



BANKRUPTCY LAW ALERT

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NEW BANKRUPTCY AMENDMENTS SIGNIFICANTLY IMPROVE CREDITORS' RIGHTS

On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA") will go into effect. While many of the new changes target consumer bankruptcy cases, the amendments also significantly enhance creditors' rights and restrict debtor protections in Chapter 11 business reorganizations and Chapter 7 business liquidations. Some of the new provisions provide trade creditors, commercial landlords, lenders, and utilities with increased protections. A few of the major changes that are beneficial to creditors are summarized below.

10 WAYS THE BAPCPA MAKES BANKRUPTCY LAWS MORE CREDITOR FRIENDLY

1. Suppliers of Goods Delivered Just Before Bankruptcy Have Higher Priority

Under the BAPCPA, a supplier will have an administrative claim for the value of goods received by the debtor within 20 days of a bankruptcy filing. Administrative claims generally must be paid in full before a plan of reorganization can be approved by a bankruptcy court.

2. Time Period to Reclaim Goods Delivered Just Before Bankruptcy Greatly Increased

The BAPCPA allows a seller to reclaim goods sold on credit to an insolvent buyer for a period of 45 days before a bankruptcy filing (increased from 20 days under the prior law).

3. Defending Preference Actions Will Be Easier

- **Ordinary Course of Business Defense Is Easier to Prove.**

Under bankruptcy law, a debtor may recover certain payments made to creditors during the 90-day period before the bankruptcy filing. One of the primary defenses to a preference action is the ordinary course of business defense. Under prior bankruptcy law, a creditor was required to prove that the payment was consistent with the payment history between the parties and with relevant industry standards. Under the BAPCPA, the ordinary course defense is broadened to allow a creditor to choose between proving either ordinary course as between the parties or ordinary course in the industry. Thus, the BAPCPA will protect more payments that are made within 90 days.

- **Smaller Preference Suits Must Be Brought Where the Defendant Resides.**

Under the BAPCPA, preference actions to collect transfers under \$10,000 must now be brought where the defendant resides.

4. Secured Creditors Have Longer Time Period to Perfect a Security Interest

The BAPCPA expands the time period to perfect a purchase money security interest from 20 to 30 days. Thus, a secured party taking a security interest in equipment has 30 days within which to file a financing statement under Article 9.

5. Time Period to Assume or Reject Commercial Leases Reduced

Prior to the BAPCPA, a tenant in bankruptcy automatically had 60 days after filing to decide whether to assume or reject a lease of commercial property. However, bankruptcy courts had the authority to extend this deadline indefinitely. Under the BAPCPA, a tenant will automatically have 120 days to assume or reject a commercial lease and, for cause, bankruptcy courts can grant a debtor's request for only one 90-day extension, unless the landlord consents. Thus, a tenant in bankruptcy has a maximum of seven months to assume a commercial lease.

6. Eviction of Bankrupt Tenants Will Not Be Halted by Bankruptcy

Under the BAPCPA, an eviction based on a judgment that was obtained prior to a bankruptcy filing will not be automatically stayed merely by the filing of a bankruptcy petition.

7. Time Period During Which Only the Debtor May File a Chapter 11 Plan Greatly Limited

A debtor in a Chapter 11 bankruptcy case has the exclusive right to file a plan of reorganization for 120 days after the filing of a petition, and the exclusive right to solicit acceptance of the reorganization plan for the first 60 days thereafter. Prior to the BAPCPA, courts were afforded broad discretion to extend these time periods. The BAPCPA forbids the extension of the debtor's exclusivity period for filing a plan beyond 18 months after the filing of the petition, and disallowing any extension of time for soliciting creditor acceptance of the plan beyond a date that is 20 months after the bankruptcy filing.

8. Expanded Grounds for Dismissal or Conversion of Chapter 11 Cases

Under the BAPCPA, bankruptcy courts must dismiss a bankruptcy case if the debtor:

- fails to pay post-petition taxes on time.
- fails to maintain appropriate insurance.
- fails to comply with any bankruptcy court order.
- fails to comply with any filing or reporting requirement under the Bankruptcy Code or the Bankruptcy Rules.

9. Tighter Restrictions On Key Employee Retention Programs

A debtor's ability to provide key employees significant incentives to stay with the company will be limited:

- Employees must be essential.
- Employees must have *bona fide* offers from another employer.
- Amount of the payments is capped at 10 times the mean retention bonus paid to non-management employees in the prior year or 25% of the employee's bonus compensation in the prior calendar year.
- Management may not receive a severance payment unless the payment is part of a program generally applicable to all full-time employees and the amount is not greater than 10 times the amount of the severance paid to non-management employees.

10. Increased Patient Rights in Health Care Business Bankruptcies

The BAPCPA also contains several provisions specifically aimed at health care reorganizations. These amendments impose additional duties on health care business debtors and grant new rights to patients, including the appointment of a patient ombudsman, the transfer of patients of a health care business that is being closed, and new regulations for the handling of patient records. Government agencies are granted additional oversight to review the transferability of property owned by nonprofit health care debtors and will have an administrative priority for expenses associated with the closing of a health care business.

FOR MORE INFORMATION

If you would like more information concerning the recent changes to the Bankruptcy Code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or have any other questions about this Bankruptcy News Alert, please contact one of the lawyers listed below.

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