

THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

BY: THOMAS H. DICKENSON, HODGES DOUGHTY & CARSON

President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") on April 20, 2005. The majority of its provisions take effect October 17, 2005. There has been a flood of local and national press devoted to BAPCPA and the introduction of "means testing" into the bankruptcy process. In its simplest terms, the "means testing" of BAPCPA is designed to prevent the use of a chapter 7 bankruptcy by those who can afford (or have the means) to pay some or all of their debts through a chapter 13 case. What the press has not reported, however, is that the income threshold triggering the applicability of the "means test" is high enough that I predict that less than 5% of the cases filed in the Eastern District of Tennessee will be impacted by the whole concept. Notwithstanding the above, and assuming Congress does not delay implementation of BAPCPA in response to Hurricane Katrina, there are plenty of other changes made by BAPCPA that deserve attention, and those changes will be the focus of this and subsequent articles. Since several new terms and definitions are introduced by BAPCPA, the new terms will be identified below in bold type.

I. Defined Terms.

For those that do not practice bankruptcy law, there is an interesting change in BAPCPA that could impact you. A new definition has been introduced into the bankruptcy world: **debt relief agency**. A **debt relief agency** is any person who provides any **bankruptcy assistance** to an **assisted person** in return for the payment of money or other valuable consideration. An **assisted person** is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000.00." **Bankruptcy assistance** is also a new defined term and is very broad. It means "any goods or services sold or otherwise provided to an **assisted person** with the express or implied purpose of providing information, advice, counsel, document preparation, or filing or attendance at a creditors' meeting, or appearing in a case or proceeding on behalf of another, or providing legal representation with respect to a case or proceeding" under the Bankruptcy Code. It does not take a rocket scientist to see that these definitions are not specifically keyed to the actual filing of a bankruptcy case, even though that is probably what was intended. I believe the precise wording of these definitions could unknowingly make many creditors attorneys, family law attorneys, and civil litigation attorneys (and possibly mediators or arbitrators in that context) **debt relief agencies** if they are not extremely careful in what they say and do. There are many divorce cases and other civil lawsuits where the potential of a bankruptcy case by one of the parties or the potential dischargeability of debts come into play. The same holds true for a creditor's attorney giving advice to an individual impacted by a bankruptcy case who meets the **assisted person** definition. So, what the heck does it mean if you are considered a **debt relief agency** and why should you care if you are deemed to be a **debt relief agency**?

II. Written Contract.

Not later than five days after the first date on which a **debt relief agency** provides an **assisted person** with any **bankruptcy assistance**, the **debt relief agency** must execute a written contract with the **assisted person** that explains clearly and conspicuously (a) the services such agency will provide and (b) the fees or charges for such services and the terms of payment. A copy of the fully executed and completed contract must be provided to the **assisted person**. There are also statutory directives relating to advertising by a **debt relief agency**.

III. Required Notices.

If you are a **debt relief agency** providing **bankruptcy assistance** to an **assisted person**, there are mandatory disclosures you must give

to the **assisted person**. One is a notice giving a brief description of the different chapters available under bankruptcy law and the general purpose, benefits, and costs of each kind of bankruptcy and the types of services available from credit counseling agencies.

Also, not later than 3 business days after the first date on which a **debt relief agency** first offers to provide any **bankruptcy assistance** services (query: could this be phone call to set up an appointment to discuss some aspect of a bankruptcy if the words used are not carefully chosen) to an **assisted person**, another notice to such person is required that must contain certain information in a clear and conspicuous format. The two notices described above may be combined into one document, and these notices must be retained for two years after they are given. As if this was not enough, yet a third notice is required to be given at the same time the above notices are given, but this third notice must be in a single document separate from the other documents or notices provided to the **assisted person**. Again, the required information must be disclosed in clear and conspicuous language. The information required by this notice is too extensive to be outlined in this article, but see 11 U.S.C. § 527 for specifics.

IV. Statutory Restrictions.

There are statutory restrictions related to a **debt relief agency**, chief among which is a directive that a **debt relief agency** shall not advise an **assisted person** or prospective **assisted person** to incur more debt in contemplation of such person filing a bankruptcy case or to pay an attorney a fee or charge for services performed as part of preparing for or representing a debtor in a bankruptcy case (see 11 U.S.C. § 526 for the additional restrictions).

V. Penalty Provisions.

There are also penalty provisions. The **debt relief agency** may be liable to the **assisted person** in the amount of fees or charges in connection with providing **bankruptcy assistance**, for actual damages and for reasonable attorney fees and costs if (a) the **debt relief agency** intentionally or negligently fails to comply with the statutory duties imposed with respect to a case or proceeding under the Bankruptcy Code for an **assisted person**, (b) the **debt relief agency** provided **bankruptcy assistance** to an **assisted person** and their case was dismissed or converted because of an intentional or negligent failure to file any required document in connection with the bankruptcy case, or (c) the **debt relief agency** intentionally or negligently disregarded the material requirements of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure applicable to the **debt relief agency**. Note that only the last of the three damage provisions is not specifically tied to an actual bankruptcy case. BAPCPA also grants broad powers to state attorney generals to pursue injunctive relief and damages against individuals who violate the restrictions applicable to **debt relief agencies**.

I think most would agree that these tough provisions were only aimed at bankruptcy practitioners but, until the courts so limit the reach of the statute, all should be careful in this area.

Part II of this article, to be published in the November DICTA, will focus on other significant changes to the Bankruptcy Code in the following areas: qualifications for filing a bankruptcy case, domestic support obligations, valuation of secured claims in chapter 13, significant changes to the automatic stay, protection in chapter 13 for purchase money security interests created within 910 days prior to the bankruptcy filing, accelerated plan payment requirements for lease obligations, and purchase money security interests in chapter 13, changes in reaffirmations, and redemptions and many other significant changes.

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As was noted in the first part of this article published last month, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") on April 20, 2005. The majority of the BAPCPA provisions take effect October 17, 2005. Part I of this article focused on several key concepts relating to "debt relief agencies" and how attorneys could be unknowingly impacted by the provisions of BAPCPA related to "debt relief agencies". This month's article will highlight some of the other key provisions of BAPCPA that primarily relate to consumer bankruptcy issues. The final part of this three-part article will focus on changes to the Bankruptcy Code in the business context.

- Individual debtors must now obtain a briefing from an approved non-profit budget and credit counseling service within 180 days prior to filing a case. The briefing may be by phone, over the internet, or in person, but the briefing must outline the opportunities for available credit counseling and assist the debtor in performing a budget analysis. The agencies approved for this service are listed on the web site of the United States Trustee and will probably be on the web site of the bankruptcy court in the near future. There is a very limited exception to this requirement and even if the exception applies to allow a debtor to file without meeting the requirement, the briefing must be conducted within 30 days after the case is filed.
- A detailed income and expense form for the "means test" analysis (does the debtor have the means to repay some or all of his/her debt) must now be filed by individual debtors. This form keys off of "median income" figures that will be reviewed by the United States Trustee and creditors to determine whether a "presumption of abuse" applies in chapter 7 cases that might force a debtor to go the chapter 13 route instead of the chapter 7 route. The "median income" figures to be used in this analysis can be found on the United States Trustee web site, which are essentially the IRS standards. For example, the median income for a family of four in Tennessee is just under \$60,000.
- Prior to receiving a discharge, a debtor must complete an instructional course regarding personal financial management and a certificate showing completion of the course must be filed with the court. The approved courses can also be found on the US Trustee web site.
- The time allowed between chapter 7 discharges has been increased from 6 to 8 years.
- The required statement of intent (where the debtor declares his/her intention with respect to reaffirmation, redemption or surrender of property that secures a consumer debt) now has some teeth. All debtors must now file the statement of intent within 30 days following the filing of their bankruptcy petition; the debtor **must perform** the stated intent within 30 days following the first date set for the meeting of creditors; and, if the debtor is an individual, the collateral is personal property, and the creditor has an allowed claim for the purchase price secured in whole or in part by the personal property, the debtor must either (a) enter into a reaffirmation agreement with the creditor or (b) redeem the property from the lien. If the debtor fails to do so, then the automatic stay is terminated with respect to that personal property.
- If (a) the debtor's statement of intent is not filed within the required 30 day period, (b) the statement of intent fails to indicate whether the debtor will reaffirm, redeem or surrender or (c) the debtor does not perform the stated intent within 30 days following the meeting of creditors (45 days for individual debtors with respect to a purchase money security interest in personal property), then the automatic stay terminates with respect to the relevant property without the necessity of filing a motion for stay relief. Please note that this automatic stay relief provision does not apply to real estate and it does not apply to non-purchase money security interests.
- The reaffirmation agreement requirements have been significantly changed. There are enough changes that they will not be detailed in this newsletter, but keep this in mind if you think you can use your old form, because it won't work for cases filed after October 17. **In fact, one well-known bankruptcy commentator estimated that it took him 50 hours just to prepare his new reaffirmation forms.**
- Redemption has changed. Previously, redemption could occur, at least in this district, by payment of the wholesale value of personal property collateral. BAPCPA makes it clear the value that must be paid now for redemption is replacement value. Replacement value is also the valuation used for chapter 13 secured claims. It is "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". Valuation of collateral in a chapter 13 does not carry over to a case that converts to a chapter 7 case.
- In chapter 13 cases, secured creditors will now retain their liens until the earlier of (a) the discharge under the chapter 13 plan or (b) payment of the underlying debt determined in accordance with non-bankruptcy law. This change prevents debtors from cramming down a value in a chapter 13, paying just that value, getting their title with the lien released and then dismissing their case.
- Some chapter 13 plans must now last 5 years, including all cases where the debtor fails the "means" test.
- Chapter 13 plan payments must now commence not later than 30 days following the filing of the petition. Previously, payments started within 30 days following the filing of the plan, which did not necessarily have to be filed at the same time as the petition was filed. Anyone doing chapter 13 work is advised to scrutinize plans carefully as the crafty debtor's attorney may try to accomplish things under a chapter 13 plan that were not done previously.
- If a debtor owes on a personal property lease or owes a creditor under a purchase money secured claim relating to personal property, and "unless the court orders otherwise", the debtor must make adequate protection payments directly to the creditor holding an allowed secured claim (or, if applicable, the lease) within 30 days from the filing of the case. **Please note** that the creditor may have to file its claim promptly to take advantage of this section as you must hold an **allowed secured claim** and the definition of "allowed" is that it be filed and no party has objected to the claim. **Please further note** that by General Order 05-07, filed October 4, 2005, the Eastern District of Tennessee has "ordered otherwise" by requiring all debtors to make all adequate protection payments required by the statute to the chapter 13 trustee and requiring the chapter 13 trustee to pay the adequate protection payments required by the statute.
- If a creditor holds a purchase money security interest in a motor vehicle that was created in the 910-day period before the filing of the bankruptcy case, then the debtor must pay this debt in accordance with the contract terms and cannot change the value, interest rate or monthly payment amount (i.e., no cram down).
- If a debtor retains personal property in a chapter 13 case that is subject to a purchase money security interest, the debtor must provide evidence of insurance to the creditor within 60 days from the date of filing and continue to do so while the case is pending.
- At least 7 days before the creditors' meeting in a chapter 13 case, the debtor must provide the trustee with a copy of the debtor's

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income tax return for the most recent year ending immediately before the case is filed. A creditor can make a written request to be provided with a copy of this return.

- A discharge under chapter 13 cannot be granted if the debtor has received a discharge in a chapter 7, 11 or 12 case in the previous 4 years before the filing of the current chapter 13 case. Furthermore, if the debtor has received a chapter 13 discharge in a case filed within 2 years of the present case, then a discharge cannot be granted in the new chapter 13 case. This could mean that debtors will utilize chapter 13 knowing that they will not get a discharge of their debts.
- As with chapter 7 cases, a debtor must participate in a personal financial management course in order to receive a chapter 13 discharge.
- A big change for chapter 13 cases is in the dischargeability of debts. Previously, the chapter 13 discharge was very broad and debts you could not discharge in a chapter 7 case could be discharged in a chapter 13. Now, many of the debts that would be non-dischargeable in chapter 7 cannot be discharged in a chapter 13 case. However, the **creditor must file suit** to obtain a determination that the debt is non-dischargeable, just like you would in a chapter 7 case. There is a deadline for filing suit as well. The deadline is 60 days following the date first scheduled for the meeting of creditors.
- The statute relating to delayed perfection has been changed so that the creditor has 30 days, not 20, to perfect its lien and escape the trustee's avoidance powers.
- Many changes have been made to the automatic stay. One is noted above with respect to the statements of intent. Other changes are: (a) if the creditor holds a lien against real property and obtains stay relief in a bankruptcy case, the automatic stay does not apply to enforcement of that lien in a subsequent case for a period of 2 years following the date of the stay relief order; (b) if the debtor is not eligible to be a debtor or if the case was

filed in violation of a bankruptcy court order in a prior case that prohibits the debtor from being a debtor in another case, then the stay does not apply with respect to enforcement of that lien; (c) if the debtor had a case pending within the year preceding a new bankruptcy case and the prior case was dismissed (with one limited exception), then the stay terminates with respect to any action taken with respect to a debt or property securing such debt on the 30th day after the filing of the later case (this may only apply to the debtor and not property of the estate).

- **PLEASE NOTE THAT THE SUMMARY OF CHANGES NOTED HEREIN IS NOT EXHAUSTIVE AND MAY BE AN OVERSIMPLIFICATION OF THE ACTUAL CODE PROVISIONS, SO DO NOT TAKE ANY ACTIONS WITHOUT A DETAILED REVIEW OF THE ACTUAL STATUTORY LANGUAGE.**
- Although not part of the BAPCPA amendments, please be advised that the filing fee for adversary proceedings increased to \$250.00 effective September 20, 2005. Also, the bankruptcy judges for the Eastern District of Tennessee have issued General Order 05-04, which will be effective January 2, 2006, and requires all attorneys practicing in the Eastern District to register with the Electronic Case Filing system and file all papers electronically through the ECF system from and after that date unless good cause is shown to file and serve documents in the traditional manner. Further, by General Order 05-05, filed October 4, 2005, the Eastern District adopted the Interim Bankruptcy Rules (adopted to provide uniform procedures for implementing BAPCPA) in their entirety. These rules may be downloaded from the court's web site. Finally, by General Order 05-06, filed October 4, 2005, the Local Rules for the Eastern District, which only went into effect on May 15, 2005, have been modified slightly and these amendments take effect on October 17, 2005.

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The primary thrust of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") was in the consumer bankruptcy arena. Key consumer provisions of BAPCPA were highlighted in Parts I and II of this article published in the September and October issues of DICTA. The final installment of this article summarizes some of the key BAPCPA provisions related to business bankruptcy issues.

- Small Business Debtor becomes a defined term and means a person (which includes partnerships and corporations) engaged in commercial or business activities (other than the primary business of owning or operating real estate) with liquidated and non-contingent secured and unsecured debts not more than \$2,000,000.00.
- Small Business Debtors have a somewhat streamlined Chapter 11 reorganization process. For instance, the Chapter 11 plan itself can be considered to contain adequate information so that a separate time-consuming and expensive disclosure statement is not required; a disclosure statement may be "conditionally approved" to permit plan solicitations based upon the conditional approval; and the Court can combine the hearing on the adequacy of the disclosure statement with the hearing on plan confirmation.
- Even though the chapter 11 process has been streamlined in some respects for small business debtors, additional disclosure and reporting requirements have been imposed.
- The Bankruptcy Judge is now prohibited from extending the debtor's exclusive 120-day period to file a Chapter 11 plan beyond 18 months from the date of the order for relief. In small business cases, the time periods are further constrained and a plan must be filed no later than 300 days after the entry of an order for relief under Chapter 11.
- Disclosure statements in Chapter 11 must now include a discussion regarding tax consequences of the plan.
- New provisions regarding adequate protection for utility service providers have been added, such as specific provisions mandating that past timely payment of utility bills is not "adequate assurance of payment" for bankruptcy purposes and administrative expense priority is not adequate assurance of payment. Further, any pre-petition security deposit for utility service can be offset against a bill owing to the utility without notice or order of the court.
- The ordinary course of business defense to preferential transfers has been changed to arguably make it more creditor friendly in that all that has to be proven to utilize this affirmative defense is that (a) the transfer was made in the ordinary course of business or financial affairs of the debtor and creditor or (b) was made according to ordinary business terms. Also, the aggregate value of all transfers for each creditor must exceed \$5,000. This would prevent a trustee from suing for one isolated small payment where the creditor would obviously spend more money in defense costs than the amount at issue, regardless of the validity of the trustee's claim. The preference statute has also been amended to prohibit preference avoidance against non-insider parties who may have benefited from a transfer by the debtor because of a guaranty from an insider. Unless the transfer at issue is in the 90-day preference window, there can be no avoidance action against such creditors, even though they may hold a guaranty from an insider.
- The trustee's right to avoid fraudulent transfers has been changed to allow an attack for transfers made within two years before the bankruptcy filing, as opposed to the old law which allowed for a one-year reach back period. Keep in mind that the trustee still has the right to utilize state law and that can involve more than two years in many instances.
- The reclamation rights of creditors has been extended from 10 days to 45 days.
- Although this does not come up with much frequency in this district, new limitations are imposed on what can be paid for employee retention bonuses and severance compensation.
- Several changes were made to the statutory provisions relating to unexpired leases and executory contracts. For instance, a non-residential lease of real property where the debtor is the lessee is considered rejected if it is not assumed within 120 days from the filing of the petition. This time frame can be extended for cause for up to 90 days maximum.

Before we leave BAPCPA, we should revisit a couple of issues related to the first two parts of this article. First, one bankruptcy judge in Georgia has already construed BAPCPA's new "debt relief agency" definition to exclude attorneys. Whether other courts will so hold remains to be seen. The last item I wanted to mention is something I alluded to in the first part of this article that I neglected to address in the second part of this article; the new definition of "domestic support obligation". This definition was added because it is used extensively in many sections of the Bankruptcy Code that are designed to add further protection for domestic obligations. Any family law practitioner should consult these new sections when faced with a bankruptcy incident to domestic support issues.