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An Overview of the Bankruptcy Reform Bill

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This overview continues to be revised and expanded. To view the most current overview, go to Industry Resources, then Servicing Topics, and select Bankruptcy & Bankruptcy Reform at www.usfn.org.

Introduction and Background

Since 1997, banks, credit card companies, and even retailers pushed Congress for a bill that would overhaul the nation's bankruptcy laws. Legislation that would make it harder for people to wipe out their debts through bankruptcy passed the House of Representatives in 2002, but was derailed in the Senate at the last minute by a dispute over an abortion-related provision. In 2005, Republicans, backed by the White House, and with a majority in both houses of Congress, were determined to proceed with the overhaul, which they said was necessary to stop abuse of the bankruptcy system by people who are capable of repaying their debts.¹ President Bush enthusiastically signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter, "the Act" or "BAPCPA") into law on April 20, 2005. Subsequently, it was assigned Public Law Number 109-8.

Effective Date

The Act became fully effective on October 17, 2005, and the provisions of BAPCPA are applicable only to bankruptcy cases filed on or after that date. However, there were a few provisions of BAPCPA that were effective immediately upon enactment in April 2005, including provisions under §§ 308, 322 and 330 (all of which pertain to the homestead exemption) and § 1223, which provided for more bankruptcy judgeships. In addition, § 1001 of BAPCPA permanently reenacted the provisions of Chapter 12 (which now applies to family fishermen in addition to family farmers) and became effective July 1, 2005.

Summary of Effect

BAPCPA applies a tougher standard: a debtor is not eligible to file a Chapter 7 (and, therefore, may only file under Chapter 13) if he or she has sufficient income to repay at least 25 percent of the debt over 5 years. Additionally, BAPCPA limits the ability of Chapter 13 debtors to "cramdown" secured claims on motor vehicles by requiring that a motor vehicle that is for the personal use of the debtor be at least 910 days old before the debt can be paid less than in full through the Chapter 13 plan. The legislation also places increased restrictions on the ability of debtors to cramdown or modify a mortgage by clarifying and expanding the definition of "debtor's principal residence."

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Further, Chapter 13 debtors now face additional hurdles in obtaining confirmation of a Chapter 13 plan. As a condition for confirmation, Chapter 13 debtors must ensure that all tax returns (including delinquent tax returns) have been filed and that any post-petition domestic support obligations (e.g., child support payments) are current. Moreover, not only must a debtor's plan be proposed in good faith, to obtain confirmation of a plan, Chapter 13 debtors are now required to demonstrate that the initial filing of the case was in good faith.

More importantly for attorneys, debtor counsel are now held accountable and can face sanctions for filing a Chapter 7 case that later fails the means test and is either dismissed or converted to Chapter 13. This part of the legislation will likely have the consequence of weeding out those attorneys who file only the occasional bankruptcy case, thus reducing competition and forcing debtors to seek the services of bankruptcy specialists.

Creditors were to benefit not only from the adoption of the means test, but from protections against abusive or serial filers. In practice, most bankruptcy courts have limited the applicability of these provisions, especially where the debtor has only had one prior bankruptcy case dismissed within the last year. Nevertheless, creditors now have the ability to move for dismissal of a Chapter 7 case for substantial abuse, and have greater ability to request information from debtors and move for dismissal should the debtor fail to provide the information.

The Office of the United States Trustee prepared a "List of Credit Counseling Agencies Approved Pursuant to 11 U.C.C. § 111," available online at: www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm#CO.

Because the time between the date the President signed the Act into law on April 20, 2005 and the effective date of the Act 180 days later did not provide sufficient time to promulgate rules under the Rules Enabling Act, 28 U.S.C. §§ 2071 – 2077 (2005), a process that ordinarily requires 3 years, bankruptcy courts were urged to adopt Interim Bankruptcy Rules (available at www.uscourts.gov/rules/interim.html), which were approved by the Advisory Committee on Bankruptcy Rules and the Committee on Rules of Practice and Procedure. These Interim Bankruptcy Rules were prepared by the Advisory Committee on Bankruptcy Laws and are designed to implement substantive and procedural changes mandated by the Act. Most bankruptcy courts have adopted the Interim Bankruptcy Rules by general order. The interim rules are expected to apply to bankruptcy cases from October 17, 2005 until final rules are promulgated and effective under the regular Rules Enabling Act process.

ANALYSIS OF SPECIFIC CHANGES TO BANKRUPTCY PRACTICE

Adoption of a Means Test

One of the primary goals of bankruptcy reform was to make it harder for individuals to file for Chapter 7 and instead have them repay something through Chapter 13. While limiting the

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amount of retirement savings a debtor can exempt from the bankruptcy estate² and making changes to the homestead exemption,³ which was seen as one of the biggest abuses under the U.S. Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (hereinafter, “the Code”), a key feature of the legislation was the adoption of a needs-based means test, using national and local IRS standards for expenses. Therefore, debtors who earn less than the median income in their state are still eligible to file under Chapter 7.

The easiest way to summarize (at the risk of oversimplifying) the test is as follows: if an individual can pay back 25 percent of his or her unsecured debt over 5 years, the individual would not be eligible for relief under Chapter 7. The means test is designed to determine the extent of a debtor’s ability to repay general unsecured claims and has three elements:

- i) *current monthly income* — defined as the average of all income received by the debtor during the 6 months preceding the date of determination (including regular contributions to household expenses made by others, excluding Social Security benefits), even if the debtor is now out of work;
- ii) *allowed monthly deductions* — as established by the Executive Office for U.S. Trustees, based on IRS standards;
- iii) *defined trigger points* — at which the income remaining after the allowed deductions would result in the presumption of abuse: (1) if the debtor has at least \$166.67 in monthly available income after the allowed deductions, abuse is presumed regardless of the amount of the debtor’s general unsecured debt; and (2) if the debtor has at least \$100 of such income, abuse is presumed if the income is sufficient to pay at least 25 percent of the debtor’s general unsecured debt over 5 years. These presumptions of abuse can be rebutted where there are special circumstances such as medical problems.

The presumption of abuse can only be rebutted with detailed documentation of special circumstances, requiring additional expenses or adjustment of current monthly income for which there is no reasonable alternative; such evidence must be submitted by the debtor under oath. Moreover, where the court finds that the debtor’s attorney violated certain bankruptcy rules in filing a Chapter 7 case, the attorney may be required to reimburse the trustee for legal fees in prosecuting a motion to dismiss or convert.

As already stated, under the old Code, only the court, U.S. Trustee, Bankruptcy Administrator (in Alabama or North Carolina), or trustee could move for dismissal of a Chapter 7 case. Unfortunately, application of the old Code provisions under § 707 was lax and inconsistent throughout the country, in large part because there was a presumption in favor of granting the debtor a discharge, which statutory presumption has now been stricken from the Code. Furthermore, the term “substantial abuse” was not defined in the Code. In some jurisdictions, debtors were allowed to receive a discharge under Chapter 7 even though they had the ability

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to contribute several hundreds of dollars per month to their creditors. In essence, the amendments to § 707 create clearer guidelines about what constitutes abuse.

Under BAPCPA, parties in interest (i.e., creditors or those with a financial stake in the outcome of a bankruptcy case) now have the ability to move for dismissal of a Chapter 7 case. However, under the new § 707(b)(6) of the Code, only the court, U.S. Trustee, Bankruptcy Administrator (in Alabama or North Carolina) may bring the motion if the debtor's income does not exceed the annual state median. Furthermore, under § 707(b)(7), the means test presumption is inapplicable in those cases where the debtor's income is below the annual state median. (Because creditors are subject to being assessed costs and attorneys' fees for bringing an unsuccessful motion under § 707(b), servicers are advised to consult with an attorney before bringing such a motion.) A bankruptcy court will also be permitted to convert a Chapter 7 case to either Chapter 11 or 13 with a debtor's consent. Under the new law, only the debtor can request a conversion to Chapter 13.

As bankruptcy practitioners expected, courts across the country have not always agreed on how the means test is to be applied. For instance, is a debtor entitled to the standard expense allowance on a motor vehicle (other than for the cost of gasoline), if the vehicle was not subject to a lease or purchase agreement?⁴ In addition, at least one court has determined that the potential payback of zero percent to unsecured creditors in a Chapter 13 case is not a special circumstance that may rebut the presumption of abuse arising in Chapter 7.⁵

By signing a bankruptcy petition, a debtor's attorney is certifying that he has:

- i) performed a reasonable investigation into the circumstances that gave rise to the petition;
- ii) determined the petition is well-grounded in fact, warranted by existing law, and does not constitute abuse under § 707(b)(1); and
- iii) conducted an inquiry and has no knowledge that the information in the schedules is incorrect.

Accordingly, debtor attorneys who in the past relied upon paralegals to meet with clients will have had to alter their practice since these provisions require more investigation on the part of the attorney. What constitutes "reasonable" is being determined by the courts and will undoubtedly vary across the country.

While it may not be necessary for a debtor attorney to hire a private investigator to verify a debtor's assets and other financial information, at a minimum, a debtor attorney should examine a credit report and PACER/schedules from previous cases, and question unrealistic expenses or budgets, such as \$50 per month to feed a family of four.

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Creditors need to also be aware that under § 1322(d), the means test is applicable to Chapter 13. Specifically, if the debtor's current monthly income multiplied by 12 is not less than the applicable median income for the state, the debtor's plan must be for 5 years, unless the plan provides for payment in full of all allowed unsecured claims over a shorter period.

Shortly before BAPCPA was passed in the Senate, the Senate overwhelmingly approved (99-0) an amendment proposed by Richard Durbin (D-IL) that exempts from means testing disabled veterans whose debts arose during military service.

Servicers should keep in mind that substantial abuse can still be found on general grounds under § 707(b)(3), including bad faith, which is determined under a totality of the circumstances.

Debtor Education

In an effort to ensure that individuals seek relief under the Code only when necessary or only as a last resort, § 106 of the Bill precludes an individual debtor from filing under the Code unless, within the 180-day period prior to the filing of the case, the individual has attended an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted the individual in performing a related budget analysis. According to the legislative history, Congress' intent in amending the Bankruptcy Code to require debtors to obtain a credit counseling briefing prior to the filing of a bankruptcy case was to give potential filers "an opportunity to learn about the consequences of bankruptcy . . . before they decide to file for bankruptcy relief."

The pre-petition credit counseling provisions shall not apply if the U.S. Trustee or Bankruptcy Administrator determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services (U.S. Trustees are apparently required to evaluate the credit counseling services in their respective districts on an annual basis.) The debtor can also avoid the requirement of having to attend credit counseling if he submits to the court a certification that:

- i) describes exigent circumstances that merit a waiver of the requirement;
- ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services during the 5-day period beginning on the date on which the debtor made that request; and
- iii) is satisfactory to the court.

Shortly before final passage of BAPCPA in the Senate, the Senate approved amendment 92 by Sen. Russell Feingold (D-WI). This amendment exempts a debtor from having to complete the pre-petition credit counseling requirements if the court determines, after notice and hearing, the debtor is unable to complete the requirements because of incapacity, disability, or

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active duty in a military combat zone. For purposes of being exempted from the credit counseling requirement, “incapacity” means that an individual is impaired by reason of mental illness or mental deficiency and is unable to realize and make rational decisions. Similarly, the term “disabled” means that an individual is so physically impaired that he cannot participate in a briefing in person, on the telephone, or on the Internet.

On October 4, 2005, the Executive Office of the United States Trustee (EOUST) issued a press release temporarily waiving the credit counseling requirement for “bankruptcy filers” in Louisiana and the Southern District of Mississippi as a result of Hurricane Katrina. Although this waiver was extended once, the waiver was terminated by the EOUST effective March 10, 2008 for bankruptcy filers in Southern Mississippi and the Middle and Western Districts of Louisiana. Nevertheless, the pre-petition credit counseling waiver has been extended until further notice for filers in the Eastern District of Louisiana.

Bankruptcy judges are almost uniformly refusing to allow debtors to proceed in a bankruptcy case where the debtor fails to file a credit counseling certificate (i.e., a document certifying that the debtor attended a credit counseling briefing prior to the filing of the bankruptcy case). At least one bankruptcy court has stated that bankruptcy courts do not have the discretion to *not* dismiss a case where the debtor fails to obtain pre-petition credit counseling.⁶ Nor will making the request for credit counseling after the filing of the case remedy the deficiency.⁷ Similarly, a bankruptcy court does not have the discretion to allow a bankruptcy case to proceed where the credit counseling briefing occurred more than 180 days prior to the filing of the bankruptcy case, even if the debtor might have complied with the “spirit” of the statutory requirement.⁸ Even where the debtor files for a waiver based on exigent circumstances, the debtor must establish that he requested the briefing prior to filing the petition.⁹ The pre-petition counseling requirement survived a constitutional challenge when a bankruptcy court rejected an equal protection argument.¹⁰

Courts disagree on the meaning of the phrase “preceding the date” in § 109(h) of the revised Code. In denying the trustee’s motion to dismiss the case, one court stated that the word “date” may mean a particular day, but it can also reference a specific time on that day.¹¹ Accordingly, it is acceptable for a debtor to obtain pre-petition counseling on the same day the petition is filed, provided it is obtained prior to the filing of the petition. At least one other court has disagreed with this interpretation, choosing to apply the statute plainly. Under this latter interpretation, a debtor that obtains credit counseling the same day that the petition is filed would be deemed ineligible to be a debtor under § 109(h) of the Code.¹²

Bankruptcy judges around the country have imposed certain requirements before approving waivers based on exigent circumstances. To begin with, although an attorney’s request for credit counseling on behalf of a debtor may satisfy the new pre-petition credit counseling requirement, “general inquiries by an attorney concerning the availability of credit counseling . . . are insufficient to satisfy the requirement of § 109(h)(3)(A)(ii) as to each individual

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debtor that the attorney may represent.”¹³ In addition, a generic motion that merely states the debtor was unable to obtain counseling within five days of filing the petition is insufficient. Instead, the “certification” should list the facts underlying any alleged exigent circumstances, the date(s) on which the debtor requested credit counseling, which agencies were contacted to render the services, why the debtor believes the services could not be obtained before filing the voluntary petition, and when the services are “reasonably likely to be obtained.”¹⁴

It should be kept in mind that the language in § 109(h)(3) should be read in the conjunctive,¹⁵ i.e., the debtor must satisfy each of the requirements, including the requirement that the court be satisfied that the circumstances merit a waiver.

In the first appellate decision regarding the pre-petition credit counseling requirement, the Eighth Circuit Bankruptcy Appellate Panel affirmed a bankruptcy court decision denying a debtor’s motion for a waiver of the credit counseling requirement based on exigent circumstances since the debtor had at least 20 days’ notice of the foreclosure sale and, therefore, the debtor’s exigency was self-inflicted. In doing so, the appellate panel found that virtually all cases in which the exigent circumstances certificate is filed will involve exigent circumstances.¹⁶

Similarly, where a debtor missed two appointments during the three-week period before the filing of his bankruptcy case, a bankruptcy court determined his failure to obtain credit counseling was a result of his lack of due diligence, not exigent circumstances.¹⁷ Again, the important question for the court is determining which circumstances merit a waiver.

According to one court, there is a subjective test that requires a court to focus on the reasons the debtor was unable to obtain the required credit counseling prior to filing the petition, as opposed to the imminence of the event that threatens the debtor with loss of property and requires the filing of a bankruptcy case to invoke the automatic stay. In *In re Talib*,¹⁸ the bankruptcy court denied a debtor’s request for a waiver of the credit counseling requirement based on exigent circumstances since the debtor did not make the request for credit counseling until 5 p.m. on the afternoon before the scheduled foreclosure, and because Missouri law would have required the creditor to give the debtor several weeks’ notice of the pending foreclosure.¹⁹

These decisions requiring a court to inquire into the reasons why a debtor was unable to obtain credit counseling suggest that debtors, creditors, and trustees should carefully review motions requesting a waiver of the credit counseling requirement based on exigent circumstances since the mere fact the debtor was facing a foreclosure is insufficient to merit a waiver. Specifically, the bankruptcy case may be subject to dismissal if the reason the debtor was unable to obtain credit counseling before the bankruptcy filing was through the debtor’s negligence or otherwise self-inflicted, or if the debtor fails to satisfy the objective requirement for the waiver (i.e., pleading with specificity that the debtor requested credit counseling prior

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to the filing, identifying the agencies contacted, and providing the court with a reasonable time period for obtaining the credit counseling).

With respect to the adequacy of services, at least one court appears to have created a variance of the exception under § 109(h)(2) of the Code. In *In re Petit-Louis*, the debtor, who spoke limited English, filed his petition after contacting and being unable to find any credit counseling services that could provide the briefing in Creole. Over the objection of the U.S. Trustee, the court determined that credit counseling services are not adequate for a debtor who does not understand the briefing, and approved the debtor's request for a waiver of the pre-petition credit counseling requirement.²⁰

Unfortunately, one issue that has arisen is the legal effect of the case when the debtor fails to satisfy the credit counseling requirement. As will be discussed in more detail further on, under the new provisions limiting the duration of the automatic stay for repeat filers, if a debtor files a bankruptcy case after having a prior case dismissed in the last year, the automatic stay terminates in the new case within 30 days unless the debtor can establish that the new case was filed in good faith.²¹ Where the debtor has had two cases dismissed in the one-year period prior to the filing of the case, there is no automatic stay, unless the debtor can overcome a presumption of bad faith, by clear and convincing evidence.²²

A number of courts, without discussing the issue, have simply dismissed cases when the debtor has failed to satisfy the pre-petition credit counseling requirement.²³ On the other hand, several recent cases have held that where the debtor fails to satisfy the credit counseling requirement, the petition is to be "stricken" rather than dismissed, on the theory that if the debtor is ineligible to be a debtor in the bankruptcy case, the petition does not commence a case, and, therefore, there is no case to be dismissed.²⁴ If this theory is correct, are we to count "stricken" cases in determining whether there is an automatic stay in a new bankruptcy case when the debtor files a subsequent case? According to Congress, the only exceptions to the calculus for determining whether the stay either terminates (i.e., one prior dismissal) or does not exist (i.e., two prior dismissals) are cases dismissed under § 707(b) of the Bankruptcy Code; that is, for failing the means test or the Code's other provisions under Chapter 7 for abuse.

In *In re Ross*, Judge Bonapfel stated that since Congress did not provide for a different consequence for ineligibility under § 109(h) (i.e., where the debtor fails to obtain or otherwise satisfy the pre-petition credit counseling requirement) than for ineligibility under any other provision of § 109, it follows that ineligibility under § 109(h) should be treated like ineligibility under any other provision of § 109. Judge Bonapfel then reminds us that Congress provided a new exception to the automatic stay under § 362(b)(21)(A) for creditors holding a security interest in real property (allowing the creditor to proceed with foreclosure) if the debtor is ineligible under § 109(g). As stated by the court, "[i]f such a filing were void *ab initio* and did not result in an automatic stay under existing law, such an amendment would

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not have been necessary.”²⁵ Since Congress is presumed to know the state of the law when it enacts new legislation, the enactment of § 362(b)(21)(A) evidences the understanding of Congress that the filing of a bankruptcy case in violation of § 109(g) commences a case and results in an automatic stay.²⁶ And given the absence of any indication that Congress intended ineligibility under § 109(h) to be treated any differently than any other provision of § 109, it therefore follows that the filing of a petition ineligible under § 109(h) “commences a bankruptcy case that is effective, and not a nullity that is void *ab initio*.”²⁷ Accordingly, Judge Bonapfel held that the proper remedy when the debtor failed to satisfy the pre-petition credit counseling requirement was to dismiss the case.²⁸

On the other hand, in *In re Salazar*, Judge Isgur stated that it was impossible to believe that Congress intended to exclude “specifically identified people” from the bankruptcy process, yet allow those same individuals to benefit from the automatic stay.²⁹ Judge Isgur acknowledged that his decision created uncertainty³⁰ as to whether the filing of a petition created an automatic stay, but stated that he saw no reason why “certainty must trump policy.”³¹ For mortgage servicers, this uncertainty could be costly if they choose to stop a foreclosure based on the filing of a petition, only to later find the petition was stricken because the debtor was ineligible.

If a case where the debtor fails to satisfy the credit counseling requirement is to be “stricken” rather than dismissed, and is not to be counted in determining whether the stay is limited in a subsequent case, then it appears some bankruptcy courts may have been successful in creating an additional exception to Congress’ provisions limiting the automatic stay. At least one court has held that the fact that a debtor was ineligible to be a “debtor” in a prior case is germane to whether the presumption that a “serial” bankruptcy filer’s current case was not filed in good faith has been adequately rebutted, under the Bankruptcy Code’s provisions limiting the stay for repeat filers.³² Furthermore, in choosing to dismiss (as opposed to striking the petition) the debtor’s case for failing to satisfy the pre-petition credit counseling requirement, the court stated the debtor’s concerns regarding the possibility of a limited stay in a subsequent case were “irrelevant.”³³ In reaching this conclusion, Judge Deller agreed with Judge Bonapfel’s conclusion in *Ross* that Congress’ addition of another exception to the automatic stay under § 362(b)(21) confirmed that Congress did not consider filings by ineligible debtors as void *ab initio*.³⁴

Another court, however, in holding that an individual who had not satisfied the credit counseling requirement was not eligible to be a debtor, and therefore the filing of the petition did not commence a bankruptcy petition, also concluded in a subsequent case filed by the individual that the first filing would not count as a “case of the debtor” for purposes of the § 362(c)(3) stay termination provisions.³⁵

Although the majority of courts appear to dismiss cases when the debtor has failed to satisfy the pre-petition credit counseling requirement, at least one court has cautioned that parties

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should be cautious and should seek a court determination before proceeding (e.g., proceeding with a foreclosure sale).³⁶ This determination from the court should also include a finding regarding whether or not a case was commenced by the filing of the petition, whether an automatic stay came into existence upon the filing of the petition, and in a future case, whether the present petition will count against the debtor for purposes of determining whether the stay is limited in scope (i.e., the stay either terminates after 30 days under § 362(c)(3) or does not go into effect under § 362(c)(4)).

Besides the credit counseling requirements preceding the filing of a case, receiving a discharge under Chapter 7 or 13 is conditioned upon the debtor's completion of an approved instructional course concerning personal financial management, unless the debtor lives in a district where such programs do not exist. Interestingly, there are no provisions regarding the funding of any such programs. In any case, no nonprofit budget or credit counseling agency may provide to a credit reporting agency information concerning whether a debtor has received or sought instruction concerning personal financial management from such agency.

Under newly added § 547(h), the trustee may not avoid a transfer (i.e., payment) to a creditor of the debtor if the payment was part of an "alternative repayment schedule" created by an approved non-profit budgeting and credit counseling agency.

Increased Filing Requirements

Title III of the BAPCPA vastly expanded the debtor's duties beyond those that previously existed under § 521 of the Code. In addition to filing a statement of financial affairs and schedules of assets, liabilities, income, and expenses, debtors under Chapter 7 and 13 are now required to file with the bankruptcy court: (1) a certificate from the approved nonprofit budget and credit counseling agency that provided services to the debtor (and any debt repayment plan developed by the agency); (2) federal tax returns; (3) evidence of employer payments received within 60 days before the filing of the case; (4) a statement of current monthly income; (5) a statement of monthly net income; and (6) a statement of anticipated income or expenditure increases over the 12-month period following the filing of the case.

Although Congress defined the term "current monthly income" as the debtor's average income for the 6-month period preceding the filing of the bankruptcy case, the term "monthly net income" was not defined. Certainly, since Congress is requiring the debtor to file a statement of "current monthly income" and a statement of "monthly net income," the terms must have different meanings. In fact, the Code specifically requires that, in addition to filing the statement of "monthly net income," the debtor must specify how the number was calculated.

Creditors are also permitted to request a copy of the debtor's petition, schedules, the statement of financial affairs, and reorganization plan filed by the debtor. Furthermore, upon request of the court, U.S. Trustee, or a party in interest, a debtor who is an individual in a

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Chapter 7, 11, or 13 case is required to file with the bankruptcy court a copy of any income tax returns filed with any government authority.³⁷ Similarly, in a Chapter 13 case, upon request of the court, U.S. Trustee, or a party in interest, the debtor is required to file annually, no later than 45 days before the anniversary date of the confirmation of the plan, a statement (under penalty of perjury) of the income and expenses of the debtor for the previous tax year, and a statement of the monthly income of the debtor, that also shows how income, expenditures, and monthly income were calculated.

The fact that creditors now have the ability to request copies of the documents and information filed by debtors, including copies of the income tax returns and statements of income and expenses filed by a debtor post-petition, should increase opportunities for loss mitigation since servicers are now able to obtain much of the needed financial information for a non-bankruptcy workout more easily.

If the debtor fails to provide the trustee a copy of his or her income tax return for the latest taxable period within 7 days of the first meeting of creditors (the § 341 meeting), or to any creditor that timely requests a copy (see § 521(e)(2)(A)(ii)), the court will require dismissal of the case, unless the debtor can demonstrate that the failure to comply is due to circumstances beyond the control of the debtor (which would seem to indicate that an opportunity for a hearing exists). Automatic dismissal is mandated if a voluntary Chapter 7 or 13 debtor fails to furnish all mandatory information or fails to timely file the requisite schedules within 45 days of filing a petition. Further, automatic dismissal is mandated on the 46th day after the filing of the petition, and the court will be required to order dismissal within 5 days of a request by a party in interest. In practice, only a few districts are actually allowing bankruptcy cases to be dismissed automatically. Instead, most districts adopted local rules before or shortly after October 17, 2005, which provide the debtor with the opportunity for notice and a hearing when a case was subject to dismissal because one or more required documents weren't furnished. Creditors are also finding that seasoned and prudent debtor attorneys are inserting language into plans that states that an order of confirmation constitutes a "finding" that all of the requirements under § 521 have been met.³⁸

The court may grant a request by the debtor for additional time (up to 45 days) to file the required information if the request is filed within the original 45-day period and there is a finding by the court that there is justification for extending the period for the filing. This provision (i.e., newly added § 521(i)(3)), however, is subject to another provision, namely, § 521(i)(4), which provides that the court may decline to dismiss a case on a motion of the trustee filed within the original 45-day period, if the court makes the following findings: (a) the debtor attempted in good faith to file all the required information and (b) the best interests of creditors would be served by administration of the case.

Strangely, this means that if the trustee wishes to administer assets for the benefit of creditors, but the debtor fails to act in good faith (e.g., failing to cooperate with his or her attorney and

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the trustee to correct the deficiencies), the trustee will be unable to keep the case from being dismissed, even though keeping the case open would be more equitable or beneficial to the creditors.

As expected, some debtors, especially those who are *pro se* (not represented by counsel), are unable to file all of the necessary information by the deadline. It is therefore important that servicers use services such as PACER and ADS to check for the filing of required documents and move for dismissal where appropriate.

Besides the amendments to § 521 of the Code requiring that additional documents and information be provided to the trustee and parties in interest, § 521 was further amended to provide that if a debtor fails to file a tax return that becomes due after the filing of a bankruptcy case or to “properly” obtain an extension of the due date for filing a tax return, the taxing authority may request that the court enter an order converting or dismissing the case. Although a debtor may be given additional time to file the delinquent tax returns, if the debtor does not file the required return or obtain an extension within 90 days after a request is filed by the taxing authority, the court “shall” convert or dismiss the case, whichever is in the best interests of creditors and the estate.

Section 1308 of the revised Code requires that the debtor file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date the petition was filed. Furthermore, § 1325(a) of the Code was amended to provide that the debtor must have filed all tax returns as required by § 1308 as a condition for confirmation of the plan. Amended § 1307 provides that if the debtor fails to timely file a tax return required under § 1308, the court shall dismiss or convert a Chapter 13 case to Chapter 7 upon request of a party in interest.³⁹ However, the debtor can avoid dismissal where the failure to comply was due to circumstances beyond his control.

Notice to Creditors

Section 342 of the Code, which deals with notice, was amended in several respects. To begin with, any entity can file a “notice of address” with any bankruptcy court, or particular bankruptcy courts, to be used in any bankruptcy case in which the entity appears as a creditor. This provision suggests that a servicer can file 1 notice with only 1 court for use by *every* bankruptcy court across the country. Since this provision will likely come under challenge, servicers wishing to provide an effective “notice of address” under § 342(f)(1) should consider filing such a notice with *each* bankruptcy court.

For notice to a creditor in a particular bankruptcy case, notice will not be effective unless it is served at an address filed by the creditor with the court, or at an address used by the creditor in at least 2 communications to the debtor within the 90-day period preceding the bankruptcy filing. In order for notice to be effective, the debtor’s name, address, account number and the last 4 digits of the debtor’s social security number must be included in the notice. If a creditor

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files a “notice of address” in a bankruptcy case specifying an address which differs from any communications to the debtor, or to a bankruptcy court under § 342(f)(1), the address contained in the “notice of address” filed in a particular bankruptcy case shall be controlling. Once a creditor files a “notice of address” with the debtor and court for use in a particular bankruptcy case, the debtor and the court must begin using the address identified in the notice of address within 5 days.

Section 342(g) further provides that notice given to a creditor by the debtor or the court other than in accordance with this section shall not be effective until the notice is brought to the attention of the creditor. If a creditor designates a person or a subdivision to be responsible for receiving notices and establishes reasonable procedures so that notices received by the creditor are to be delivered to such person or subdivision, then a notice provided to the creditor is not considered effective, as contemplated by § 342, until the notice is received by such person or subdivision. Furthermore, a monetary penalty may not be imposed on a creditor for a violation of the automatic stay or for a failure to turn over property of the estate, unless the conduct that is the basis of the violation or such failure occurs after the creditor receives effective notice, as provided for under § 342.

Servicers should give serious consideration to taking advantage of the provisions allowing for the filing of a notice of address with any or all bankruptcy courts for use by the courts in all bankruptcy cases in which the servicer is listed as a creditor or party in interest. Similarly, servicers should consider filing a notice of address upon the court, the debtor, and debtor’s counsel for use in each particular case that notice of a bankruptcy filing is received. Additionally, a disclaimer should be included in each “notice of address,” providing that any notice or communication sent to any address other than that in the “notice of address” shall not be effective or in accordance with § 342 of the Code.

The failure to give effective notice may not only impact operation of the automatic stay, but also the deadline for filing a claim, an objection to exemptions, or a nondischargeability complaint. Accordingly, servicers should consider designating a person (which can include a corporation under the Code) to receive all notices, and establish reasonable written procedures regarding the receipt and delivery of mail. However, for those institutions whose consumer lending portfolio includes more than one type of loan (e.g., mortgages, car loans, credit cards), this may be confusing for all parties, and chances are that notices may get misdirected. Therefore, it may be advisable for servicers to amend their monthly statements and other notices sent to borrowers to include language directing that all notices regarding bankruptcy be sent to a particular address.

It may be arguable under this safe harbor provision (§ 342(g)) that notice other than in accordance with a creditor’s “notice of address” would not be deemed “brought to the attention of such creditor” and therefore ineffective to put a servicer on notice of a bankruptcy filing. However, the case law regarding the level of notice required to put a creditor on notice

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of the automatic stay is sufficiently developed so that if a servicer or its counsel had “actual notice” of a bankruptcy filing, regardless of a debtor’s compliance with § 342, the servicer and its agents would have to cease its foreclosure and collection efforts. Keep in mind that in a Chapter 13 case, there may be a codebtor stay. The amendments to § 342 fail to make any mention of the codebtor stay under § 1301. Although this may have been an oversight on the part of Congress, there isn’t an express “safe harbor” for ineffective notice with regard to the codebtor stay.

Discouraging Bankruptcy Abuse

Under the former Code, creditors were forced to file emergency motions for relief from the stay or take other defensive measures such as seeking *in rem* or prospective relief in response to serial filers. Moreover, bankruptcy court decisions were not uniform on the issue of whether the filing of a bankruptcy petition by an ineligible debtor invoked the automatic stay. The result was that creditors endured significant delays as well as legal expenses from multiple or otherwise abusive filings.

The new § 362(c)(3) of the Code was intended to provide creditors with greater protections, including the termination of the automatic stay 30 days after the filing of a petition if a Chapter 7, 11, or 13 petition was pending and dismissed within the preceding year, unless the stay is extended by the court and the “later” filing is in good faith. New § 362(c)(3)(D) identifies certain conditions under which a history of previous cases gives rise to a rebuttable presumption that the case is not filed in good faith. But such cases as *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006) have held that even if the automatic stay terminates, it does so only with respect to the debtor and not as to property of the estate. Thus, a foreclosure action may still be stayed even after the 30 days expires. In fact, the overwhelming majority of bankruptcy courts have followed *Johnson*.⁴⁰ Therefore, it is more practical to move for relief from the stay instead of opposing a debtor’s motion to extend the stay.

Newly added § 362(j) provides that upon a request by a party in interest, the court “shall” issue an order confirming that the automatic stay has been terminated. Accordingly, when the stay terminates automatically after the expiration of 30 days, servicers may wish to obtain such an order before proceeding with foreclosure, especially where title companies are reluctant to insure title without an order or some other document confirming there is no longer an automatic stay in place. Unfortunately, Congress provided little direction as to the procedure for filing the request for the comfort order, or who the request for a comfort order should be served upon. Prior to the effective date of BAPCPA, several judges commented publicly that they would be reluctant to issue an order confirming that the stay has terminated without giving the debtor an opportunity to respond, even though the Code specifically provides that any hearing to extend the stay in the “later” case must take place within the first 30 days after the filing of the “later” case.

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However, at least one other judge indicated that, although the debtor might have to be served with the request for a comfort order, the debtor would not necessarily be afforded a hearing, and thus a request for an order confirming that the stay had terminated would be similar to the process in most jurisdictions for an order authorizing an examination under Federal Bankruptcy Rule 2004 (i.e., *ex parte*). Still another judge envisioned the process for requesting comfort orders as similar to requesting a copy of the order for relief from the court clerk, thus indicating the issuance of comfort orders may be quick, and without the benefit of a hearing. Unfortunately, since many courts took a long time in adopting local rules and procedures to address comfort orders and others chose not to adopt procedures at all, the procedures for obtaining comfort orders vary greatly across the country.

Again, since bankruptcy courts have limited the effect of § 362(c)(3) by determining the automatic stay does not terminate after 30 days with respect to property of the estate, there is little benefit to seeking a comfort order unless the order specifically states the entire automatic stay terminates (i.e., also with respect to property of the estate) or the servicer is given permission to foreclose or seek other nonbankruptcy remedies (e.g., loss mitigation). Instead, the servicer should file a motion for relief from the automatic stay.

Where a debtor has had more than one case pending within the previous year and where the previous case(s) ended in a dismissal (not counting any cases dismissed for failing to meet the means test under § 707(b)), there is a presumption that the later case has not been filed in good faith, although the presumption can be rebutted by “clear and convincing evidence.” The new § 362(c)(4) of the Code further provides that if the later case follows 2 or more cases that were dismissed within the previous year, then the stay does not take effect at all and can be imposed only upon motion of a party in interest such as the debtor, trustee, or creditor and only if the debtor can rebut the presumption of bad faith (i.e., by clear and convincing evidence). At least one court has upheld this interpretation. See *In re Frazier*, 339 B.R. 516 (Bankr. N.D. Fla. 2006). Further, under § 362(c)(4), on request of a party in interest, a court is required to promptly enter an order confirming that no stay is in effect. U.S. Bankruptcy Judge Brown (W.D. Tennessee) and Nashville attorney Lawrence Ahern, III have specifically stated that “[p]resumably this would require the court to verify without the benefit of a hearing that the request for such an order was based upon correct facts.”⁴¹ Aggressive creditors wishing to get debtors into a posture of having 2 previous cases sooner may want to consider moving for dismissal under § 1307(c)(6) when there is a material default by the debtor with respect to a term of the confirmed plan.

These new provisions were intended to shift the burden from the creditor to the debtor since the debtor (or another party in interest) was now be required to take steps to keep the automatic stay in place and establish good faith (versus the creditor establishing bad faith or lack of good faith), which ordinarily requires a showing that circumstances have changed (e.g., new employment, additional source of income, reduced expenses) sufficiently to suggest the debtor has the ability to succeed in the later case. Unfortunately for creditors,

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bankruptcy courts have been liberal in granting motions to extend or impose the stay, and scrutiny is only heightened if a creditor appears at the hearing to object.

Nevertheless, servicers need to be diligent in reviewing the pleadings that are received during the first 30 days in a case where the stay is subject to automatic termination. In certain cases, potential red flags may be raised, and servicers may choose to move for relief from stay or object to confirmation based on information revealed in the motion to extend/impose the stay. While *pro se* debtors and those debtors represented by attorneys who are less familiar with the amendments to the Code may be unaware that the protections usually afforded by the automatic stay will be limited where the debtor has had 1 or more bankruptcy cases dismissed in the prior year, it is likely that debtors represented by more seasoned bankruptcy counsel will file motions to keep the automatic stay in place after 30 days at the same time as the petition. However, in determining whether the automatic stay will terminate automatically in the “later” case, it is important to note that previous bankruptcy cases dismissed pursuant to § 707(b) (i.e., for substantial abuse or for failing the means test) do not count for purposes of determining application of the automatic stay. Therefore, when using ADS, PACER, or other services or technologies to monitor the dismissal and filing of bankruptcy cases, it will be important to know why any previous cases were dismissed.

On the other hand, an alternate strategy for servicers may be to secure an adequate protection order in response to the second filing and a request to keep the stay in place (especially for those servicers less concerned about the second case than others) since: (1) 30 days may not be ample time to carefully review the schedules and plan; or (2) some servicers (or their title companies) may not wish to proceed to foreclosure upon automatic termination of the stay without some order or notice from the court.

Even though § 362(c)(4) states that the automatic stay does not go into effect where there have been 2 or more pending cases in the preceding year before the filing of the later case, the use of the conjunctive “and” before the phrase “on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect” may lead to the suggestion, at least by debtor attorneys, and perhaps by debtor-friendly judges, that servicers will need an order confirming there is no automatic stay in effect before proceeding with foreclosure. Nevertheless, even where the court does allow a servicer to proceed to foreclosure without the comfort order, it may be advisable to request the order after the sale in order to ensure a title company will insure title.

Servicers need to be cautious, however, that the new provisions dealing with serial or abusive filers make no mention of § 1301 of the Code (i.e., the codebtor stay). Therefore, even though the automatic stay may terminate 30 days after the filing of the “later” case where the debtor has had a prior case that was pending and dismissed in the 12-month period immediately preceding the filing of the later case, if the “later” case is a Chapter 13 case, servicers may need to move for codebtor relief (where a codebtor exists) before proceeding with a

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foreclosure since the codebtor stay will not terminate automatically. The same will apply where the debtor has had 2 cases dismissed in the 12-month period prior to the filing of the later case and there is no automatic stay in the later case. See *In re King*, 362 B.R. 226 (Bankr. D. Md. 2007).

As it turns out, whether or not the codebtor stay automatically also terminates when the stay under § 362(a) terminates (where the debtor has had at least 1 previous bankruptcy case dismissed within the 12-month period immediately preceding the filing of the “later” case) may be subject to interpretation by the courts. On one hand, some judges may choose to interpret the provisions of § 362(c) broadly and hold that the codebtor stay provided by § 1301 terminates at the same time as the automatic stay provided by § 362(a). On the other hand, § 1301 does not incorporate the provisions of § 362, but is rather a separate stay provision in itself.

Therefore, those judges who believe that it is not their role to issue decisions based on what Congress should have done will likely be reluctant to hold that the codebtor stay terminates as a matter of law, regardless of the oddity of the result. The key point here is that mortgage servicers and other creditors need to be aware that whether the codebtor stay terminates at the same time as the automatic stay after 30 days in the “later” case is an open issue, one that will vary among jurisdictions. Accordingly, servicers and other creditors must be cautious in determining whether a codebtor exists (and moving for appropriate relief) before proceeding on the assumption there is no stay in effect.

Note that at least one bankruptcy judge from Alabama indicated prior to the effective date of BAPCPA that, due to the severe consequences to the debtor arising from the dismissal of a bankruptcy case (i.e., automatic termination of the stay after 30 days in the next case), there would be no automatic dismissal of bankruptcy cases. In other words, whenever a debtor is facing dismissal of a bankruptcy case, the debtor would have to be afforded the opportunity of a hearing (as previously indicated, many bankruptcy courts adopted local rules requiring a hearing before a case was actually dismissed, instead of automatically dismissing the case). Arguably, if the case is dismissed, any failure by the debtor to appear at the hearing would be a factor in determining whether any “later” case was filed in good faith.

An additional wrinkle, and possibly another unintended consequence of the amendments to the Code, is how servicers should respond to the debtor’s plan where the stay is subject to termination (or never being effective — i.e., where the debtor has had 2 or more cases dismissed within the 12-month period prior to the “later” case). Under § 1327, if a creditor fails to object to a debtor’s plan provision regarding the cure of mortgage default, the debtor’s plan would be confirmed, and the order of confirmation would be *res judicata* (considered final and barred from any future objections by the creditor). Accordingly, unless dealing with a Chapter 13 trustee who will be proactive in objecting to confirmation where the stay terminates after 30 days (or never becomes effective) or there is a local rule in a particular

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jurisdiction to obviate the need for such an objection, servicers must be diligent in ensuring that an objection to confirmation is filed in any case where the debtor proposes to cure a pre-petition default or otherwise modify the rights of the servicer when the debtor has had 1 or more cases dismissed within 12 months of the present case. At least one court has determined that a debtor can confirm a plan even after the court has denied a motion to extend the stay. See *In re Tomasini*, 339 B.R. 773 (Bankr. D. Utah 2006).

Newly added § 362(d)(4) of the Code further provides that a bankruptcy court is to grant 2-year relief from the automatic stay upon request of a party in interest in connection with certain real property actions if the court finds that filing the bankruptcy petition was part of a scheme to delay, hinder, and defraud creditors, including: (a) a transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (b) multiple bankruptcy filings affecting such real property. At least one court has found that a creditor may obtain *in rem* relief from the automatic stay pursuant to § 362(d)(4) only if the creditor can demonstrate that the debtor has filed repeated cases with the intent to hinder, delay and defraud creditors. See *In re Muhaimin*, 2006 WL 1153898 (Bankr. D. Md. Apr. 25, 2006). Additional courts have confirmed that the three requirements (i.e., hinder, defraud and delay) must be found in the conjunctive. See *In re Gould*, 348 B.R. 78, 80 (Bankr. D. Mass. 2006). And since the Code does not define the term “scheme”, a bankruptcy court may use the plain meaning of the term. See *In re Young*, 2007 WL 128280 (Bankr. S.D. Tex. 2007). In another case, a bankruptcy court sanctioned the debtors’ attorney as a willing participant in the scheme to hinder, defraud and delay. See *In re Johnson*, 2008 WL 183342 (Bankr. E.D. Va. Jan. 18, 2008).

In essence, § 362(d)(4) authorizes *in rem* relief. It is important to note, however, an order entered under this paragraph is binding in any other case under the Code “purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court” only if the order is recorded in accordance with state law(s) governing notices of interests or liens in real property. Moreover, the Code specifically provides that any federal, state or local government unit that accepts notices of interests or liens in real property shall accept any certified copy of any order under § 362(d)(4) for indexing and recording. Therefore, servicers should consider recording *all* orders entered pursuant to § 362(d)(4), which will require obtaining a certified copy of the order entered under § 362(d)(4). Keep in mind, however, that Congress specifically provided that a debtor in a subsequent case can move for relief from an order under § 362(d)(4) based upon changed circumstances or for good cause shown, after notice and a hearing.

The provisions regarding *in rem* relief (§ 362(d)(4)) are made even more effective by the addition of § 362(b)(20), which provides that after the entry of an order under § 362(d)(4), any act to enforce a lien against or security interest in real property is excepted from operation of the automatic stay in later cases, up to a period of 2 years following the entry of the order under § 362(d)(4). Therefore, should a debtor file a subsequent bankruptcy case during the 2-

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year period, the creditor should be free to foreclose without first having to obtain a comfort order or filing a motion to validate.

Similarly, under another exception to the automatic stay (§ 362(b)(21)) added by BAPCPA, any act to enforce any lien against or security interest in real property is excepted from operation of the automatic stay, where the debtor is ineligible under § 109(g) to be a debtor in a bankruptcy case, or if the bankruptcy case was otherwise filed in violation of a bankruptcy court order in a prior bankruptcy case prohibiting the debtor from being a debtor in another bankruptcy case (e.g., an order under § 349 prohibiting a debtor from filing for a period greater than 180 days). In essence, this new provision authorizes prospective relief. Again, where the creditor has an order from a prior case declaring the debtor ineligible to be a debtor in a future case, the creditor should be free to foreclose without first having to obtain a comfort order or filing a motion to validate should the debtor file a subsequent case during the prohibited period.

Although not affecting servicers directly, the automatic stay no longer applies to the collection of support from the debtor's wages or the interception of income tax refunds. Nor does the automatic stay apply to the withholding of income from a debtor's wages and collection of amounts withheld towards repayment of a loan against an ERISA-qualified retirement plan or a thrift-savings plan recognized by the Internal Revenue Code.

Aside from the amendments to § 362, Congress has limited the ability of a debtor to receive a discharge, although these provisions do not stop a debtor from *filing* a subsequent case. Individuals were formerly eligible to receive a discharge under Chapter 7 once every 6 years. BAPCPA extended this time period to 8 years. Moreover, a Chapter 13 discharge will be denied any debtor who has received a discharge: (1) in a Chapter 7, 11, or 12 case within the preceding 4 years; or (2) in another Chapter 13 case within the preceding 2 years. Again, this limitation on the discharge does not affect a debtor's eligibility to file for Chapter 13 relief.⁴² Note, however, that § 727(a)(9) remained unchanged. Therefore, if a debtor received a discharge in a Chapter 13 case within the previous 6 years after paying at least 70 percent to unsecured creditors, the debtor would be eligible for a Chapter 7 discharge.

Nondischargeability provisions under § 523 of the Code were also been modified to reduce the amount and timeframe for nondischargeability from \$1,075 to \$500, for aggregate consumer debts owed to a single creditor on luxury goods incurred within 90 days (formerly 60 days) prior to the filing of the bankruptcy case. Similarly, for cash advances that are extensions of consumer credit under an open end credit plan, the time period was extended from 60 days to 70 days, and the amount would be reduced from \$1,075 to \$750.

Treatment of Secured Claims

Section 306 of BAPCPA provides that § 506 of the Code, which enables bifurcation and cramdown of a secured creditor's claim, shall not apply if:

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- i) the creditor has a purchase money security interest securing the debt that is the subject of the claim,
- ii) the debt was incurred within the 910-day period preceding the filing of the case, and
- iii) the collateral for that debt consists of a motor vehicle acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing (e.g., big screen televisions).

Bankruptcy courts have disagreed on many levels regarding the treatment of automobiles. For instance, many courts have held that since an automobile lender is allowed to be paid in full (to the extent the obligation is “purchase money”)⁴³ where the loan on an automobile for personal use⁴⁴ is less than 910 days old, the lender is also subject to having the vehicle surrendered in full satisfaction of the debt.⁴⁵ Similarly, if an automobile loan is not subject to cramdown under § 506(b) because the loan is less than 910 days old, the lender is also not eligible to interest or fees since § 506(b) is the same section of the Code authorizing interest and fees. Therefore, the lender must choose between being paid in full, or receiving interest⁴⁶ and fees.

With § 306 of BAPCPA, it appears Congress intended to overrule court decisions allowing debtors to cram down or modify residential mortgages secured by the debtor’s principal residence either because the property involved a multi-unit or multi-family dwelling, or because the court determined the mortgage was not secured “only” by a security interest in real property since the security interest extended to rents, insurance proceeds, or an escrow account. In addition to clarifying that mobile homes and manufactured homes are subject to the anti-modification provision of § 1322(b)(2) of the Code,⁴⁷ the definition for “debtor’s personal residence” has otherwise been amended to restrict the ability of a debtor to cram down or modify a mortgage. Under § 101(13A), the term “debtor’s personal residence” means: (a) a residential structure, including incidental property, without regard to whether the structure is attached to real property; and (b) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer. The term “incidental property” means: (a) property commonly conveyed with a principal residence in the area where the real property is located; (b) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and (c) all replacement or additions. Interestingly, the term “debtor’s principal residence” does not contain a requirement that the debtor actually reside there.

Section 1325(a) of the Code was amended to prohibit plan provisions that provide for the release of a lien upon payment of a stripped-down secured claim. In other words, the secured creditor retains the lien until the claim is paid pursuant to non-bankruptcy law or the case is discharged (whichever occurs first). Of course, the secured creditor retains the lien if the case is dismissed or converted without completion of the Chapter 13 plan. Accordingly, servicers

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should consider objecting to any plan provisions that are in violation of these amendments to § 1325(a) of the Code. It should go without saying that, in addition to objecting to plans that attempt to modify a servicer's rights, including the ability to charge inspection fees, servicers should consider objecting to any plans that fail to provide for such fees, as well as adjustments in the monthly payment due to escrow and ARM adjustments.

An additional provision under § 309 of BAPCPA, that only lessors of personal property and creditors holding a claim secured by personal property benefit from, is the requirement that debtors begin making adequate protection payments directly to the lessor or secured creditor prior to confirmation, and the requirement that a debtor retaining possession of personal property provide reasonable evidence of requisite insurance coverage within 60 days after the filing of the bankruptcy case. In most jurisdictions, however, local rules usually require a debtor to have insurance in place much earlier than 60 days after the filing of the bankruptcy case.

Valuation

Section 327 of BAPCPA states that if the debtor is an individual Chapter 7 or 13 debtor, the value of personal property securing an allowed claim shall be determined based on its "replacement value" as of the date of petition filing without deduction for costs of sale or marketing. Furthermore, with respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

Section 309 of BAPCPA provides that valuations of property and allowed secured claims in a Chapter 13 case shall not apply in a case converted to Chapter 7. With respect to cases converted from Chapter 13, the claim of any creditor holding security at the commencement of the case shall continue to be secured by that security unless the full claim amount, as determined by applicable non-bankruptcy law, has been paid in full as of the date of conversion. Finally, a pre-petition default shall have the effect given under applicable non-bankruptcy law unless at the date of conversion the default has been fully cured pursuant to the plan.

Section 722 of the Code was amended so that redemption of personal property now requires payment of the allowed secured claim in full at the time of redemption, thus precluding redemption in installment payments.

Truth in Lending Amendments

Section 1302 of BAPCPA amended the Truth in Lending Act, rather than the Bankruptcy Code, to provide for enhanced disclosures for credit extensions secured by a dwelling. In addition to having to disclose when a consumer applies for an open-end loan secured by a dwelling the need to consult a tax advisor regarding the deductibility of interest and charges, a lender will now have to include a clear and conspicuous statement that the interest on any

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portion of the credit extension exceeding the fair market value of the dwelling is not deductible for income tax purposes, and that the consumer should consult a tax advisor for further information regarding the deductibility of interest and charges. This additional statement must also be included in: advertisements for open-end credit lines (print or Internet advertisements), disclosures made at the time of application for closed-end credit, and advertisements for closed-end credit (print or Internet advertisements).

Miscellaneous Changes to Chapter 13

In addition to the changes previously discussed, there are several other amendments specific to Chapter 13. Under the former Code, § 1325 required that the debtor's plan be proposed in good faith. The revised Code adds an additional condition for confirmation: the debtor must also demonstrate that the initial case filing was in good faith. However, Congress failed to specify how this determination would be made or the factors that would be considered. Arguably, the factors for measuring whether a Chapter 13 case was filed in good faith should be the same as those listed under § 362(c) for dealing with the repeat filer. Whether a debtor was forced to convert to Chapter 13 after failing the means test (meaning there was a presumption of abuse) may also be a factor considered by a bankruptcy court.

Section 1326 of the Code, entitled "Payments," was amended to provide that the debtor must begin making payments no later than 30 days after the filing of the plan or the case, whichever is earlier. The debtor must pay the amount proposed by the plan. However, the debtor may reduce the amount paid to the trustee by the amounts that must be paid directly to the lessor of personal property and purchase money secured creditors (i.e., adequate protection payments). Since Chapter 13 trustees in some jurisdictions felt that it would be difficult to monitor the debtor's adequate protection payment to secured creditors (for personal property), they filed motions to make those payments on behalf of the debtor.

The amendments to § 1326 suggest that in the event a case is dismissed prior to confirmation, instead of the trustee refunding the amounts paid by the debtor directly to the debtor, as was the case under the former Code, creditors will now be entitled to receive, before the debtor receives any refund, the pre-confirmation payments that are due and not yet paid (i.e., adequate protection payments).

Section 1324 of the Code was amended to add subparagraph (b), which provides that the confirmation hearing may be held not earlier than 20 days and not later than 45 days "after the date of the meeting of creditors," unless the court determines that it would be in the best interests of creditors and the estate to hold such a hearing at an earlier date and there is no objection to holding the confirmation hearing on an earlier date. It is unclear who is entitled to request that the confirmation hearing be held on an earlier date. Arguably, since it is "parties in interest" that have standing to object to confirmation under § 1324(a), any party in interest (e.g., the debtor, a creditor, or trustee) could move for an earlier confirmation hearing.

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It is also unclear whether “after the date of the meeting of creditors” refers to only the first setting for the 341 hearing, or the date for any continued or rescheduled 341 hearing. In any event, servicers need to be aware that confirmation hearings are now being scheduled much earlier than before in many jurisdictions, and thus it will be necessary that any initial review prior to the loan being referred to counsel be conducted even more quickly than in the past.

Section 1328 of the Code was amended to reduce the scope of the super discharge. Chapter 13 debtors will no longer be able to discharge fraud claims (including those arising from providing false information on a loan application), for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. A Chapter 13 discharge would apply to unpaid but timely filed taxes, and debts incurred to pay nondischargeable tax obligations, but would not apply to taxes that should have been withheld, trust fund taxes, unfiled or late-filed tax obligations. Similarly, a Chapter 13 discharge will not apply to claims for evasion of taxes or where the debtor makes a fraudulent return.

A Chapter 13 debtor will not be able to obtain a discharge of a debt for restitution, or damages awarded against the debtor as a result of a willful or malicious injury that caused personal injury or death to an individual (see § 1328(a)(4)). However, the super discharge will still include debts for willful and malicious injury to property under § 523(a)(6).

Chapter 11 Cases Filed by Individuals

Several changes have been made to the Code regarding Chapter 11. To begin with, § 1121 has been amended to provide that the 120-day exclusivity period for filing a plan may not be extended beyond a date that is 18 months after the date of the order for relief (i.e., the date of the filing of the petition in a voluntary case). There are also several changes that are specific to Chapter 11 cases filed by individual debtors.

Section 1115 was added to the Code to expand the definition of property of the estate in individual Chapter 11 cases beyond that found in § 541 to include:

- i) all property acquired by the debtor after the commencement of the case but before the case is closed, dismissed or converted to a case under Chapter 7, 12 or 13 (whichever occurs first); and
- ii) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed or converted to a case under Chapter 7, 12 or 13 (whichever occurs first).

Similarly, newly added § 1123(a)(8) requires the plan in an individual debtor’s case to provide for the payment of all or such portion of earnings from post-petition personal services performed by the debtor or other future income of the debtor as is necessary for the execution of the plan. Furthermore, under § 1129(a)(15), the plan in an individual debtor’s case (where the holder of an unsecured claim objects to confirmation of the plan) must provide that:

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- i) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
- ii) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides for payments, whichever is longer.

In what may have been an effort by Congress to resolve the split of authority regarding whether a bankruptcy court has jurisdiction after confirmation of plan, at least in cases involving individual debtors, § 1141(d)(5)(A) provides that unless the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan. Moreover, § 1127(a)(e) provides that in the case of an individual debtor, the plan may be modified after confirmation of the plan (but before completion of the payments), regardless of whether or not the plan has been substantially consummated, upon request of the debtor, trustee, United States trustee, or the holder of an allowed unsecured claim, to:

- i) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- ii) extend or reduce the time period for such payments; or
- iii) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made outside the plan.

The Act also imposed a new deadline under § 1129(e) for the small business debtor that requires confirmation of a plan not later than 45 days after the plan is filed. Moreover, a bankruptcy court may only grant an extension of the deadline for confirmation of a small business plan under Chapter 11 if it complies with all the requirements of the Code governing plans in small business cases. Therefore, if there is no signed order extending the time for confirmation of a plan in a small business case prior to expiration of the 45-day deadline, then no extension may be granted. See *In re Caring Heart Home Health Corp., Inc.*, 380 B.R. 908 (Bankr. S.D. Fla. 2008).

With limitations on an individual Chapter 11 debtor's ability to indefinitely prolong the exclusivity period, and provisions altering the scope of the property of the estate, the value that must be paid to creditors, the timing of discharge, and the ability of the debtor to modify a plan post-confirmation, it is clear that servicers should approach an individual Chapter 11 case much like a Chapter 13 case. For instance, servicers should promptly file claims, seek adequate protection orders, and pursue scheduling orders regarding the filing of a plan and a disclosure statement.

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Child Support

BAPCPA revised the priority rankings under § 507 of the Code to place certain unsecured claims for “domestic support obligations” (hereinafter, “support claims”) within the first priority claim if the funds are received by a governmental unit. Nevertheless, specified administrative expenses of the trustee are granted priority over such claims. At first glance, this raising in priority of support claims may seem like a huge victory for support claimants. However, when one considers that the goal of BAPCPA was to force more debtors to Chapter 13, and the effect of § 306 of BAPCPA will be to shift money away to secured creditors at the detriment of unsecured creditors, there will be little, if anything left for which to claim victory. Nevertheless, the revised Code conditions confirmation of a plan, and discharge under Chapter 11, 12, or 13 upon certification that the debtor has fully paid all support claims and made all post-petition support payments that have come due after the filing of the case. Moreover, the failure to make post-petition support payments is grounds for dismissal or conversion under the newly added § 1307(c)(11).

The amendments to the Bankruptcy Code also significantly increased the duties of the Chapter 13 trustee with regard to support claims. First, the trustee must now provide written notice to the holder of a support claim of the right to use the services of the state child support enforcement agency for the state in which the claimant resides in collecting child support during and after the bankruptcy case. This notice must provide the address and telephone number of said state enforcement agency. In addition, the trustee must provide notice to the state child support agency of the existence of the support claim, including the name, address, and telephone number of the claimant. Finally, when the debtor is granted a discharge under § 1328, the trustee must notify the state child support agency of:

- i) the granting of the discharge;
- ii) the last recent known address of the debtor;
- iii) the last recent known name and address of the debtor’s employer; and
- iv) the name of each creditor that holds a claim that:
 - a. is not discharged under §§ 523(a)(2) or 523(a)(4); or
 - b. was reaffirmed by the debtor under § 524(c).

Although the child support provisions of BAPCPA do not affect mortgage servicers directly, there are several unintended consequences that may have an indirect effect on the mortgage industry. First, since child support claimants now have first priority, ahead of administrative expense claimants, such as attorneys’ fees incurred by the debtor for the benefit of the estate, debtors who have child support arrears may find it more difficult to find an attorney to file their Chapter 13 case unless the attorney fee is paid in full prior to the case being filed. Likewise, those debtors who do not have the means or intention of maintaining their post-petition child support obligations will be unable to obtain confirmation of a Chapter 13 plan, and will thus be unable to obtain the benefits of the automatic stay, cramdown, or possibly even the ability to strip off a junior lien.

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In addition, the automatic stay no longer applies to the collection of support from the debtor's wages or the interception of income tax refunds. Thus any Chapter 13 case that is dependent upon tax refunds may be impacted by a support creditor. Moreover, since the automatic stay does not apply to the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under state law, support creditors have even greater ability to disrupt the repayment of debt in a Chapter 13 case.

Consumer Protections

Most of the provisions of the legislation are in favor of creditors and designed to prevent certain abuses by debtors. However, the full title of the legislation is the "Bankruptcy Abuse Prevention and Consumer Protection Act," and there are in fact a few consumer protection provisions. Other provisions were suggested by way of amendment, but most were defeated.

The first consumer provision affects unsecured creditors. Under § 201 of BAPCPA, a bankruptcy court may reduce a claim "based in whole on an unsecured consumer debt" by up to 20 percent if the debtor can show by clear and convincing evidence that the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed by an approved credit counseling agency acting on the debtor's behalf. (Approved agencies can be found at www.usdoj.gov/ust/bapcpa/ccde/cc_approved.htm.) For this provision to apply, no part of the debt under the alternative repayment schedule may be nondischargeable, and the offer by the debtor must have: (1) been made at least 60 days before the date of the filing of the petition and (2) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof.

Also affecting creditors are amended procedures for reaffirmation, which mandate detailed disclosures and explanations in a clear and conspicuous manner, including the terms "Amount Reaffirmed" and "Annual Percentage Rate," which must be disclosed more conspicuously than other terms. The "Amount Reaffirmed" refers to the total of any fees and costs accrued as of the date of the disclosure statement related to such total amount. The term "Annual Percentage Rate" shall be disclosed as the annual percentage rate determined under the Truth in Lending Act.

A debtor wishing to enter into a reaffirmation agreement must make various certifications to the court. The debtor must certify that he or she understands that if the debtor's expenses less income does not leave enough to make the payments under the reaffirmation agreement, there is a presumption that the agreement would create an undue hardship, and thus the agreement must be reviewed by the court. However, this presumption may be overcome if the debtor can sufficiently explain (in writing) how the payments will be made (such as identifying additional sources of funds to make the payments). A debtor represented by counsel who

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wishes to enter into a reaffirmation agreement must obtain a written certification from the attorney that:

- i) the reaffirmation agreement represents a fully informed and voluntary agreement by the debtor;
- ii) the agreement does not impose a hardship on the debtor or any dependent of the debtor;
- iii) the attorney has advised the debtor of the legal effect of and consequences of the agreement and any default under the agreement; and
- iv) if a presumption of undue hardship has been established with respect to the agreement, in the opinion of the attorney, the debtor is able to make the payments.

Under § 524(l) of the Code, a creditor may accept payments from a debtor before and after the filing of a reaffirmation agreement. Furthermore, a creditor may accept payments from a debtor under a reaffirmation agreement that the creditor believes in good faith to be effective. Significantly, credit unions are exempt from such detailed disclosures and requirements for reaffirmation agreements.

A national reaffirmation form, in conformity with the expanded disclosure requirements contained in § 524, was developed by the Administrative Office of the U.S. Courts.⁴⁸ In many jurisdictions, use of this model form for reaffirmation agreements is mandatory.

The changes to Section 524 of the Code have meant that bankruptcy courts have to devote much more time to the review of proposed reaffirmation agreements.⁴⁹

Under § 524(i) of the Code, if a creditor “willfully” fails to credit payments received under a confirmed plan (unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan — including crediting amounts required under the plan), the creditor will be found to have violated the discharge injunction if the failure to credit the payment in the manner required by the plan caused material injury to the debtor. It is likely this consumer provision will be highly litigated. What constitutes “willful” will certainly vary across the country, as well as the type of damages awarded to the debtor (e.g., damages for emotional distress). Also, since there is no discharge in Chapter 13 for long-term debts that were cured through a plan, an argument can be made that there can be no discharge injunction in those cases and, therefore, there cannot be a § 524(i) violation of an injunction that does not exist. There are no reported cases to support this contention, however, so servicers should treat the provisions of § 524(i) seriously and check with local counsel as to how the payments should be applied.

Meanwhile, many debtor attorneys are using § 524 as an offensive weapon by inserting language into plans dictating how payments are to be applied, and providing that any divergence from this language constitutes a violation of § 524. In fact, debtor attorneys argue

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that adding special plan language regarding the application of payments is necessary since the provisions of § 524(i) of the Code are not “self-executing.” However, these same attorneys are also using § 524(i) of the Code as a basis to justify superfluous plan provisions that require compliance with RESPA, TILA and other federal statutes, or provisions providing that the account is current upon confirmation.⁵⁰

While several courts have rejected these arguments and specifically indicated that § 524(i) does not authorize this type of language,⁵¹ other provisions have been allowed to remain in a plan. Moreover, these arguments by debtors’ counsel appear to be the basis for several jurisdictions imposing requirements that mortgage servicers either file an amended claim or give notice on at least an annual basis while a Chapter 13 case is pending before assessing or charging post-petition fees or costs.

Accordingly, it is important that servicers have documented procedures regarding the application of payments. For instance, servicers should ensure there is accurate contact information on proofs of claim and that trustees can otherwise reach servicers easily, especially when it comes to Chapter 13 plans that provide for post-petition payments to be made by the trustee. More importantly, it will now be more important than ever that servicers conduct a post-petition escrow analysis as soon as possible after the filing of a bankruptcy case and otherwise notify the debtor (and counsel) as soon as possible of changes in the monthly payment, escrow changes, adjustable rate mortgage changes, and the like. Finally, it is important to review a loan to verify proper payment application when a Chapter 13 case nears completion (especially in response to a motion to deem the loan current); once the case is discharged, the loan should not be referred for foreclosure or other collection activity without the loan being reviewed by an attorney.

Section 204 of BAPCPA inserted a new subsection (o) to § 363 of the Code, which provides that if any person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract, and if such interest is purchased through a sale under § 363, then the person shall remain subject to all claims and defenses that are related to the consumer credit transaction or the consumer credit contract, to the same extent as the person would be subject to such claims and defenses of the consumer had such interest been purchases at a sale not under § 363.

Post-Discharge Communications with Debtors

Section 524 of the Code was amended to provide that the discharge injunction does not apply to an act by a creditor that holds a secured claim if:

- i) the creditor retains a security interest in real property that is the debtor’s principal residence;
- ii) the act is in the ordinary course of business between the creditor and the debtor; and

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- iii) the act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of *in rem* relief to enforce the lien.

Not only does this provision pave the way for servicers to send statements to debtors after the discharge of a bankruptcy case in an effort to seek periodic payments or to provide debtors with information regarding the amount of the monthly payment, escrow, taxes, and insurance, it opens the door for more loss mitigation opportunities provided the communications are in the ordinary course of business.

Initial Expectations

As in years past when passage of a bankruptcy reform bill has loomed, many people filed bankruptcy before the new legislation became effective. In fact, according to Robert D. Miller, Acting Assistant Director, Review and Oversight, Executive Office for U.S. Trustees, more than 625,000 individuals sought bankruptcy protection between October 1, 2005 and October 16, 2005, including 275,000 cases between October 14, 2005 and October 16, 2005. As expected, the majority of bankruptcy filings in the months before the effective date of BAPCPA were Chapter 7 cases by individuals attempting to obtain a discharge under the easier system, or whose income might be subject to the new means test.

Due to the increased filing requirements for debtors under the new Code, the higher cost to debtors to achieve a Chapter 13 discharge (since the ability to cramdown secured claims will be restricted), and the uncertainty in the interpretation and application in other provisions of the new Code, including the means test, we did not anticipate seeing an immediate increase in the number of Chapter 13 cases after October 17, 2005. In some jurisdictions, the number of bankruptcy filings fell 70-85 percent. Most jurisdictions are seeing their bankruptcy filings approach their pre-BAPCPA levels, while others are still at the levels immediately after the enactment of BAPCPA.

Because servicers always need to be vigilant of new efforts by debtors to avoid termination of the stay, and since the proper application of payments has become even more important, especially with attempts by debtor attorneys to include non-standard plan provisions directing not only payment application but provisions that limit what can appear in a proof of claim, we would caution against any permanent reduction in staffing. Regardless of the decision regarding the level and allocation of staffing, it is strongly recommended that servicers train their personnel to be familiar with BAPCPA's provisions.

[See next page for additional resources.]

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Additional Resources

Articles, relevant court decisions, and other materials concerning bankruptcy and bankruptcy reform: www.usfn.org (go to Industry Resources, then Servicing Topics, and select Bankruptcy & Bankruptcy Reform).

List of Approved Credit Counseling Agencies:

www.usdoj.gov/ust/bapcpa/ccde/cc_approved.htm

American Bankruptcy Institute: www.abiworld.org

American Bankruptcy Institute's Web page on bankruptcy reform:

<http://abiworld.net/bankbill/index.html>

Commercial Law League of America: www.clla.org

Synopsis of the Bankruptcy Abuse Prevention and Consumer Protection Act:

www.abiworld.org/pdfs/s256/yerbich.pdf

Text of the ABI Consumer Bankruptcy Committee's Online Chat Session on May 3, 2005 regarding the impact of the Bill:

www.abiworld.org/consumerlive/consumerprogram.html

25 Changes to Personal Bankruptcy Law: <http://abiworld.net/bankbill/changes.html>

Redlined version of the Code: <http://www.dpw.com/practice/code.blackline.pdf>

ABI Real Estate Committee Article:

<http://abiworld.net/newsletter/realestate/vol2num1/s256.html>

Major Consumer Bankruptcy Effects of the 2005 Reform Legislation (prepared by Eugene R. Wedoff, U.S. Bankruptcy Judge, Northern District of Illinois, April 13, 2005):

<http://www.abiworld.org/pdfs/s256/mainpoints6.pdf>

1. The Senate Judiciary Committee approved the Bill by a vote of 12-5 on February 17, 2005. This vote included 3 of the Committee's 8 democrats.

2. In general, § 224 of BAPCPA provides that retirement funds to the extent those funds are in a fund or account that is exempt from taxation under the Internal Revenue Code, or have received a favorable determination as of the date of the petition, are exempt from the bankruptcy estate. Section 224 also places a limit of \$1 million in retirement funds that a debtor may exempt from the bankruptcy estate. Section 225 provides that funds placed in

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educational IRAs not later than 365 days before the date of the filing of the bankruptcy case are exempt from the property of the bankruptcy estate if the designated beneficiary is the debtor's child or grandchild.

3. Section 307 increases from 180 days to 730 days the duration of the debtor's domicile for purposes of determining which state law governs the debtor's selection of property exempt from the bankruptcy estate. This provision of BAPCPA has survived constitutional challenge. *In re Urban*, 375 B.R. 882 (9th Cir. BAP 2007)(The domicile requirement added by BAPCPA that purported to close the so-called "mansion loophole" by preventing debtors from claiming exemptions under the law of the state where they were domiciled on the petition date unless they were domiciled in that state for 730 days prior to the petition date, did not violate the uniformity requirement of Constitutional provision authorizing Congress to enact only uniform bankruptcy laws, though this domicile requirement, in the case of debtors who moved to a state less than 730 days prior to filing for bankruptcy, operated to require debtors to claim exemptions under the laws of a state other than that in which they were currently domiciled and meant that the trustee would not have the same access to debtor's assets in bankruptcy as the debtor's creditors would have outside bankruptcy). Section 322 provides that a debtor may not exempt any amount of interest that was acquired by the debtor during the 1,215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$125,000 in value in real or personal property that the debtor or dependent of the debtor claims as a homestead. As a result of indexing for inflation, this homestead cap is now \$136,875.

4. *In re Hardacre*, 338 B.R. 718, 728 (Bankr. N.D. Tex. 2006) (In applying "means" test established by BAPCPA to calculate her projected disposable income, Chapter 13 debtor whose income was above applicable median family income benchmark could not deduct standard expense allowance for motor vehicle which was not subject to lease or purchase agreement, but which she owned free and clear). *Cf. In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006).

5. *In re Johns*, 342 B.R. 626, 628 (Bankr. E.D. Okla. 2006).

6. *See, e.g., In re Waggoner*, 2006 WL 705931 (Bankr. E.D. Ky. 2006).

7. *See, e.g., In re Davenport*, 335 B.R. 218, 221 (Bankr. M.D. Fla. 2005). *See also Waggoner*, 2006 WL 705931 at *2; *Warden*, 2005 WL 3207630 (Bankr. W.D. Mo. 2005).

8. *See, e.g. In re Gaddis*, 2007 WL 1610783 (Bankr. D. Kan. 2007) (bankruptcy case dismissed where credit counseling session occurred 186 days prior to the filing of the bankruptcy case); *In re Dyer*, 381 B.R. 200 (Bankr. W.D.N.C. 2007) (Chapter 7 case

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dismissed because debtors obtained pre-petition credit counseling briefing 204 days before filing their bankruptcy case).

9. *See, e.g., In re Ross*, 338 B.R. 134 (Bankr. N.D. Ga. 2006) (Bonapfel, J.) (*citing In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005); *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005); *In re Cleaver*, 333 B.R. 430 (Bankr. S.D. Ohio 2005); *In re Watson*, 332 B.R. 740 (Bankr. E.D. Va. 2005); *In re Gee*, 332 B.R. 602 (Bankr. W.D. Mo. 2005).

10. *Watson*, 332 B.R. at 746-47.

11. *In re Warren*, 339 B.R. 475, 479 (Bankr. E.D. Ark. 2006).

12. *In re Mills*, 341 B.R. 106 (Bankr. D. Colo. 2006) (Teel, J.) (Under BAPCPA, debtor must obtain credit counseling not just some hours, minutes or seconds prior to filing petition, but at least one calendar day prior to petition date).

13. *In re Hubbard*, 333 B.R. 377, 385 (S.D. Tex. Nov. 16, 2005) (Isgur, J).

14. *In re Hubbard*, 332 B.R. 285 (S.D. Tex. Oct. 31, 2005) (Isgur, J.). *See also In re La Porta*, 332 B.R. 879, 881 (Bankr. D. Minn. 2005) (Kishel, J.) (the court rejected a pro se debtor's unsigned letter to the court stating that she could not afford to travel to any of the approved credit counseling agencies in her district, and held that a certification must be subscribed to under penalty of perjury); *but see In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005) (holding a certification of exigent circumstances need not be under oath); *In re Graham*, 336 B.R. 292 (Bankr. W.D. Ky. 2005) (permitting any paper or motion which contains the required information and is signed by the debtor to constitute a "certification"); *In re Gee*, 332 B.R. 602, 603-04 (Bankr. W.D. Mo. 2005) (A debtor can be eligible for a waiver of the credit counseling requiring for exigent circumstances if his certification states that the debtor requested credit counseling services from an approved agency, but was unable to obtain the services during the five-day period beginning on the date on which the debtor made the request).

15. *In re Watson*, 332 B.R. 740, 745 (Bankr. E.D. Va. 2005). *See also Cleaver*, 333 B.R. at 434; *In re Tomco*, 339 B.R. 145 (Bankr. W.D. Pa. 2006) (Deller, J.) (*citing In re Graham*, 336 B.R. 292, 292 (Bankr. W.D. Ky. 2005)).

16. *In re Dixon*, 338 B.R. 383 (8th Cir. B.A.P. 2006) ("After all, the reason that such debtors are filing bankruptcy quickly and before they receive the briefing is because they feel that they are unable to wait.").

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17. *In re Dansby*, 340 B.R. 564 (Bankr. D.S.C. 2006) (Waites, J.) (“This Court believes the better view is that the request [for credit counseling] must be made five days prior to the petition”).

18. 335 B.R. 417 (Bankr. W.D. Mo. 2005) (Dow, J.).

19. *Id.*, at 422-23. *See also In re Wallert*, 332 B.R. 884, 885-86 (Bankr. D. Minn. 2005) (motion for waiver of the credit counseling requirement based on exigent circumstances denied where the debtor did not consult with a credit counseling agency until the day before foreclosure, and the debtor failed to allege that she had been unable to obtain the counseling services during the five-day period beginning with the date of her request); *In re Hubbard*, 333 B.R. 377, 386-87 (the court rejected the certification of debtor who filed immediately preceding scheduled foreclosure sale or sequestration hearings as not in compliance with § 109(h)(3)(A)(ii), since the evidence demonstrated that at least one agency could have offered the required services within four to five days of request); *Cleaver*, 333 B.R. at 435 (motion for waiver based on exigent circumstances denied where the certification did not state that the debtor attempted to seek counsel prior to filing the bankruptcy petition and that the debtor could not get counseling within five days).

20. *In re Petit-Louis*, 338 B.R. 132 (Bankr. S.D. Fla. 2006) (Cristol, J.).

21. 11 U.S.C. § 362(c)(3).

22. 11 U.S.C. § 362(c)(4).

23. *Ross*, 338 B.R. at 136 (citing *In re DiPinto*, 336 B.R. 693 (Bankr. E.D. Pa. 2006); *In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005); *In re Rodriguez*, 336 B.R. 462 (Bankr. D. Idaho 2005); *In re Talib*, 335 B.R. 417, *reconsideration denied*, 335 B.R. 424 (Bankr. W.D. Mo. 2005); *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005); *In re Cleaver*, 333 B.R. 430 (Bankr. S.D. Ohio 2005); *In re Watson*, 332 B.R. 740 (Bankr. E.D. Va. 2005); *In re Gee*, 332 B.R. 602 (Bankr. W.D. Mo. 2005)).

24. *See, e.g., In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005). *But see In re Tomco*, 339 B.R. at 157 (Where an individual seeking relief under Chapter 13 acknowledges that she has not contacted any approved credit counseling agency before filing her bankruptcy petition, so that her certificate of exigent circumstances is deficient and she is therefore ineligible to be a debtor, the proper remedy is for the bankruptcy court to dismiss the case, as opposed to striking the petition as void *ab initio*). *See also Salazar*, 339 B.R. 622, 633 (The dismissal of a petition amounts to dismissal of a “case” prior to the case’s commencement).

25. *Ross*, 338 B.R. at 138-39.

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26. *Ross*, 338 B.R. at 139 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979)).

27. *Ross*, 338 B.R. at 139. See also *In re Seaman*, 340 B.R. 698, 707 (Bankr. E.D.N.Y. 2006) (Stong, J.) (Until a bankruptcy court determines that a petitioner is ineligible to be a debtor, a case is commenced by the filing of a petition and cannot be a nullity).

28. See also *In re La Porta*, 332 B.R. 879, 881 (Bankr. D. Minn. 2005) (“The statute is utterly clear”).

29. *Salazar*, 339 B.R. at 629-30.

30. *Id.*, at 627 (“[T]he Court is unaware of any reason that precluded Congress from creating a level of uncertainty pending a final determination by the Court”).

31. *Id.*

32. *Tomco*, 339 B.R. at 156.

33. *Id.*

34. *Id.*, at 160 (citing *Ross*, 338 B.R. at 138-39).

35. *In re Calderon*, 2006 WL 871477 (Bankr. S.D. Fla. 2006).

36. See *In re Rios*, 336 B.R. 177 (Bankr. S.D.N.Y. 2005) (A debtor who neither seeks the pre-petition credit counseling briefing required by BAPCPA nor makes the appropriate certification to the bankruptcy court evidencing eligibility for an exemption from the credit counseling requirement, does not properly commence a case and, therefore, his petition should be stricken as opposed to dismissed).

37. Getting used to these particular provisions of BAPCPA should not be overly difficult for debtors and their attorneys considering that they have been part of the Civil Enforcement Initiative. As Congress had been unsuccessful in getting bankruptcy reform enacted over the last few years, the U.S. Trustee’s office eventually decided to use the mechanisms already in place to prevent bankruptcy abuse, in particular, more aggressive use of substantial abuse motions under § 707(a), and ensuring that trustees under Chapter 7 and 13 are being more aggressive about checking the information debtors are putting on schedules. For approximately 2 years before the effective date of BAPCPA, in many jurisdictions across the country, trustees had been requiring debtors to provide information to the trustee to review in advance of the 341 meeting, such as tax returns, paychecks, car titles, and bank statements.

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38. *But see In re Irons*, 379 B.R. 680 (Bankr. S.D. 2007) (denying debtor’s motion for reconsideration and upholding automatic dismissal, and further providing that bankruptcy rules authorize sanctions against debtor’s counsel for failing to use reasonable care in the preparation of documents).

39. *See, e.g., McCluney*, 2007 WL 2219112 (Bankr. D. Kan. 2007).

40. *In re Holcomb*, 380 B.R. 813 (10th Cir. BAP 2008) (By its plain terms, Section 362(c)(3)(A) of the Bankruptcy Code, which provides that on the 30th day after the filing of repeat filer’s second successive bankruptcy petition, the automatic stay “shall terminate with respect to the debtor” terminates automatic stay only with regard to debtor and property of debtor, and not with regard to property of the estate). *Cf. In re Curry*, 362 B.R. 394, 400-01 (Bankr. N.D. Ill. 2007) (Congress intended to terminate the stay in its entirety).

41. Hon. William Houston Brown and Lawrence R. Ahern, III, *2005 Bankruptcy Reform Legislation with Analysis* (Eagan, MN: West, 2005), 53.

42. *In re Bateman*, 515 F.3d 272 (4th Cir. 2008) (Section 1328(f) of the Code, which denies a discharge to a Chapter 13 debtor who previously received a discharge in a Chapter 7 case filed during the four-year period preceding the order for relief in debtor’s current Chapter 13 case, is not eligibility provision, and does not prohibit a debtor who is ineligible for Chapter 13 discharge from filing for Chapter 13 relief).

43. *In re Wall*, 376 B.R. 769 (Bankr. W.D. N.C. 2007) (An automobile loan that includes negative equity in a traded-in vehicle is a purchase money security interest and is not subject to modification in a Chapter 13 plan). *Cf. In re Sanders*, 377 B.R. 836, 847, 853, 859-60 (Bankr. W.D. Tex. 2007) (An auto lender that financed the purchase of a motor vehicle less than 910 days before the filing of the bankruptcy case and which also paid off the negative equity on a trade-in was not entitled to the limited protections of the “hanging paragraph in Section 1325 of the Code; since the claim was not entirely a purchase money security interest, none of the claim is entitled to the protection of the “hanging paragraph”); *In re Hayes*, 376 B.R. 655, 670-71, 672-73, 676 (Bankr. M.D. Tenn. 2007) (An automobile that was purchased and financed less than 910 days before the filing of the bankruptcy case would not receive total protection by the “hanging paragraph” of Section 1325(a) where the debtor also financed the purchase of GAP insurance, credit life insurance, and the negative equity on the trade-in; instead the court would apply a “dual status” role); *Cf. In re Spratling*, 377 B.R. 941, 946 (Bankr. M.D. Ga. 2007) (The amounts paid for an extended service contract and GAP insurance are part of the purchase price for a car, and subject to the protections of the “hanging paragraph” of Section 1325(a) of the Code).

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44. *In re Gonzales*, 2007 WL 3217671, *2 (Bankr. N.D. Tex. 2007) (A chapter 13 debtor who acquired a pickup truck to be used principally in his sheetrock business would be able to “cram down” the claim secured by the truck even though the truck was acquired less than 910 days before the filing of the bankruptcy case).

45. *In re Quick*, 371 B.R. 459 (10th Cir. BAP 2007) (The “hanging paragraph” added by BAPCPA, in indicating that Section 506(b) of the Code with respect to the bifurcation of undersecured claims shall not apply for purpose of determining treatment to which secured creditor is entitled under proposed Chapter 13 plan, if creditor has purchase-money claim for debt that debtor incurred within 910 days of petition date to acquire motor vehicle for his/her personal use, precludes any bifurcation of such “910 claims” not only in “cramdown” context, so as to prevent Chapter 13 debtor from cramming down plan by paying creditor only the value of motor vehicle securing its claim, but also in event that debtor elects to surrender vehicle; thus, since “hanging paragraph” mandates that creditor shall be treated as fully secured for both cramdown and surrender purposes, surrender of vehicle will fully satisfy 910 creditor’s claim, and creditor can have no claim for deficiency).

46. *But see In re Lilly*, 378 B.R. 232, 234-36 (Bankr. C.D. Ill. 2007) (A Chapter 13 debtor who is not eligible for discharge is still only required to pay the “present value” interest rate on an automobile loan).

47. *See, e.g., In re Fells*, 2007 WL 3120113, *5 (Bankr. W.D. La. Oct. 23, 2007) (Pursuant to Section 1322(b)(2) of the Code, a lien on a mobile home that is the debtor’s principal residence is not subject to modification). *Cf. In re Fuller*, 2007 WL 3244113 (Bankr. M.D. N.C. Nov. 2, 2007) (The anti-modification provisions of Section 1322(b)(2) of the Code do not apply to a mobile home or a manufactured home that is not part of the real property where the home sits); *Moss v. Greentree-Al, LLC*, 378 B.R. 655, 657, 660 (S.D. Ala. 2007) (The anti-modification provision of Section 1322(b)(2) of the Code does not prevent a debtor from modifying a claim secured by a mobile home where the mobile home is not affixed to real property).

48. Hon. William Houston Brown and Lawrence R. Ahern, III, *2005 Bankruptcy Reform Legislation with Analysis* (Eagan, MN: West, 2005), 68.

49. *See, e.g. In re Patton*, 338 B.R. 899 (Bankr. D. N.M. 2006) (A bankruptcy court was under no obligation to approve proposed reaffirmation agreement, even assuming that debtor-wife’s income would remain available to debtors despite her recent medical problems, and even assuming that debtors’ monthly income, contrary to representation on statement of financial affairs, exceeded total of their other expenses plus the payment that they would be required to make under reaffirmation agreement. Further, the bankruptcy court was under no obligation to notify creditor prior to disapproving, as not being in best interests of Chapter 7 debtors and their dependents, a proposed reaffirmation agreement, where budget numbers in

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proposed agreement did not reflect deficit in debtors' budget if they made payments required by proposed agreement.); *In re Stillwell*, 348 B.R. 578 (Bankr. N.D. Okla. 2006) (Bankruptcy court would exercise its discretion to disapprove proposed reaffirmation agreement between Chapter 7 debtor and creditor whose claim was collateralized by security interest in her motor vehicle, where debtor, whose schedules disclosed disposable household income of only \$185 per month to make monthly car payment of \$570.81, failed to rebut statutory presumption that reaffirmation agreement would impose "undue hardship" upon her).

50. *See In re Wilson*, 321 B.R. 222 (Bankr. N.D. Ill. 2005) (A mortgage which is being cured by a borrower through a Chapter 13 case is not fully reinstated until the pre-petition arrearage has been paid). *But see In re Collins*, 2007 WL 2116416, *14 (Bankr. E.D. Tenn. 2007) (A plan provision that requires a mortgage creditor to deem the pre-petition arrearage amounts contractually current as of the date of confirmation is merely procedural and only requires the mortgage creditor to update its accounting procedures to ensure that the debtor's account is not subject to any additional charges associated with any pre-petition default). Obviously a provision in a Chapter 13 plan that deems a delinquent loan current at the time of confirmation can have consequences beyond the application of payments or the collection of various fees and costs since the regulations governing RESPA require a servicer to refund to the borrower any surplus in an escrow account in excess of \$50 *only* if the loan is current. *See* 24 CFR Part 3500.17.

51. *See Collins*, 2007 WL 2116416, *4 ("This subsection does not provide a basis for the incorporation of proposed language in a Chapter 13 plan. Instead, it merely provides a potential remedy, post-discharge, if a creditor has failed to honor the terms of a confirmed plan by not properly crediting payments received as required by the plan."). *See also In re Anderson*, 2008 WL 410077 (Bankr. D. Or. 2008) ("This Court agrees with the *Collins* court. Section 524(i) provides a remedy. It does not dictate what is permissible under a Chapter 13 plan.").

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