(4) (referring to § 362(a)(7)); actions to exclude health care providers from Medicare and Medicaid, 11 U.S.C. § 362(b)(28); and various tax provisions, 11 U.S.C. § 362(b)(26), which are addressed separately in this issue.

IV. Termination/inapplicability of the stay

Section 362(a) describes activities that generally are subject to the stay. Section 362(b) describes activities that might otherwise fall within the purview of § 362(a), but which Congress has excepted from its application. Other provisions in § 362 describe the circumstances under which the stay, commenced upon filing pursuant to § 362(a), terminates. Finally, some provisions describe circumstances under which the stay is deemed never to arise, despite the terms of § 362(a). New provisions in the latter two categories are found at § 362(c).

Subsections (c)(1) and (2), which set forth the general rule as to when the stay terminates, remain largely unchanged by BAPCPA. Congress created new §§ 362(c)(3) and (c)(4), however, to rein in perceived abuses by serial filers. Subsection (c)(3) applies when an individual who had a prior case dismissed (except for a dismissal under 11 U.S.C. § 707(b)) in the year preceding the filing, files a petition under chapter 7, 11, or 13. If 11 U.S.C. § 362(c)(3) applies, the stay arises on the petition date but terminates after thirty days, unless the debtor can show that the later case was filed in good faith. Subsection (c)(4) applies to filings by individuals who had two prior cases dismissed (except under § 707(b)) in the year preceding the filing. If 11 U.S.C. § 362(c)(4) applies, the stay never arises upon the filing of the petition. An interested party can ask the court to impose a stay if it can show that the later petition was filed in good faith.

Subsections (c)(3) and (c)(4) appear to be the most litigated of BAPCPA's changes to § 362. Because BAPCPA created new grounds upon which cases could be dismissed, see 11 U.S.C. §§ 707, 1112, debtors are more likely to find themselves in a one or two strike position, possibly requiring them to overcome a presumption of bad faith before they can benefit from a stay when they file another petition. At least two courts have held that to overcome the presumption of bad faith under 11 U.S.C. § 362(c)(3), the debtor must establish good faith by "clear and convincing evidence." *In re Mark*, 336 B.R. 260, 264-65 (Bankr. D. Md. 2006); *In re Phillips*, 336 B.R. 818, 819-20 (Bankr. E.D. Okla. 2006). A debtor is more likely to meet that burden if it can show a change in circumstances which leads the court to believe that the new filing has a

better chance of success than the first. For a comprehensive list of factors to consider in determining "good faith," see *In re Havner*, 336 B.R. 98 (Bankr. M.D.N.C. 2006).

At least two courts have found that 11 U.S.C. § 362(c)(3) did not apply to a subsequent filing, despite the fact that the later case was filed within a year after a prior case was dismissed. In *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006), the court drew a distinction between "acts against property of the estate" and actions taken "with respect to the debtor," and held that the debtor did not need to seek an extension of the stay beyond thirty days to protect his home from foreclosure. *Id.* at 805. Because the home was "property of the estate" and subsection (c)(3) does not apply to "property of the estate," the burden remained on the bank to seek relief from the stay (for example, under § 362(d)(4)). *Id.* In *In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C. 2006), the court held that subsection (c)(3) only terminates the stay as to a formal judicial or administrative proceeding commenced prior to the petition date. *Id.* at 280. In so holding, the court drew a distinction between the broad term "any act" used in §§ 362(c)(1) and (2), and "action taken" in subsection (c)(3). *Id.* at 279-80. "Action," the court opined, connotes "formal activity." *Id.* at 280. "Taken" must refer to an act in the past, or pre-petition activities. *Id.* Having so narrowly construed subsection (c)(3), the court concluded that despite the dismissal of a prior case within the previous year, (c)(3) did not terminate the stay after thirty days because no creditor had filed any formal proceeding against the debtor prior to the petition date in the later case. *Id.* at 281.

V. Preferred treatment for creditors with interests in personal property

New § 362(h) (formerly the sanctions provision of § 362, which was recodified at § 362(k)) terminates the stay as to personal property if the debtor fails: (1) to file a "statement of intention" under § 521(a)(2) or to indicate therein whether it will surrender or retain (redeem, reaffirm, assume) the property and to take the necessary steps to surrender or retain the property within the specified time period; or (2) to file a motion for relief, showing that the property is of value to the estate and offering the creditor adequate protection. *But see* Philip R. Principe, *Did BAPCPA Eliminate the "Fourth Option" for*

Individual Debtors' Secured Personal Property?, 24 AM. BANKR. INST. J. 6 (Oct. 2005) (discussing whether BAPCPA preserved the debtor's right to "ride through" a bankruptcy without redeeming or reaffirming). Section 521(a)(6) similarly terminates the stay with respect to purchase money security interests, but Congress chose not to include a conforming amendment in § 362. This provision may assist the United States when it takes a security interest in personalty such as equipment, livestock (farm loans), or furniture and fixtures (Small Business Administration, Housing and Urban Development loans). Congress provided further that if a creditor repossesses personal property in violation of § 362(h), the debtor may not seek punitive damages for the stay violation if the creditor can show it had a "good faith belief" that the stay was terminated under § 362(h).

VI. Sanctions for stay violations

Section 362's sanctions provision was recodified from former § 362(h) to new § 362(k), although most of its terms remain the same. For purposes of legal research, attorneys may need to search under both the old and new section numbers to find applicable case law. Section 362(k) permits the court to award actual damages, including costs and fees, as well as punitive damages (except for good faith violations of § 362(h)). Section 362(k)'s impact is limited, however, by BAPCPA's new notice provisions. Under 11 U.S.C. § 342(g)(2), the court may not impose a monetary penalty for violating the stay unless the debtor provided "effective notice" within the meaning of § 342, even if the creditor actually knew about the bankruptcy. Notice may not be effective if, for example, the creditor designates a particular individual for service and the debtor serves someone else within the organization. *See* 11 U.S.C. § 342(g)(1); *see also* Levin & Ranney-Marinelli, *supra*, at 633.

VII. Comfort orders

New § 362(j) allows the court to issue an order confirming that the stay has terminated under subsection (c), even if there is no dispute on record between the parties. This permits more conservative creditors to confirm that no stay is in effect before they take action against the debtor or estate property.

VIII. Conclusion

One of the few things commentators and courts seem to agree on is that BAPCPA will provide fodder for litigation for years to come. The extensive revisions to § 362, particularly the serial filing provisions, are likely to remain at the eye of the litigation storm. AUSAs must practice the conservative approach—seek approval from the court before taking any action which might cause a potential stay violation, while taking the steps necessary to preserve the government's interest in its claims and collateral.❖

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Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Impact on Federal Taxes

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I. Introduction

Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (BAPCPA), title VII contains twenty tax-related provisions. Some of these changes apply only to state and local tax claims. Other titles of BAPCPA also include tax-related changes, particularly provisions confirming that debtors and trustees must comply with their tax return filing obligations. Many of BAPCPA's tax-related amendments reflect the Department of Justice (Department) Bankruptcy Working Group's September 1996 recommendations to the National Bankruptcy Review Commission, as subsequently refined by the Commission's Tax Advisory Committee.

II. Debtors' tax return filing obligations

Until enactment of BAPCPA, the Bankruptcy Code did not include comprehensive rules regarding the obligations of trustees and debtors to file tax returns. Bankruptcy courts dealt with

unfiled returns in a variety of ways. Some courts published local rules or general orders directing debtors to file delinquent tax returns. Other courts required the government to file a motion to compel the debtor to file such returns. In chapter 13 cases, the issue was often raised by filing an objection to plan confirmation.

BAPCPA enacted the following provisions that relate to a debtor's obligation to file tax returns and the consequences of failure to file or to produce requested tax returns.

- An individual debtor in a chapter 7 or 11 case must provide a copy of the debtor's most recent federal income tax return or a transcript of that return to the trustee at least seven days before the § 341 meeting. *See* Bankruptcy Code § 521(e)(2).
- The debtor must also provide a copy of that return or transcript to any creditor that makes a timely request. *Id.*
- A debtor's failure to provide the tax return or transcript to the trustee or a creditor will result in dismissal of the case, except for circumstances beyond the debtor's control. *Id.*
- A chapter 7 or 13 case is subject to dismissal or conversion if an individual debtor fails to:

(1) file any tax return that becomes due after the petition date within ninety days of a request from the Internal Revenue Service (IRS) or other taxing authority; or (2) to obtain an extension of the due date for the return. *See* Bankruptcy Code § 521(j).

- An individual debtor in a chapter 7, 11, or 13 case must file with the court, at the request of the court, the United States Trustee, or any party in interest, a copy of: (1) any federal income tax return for a post-petition tax year that ends while the case is pending; and (2) any delinquent federal income tax returns filed post-petition for tax years that ended within three years before the petition date. *See* Bankruptcy Code § 521(f).
- The court may not grant a discharge to an individual debtor in a chapter 7 or 11 case or confirm an individual's chapter 11 or chapter 13 plan, unless requested tax documents have been filed with the court. *See* BAPCPA § 1228, a provision not codified in the Bankruptcy Code.
- A small business debtor must append to its bankruptcy petition a copy of its most recent federal income tax return or a statement that it has not filed a return. *See* Bankruptcy Code § 1116.
- The failure of a chapter 11 debtor to file post-petition tax returns or pay post-petition taxes, as those taxes become due, is now specified grounds for dismissal or conversion for cause. *See* Bankruptcy Code § 1112(b)(4)(I).

In addition, chapter 13 now includes detailed tax return filing provisions in new § 1308 and amended § 1325. In general, prior to the date of the § 341 meeting, a chapter 13 debtor must file all pre-petition income tax returns for the four years ending before commencement of the case. The trustee is authorized to hold the § 341 meeting open for a reasonable time to allow the debtor to file delinquent tax returns, but not longer than 120 days after the meeting is first scheduled (or, for any return not due on the petition date, the due date of return under the last automatic extension to which the debtor is entitled). "Return" is defined, for purposes of this section, as including a return prepared under 26 U.S.C. § 6020(a) or (b) or a written stipulation to a judgment or final order of a non-bankruptcy tribunal. Note that this definition of a "return" is different from, and broader than, the definition

that now appears in flush language at the end of § 523(a) and is discussed, *infra*. Upon motion of the United States Trustee or a party in interest, the court is required to dismiss a case or convert it to chapter 7 for failure to file tax returns. A proof claim for taxes is timely if filed within sixty days after a return is filed under § 1308. *See* Bankruptcy Code § 502(b)(9).

III. Trustees' obligations to file tax returns and pay taxes in due course

BAPCPA amended 28 U.S.C. § 960 to require officers and agents conducting any business under court authority, such as bankruptcy trustees and debtors in possession, to pay all federal, state, and local taxes in the course of the business when due, unless: (1) the tax is a property tax secured by a lien against estate property that the trustee abandons in a chapter 11 case within a reasonable period of time after the lien attaches; or (2) payment of the tax is excused under a specific Bankruptcy Code provision.

In addition, Bankruptcy Code § 503(b)(1)(D), as amended, provides that: (1) a taxing authority is not required to file a request for the payment of administrative taxes; (2) in a case under chapter 7, payment of administrative taxes can be deferred until final distribution, where the estate does not have sufficient funds to pay in full all administrative expenses with the same priority as the taxes; and (3) the trustee is authorized to pay any taxes incurred by the bankruptcy estate (including property taxes) as an administrative expense, whether or not the tax is secured. Thus, administrative taxes can be paid in the ordinary course without requesting payment or filing a motion as a condition of getting paid.

IV. BAPCPA amendments that affect priority tax claims

A. Wage and pension claims

BAPCPA raised the aggregate monetary limits on wage and benefit claims in former Bankruptcy Code § 507(a)(3) and 507(a)(4) (redesignated § 507(a)(4) and (5)) from \$4,000 to \$10,000, and increased the look-back period for wage claims from ninety days before the petition date to 180 days before filing. The increased monetary limits and the longer look-back period

will indirectly affect tax priority claims under § 507(a)(8) by depleting the amount available, in some cases, to satisfy such claims.

B. Pre-petition tax claims

BAPCPA amended § 507(a)(8) to codify and extend the Supreme Court's holding in *Young v. United States*, 535 U.S. 43 (2002), regarding the impact of serial bankruptcies on the tax priority time periods. The priority period for income tax returns due within three years of the petition date, as well as the 240-day post-assessment priority period, are suspended not only while collection is stayed or prohibited because of a prior bankruptcy proceeding, but also during the pendency of a collection due process request, hearing, and appeal, or while collection was precluded because of a confirmed bankruptcy reorganization plan, plus ninety days. In addition, the 240-day period is stayed while an offer-in-compromise is pending, plus thirty days. The amendment also clarifies that paragraphs (i), (ii), and (iii) of § 507(a)(8)(A) all pertain solely to tax years of the debtor ending on or before the petition date. See *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292 (9th Cir. 1995). Although 26 U.S.C. § 6331(k)(2) prohibits collection while an installment payment agreement is pending or in effect, the BAPCPA amendments do not suspend the tax priority period under such circumstances.

C. Chapter 11 pre-petition tax claims

Section 1129(a)(9)(C) of the Bankruptcy Code specifies that priority taxes can be deferred and paid over time. BAPCPA changed the treatment of periodic tax payments under § 1129(a)(9) in four ways: (1) deferred payments must be completed within five years beginning with the petition date (rather than six years from the assessment date); (2) the payments must be in "regular installment payments"; (3) the payment schedule must be no less favorable than the payment schedule of the most favored class of non-priority, unsecured claims provided for by the plan (other than a class of nuisance claims); and (4) the same payment schedule applies to tax claims secured by a lien that, if unsecured, would otherwise be described in § 507(a)(8). The legislative history does not define "regular installment payments." The modifier "regular" suggests that the term means monthly or quarterly payments of an equal amount, not annual or

escalating payments. Moreover, the legislation specifically prohibits plans that provide more favorable treatment to general unsecured claims as a whole, than to priority tax claims. As a priority claimant, the IRS will benefit from the changes to § 1129(a)(9).

D. Pre-petition tax claims of a family farmer

Bankruptcy Code § 1222, as amended, reclassifies a priority tax claim of a family farmer as a general, unsecured claim in a chapter 12 case when the claim arises from the "sale, transfer, exchange, or other disposition of any farm asset," as long as the debtor receives a discharge (the debtor makes all payments required by the plan). The term "farm asset" includes produce, livestock, farmland, and equipment. This change applies to cases commenced on or after April 20, 2005.

E. Priority of late-filed claims

Bankruptcy Code § 726(a)(1) states that late filed claims in a chapter 7 case are entitled to the same priority in distribution as timely filed claims, if filed before the date when the trustee begins distribution. As modified by BAPCPA, § 726(a)(1) requires late claims to be filed on or before the earlier of ten days after the summary of the trustee's final report is mailed to creditors or the date on which the trustee makes final distribution.

V. Discharge issues

A. Definition of a return

Bankruptcy Code § 523(a)(1)(B) excepts from discharge tax debts for which a return either was not filed, or was filed late, less than two years before the filing of the bankruptcy petition. When a taxpayer has not filed a return, 26 U.S.C. § 6020 authorizes the IRS to prepare one. Under § 6020(a), a return prepared by the IRS, with the cooperation of the taxpayer and signed by the taxpayer, is considered a return for Internal Revenue Code purposes. On the other hand, a substitute return prepared by the IRS, but not signed by the taxpayer, is not considered a return for tax purposes. See 26 U.S.C. § 6020(b). Modified § 523(a)(1)(B) states that, for discharge purposes, a tax return includes a § 6020(a) return

prepared by the IRS and "a written stipulation to a judgment or a final order entered by a non-bankruptcy tribunal, but does not include a return made pursuant to § 6020(b)."

The BAPCPA amendments do not answer a much-litigated question about whether a tax return filed by a debtor after the IRS has assessed taxes on the basis of a return prepared under 26 U.S.C. § 6020(b) will be treated as a tax return for discharge purposes. *See In re Hindenlang*, 164 F.3d 1029 (6th Cir.1999); and *In re Payne*, 431 F.3d 1055 (7th Cir. 2005).

B. Exception to discharge for corporate fraud

Bankruptcy Code § 1141(d)(2) has long provided that an individual chapter 11 debtor's debts described in § 523(a) are excepted from discharge. Until now, however, all corporate debts were discharged, except to the extent that the plan provided otherwise. New § 1141(d)(6) excepts from discharge taxes and customs duties for which a corporate debtor submitted a fraudulent return or which the debtor attempted to evade or defeat. Section 1141(d)(2) also excepts from discharge government claims attributable to false or fraudulent conduct of a corporate debtor described in § 523(a)(2)(A) and (B), such as violations of the False Claims Act, 31 U.S.C. § 3729.

C. Tax exception from chapter 13's super discharge

In general, as a condition of confirmation, a chapter 13 plan must provide for full payment of priority taxes. As a consequence, priority taxes, while not excepted from discharge under § 1328(a), are usually satisfied in full. There are cases, however, in which the debtor fails to specifically list priority taxes, but the IRS fails to object, and the court holds that the priority taxes are provided for and discharged. *See In re Tomlan*, 102 B.R. 790 (Bankr. E.D. Wash. 1989), *aff'd*, 907 F.2d 114 (9th Cir. 1990). That circumstance has occurred most frequently with derivative taxes, such as the trust fund recovery penalty. Bankruptcy Code § 1328(a)(2), as amended by BAPCPA, now excepts from discharge trust fund taxes, taxes attributable to certain delinquent tax returns, and taxes attributable to fraud. These changes will not affect

the discharge of priority taxes, other than trust fund taxes.

D. Discharge of an estate's liability for unpaid taxes

Amended Bankruptcy Code § 505(b)(2) discharges the estate from liability for unpaid taxes when the trustee makes a request for a prompt audit and satisfies any liability that is determined in a timely fashion by the IRS. This amendment overturns decisions holding that, upon compliance with the prompt audit provisions, a discharge was available to the debtor and the trustee, but not to the estate.

VI. Tax liens

A. Limitation on the authority of a trustee to avoid a tax lien

Bankruptcy Code § 545(2) allows a trustee to avoid a statutory lien, such as a tax lien, that is not perfected or enforceable as of the commencement of the case against a hypothetical bona fide purchaser. Under 26 U.S.C. § 6323(b), a perfected federal tax lien is not valid against specified purchasers (purchasers of securities, motor vehicles, personal property purchased at retail, and personal property purchased at casual sales). An amendment to § 545(2) clarifies that a trustee cannot rely on the super priority accorded to these specified purchasers to avoid federal tax liens.

B. Subordination of tax liens

In general, secured claims have priority over expenses of administration and unsecured claims, including unsecured priority claims, to the extent of the value of the property securing the claim. Prior to enactment of BAPCPA, Bankruptcy Code § 724(b) provided less favorable treatment for secured tax claims in a chapter 7 case, by subordinating such claims to expenses of administration and to claims having second through seventh priority, including administrative claims incurred in a failed chapter 11 case. Section § 724(b)(2), as amended, changes the subordination scheme for federal tax liens. These liens will not be subordinated to expenses incurred in a chapter 11 case prior to its conversion to chapter 7 (except claims for wages, salaries, commissions, and pension contributions).

Ad valorem tax liens will receive more favorable treatment than federal tax liens, and will not be subordinated to any claims in a chapter 7 case (except claims for wages, salaries, commissions, and pension contributions).

VII. Setoff of tax refunds

New Bankruptcy Code § 362(b)(26) authorizes the setoff of an income tax refund for a tax period ending before the petition date, against an income tax liability for a tax period ending before the petition date. Where setoff is not permitted under non-bankruptcy law because of a pending challenge to the amount or legality of the tax liability, this provision allows the IRS to freeze the refund unless, after notice and hearing, the bankruptcy court orders its release because "adequate protection" within the meaning of § 361 is provided.

Note, however, that the § 362(b)(26) exception only applies to income taxes and does not permit the offset of pre-petition income taxes against other types of taxes.

VIII. Interest rate on tax claims

Until passage of BAPCPA, the Bankruptcy Code had not specified the appropriate rate for computing interest on tax claims, and the courts often declined to apply the statutory interest rate in favor of a "market rate" or a prime rate adjusted for risk. New Bankruptcy Code § 511 specifies that the interest rate on tax claims will be the applicable non-bankruptcy rate. For IRS claims, the 26 U.S.C. § 6621 interest rate in the month of plan confirmation will apply to payments under the plan, including computation of the present value of the claim. This rate will also apply to interest on unpaid taxes incurred during the administration of a case. Note that, as applied to a confirmed plan, the rate will not change with fluctuations in the § 6621 interest rate. The interest rate in the month of confirmation will apply even though the effective date of the plan may be deferred for some time.

IX. Other issues

A. Discussion of tax consequences in chapter 11 disclosure statements

The feasibility of a proposed reorganization plan may hinge on the tax consequences of the plan to the debtor. In addition, the tax consequences of the plan to the creditors and other parties in interest may affect their vote. Bankruptcy Code § 1125, as amended by BAPCPA, requires a disclosure statement to include a full discussion of the potential material federal tax impact of the plan on the debtor and on a hypothetical investor typical of the holders of claims or interests in the case.

Note that it is not uncommon for the debtor in possession (DIP) or other proponent of a plan of reorganization to exaggerate the tax benefits that would result from approval of the plan. The IRS National Office includes attorneys experienced in deciphering the tax effects of proposed reorganization plans and will provide assistance to Department attorneys on request. Contact your local IRS Counsel or the Tax Division to request assistance.

B. Post-petition tax returns in an individual debtor's chapter 11 case

New Bankruptcy Code § 1115(a) expands property of the estate in an individual debtor's chapter 11 case to include all property described in § 541 that the debtor acquires *after* the petition date and *before* the case is closed, dismissed, or converted, including the debtor's earnings from post-petition services. Section 1115(b) specifies that the debtor will retain possession of the property of the estate unless a trustee or examiner is appointed or unless the confirmation order provides otherwise. This revised treatment of a debtor's post-petition property makes an individual's chapter 11 case similar to a chapter 12 or 13 case because the DIP will be treated as a continuation of the pre-petition debtor, instead of as a new entity in the form of the estate. This new treatment of a individual debtor's post-petition property and earnings has some repercussions for income tax reporting purposes.

Section 1398(a), 26 U.S.C., provides that when an individual commences a chapter 7 or 11 case, a separate taxable estate is created. The

estate as an entity must file tax returns reporting income it receives during the pendency of the case and must pay the resulting taxes. A separate taxable entity is not created in a chapter 12 or 13 case. While under new § 1115, the treatment of an individual chapter 11 debtor closely resembles the treatment of a chapter 12 or 13 debtor, the provisions of § 1398 have not been correspondingly changed to account for the different Bankruptcy Code treatment of such debtors. The IRS will issue guidance explaining the impact of § 1115 on the income tax obligations of the debtor and the estate to fill the void until Congress decides whether to clarify § 1398.

X. Conclusion

BAPCPA resolves many tax-related problems that the Department of Justice Bankruptcy Working Group identified and that vexed the IRS and the Department over the years. The new tax return filing provisions are likely to have a positive effect, and the other amendments generally enhance the treatment of tax claims in bankruptcy proceedings.❖

ABOUT THE AUTHOR

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The Family Farmer and Fisherman Bankruptcy Provisions under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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I. Introduction

Congress has struggled for several years with the special provisions for bankruptcy protection for small family farmers, and now fishermen. For simplicity we shall refer to family farmers and fishermen

collectively as "farmers" in this article. A more detailed discussion of who qualifies follows.

In the oxymoronic world of bankruptcy lawyer humor, it is quipped that chapter 12 is somewhere between chapter 11 and chapter 13. Chapter 13 is the former "wage earner plan" which allows a person with a "regular" income (wages, regular commissions, government benefits, and others) to confirm a three to five year plan to restructure their debts and avoid the liquidation provisions of chapter 7, while paying as large a portion to their creditors as their income stream allows. It is simple, relatively cheap to administer, and summary in procedure. The

standing chapter 13 trustee administers the estate. Chapter 11, on the other hand, is for business debtors (K-Mart, large airline cases, among others) and is much more cumbersome. The debtor acts as a trustee in the capacity of a "debtor in possession," and proposes a plan for repayment of debts or restructuring of the business.

Chapter 12 has similarities and differences to both chapters 11 and 13. The U.S. Trustee appoints a trustee (this could be the standing chapter 13 trustee, but not necessarily) who takes payments and administers the case. In Alabama and North Carolina, a Bankruptcy Administrator, whose duties mirror those of the U.S. Trustee, designates the chapter 12 trustee or trustees. The plan usually runs three to five years and may restructure the farm (that is, change the crop or sell off excess land or equipment), but often merely restructures the debt, and while paying at least the value of the assets, discharges some of the debts. The track record of plans making a complete payout is low. Another humorous quip is, "What chapter 12 always works? The one where the farm becomes a subdivision!"

Farmers have been hit with the proverbial "double whammy" over the past few years. They have seen equipment, agricultural chemicals, feed, and equipment costs soar, while commodity product prices for their crops have not kept pace. A rational person asks why someone would work twelve to eighteen hours a day, seven days a week to continue to farm. The honest answer is that family farms are a way of life and not a purely economic decision. The only salvation for family farmers in some areas is that the land has appreciated, but not as farm land. Its new value is for development or for "ranchettes" (small tracts sold to baby boomers who want to "hobby" farm). The problem is that as a farmer sells off land, he or she is liquidating the business. During the past year cattle prices have rebounded, despite the Bovine Spongiform Encephalopathy or "mad cow" scare, and the relatively mild weather. Again local factors are critical, for example, ranchers and farmers in Oklahoma and Texas have been hit with unprecedented drought.

In the years since Congress first passed chapter 12, the family farmer has declined in number, but lately the decline has not been as rapid as it was during the peak years of 1982 to 1992. C. Bialik, *The Numbers Guy*, Wall Street Journal Online, Jan. 12, 2006, available at <http://www.wsj.com>. See also, United States

Department of Agriculture (USDA) National Agricultural Statistics Service, *2002 Census of Agriculture* (USDA 2002), available at http://www.nass.usda.gov/Census_of_Agriculture/index.asp (hereinafter "2002 Agriculture Census"). Depending on the statistics chosen, the number of family farms has declined by 13,000 from 1997 to 2002, or about fifty farms per week. See Bialik, *supra*, noting that this does not account for the number of non-economic farms included in that number. The Farm Aid group asserts that overall family farms have declined by five million since the 1930s. They contend that 330 farmers leave their land every week. While statistics are hard to reconcile, it is clear that family farms are in a state of change and that larger is the new wave.

This may be due to the aging farm population. According to the USDA's latest numbers from 2002, half of all farmers were between forty-five and sixty-five-years old, while only 6 percent were under the age of thirty-five. 2002 Agriculture Census, *supra*. Anecdotally, it is clear that farm communities have aged as younger farmers have taken "jobs in town" to meet the ever-rising costs of living and the need for such things as health insurance. The statistical rise in farm income is likely due to the influx of off-farm income. See the USDA Economic Research Service, Briefing Room, *Farm Policy, Farm Households, and the Rural Economy*, <http://www.ers.usda.gov/Briefing/Adjustments/> (page updated Nov. 7, 2005) (hereinafter "ERS Briefing").

It is clear that with land prices increasing by 50 percent to 200 percent in some areas, buying land to farm is not feasible. Those who inherit farm land are likely left as the only possible future farmers. Certain farm segments (namely small dairy farms) are being replaced with large, corporate farms run with non-owner labor, and the economy of scale in farming overall has grown substantially. Small family farms produce a large portion of America's food, but their share of production fell by a third between 1993 and 2003. ERS Briefing, *supra*.

It is with this backdrop that we look at the changes made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat 23, (BAPCPA). It is fair to say that the "abuse" addressed by Congress in this act is not largely farm related. Still some farmers do suffer from consumer debts and "credit

carditis." However, many farmers are heavily indebted to the government for farm loans made or guaranteed by the U.S. Department of Agriculture (USDA). Congress has often made low interest and special provision loans a part of farm programs. In recent years, USDA began to make guaranteed loans rather than direct loans, but those distinctions are beyond the scope of this article. As a result, the U.S. Attorneys' offices are often involved in chapter 12 proceedings, protecting the interest of the USDA as the largest creditor. USDA loans are designed by Congress to help farmers who do not qualify for bank loans. Many of these loans are not fully secured and result in losses. Farmers also suffer from a lack of bookkeeping training and resources, and often have very deficient books and records. Following is a brief overview of the changes brought on by BAPCPA and a short outlook for the future.

II. Sunset

Chapter 12 was apparently expected to remedy a short term problem when it was passed, and was given an ending date, or so-called "sunset" provision. After a number of extensions, some retroactive, BAPCPA eliminated the sunset provision. (S. 256, 109th Cong. § 1001 (2005)). The law will now continue unless repealed.

III. Debt limit

Chapter 12 has always been limited by its terms to "family" farmers and has had a debt limit tailoring it to smaller farm operators. As inflation hit the calculation, the limits have been raised. BAPCPA raised the debt limit from \$1,500,000 to \$3,237,000 (S. 256 § 1004), and indexed it to inflation. (S. 256 § 1002). At first blush this seem very high, but when one takes into account that a new tractor or combine may cost well over \$100,000 and that land may cost \$2,000 to \$4,000 per acre or more, the provisions are more understandable. The increase in land prices is exacerbated by the rise in the economy of scale of most farming operations.

The new BAPCPA added family fishermen as a class of persons eligible for chapter 12 relief, but limited the debt balance to \$1,500,000.

IV. Nonpriority status for certain transfer claims

One problem in a chapter 12 bankruptcy that involves large land holdings is that the land often has a low basis for tax purposes. Likewise, equipment may well be depreciated for tax purposes and, if sold, yield a current tax liability that would otherwise be a priority tax under 11 U.S.C. § 523. Since these taxes must be paid in full during the plan, this may well sink the plan before it starts, because often the only way to reorganize the farm is to sell assets.

To address this problem, Congress changed the treatment of the claim and made it unsecured, which makes the claim subject to "cramdown" (less than 100 percent paid). *See* 11 U.S.C. § 1222(a). This special benefit inures only if the farmer completes the plan so as to obtain a discharge. (S. 256 § 1003).

V. Farming income percentage redefined

Another common problem with chapter 12 is the "job in town" and the impact it has on a farmer qualifying for chapter 12. Pre-BAPCPA, a farmer had to derive 50 percent of his or her gross income from farming in the year prior to filing. 11 U.S.C. § 101(A)(18)(a). The new provision recognizes that the farmer or farmer's spouse may go to work in town, trying to "save the farm," and by so doing bring in enough money to surpass the 50 percent test, but not enough to prevent filing.

The new provision allows a "look back" to the two prior years, and if the income was more than 50 percent from farming, the farmer qualifies. (S. 256 § 105). It also allows the farmer whose entire crop failed due to weather or other disaster, and who had little or no income in the year prior to filing, to qualify.

VI. Retroactive adjustment of payment amounts

Section 1225 of title 11 provides that a chapter 12 debtor must project "disposable income" and pay that into the plan for the benefit of unsecured creditors over three or more years. 11 U.S.C. § 1225(b)(1). BAPCPA does not allow anyone except the creditor to require that a plan payment be increased so as to exceed disposable

income or, in the last year of the plan, to be increased so as to prevent the debtor from being able to farm after the plan is completed.

VII. Family fisherman added

BAPCPA also added to the list of qualified persons the "family fisherman." (S. 256 § 1007). This means that a person (including certain corporations and partnerships) who catches or harvests fish, shrimp, and lobsters, among other things, and who has debts of less than \$1,500,000 of which 80 percent (excluding home mortgage debt) is from that enterprise and who had 50 percent or more of his/her prior year income from that endeavor, may file as a "family fisherman" under the other provisions of chapter 12. 11 U.S.C. § 101(19A).

VIII. Bar to refiling

Individuals or family farmers are barred from refiling a chapter 12 under 11 U.S.C. § 109(g) if they are dismissed by the court for willful failure to abide by order of the court, fail to appear in proper prosecution of their case, or voluntarily dismiss their case following a request for relief from the automatic stay. BAPCPA did not add "family fisherman" to the list of debtors barred from refiling.

IX. Automatic stay

Under BAPCPA, chapter 7, 11, or 13, debtors lose protection of the automatic stay for their encumbered property in cases filed within a year of a dismissal of a prior case. Family farmers and family fisherman appear to retain automatic stay protection in subsequent cases as chapter 12 is absent from 11 U.S.C. § 362(c)(3).

X. Cheat sheet

Changes under the new Act are set forth below.

Code §	Change?	Change	Comment
1201	No		Stay of action against codebtor.
1202	Yes	New section. Trustee has increased duties in claims regarding domestic support obligation. Written notice to state agencies.	Duties parallel chapter 13 in domestic support claims.
1203	Yes	Added commercial fishing operation.	Rights and powers of debtor.
1204	No		Removal of debtor as debtor in possession.
1205	No		Section 361 does not apply, adequate protection provided by cash, replacement lien, reasonable rent, "other relief."

1206	Yes	Added "property used to carry out a commercial fishing operation including a commercial fishing vessel."	Sales free of interest.
1207	No		Property of the estate.
1208	Yes	Added as cause: failure of the debtor to pay any domestic obligation that first becomes payable after the date of the filing of the petition.	Conversion or dismissal. A "family farmer" who does not meet the definition of "farmer" could be converted to chapter 7 without fraud allegation.
1221	No		Filing of a plan in ninety days.
1222	Yes	A chapter 12 plan may treat capital gains from sale of farm assets as a non-priority unsecured claim. Percentage provision for domestic support claims so long as debtor pledges all projected disposable income for five years.	Contents of plan. Does not address capital gain from sale of commercial fishing boat. Comment: A claim of a governmental unit (read "tax" but could arguably be a sales tax, use tax, income tax, or penalty,) in a chapter 12 case that arises as a result of the sale, transfer, exchange, or other disposition of an asset used in a debtor's farming operation will be treated as an unsecured claim (as opposed to a priority claim), but only if the debtor receives a discharge, unless the creditor agrees to a different treatment. This section also allows plan proponents to seek a determination of certain federal tax issues and makes these provisions effective on date enacted for cases filed thereafter. Domestic support claims are classified and paid as priority claims.
		Post petition interest on non-dischargeable debts can be provided for in 100% plan if debtor has available disposable income.	Debts nondischargeable under § 1228.
1223	No		Modification of plan before confirmation.
1224	No		Confirmation hearing.

1225	Yes	<p>Post petition preconfirmation domestic support obligations are paid.</p> <p>If an objection to the plan, then value of the property to be distributed under the plan in a three year period (or longer) is not less than the debtor's projected disposable income for such period.</p>	<p>Requirements for confirmation of plan.</p> <p>New provision factors in domestic support obligation, that first becomes payable after the date of the filing of the petition, in determining disposable income.</p>
1226	No		<p>Payments (technical change to reflect that administrative payments be made).</p>
1227	No		<p>Effect of confirmation.</p>
1228	Yes	<p>New provision for domestic support obligations: Debtor must certify that all post-petition domestic support obligations and pre-petition domestic support obligation plan payments have been paid as provided in the plan, before a discharge can be issued.</p> <p>New provision requiring the court to hold a hearing to determine whether § 522(q)(1)(2) may be applicable.</p>	<p>Discharge granted after plan payments are completed or for hardship.</p> <p>§ 522(q) limits exemption for debtors who commit securities fraud.</p>
1229	Yes	<p>New provision: plan may not be modified</p> <p>(1) to increase the amount of any payment due before the plan, as modified, becomes the plan,</p> <p>(2) by anyone except the debtor, based on an increase in the debtor's disposable income, to increase the amount of payments to unsecured creditors required for a particular month so that the aggregate of such payments exceed the debtor's disposable income for such month, or</p>	<p>Modification of plan after confirmation.</p>
1229	Yes	<p>(3) in the last year of the plan by anyone except the debtor, to require payments that would leave the debtor with insufficient funds to carry on the farming operation after the plan is completed.</p>	<p>No corresponding provision for family fisherman.</p>
1230	No		<p>Revocation of an order of confirmation.</p>

1231	Yes	Deleted section on taxable period of estate. Deleted requirement of trustee to file tax returns.	Special tax provisions.
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XI. Conclusion

The new provisions of BAPCPA give some relief to the struggling farmer. They recognize the dire conditions in rural America and will allow some farmers to reorganize and continue to do what they love best; till the soil and raise livestock. The long-term outlook for the small farmer is still dark at best, but as one farmer put it when asked what he would do if he won a million dollars in the lottery, replied, "I'll just keep farming till its all gone."❖

ABOUT THE AUTHORS

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Congressional Changes to Business Bankruptcy

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I. Introduction

The amendments to the Bankruptcy Code which took effect on October 17, 2005 were famously directed to consumer, rather than business, bankruptcies. Yet, a substantial portion of the 500 page bill, formally S. 256 and entitled "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," Pub. L. No. 108-9, 119 Stat 23 (2005) (BAPCPA), in fact, affects businesses. *See* S. 256, 109th Cong. (2005). As its title indicates, the bill was sparked

by the perceived abuses of existing bankruptcy law. The weight of the changes increases the burden on the business debtor, particularly with regard to reorganization under chapter 11. The degree of that burden is the subject of a lively debate. An article entitled *New Bankruptcy Law Amendments: The Creeping Repeal of Chapter 11* gives a flavor of the alarmist tone of some. Richard Levin & Alesia Ranney-Marinelli, *New Bankruptcy Law Amendments: The Creeping Repeal of Chapter 11*, 79 AM. BANKR. L.J. 603 (July 2005).

The new amendments, however, are more accurately described as tweaking rather than tectonic. Nevertheless, some changes are important. For example, because of BAPCPA's hard cap on the debtor's plan exclusivity power, businesses in chapter 11 will have to reorganize

faster or risk losing that lever to control the proceedings. Some debtors must make quicker lease assumption decisions due to limits on extensions of time to assume or reject nonresidential real property leases. Preferences will be harder to prove. Large businesses will have less flexibility in retaining the services of key executives due to limits on compensation. Some small businesses will be forced into a procedurally more expedited, but flexible, plan process with mandatory disclosure requirements and increased oversight by the U.S. Trustee. Clearly, some debtors will have greater difficulty in achieving a successful reorganization. One change clearly beneficial to the United States makes federal False Claims Act (FCA), 31 U.S.C. § 3729, liability nondischargeable, even under a chapter 11 reorganization plan.

II. False Claims Act liability saved from discharge in corporate reorganizations

In an exception to the heretofore unlimited power of a corporate debtor to discharge debts in a non-liquidating, corporate chapter 11 plan, false claims liability owed to a "domestic governmental unit" is expressly protected. Debt for tax fraud and tax evasion are also protected. 11 U.S.C. § 1141(d)(6)(B). That is, the power of a corporate debtor to discharge "any debt" in a non-liquidating, chapter 11 plan under § 1129(d)(1)(A) is limited by the new § 1141(d)(6)(A), which saves from discharge those debts saved in §§ 523(a)(2)(A) and (B), to the extent held by a "domestic governmental unit" or a relator of an FCA claim.

Even though the type of debt saved here is defined in §§ 523(a)(2)(A) and (B), the new exception does not include in § 1141 an analog to § 523(c)(1). Subsection 523(c)(1) makes a debt *which qualifies* under § 523(a)(2), nevertheless dischargeable unless the holder successfully proves the qualifying character of the debt before the bankruptcy court. This can be a formidable task in the case of FCA liability because the claim often is not ready for litigation, yet the deadline for initiation of the complaint under § 523(c)(1) is short; viz., sixty days after the first meeting of creditors. FED. R. BANKR. P. 4007(c). The lack of an analog to § 523(c)(1) in the new exception should mean that it is self-executing. Debtors are likely to argue, however, that the § 523(c)(1) process is implied for chapter 11. The timely

filing of a protective complaint under FED. R. BANKR. P. 4007(c), coupled with a request for a ruling on the issue, seems prudent until the issue is clarified.

The new protection for FCA claims, while welcome, does not mean that chapter 11 proceedings of an FCA defendant can safely be ignored. The assets of the debtor are being divvied up in chapter 11, and a failure to participate in the bankruptcy process invites creative stratagems to leave the government's claim to survive against an entity with *few* assets. Furthermore, if the FCA liability makes a plan impractical, the other constituencies in the bankruptcy will demand a settlement of the FCA claim or waiver of governmental immunity from discharge by threatening to render the immunity valueless by forcing a liquidation. The moral is, as before, timely file the government's claim in the bankruptcy and actively assert its rights as a creditor.

III. "Means test" for individuals in chapter 11

The "means test" in chapter 7, which has rightfully received most of the attention, is limited to individuals whose "debts are primarily consumer debts." 11 U.S.C. § 707(b). Thus, an individual in chapter 7 whose debts are "primarily" business related will *escape the "means test"* in chapter 7. The same is not true for chapter 11. An individual in chapter 11—including those with business debts—can be forced into a *chapter 11 plan which must satisfy the confirmation test* of a chapter 13 plan. That is, BAPCPA makes post-petition wages part of the estate and modifies chapter 11 to allow an unsecured creditor, who is not paid in full, to require that the plan pay out at least the debtor's disposable income under § 1325(b)(2) for five years. 11 U.S.C. §§ 1115(a)(2) and 1129(15).

IV. Preference actions—"ordinary course" defense enhanced

In a change which will, hopefully, help stem the rising tide of preference litigation, BAPCPA loosened the standards for proving the "ordinary course of business" defense. Formerly, to sustain such a defense, the creditor had to prove that both the debt and the challenged payment were made in the ordinary course of business *and* that the

payment was made in accord with "ordinary business terms." BAPCPA changes the underscored "and" in the last sentence to "or." 11 U.S.C. § 547(c)(2). That is, a creditor need prove merely that the payment was *either* in the ordinary course of business (a function of the parties' actual practices) *or* in accord with ordinary business terms (a function of the industry's usual practices). The latter test can be troublesome for creditors because of litigation uncertainty in defining the relevant industry and the expense of obtaining expert testimony.

In addition, BAPCPA added limits on smaller preference claims. For business debts, preference actions are barred in the case of transfers of less than \$5,000. *Id.* § 547(c)(9). Also, the trustee must sue the non-insider, business creditor in the defendant's home federal district to recover a debt of less than \$10,000. The latter limit applies to any non-consumer debt, not just preferences. The comparable consumer debt venue limit is \$15,000. 28 U.S.C. § 1409(b).

V. Limits on executive compensation

The new amendments place severe limitations on the granting of an administrative priority to *proposed* payments to induce an "insider . . . to remain with the debtor's business" and on severance pay to an insider. *See* 11 U.S.C. § 503(c)(1). Debtors often respond to the threatened loss of key executives by offering them compensation inducements, such as salary, pension, and stock option guaranties. Under BAPCPA, retention payments are allowed only where: (1) the executive has a "bona fide offer from another business at the same or greater rate of compensation;" (2) he or she is essential to the business' "survival;" and (3) the payment is capped at ten times the mean of similar payments to non-management employees in the same year of the transfer or, if none, limited to 25 percent of a prior such payment to him or her in the year preceding the transfer. *Id.* The last requirement implies that no such payments will be allowed to executives unless the company had a retention program in place for at least one year prior to the bankruptcy. Similarly, severance is barred to executives unless also available to non-management employees and capped at ten times the mean of similar payments made to the latter during the same year. *Id.* § 503(c)(2).

A word of warning. This change includes a "wild card" which literally bars *any* administrative payment "outside the ordinary course of business and that is not justified by the facts and circumstances of the case." *Id.* § 503(c)(3). Adding another broad test to the allowance of an administrative expense seems out of character with the rest of the changes, so it remains to be seen how it will be applied.

VI. Commercial real property leases

Formerly, the Bankruptcy Code required debtor lessees of nonresidential real property to assume or reject them within sixty days. The sixty-day period could be extended only for cause. Debtors routinely received, however, repeated extensions resulting in many leases being assumed or rejected only by the plan itself. BAPCPA changes the initial sixty-day period to 120 days, but limits the debtor's power to obtain extensions for cause to one ninety-day period. Further extensions require the lessor's prior written consent. 11 U.S.C. § 365(d)(4).

This change will limit the flexibility of business debtors with such leases as lessors can force an assumption or rejection decision without waiting for the business or reorganization risks to clarify. For leases which are improvidently assumed and subsequently rejected by the estate, BAPCPA limits the lessor's administrative claim to a maximum of two years' rent. 11 U.S.C. § 503(b)(7).

VII. Single asset real estate bankruptcies expanded

A special exception to the automatic stay applies to a debtor who generates "substantially all" its "gross income" from a "single property," whether residential or commercial, if the debtor conducts no business on the premises other than operating the real property. 11 U.S.C. § 362(d)(3). Pre-BAPCPA creditors holding security in such real property were entitled to relief from the stay within ninety days after the bankruptcy was commenced if the debtor did not file a feasible plan or commence monthly payments equal to the interest due at a fair market rate on the secured portion of the creditor's claim within that time. This exception had little play because it applied only if the total secured debt was less than \$4 million. BAPCPA eliminates the debt limitation,

which greatly expands the exception's potential application. *See* 11 U.S.C. § 101(51B).

For those representing federal lenders, like Housing and Urban Development, whose claims are secured by mortgages, this exception should enhance the government's ability to obtain interim interest payments. In addition to removing the debt limit, BAPCPA made several other changes. For example, the ninety-day window was expanded to be the later of ninety days or thirty days after the court "determines that the debtor" is subject to the exception. Therefore, the secured creditor should move for such a ruling as soon as practicable to prevent the time limits from expanding beyond ninety days. Also, BAPCPA codified the practice of many bankruptcy courts to allow the debtor to make the mandated payments from the project's rents without the consent of the creditor with a lien on the cash collateral. Further, the interest rate for the payments is measured by the "non-default contract" rate rather than the current market rate. The latter change, which is out of step with the principles governing adequate protection payments, will be an advantage when the contract rate is above market and a detriment when it is below.

VIII. Small business bankruptcies

In return for relaxed procedural requirements, the small business debtor must meet quicker deadlines, face added mandatory reporting requirements, and suffer stricter oversight by the U.S. Trustee. BAPCPA amended this process and imposed significant new obligations on small business debtors.

Formerly, a small business was a person filing under chapter 11 who was engaged in a commercial enterprise, other than one owning or operating real property, and whose liquidated, accrued debts did not exceed \$2 million. BAPCPA retained that definition, but adapted it to add the concept of a small business case and of a small business debtor (SBD). 11 U.S.C. §§ 101(51C) and (51D). BAPCPA added the express requirement that the appointment of a creditors' committee is disqualifying to the SBD. The SBD regains its status, however, when the court finds that the appointed committee is "not sufficiently active and representative to provide effective oversight of the debtor." *Id.* § 101(51D)(A). This definition allows SBD status to become an on and off again proposition and,

seemingly, will not synchronize well with the SBD's time limits. BAPCPA did not exempt the small business case from the U.S. Trustee's duty to appoint a committee, although the court may impose such an exemption upon a request by a party in interest. 11 U.S.C. §§ 1102(a)(1) and (3). Hence, the use of SBD status may be limited to cases in which the U.S. Trustee is unable, as a practical matter, to formulate a committee. A business debtor with less than \$2 million in debt does not know whether a committee will be formed when it files, so the "threat" of SBD status could force *some* to prepare for such status. This increased preparation, if it happens, should have a salutary impact on the speed and efficiency of administration of the case, even if SBD status is avoided. The definition also clarifies that the term "person" includes an affiliate that is also in bankruptcy and that the \$2 million debt limitation does not include debts owed to affiliates or insiders.

Formerly, small business status was strictly by election. 11 U.S.C. § 1121(e) (superceded). BAPCPA drops that option and makes SBD status mandatory for qualifying debtors. *Id.* This greatly expands the scope of SBD status since most debtors opted to avoid it under the former practice.

IX. Creditors given more power to dismiss, convert, or appoint a trustee in chapter 11

BAPCPA makes it easier for a creditor to force a liquidation or remove the debtor in possession in chapter 11. First, the bankruptcy court's discretion to deny such relief is reduced if the creditor proves a sufficient "cause." 11 U.S.C. § 1112(b)(1). Second, the enumerated circumstances that give rise to such cause expand from five to sixteen, including the failure of the SBD to "maintain appropriate insurance," "unauthorized use of cash collateral," and "failure timely to pay taxes." *Id.* §§ 1112(b)(4)(C), (D), (H). Third, the court must hear the creditor's motion within thirty days and rule within fifteen days unless the creditor consents to a delay or the court finds "compelling circumstances." *Id.* § 1112(b)(3). The debtor or another party in interest can stave off relief by showing in rebuttal a "reasonable likelihood" that a plan will be timely forthcoming and that, with respect to the creditor's predicate ground for relief (with one

exception), the debtor had a "reasonable justification" and the ground "will be cured within a reasonable period of time." *Id.* § 1112(b)(2). The legislation grouped this change under the heading of small business changes, however, it applies in every chapter 11 case.

X. Conclusion

BAPCPA's business changes, while narrowly focused, are significant for those areas targeted. This article will, hopefully, help bankruptcy practitioners identify the areas affected and anticipate their impact on their cases. ♦

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Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: New Provisions

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I. The new chapter 15 for ancillary and other cross-border cases

Title VIII of the Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005) (BAPCPA), adds a new chapter 15 that incorporates a model law on cross-border insolvency to the Bankruptcy Code. While involvement in cross-border cases is rare for attorneys representing the United States, that is likely to change due to the increasing international component of bankruptcies, *see, e.g., In re Yukos Oil Co.*, 321 B.R. 396 (Bankr. S.D. Tex. 2005), and chapter 15, itself, which requires its use before parties can request that United States courts defer, on comity grounds, from acting in cases in furtherance of a foreign insolvency proceeding.

The hallmark of chapter 15 is to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases. The House Judiciary Committee noted in its report, "comity is raised to the introductory

language [of title VIII] to make clear that it is the central concept to be addressed." H.R. Rep. No. 109-31, at 109 (2005). Chapter 15 replaces § 304 of the Bankruptcy Code, "Cases ancillary to foreign proceedings," which is repealed.

Debtors eligible for relief under § 109 of the Bankruptcy Code will also be eligible for relief under chapter 15. Foreign banks will not be eligible if they have a branch or agency in the United States. Foreign insurance companies doing business in the United States, however, will be eligible. 11 U.S.C. § 1501(c)(2).

Chapter 15 divides "incoming" foreign proceedings into: (1) foreign main proceedings, which are pending in the country where the debtor has its center of main interests; and (2) foreign non-main proceedings, which are themselves ancillary proceedings pending in a country where the debtor has an establishment. A case under chapter 15 is commenced by a petition filed by a "foreign representative" (11 U.S.C. § 101(23)) of a "foreign proceeding" (11 U.S.C. § 101(24)), accompanied by documents evidencing the foreign proceeding and appointment and authority of the foreign representative. 11 U.S.C. § 1515. The minimal document requirements of § 1515 and evidentiary presumptions regarding those documents, 11 U.S.C. § 1516, were "designed to

make recognition as simple and expedient as possible. . . ." H.R. Rep. No. 109-31, at 112. The order granting "recognition" of the foreign proceeding specifies if the foreign proceeding is main or nonmain.

Unlike § 304 of the Bankruptcy Code, where all relief was dependent on court approval based on satisfaction of a statutory list of criteria, chapter 15 provides that, upon recognition of a foreign main proceeding, the automatic stay (and its exceptions) and selected other provisions of the Bankruptcy Code take effect. 11 U.S.C. § 1520 (incorporating §§ 361, 362, 363, 549 and 552 of the Bankruptcy Code). While a foreign, non-main proceeding can be recognized, it does not receive the benefit of the automatic stay or other Bankruptcy Code sections listed in § 1520(a), and United States' assistance with requested relief in a non-main proceeding is specifically limited. 11 U.S.C. §§ 1521(c) and 1523(b). A foreign representative of either a main or non-main proceeding may also seek relief not enumerated in § 1520. 11 U.S.C. § 1521. This could include additional injunctions, discovery, and the turn over of assets for distribution in a foreign proceeding. Chapter 15 also specifically bars a court from enjoining the exercise of a governmental unit's police or regulatory action, including a criminal action or proceeding. 11 U.S.C. § 1519(d).

The recognition procedure is the sole entry point for a foreign representative to the state and federal court systems in the United States. In the past, a foreign representative could move any United States court, in the interests of comity, to stay a case when advised of a foreign proceeding in the home country of one of the parties. Now, the foreign representative must use chapter 15 to stay the case, and deferral for comity purposes is not authorized without using chapter 15. 11 U.S.C. § 1509(c), (d); *see also United States v. J.A. Jones Construction Group, LLC*, 333 B.R. 637 (E.D.N.Y. 2005). Venue of chapter 15 proceedings is narrowed to a single entry point where the debtor has its principal place of business or assets in the United States. If the debtor does not have a place of business or assets in the United States, the entry point is where there is litigation pending against the debtor. If there is no such litigation pending, the entry point is where venue will be consistent with the interests of justice and the convenience of the parties. 28 U.S.C. § 1410.

Chapter 15 requires courts to cooperate, to the maximum extent possible, with foreign courts and foreign representatives and entitles courts to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives. 11 U.S.C. §§ 1525, 1526. Courts may implement this cooperation through "any appropriate means," including the appointment of a person to act at the direction of the court and the use of coordination agreements or protocols. 11 U.S.C. § 1527.

Chapter 15 centralizes all aspects of cross-border insolvencies. For United States Attorneys, the key component of this centralization might be the use of chapter 15 as the sole means for obtaining a stay of an action based on a party's foreign insolvency proceeding. Without "recognition" of a foreign proceeding via chapter 15, United States courts are not free to stay actions involving a foreign insolvent party, *J.A. Jones*, 333 B.R. at 639 ("In the absence of recognition under chapter 15, this Court has no authority to consider [the foreign receiver's] request for a stay"), and any requests for a United States court to do so in cases involving the United States should be resisted.

II. BAPCPA's impact on health care bankruptcies

While BAPCPA focuses on consumer bankruptcies, it enacts for the first time in the Bankruptcy Code specific health care bankruptcy provisions. The thrust of these provisions provides greater rights and protections to patients in a bankruptcy. This article will highlight the most significant of these provisions, as well as the related interim bankruptcy rules implementing BAPCPA (the "Interim Rules").

A. New definitions

BAPCPA creates a broad definition for a "health care business" in § 101(27A) that includes, among others, hospitals, emergency treatment facilities, hospices, home health agencies, skilled nursing facilities, and assisted living facilities. 11 U.S.C. § 101(27A). BAPCPA also adds specific definitions for "patient" and "patient records." *Id.* §§ 101(40A), 101(40B).

Under the Interim Rules, if a petition states that the debtor is a health care business, the case shall proceed as such unless the court orders

otherwise. INTERIM FED. R. BANKR. P. 1021(a), available at Interim Rules and Official Forms Implementing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, <http://www.uscourts.gov/rules/interim.html>. The United States Trustee, or a party in interest, may file a motion for a determination as to whether a debtor is a health care business. Fed. R. Bankr. P. 9014 shall govern the motion. INTERIM FED. R. BANKR. P. 1021(b).

B. Automatic stay exception

BAPCPA provides a new exception to the automatic stay for the Secretary of Health and Human Services (HHS) to exclude a debtor from participation in the Medicare program or any other federal health care program, as defined in the Social Security Act, 49 Stat. 620 (1935). 11 U.S.C. § 362(b)(28). Hence, reliance on the police/regulatory power exception to the automatic stay (11 U.S.C. § 362(b)(4)) for exclusion should no longer be necessary. Courts were split on applicability of that exception to Medicare exclusion. Compare *In re Psychotherapy & Counseling Ctr., Inc.*, 195 B.R. 522, 533 (Bankr. D.D.C. 1996) ("[I]f HHS had determined that the debtor should be excluded from the program by reason of some improper action, such as fraud or other criminal activity, then the court should not prevent HHS's exclusion of the debtor. In that circumstance, HHS would be properly exercising its regulatory authority over property of the estate.") with *In re Rusnak*, 184 B.R. 459, 466 (Bankr. E.D. Pa. 1995) (holding that HHS' exclusion for debtor's default on Health Education Assistance loans did not fall within section 362(b)(4)); *In re Richmond Paramedical Servs., Inc.*, 94 B.R. 881 (Bankr. E.D. Va. 1988), (relying on 11 U.S.C. § 105 to stay criminally convicted debtor's exclusion for sixty days to permit sale of debtor's assets).

BAPCPA says nothing about the suspension of Medicare payments, 42 C.F.R. § 405.371, and courts are split on whether suspension falls within 11 U.S.C. § 362(b)(4). Compare *In re Orthotic Center, Inc.*, 193 B.R. 832, 834 (Bankr. N.D. Ohio 1996) (reversing bankruptcy court and holding suspension of provider's payments exempt from stay under § 362(b)(4)); *In re Univ. Nursing Care Ctr., Inc.*, Case No. 92-00199 (Bankr. N.D. Fla. Jan. 16, 1996) (same) with *In re Medicar Ambulance Co.*, 166 B.R. 918, 926-27 (Bankr. N.D. Cal. 1994) (holding suspension of payments

for fraud was not exempted from stay); *In re Allied Home Health Nursing Servs., Inc.*, Case No. 96-51232 (Bankr. W.D. Tex. Apr. 2, 1996) (granting temporary restraining order against Medicare fraud suspension); *First Am. Health Care v. Dep't. of Health and Human Servs.*, 208 B.R. 985 (Bankr. S.D. Ga.), vacated, 1996 WL 282149 (Bankr. S.D. Ga. 1996); *In re Healthmaster Home Health Care, Inc.*, 1995 WL 928920 (Bankr. S.D. Ga. Apr. 13, 1995) (same); *In re Community Hospice Inc.*, Adv. Proc. No. 93-1158 (Bankr. D. Ariz. Dec. 6, 1993) (granting temporary restraining order against termination of provider agreement for standard of care problems).

C. Patient care ombudsman

Section 333 is added to require the appointment of a patient ombudsman in the bankruptcy of a health care business, to monitor the quality of patient care, and to represent patients' interests. 11 U.S.C. § 333(a)(1). The court may decline to appoint an ombudsman if it finds the appointment unnecessary for the protection of the patients. The United States Trustee chooses a disinterested person to be the ombudsman, and in the bankruptcy of a long-term care facility, may choose the state's Long-Term Care Ombudsman, appointed under the Older Americans Act of 1965, 42 U.S.C. §§ 3001-3002, 3011-3058ee. The ombudsman's duties include: (1) monitoring patient care, including interviewing patients and physicians; (2) reporting to the court regarding the quality of patient care within sixty days of its appointment and in sixty-day intervals thereafter; and (3) filing a report or motion with the court if patient care is "declining significantly or otherwise being materially compromised." 11 U.S.C. § 333(b). BAPCPA does not, however, establish any standards by which an ombudsman is to evaluate the quality of patient care. An ombudsman shall have access to patient records consistent with the authority of an ombudsman under the Older Americans Act and under applicable non-federal law. The ombudsman shall maintain patient information as confidential information and may not review patient records absent court approval. *Id.* § 333(c).

Section 330(a)(1) is amended to include a patient care ombudsman as a professional person entitled to reimbursement from the estate. There is, however, no specific provision allowing the ombudsman to hire counsel or other professionals.

The Interim Rules provide that the court shall order the appointment of the ombudsman under § 333 unless the court, on motion of the United States Trustee or a party in interest filed within twenty days of the commencement of the case, finds that the appointment is not necessary under the section. INTERIM FED. R. BANKR. P. 2007.2(a). If the court orders the appointment of an ombudsman, the United States Trustee must file a notice of appointment, including the name and address of the person appointed and a verified statement setting forth the person's connections to the debtor, creditors, patients, any party in interest, their respective attorneys and accountants, and the United States Trustee. *Id.* 2007.2(c). On motion of the United States Trustee or a party in interest, the court may terminate the appointment of an ombudsman if it finds that the appointment is not necessary for the protection of patients. *Id.* 2007.2(d). Similarly, the court may, upon motion of the United States Trustee or a party in interest, order the appointment at any time in the case, if the court finds that appointment is necessary to protect patients. *Id.* 2007.2(b).

The Interim Rules require that the ombudsman give ten days' notice to the debtor, the trustee, the United States Trustee, all patients, any committee, and if there is no committee of unsecured creditors, to the creditors listed under FED. R. BANKR. P. 1007(d), before making a report to the court under 11 U.S.C. § 333(b)(2). The ombudsman must also conspicuously post the notice at the health care facility that is the subject of the report. INTERIM FED. R. BANKR. P. 2015.1(a).

Regarding an ombudsman's review of patient records under § 333(c), the ombudsman must make a motion governed by FED. R. BANKR. P. 9014 and serve it on the patient and any family member or other contact person whose name and address has been given to the trustee. 11 U.S.C. § 333(c). A hearing on the motion may be commenced no earlier than fifteen days after service. *Id.* 2015.1(b).

D. Disposal of patient records

BAPCPA addresses the disposal of patient records in new 11 U.S.C. § 351. If a health care business does not have sufficient funds to pay for the storage of patient records under applicable law, the trustee is obligated to: (1) publish notice,

in one or more appropriate newspapers, indicating the trustee's intent to destroy the records one year later; (2) during the first 180 days of that one year period, the trustee must attempt to contact each patient and insurance carrier with notice of the claiming or disposing of the records; (3) if the records are not claimed during the one year period, the trustee must mail a request to each appropriate federal agency requesting that they take possession of the records, although no agency is required to take possession; and (4) if no one claims the records, the trustee is obligated to destroy them by shredding, burning, or obliterating them (if electronic), 11 U.S.C. §§ 351(1)(A), (1)(B), (2), (3).

The Interim Rules specify the information that must be included in the published notice under § 351(1)(A) and the notice under § 351(1)(B). INTERIM FED. R. BANKR. P. 6011(a) and (b). The trustee must file a report within thirty days of destruction certifying the destruction and the method used. *Id.* 6011(d).

E. Duty to transfer patients and administrative expense status for the costs of closing a health care business

BAPCPA adds 11 U.S.C. § 704(a)(12) to the duties of a chapter 7 trustee for a health care business. The section requires a trustee to "use all reasonable and best efforts" to transfer patients from a health care business being closed to one that: (1) is in the vicinity of the closing facility; (2) provides substantially similar patient care to the closing facility; and (3) maintains a reasonable quality of care. 11 U.S.C. § 704(a)(12).

The Interim Rules provide that the trustee may not transfer patients under § 704(a)(12) unless the trustee gives ten days' notice of the transfer to the patient care ombudsman and to the patient and any family member or other contact person whose name and address has been given to the trustee. INTERIM FED. R. BANKR. P. 2015.2. BAPCPA adds 11 U.S.C. § 503(b)(8) to create an administrative expense for the "actual necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency," including the cost of disposing of patient records and the transfer of patients. 11 U.S.C. § 503(b)(8). Prior to BAPCPA's enactment, at least one court held that the costs of closing a health care business were not entitled to

administrative priority. *In re Allen Care Centers, Inc.*, 96 F.3d 1328 (9th Cir. 1996).

III. Conclusion

The principal governmental agency involved in health care bankruptcies is the HHS, Centers for Medicare & Medicaid Services (CMS), which administers the Medicare program. Each of the above changes in some way touches upon CMS' administration of Medicare and may, in certain circumstances, directly affect CMS' duties under Medicare laws and regulations. For that reason, United States Attorneys should become familiar with them.❖

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Treatment of Unexpired Leases: Post-Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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I. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat 23 (2005) (BAPCPA), made a number of changes to the treatment of unexpired residential and commercial leases. Except as otherwise specified, these changes relate only to real property leases, not personal property leases or executory contracts.

II. Section 365(d)(4): Time to assume or reject

Before the amendments to the Bankruptcy Code took effect, a debtor had sixty days within which to assume or reject an unexpired lease of nonresidential real property. 11 U.S.C. § 365(d)(4). The court could, however, extend that period of time "for cause." The Bankruptcy Code did not define "cause" for purposes of § 365,

but took into account a number of factors, including: (1) whether the debtor was "paying for the use of the property"; (2) whether "the debtor's continued occupation could damage the lessor beyond the compensation available under the Bankruptcy Code"; (3) whether the lease was the debtor's primary asset; (4) whether the debtor had sufficient time to formulate a plan of reorganization; (5) the complexity of the case facing the debtor; and (6) the number of leases that the debtor had to evaluate. *See, e.g., In re Burger Boys, Inc.*, 94 F.3d 755 (2d Cir. 1996); *In re Service Merchandise Co., Inc.*, 256 B.R. 744 (Bankr. M.D. Tenn. 2000); *In re Resource Technology Corp.*, 254 B.R. 215 (Bankr. N.D. Ill. 2000). In practice, extensions of time were granted routinely—often up to the date of plan confirmation—provided the debtor remained current on all its post-petition obligations to the lessor.

The amendment to § 365(d)(4) extends the initial assumption period to 120 days, or the date of plan confirmation, whichever occurs first. 11 U.S.C. § 365(d)(4)(A). Upon the motion of the debtor in possession (DIP) or trustee, the court may extend the period only once, for ninety days.

Id. § 365(d)(4)(B)(i). The court lacks any discretion to grant additional extensions without the prior written consent of the landlord, even if "cause" sufficient to justify an extension pre-BAPCPA exists. *Id.* § 365(d)(4)(B)(ii). Accordingly, without the landlord's cooperation, a debtor has, at most, 210 days to assume or reject a nonresidential lease.

<p>§ 365(d)(4)</p>	<p>Provides that if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within sixty days after the date of the order for relief (or such other period as the court orders), then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.</p>	<p>Extends time to assume or reject a lease from 60 days to 120 days, or plan confirmation, whichever is earlier.</p> <p>Permits the court to extend this time for an additional ninety days (for a total of 210 days), for cause.</p> <p>Subsequent extensions of time can only be authorized by the lessor; the court has no discretion to make subsequent extensions.</p> <p>Assumption or rejection must take place before plan confirmation (no post-confirmation assumptions or rejections).</p> <p>Applies to non-residential real property leases.</p> <p>Applies to all debtors.</p>
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Under prior law, once the bankruptcy estate assumed a lease, a subsequent breach or rejection gave rise to an administrative expense claim for the full amount of the rent for the entire balance of the lease term. Because BAPCPA will require debtors to make a decision to assume or reject commercial leases within a shorter time frame than previously (absent lessor consent), a new § 503(b)(7) provides that for non-residential real estate previously assumed under § 365, but subsequently rejected, the lessor's administrative expense claim is limited to

a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor.

11 U.S.C. § 503(b)(7).

Claims for rejection damages for the remaining portion of the lease term are unsecured, and subject to the limitations set forth in 11 U.S.C. § 502(b)(6).

§ 503(b)(7)	N/A	<p>Provides that where non-residential lease is assumed but subsequently rejected, lessor's administrative claim is limited to two years following rejection of the lease or turnover of the leased premises, less sums received from other parties. Previously, there was no limit and lessor could make administrative claim for balance of lease term.</p> <p>Claims for amounts beyond that time are unsecured and subject to the § 502(b)(6) cap.</p> <p>Excludes penalties for failure to operate.</p> <p>Applies to all debtors.</p> <p>Applies to non-residential real property leases.</p>
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The likely effect of these new provisions, taken together, will be to mandate closer communication and more negotiation between debtors and landlords. Although the amendment to § 365(d)(4) appears to benefit commercial landlords, as it requires a debtor to assume a commercial real estate lease within 210 days unless the landlord consents, the addition of § 503(b)(7) confers bargaining power on debtors in negotiating extensions of the time to assume or reject. Commercial landlords who refuse to negotiate such extensions of time with debtors who are current on all their lease obligations run the risk that the debtors will assume long-term commercial leases before having an adequate amount of time to evaluate their ongoing ability to make lease payments, or the true benefit of such leases to the estate. In that event, their ability to recover lease rejection damages may be severely curtailed. Additionally, § 365(d)(4)(A)(ii) appears to answer the question if an unexpired commercial real estate lease may be assumed or rejected after plan confirmation, in the negative.

III. 11 U.S.C. § 365(b): Curing defaults

Generally, the DIP or trustee may assume or reject any executory contracts and unexpired

leases. Prior to BAPCPA, if there was a default in an executory contract or unexpired lease, the debtor or trustee could not assume the contract or lease unless the following steps were taken.

- Cured or provided adequate assurance that it would promptly cure the default.
- Compensated or provided adequate assurance of compensation for any actual pecuniary loss resulting from the default.
- Provided adequate assurance of compensation for any actual pecuniary loss resulting from future defaults.

BAPCPA introduces a limitation on debtors' obligation to cure defaults in unexpired real estate leases. Section 365(b)(1)(A) now makes it unnecessary for the debtor to cure a default that is a breach of a provision relating to

the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a

nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph.

11 U.S.C. § 365(b)(1)(A).

The purpose of this convoluted provision apparently was to address a dispute over a debtor's right to assume an unexpired lease when a non-monetary default had taken place that could not be cured because of the passage of time. The most common instance of this type of non-monetary default was a failure to operate in accordance with lease terms requiring a business to maintain continuous operations. In such cases, some courts have held that the lease could not be assumed,

provision does not apply to personal property leases or executory contracts.

Title 11 U.S.C. § 1124(2) has been amended as well, apparently to conform to the changes to § 365(b). New § 1124(2)(D) now provides that a claim is not impaired under a chapter 11 plan if the plan, with respect to a claim or interest arising from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure.

<p>§ 365(b)(1)(A)</p>	<p>Provides that if there has been any default (whether monetary or nonmonetary) in an unexpired lease of the debtor, the DIP or trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee/DIP cures the default, compensates the lessor for actual pecuniary loss, and provides adequate assurance of future performance.</p>	<p>Amends statute by permitting debtor to assume unexpired lease notwithstanding non-curable non-monetary default (other than a penalty rate or penalty provision).</p> <p>Lessor entitled to compensation for actual pecuniary loss resulting from default.</p> <p>If default is caused by failure to operate nonresidential lease, default must be cured by resuming operation at and after date of lease assumption.</p> <p>Applies to all debtors.</p> <p>Applies to residential and nonresidential real property leases.</p>
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regardless of the absence of monetary defaults, because there was an incurable nonmonetary default. *See, e.g., Worthington v. General Motors Corp.*, 113 F.3d 1202 (9th Cir. 1997) (holding that a franchise agreement could not be assumed because the non-monetary default resulting from closing operations could not be cured). Under § 365(b)(1)(A), as amended, such a default can be cured by resuming operations at the time of assumption and continuing such operations. This

New § 1124(2)(D) raises more questions than it answers. First, the revisions to § 365(b)(1)(A) concerning non-monetary defaults do not apply to executory contracts or personal property leases, meaning that under § 365(b)(1)(A), an executory contract or personal property lease arguably may not be assumed if there has been an incurable non-monetary default. *See, e.g., In re Claremont Acquisition Corp., Inc.*, 113 F.3d 1029 (9th Cir. 1997) (holding that non-monetary defaults in an

executory contract must be cured before assumption). Unlike § 365(b)(1)(A), however, § 1124(2)(D) is not limited to unexpired real property leases. Accordingly, in the event a chapter 11 plan proposes to assume an executory contract or personal property lease in which there has been an incurable non-monetary default and to compensate the non-debtor party for its actual pecuniary losses, § 1124(2)(D) suggests that the non-debtor party to such a contract or lease is unimpaired and deemed to have accepted the plan. *Id.* § 1126(f). It remains open to question whether a debtor may assume such contracts and leases pursuant to a plan where the non-debtor party is unimpaired, even if the debtor would not have been able to assume such contracts and leases under § 365 in the absence of a plan, due to incurable nonmonetary defaults.

Additionally, § 1124(2)(D) excludes defaults resulting from the failure to operate a commercial real estate lease from the general rule that a claim arising from an incurable non-monetary default is unimpaired under a plan that provides compensation for actual pecuniary loss. The effect of this exclusion is unclear. One sensible reading of the statute suggests that such a claim is unimpaired only if, in addition to providing compensation for actual pecuniary losses, the plan provides that the debtor will resume operations at the time of lease assumption. Another plausible reading of the statute, however, suggests that the holder of a claim arising from the debtor's failure to operate in accordance with the terms of a commercial real estate lease is considered impaired under the plan, and that this impairment cannot be remedied, even by resumption of operations at the time of lease assumption.

IV. Section 365(b)(2)(D): Treatment of penalty rates and penalty provisions

Before passage of BAPCPA, the extent to which a DIP or trustee was required to cure provisions relating to non-monetary defaults under an executory contract or unexpired lease was unclear. Pre-BAPCPA § 365(b)(2)(D) provided that the trustee was not required to cure a default arising from "the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease." Because the word "penalty" arguably modified the word "provision" as well as "rate," the majority of courts held that the trustee did not have to pay penalty rates or other penalty provisions regarding non-monetary defaults. *See, e.g., Claremont Acquisition*, 113 F.3d 1029 (9th Cir. 1997); *In re Williams*, 299 B.R. 684 (Bankr. S.D. Ga. 2003); *In re Walden Ridge Dev.*, 292 B.R. 58 (Bankr. D.N.J. 2003); *In re New Breed Realty Enterprises*, 278 B.R. 314 (Bankr. E.D.N.Y. 2002). A minority of courts held that the trustee was obliged to satisfy all other, non-penalty rate provisions relating to the nonmonetary default.

The amendment to § 365(b)(2)(D) adds the word "penalty" before "provision," adopting the majority view.

<p>§ 365(b)(2)(D)</p>	<p>Provides that the cure provisions of § 365(b)(1) do not apply to a default that is a breach of a provision relating to the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform non-monetary obligations under the unexpired lease.</p>	<p>Amends statute to provide that § 365(b)(1) does not apply to a default that is a breach of a provision relating to the satisfaction of any penalty rate <i>or penalty provision</i> relating to a default arising from any failure by the debtor to perform non-monetary obligations under the unexpired lease.</p> <p>Clarifies that trustee is not required to pay contractual penalty interest rates or pay penalty provisions applicable to non-monetary defaults.</p> <p>Applies to all debtors.</p> <p>Applies to all leases and executory contracts.</p>
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V. Conclusion

Although most of the BAPCPA amendments to the Bankruptcy Code favor creditors, the changes relating to treatment of unexpired leases, particularly commercial real estate leases, provide some real advantages to debtors. Client agencies should exercise caution in structuring long-term leases to avoid giving rise to large general unsecured claims for lease rejection damages, and should attempt to renegotiate the terms of any commercial lease before the lessee enters bankruptcy, in order to avoid protracted arguments over assumption under § 365.❖

ABOUT THE AUTHOR

❑ **Wendy Tien** has been with the Corporate and Financial Litigation section since 2000. Before coming to the Department of Justice, she worked in both the Corporate and Litigation departments at Pillsbury Winthrop Shaw Pittman LLC and as a tax attorney with the Internal Revenue Service.✉

NOTES





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