

## Introduction

Since Congress overhauled the bankruptcy laws in 1978, Congress has amended the Bankruptcy Code numerous times, with major changes in 1984, 1988, 1994 and most recently, in April 2005. While sometimes the changes addressed problems that likely could not have been foreseen, in other cases the changes were designed to except particular types of transactions from the Code's general operation, give special protection to particular groups, such as retirees, or significantly change the rights of debtors and their creditors. Whether one sees these changes as clutter from special interests or greater sophistication in the Code's approach to difficult economic issues, many people would agree that speedy access to relevant Code and Bankruptcy Rule provisions can only help the people that use the Code to get their jobs done. For that reason, in 1995, when the ABA Business Law Section Committee on Publications decided to continue the "portable" series it had begun with the publication of *The Portable UCC*, I was asked to create indices for *The Portable Bankruptcy Code and Rules*.

We have attempted to make the indices useful to lawyers with diverse practices who use the Code, from the general practitioner who occasionally represents a Chapter 13 debtor, to the lawyer whose practice is almost exclusively bankruptcy-related. If you have suggestions as to how the book or its indices could be more useful, please let me know so that we can consider the suggestions for future editions. We have also attempted to make this book truly "portable" and therefore decided to exclude legislative history and the advisory committee notes to the Bankruptcy Rules. In this edition, we have included the Federal Rules of Civil Procedure incorporated in the Bankruptcy Rules, the Federal Rules of Evidence, and certain provisions of Title 18 of the United States Code relating to bankruptcy crimes. Practitioners should also be sure to refer to local rules and chambers rules, which are available from the courts or on the website [www.uscourts.gov](http://www.uscourts.gov).

A number of lawyers at Skadden, Arps, Slate, Meagher & Flom LLP, where I practice, have given me many helpful suggestions. My partner, Richard B. Levin, initially supervised a project incorporating the 2005 amendments into the Bankruptcy Code; he was generous enough to let me use his efforts as a starting point, just as he has been generous in sharing his great expertise with all of us at the firm. My former assistant, Pauline Avila, and my current assistant, Maria Cipriano, worked diligently to complete the manuscript. Without their able assistance, this edition could not have been completed.

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## What's New

### A lot

Congress has amended the Bankruptcy Code, and here is a quick overview of some of the key changes. The actual law amending the Code, The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (P.L. 109-8, 119 Stat. 23) (“BAPCPA”), is available online at [www.thomas.loc.gov](http://www.thomas.loc.gov).

Here is a sample of the changes:

**Chapter 7**—A means test has been put in place that will necessitate complicated disclosures; debtors in states with low median income could be hurt the most. Depending upon a debtors' disposable income and his debts, a "presumption of abuse" can arise that could lead to the dismissal of a bankruptcy case. Calculating whether the presumption of abuse arises is a complicated process. To show whether such a presumption arises, debtors will need to complete a complicated form.

Note that proposed forms that may be adopted by local courts are available on [www.uscourts.gov](http://www.uscourts.gov).

- A chapter 7 case must be dismissed or converted (with consent) if it is an abuse—§ 707(b)
- There is a presumption of abuse dependent upon income, expenses and debts—§ 707(b)(2)
- The presumption of abuse always arises if a debtor's income less eligible expenses is equal to or more than \$166.67—§ 707(b)(2)
- The presumption of abuse never arises if a debtor's income less eligible expenses is less than \$100—§ 707(b)
- No motion to dismiss for abuse is permitted if the income of debtor and spouse (when considered) is less than state median income; in other cases in which the debtor's income is less than the state median income, standing to more to dismiss is limited—§ 707(b)
- Notice must be given to creditors when presumption of abuse arises—§ 704(b)
- Attorney certifications are necessary for filing Chapter 7 case—§ 707(b)(4)(C)
- Attorneys can be liable for trustee costs and attorneys' fees if Chapter 7 filing violated Rule 9011—§ 707(b)(4)
- Time between Chapter 7 discharges is expanded to eight years—§ 727(a)(8)

- Debtors must complete personal financial management course for discharge (when available)—§ 727(a)(11)
- Discharge may not be granted if debtor may have committed certain crimes or violated securities laws—§ 727(a)(12)

***Individual Chapter 11 Cases***—For the first time, Congress has set forth detailed provisions relating to individual Chapter 11 cases, apparently to prevent Chapter 11 from being a loophole from the stringent new requirements of other chapters.

- Individual estate property includes post-petition earnings from services—§ 1115(a)
- Individual debtors must apply post-confirmation earnings to their plan—§ 1123(a)(8)
- Individual debtors receive a discharge only on conclusion of plan—§ 1141(a)(5)
- Case may be dismissed if debtor not paying post-filing domestic support obligations—§ 1112(b)(4)(P)

***Chapter 13***—Chapter 13, too, has been made more onerous for debtors.

- In some cases, plan must provide for interest on nondischargeable debts for a five-year period—§ 1322(b)(10)
- Five-year limit for plan payments if debtors' income is equal to or greater than state median income —§ 1322(d)
- Confirmation hearing generally must be held within 20-45 days of meeting of creditors—§ 1324(b)
- Plan cannot be confirmed unless debtor paying post-filing domestic support obligations—§ 1328(a)(8)
- New good faith requirement for plan confirmation—§ 1325(a)(7)
- No discharge for willful or malicious injury that caused personal injury or death—§ 1328(a)(4)
- A debtor may not obtain a Chapter 13 discharge if he received a Chapter 13 discharge within the preceding two years (Four years if the discharge was in Chapter 7, 11 or 12)—§ 1328(e)
- Plan can be modified to allow for health insurance payments—§ 1329(a)(4)

**Domestic Support Obligations**—Bankruptcy reform was attacked because many debtors are owed domestic support obligations. Congress responded by protecting non-debtors.

- Domestic support obligations are broadly defined to include pre-and post-petition alimony, maintenance, and support—§ 101(14A)
- Creditors whose debts are reaffirmed (and thus have continuing contact with a debtor) may disclose to creditors with domestic support obligations the last known address of the debtor— § 704(c)(2)
- Domestic support obligations are non-dischargeable—§ 523(a)(5)
- Domestic support obligations generally given first priority, subject to claim of a trustee who administers assets available to pay such claims—§ 507(a)(1)
- Payments on domestic support obligations cannot be avoided as preferences—§ 547(c)(7)
- Trustee gives notice to holders of domestic support obligations designed to aid in tracking deadbeat dads or moms—§§ 1106(c)(1), 1202(d), 1302(d).
- Holder of domestic support obligations may ask creditors for debtor's address; obligor shall not be liable for the disclosure—§ 1106(c)(2)(B)
- Case may be dismissed or converted if debtor fails to pay post-petition domestic support obligation—§§ 1112(a)(4)(P); 1307(c)(11)
- In Chapter 13 case, assigned domestic support obligations may be paid less than 100% if all debtor's projected disposable income for five-year period is dedicated to plan—§ 1322(a)(4)

**Exemptions**—The revised Code limits exemption shopping and limits certain exemptions (especially for debtors that have committed certain crimes, securities fraud, or willful torts).

- Two-year residency generally required to take advantage of a particular state's exemptions—§ 522(a)(2)(3)(A)
- Venue shopping for state-law based exemptions is more difficult—§ 522(b)(2)
- Household goods that are protected from judicial liens under federal exemption are specified—§ 522(f)(4)(A)
- IRA exemption generally capped at \$1,000,000—§ 522(n)
- State homestead exemption capped at \$125,000 (for 1215 day period) to avoid manipulating available exemptions by purchasing homes—§ 522(p)(1)

- Homestead exemption capped at \$125,000 for debtors with certain types of debts, including securities fraud—§ 522(q)(1)

***Discharge/Discharge ability—***

- Condominium, cooperative and homeowner association fees are non-dischargeable—§ 523(a)(16)
- Detailed forms for reaffirmation are required for reaffirmation to be effective—§ 524(c)(2)

***General Provisions for Individual Cases—***

- Filing fee can be waived for debtors whose income is 150% below the poverty level—28 U.S.C. § 1930
- Individuals generally must participate in credit counseling briefing within 180 days pre-filing— § 107(h)(1)
- Tightened requirements for bankruptcy petition preparers—§ 110
- The details of the notice of alternatives that the clerk must give debtors pre-filing are spelled out—§ 342(b)
- Property of the estate does not include pawned property or certain education individual retirement accounts—§ 541(b)(5); 541(b)(8)
- Records relating to improper involuntary petitions may be sealed or expunged—§ 303(l)(1)
- Clarifies that a creditor need not be represented by attorney at § 341 meeting—§ 341(c)
- Secured claims against an individual in Chapter 7 and Chapter 13 cases are valued based on replacement value of collateral without deduction for the costs of sales or marketing— § 506(a)(2)
- Individual debtors may not retain personal property secured by purchase money security interest unless they either redeem it or reaffirm the debt within 45 days of the first § 341 meeting—§ 521(a)(6)

***Committees/Trustee—***Committees will likely put the web to use.

- Court can order the U.S. Trustee to increase creditors' committee to include a small business concern that holds claims that are disproportionately large compared to its income—§ 1102(a)(4)

- Creditors' committees must solicit and receive comments from their constituents—§ 1102(b)(3)
- Creditors' committees have a duty to provide information to their constituents—§ 1102(b)(3)
- Broader grounds for appointment of trustee in cases where top management participated in fraud, dishonesty or criminal conduct—§ 1104(e)

***United States Trustee appoints retiree committee—§ 1114(d)***

***General Chapter 11 Provisions***

- Broader, more stringent grounds to convert or dismiss the case—§ 1112
- Allows unwinding of modifications to retiree health plans made 180 days pre-petition when debtor was insolvent—§ 1114(n)
- Section 341 meetings can be waived in prepackaged cases—§ 341(e)
- Trustee can be appointed if grounds exist to convert or dismiss the case—§ 1104(a)(3)
- Corporate debtor's obligations for tax fraud, customs fraud, or other fraud owing to a governmental entity is not dischargeable—§ 523

***Exclusive Periods***—Exclusive periods to file a reorganization plan have been shortened.

- Debtor's exclusive time to file a plan cannot be extended beyond 18 months—§ 1121(d)(2)(A)
- Small business debtors have 180-day exclusive period and must file plan within 300 days, absent extraordinary circumstances—§ 1121(e)(2)

***Disclosure Statements*** – Generally, disclosure statement requirements are streamlined.

- Disclosure statement requirements are clarified and relaxed (except for specifically requiring tax information)—§ 1125
- Federal tax consequences must be set forth in disclosure statement—§ 1125(i)
- Pre-packaged solicitation may continue post-petition if it complies with applicable non-bankruptcy law—§ 1125(g)

***Small Business Cases***—Cases should move faster for small business debtors.

- New reporting requirements for small business debtors that have less than \$2million in debts or otherwise qualify (not immediately effective)—§ 308

- Small business debtors generally have 180-day exclusive period—§ 1121(e)(1)
- Small business debtors generally must file plan within 300 days—§ 1121(e)(1)
- Small business debtors' plan may substitute for disclosure statement—§ 1125(f)
- Status as small business debtor no longer elective—§§ 101(51C); 1121(e)

***Single Asset Real Estate Cases***—The revised Code may make these cases faster and much less attractive to debtors.

- Single asset real estate cases are no longer limited to cases with no more than \$4 million in debt —§ 101(51B)
- Interest payments generally must commence 90 days from the filing date or the date that the court determines the case is a single asset real estate case unless the debtor has filed a plan with a reasonable possibility of being confirmed within a reasonable time—§ 362(d)(3)
- Interest payments must be at applicable nondefault contract rate—§ 362(d)(3)(B)
- Interest payments may be made from pre-petition or post-petition earnings—§ 362(d)(3)(B)

***Administrative Expenses/Priorities***—The big news is the new priority for goods received within 20 days.

- Administrative expense priority granted for certain back pay awards—§ 503(b)(1)(A)(ii)
- Claims for assumed leases later rejected subject to two-year cap for administrative status and thereafter to 506(b) cap—§ 503(b)(7)
- Eliminates specific administrative expense allowance for counsel to individual committee members—§ 503(b)(4)
- Grants administrative priority for the value of goods received twenty days prepetition— § 503(b)(9)
- Limits administrative claims for executive compensation and severance—§ 503(c)
- Domestic support obligations given top priority—§ 507(a)(1)
- Priority for employee wages increased to \$10,000 and "reaches back" 180 days—§ 507(a)(4)
- Priority for employee benefit plans increased—§ 507(a)(5)

- Drunk driving and similar debts given tenth priority—§ 507(a)(10)
- Increases reclamation reach back period to 45 days, but eliminates administrative claim or lien in lieu of reclamation—§ 546(c)
- Warehouseman's liens are protected—§ 546(j)

**Corporate Abuse Provisions**—Recent corporate scandals have led to a host of provisions aimed at top management.

- Key employee retention plans are so limited they likely will disappear—§ 503(c)(1)
- Administrative expense status for severance payments to top management is capped—§ 503

Payments on golden parachutes can be federal fraudulent transfers with one-year (soon to be two-year) reach back period—§ 548

**Automatic Stay**—These provisions are designed to stop the abuses that have plagued bankruptcy.

- No monetary penalties for stay violations unless creditor has received notices as provided for in § 342-§ 342(g)(2)
- Stay terminates to prevent certain serial filings of individual cases—§ 362(c)(3)
- Stay generally does not go into effect for individuals who have had two or more cases in the previous year—§ 362(c)(4)(A)
- Stay ineffective with respect to real property if case has been filed in violation of a previous court order or entity ineligible to be a debtor—§ 362(b)(21)(B)
- Deadline to determine stay motions tightened—§ 362(d)
- Generally, automatic stay is terminated unless Chapter 7 individual debtor redeems property or reaffirms debt within 45 days of first meeting of creditors—§ 521(a)(6)(B)
- The time to determine lift stay motions is tightened in individual cases—§ 362(e)(2)

**Avoidance Actions (Preference, Fraudulent Transfer)**—Fraudulent transfers are easier to establish in some cases; preferences are generally harder to establish.

- "Ordinary course" defense for preference cases relaxed—§ 547(c)
- Preferences of non-consumer debtors must exceed \$5000 to be avoidable—§ 547(c)(9)

- Expands the grace period to 30 days for perfecting a security interest to avoid a preference—§ 547(e)(2)(C)
- Expands the grace period to 30 days for perfecting a security interest in a purchase money security interest—§ 547(c)(3)(B)
- Payments made under alternative repayment schedule may not be avoided as preferential—§ 547(h)
- Payments on domestic support obligations not preferential—§ 547(c)(7)
- Preferences made more than 90 days pre-petition can only be recovered from the insider, fixing *DePrizio* problem—§ 547(i)
- As of April 20, 2006, federal fraudulent transfer law will have two year reach back; major effect should be on avoidance of transfers under employment contract for less than reasonably equivalent value—§ 548(a)(1)
- Makes voidable transfers to insiders based on employment contracts out of the ordinary course of business for less than reasonably equivalent value—§ 548(a)(1)(B)(IV)
- Transfers by individual to a self-settled trust are voidable if made with intent to defraud—§ 548(e)(1)

**Chapter 12**—Family fishermen come home with great catch—a relatively easy chapter under which to confirm a repayment plan is now available to them.

- No sunset for Chapter 12
- Relaxed definition of family farmer allows Chapter 12 to apply to entities with greater debt, a smaller percentage of which arose from farming operations—§ 101(18)
- Applies to family fisherman—§ 109(f)
- Family fisherman defined, subject to caps on their debts, nature of their debts, and percentage of income from fishing—§ 101(19A)
- Certain government claims arising from property sales not entitled to priority if the debtor receives a discharge—§ 1222(a)(2)
- Limitation on plan modifications—§ 1229

**Cross-Border Cases**—In this "feel good" Chapter, Congress has reflected the practices courts have been developing in cross-border cases; watch out, though, it contains a few generally applicable notice provisions that could be land mines.

- Replaces § 304 (ancillary proceedings)
- Courts may dismiss a case or suspend proceedings, if a petition for recognition of a foreign proceeding has been granted—§ 305(a)
- Differentiates between "main" and "non-main" proceedings—§ 1502, § 1520
- Foreign representatives may participate in domestic cases or commence a voluntary or involuntary case—§ 1512
- Foreign creditors generally have the same rights as domestic creditors, but are given special notices—§ 1514
- Grants foreign representatives the power to bring avoidance actions when case is proceeding in the United States—§ 1523
- Provides for the recognition of foreign proceedings—§ 1515
- Provides for concurrent proceedings in the United States when a foreign "main" proceeding is pending—§ 1528
- No double-dipping between payments in foreign case and United States case—§ 1532

### ***General Provisions***

- Consumer privacy ombudsman can be appointed to protect consumer privacy—§ 332
- Patient care ombudsman to be appointed in health care business cases—§ 333
- Stringent requirements for disposing of patient records in health care business case—§ 351
- Addresses for notices are specified—§ 342(c)
- Providing adequate assurance for utilities is much more difficult—§ 366
- Claims of creditors who unreasonably refuse to participate in certain nonbankruptcy repayment plans can be reduced by up to 20%—§ 502(k)
- Clarifies that the "bona fide" dispute that disqualifies an entity from being a petitioning creditor in an involuntary case can be for liability or amount—§ 303(b)(1)
- Creditor does not need attorney to appear at 341 meeting—§ 341(c)
- References to investment bankers in § 101(14) eliminated, thereby eliminating *per se* disqualification—§ 101(14)

**Leases**—The time to assume leases is shortened, but the damages from a too-early assumption are limited.

- Absent landlord consent, the deadline to assume non-residential real property leases cannot be extended beyond roughly seven months—§ 365(d)(4)
- Defaults from the failure to perform non-monetary obligations do not preclude lease assumption—§ 365(b)(1)(A)
- Claims for assumed leases later rejected subject to two-year limitation and § 502(b)(6) cap thereafter—§ 503(b)(7)

### ***Financial Contract Provisions***

- Master netting agreements now explicitly protected—§§ 101(38A), 555, 556, 559, 560
- Sections 555, 556, 559 and 560 amended to expand rights to enforce contractual liquidation, termination, or acceleration provisions—§§ 555, 556, 559, 560

### ***Title 28***

- Exclusive jurisdiction for professional disqualification issues—28 U.S.C. § 1334(e)(2)
- Chapter 15 cases are core proceedings—28 U.S.C. § 547(b)(2)(P)
- Adversary proceedings in non-consumer cases involving less than \$10,000 in obligations of non-insiders may only be brought in the district in which the debtor resides—28 U.S.C. § 1409
- Adversary proceedings in consumer cases involving consumer debts less than \$15,000 may only be brought in the district where the debtor resides—28 U.S.C. § 1409

### **Early Case law**

At press time, few reported decisions have addressed the provisions of BAPCPA, because most provisions are not yet effective. Here is the first important case:

In re McNabb, 2005 Bankr. LEXIS 1231 (Bankr. D. Ariz. June 23, 2005) (Section 522(p), capping certain homestead exemptions, only applies in the few states in which debtor is allowed to elect federal exemptions).