THE YEAR IN REVIEW: CASE LAW DEVELOPMENTS UNDER THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

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I. INTRODUCTION

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA") was signed into law by President George W. Bush on April 20, 2005.[1] The new legislation, which brought to a conclusion a reform initiative spanning over the course of a decade, makes the most comprehensive changes to the Bankruptcy Code (the "Code") since its enactment in 1978.[2] Indeed, the term "overhaul" would not be a misnomer. The amendments to the Code were not adopted in response to an economic calamity but rather resulted from a desire to recalibrate the balance of the often-competing interests of debtors and creditors and to correct perceived deficiencies that existed under former law. The legislation is the product of the political process and is replete with reforms that reflect (and advance) the interests of various constituencies. The BAPCPA is designed to strengthen the rights of creditors, clarify areas of uncertainty in pre-amendment law, limit judicial discretion, and—perhaps most significantly—change the dynamics of the debtor-creditor relationship.

The majority of the BAPCPA's provisions became effective on October 17, 2005.[3] The new law poses greater interpretive challenges than existed under the Bankruptcy Reform Act of 1978, due to the imprecise language frequently utilized by Congress and other drafting issues that do not in many cases clearly articulate Congressional intent. The case law construing the changes to the law over the last twelve months or so has underscored the interpretive difficulties encountered by courts and attorneys when dealing with many of the new provisions. The legislation has given rise to sharp criticism, already created splits in the decisional law and, at least in some instances, resulted in unintended consequences. Courts have departed from a plain meaning statutory interpretation in some cases, in order to achieve a result that is more consistent with perceived Congressional intent. The lack of a developed and clearly articulated legislative history, in many cases, makes this an arduous task and compounds the issues for both the bench and the bar.

This Article reviews some of the more significant judicial decisions interpreting the BAPCPA since the effective date of the legislation and provides an analysis of those decisions. In order to provide context for the

1. Pub. L. No. 109-8, 119 Stat. 23 (2005).

2. *See generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (discussing the development of the legislation and tracing its evolution).

3. S. 256, 109th Cong. § 1501 (2005).

discussion, the Article summarizes the implicated changes to the law made by the BAPCPA. The Article begins with a discussion of changes to consumer bankruptcy and the decisions of courts that have been called upon to construe the new legislation and apply it to pending cases. The Article then examines some of the changes impacting business bankruptcy cases and decisions that have emerged over the last year in this area. The Article concludes by highlighting some of the views that have been articulated in published opinions by judges, who have been forced to make sense of the new law's requirements.

II. CONSUMER BANKRUPTCY

The articulated purpose of the BAPCPA is to "improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."[4] As the name signals, "bankruptcy abuse prevention" was the predominant motivating factor behind many of the changes to the consumer

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4. H.R. REP. NO. 109-31, pt. 1 (2005). At the signing ceremony for the BAPCPA, President Bush made the following statements:

> Today we take an important action to strengthen—to continue strengthening our nation's economy. The bipartisan bill I'm about to sign makes common-sense reforms to our bankruptcy laws. By restoring integrity to the bankruptcy process, this law will make our financial system stronger and better. By making the system fairer for creditors and debtors, we will ensure that more Americans get access to affordable credit.
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> . . . .
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> Our bankruptcy laws are an important part of the safety net of America. They give those who cannot pay their debts a fresh start. Yet bankruptcy should always be a last resort in our legal system. If someone does not pay his or her debts, the rest of society ends up paying them. In recent years, too many people have abused the bankruptcy laws. They've walked away from debts even when they had the ability to repay them. This has made credit less affordable and less accessible, especially for low-income workers who already face financial obstacles.
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> The bill I sign today helps address this problem. Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts. Those who fall behind their state's median income will not be required to pay back their debts. This practical reform will help ensure that debtors make a good-faith effort to repay as much as they can afford. This new law will help make credit more affordable, because when bankruptcy is less common, credit can be extended to more people at better rates.
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> America is a nation of personal responsibility where people are expected to meet their obligations. We're also a nation of fairness and compassion where those who need it most are afforded a fresh start. The act of Congress I sign today will protect those who legitimately need help, stop those who try to commit fraud, and bring greater stability and fairness to our financial system. I'm honored to join the members of Congress to sign the Bankruptcy Abuse Prevention and Consumer Protection Act.

Press Release, White House Press Office, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html.

bankruptcy provisions. The BAPCPA has created numerous new requirements that, in turn, create new pitfalls for debtors and bankruptcy practitioners. During the last twelve months, the bench and bar have struggled with many of the substantive and procedural challenges created by the new legislation.

A. DEBT RELIEF AGENCIES

Implicated Code Sections: 11 U.S.C. §§ 101, 526, 527, 528

Summary of Changes to Law: The BAPCPA was enacted in large part to prevent the abuse and manipulation of the bankruptcy system. Congress has adopted reforms that are designed to address misconduct by consumer debtors and other professionals involved with rendering bankruptcy assistance to a debtor.[5] The new legislation subjects all "debt relief agencies"[6] that render "bankruptcy assistance"[7] to "assisted persons"[8] to new and significant requirements. Indeed, the BAPCPA, among other things, requires debt relief agencies to enter into written contracts with assisted persons, disclose the extent of services provided and fees charged, provide specified information, maintain records, and disclose clearly and conspicuously in all advertising that their services contemplate bankruptcy.[9] The law, therefore, now contains provisions regulating the manner in which a "debt relief agency" provides services to both potential and actual clients. A failure to satisfy the extensive requirements of the new legislation may subject debt relief agencies to loss of fees, damages, injunctive relief, and other penalties.[10] The definitions specifying the parameters of who is a "debt relief agency" and subject to the law's new stringent requirements captures those who provide goods or services "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

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5. The House Report characterizes the BAPCPA as a "civil enforcement initiative" that has "'consistently identified' such problems as 'debtor misconduct and abuse, misconduct by attorneys and other professionals, problems associated with bankruptcy petition preparers, and instances where a debtor's discharge should be challenged.'" H.R. REP. NO. 109-31 *reprinted in* 2005 U.S.C.C.A.N. 92.

6. *See* 11 U.S.C. § 101(12A) (2006). Subject to certain exceptions, a "debt relief agency" is defined as "any person who provides bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer . . . ." *Id.*

7. *See id.* § 101(4A). *See* text accompanying note 11 *infra* for definition of "bankruptcy assistance."

8. *See id.* § 101(3). The phrase "assisted person" "means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000." *Id.*

9. *See id.* §§ 526, 527, 528.

10. *See, e.g.*, *id.* § 526(c).

proceeding on behalf of another *or providing legal representation* with respect to a case proceeding" under Title 11.[11]

1. *Attorneys Licensed to Practice Law and Admitted to Bar Are Not "Debt Relief Agencies" and Are Excused from Complying with BAPCPA's Requirements Regulating Such Parties*

Case Name: *In re* Attorneys at Law and Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005)

Ruling: Attorneys that are regularly admitted to the bar before the court or those admitted to practice *pro hac vice* are not covered by the provisions of the Code regulating "debt relief agencies" and are, therefore, excused from compliance with "any of those requirements or provisions, so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise."[12]

Facts & Analysis: On October 17, 2005 (at 9:35 a.m.),[13] the United States Bankruptcy Court for the Southern District of Georgia, sua sponte, entered an order declaring that Congress did not intend to "ensnare attorneys in the thicket" of the provisions regulating "debt relief agencies."[14] The court entered the order on its own motion based upon Code § 105 (general equitable power to enter necessary orders) and Code § 526 (authorizing the court on its own motion to enjoin violations of the debt relief agency provisions) and its inherent power.[15] The court, construing the statutory scheme and parsing the definitional prerequisites, concluded that it "would be a breathtaking expansive interpretation of federal law to usurp state regulation of the practice of law via the ambiguous provisions of [the BAPCPA], which in no clear fashion lay claim to the right to do any such thing."[16] The court did not believe that "Congress would ever take such an astounding step toward the federal regulation of professionals without forthrightly and expressly stating its intent."[17] Accordingly, at least in the Southern District of Georgia, attorneys are not subject to the debt relief agency provisions. It should be

11. *Id.* § 101(4A) (defining the phrase "bankruptcy assistance") (emphasis added).
12. *In re* Attorneys at Law and Debt Relief Agencies, 332 B.R. 66, 71 (Bankr. S.D. Ga. 2005).
13. The court's order was entered on the effective date of the BAPCPA, and obviously prepared in anticipation of its effectiveness.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

noted, however, the United States Trustee has appealed the order. That appeal currently remains pending.

It is important to recognize that other courts are not in accord with the decision of the Georgia Bankruptcy Court. More than one federal court has found that applying a "plain meaning" construction to the statutory language results in the inescapable conclusion that most consumer bankruptcy attorneys are generally considered "debt relief agencies" and subject to the requirements of the new legislation.[18] This is the better view, although obviously a disappointing interpretation for most consumer bankruptcy lawyers.

2. *Comfort Order Not Warranted Where No Live "Case or Controversy" is Presented*

Case Name: *In re* McCartney, 336 B.R. 588 (Bankr. M.D. Ga. 2006)

Ruling: A motion for a determination that attorneys practicing before the bankruptcy court were not "debt relief agencies" within the meaning of the BAPCPA was denied because attorneys were not subject to the obligations imposed on debt relief agencies. The motion did not present a live "case or controversy" over which the bankruptcy court could exercise jurisdiction.

Facts & Analysis: The attorney for the Chapter 7 debtors in *In re McCartney*[19] filed a motion requesting the court to determine that attorneys admitted to practice before the court were not "debt relief agencies" and subject to the BAPCPA's new and stringent requirements.[20] The court determined that it did not have jurisdiction to decide the motion. The movant did not allege that any party threatened to enforce the debt relief agency provisions against the attorney and did not establish that he had

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18. *See, e.g.*, Olsen v. Gonzales, 2006 WL 2345503 (D. Or. Aug. 11, 2006); Hersh v. United States, 347 B.R. 19 (N.D. Tex. 2006). The lawyer in *Hersh* brought a declaratory judgment action seeking a determination that the debt relief agency provisions of the BAPCPA did not apply to licensed attorneys. The district court found that the phrase "providing legal advice" contained in the Code's definition of "bankruptcy assistance" renders it quite "clear" that most consumer bankruptcy attorneys fit within the applicable definition and are debt relief agencies. *Hersh*, 347 B.R. at 21. "[A]ny inferences possibly created by imprecise drafting are surely overwhelmed by the plain language." *Id.* The court also found that the legislative history "clearly indicates that Congress had attorneys in mind with this statute" as the House Report on the new legislation mentions "attorney" 164 times. *Id.* (citing H.R. REP. NO. 109-31, *reprinted* in 2005 U.S.C.C.A.N. 88). The court in *Olsen* similarly concluded that the BAPCPA's legislative history provides a "very strong" indication that attorneys are included within the definition: "The bill's consumer protections include provisions strengthening professionalism standards for attorneys and others who assist consumer debtors with bankruptcy cases." *Olsen*, 2006 WL 2345503, at *3 (quoting H.R. REP. NO. 109-31, 109th Cong., 1st Sess. 4, *reprinted in* 2005 U.S.C.C.A.N. 103).

19. 336 B.R. 588 (Bankr. M.D. Ga. 2006).

20. *In re* McCartney, 336 B.R. at 590.

sustained any "real, actual, or direct harm or injury."[21] As such, the movant failed to satisfy the case or controversy requirement and the court refused to enter an advisory opinion.[22]

3. *Lawyer Lacked Standing to Challenge Constitutionality of BAPCPA's "Debt Relief Agency" Provisions*

Case Name: Geisenberger v. Gonzales, 2006 WL 1734705 (E.D. Pa. June 19, 2006)

Ruling: A party seeking to challenge the constitutionality of a statute must demonstrate a real justiciable controversy that requires sufficient immediacy and reality of harm to warrant relief. Mere "bald assertions" of harm are insufficient.

Facts & Analysis: In *Geisenberger v. Gonzales*,[23] a practicing bankruptcy attorney commenced an adversary proceeding against the United States Attorney, the United States Trustee, and the Pennsylvania Attorney General two days after the effective date of the BAPCPA challenging the constitutionality of portions of the legislation regulating "debt relief agencies."[24] The plaintiff sought a declaration that certain provisions of the new legislation regulating debt relief agencies were unconstitutional and a permanent injunction against their enforcement, since the lawyer would be "irreparably harmed."

The district court dismissed the complaint. The court reasoned that in order to present a justiciable controversy warranting relief against a feared future event, a party must demonstrate that "the probability of that future event occurring is real and substantial" and of "sufficient immediacy and reality" to warrant relief.[25] The court found significant the absence of any allegation in the complaint that the federal or state government had threatened to enforce the "debt relief agency" provisions of the BAPCPA against him. The complaint merely indicated that "many of the provisions of BAPCPA, as enacted, are at best poorly worded and subject to multiple interpretations based on the facts presented by each individual client."[26]

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21. *Id.*

22. *Id.* at 591. *Accord In re* Beaver, BKY Case No. 05-40804 (Bankr. W.D.N.C. Nov. 15, 2005) (denying motion for declaration that debt relief agency provisions of the BAPCPA are invalid as applied to members of the bar duly admitted to practice law in the court); *In re* Cantor, BKY Case No. 05-20005 (Bankr. W.D. Ky. May 23, 2006) (adopting *McCartney* and dismissing request for declaratory relief as no genuine case or controversy existed for the court to exercise jurisdiction).

23. 2006 WL 1737405 (E.D. Pa. June 19, 2006).

24. *Geisenberger*, 2006 WL 1737405, at *1.

25. *Id.* at *2.

26. *Id.* (quoting Complaint ¶ 4) (internal quotations omitted).

The plaintiff, during oral argument, reinforced the court's view that he was really seeking an advisory ruling in light of the perceived uncertainties associated with the requirements of the legislation. As such, the court did not find a justiciable issue and concluded that the plaintiff lacked standing to challenge the constitutionality of the legislation.[27]

4. *Portion of BAPCPA's "Debt Relief Agency" Provisions Held Unconstitutional*

Case Name: Hersh v. United States, 347 B.R. 19 (N.D. Tex. 2006)

Ruling: The restrictions contained in 11 U.S.C. § 526(a)(4) that impose restrictions on a debt relief agency's ability to render legal advice violate the First Amendment of the U.S. Constitution.

Facts & Analysis: The attorney in *Hersh v. United States*[28] filed an action in the United States District Court seeking a declaratory judgment that, among other things, certain provisions of the BAPCPA regulating "debt relief agencies" are unconstitutional.[29] The attorney in *Hersh*, whose practice includes counseling clients for a fee regarding the bankruptcy laws, challenged the constitutionality of 11 U.S.C. § 526(a)(4), which prohibits "debt relief agencies" from giving certain advice to clients and prospective clients relative to the incurrence of additional debt in contemplation of bankruptcy,[30] and 11 U.S.C. § 527, which requires "debt relief agencies" to make certain disclosures.[31]

The government initially challenged the plaintiff's standing on the basis that there was no justiciable controversy since no action had been taken to enforce any of the BAPCPA provisions against her. The court rejected the argument with respect to the First Amendment challenges, finding that the legislation's alleged suppression of speech was sufficient to provide standing.[32]

In addressing the merits, the court found that Code § 526(a)(4) was not sufficiently narrow to pass constitutional muster. The court recognized that

27. *Id.*

28. 347 B.R. 19 (N.D. Tex. 2006).

29. *Hersh*, 347 B.R. at 21.

30. Section 526(a)(4) of the Code provides 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 case" or "to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor" in a bankruptcy case. 11 U.S.C. § 526(a)(4) (2006).

31. Section 527 of the Code requires "debt relief agencies" to provide "assisted persons" with written notice of specified information, including a "clear and conspicuous" statement specified in the legislation (or one substantially similar that specified) in a single document separate from other documents or notices provided. *Id.* § 527.

32. *Hersh*, 347 B.R. at 22 n.3.

the BAPCPA was enacted in large part to remedy abuse of the bankruptcy system, including debtors who improperly incur additional debt prior to filing with the intention of discharging it. Rather than closing loopholes or sanctioning those who engage in such conduct, Congress enacted a "prophylactic rule" in § 526(a)(4) that bans bankruptcy attorneys from advising their clients to incur additional debt in contemplation of bankruptcy.[33] The court found this restriction to be overbroad under any constitutional standard in that it prevents lawyers from advising clients to take actions that are lawful, and even in some cases, financially prudent.[34] The legislation extends beyond abuse and impermissibly operates to deprive clients of good counsel. In light of the foregoing, the court found Code § 526(a)(4) to be facially unconstitutional and invited the plaintiff to move for summary judgment on that claim.[35] At least one federal court has found the reasoning of *Hersh* persuasive and similarly found Code § 526(a)(4) to be overly restrictive and unconstitutional.[36]

The court in *Hersh*, however, rejected the plaintiff's assertion that the disclosure requirements of Code § 527 were unconstitutional. The court, looking to Supreme Court precedent on compelled disclosures by professionals, found that § 527 advances a sufficiently compelling governmental interest and does not unduly burden the ability of a debtor to seek bankruptcy relief or the attorney-client relationship.[37]

B. MANDATORY PRE-BANKRUPTCY CREDIT COUNSELING

Implicated Code Sections: 11 U.S.C. §§ 109, 111

Summary of Changes to Law: Section 109 of the Code provides that an individual debtor is *not eligible* for relief under any chapter of the Code unless, within "the 180-day period preceding" the bankruptcy filing, the debtor received an individual or group briefing from an approved, nonprofit budget and credit counseling agency.[38] The required prepetition "briefing," which may take place over the telephone or Internet, must "outline" the

33. *Id.* at 24.

34. *Id.* A client may be well advised, for instance, to refinance a mortgage at a lower rate to reduce payments and forestall, or even prevent, a bankruptcy. *Id.* It may also be advisable for a consumer to take on secured debt, such as a loan on a motor vehicle, which would survive bankruptcy and enable the debtor to continue to get to work and earn income. *Id.*

35. *Id.*

36. *See, e.g.*, Olsen v. Gonzales, 2006 WL 2345503 (D. Or. Aug. 11, 2006) (ruling that Code § 526(a)(4) is an overly restrictive violation of the First Amendment as it ensnares advice regarding lawful actions).

37. *Hersh*, 347 B.R. at 27.

38. 11 U.S.C. §§ 109(h), 111 (2006). The credit counseling requirement of the statute is a substantive requirement and not a mere procedural formality.

opportunities for credit counseling, and the agency is required to assist the debtor with a budgetary analysis.[39] The debtor is required to file a certificate from the credit counseling agency describing the services provided and any debt repayment plan developed with the agency.[40] Among the limited exceptions to the credit counseling requirement is the "exigent circumstances" exception.[41] Under that exception, a debtor who submits a "certification" that is "satisfactory to the court," setting forth exigent circumstances warranting a waiver of the prepetition credit counseling requirement *and* a representation that the debtor could not receive the counseling within "5 days" of making the request, may be temporarily excused.[42] The eligibility requirements under the Code § 109 are stringent and a failure to strictly observe the statutory requirements is a "fatal flaw." Indeed, such a failure warrants a dismissal of the bankruptcy case or, in some jurisdictions, having the petition stricken.[43]

1. *Credit Counseling Requirement Is an Eligibility Issue Requiring Strict Compliance*

Case Name: *In re* LaPorta, 332 B.R. 879 (Bankr. D. Minn. 2005)

Ruling: Satisfying the prepetition credit counseling requirement is a first-level requirement (i.e., the ticket in to the proceeding) for any individual who seeks bankruptcy relief. The lack of eligibility is an incurable defect constituting cause for the immediate dismissal of the case.

Facts & Analysis: The debtor in *In re LaPorta*[44] filed a pro se petition for relief under Chapter 7.[45] The debtor did not submit a certificate from a credit counseling agency, attesting to the receipt by the debtor of the

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39. *Id.* at § 109(h). The legislative history surrounding the BAPCPA indicates that the "prepetition" requirement was intended to compel debtors to "receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences." H.R. REP. NO. 109-31(I), at 105, *reprinted in* 2005 U.S.C.C.A.N. 89, 104. Congress intended to provide prospective filers with "an opportunity to learn about the consequences of bankruptcy . . . before they decide to file for bankruptcy relief." *Id.*

40. 11 U.S.C. § 109(h).

41. *Id.* § 109(h)(3).

42. *Id.* The court is, upon an appropriate showing, authorized to waive the credit counseling requirement and permit the debtor to obtain the counseling and file the certification within the thirty-day period subsequent to the filing of the petition. *Id.* § 109(h)(3)(B). The court has the discretion, for cause shown, to extend the thirty-day period for an additional fifteen days. *Id.* The credit counseling requirements of Code § 109(h) do not apply with respect to a debtor whom the court determines is not able to complete the requirements due to "incapacity," "disability," or because of the debtor's "active duty in a military combat zone." *Id.* § 109(h)(4).

43. *See infra* notes 56-70 and accompanying text (discussing the approaches taken by the courts).

44. 332 B.R. 879 (Bankr. D. Minn. 2005).

45. *In re* LaPorta, 332 B.R. at 880.

services required by Code § 109(h)(1). The debtor did, however, submit a three-paragraph unverified, signed statement addressing the credit counseling requirement and indicating that she reviewed the United States Trustee's website for approved agencies and concluded that she could not afford to travel given the time, distance, and gas prices. The debtor was facing repossession of her motor vehicle and was not able to retain legal counsel.

The court found the factual content of the debtor's statement not to be satisfactory, determined that the debtor never made a request for credit counseling services, and dismissed the case.[46] The court, while recognizing that the result was "harsh," found the outcome to be the only one possible.[47] The credit counseling requirement is a prerequisite to eligibility for relief under the Code, the absence thereof, in these circumstances, constitutes an incurable defect.[48]

2. *Credit Counseling Must Be Obtained No Later Than Day "Before" Bankruptcy Filing*

Case Name: *In re* Murphy, 342 B.R. 671 (Bankr. D.D.C. 2006)

Ruling: In order to satisfy the new credit counseling requirements of the Code, the counseling must be obtained not just some hours, minutes, or seconds before the filing, but at least one calendar day in advance of the filing of the petition.

Facts & Analysis: The attorney for the debtor in *In re Murphy*[49] electronically opened a docket reflecting the commencement of the bankruptcy case on the same date the debtor obtained credit counseling.[50] In addition, counsel paid the fee and filed the debtor's plan bearing the debtor's signature along with a statement of social security number and the required certificate of credit counseling. The bankruptcy petition was, however, filed the next day. The Chapter 13 trustee sought dismissal of the bankruptcy alleging that the debtor failed to comply with the Code's credit counseling requirements, since the case was commenced on the same day that the counseling was received.

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46. *Id.* at 880-83.

47. *Id.* at 883.

48. *Id.* *Accord In re* Talib, 335 B.R. 424 (Bankr. W.D. Mo. 2005); *In re* Fields, 337 B.R. 173, 180 (Bankr. E.D. Tenn. 2005) (holding that a bankruptcy court has no discretion to relieve debtors of their obligation to first obtain credit counseling as a prerequisite to filing for bankruptcy protection; the case had to be dismissed); *In re* Mingueta, 338 B.R. 833 (Bankr. C.D. Cal. 2006) (noting that eligibility is determined as of the petition date); *In re* Ross, 338 B.R. 134 (Bankr. N.D. Ga. 2006).

49. 342 B.R. 671 (Bankr. D.D.C. 2006).

50. *In re* Murphy, 342 B.R. at 672.

The court observed that the Code does not simply require the debtor to obtain credit counseling before the bankruptcy filing. Rather, "it specifies that credit counseling must be obtained *prior* to 'the *date* of the filing of the petition.'"[51] The debtor's petition was filed the day after the credit counseling was obtained, thus satisfying the requirements of the Code (albeit inadvertently in this case). The trustee's reliance on the mistaken docket entry did not alter the fact that the petition was actually filed after the counseling had been obtained.

3. *Spouse in Joint Bankruptcy Case Dismissed as a Debtor for Failure to Obtain Credit Counseling*

Case Name: *In re* Piontek, 2006 WL 1837905 (Bankr. W.D. Pa. July 5, 2006)

Ruling: The Code unequivocally requires *all* debtors to obtain credit counseling. The counseling obtained by one spouse in a joint case may not be imputed for the benefit of the other spouse even in a jointly filed case.

Facts & Analysis: The wife-debtor in the jointly filed case of *In re Piontek*[52] failed to obtain credit counseling, although the husband-debtor did so.[53] The court rejected the debtor's argument of financial inability to pay the associated costs and the contention that the counseling obtained by her husband was sufficient.[54] The court dismissed the debtor-wife from the bankruptcy case.[55]

4. "Striking" Petition Filed by Ineligible Debtor Confirms Ineffectiveness of Bankruptcy Filing and Is Proper Remedy

Case Name: *In re* Salazar, 339 B.R. 622 (Bankr. S.D. Tex. 2006)

Ruling: The filing of a bankruptcy petition by an ineligible debtor has no legal significance. Such a petition should be "stricken."

Facts & Analysis: The court in *In re Salazar*[56] entered an order striking the putative debtors' bankruptcy petition due to a failure to satisfy

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51. *Id.* at 673 (quoting 11 U.S.C. § 109(h) (2006)). *Accord In re* Cole, 2006 WL 2336586 (Bankr. E.D. Tenn. July 31, 2006) (finding that a debtor that obtains credit counseling on the same day as the bankruptcy filing does not satisfy the Code's requirements and is not an eligible debtor). *Contra In re* Warren, 339 B.R. 475, 480 (Bankr. E.D. Ark. 2006) (opining that nothing in the legislative history contemplates at least a one-day waiting period after completion of credit counseling).

52. 2006 WL 1837905 (Bankr. W.D. Pa. July 5, 2006).

53. *In re* Piontek, 2006 WL 1837905, at *1.

54. *Id.*

55. *Id.*

56. 339 B.R. 622 (Bankr. S.D. Tex. 2006).

the prepetition credit counseling requirements of the Code.[57] The putative debtors acknowledged that their failure rendered them ineligible for relief under the BAPCPA. After the date that the bankruptcy petition was filed, a creditor completed the foreclosure of the debtors' home. The court was forced to address the consequences of the putative debtors' initial filing and determine whether the original filing invoked the automatic stay, and thereby rendered the foreclosure sale voidable.

The court in *Salazar* held that no automatic stay arises on the filing of a bankruptcy petition by an ineligible individual.[58] Framing the legal question, the court posited: "Did Congress intend to impose an eligibility requirement on putative debtors, but also intend for an ineligible person to receive the benefits of the automatic stay?"[59] The court answered the question in the negative: *"It is implausible to believe that Congress specifically identified people to exclude from the bankruptcy process, yet permitted those same people to benefit from bankruptcy's most powerful protection: the automatic stay."*[60] The court concluded that when the petition is stricken, no automatic stay exists—either before or after the date it was stricken.[61] As such, there is no legal significance to filings by ineligible debtors. The court acknowledged that the practical implications of its ruling may create uncertainty for parties seeking an eligibility determination.[62] The bankruptcy laws are, however, designed to accommodate such uncertainty.

The court in *Salazar* acknowledged that other courts have created a distinction between "dismissal" of a case and "striking" of the petition. The striking of a *petition* operates as a judicial recognition that the bankruptcy case was never commenced and is the appropriate remedy.[63] It was

57. *In re* Salazar, 339 B.R. at 623.

58. *Id*. at 624.

59. *Id*.

60. *Id*. (emphasis in original).

61. *Id*. at 625.

62. *Id*. at 627. As the court pointed out:

> It is true that an ineligible debtor is temporarily protected by a delay when a creditor chooses to wait for an eligibility determination before taking action that would otherwise violate a valid stay. Without question, there would be more certainty without the ambiguity that exists in the gap between filing and the eligibility determination. Creditors who act in the face of ambiguity may face repercussions if it is determined that they violated the automatic stay. The law contains both mechanisms to handle violations of a valid stay, and mechanisms to punish ineligible debtors who file to wrongfully seek shelter under the automatic stay provisions.

Id. (internal citations omitted).

63. *In re* Salazar, 339 B.R. at 633. *Accord In re* Elmendorf, 2006 WL 19849783 (Bankr. S.D.N.Y. July 18, 2006); *In re* Carey, 341 B.R. 798 (Bankr. M.D. Fla. 2006); *In re* Rios, 336 B.R. 177 (Bankr. S.D.N.Y. 2005); *In re* Hubbard, 333 B.R. 377 (Bankr. S.D. Tex. 2005).

effectively void ab initio. A dismissal of the *case* brings about a different result and may have implications for debtors seeking to refile.[64] A number of courts have not used great care to date in making this distinction—one that is more than merely semantic.[65]

5. *"Dismissal" of Case by Ineligible Debtor Is Proper Remedy*

Case Name: *In re* Brown, 342 B.R. 248 (Bankr. D. Md. 2006)

Ruling: A petition filed by an ineligible debtor gives rise to a case in a limited sense and to an automatic stay, until the court makes a determination as to eligibility and the case is dismissed. In other words, the filing of a petition gives rise to a case and "dismissal" is the appropriate remedy.

Facts & Analysis: The court in *In re Brown*[66] issued an order to show cause to determine the validity of a foreclosure sale that was conducted *after* the Chapter 13 bankruptcy case was commenced but *before* the entry of the court's order dismissing the case.[67] The debtor in *Brown* filed for bankruptcy protection under Chapter 13, and, in connection with the bankruptcy filing, moved the court to waive the prepetition credit counseling requirement. Seven days later, the court issued an order "dismissing" the bankruptcy case since the certification requesting the waiver was not satisfactory to the court. Prior to the entry by the court of its order dismissing the case, the creditor proceeded to auction off the debtor's residence with full knowledge of the bankruptcy filing. The debtor obtained the credit counseling postpetition and sought to vacate the court's dismissal order. The creditor asserted that since the debtor did not obtain prepetition credit counseling and the certification requesting a temporary waiver did not appear to meet the statutory requisites, no automatic stay was created by the filing of the bankruptcy petition.

The court examined the consequences of the filing of a bankruptcy petition under circumstances in which the individual debtor is not eligible for relief. The *Brown* court recognized that the authorities were not

64. *See, e.g.*, 11 U.S.C. § 362(c)(3) (2006) (terminating the automatic stay in a subsequent case if an earlier case is dismissed during the previous year unless the debtor proves that he or she is entitled to the continuation of the stay in the subsequent case). *See infra* notes 89-90 and accompanying text for a discussion of 11 U.S.C. § 362(c)(3)-(4).

65. *See, e.g.*, *In re* Burrell, 339 B.R. 664, 667 (Bankr. W.D. Mich. 2006) (dismissing the case without prejudice but cautioning that the debtor "should be aware that another immediate bankruptcy filing has implications"); *In re* Hawkins, 2006 WL 1234927, at *2 (Bankr. D.D.C. Mar. 20, 2006) (opining that although the debtor was ineligible to be a debtor under Code § 109(h), the filing counted for purposes of Code § 362(c)(3), limiting the availability of the automatic stay in succeeding bankruptcy case unless the debtor takes steps to extend its applicability).

66. 342 B.R. 248 (Bankr. D. Md. 2006).

67. *In re* Brown, 342 B.R. at 249.

uniform on the issue and departed from the views articulated in *Salazar*.[68] The court found the *Salazar* reasoning "unpersuasive" and opined that a debtor's ineligibility cannot be ascertained until a court rules on the issue in the first instance.[69] Until that time, the automatic stay remains in effect. The court found dismissal to be the appropriate mechanism to dispense with ineligibility under the circumstances and ruled that the creditor had violated the automatic stay, notwithstanding the fact that the case was ultimately dismissed.[70]

6. *"Exigent Circumstances" Warranting Temporary Waiver of Credit Counseling Requirement Must Demonstrate BOTH Exigency and Inability to Obtain Services within "5 days" of Request*

Case Name: Dixon v. LaBarge (*In re* Dixon), 338 B.R. 383 (B.A.P. 8th Cir. 2006)

Ruling: Chapter 13 debtor's bankruptcy that was filed in order to forestall a foreclosure sale on the debtor's home scheduled one day after the filing did not rise to the level of exigent circumstances meriting a temporary waiver of the prepetition credit counseling requirement. Dismissal of the bankruptcy case was appropriate.

Facts & Analysis: The Chapter 13 debtor in *Dixon v. LaBarge* (*In re Dixon*)[71] filed a certification under penalty of perjury along with the bankruptcy petition requesting a waiver of the credit counseling requirement.[72] The certification indicated that a foreclosure sale was scheduled for the debtor's home the day after the bankruptcy filing and that he did not contact his attorney until the day before the filing. The debtor attempted to get the mortgage company to delay the foreclosure sale before the bankruptcy filing, but was unsuccessful. Upon being advised of the credit

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68. *Id.* at 252. *See supra* notes 56-64 and accompanying text (discussing *Salazar*).

69. *In re* Brown, 342 B.R. at 252-53.

70. *Id.* at 255-56 (awarding consequential damages to debtor for expenses incurred but declining debtor's request for the imposition of punitive damages). *Accord In re* Hawkins, 340 B.R. 642, 643-46 (Bankr. D.D.C. 2006); *In re* Mills, 341 B.R. 106, 109-10 (Bankr. D.D.C. 2006) (opining that a petition filed by an ineligible debtor is not void ab initio but gives rise to a case (and to the automatic stay) for the limited purpose of permitting the court to ascertain eligibility); *In re* Westover, 2006 WL 1982751 (Bankr. D. Vt. July 11, 2006); *In re* Seaman, 340 B.R. 698, 707 (Bankr. E.D.N.Y. 2006) (opining that a commenced case cannot be a nullity); *In re* Racette, 343 B.R. 200 (Bankr. E.D. Wis. 2006). *See generally In re* Dixon, 338 B.R. 383, 389 (B.A.P. 8th Cir. 2006) (affirming lower court's dismissal of the case, but not specifically deciding whether dismissing case as opposed to dismissing or striking petition is the proper remedy as the issue was not directly before the court).

71. 338 B.R. 383 (B.A.P. 8th Cir. 2006).

72. Dixon v. LaBarge (*In re* Dixon), 338 B.R. at 385.

counseling requirement, the debtor was informed that it would be "two weeks" before credit counseling could be obtained over the telephone and twenty-four hours before the counseling could be provided by the Internet. He, therefore, attested that it was impossible for him to obtain the requisite counseling prior to the time set for the foreclosure sale.

The bankruptcy court found that the request for a waiver of the prepetition credit counseling requirement did not describe exigent circumstances meriting a waiver of the statutory requirement. Exigency of circumstances occur where "the debtor finds himself in a situation in which adverse events are imminent and will occur before the debtor is able to avail himself of the statutory briefing."[73] The court, however, concluded that the exigency must be such that precludes the debtor's ability to obtain the credit counseling within the 5-day "window" preceding the bankruptcy as required under the statute. As a result, the bankruptcy court ruled that the debtor was not eligible to be a debtor and dismissed the case. The Bankruptcy Appellate Panel for the Eighth Circuit affirmed.[74] Other courts have similarly ruled (particularly where no attempt to seek counseling is made), concluding that Congress wanted to discourage the practice of hastily filed bankruptcy cases.[75]

7. *Certification of Exigent Circumstances Must Be Subscribed to by "Debtor"*

Case Name: *In re* DiPinto, 336 B.R. 698 (Bankr. E.D. Pa. 2006)

Ruling: A fundamental prerequisite of a certification is that it must, at a minimum, be "signed."[76] Moreover, it must be signed by the "debtor."

Facts & Analysis: The Chapter 13 debtor in *In re DiPinto*[77] applied for a waiver of the Code's prepetition credit counseling requirement.[78] The putative certification describing the exigency was signed only by the

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73. *Id.* at 388.

74. *Id.* at 390.

75. *See, e.g.*, Hedquist v. Fokkena (*In re* Hedquist), 342 B.R. 295, 298 (B.A.P. 8th Cir. 2006) (ruling that pro se debtors' decision to wait to file for bankruptcy relief until eve of mortgage foreclosure did not constitute exigent circumstances such as might permit a temporary waiver of the credit counseling requirement); *In re* Wallert, 332 B.R. 884 (Bankr. D. Minn. 2005). *See also In re* Davenport, 335 B.R. 218, 220-21 (Bankr. M.D. Fla. 2005) (finding an individual's failure to have made a prepetition request for credit counseling barred her from receiving a waiver under any circumstance; result is not mitigated even if credit counseling actually received two days after the filing); *In re* Tomco, 339 B.R. 145 (Bankr. W.D. Pa. 2006); *In re* Gee, 332 B.R. 602, 603-04 (Bankr. W.D. Mo. 2005) (rejecting certification of exigent circumstances and refusing to waive credit counseling requirement despite existence of exigency since debtor failed to demonstrate that services were not available within five-day period after making request).

76. *In re* Graham, 336 B.R. 292, 298 (Bankr. W.D. Ky. 2005).

77. 336 B.R. 693 (Bankr. E.D. Pa. 2006).

78. *In re* DiPinto, 336 B.R. at 696.

debtor's attorney and not the debtor himself. The court denied the request for a waiver, concluding that the debtor made no certification at all since the facts were not attested to by the party responsible for satisfying the credit counseling requirements.[79]

8. *Certification of Exigent Circumstances Must Be Subscribed to under Penalty of Perjury*

Case Name: *In re* Cobb, 343 B.R. 204 (Bankr. E.D. Ark. 2006)

Ruling: A proper certification of exigent circumstances warranting relief from the prepetition credit counseling requirement is one that is attested to under penalty of perjury.

Facts & Analysis: The pro se Chapter 13 debtors in *In re Cobb*[80] submitted a typed statement seeking a temporary waiver of the prepetition credit counseling requirement imposed by Code § 109(h)(3).[81] The petition and statement were filed three days before the scheduled foreclosure sale on the debtors' home and indicated that the filing was precipitated as an emergency to save the home. The statement was signed and further indicated that the debtors had an appointment with a credit counseling agency six days after the filing "but were unable to get anything sooner from any of the approved agencies."[82] The court interpreted the statutory requirement of a proper "certification" to mean that "the facts contained in the statement must be sworn to under oath."[83] Labeling a document or pleading a

79. *Id*. *Accord In re* Rodriguez, 336 B.R. 462, 469 (Bankr. D. Idaho 2005) (opining that a simple motion, signed only by counsel, is insufficient: "There would be no reason for Congress to specifically require a certification if it intended a garden-variety motion signed by counsel to suffice."); *In re* Hubbard, 332 B.R. 285, 289 (Bankr. S.D. Tex. 2005) (finding an unverified motion by counsel not to be a certification for purposes of the statute). *Contra In re* Davenport, 335 B.R. 218, 220 n.4 (Bankr. M.D. Fla. 2005) (requiring only that the debtor file, or cause to be filed, a verified motion, an affidavit, or testify at the hearing on the eligibility motion).

80. 343 B.R. 204 (Bankr. E.D. Ark. 2006).

81. *In re* Cobb, 343 B.R. at 205.

82. *Id*.

83. *Id*. at 207. *See infra* note 88 for authorities in accord.

"certification" is simply not sufficient.[84] The court dismissed the case in light of the deficiency.[85]

9. *Certification of Exigent Circumstances Need NOT Be Subscribed to under Penalty of Perjury*

Case Name: *In re* Talib, 335 B.R. 417 (Bankr. W.D. Mo. 2005)

Ruling: Although the statute offers little or no guidance as to the formal requirements of the certification, and other courts have concluded otherwise, a "certification" of exigent circumstances under Code § 109(h)(3) need not be signed under penalty of perjury. However, it must not be presented for an improper purpose and needs to have evidentiary support in order to be acceptable.

Facts & Analysis: The debtor in *In re Talib*[86] filed a certification of exigent circumstances and motion to waive the credit counseling requirement prior to filing.[87] The certification, which was submitted by the debtor's counsel, was accompanied by a separate statement signed by the debtor attesting to the facts. The court rejected the line of authority standing for the proposition that the certification must be subscribed to as true under penalty of perjury.[88] The court found that the signer must simply affirm or attest the facts to be true and provide appropriate evidentiary support.

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84. Some courts have utilized 28 U.S.C. § 1746 for guidance on determining what constitutes a "certification" under the Code. *See, e.g.*, *In re* Hubbard, 333 B.R. 377, 388 (Bankr. S.D. Tex. 2005); *In re* La Porta, 332 B.R. 879, 881 (Bankr. D. Minn. 2005). The statute provides in pertinent part as follows:

> Whenever, under any law of the United States . . . any matter is required or permitted to be supported, evidenced, established or proved by the sworn declaration, verification, *certificate*, . . . [the following form may be used]: . . .
>
> "I hereby declare (or certify, verify or state) *under penalty of perjury* that the foregoing is true and correct. Executed on (date)."

28 U.S.C. § 1746 (2006) (emphasis added).

85. *In re* Cobb, 343 B.R. at 208.

86. 335 B.R. 417, *reconsideration denied*, 335 B.R. 424 (Bankr. W.D. Mo. 2005).

87. *In re* Talib, 335 B.R. at 418.

88. *See, e.g.*, *In re* LaPorta, 332 B.R. 879, 882 (Bankr. D. Minn. 2005) (because the written statements "are not subscribed under penalty of perjury, . . . they do not constitute a 'certification'" as expressly required by Code § 109(h)(1)); *In re* Hubbard, 333 B.R. 373 (Bankr. S.D. Tex. 2005); *In re* Cobb, 343 B.R. 204, 207 (Bankr. E.D. Ark. 2006); *In re* Wallert, 332 B.R. 884, 887 n.3 (Bankr. D. Minn. 2005). *But see, e.g.*, *In re* Henderson, 339 B.R. 34, 38 (Bankr. E.D.N.Y. 2006) (finding that certificate of exigent circumstances need not be executed under penalty of perjury); *In re* Graham, 336 B.R. 292, 296 (Bankr. W.D. Ky. 2005) (interpreting "certification" to mean that a debtor must simply sign her or his motion for an extension).

C. LIMITS ON AVAILABILITY OF AUTOMATIC STAY

Implicated Code Sections: 11 U.S.C. § 362(c)(3)-(4)

Summary of Changes to Law: Multiple bankruptcy filings within a relatively short period of time are often indicative of abuse or bad faith. Code § 362(c)(3) has been amended to limit the duration of the automatic stay in a bankruptcy case commenced by a debtor who has had a prior case dismissed during the preceding year. The new legislation provides that where an individual debtor had another bankruptcy case that was dismissed within one year of the instant case, the automatic stay terminates "with respect to the debtor" and "with respect to any action taken with respect to a debt or property securing a debt" 30 days after the subsequent filing.[89] A party in interest is required to move the court to extend the automatic stay beyond 30 days "as to any or all creditors after notice and hearing completed before the expiration of the 30-day period" if it can be demonstrated that the "filing" of the instant case was in "good faith as to the creditors to be stayed."[90] In other words, the statute affords a 30-day automatic stay for first-time repeat filers, unless the debtor takes action and the court rules before the expiration of the 30-day period.

The rules are different under the BAPCPA for multiple repeat filers (i.e., for those who have had two or more prior cases dismissed within the year), and intended to be harsher. Pursuant to Code § 362(c)(4), the automatic stay does "not go into effect" at all for multiple repeat filers upon the filing of the current case.[91] There is, however, an explicit substantive right and statutory procedure under Code § 362(c)(4) that enables multiple repeat filers to seek the imposition of a stay in appropriate circumstances.[92] The court may order that the stay take effect as to any or all creditors, after notice and hearing, provided that a party in interest requests that relief "within 30 days" after the later case is filed and the movant demonstrates

89. 11 U.S.C. § 362(c)(3) (2006). The expiration of the automatic stay does not apply in a case brought by a "family farmer" under Chapter 12 or where the later case is re-filed in another chapter after dismissal of an earlier Chapter 7 case based on the "means test" under Code § 707(b). *Id.*

90. *Id.* Counsel for a debtor would be well advised to file a motion seeking an extension of the stay contemporaneously with the petition. *In re* Ellis, 339 B.R. 136, 141 n.9 (Bankr. E.D. Pa. 2006). *See generally In re* Toro-Arcila, 334 B.R. 224, 226 (Bankr. S.D. Tex. 2005) (holding that relief requesting an extension of the limited stay under Code § 362(c)(3)(B) may only be granted if the hearing is completed before the expiration of the 30-day period); *In re* Ziolkowski, 339 B.R. 543 (Bankr. D. Conn. 2006) (finding that the date the motion was filed and the reliance upon the clerk's office was irrelevant).

91. 11 U.S.C. § 362(c)(4) (2006).

92. *Id.* § 362(c)(4)(B).

that the later case is filed in "good faith" as to the creditors to be stayed.[93] Unlike the rule imposed by Code § 362(c)(3) for individual debtors who have had just one previous case dismissed in the preceding year and seek the continuation of the stay, there is no requirement that hearing on a motion under § 362(c)(4) be *completed* within 30 days of the bankruptcy filing.[94]

Under the amended statute, a case is "presumptively" not in good faith (i.e., bad faith) if: (1) multiple cases were pending at the same time; (2) at least one case was dismissed for the failure to file schedules and other documents required by Code § 521; (3) the debtor failed to provide adequate protection as ordered by the court; (4) the debtor failed to perform under a previously confirmed plan; or (5) there has not been a substantial change in the financial or personal affairs of the debtor since the previous dismissal.[95] If a presumption of bad faith arises, the party moving to extend the automatic stay must carry its burden by "clear and convincing evidence."[96]

1. *Overcoming Presumption of Bad Faith by "Clear and Convincing" Evidence Is a Heavy Burden*

Case Name: *In re* Kurtzahn, 337 B.R. 356 (Bankr. D. Minn. 2006)

Ruling: Chapter 13 debtor whose previous Chapter 13 case had been dismissed less than one year earlier due to a failure to make the payments required under the plan failed to rebut the statutory presumption that current case was not filed in good faith. The court denied the motion requesting an extension of the temporary 30-day stay under Code § 362(c)(3).

Facts & Analysis: The debtor in *In re Kurtzahn*,[97] a 72-year-old woman, filed for bankruptcy relief, either solely or with her husband, four times.[98] Her previous Chapter 13 case, which was filed with her 71-year-old husband who was not a debtor in the instant case, was dismissed due to a default in payment under their confirmed plan. The debtor sought to continue the stay of creditors' enforcement of their rights against her and her property. In light of the previous plan default under a case that was dismissed within the previous year, a statutory presumption that the instant filing was not in good faith arose, a presumption that must be rebutted by clear and convincing evidence. The presumption is a "steep" one.

93. *Id.*
94. *See id.*
95. *Id.* § 362(c)(3)(C), (c)(4)(D).
96. *Id.*
97. 337 B.R. 356 (Bankr. D. Minn. 2006).
98. *In re* Kurtzahn, 337 B.R. at 358.

The court indicated that under a standard that exceeds the ordinary preponderance of the evidence burden, the evidence must "place in the ultimate fact finder an abiding conviction that the truth of [the proponent's] factual contentions are highly probable."[99] The evidence "must be 'so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'"[100] The court, taking guidance from pre-BAPCPA jurisprudence interpreting good faith under Code § 1325(a)(3), focused on the debtor's proposed plan.[101] The court posited that "if the debtor didn't make the prior case work, what is there now that will make this one succeed?"[102] The court, therefore, focused the good faith analysis on feasibility and found that the debtor could not satisfy the quantum of proof required to justify the continuation of the stay under the circumstances.[103]

2. *Rebutting Presumption of Bad Faith in Succeeding Bankruptcy Case so as to Warrant Continuation of Automatic Stay Required Showing of Good Faith under "Totality of the Circumstances" Test*

Case Name: *In re* Galanis, 334 B.R. 685 (Bankr. D. Utah 2005)

Ruling: A debtor's good faith, which is necessary to rebut a presumption of abuse and must be demonstrated under Code § 362(c)(3) by "clear and convincing evidence," in order to justify the continuance of the automatic stay, is governed by a totality of the circumstances test. Such a determination should be made with reference to some of the standards that have developed under § 1325(a) (confirmation) and § 1307(c) (conversion or dismissal) of the Code.

Facts & Analysis: The debtors, in separate Chapter 13 cases filed by repeat filers and consolidated in *In re Galanis*,[104] moved for the extension of the temporary 30-day stay that arose in their current bankruptcy cases. In each of the cases, a presumption of bad faith arose because the debtors failed to perform under their confirmed Chapter 13 plans.[105]

The court noted that the term "good faith" is not new to the Code and tailored historical standards to the inquiry contemplated by Code § 362(c)(3)(B), including: (1) the timing of the new filing; (2) how the debts

99. *Id*. at 366 (citation omitted).
100. *Id*. (citation omitted).
101. *Id*. at 367.
102. *Id*. at 366 (internal quotations omitted).
103. *Id*.
104. 334 B.R. 685 (Bankr. D. Utah 2005).
105. *In re* Galanis, 334 B.R. at 691.

arose; (3) the debtor's motives in filing the cases; (4) how the debtor's actions impacted creditors; (5) the explanation for the dismissal of the earlier case; (6) the likelihood that the debtor will have a steady income stream and be able to properly fund a plan; and (7) whether there are any objections to the debtor's motion.[106] In contemplating the totality of the circumstances as guided by the above factors, the court found that the debtors were able to establish by clear and convincing evidence that the present case was filed in good faith.[107] The court noted, however, in cases where the presumption of abuse does not arise, the debtor still bears the burden of proof under a preponderance of the evidence standard as a proponent of the extension.[108] Under either evidentiary standard, mere statements of the debtor set forth in the motion do not carry any evidentiary weight.[109] At least one court has found that extensions of the limited automatic stay should be liberally granted when the surrounding circumstances do no give rise to a statutory presumption of bad faith.[110]

3. *"Sufficient" Notice of Motion to Extend Automatic Stay in Successive Bankruptcy Case Must Be Provided*

Case Name: *In re* Taylor, 334 B.R. 660 (Bankr. D. Minn. 2005)

Ruling: Due process requires notice that is reasonably calculated to afford interested parties with a meaningful opportunity to respond.

Facts & Analysis: The debtors in related cases sought to continue the automatic stay under Code § 362(c)(3) in their subsequent bankruptcy cases. The debtors in *In re Taylor*[111] served their motions upon creditors by mail eight and five days in advance of the scheduled hearings.[112]

106. *Id.* at 693. *See In re* Tomasini, 2006 WL 688003 (Bankr. D. Utah Mar. 8, 2006); *In re* Baldassaro, 338 B.R. 178 (Bankr. D. Mass. 2006); *In re* Ball, 336 B.R. 268 (Bankr. M.D.N.C. 2006); *In re* Mark, 336 B.R. 260 (Bankr. D. Md. 2006); *In re* Havner, 336 B.R. 98 (Bankr. M.D.N.C. 2006); *In re* Collins, 335 B.R. 646 (Bankr. S.D. Tex. 2005); *In re* Charles, 334 B.R. 207 (Bankr. S.D. Tex. 2005); *In re* Montoya, 333 B.R. 449 (Bankr. D. Utah 2005) (cases discussing burdens of proof and analysis for determining good faith). *See also In re* Phillips, 336 B.R. 818, 820 (Bankr. E.D. Okla. 2006) (indicating that in a properly served and pled motion, the court may grant a motion to extend the automatic stay even in cases where a presumption of bad faith arises if the relief requested is unopposed).

107. *In re* Galanis, 334 B.R. at 698.

108. *Id.*

109. *See In re* Casteneda, 342 B.R. 90, 96 (Bankr. S.D. Cal. 2006). "The movant must provide detailed, competent, evidence sufficient to satisfy all of the elements [of the statute] and, if applicable, to rebut the presumption of bad faith." *Id.* "The evidence must be filed and served with the motion so that creditors can evaluate the integrity of the current case, and so that the Court can determine under the applicable evidentiary standard whether the later case was filed in good faith." *Id. Accord In re* Wilson, 336 B.R. 338, 348-49 (Bankr. E.D. Tenn. 2005).

110. *See, e.g.*, *In re* Warneck, 336 B.R. 181 (Bankr. S.D.N.Y. 2006).

111. 334 B.R. 660 (Bankr. D. Minn. 2005).

112. *In re* Taylor, 334 B.R. at 662.

The court found the notice provided under the circumstances to be inadequate. The court indicated that service of a motion under Code § 362(c)(3) would be adequate "if it were of a duration in compliance with the bedrock requirements" of the local rules—which require ordinary-course motions to be "filed and delivered not later than ten days, or mailed not later than fourteen days before the hearing date."[113] These periods are calculated to balance the following competing values: "the frequent exigencies of bankruptcy cases, where often time literally is money, and the manifest goal of due process, to enable meaningful participation and informed advocacy."[114] It is significant to note, however, that at least one court has entertained an emergency motion of the debtor on abbreviated notice and rejected the secured creditor's contention that notice was inadequate.[115]

4. *"All" Affected Creditors Must Be Given Notice*

Case Name: *In re* Collins, 334 B.R. 655 (Bankr. D. Minn. 2005)

Ruling: Motion seeking to extend 30-day stay must be served upon individual creditors that would be affected by the proposed extension.

Facts & Analysis: The individual debtor in *In re Collins,*[116] who filed for Chapter 7 relief within one year of the entry of an order dismissing a prior Chapter 13 case, moved for an extension of the temporary 30-day stay that arose upon serial filing.[117] The only parties that were served with the motion were the United States Trustee and the interim Chapter 7 trustee. The court denied the motion on procedural grounds since affected creditors were not served.[118] The court ruled that "at the very least," those individual creditors who are to be subject to the continued stay must be served.[119]

113. *Id.* at 663.

114. *Id.* *Accord In re* Wilson, 336 B.R. 338 (Bankr. E.D. Tenn. 2005).

115. *See, e.g.*, *In re* Frazier, 338 B.R. 516 (Bankr. N.D. Fla. 2006) (noting that the question as what notice is appropriate in a particular circumstance is left to the court and finding that five days' notice was sufficient under the circumstances).

116. 334 B.R. 655 (Bankr. D. Minn. 2005).

117. *In re* Collins, 334 B.R. at 656.

118. *Id.* at 658-59.

119. *Id.* at 659.

5. *Reinstatement of Stay Not Possible under § 362(c)(3) or § 362(c)(4) for One-Time Repeat Filers after It Has Already Expired*

Case Name: *In re* Whitaker, 341 B.R. 336 (Bankr. S.D. Ga. 2006)

Ruling: The window for seeking the continuation of the automatic stay under Code § 362(c)(3) beyond the 30-day period from the commencement of the case, after which it automatically terminates, is very narrow and requires that *both* the notice and the hearing on the motion be completed *before* the expiration of the period. A debtor who has had only one case filed in the previous year is ineligible to utilize Code § 362(c)(4), which by its terms is only available to multiple repeat filers, as the basis for reinstating a stay that has lapsed.

Facts & Analysis: The Chapter 13 debtors in *In re Whitaker*[120] sought continuation and reinstatement of the automatic stay after the temporary 30-day time period in a successive case had elapsed.[121] Even though the debtors filed their motion *prior* to the expiration of the automatic stay, the matter was not brought on for hearing until some time thereafter. All creditors were served with the debtors' motion and no one objected or even filed a response.

The court in *Whitaker* concluded that the applicability of the automatic stay and safe harbor afforded debtors under Code § 362(c)(3) are limited.[122] The court opined that the BAPCPA has separate safe harbors for first-time repeat filers described in Code § 362(c)(3) and multiple repeat filers described in Code § 362(c)(4).[123] The automatic stay evaporates for one-time repeat filers if the hearing on the motion requesting an extension of the stay is not "completed" before the expiration of the 30-day period after the case is filed. The court concluded that Code § 362(c)(4), which permits a court to order the imposition of a stay, so long as the motion requesting the relief is *filed* within 30 days of the bankruptcy filing, is limited to multiple repeat filers and is not available to first-time repeat filers.[124] The court in *Whitaker* did, however, conclude that it had the authority to impose a stay

120. 341 B.R. 336 (Bankr. S.D. Ga. 2006).

121. *In re* Whitaker, 341 B.R. at 340-41.

122. *Id.* at 342.

123. *Id.* at 343-44.

124. *Id.* at 344. *Accord In re* Jumpp, 344 B.R. 21, 27 (Bankr. D. Mass. 2006) (concluding that Code § 362(c)(4) cannot be used by a single repeat filer to reimpose a stay after the 30-day period under Code § 362(c)(3) has lapsed).

by virtue of the broad equitable powers conferred upon courts in Code § 105 and found it appropriate to reinstate the stay under the facts.[125]

The courts are not altogether in agreement with *Whitaker*. Some courts have ruled that the clear mandates of the Code § 362(c) preclude courts from using their equitable powers under Code § 105 to override the consequences dictated by Congress in the statute.[126] Other courts have ruled that first-time repeat filers may be entitled to utilize the Code § 362(c)(4) safe harbor to seek reinstatement of the stay.[127]

6. *Court Cannot Use Its General Equitable Powers under § 105 to Impose Stay*

Case Name: *In re* Jumpp, 344 B.R. 21 (Bankr. D. Mass. 2006)

Ruling: A court cannot use its general equitable powers under Code § 105 to impose a stay that Congress has, by statute, declared must be terminated. When the automatic stay terminates under Code § 362(c)(3), it terminates as to both property of the debtor and property of the bankruptcy estate.

Facts & Analysis: The debtors in *In re Jumpp*[128] had their previous Chapter 13 case dismissed and sought reinstatement of the automatic stay and a determination that the automatic stay did not terminate as to their residence.[129] The debtors made three arguments in support of their positions. First, the debtors contended that Code § 362(c)(4) was available not only to multiple repeat filers, but served as a basis for authority to permit the court to extend the stay for first-time filers, where the time to act under § 362(c)(3) had expired. Although other courts have ruled otherwise, the court in *Jumpp* concluded that a first-time filer could not avail oneself to Code § 362(c)(4)—which is limited to multiple repeat filers.[130] Next, the debtors argued that the court could use its general equitable powers under Code § 105 to impose a stay. The court rejected this conclusion, since that statute clearly specifies that the stay terminates if the requirements specified

125. *In re* Whitaker, 341 B.R. at 346-47.

126. *See, e.g.*, *In re* Jumpp, 344 B.R. 21, 27 (Bankr. D. Mass. 2006). *See also infra* notes 128-33 and accompanying text.

127. *See, e.g.*, *In re* Toro-Arcila, 334 B.R. 224, 229 (Bankr. S.D. Tex. 2005). *See infra* note 130 and accompanying text.

128. 344 B.R. 21 (Bankr. D. Mass. 2006).

129. *In re* Jumpp, 344 B.R. at 27.

130. *Id.* *Contra In re* Toro-Arcila, 334 B.R. 224, 229 (Bankr. S.D. Tex. 2005); *In re* Beasley, 339 B.R. 472, 473-74 (Bankr. E.D. Ark. 2006) (authority holding that relief is available to debtors under Code § 362(c)(4) in cases where the automatic stay has expired under Code § 362(c)(3)).

in Code § 362(c)(3) are not satisfied.[131] Finally, the debtors, seeking to shelter their residence from creditor action, contended that the stay terminated only with respect to "property of the debtor" and not "property of the estate" as compelled by a plain reading of the Code. The court rejected an isolated reading of the statute and did not believe that the Congress intended to differentiate between the debtor's and the estate's property.[132] As such, the court concluded that a creditor has a right to proceed against the collateral when the automatic stay terminates under Code § 362(c)(3).[133]

7. *Limitation Imposed on Duration of Automatic Stay in Certain Successive Bankruptcy Cases Restricts Stay Only as to "Debts" or "Property of the Debtor" and Not as to "Property of the Estate"*

Case Name: *In re* Johnson, 335 B.R. 805 (Bankr. W.D. Tenn. 2006)

Ruling: The thirty-day time limit imposed by Code § 362(c)(3) on the duration of the automatic stay in successive bankruptcy cases commenced by repeat filers less than one year after the dismissal of a previous case did not result in termination of the automatic stay with respect to property of the bankruptcy estate. The automatic stay continues with respect to such property, even in cases where the debtor cannot satisfy its burden of establishing good faith, until the debtor's case is dismissed or discharged.

Facts & Analysis: The debtor in *In re Johnson*[134] filed another Chapter 13 case within a year of his previously dismissed case.[135] The prior case was dismissed due to a default under the plan, thereby triggering a presumption of bad faith. The debtor brought a motion to continue the duration of the automatic stay and the mortgage holder on the debtor's residence objected.

The court held that the statute's plain meaning makes it clear that the automatic stay in a succeeding case only terminates "with respect to the debtor," but nevertheless continues to protect "property of the estate" as long as it remains such.[136] The court cautioned that creditors taking any action against such property without first obtaining court approval may be violating the automatic stay.[137] Other courts have agreed with the analysis

131. *In re* Jumpp, 344 B.R. at 27.

132. *Id.* at 26-27.

133. *Id.* at 27. The courts are not in agreement with respect to this issue and have reached different conclusions. *See infra* notes 134-38 and accompanying text.

134. 335 B.R. 805 (Bankr. W.D. Tenn. 2006).

135. *In re* Johnson, 335 B.R. at 805-06.

136. *Id.* at 807.

137. *Id.*

in *Johnson* even if such a construction renders the statute essentially meaningless.[138]

8. *Automatic Stay Terminates Only with Respect to Actions "Taken" by the Creditor against the Debtor Prior to Bankruptcy*

Case Name: *In re* Paschal, 337 B.R. 274 (Bankr. E.D.N.C. 2006)

Ruling: No protections afforded by the automatic stay are terminated under Code § 362(c)(3)(A) unless there was a pending creditor action that was "taken against the debtor prior to bankruptcy."

Facts & Analysis: The Chapter 13 debtor in *In re Paschal*,[139] who had been a debtor in a prior case dismissed less than one year earlier, brought a motion to extend the temporary automatic stay arising in her pending case.[140] The court was confronted with the following question: to what extent is the automatic stay terminated under Code § 362(c)(3)(A) in a subsequent case?

The court recognized that the legislative history of the statute suggested that Congress intended to terminate "all" protections of the automatic stay in certain instances as part of a regime aimed at curbing abusive filings.[141] However, the language of the statute, although ambiguous, contradicts the intention expressed in the legislative history. Section 362(c)(3)(A)'s reference to an "action" "taken" by a creditor only terminates the stay with respect to the continuation of formal legal action that was commenced prepetition with respect to such debt or property. The court essentially

138. *See, e.g.*, *In re* Moon, 339 B.R. 668, 673 (Bankr. N.D. Ohio 2006) (holding that "the language of § 362(c)(3)(A) unambiguously terminates the automatic stay only as it applies to 'debts' or 'property of the debtor'"); *In re* Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006) (noting that although there are arguments against such a construction, those arguments are not convincing in the face of an unambiguous statute); *In re* Harris, 342 B.R. 274, 278-79 (Bankr. N.D. Ohio 2006) (opining that the automatic stay does not terminate as to property of the estate under Code § 362(c)(3)); *In re* Williams, 2006 WL 2285676, at *3-4 (Bankr. E.D. Pa. June 21, 2006) (opining that the language of the statute should be construed as drafted and finding the automatic stay remained in effect as to property of the estate); *In re* Gillcrese, 2006 WL 2265546 (Bankr. W.D. Pa. July 20, 2006) (indicating that notably absent from the statute is any reference to property of the estate). *But see, e.g.*, *In re* Jumpp, 344 B.R. 21, 27 (Bankr. D. Mass. 2006) (holding that a fair and logical reading of the statute in context renders any distinction between property of the debtor and property of the estate irrelevant); *In re* Jupiter, 344 B.R. 754, 760 (Bankr. D.S.C. 2006) (holding that the stay does not continue with respect to property of the estate). The legislative history suggests that Congress intended in § 362(c)(3) to terminate *all* of the protection provided by the automatic stay. *See* H.R. REP. NO. 256 (Apr. 8, 2005); H.R. REP. NO. 109-31(I), 1st Sess. 69-70, *reprinted in* 2005 U.S.C.C.A.N. 88, 138 (indicating that the amendments to Code § 362(c) were designed "to terminate the stay").

139. 337 B.R. 274 (Bankr. E.D.N.C. 2006).

140. *In re* Paschal, 337 B.R. at 276.

141. *Id.* at 276-77.

concluded that the statute, read literally, applies under only a very narrow set of facts.[142]

9. *Prior Bankruptcy Case Was Not "Pending" Once It Was Dismissed Even Though Case Remained Open until Trustee Filed Final Report*

Case Name: *In re* Moore, 337 B.R. 79 (Bankr. E.D.N.C. 2005)

Ruling: Chapter 13 debtor did not have a prior case "pending" within one year of the commencement of his present Chapter 13 case, even though the trustee had not filed a final report and accounting and the case has not been closed. Accordingly, the termination provision of Code § 362(c)(3) was not applicable.

Facts & Analysis: In *In re Moore*,[143] the debtor's prior Chapter 13 case was dismissed by the court over one year prior to the commencement of the instant case but the case was not closed until some time later.[144] The court in *Moore* found the date of dismissal to be the relevant date for determining when a case is "pending" for purposes of the statute, even though the prior case was "open" within the one-year period preceding the filing of the current case.[145]

D. DEBTOR'S DUTIES AND CONSEQUENCES FOR DERELICTIONS

Implicated Code Sections: 11 U.S.C. §§ 362(h), 521

Summary of Changes to Law: Section 521 of the Code has been amended by the BAPCPA to impose a number of new duties upon individual debtors. Unless otherwise ordered by the court, debtors are required to file with the court (in addition to the list of creditors, schedule of assets and liabilities, income and expenses) a certificate indicating that the debtor received certain information about bankruptcy, evidence of payment (if any) received from employers within 60 days of the bankruptcy filing, statement of monthly net income, and any anticipated increase in income or expenses over the twelve-month period after the filing.[146] The debtor is also required to file a certificate of credit counseling and a host of other specified items.[147] With respect to debt secured by property of the bankruptcy estate, the debtor is required to file a statement of intention

142. *See id*. at 277.
143. 337 B.R. 79 (Bankr. E.D.N.C. 2005).
144. *In re* Moore, 337 B.R. at 80.
145. *Id*. at 82. *Accord In re* Easthope, 2006 WL 851829 (Bankr. D. Utah Mar. 28, 2006).
146. *See* 11 U.S.C. § 521 (2006).
147. *See id*.

within 30 days of the bankruptcy filing under Chapter 7 (or such additional time as the court, for cause, fixes) and indicate whether the debtor will be surrendering or retaining the property and, if retaining, that the debtor will redeem, reaffirm, or (in the case of a lease) assume the obligation.[148] The debtor is required to perform his or her stated intention within 30 days after the first date set for the meeting of creditors (or such additional time as the court, for cause, within such 30-day period fixes).[149] A failure to observe the expanded and more stringent requirements of Code § 521 can, in certain cases, result in the termination of the automatic stay or automatic dismissal of the case.

1. *Chapter 7 Debtor Needs to Indicate Decision with Respect to Secured Personal Property in Statement of Intention or Loses Protection of Automatic Stay*

Case Name: *In re* Craker, 337 B.R. 549 (Bankr. M.D.N.C. 2006)

Ruling: A Chapter 7 debtor who fails to choose one of the three statutory options available to her by electing in her statement of intention to surrender or redeem the motor vehicle or reaffirm the debt loses protection of automatic stay 30 days after the petition was filed, even though the debtor's statement of intention was timely filed.

Facts & Analysis: The Chapter 7 debtor in *In re Craker,*[150] who owned a motor vehicle subject to a lien, filed her statement of intention in a timely manner.[151] Nevertheless, the debtor failed to indicate her decision with respect to one of the three options available relative to that vehicle in her timely filed statement (i.e., reaffirmation, surrender, or redemption). Accordingly, the automatic stay terminated with respect to that lien creditor in accordance with Code § 362(h)(1), and the collateral was no longer property of the bankruptcy estate.[152]

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148. *Id.*

149. *Id.*

150. 337 B.R. 549 (Bankr. M.D.N.C. 2006).

151. *In re* Craker, 337 B.R. at 550.

152. *Id.* at 549. *Accord In re* Faught, 2006 WL 151884 (Bankr. W.D. Ky. Jan. 19, 2006); *In re* Brown, 2006 WL 871284 (Bankr. N.D. Fla. Mar. 13, 2006) (providing that it is important to recognize that even though the automatic stay may terminate with respect to certain collateral if the debtor fails to properly indicate his or her stated intentions or perform in accordance therewith, the creditor may not necessarily be entitled to a return of the property) (citations omitted). *See In re* Steinhaus, 2006 WL 2529631 (Bankr. D. Idaho Sept. 1, 2006) (concluding that remedy from bankruptcy court compelling immediate turn over of collateral not available under the Code). The debtor in *In re* Rowe, 342 B.R. 341 (Bankr. D. Kan. 2006), was current on his payment to a creditor secured by the debtor's motor vehicle. *Id.* at 343. The debtor indicated in his Statement of Intention that he would retain the collateral and continue to make regular payments. *Id.* at 344. The debtor did not reaffirm the obligation or redeem the collateral. *Id.* The creditor sought an order compelling the debtor to turnover the motor vehicle since the debtor did not fulfill the

2. *Chapter 7 Bankruptcy Case Automatically Dismissed if Documents Required by § 521 Are Not Filed within 45 Days of Bankruptcy Filing*

Case Name: *In re* Fawson, 338 B.R. 505 (Bankr. D. Utah 2006)

Ruling: Chapter 7 cases were automatically dismissed by operation of law upon the forty-sixth day of the bankruptcy filing based upon the debtor's failure to file payment advices or other evidence of payments received from employers as required under Code § 521 or to request an extension to the 45-day period within that period.

Facts & Analysis: The debtors in two Chapter 7 bankruptcy cases in *In re Fawson*[153] failed to file employer payment advices required by Code § 521 within the 45-day period specified by the statute.[154] After the expiration of the 45-day period, the bankruptcy court issued an order to show cause in both bankruptcy cases, requiring the debtors to file a written explanation of the failure to file the documents required and explain why the cases were not dismissed by operation of the statute "effective on the 46th day after the date of the filing of the petition."[155] The debtors subsequently filed the payment advices or an explanation indicating that the debtor was not employed during the applicable period and requested that the cases not be dismissed. Counsel for the debtors represented that he delivered the payment advices to the United States Trustee and to the Chapter 7 trustee but neglected to file them with the court in a timely manner because of his inexperience with the new legislation and indicated that the lateness was "harmless error."[156]

The court noted that filing a case under the new Code "can be perilous."[157] Indeed, the statute is "quite clear" regarding the duties of the court if the requisite filings are not made in a timely manner—the court is

obligations now required by Code § 521 with respect to personal property secured by a purchase-money security interest. The court found that the debtor's derelictions resulted in the automatic stay termination and the re-vesting of the property with the debtor. *Id.* at 350. That did not end the inquiry, however. The creditor's rights are controlled by the security agreement and state law. The court found that, unless there is a default in payment or the prospect of payment, performance or realization of the collateral is impaired under state law, the creditor is not entitled to possession of the collateral. *Id.* at 351. As such, the court opined that the creditor's remedy upon the termination of the automatic stay may, due to applicable state law, be "illusory" in many cases because the conditions to declare a default and obtain possession of the collateral will not be present when the debtor remains current on the obligation, and there is no other basis for finding a material impairment in the collateral or creditor's rights. *Id.* The court denied the creditor's motion to turn over the collateral. *Id.* at 352.

153. 338 B.R. 505 (Bankr. D. Utah 2006).

154. *In re* Fawson, 338 B.R. at 505.

155. *Id.* at 508.

156. *Id.* at 509.

157. *Id.* at 515.

relieved of all discretion and the execution of a dismissal order is purely ministerial.[158] Even in cases where the debtors are "honest but unfortunate," acting in good faith and guided by responsible legal counsel, the court has no discretion to remedy any mistake—large or small—by a debtor or by the debtor's lawyer.[159] The time frames provided under the statute cannot be enlarged under Rule 9006 of the *Federal Rules of Bankruptcy Procedure*.[160] Any request for enlargement must be made prior to the expiration of the applicable period.[161]

3. *Trustee Retains Prosecutorial Discretion to Waive Derelictions*

Case Name: *In re* Duffus, 339 B.R. 746 (Bankr. D. Or. 2006)

Ruling: Where the mandate of Code § 521(e)(2) that requires a debtor to provide a trustee with a copy of his or her federal income tax return not later than 7 days before the date first set for the meeting of creditors and requires the court to dismiss the case, unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the debtor's reasonable control, the trustee has discretion.

Facts & Analysis: The debtors in *In re Duffus*[162] delivered a copy of their latest tax return to the trustee "4" days before the first meeting of creditors, rather than the "7" days required by the statute.[163] The trustee, noting that he did not advocate for dismissal, particularly since assets were available for possible distribution, believed that he had no choice but to seek dismissal of the case in light of the statutory mandates. The court ruled that the trustee was "mistaken."[164] It is well established that trustees have substantial prosecutorial discretion and the authority to "waive" an untimely

158. *Id.* *Accord In re* Lovato, 343 B.R. 268, 270 (Bankr. D.N.M. 2006) (holding that a failure to timely submit payment advices leaves the court with no discretion to fashion any reasonable or equitable resolution and requires dismissal); *In re* Ott, 343 B.R. 264, 268 (Bankr. D. Colo. 2006) ("After the expiration of the specified period set forth in 11 U.S.C. § 521(i)(1), there are no exceptions, no excuses, only dismissal and the consequences that flow therefrom."); *In re* Williams, 339 B.R. 794 (Bankr. M.D. Fla. 2006) (opining that a court has no discretion where a debtor does not request an extension prior to the expiration of the governing period).

159. *In re* Fawson, 338 B.R. at 510-11; *In re* Ott, 343 B.R. at 268.

160. Bankruptcy Rule 9006 only allows parties to seek to enlarge the time "when an act is required or allowed to be done at or within a specified period *by these rules* or by a notice given thereunder or by order of court." FED. R. BANKR. P. 9006(b)(1) (emphasis added). By its own terms, Rule 9006(b) does not permit courts to enlarge the time periods expressly provided in the Code.

161. *In re* Fawson, 338 B.R. at 513.

162. 339 B.R. 746 (Bankr. D. Or. 2006).

163. *In re* Duffus, 339 B.R. at 747.

164. *Id.* at 748.

delivery of documents "simply by declining to file the motion."[165] The court denied the motion, finding that the trustee failed to properly exercise that discretion since a dismissal would not serve the best interests of creditors or the estate.[166] Trustees have substantial discretion in the performance of their duties under the bankruptcy laws. While the Code imposes new duties on debtors in rather unequivocal language, this does not necessarily mean that the trustee's discretion to excuse compliance in appropriate circumstances is circumscribed by the BAPCPA. As such, trustees should only file motions to dismiss when there is a purpose to be served.[167]

4. *Counsel's Derelictions Constitute "Circumstances Beyond the Control of the Debtor" under Purposes of § 521(e)*

Case Name: *In re* Moser, 2006 WL 2374407 (Bankr. W.D.N.Y. Aug. 7, 2006)

Ruling: The derelictions of legal counsel in failing to submit tax returns within the time parameters specified in the statute constituted circumstances beyond the debtor's control and warranted an exception to the Code's dismissal requirements.

Facts & Analysis: Code § 521(e)(2) requires debtors to submit tax returns to a trustee within "7 days" before the first date set for the meeting of creditors.[168] The court is required to dismiss the bankruptcy case for a failure to comply with the Code's requirements unless the debtor demonstrates that the dereliction is attributable "to circumstances beyond the control of the *debtor*."[169] The debtors in *In re Moser*[170] provided the tax

165. *Id.*

166. *Id.* *Accord In re* Ring, 341 B.R. 387, 390-91 (Bankr. D. Me. 2006) (finding that a failure to comply with the Code's tax return provision requirement does not lead to automatic dismissal; the trustee has prosecutorial discretion); *In re* Grasso, 341 B.R. 821, 824 (Bankr. D.N.H. 2006) (finding that the statute's use of the word "shall" with respect to the debtor's tax return filing requirement does not limit the authority of the trustee to decline to file a motion to dismiss; resulting in no automatic dismissal).

167. The United States Trustee in *In re* Satinoff, 2006 WL 1206492 (Bankr. S.D. Fla. May 4, 2006) (depublished), BKY Case No. 06-10112 [docket entry no. 22], brought a motion to dismiss under circumstances where the *de minimus* delay in providing tax returns did not impede the administration of the bankruptcy case. Counsel for the United States Trustee advised the court that the Office of the United States Trustee had been instructed to direct panel trustees to seek dismissal of cases in which debtors do not strictly comply with the requirements of the statute. The court in *Satinoff* opined that this instruction is not required by the BAPCPA and appeared to be "perfectly ridiculous." *Id.* at 4. The court noted that the position advanced by the United States Trustee "will create unnecessary, even pointless, work by trustees, courts, and clerk's offices." *Id.* The court nevertheless reluctantly granted the motion since the debtor joined in the requested relief and it furthered overall bankruptcy policy. *Id.* at 5. It should be noted that the court's opinion in *Satinoff* was removed from publication at the request of the court.

168. 11 U.S.C. § 521(e)(2)(A) (2006).

169. *Id.* § 523(e)(2)(B) (emphasis added).

returns required by the Code to their lawyer more than a week in advance of the first meeting of creditors.[171] However, the debtors' lawyer did not provide the tax returns to the trustee until the first meeting. In response to the trustee's motion to dismiss, counsel for the debtors assumed the responsibility for the delay and argued that *his* tardiness qualified as a circumstance beyond the control of his client justifying an exception to the rule requiring dismissal.

The court in *Moser* indicated that, as a general rule, the actions and inactions of legal counsel are imputed to the client.[172] However, the statute clearly excuses errors due to circumstances beyond the control of the "debtor." As such, the court may enforce that legislative directive in Code § 521(e) by penalizing only mistakes made by the debtors themselves.[173] The court, therefore, excused the delayed delivery of the tax returns under the facts and denied the trustee's motion to dismiss the case.[174]

5. *Individual Debtor Whose Debts Are NOT Primarily Consumer Debts Is Not Subject to Means Testing*

Case Name: *In re* Moates, 338 B.R. 716 (Bankr. N.D. Tex. 2006)

Ruling: Individual debtors whose debts are primarily "business" debts are not required to file a statement of current monthly income. The filing of schedules I and J, which itemize current income and expenditures, satisfy the requirements of Code § 521(a)(1)(B)(v).

Facts & Analysis: The two individuals who filed for Chapter 7 protection in *In re Moates*[175] classified their debts as "business" debts.[176] The debtors received notices of deficiency advising them that their cases were subject to dismissal in that they failed to comply with Code § 521(a)(1), which required the filing of "a statement of the amount of monthly net income, itemized to show how the amount is calculated." The official form prescribed for that purpose, Form B22A, is necessary to the means testing calculation under § 707(b). The court found that the means testing provision and required schedule is only applicable to individual debtors whose debts are primarily consumer debts.[177]

170. 2006 WL 2374407 (Bankr. W.D.N.Y. Aug. 7, 2006).
171. *In re* Moser, 2006 WL 2374407, at *1.
172. *Id.*
173. *Id.* at *2.
174. *Id.*
175. 338 B.R. 716 (Bankr. N.D. Tex. 2006).
176. *In re* Moates, 338 B.R. at 716.
177. *Id.* at 717-18.

6. *Requirement to File Statement of Intention and Perform in Accordance Therewith or Risk Termination of Automatic Stay Does Not Apply to Chapter 13 Cases*

Case Name: *In re* Schlitzer, 332 B.R. 856 (Bankr. W.D.N.Y. 2005)

Ruling: Section 362(h) of the Code, which provides for the early termination of the automatic stay when a debtor fails to file or perform in accordance with his or her statement of intentions, does not apply in Chapter 13 cases.

Facts & Analysis: The debtor in *In re Schlitzer*[178] filed a pro se petition initiating a Chapter 13 case and failed to file the schedules and statements required by Code § 521 and Bankruptcy Rule 1007.[179] The Chapter 13 trustee, concerned with the applicability of the automatic stay and the fact that the meeting of creditors had not yet been held, filed a motion under § 362(h)(2) requesting an order continuing the stay.

The court found that the plain language of Code § 521(a)(2), which specifically obligated a "Chapter 7" debtor to file a statement of intention, when read in conjunction with the remedy in § 362(h) for a failure to so comply, did not apply in Chapter 13 cases.[180]

E. EXEMPTIONS: LIMITS ON HOMESTEAD EXEMPTION FOR MISCONDUCT

Implicated Code Sections: 11 U.S.C. § 522(o), (q)

Summary of Changes to Law: As part of the amendments to the Code that were aimed at curbing abuse, Congress added Code § 522(o) and § 522(q) in order to expressly limit a debtor's entitlement to a homestead exemption in defined circumstances. The situations that permit the invasion of a homestead exemption to which the debtor would otherwise be entitled arise when the debtor's prepetition conduct is sufficiently egregious or harmful to warrant the remedy.[181]

The courts in a number of jurisdictions have long recognized that the conversion of nonexempt assets to exempt assets on the eve of bankruptcy, "without more," is not wrongful even if the expressed purpose is to place the property beyond the reach of creditors.[182] However, an exemption will

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178. 332 B.R. 856 (Bankr. W.D.N.Y. 2005).

179. *In re* Schlitzer, 332 B.R. at 856.

180. *Id.* at 858.

181. *Cf. infra* notes 205-09 and accompanying text for other limitations on the homestead exemption imposed by the BAPCPA.

182. *See, e.g.*, Norwest Bank Nebraska v. Tveten, 848 F.2d 871 (8th Cir. 1988); Hanson v. First Nat'l Bank (*In re* Hanson), 848 F.2d 866 (8th Cir. 1988).

be lost where a debtor acts with an actual intent to defraud creditors.[183] The line of demarcation between permissible exemption planning and prohibited fraudulent activity has been said to rest on the "'principle of too much; phrased colloquially, when a pig becomes a hog it is slaughtered.'"[184] Circumstantial evidence of fraud has been employed in order to ferret out abuse and account for the fact that direct evidence of wrongful intent is rarely available.[185] As part of the amendments to the Code that were aimed at curbing abuse, Congress added Code § 522(o) in order to expressly limit a debtor's entitlement to a homestead exemption in defined circumstances. Section 522(o) of the Code now mandates the reduction of the debtor's homestead exemption to the extent the value attributable to any portion thereof is based upon any disposition of nonexempt property made within ten years of the bankruptcy filing with an "intent to hinder, delay, or defraud a creditor."[186]

Congress has also added Code § 522(q) in order to permit the Court to limit (i.e., cap) the debtor's homestead exemption under state law to $125,000 where (1) the court determines that the debtor has been convicted of a felony demonstrating that the filing was an abuse of the provisions of the Code; or (2) the debtor owes a debt that arose from (a) a violation of federal or state securities laws, (b) fraud or misconduct in connection with the purchase or sale of a security, or (c) "any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years."[187] The limitation or cap is not, however, applicable if the homestead property is determined to be "reasonably necessary" for the support of the debtor and any dependent of the debtor.[188]

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183. *In re* Hanson, 848 F.2d at 868; Fed. Sav. & Loan Ins. Corp. v. Holt (*In re* Holt), 894 F.2d 1005, 1008 (8th Cir. 1990). Prior to the enactment of the BAPCPA, there was no express statutory basis for denying a homestead exemption based upon fraud. *See In re* McGinnis, 306 B.R. 279, 285 (Bankr. W.D. Mo. 2004).

184. *In re* Tveten, 848 F.2d at 879 (quoting *In re* Zouhar, 10 B.R. 154, 157 (Bankr. D.N.M. 1981)) (Arnold, J., dissenting).

185. *See, e.g.*, *In re* Northgate Computer Sys., Inc., 240 B.R. 328, 360-61 (Bankr. D. Minn. 1999) (setting forth certain "badges of fraud").

186. 11 U.S.C. § 522(o) (2006).

187. *Id.* § 522(q)(1).

188. *Id.* § 522(q)(2).

1. *Totality of Circumstances Reveals That Prepetition Transfers Went Beyond Mere Exemption Planning and Warranted Denial of Homestead Exemption for Any Equity So Created*

Case Name: *In re* Maronde, 332 B.R. 593 (Bankr. D. Minn. 2005)

Ruling: Pre-BAPCPA case law is highly relevant to determining the application of new Code § 522(o) and the denial of homestead exemption to the extent of any equity created by prepetition transfers, that evidence an actual intent to hinder, delay, or defraud.

Facts & Analysis: The Chapter 13 trustee in *In re Maronde*[189] objected to the debtor's claim of homestead exemption and confirmation of the debtor's plan.[190] Prior to the bankruptcy filing, the debtor obtained funds transferred from several credit cards to make a substantial pay down on his second mortgage. The transfers were made with new and old credit cards in a series of four different transactions. Additional transfers were attempted but reversed by the credit card companies that had detected the activity. The debtor was insolvent at the time and knew he did not have the ability to repay the debt incurred. Within days of the bankruptcy filing, the debtor sold his truck and trailer and applied proceeds in the amount of $19,130.42 from the sale to his home loan.

The court found that the sales activity took place in contemplation of bankruptcy and were part and parcel of an overall scheme to defraud his creditors.[191] The court, in examining new Code § 522(o) and the "intent to hinder, delay, or defraud" standard set forth in the statute, found that the statutory language is essentially identical to the language contained in the fraudulent transfer and denial of discharge provisions of the Code.[192] The court noted that each of those sections of the Code has a well-developed body of case law for determining fraudulent intent that can provide guidance when interpreting new Code § 522(o).[193] The court had no difficulty in concluding that the transfers were made with the requisite intent to hinder, delay, or defraud and denied the debtor's exemption to the extent of the transfers.[194]

189. 332 B.R. 593 (Bankr. D. Minn. 2005).

190. *In re* Maronde, 332 B.R. at 595.

191. *Id.* at 601.

192. *Id.* at 599 (referencing 11 U.S.C. §§ 548 and 727).

193. *Id.*

194. *Id.* at 601. *Accord In re* LaCounte, 342 B.R. 809 (Bankr. D. Mont. 2005) (denying confirmation and exemption as a result of an application of $42,500 from asset sales that were made in the months before the bankruptcy filing with the purpose of diverting funds away from the debtor's creditors).

2. *Homestead Exemption Capped Based upon "Criminal Act" Even if There Was No Conviction and Conduct Was Merely Negligent*

Case Name: *In re* Larson, 340 B.R. 444 (Bankr. D. Mass. 2006)

Ruling: The phrase "criminal act" in the provision that caps the debtor's state homestead exemption at $125,000 if the debtor owes a debt based upon certain criminal acts, does not require a criminal conviction or a specific level of culpability.

Facts & Analysis: The Chapter 7 debtor in *In re Larson*[195] claimed an exemption under state law of $500,000 in her residence.[196] The panel trustee and creditors objected to the exemption and contended that the exemption must be reduced based upon newly enacted Code § 522(q), which limits a state homestead exemption to $125,000 if a debtor owes a debt based upon "any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years."[197] The debtor in *Larson* was driving a motor vehicle and failed to yield while making a left-hand turn as a motorcyclist and his wife were traveling the opposite direction. A collision ensued and one of the parties riding on the motorcycle did not survive. As a result, the debtor was "charged" with motor vehicle homicide by negligent operation. Although the transcript of the proceeding disclosed sufficient facts to find the debtor guilty, the court continued the matter for twelve months without making such a finding and placed the debtor on probation. The surviving spouse obtained a civil judgment against the debtor for $1,000,000. The debtor filed for relief under Chapter 7 of the Code and claimed a homestead exemption of $500,000. The judgment creditor objected, claiming that the exemption must be reduced from $500,000 to $125,000 under new Code § 522(q)(1) as the debtor committed a criminal act that resulted in a death within the meaning of the statute.[198] The debtor contended that when analyzing the phrase "criminal act" in conjunction with the phrases "intentional tort" and "willful and reckless misconduct" in the statute, the drafters did not mean to include conduct that amounted to mere negligence.[199] The debtor also contended that she was not convicted of a crime.[200]

195. 340 B.R. 444 (Bankr. D. Mass. 2006).
196. *In re* Larson, 340 B.R. at 446.
197. *Id*. at 445 (quoting 11 U.S.C. § 522(q)(1)(B)(iv)).
198. *Id*. at 446.
199. *Id*. The Code does not define the phrase "criminal act."
200. *Id*. at 447.

The court recognized that the death was the result of an accident. Nevertheless, the court found the term "criminal act" to be sufficiently clear (i.e., an act having the character of a crime).[201] In construing case law interpreting the phrase "criminal act" in other contexts, such as exclusions in insurance policies, the court found that the phrase did not require adjudication in a court of law.[202] According to the court, the phrase "criminal act" in the statute, therefore, does not require a conviction.[203] Nor does the statute impose a certain level of culpability—all acts that would amount to or constitute a crime fall within purview of the exemption limitation imposed by the BAPCPA under Code § 522(q).[204]

It is important to recognize that the exemption limitation imposed by the Code under § 522(q) does not (obviously) become implicated until the debtor seeks relief in bankruptcy. The statute is designed to limit the debtor's state law exemption in defined circumstances and represents part of the quid pro quo for the benefits conferred under the Code. As such, debtors and their counsel must necessarily compare the benefits and burdens of state law with federal bankruptcy law.

F. EXEMPTIONS: RESIDENCY REQUIREMENTS

Implicated Code Sections: 11 U.S.C. § 522(b), (p), (q)

Summary of Changes to Law: States have had a long-standing interest in providing and setting the parameters of the homestead exemption. While some states permit a debtor to protect homesteads of unlimited value, other states recognize no homestead exemption at all. Others fall somewhere in between. The disparity among the different states in the availability of the homestead exemption has resulted in perceived inequities, particularly when bankruptcy policies become implicated.[205]

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201. *In re* Larson, 340 B.R. at 448.

202. *Id.* at 449. As such, the fact that the charge against the debtor in *Larson* was continued without a finding was essentially irrelevant.

203. *Id.*

204. *Id.* The court scheduled an evidentiary hearing to determine the extent of the applicability of the homestead cap under Code § 522(q)(2) in light of the statute's exception for what may be necessary for the debtor's support. *See id.* at 450.

205. The National Bankruptcy Review Commission (the "Commission") noted in its Report to Congress that "[u]nlimited homesteads have led to national ridicule and the efforts of some less needy and better represented families to find literal and figurative shelter in generous states." FINAL REPORT OF THE NAT'L BANKRUPTCY REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 124 (Oct. 20, 1997). The Commission recommended a national homestead exemption cap of $100,000 be adopted in order to curb abuse, create uniformity, and limit the inequities associated with the availability of more generous homestead exemptions in some jurisdictions. *Id.* ¶ 1.2.2, at 125. Congress instead chose to address homestead exemption concerns voiced by the Commission and others by focusing on particular fact patterns. *See*

Indeed, a number of debtors have attempted to take advantage of the more generous homestead exemptions that are available in other states as partial asset protection measures and have changed residences in order to accomplish that goal.[206] The BAPCPA now places limits on an individual debtor's ability to shop for the most favorable homestead venue.[207]

Section 522(p) of the Code imposes domiciliary requirements on an individual debtor's ability to take advantage of a state's homestead exemption laws in certain instances. The statute now prohibits the exemption of "any amount of interest" in excess of $125,000 that was acquired during the 1,215 days (i.e., approximately three years, four months) before the bankruptcy filing in real or personal property that the debtor claims as his or her homestead.[208] The limitations imposed by the statute operate purely on the application of the statute to the facts without regard to a debtor's intent. The statute does, however, contain a safe harbor. The $125,000 cap does not apply to a principal residence of a family farmer or to the value attributable to the debtor's sale of a residence located within the same state that the debtor had acquired within 1,215 days of the bankruptcy filing.[209]

Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397 (2005).

206. *See* Howard, *supra* note 205, at 398 n.8 (providing some examples of notable debtors that have taken advantage of the exemptions afforded in certain states by moving and establishing a new residence).

207. One of the purposes of the statute was "to prevent out of state residents from moving to certain states in order to file for bankruptcy under more advantageous state homestead exemption laws." *In re* Blair, 334 B.R. 374, 378 (Bankr. N.D. Tex. 2005). *Contra In re* Landahl, 338 B.R. 920 (Bankr. M.D. Fla. 2006) (applying § 522(p) cap where the debtor *inherited* his interest in the property less than 1,215 days before the date the petition was filed thereby rendering the means by which the interest was acquired irrelevant).

208. 11 U.S.C. § 522(p) (2006). The legislative history of the statute clearly articulates its purpose:

> The bill . . . restricts the so-called "mansion loophole." Under current bankruptcy law, debtors living in certain states can shield from their creditors virtually all of the equity in their homes. In light of this, some debtors actually relocate to these states just to take advantage of their "mansion loophole" laws. [The BAPCPA] closes this loophole for abuse by requiring a debtor to be a domiciliary in the state for at least two years before he or she can claim that state's homestead exemption . . . .

H.R. REP. NO. 109-31, pt.1, *reprinted in* 2005 U.S.C.C.A.N. 88, 102.

209. 11 U.S.C. § 522(p)(2).

1. *Section 522(p) Cap on Homestead Exemption Only Applies in Some Jurisdictions*

Case Name: *In re* McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005)

Ruling: The $125,000 cap imposed by Code § 522(p) on a debtor's homestead exemption acquired within 1,215 days of the bankruptcy filing only applies in states that have not opted out of the federal exemption scheme.

Facts & Analysis: The debtor in *In re McNabb*[210] moved the court for an order compelling the Chapter 7 trustee to abandon the bankruptcy estate's interest in his home.[211] The debtor contended that the difference between the value of the home and the outstanding mortgage was less than the homestead exemption allowed under applicable state law and, as such, the estate had no realizable interest in the property. Creditors objected, asserting that the debtor's exemption was subject to the $125,000 cap of Code § 522(p) since the debtor moved into the state and purchased the home within 1,215 days of the bankruptcy filing.

The court reviewed the operative language of the statute and noted that the limitations of Code § 522(p) apply "as a result of electing under subsection (b)(3)(A) to exempt property under State or local law."[212] The court reviewed the historical underpinnings of the exemption statutes. As originally drafted, Congress contemplated that most debtors would be able to elect either local state exemptions or the federal exemptions provided in the Code. The Code, however, permitted states to "opt out" of the federal exemption scheme and only two states have not opted out.[213] Thus, debtors in most jurisdictions do not have the ability to "elect" between federal and state exemptions. The court reasoned that since the cap of Code § 522(p) becomes applicable only "as a result of electing," then it could only apply in non-opt out states (i.e., those states in which an election is possible).[214] The court recognized the limited utility that cap set forth in Code § 522(p) would have been applicable under its analysis,[215] but held that it was bound

210. 326 B.R. 785 (Bankr. D. Ariz. 2005).

211. *In re* McNabb, 326 B.R. at 786.

212. *Id*. at 788 (quoting 11 U.S.C. § 522(p)(2006)).

213. *See* 11 U.S.C. § 522(b)(2) (2006) (providing that the federal bankruptcy exemptions may not be elected by the debtor if the applicable state law does not specifically so authorize).

214. *In re* McNabb, 326 B.R. at 788.

215. *See id*. at 788-89. Under the court's construction, only two states that had not opted out of the federal exemption scheme provided homestead exemptions potentially in excess of the $125,000 cap imposed by new Code § 522(p). *Id*. The court recognized that "it makes little sense to limit the cap to the few remaining opt out states, nor to permit debtors to shield assets by obtaining a homestead in some other state merely because that state precludes the alternative of

by the unambiguous language of the statute given the lack of absurdity in the result.[216] The majority of the courts that has considered the issue to date (including a sister court located in the same jurisdiction) have disagreed with the reasoning in *McNabb*.[217]

2. *Section 522(p) Cap on Homestead Exemption Applies in All Jurisdictions*

Case Name: *In re* Kaplan, 331 B.R. 483 (Bankr. S.D. Fla. 2005)

Ruling: The BAPCPA amendment to Code § 522 limiting the homestead exemption to $125,000 applies in all states and not only in those jurisdictions which afford their residents a choice between the federal and state exemption schemes.

Facts & Analysis: The Chapter 7 trustee in *In re Kaplan*[218] objected to the amount of the state law homestead exemption claimed by the debtor in a condominium located in Florida and acquired within 1,215 days of the bankruptcy filing.[219] The debtor had more than $125,000 in equity in the property. The debtor, in response to the trustee's objection, asserted that the cap imposed by § 522(p) was not applicable since Florida had opted out of the federal exemption scheme and contended that the homestead cap was not applicable.

The court found that the $125,000 cap was applicable and served to limit the debtor's homestead exemption under the circumstances.[220] The court recognized the contrary decision in *McNabb* and opined that the result in that case, while supportable, interpreted the language using narrow rules of statutory construction.[221] The court in *Kaplan* disagreed with the result in *McNabb* and its conclusion that the language was unambiguous. The court found that the language of the statute was not merely awkward, but subject to more than one plausible meaning.[222] A consultation to the statute's legislative history was, therefore, appropriate. The court rejected the contention in *McNabb* that the legislative history on the subject "is virtually useless as an aid to understanding the language and intent."[223] To the contrary, the court found the legislative history on the issue to

claiming far less generous federal exemptions." *Id.* at 791. The court indicated that the solution for the glitch, if this was indeed one, rested with Congress. *Id.*

216. *Id.* at 789.

217. *See infra* notes 218-26 and accompanying text.

218. 331 B.R. 483 (Bankr. D. Fla. 2005).

219. *In re* Kaplan, 331 B.R. at 484-85.

220. *Id.* at 488.

221. *Id.* at 486.

222. *Id.* at 486-87.

223. *Id.* at 487 (quoting *In re* McNabb, 326 B.R. 785, 789 (Bankr. D. Ariz. 2005)).

"overwhelmingly and convincingly" demonstrate legislative intent in clear conflict with the holding in *McNabb*.[224]

> There is not a single shred of legislative history or commentary during the several years of debate regarding the homestead exemption suggesting that Congress intended to apply the new caps in only a couple of non opt-out states. In fact it is common knowledge that Florida's unlimited homestead was at the heart of the legislative debate.[225]

The result reached in *McNabb* is clearly at odds with the intentions of the drafters and would render the application of new Code § 522(p) largely inconsequential. Several other courts have correctly reached similar conclusions.[226]

3. *Section 522(p)(2)(B) Safe Harbor Shelters Intra-State Homestead Transactions from the Cap Imposed by § 522(p)(1)*

Case Name: *In re* Wayrynen, 332 B.R. 479 (Bankr. S.D. Fla. 2005)

Ruling: A debtor is not subject to the Code § 522(p)(1) limitation if the proceeds obtained from the first residence are reinvested in a second residence in the same state, even if accomplished during the 1,215-day period prescribed in the statute imposing the cap.

Facts & Analysis: The Chapter 7 trustee in *In re Wayrynen*[227] objected to the state law homestead exemption claimed by a debtor that acquired his current residence within 1,215 days of the bankruptcy filing.[228] The trustee contended that the debtor was limited to $125,000 of equity in his homestead since the residence was purchased within 1,215 days of the commencement of the case in accordance with Code § 522(p)(1). The debtor contended that he was entitled to exempt the full value of his home due to the safe harbor afforded by Code § 522(p)(2)(B), since the equity was derived from the sale of his previous home within the same state.[229]

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224. *In re* Kaplan, 331 B.R. at 488.

225. *Id.*

226. *See, e.g.*, *In re* Virissimo, 332 B.R. 201 (Bankr. D. Nev. 2005), *cert. granted*, 332 B.R. 208 (Bankr. D. Nev. 2005); *In re* Wayrynen, 332 B.R. 479 (Bankr. S.D. Fla. 2005); *In re* Wagstaff, 2006 WL 1075382 (Bankr. S.D. Fla. Mar. 17, 2006); *In re* Landahl, 338 B.R. 920 (Bankr. M.D. Fla. 2006); *In re* Kane, 336 B.R. 477 (Bankr. D. Nev. 2006); *In re* Summers, 344 B.R. 108 (Bankr. D. Ariz. 2006).

227. 332 B.R. 479 (Bankr. S.D. Fla. 2005).

228. *In re* Wayrynen, 332 B.R. at 481.

229. *Id.* at 482. Section 522(p)(2)(B) provides that for purposes of the interest subject to the $125,000 cap under Code § 522(p)(1), "any amount of interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1,215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State." 11 U.S.C. § 522(p)(2)(B) (2006).

The court rejected the trustee's assertion that Code § 522(p)(1) renders nonexempt any interest in homestead property in excess of $125,000 simply because the debtor rolled over the equity in a home sale into a new residence acquired within 1,215 days of the bankruptcy filing.[230] The court reasoned that the cap imposed by § 522(p)(1) is intended to limit the ability of individuals to take advantage of more generous exemption provisions in "debtor-friendly" states by relocating there.[231] The "safe harbor" of § 522(p)(2)(B), by contrast, appears to have been intended to continue protection to individuals that have taken advantage of the general appreciation of property values attributable to intra-state transactions.[232] Section 522(p)(2)(B), therefore, permits equity rollovers by debtors in one residence to another located within the same state—without penalty—to the full extent of the amount of the available exemption.[233]

4. *Section 522(p) Cap on Any Amount of "Interest" Acquired by Debtor Does Not Encompass Appreciation in Homestead*

Case Name: *In re* Sainlar, 344 B.R. 669 (Bankr. M.D. Fla. 2006)

Ruling: The cap on the homestead exemption on "any amount of *interest* that was acquired by the debtor" within less than 1,215 days of the bankruptcy filing refers to real estate purchased or otherwise acquired during that period. It does not encompass the appreciation in equity gained in property acquired more than 1,215 days as a result of increased property values or payments on secured debt.

Facts & Analysis: The Chapter 7 debtors in *In re Sainlar*[234] purchased their homestead more than 1,215 days before the bankruptcy filing.[235] The property increased in value substantially since the purchase date and equity of over $900,000 existed. The largest creditor in the case, which was unsecured and owed over $550,000, objected to the debtor's claim of exemptions. The creditor contended that the debtors are limited to an exemption on the homestead of no more than $125,000 and the creditors were entitled to the appreciation in value in excess of that amount as a result of the cap imposed by Code § 522(p). In other words, the creditor asserted that any appreciation in value that occurred in the 1,215-day period

230. *In re* Wayrynen, 332 B.R. at 485.

231. *Id.* at 486.

232. *Id.*

233. *See, e.g.*, *id.*; *In re Blair*, 334 B.R. 374, 378 (Bankr. N.D. Tex. 2005); *In re* Summers, 344 B.R. 108, 112-13 (Bankr. D. Ariz. 2006).

234. 344 B.R. 669 (Bankr. M.D. Fla. 2006).

235. *In re* Sainlar, 344 B.R. at 670.

preceding the bankruptcy filing was available to satisfy the claims of creditors.

The court noted that the creditor's reading of the statute would not only require a cap on all property purchased or acquired within the 1,215-day period, but to all appreciation in the value of the property purchased or acquired prior to that time.[236] The court ruled that the phrase "interest that was acquired" as used in Code § 522(p)(1) "means the acquisition of *ownership* of real property."[237] The homestead cap does not, therefore, apply to property in which the debtor acquired "title" more than 1,215 days prior to the bankruptcy.[238] Accordingly, the court ruled that the debtors were entitled to the claimed homestead exemption free from any cap.[239]

G. MEANS TEST

Implicated Code Sections: 11 U.S.C. § 707(b)

Summary of Changes to Law: Under pre-amendment law, a Chapter 7 bankruptcy case could be dismissed by the court, on its own motion or on the motion of the United States Trustee (but not at the request or suggestion of any other party), if the court determined that granting relief under that chapter would constitute a "substantial abuse."[240] Prior to the effective date of the BAPCPA, there was a "presumption in favor of granting the relief requested by the debtor."[241] The BAPCPA has fundamentally changed the landscape and dynamics of consumer bankruptcy. Now, dismissal is authorized when there is an "abuse."[242] The former presumption of Chapter 7 availability has been deleted from the Code. The reform legislation creates a "means test" in an attempt "to ensure that those who can afford to repay some portion of their unsecured debts are required to do so."[243] The "means test" limits judicial discretion. The statute imposes an objective, formulaic determination aimed at measuring a consumer debtor's ability to

236. *Id.* at 672.
237. *Id.* at 673 (emphasis added).
238. *Id.*
239. *Id.*
240. 11 U.S.C. § 707(b) (2004).
241. *Id.*
242. 11 U.S.C. § 707(b)(1) (2006).
243. 151 CONG. REC. S2470 (Mar. 10, 2005).

> The Bankruptcy Reform Act of 2005 asks the very fundamental question of whether repayment is possible by an individual. It is this simple: If repayment is possible, then he or she will be channeled into chapter 13 of the Bankruptcy Code which requires people to repay a portion of their debt as a pre-condition for limited debt cancellation . . . . This bill does this by providing for a means-tested way of steering people . . . who can repay a portion of their debts, away from chapter 7 bankruptcy.

151 CONG. REC. S1856 (statement of Sen. Charles Grassley, Mar. 1, 2005).

repay at least some portion of his or her general unsecured debt over time. A presumption of "abuse" arises when a consumer debtor's *presumed* available income, after deduction of *allowed* expenses, suggests sufficient debt-paying ability.[244] If the presumption under the "means test" is not rebutted, the Chapter 7 case will be dismissed or, with the debtor's consent, converted to a case under Chapter 11 or Chapter 13 of the Code.[245] A Chapter 7 bankruptcy case may also be dismissed even where a presumption of abuse does not arise or has been rebutted if the court determines that the petition was "filed" in "bad faith" or the "totality of the circumstances . . . of the debtor's financial situation demonstrates abuse."[246]

1. *"Totality of Circumstances" May Warrant Dismissal of Chapter 7 Case Even if No Presumption of Abuse Arises under "Means Test"*

Case Name: *In re* Paret, 2006 WL 2138116 (Bankr. D. Del. Aug. 1, 2006)

Ruling: Ability to pay remains relevant and provides a basis for dismissal of a Chapter 7 case even if the consumer debtor is sheltered from the "means test" because his or her income falls below the State's median income.

Facts & Analysis: The Chapter 7 trustee in *In re Paret*[247] moved to dismiss the debtor's bankruptcy case based upon the totality of the debtor's financial circumstances.[248] The trustee argued that Chapter 7 was inappropriate as the debtor had the ability to repay his unsecured debt in full in fewer than sixty months. The debtor contended that because he was not subject to means testing under the BAPCPA, since his income fell below the applicable State median income level, he was deemed to not have the ability to pay due to the safe harbor afforded under Code § 707(b)(7).[249]

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244. 11 U.S.C. § 707(b)(1) (2006). It is significant to note that the "means" test presumption is not applicable to debtors whose income is at or below the highest applicable State median family income. *Id.* § 707(b)(7)(A)(i). *See generally* Hon. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005).

245. 11 U.S.C. § 707(b). In order to rebut the presumption of abuse, the statute requires the debtor to demonstrate the existence of "special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces," justifying adjustments of income or expenses and "for which there is no reasonable alternative." *Id.* § 707(b)(2)(B)(i).

246. *Id.* § 707(b)(3)(A)-(B).

247. 2006 WL 2138116 (Bankr. D. Del. Aug. 1, 2006).

248. *In re* Paret, 2006 WL 2138116, at *1.

249. *Id.* Section 707(b)(7) of the Code prevents all parties, including the United States Trustee and the court, from moving to dismiss a Chapter 7 case based upon a presumption of abuse under the means test when the debtor's income falls below the applicable median income. *See* 11 U.S.C. § 707(b)(7).

The court opined that the fact that a "presumption" of abuse does not arise under the "means test" "does not mean that there is no abuse."[250] The fact that the debtor is not subject to means testing due to the safe harbor afforded under Code § 707(b)(7) does not result in a conclusive determination that the debtor is unable to pay his creditors.[251] Code § 707(b)(3), which permits dismissal based upon the totality of the circumstances of the debtor's "financial situation," correctly permits an examination of the debtor's ability to pay as a factor.[252] Indeed, the legislative history of the statute "unequivocally" indicates that Congress intended for the courts to consider ability to pay even though no presumption of abuse arises under the "means test."[253]

2. *Debtors May Include Deduction for Installment Payments on Secured Debt in "Means Test" Calculation Even if Debtor Intends to Surrender Collateral*

Case Name: *In re* Walker, 2006 WL 1314125 (Bankr. N.D. Ga. May 1, 2006)

Ruling: The "means test" calculations under Code § 707(b) for determining whether a presumption of abuse arises are based upon historical facts fixed as of the date of the bankruptcy filing.

Facts & Analysis: The Chapter 7 debtors in *In re Walker*[254] included scheduled installment payments on secured debt in the expense deductions of the "means test" calculations.[255] The United States Trustee filed a motion to dismiss the case since the debtors intended to surrender the collateral and would no longer be making the payments included in the "means test" calculation to the secured creditors. The court conducted an evidentiary hearing in order to determine whether a presumption of abuse had arisen.

The "means test" calculation permits a deduction from current monthly income payments for secured debts "scheduled as contractually due."[256]

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250. *In re* Paret, 2006 WL 2138116, at *2.

251. *Id.*

252. *See id.* at *2, *4. *Accord In re* Pennington, 2006 WL 2505942, at *2 (Bankr. D. Del. Aug. 30, 2006); *In re* Pak, 343 B.R. 239, 244 (Bankr. N.D. Cal. 2006).

253. *In re* Paret, 2006 WL 2138116, at *4 (citing *Bankruptcy Reform Act of 2000-Conference Report*, 146 CONG. REC. S11683-02, S11703).

254. 2006 WL 1314125 (Bankr. N.D. Ga. 2006).

255. *In re* Walker, 2006 WL 1314125, at *1.

256. *See* 11 U.S.C. § 707(b)(2)(A)(iii) (2006) (providing that the "debtor's average monthly payments on account of "secured debts" are to be calculated as the sum of "all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition . . . .").

The debtors contended that the Code does not require a debtor to reaffirm a debt in order to deduct the payment on secured debt from the calculation. As long as the payment was "contractually due" at the date of the bankruptcy filing, the deduction was, according to the debtors, appropriate. The United States Trustee argued that permitting a deduction for payments that the debtors did not intend to make and will not, upon surrender of the collateral, be obligated to make is contrary to legislative intent.

The "means test" is a "backward looking test" that is intended to apply to the debtor's financial condition and facts in existence as of the date of the bankruptcy filing.[257] The court in *Walker* believed that "Congress chose to base the means test on historic income and expense figures that are in effect on the petition date, as opposed to figures that may change with the passage of time or with a change in the debtor's lifestyle."[258] While it is true that this analysis does not produce an accurate picture of the debtor's post-petition financial condition, the court indicated that the "means test" presumption "was not intended to and does not produce the most accurate prediction of the debtor's actual ability to fund a Chapter 13 plan."[259] The court found that the plain language of the statute permitted the deduction and concluded that a presumption of abuse did not arise under Code § 707(b)(2).

It is significant to note that the court in *Walker* did *not* rule on whether the debtor's postpetition change in financial condition would be a circumstance giving rise to grounds for dismissal under Code § 707(b)(3). It would seem, however, that changes in circumstances and postpetition events impacting a debtor's ability to pay would be highly relevant under the BAPCPA and should be considered to further Congressional intent.[260] A court should not be limited to a review of the debtor's financial situation as of the date of the filing as a review of the future situation permits a more accurate assessment of whether the debtor's case exemplifies the concerns of Congress as expressed in Code § 707(b): abuse of the bankruptcy system by debtors attempting to take unfair advantage of their creditors.[261]

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257. *In re* Walker, 2006 WL 1314125, at *5.

258. *Id*.

259. *Id*. at *6.

260. *See In re* Paret, 2006 WL 2138116, at *2 (Bankr. D. Del. Aug. 1, 2006) (indicating that ability to pay remains relevant for dismissal under Code § 707(b)(3) even though no presumption of abuse arises). *See also* United States Trustee v. Cortez (*In re* Cortez), 2006 WL 2023117 (5th Cir. July 20, 2006) (ruling under former Code § 707(b) that a "bankruptcy court can and should consider postpetition events up until date of discharge, including any postpetition improvements" in the debtor's financial condition in determining whether to dismiss a Chapter 7 case).

261. *In re* Pennington, 2006 WL 2505942, at *3-4 (Bankr. D. Del. Aug. 30, 2006).

3. *Debtors May Not Deduct 401(k) Loan Repayments as "Other Necessary Expenses" under Means Test*

Case Name: *In re* Barraza, 2006 WL 2136697 (Bankr. N.D. Tex. Aug. 1, 2006)

Ruling: A 401(k) loan repayment is not an appropriate deduction or permitted expense under the "means test."

Facts & Analysis: The Chapter 7 debtor in *In re Barraza*[262] participated in two 401(k) plans and borrowed funds from each of those plans.[263] The debtor deducted the monthly loan payments of $915 from his current monthly income as part of his means test analysis under Code § 707(b)(2)(A)(ii)(I). Specifically, the debtor deducted the sum as "Other Necessary Expenses: mandatory payroll deductions" on Official Form B22A, which instructs the debtor to enter the total monthly deductions from payroll that are "required" for employment, such as "mandatory retirement contributions."[264] The debtor argued that the 401(k) loan repayments were "mandatory payroll deductions" and noted that the BAPCPA now expressly exempts such payroll deduction loan repayments from the automatic stay and the calculation of disposable income under Chapter 13.[265]

The court ruled that expenses can be only deducted as "Other Necessary Expenses" under the categories specified by applicable Internal Revenue Service guidelines if they provide for the health and welfare of the debtor or are required for the production of income.[266] The debtor's 401(k) loan repayments, even though effectuated through payroll deductions, did not qualify under either category. The court noted that although the debtor may incur a tax penalty if he defaults, the repayment of the loans is not a condition of employment.[267] As such, the deduction was not appropriate.

H. LIMITS ON DISCHARGES

Implicated Code Sections: 11 U.S.C. §§ 1325(a)(1), 1328(f)(1)

Summary of Changes to Law: One of the expressed purposes of the new legislation is to curb abuse. Congress amended the "discharge" provisions of the Code to limit the number of times an individual debtor is able to obtain a subsequent discharge in Chapter 7 and Chapter 13 bankruptcy cases. Under the BAPCPA, an individual is not able to receive a discharge

262. 2006 WL 2136697 (Bankr. N.D. Tex. Aug. 1, 2006).
263. *In re* Barraza, 2006 WL 2136697, at *1.
264. *Id.* at *4.
265. *Id.* (citing 11 U.S.C. §§ 362(b)(19) & 1322(f)).
266. *Id.* at *5.
267. *Id.*

in Chapter 7 if a prior discharge was received "within 8 years" (rather than 6 years under former law) of the current bankruptcy filing.[268] Similarly, a discharge will not be granted in a Chapter 13 case if the debtor obtained a discharge in Chapter 7, 11 or 12 within four years prior to the date of the pending filing, or in a Chapter 13 case filed within two years of the pending case.[269]

1. *Successive Bankruptcy Filings Prohibiting Chapter 13 Discharge in Subsequent Case Does Not Impact Eligibility for Relief, or* Ipso Facto, *Warrant Dismissal of Case*

Case Name: Lewis v. Lewis (*In re* Lewis), 339 B.R. 814 (Bankr. S.D. Ga. 2006)

Ruling: The law limiting a debtor's ability to receive successive discharges in subsequent cases does not implicate eligibility for bankruptcy relief. Accordingly, the court overruled the objection of the Chapter 13 trustee that sought dismissal of Chapter 13 cases under circumstances in which the debtors could not receive a discharge upon successful completion of their Chapter 13 plans due to prior bankruptcy filings.

Facts & Analysis: The Chapter 13 debtors in *Lewis v. Lewis (In re Lewis)*[270] had been debtors and received discharges in previous bankruptcy cases such that amended Code § 1328(f)(1) precluded the court from granting discharges in the pending cases.[271] The trustee sought to dismiss the cases.

The court found that the legislative limits placed upon a debtor's ability to obtain the benefit of another bankruptcy discharge in a second case did not preclude the debtors from availing themselves of other benefits afforded in bankruptcy.[272] The court opined that the benefits of bankruptcy protection to debtors and creditors are not altogether tied to the discharge:

> As to secured creditors an orderly distribution of debtor's postpetition income to pay down pre-petition creditor obligations provides for adequate protection of creditor's pre-petition collateral interest and is far superior to a first come first paid race to the courthouse contemplated under non-bankruptcy law. Unsecured creditors have a better chance and more cost-efficient

268. 11 U.S.C. § 727(a)(8) (2006).

269. *Id.* § 1328(f)(1)-(2).

270. 339 B.R. 814 (Bankr. S.D. Ga. 2006).

271. Lewis v. Lewis (*In re* Lewis), 339 B.R. at 815.

272. *Id.* *Accord In re* Bateman, 2006 WL 1233889 (Bankr. D. Md. May 1, 2006) (opining that a debtor's ineligibility for a Chapter 13 discharge does not, alone, serve as a bar to being eligible to file another bankruptcy case).

> opportunity to be paid in a chapter 13 plan under court supervision than contemplated under available state debt-collection law.[273]

The court rejected the trustee's argument that the debtors' ineligibility to receive discharges in their Chapter 13 cases, standing alone, established bad faith, precluding plan confirmation, and grounds for dismissal.[274]

I. PURCHASE-MONEY SECURITY INTERESTS IN MOTOR VEHICLES

Implicated Code Sections: 11 U.S.C. §§ 506, 1325(a)

Summary of Changes to Law: Section 1325 of the Code establishes the requirements for confirmation of a Chapter 13 plan. Section 1325(a)(5) requires Chapter 13 plans to provide one of three alternative treatments for secured claims. First, a plan can generally provide for whatever treatment the secured creditor has agreed to accept.[275] Second, a plan can provide for the surrender of the collateral to the secured creditor.[276] The only remaining option for a Chapter 13 plan is to provide for the retention of the collateral and give the secured creditor a stream of payments equal to the *value* of its allowed secured claim.[277] Section 506 of the Code generally permits debtors to bifurcate a secured creditor's claim into secured and unsecured parts, based upon the value of the underlying collateral.[278] In other words, a debtor may typically utilize Code § 506 to strip down secured claims to the value of the collateral. The new legislation contains some special exceptions to the applicability of § 506 for certain secured creditors in Chapter 13 cases. One such exception has been made in Code § 1325 for purchase-money collateral consisting of a "motor vehicle" that was "acquired for the personal use of the debtor" within "910 days" of the bankruptcy filing (i.e., two days less than two and one half years).[279] For purposes of plan confirmation and treatment under Chapter 13, an unnumbered paragraph appearing at the end of Code § 1325(a) prevents the application of § 506 when (1) the creditor holds a purchase-money security interest; (2) in a motor vehicle acquired for the debtor's personal use; and

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273. *In re* Lewis, 339 B.R. at 817.
274. *Id*. *Accord In re* McGhee, 342 B.R. 256 (Bankr. W.D. Ky. 2006).
275. 11 U.S.C. § 1325(a)(5)(A) (2006).
276. *Id*. § 1325(a)(5)(C).
277. *Id*. § 1325(a)(5)(B).
278. *Id*. § 506(a)(1).
279. 11 U.S.C. § 1325(a) (unnumbered, hanging paragraph at the end of Code § 1325(a)(9)). The new legislation also limits the ability of a debtor to strip down secured debt of any kind if the obligation was incurred within the one-year period preceding the bankruptcy filing. *Id*.

(3) the obligation secured by the motor vehicle was incurred within 910 days of the bankruptcy filing.[280]

1. *Transformation Rule under Article 9 of the U.C.C. Precludes PMSI and Applicability of Exception to Lien Stripping*

Case Name: *In re* Horn, 338 B.R. 110 (Bankr. M.D. Ala. 2006)

Ruling: The bankruptcy court overruled the automobile lender's objection to confirmation of a Chapter 13 plan that bifurcated the lender's claim into secured and unsecured components in accordance with Code § 506(a)(1). The refinancing of a purchase-money loan destroyed its protected PMSI status under Code § 1325(a) and resulted in permissible claim bifurcation.

Facts & Analysis: The Chapter 13 debtor in *In re Horn*[281] borrowed $6,792 to purchase a motor vehicle.[282] The loan was subsequently refinanced on multiple occasions, with the debtor borrowing sums ranging from $500 to $2,300. At the time of the bankruptcy filing, the debtor valued the car at $2,300 and proposed to treat the lender's claim as secured at the stripped-down amount. The lender objected, arguing that its claim must be treated as fully secured under the amendments to Code § 1325(a), notwithstanding Code § 506(a)(1).

The court, looking to state law, disagreed. Under Article 9 of the U.C.C., a purchase-money security interest, according to the court, "remains one that secures the money used to acquire the collateral and nothing else."[283] The court found dispositive the fact that the debt secured by the car included both the money loaned for its purchase and additional advances. The refinancing and inclusion of additional debt thus destroyed the purchase-money status and the protection from bifurcation afforded to such creditors under the new legislation.[284]

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280. *See generally* Jean Braucher, Rash *and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457 (2005); Timothy Moratzka, *The "Hanging Paragraph" and Cramdown: 11 U.S.C. §§ 1325(a) and 506 after BAPCPA*, 25 AM. BANKR. INST. L.J. 18 (2006).

281. 338 B.R. 110 (Bankr. M.D. Ala. 2006).

282. *In re* Horn, 338 B.R. at 112.

283. *Id.* at 114 n.4.

284. Notably, the court disregarded the "dual status" rule applicable to non-consumer goods transactions under U.C.C. § 9-103(f) in which a purchase-money security interest does not lose its status as such even if the obligation has been refinanced or also secures an obligation that is not purchase money. *See* U.C.L. § 9-103(f). *Contra In re* Vega, 2006 WL 1731224 (Bankr. D. Kan. June 19, 2006) (holding that because the debtor's plan proposed to pay the full PMSI-portion of the obligation, the plan does not violate the anti-bifurcation provisions of the new legislation).

2. *Motor Vehicle Must Be Acquired for "Personal Use" of "Debtor"*

Case Name: *In re* Jackson, 338 B.R. 923 (Bankr. M.D. Ga. 2006)

Ruling: A motor vehicle that the Chapter 13 debtor acquired shortly before the bankruptcy filing with proceeds of a purchase-money loan was not "acquired for the personal use of the debtor" within the meaning of the statute, since it was acquired to serve as a replacement vehicle for his non-debtor wife. Accordingly, the Chapter 13 debtor was not barred from cramming down his Chapter 13 plan, in which he proposed to bifurcate the purchase-money motor vehicle lender's claim, and pay only the reduced value of the collateral.

Facts & Analysis: The Chapter 13 debtor in *In re Jackson*[285] was the sole purchaser of a vehicle under a sales contract which expressly provided that the car was purchased for "personal, family, or household" use.[286] Nevertheless, it was undisputed that the car was purchased for the debtor's wife, who was not a debtor in the case. The debtor's wife was not a party to the sales contract and the vehicle was not titled in her name. The lender argued that because the debtor acknowledged in the sales contract that the car was purchased for "personal, family, or household use," its claim satisfied the requirement under the statute that the collateral be "acquired for the personal use of the *debtor*."

The court, noting that Congress used the terms "personal, family, or household use" elsewhere in the Code, recognized that the term "personal use" must mean something different.[287] The limiting language rendered the protection afforded by Code § 1325(a) inapplicable to the lender's claim.[288] As such, bifurcation of the claim and strip down of the lien were permissible under the facts.[289]

285. 338 B.R. 923 (Bankr. M.D. Ga. 2006).

286. *In re* Jackson, 338 B.R. at 924.

287. *Id.* at 925. *See, e.g.*, 11 U.S.C. § 101(8) (2006) (defining consumer debt); § 365(d)(5) (regarding performance obligations under an unexpired lease); § 522 (regarding exempt property).

288. *In re* Jackson, 338 B.R. at 924. *Accord In re* Lewis, 2006 WL 2372162 (Bankr. D. Kan. Aug. 3, 2006) (ruling that the phrase "for personal use of the debtor" cannot be stretched to include a motor vehicle acquired for the use of an independent child that did not reside with the debtor).

289. When a debtor can establish that a vehicle has been acquired for "business" purposes, rather than for "personal use," the debtor will likewise be able to bifurcate the claim into secured and unsecured portions and pay only the value of the vehicle under Code § 1325. *In re* Lowder, 2006 WL 1794737, at *4 (Bankr. D. Kan. June 28, 2006).

3. *BAPCPA Requires Treatment of 910 Claim as Fully Secured*

Case Name: *In re* Johnson, 337 B.R. 269 (Bankr. M.D.N.C. 2006)

Ruling: The Code now prohibits a Chapter 13 debtor from bifurcating claim of lender with a purchase-money security interest in a motor vehicle that was purchased within 910 days of the bankruptcy filing for the debtor's personal use. The existence of additional collateral does not prevent the protections afforded 910 creditors under Code § 1325(a).

Facts & Analysis: The Chapter 13 debtors in *In re Johnson*[290] owed $12,482.83 on a vehicle worth $9,967 that was secured by 910 collateral.[291] The debtors proposed in their plan to cram down the value of the secured creditor's claim and the creditor objected. The court noted that the new legislation changed the historical treatment of certain secured claims in Chapter 13.[292] In response to the argument that the BAPCPA renders Code § 506 no longer applicable and, therefore, "turns a secured claim into an unsecured claim," the court ruled that the statute "simply provides that debtors may not bifurcate the claims of lenders with purchase money security interests in vehicles purchased within 910 days of the bankruptcy for the debtor's personal use.[293] *Such a creditor is entitled to the full payment of his contractual claim or return of the vehicle*."[294] The majority of courts that have weighed in on the issue so far is in accord.[295] However, at least one court has disagreed with the notion that claims secured by 910 collateral become secured claims for purposes of distribution in Chapter 13.[296]

The court in *Johnson,* likewise, rejected the debtors' argument that the simultaneous purchase of an extended service contract and a motor vehicle prevents the 910 creditor from obtaining a purchase-money security interest

290. 337 B.R. 269 (Bankr. M.D.N.C. 2006).

291. *In re* Johnson, 337 B.R. at 270.

292. *Id*.

293. *Id*. at 272.

294. *Id*. (emphasis added).

295. *See, e.g*., *In re* Brown, 2006 WL 1914083 (Bankr. M.D. Ga. June 30, 2006); *In re* Lowder, 2006 WL 1794737 (Bankr. D. Kan. June 28, 2006); *In re* Robinson, 338 B.R. 70 (Bankr. W.D. Mo. 2006); *In re* Horn, 338 B.R. 110 (Bankr. M.D. Ala. 2006); *In re* Wright, 338 B.R. 917 (Bankr. M.D. Ala. 2006). Some of the available legislative history indicates that the protections for secured creditors under the BAPCPA "include a prohibition against bifurcating a secured debt incurred within the 910-day period preceding the filing of a bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the debtor's personal use." H.R. REP. NO. 109-31(I), *reprinted in* 2005 U.S.C.C.A.N. 88, 103.

296. *See, e.g*., *In re* Carver, 338 B.R. 521 (Bankr. S.D. Ga. 2006). *See infra* notes 298-305 and accompanying text (discussing *Carver*).

in the motor vehicle. The court found that there is no requirement in Code § 1325(a) that the creditor be secured "only" by a motor vehicle.[297]

4. *BAPCPA Prohibits Treatment of 910 Creditor's Claim as Fully Secured*

Case Name: *In re* Carver, 338 B.R. 521 (Bankr. S.D. Ga. 2006)

Ruling: The court in *In re Carver* rejected the line of authority holding that the claim of a 910 creditor is treated as fully secured.[298] The appropriate interpretation must be one in which Code § 506 is not applicable. Chapter 13 debtors must provide such a creditor with the greater of payments equal to the full amount of its claim "without interest," or an amount that the creditor would receive if its claim were bifurcated and crammed down.

Facts & Analysis: The creditor in *In re Carver*[299] that provided purchase-money financing for a vehicle that Chapter 13 debtors acquired within 910 days of the bankruptcy filing for their personal use objected to confirmation of the debtor's plan, which provided for the payment of creditor's claim in full, but without interest.[300] The court rejected the decisional law that had developed and stands for the proposition that a 910 creditor's claim must be paid in full in accordance with revised Code § 1325(a).[301] The plain language of the statute renders § 506 inapplicable if the creditor holds a 910 claim and thereby prevents such claims from being treated as secured under a Chapter 13 plan.[302] The court used Code § 1111(b) as a guide and ruled that, in the context of a Chapter 13 plan, a 910 claim must receive "the *greater* of (1) the full amount of the claim without interest; or (2) the amount the creditor would receive if the claim were bifurcated and crammed down (i.e., secured portion paid with interest and unsecured portion paid pro rata)."[303] The court therefore created a formula for the payment of such a claim.

It is significant to recognize that few reported decisions have embraced the *Carver* analysis. The overwhelming majority of decisions addressing the issue to date have found that nothing in the new legislation erases a

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297. *In re* Johnson, 337 B.R. at 272-73. *Accord In re* Brown, 2006 WL 1914083 (Bankr. M.D. Ga. June 30, 2006); *In re* Murray, 2006 WL 2080638 (Bankr. M.D. Ga. June 6, 2006).

298. *In re* Carver, 338 B.R. at 525.

299. *Id*. at 522.

300. *Id*.

301. *Id*. at 527-28.

302. *Id*. *Accord In re* Wampler, 2006 WL 1971647 (Bankr. D. Kan. June 29, 2006) (holding that 910 claims under Chapter 13 are "allowed" claims, but are not "allowed secured claims" for purposes of Code § 1325).

303. *In re* Carver, 338 B.R. at 528.

creditor's secured status simply because the valuation mechanism in § 506 is now rendered inapplicable to the creditor's particular claim.[304] The bankruptcy judge that decided *Carver* recently reaffirmed his conclusion that *Carver* was correctly decided despite the fact that the opinion has been rejected by most subsequent decisions.[305]

5. *Chapter 13 Plan Cannot Alter Strip-Down Prohibition of § 1325 Even in Absence of Creditor Objection*

Case Name: *In re* Montoya, 341 B.R. 41 (Bankr. D. Utah 2006)

Ruling: Creditors are entitled to rely upon the unambiguous provisions of the BAPCPA and are not required to "scour" a debtor's plan to ensure that provisions inserted into the plan that are inconsistent with the statute's plain meaning and impose improper treatment will become binding.

Facts & Analysis: The Chapter 13 debtor in *In re Montoya*[306] sought confirmation of a plan that proposed to use Code § 506(a)(1) to bifurcate the 910-day vehicle claim of a secured creditor.[307] The 910-creditor did not object to the treatment or file a proof of claim in the case. The bankruptcy court rejected the argument of the debtor and the Chapter 13 trustee that the creditor's failure to object to a properly noticed plan constitutes acceptance of the plan satisfying the requirements for confirmation in accordance with § 1325(a)(5)(A) (allowing plan confirmation with respect to a holder of an allowed secured claim if the claimant has accepted the plan). The court held that Code § 1325(a) now provides a 910-day vehicle claim holder with a statutory right—namely, the right not to have their claim crammed down.[308] Accordingly, plan treatment to the contrary should require some sort of "affirmative assent or waiver" on the part of the creditor.

304. *See In re* DeSardi, 340 B.R. 790, 812 (Bankr. S.D. Tex. 2006) (rejecting the conclusions of *Carver* and refusing to support a judicially crafted treatment of claims not having any basis in the Code); *In re* Lowder, 2006 WL 1794737, at *6 n.32 (Bankr. D. Kan. June 28, 2006) (collecting cases) (opining that Code § 1325(a) does not render a creditor, secured by operation of nonbankruptcy law, into some undefined other type of creditor, rather the purchase-money claim remains secured despite the inapplicability of the valuation mechanism set forth in Code § 506). *Contra* 8 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 1325.06[1][a] (15th ed. rev. 2006) (opining that 910 claims "cannot be determined to be allowed secured claims under section 506(a) and are not within the ambit of section 1325(a)(5)").

305. *See In re* Green, 2006 WL 2531531 (Bankr. M.D. Ga. Aug. 30, 2006).

306. 341 B.R. 41 (Bankr. D. Utah 2006).

307. *In re* Montoya, 341 B.R. at 42.

308. *Id.* at 46 n.19. *Accord In re* Montgomery, 341 B.R. 843, 845 (Bankr. E.D. Ky. 2006).

6. *Strip-Down Prohibition of § 1325 Does Not Preclude Modification of Other Contract Rights*

Case Name: *In re* Wright, 338 B.R. 917 (Bankr. M.D. Ala. 2006)

Ruling: Prohibition against utilization of Code § 506 to bifurcate the claims of a holder of 910 collateral does not prevent modification of other contractual terms such as interest. Congress did not, in providing relief for certain automobile lenders in § 1325 from claim bifurcation, create an absolute safe harbor.

Facts & Analysis: The purchase-money motor vehicle lender in *In re Wright*[309] objected to confirmation of the debtor's proposed Chapter 13 plan on the basis that it was not paying the creditor the contractual rate of interest to which it was entitled under § 1325(a).[310] The plan provided that the creditor would be paid interest on its claim at the rate of 7.75%, rather than the 17.90% reflected in the contract. The creditor contended that Code § 1325(a) now precludes the modification of any of its contractual rights. The court disagreed, finding that the claims of 910 creditors must simply be treated as fully secured under the plan since the BAPCPA left unchanged § 1322(b)(2).[311] The restriction placed upon bifurcation in the statute does not protect these creditors from modification of other contractual rights.[312]

7. *910 Creditors Are Entitled to Interest on Fully Secured Claim*

Case Name: *In re* Shaw, 341 B.R. 543 (Bankr. M.D.N.C. 2006)

Ruling: Under a Chapter 13 plan, a 910 creditor is entitled to receive the value, as of the effective date of the plan, of the allowed amount of its secured claim. As such, the creditor must be paid in full on the effective date of the plan or receive a stream of payments equal to the present value of its allowed secured claim.

Facts & Analysis: The debtor in *In re Shaw*[313] sought confirmation of its Chapter 13 plan and argued that no interest was due on the 910 creditor's allowed secured claim.[314] The debtor contended that the amendments to the Code make § 506 and the present value requirement set forth in Code § 1325(a)(5) inapplicable to the allowed secured claims of creditors holding

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309. 338 B.R. 917 (Bankr. M.D. Ala. 2006).

310. *In re* Wright, 338 B.R. at 918.

311. *Id.* at 919-20. Section 1322(b)(2) of the Code permits a Chapter 13 plan to "modify" the rights of holders of secured claims, other than those secured only by the debtor's principal residence. 11 U.S.C. § 1322(b)(2) (2006).

312. *In re* Wright, 338 B.R. at 920.

313. 341 B.R. 543 (Bankr. M.D.N.C. 2006).

314. *In re* Shaw, 341 B.R. at 544.

purchase-money security interests in motor vehicles acquired for personal use within 910 days of the bankruptcy filing. According to the debtor, these claims are not treated like secured claims or unsecured claims. Rather, the new legislation created a new class of claims that are required to be paid in full without interest.[315]

The court rejected the debtor's analysis and conclusions. The court opined that a creditor's rights are determined initially in accordance with state law, which may then be altered by a substantive provision of the Code.[316] Although § 506 is now inapplicable to certain secured claims, it does not mean that such claims are no longer secured or that the requirements of § 1325(a)(5) (requiring interest on secured claims) are no longer applicable to 910 claims.[317] The court found that the Code requires a Chapter 13 plan to provide for the payment of interest on the full, unbifurcated secured claim of a 910 creditor.[318] Most courts that have considered the issue are in accord and have generally rejected the argument that holders of 910 claims are not entitled to interest on that claim.[319] As such, the court must, as under pre-amendment law, determine the appropriate rate of interest to be applied to the creditor's 910 claim in order to determine the

315. *Id*. at 546.

316. *Id*.

317. *Id*. The court reasoned that Code § 1325(a)(5)(B)(ii), the provision of the statute that mandates the application of an interest component to payments of secured claims, was unaltered by the BAPCPA. *Id*. at 547. Similarly, when enacting the BAPCPA, Congress was presumed to have known about the Supreme Court's decision in *Till v. SCS Credit Corp*., 541 U.S. 465 (2004) interpreting the statute to require an interest component and providing detailed instructions for subsequent courts to follow in order to calculate the appropriate rate of interest. Given Congress's knowledge of the *Till* precedent and its decision not change the applicable statute when enacting the BAPCPA, the court reasoned that pre-amendment law (including *Till*) remained unaltered by the new legislation. *In re* Shaw, 341 B.R. at 547.

318. *Id*.

319. *See, e.g*., *In re* Soards, 2006 WL 1676221, at *2 (Bankr. W.D. Ky. June 16, 2006) (finding secured creditor on 910 vehicle entitled to interest on its secured claim); *In re* Bufford, 343 B.R. 827, 833 (Bankr. N.D. Tex. 2006) (holding that 910 claims are included in the present value requirement of § 1325(a)(5)); *In re* Fleming, 339 B.R. 716, 723-24 (Bankr. E.D. Mo. 2006) (ruling that anti-modification provision of revised § 1325(a) for 910 claims does not alter the requirement to pay present value or protect claims from any modification under a Chapter 13 plan); DaimlerChrysler Fin. Servs. Am., L.L.C. v. Brown (*In re* Brown), 339 B.R. 818, 822 (Bankr. S.D. Ga. 2006) (holding that the revisions to Code § 1325 prohibiting claim bifurcation did not exempt the "present value" requirement from the statute; debtors are required to pay interest); *In re* Robinson, 338 B.R. 70, 74-75 (Bankr. W.D. Mo. 2006) (concluding that amendments do not overrule the United States Supreme Court decision of *Till v. SCS Credit Corp*., 541 U.S. 465 (2004), which held that Chapter 13 debtors may modify the interest rates that secured creditors are entitled to receive in a Chapter 13 case). *But see In re* Taranto, 344 B.R. 857, 862-63 (Bankr. N.D. Ohio 2006) (rejecting, under the facts, the argument that a 910 claim which has protection from bifurcation is also entitled to receive the present value protection provided for in § 1325(a)(5)(B)(ii) as the creditor would receive a windfall at the expense of unsecured creditors).

present value of the claim and is not bound by the contract rate. At least one court has ruled otherwise, however.[320]

8. *910 Creditors Are Not Necessarily Entitled to Interest*

Case Name: *In re* Taranto, 344 B.R. 857 (Bankr. N.D. Ohio 2006)

Ruling: A 910 creditor's entitlement to interest on its claim must be addressed based upon the facts of the particular case and justified on the record.

Facts & Analysis: The automobile lender in *In re Taranto*[321] was the holder of a claim in the amount of $28,222.66, which was secured by a motor vehicle that had a value of $16,706.11.[322] The contract between the debtor and the creditor provided for 0% interest. The Chapter 13 debtor proposed a plan under which the creditor was to receive the full claim amount without interest and a stream of payments ahead of the contract scheduled payments. The creditor objected, contending that it was entitled to interest on the full amount of its allowed claim.

The court recognized that the amendments to the Code operate to create, in most instances, an allowed claim in an amount greater than the value of the creditor's collateral, and thus recognition of a claim that will receive preferred treatment under the new law.[323] However, the court found no evidence in the legislative history that Congress intended for 910 claims to receive, in addition to other protections now afforded under the law, the present value protection provided for in Code § 1325(a)(5)(B)(ii) on the full claim amount where the value of the collateral securing the claim is less than the amount of the claim.[324] The court reasoned that the artificial inflation of a 910 creditor's claim that results from the strip-down protection afforded under the BAPCPA reduces the risk exposure such creditors previously confronted under former law.[325] The court concluded that nothing in the amended statute addressed the payment of interest on 910 claims:

> The entitlement to interest on the 910 Claim must be addressed on the facts of the particular claim. There may be circumstances where the value of the collateral securing the 910 Claim is in fact greater than the amount of the 910 Claim and payment of interest

320. *See infra* notes 321-27 and accompanying text.
321. 344 B.R. 857 (Bankr. N.D. Ohio 2006).
322. *In re* Taranto, 344 B.R. at 858.
323. *Id*. at 861.
324. *Id*.
325. *Id*. at 862.

either at the contract rate or at a constructed rate is justified on the record evidence of that case.[326]

The court in *Taranto*, which recognized that the creditor was being paid the full amount owed and the interest provided for under the contract, unquestionably reached an equitable result under the circumstances. Any payment of interest would necessarily have provided this creditor a windfall and would have to come from funds that would otherwise be paid to unsecured creditors. However, the court was required to find that Code § 1325(a)(5) is not applicable to 910 claims in order to reach the result.[327]

9. *Surrender of Motor Vehicle Securing 910 Claim Deemed to Be in Full Satisfaction of Claim*

Case Name: *In re* Ezell, 338 B.R. 330 (Bankr. E.D. Tenn. 2006)

Ruling: Anti-cramdown provision of revised Code § 1325(a) that prohibits application of § 506 to allow any bifurcation of purchase-money, 910 obligation, also operates to *fully satisfy* the creditor's claim, whether secured or unsecured, barring a deficiency in the event that the debtors elect to surrender the vehicle.

Facts & Analysis: The creditor in *In re Ezell*,[328] whose debt was secured by a purchase-money security interest in a motor vehicle acquired within 910 days of the debtor's Chapter 13 bankruptcy filing, objected to the confirmation of the debtor's plan.[329] The plan provided for the surrender of the motor vehicle that served as collateral for the debt to the creditor in "full satisfaction of its claim." The parties did not dispute that if the debtors desired to retain the motor vehicle and provide for its payment through the plan, the anti-cramdown provision set forth in revised Code § 1325(a) would provide the creditor with an allowed secured claim equal to full amount of the debt. However, the debtors contended that because the anti-cramdown provision now eliminates the application of Code § 506 to § 1325(a)(5), there can no longer be any deficiency claim when the collateral is surrendered.

326. *Id*. at 863.

327. The court in *Taranto* opined:

> For a claimant to have the benefits of § 1325(a)(5), it must hold an allowed secured claim. Under the Bankruptcy Code, one holds an allowed secured claim only through operation of § 506. The 910 Provision specifically excludes the application of § 506. The canceling effect of the code operations . . . forces this Court to go beyond the text and consider what issues Congress viewed itself as addressing when it added the 910 Provision to the Bankruptcy Code.

Id.

328. 338 B.R. 330 (Bankr. E.D. Tenn. 2006).

329. *In re* Ezell, 338 B.R. at 330.

The court interpreted the prohibition from bifurcation in the new statute as written, i.e., that it applies both to Code § 1325(a)(5)(B) (retention of collateral) and (C) (surrender of the collateral):

> To apply the Anti-Cramdown Paragraph only to Revised § 1325(a)(5)(B), but not to Revised § 1325(a)(5)(C), would allow a secured creditor, upon surrender of its collateral, to bifurcate its claim into different secured and unsecured components, contrary to [the] unambiguous mandate that Revised § 506 "shall not apply to a claim described in [Revised § 1325(a)(5)]."[330]

While it is difficult to believe that Congress and the credit lobby actually intended for the changes to Code § 1325(a) to preclude deficiency claims on surrendered motor vehicles, the holding appears to be based upon a logical reading of the statute.[331] Other courts have found an ambiguity in the statute to reach a different result, however.[332]

10. *Surrender of Motor Vehicle Securing 910 Claim NOT Deemed to Be in Full Satisfaction of Creditor's Claims*

Case Name: *In re* Duke, 345 B.R. 806 (Bankr. W.D. Ky. 2006)

Ruling: A debtor's surrender of a motor vehicle purchased within 910 days of the bankruptcy filing for personal use does not result in the full satisfaction of the creditor's claims.

Facts & Analysis: The Chapter 13 debtors in *In re Duke*[333] sought to surrender motor vehicles to the creditor in full satisfaction of the debt.[334] The debtors contended that the anti-bifurcation provisions engrafted by the BAPCPA on to § 1325(a) preclude a 910 creditor's right to a deficiency claim in the context of a surrender of the motor vehicle.

Based upon a review of the case law that has developed interpreting the language added to the statute, the court found an ambiguity in order to depart from the statute and ascertain probable Congressional intent.[335] In reviewing the limited legislative history on the issue, the court indicated

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330. *Id.* at 341. "Because application of § 506(a) is entirely removed from the picture, there can be no deficiency balance, either secured or unsecured, and surrender satisfies an allowed claim in full." *Id.* at 342.

331. *Accord In re* Payne, 2006 WL 2289371 (Bankr. S.D. Ohio July 10, 2006) (concluding that the surrender in full satisfaction of claim is supported by plain language of the statute); *In re* Sparks, 2006 WL 2243076 (Bankr. S.D. Ohio July 26, 2006) (providing that Chapter 13 plan may provide for surrender in full satisfaction of claim); *In re* Brown, 2006 WL 2268535 (Bankr. N.D. Fla. July 18, 2006).

332. *See infra* notes 333-39 and accompanying text.

333. 345 B.R. 806 (Bankr. W.D. Ky. 2006).

334. *In re* Duke, 345 B.R. at 807.

335. *Id.* at 808.

that the only clear intent that can be discerned is that Congress intended to discourage abuse and provide greater protection for creditors with purchase-money security interests.[336] An interpretation of the statute that permits the surrender of 910 vehicles in full satisfaction of debt would not further that intention and would have the effect of abrogating deficiency claims and state law remedies.[337] The court concluded that, absent a clear legislative intent on the face of the statute of what would essentially amount to an anti-deficiency provision, the surrender of a 910 vehicle does not abrogate the creditor's unsecured deficiency claim.[338] The conclusions reached by the court in *Duke* are, undoubtedly, consistent with what Congress had in mind (i.e., more, rather than less protection, for holders of purchase-money security interests). However, one could take issue with the ambiguity found by the court in order to permit a departure from strict statutory construction and achieve the result.[339]

J. REAFFIRMATION

Implicated Code Section: 11 U.S.C. §§ 362(h), 521, 524

Summary of Changes to Law: A Chapter 7 consumer debtor generally has three options with respect to tangible personal property secured by a lien. First, the debtor may "surrender" the collateral to the creditor. Second, the debtor may "redeem" the collateral by paying the creditor the full amount of its secured claim.[340] Third, the debtor may "reaffirm" the obligation and retain the collateral. Pre-BAPCPA, a debtor in some jurisdictions had a fourth option known as "ride-through" or "pay and drive."[341] Some courts have permitted a debtor to simply "retain" the property without redemption, surrender or reaffirmation if the debtor was current on his or her payments and remained current. This enabled the debtor to obtain the best of all worlds—personal financial absolution by the bankruptcy discharge and retention of possession of the property, thus relegating the lender to recourse only against the collateral in the event of a default. The BAPCPA has amended the Code in order to eliminate the "ride-through"

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336. *Id.* at 809.

337. *Id.*

338. *Id.*

339. *See* 11 U.S.C. § 1325(a) (2006) ("For purposes of [§ 1325(a)(5)], *section 506 shall not apply* to a claim described in that paragraph . . . .") (emphasis added).

340. *See id.* § 722.

341. *See, e.g.*, *In re* Belanger, 962 F.2d 345 (4th Cir. 1992); Price v. Delaware State Police Fed. Credit Union (*In re* Price), 370 F.3d 362 (3d Cir. 2004); *In re* Parker, 139 F.3d 668 (9th Cir. 1998), *cert. denied sub nom*, McClellan Fed. Credit Union v. Parker, 525 U.S. 1041 (1998); Capital Commc'ns Fed. Union v. Boodrow (*In re* Boodrow), 126 F.3d 43 (2d Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998); Lowry Fed. Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989).

option with respect to "personal property" in possession of the debtor that is secured in whole or in part by a purchase-money security interest.[342] Under the new legislation, the debtor is required to file a statement of intention with the court and indicate whether collateral will be retained or surrendered and is required to perform in accordance with that stated intention.[343] A failure to timely perform in accordance with the requirements imposed by the Code can result in consequences that include the termination of the automatic stay.[344]

The BAPCPA also imposes a host of new (and specific) requirements relating to the debtor's reaffirmation of an obligation. Section 524 of the Code has been amended to, among other things, require additional disclosures of information to the debtor at or before the time the debtor executes a reaffirmation agreement.[345] A "disclosure statement" must be provided to the debtor that "clearly and conspicuously" details material information including the amount of the debt being reaffirmed, rates of interest, when payments begin, the right to rescind, and a certification that the agreement does not impose an undue hardship on the debtor.[346] An agreement that fails to comply with the requirements of Code § 524 is generally unenforceable,[347] although the requirements of the statute relating to disclosure "shall be satisfied" if they are "given in good faith."[348]

1. *"Ride-Through" Option Remains Viable under BAPCPA with Respect to "Real Property"*

Case Name: *In re* Bennet, 2006 WL 1540842 (Bankr. M.D.N.C. May 26, 2006)

Ruling: The BAPCPA does not displace pre-amendment law permitting a debtor to retain *real property* without being required to reaffirm or redeem as long the debtor is current in his or her payments (i.e., the "ride-through" option remains viable with respect to such property).

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342. *See* 11 U.S.C. § 521(a)(6) (2006). *See generally* Jean Braucher, Rash *and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457 (2005).

343. *See supra* notes 146-49 and accompanying text.

344. 11 U.S.C. §§ 521(a)(6), 524 (2006). The introductory comments to the House Report indicates that the secured creditor's protection in the legislation is provided for by the termination of the automatic stay "with respect to personal property if the debtor does not timely reaffirm the underlying obligation or redeem the property." H.R. REP. NO. 109-31, Pt. 1, 109th Cong., 1st Sess. (2005).

345. *See* 11 U.S.C. § 524 (2006).

346. *Id.* § 524(k).

347. *Id.* § 524(c)(2).

348. *Id.* § 524(l)(3).

Facts & Analysis: The Chapter 7 debtors in *In re Bennet*[349] owned real estate subject to a mortgage. The debtors were current on the payments at the time of the bankruptcy filing and remained current during the pendency of the case.[350] The matter came before the court seeking approval of a reaffirmation agreement between the debtor and the mortgage holder.

The court observed that the BAPCPA did not limit the right of a debtor to continue to make payments on a debt that was current and retain the property when the collateral for the obligation is real property.[351] The BAPCPA limited the "ride-through" option and provided remedies only "with respect to personal property" when the debtor does not indicate an intention to reaffirm or redeem or does not perform in accordance with such intention within the period specified by the statute.[352] The court, recognizing that Congress specifically limited the "ride-through" option to "personal property," ruled that debtors continue to have the right to retain real property without being required to reaffirm or redeem if they are current on the obligation.[353] The court, therefore, did not believe that the reaffirmation agreement was in the debtor's best interests and refused to approve it.

2. *BAPCPA Remedies Not Available to Creditor Failing to Comply with Requirements of § 524*

Case Name: *In re* Quintero, 2006 WL 1351623 (Bankr. N.D. Cal. May 17, 2006)

Ruling: A creditor that fails to comply with the disclosure and other requirements of Code § 524 may be precluded from repossessing collateral. A consumer debtor can obtain a "ride-through" where a creditor fails to comply with the requirements necessary for an enforceable reaffirmation agreement.

Facts & Analysis: In *In re Quintero*,[354] the Chapter 7 debtor submitted a reaffirmation agreement to the court for approval under which the debtor sought to retain a motor vehicle and reaffirm the obligation.[355] The reaffirmation agreement was executed by the debtor but failed to comply with the disclosure requirements of Code § 524. It was, therefore, unenforceable

349. 2006 WL 1540842 (Bankr. M.D.N.C. May 26, 2006).
350. *In re* Bennet, 2006 WL 1540842, at *1.
351. *Id.*
352. *See* 11 U.S.C. §§ 362(h)(1), 521(a)(6) (addressing rights and obligations only with respect to "personal property").
353. *In re* Bennet, 2006 WL 1540842, at *1.
354. 2006 WL 1351623 (Bankr. N.D. Cal. May 17, 2006).
355. *In re* Quintero, 2006 WL 1351623, at *1.

and the court refused to approve it. The problem could not be solved by providing a new reaffirmation agreement, and the required disclosures as the deadlines imposed by the Code had passed.

The issue before the court was whether the creditor could exercise its right to repossess the car since the debtor could not, due to no fault of her own, reaffirm the obligation in accordance with the Code's requirements. The court observed that Code § 521(a)(6) only requires the debtor to "enter" into a reaffirmation agreement, which was done. It does not require the court to approve the agreement. The court concluded that "Congress cannot have intended to leave it within a secured creditor's power to thwart a chapter 7 debtor's attempt to retain her car and reaffirm her debt by failing to comply with the requirement that the creditor supply the debtor with the expanded disclosures at the appropriate time."[356] The court indicated that its conclusion was consistent with Code § 362(h)(1)(B), which provides that the automatic stay does not terminate if the debtor has offered to enter into an agreement to reaffirm the debt on the same terms provided in the contract and the creditor refuses to agree to reaffirmation on those terms.[357] The court entered an order prohibiting the creditor from repossessing the collateral based on the court's refusal to approve the deficient agreement.[358] The creditor's failure to timely comply with the Code's requirements for an enforceable reaffirmation agreement in *Quintero* effectively resulted in a permissive ride-through—the debtor received her discharge and was permitted to retain the motor vehicle without reaffirming her personal liability on the debt.

3. *BAPCPA Abrogated "Ride-Through" Option for Debtors (in Most Instances)*

Case Name: *In re* Donald, 343 B.R. 524 (Bankr. E.D.N.C. 2006)

Ruling: The BAPCPA has terminated the "ride-through" or "pay and drive" option for consumer debtors—unless equitable circumstances, not in the debtor's control, intervene that frustrate a debtor's ability to reaffirm the obligation.

356. *Id*. at *3.
357. *Id*.
358. *Id*.

Facts & Analysis: The Chapter 7 debtors in *In re Donald*[359] entered into a reaffirmation agreement with a creditor holding a lien in the debtors' motor vehicle.[360] The debtors were current on their obligations with the lender and indicated on their statement of intention that they intended to retain the collateral and continue to make payments. The statement of intention did not mention reaffirmation. The debtors asserted that they are entitled to retain their vehicle without reaffirming the debt, even under the BAPCPA, but executed the reaffirmation agreement since the law did not appear clear on the point. The issue before the court was whether the "ride-through" method of addressing a secured claim remains viable under the Code as amended by the BAPCPA.

The debtors contended that the issue of whether a reaffirmation agreement is ultimately disapproved or unenforceable is of little consequence as it is the act of entering into the reaffirmation agreement that is dispositive. The debtors argued that a creditor's remedies under the BAPCPA are triggered by virtue of a debtor's failure to enter into the reaffirmation agreement, and whether the court ultimately disapproved that agreement or subsequently determined that the agreement is unenforceable is irrelevant. The court disagreed and ruled that debtors are required under the Code to *actually* reaffirm their obligation or redeem the vehicle under an enforceable arrangement in order to avoid the consequences attendant to termination of the automatic stay.[361] The court concluded that the "ride-through" option has been terminated by the BAPCPA with respect to personal property.[362] However, the court pointed out that debtors may obtain the benefit of the "ride-through" option in circumstances "beyond the debtor's control" that render the agreement unenforceable (i.e., where the creditor fails to comply with the disclosure requirements for reaffirmation agreements under Code § 524).[363]

359. 343 B.R. 524 (Bankr. E.D.N.C. 2006).

360. *In re* Donald, 343 B.R. at 528.

361. *Id*. at 540.

362. *Id*. at 539-40. *Accord In re* Craker, 337 B.R. 549 (Bankr. M.D.N.C. 2006); *In re* Rowe, 342 B.R. 341 (Bankr. D. Kan. 2006).

363. *In re* Donald, 343 B.R. at 540-41 (citing *In re* Quintero, 2006 WL 1351623, at *3 (Bankr. N.D. Cal. 2006)).

K. CHAPTER 13 PLANS AND PAYMENTS

Implicated Code Sections: 11 U.S.C. §§ 1325, 1326

Summary of Changes to Law: The BAPCPA has made a number of changes to Chapter 13. Section 1326 of the Code has been amended to clarify the obligations of the debtor in connection with matters such as the timing of plan payments and requirement to provide adequate protection to purchase-money lien holders. Section 1325 of the Code has also been amended to change some of the requirements for confirmation of a Chapter 13 plan. Indeed, the BAPCPA has added new requirements for confirmation and rendered the Chapter 7 "means test" applicable to the requirement that the debtor devote all "projected disposable income" to the plan during the "applicable commitment period." The changes to Chapter 13, and other provisions impacting consumer bankruptcy under the Code, have increased the costs associated with the administration of these cases.

1. *BAPCPA Does Not Limit Means of Providing Adequate Protection*

Case Name: *In re* Beaver, 337 B.R. 281 (Bankr. E.D.N.C. 2006)

Ruling: Provision in new legislation requiring debtor to provide adequate protection "directly to a creditor" holding a purchase-money security interest in personal property within a specified time frame did not require direct payment to the creditor unless that is the form of adequate protection chosen by the debtor.

Facts & Analysis: A credit union in *In re Beaver*[364] filed a motion for pre-confirmation adequate protection payments under new Code § 1326(a)(1)(C) seeking direct payment from the debtors in the amount of the monthly installments under the contract.[365] The debtors contended that adequate protection may be provided by means other than direct payments. The court agreed and held that adequate protection may be provided, as under former law, by a variety of methods.

2. *Outside the Plan Payments Not Prohibited by BAPCPA*

Case Name: *In re* Clay, 339 B.R. 784 (Bankr. D. Utah 2006)

Ruling: Debtors are entitled to make direct payments to mortgagee outside Chapter 13 plan, while paying only arrearage under the plan, as long as the direct payments were made according to the terms of the

364. 337 B.R. 281 (Bankr. E.D.N.C. 2006).
365. *In re* Beaver, 337 B.R. at 283.

contract and did not attempt to alter contractual rights. The new legislation does not alter pre-BAPCPA law.

Facts & Analysis: The Chapter 13 debtors in *In re Clay*[366] sought to make certain payments outside the plan directly to certain creditors in order to avoid payment of the trustee's percentage fee.[367] The court rejected the trustee's argument that the amendments to Code § 1326, which addressed certain issues with respect to payments, installed a presumption that debtors should normally pay all creditors through the plan.[368] The court did not believe that Congress intended to eliminate a debtor's right to pay secured creditors directly under the terms of the contract.[369] Indeed, the changes to § 1326 might even be read to further place such a right beyond question.

3. *"Applicable Commitment Period" Defines Minimum Plan Length*

Case Name: *In re* Davis, 2006 WL 2391138 (Bankr. E.D. Mich. Aug. 21, 2006)

Ruling: The term "applicable commitment period" in Code § 1325 defines the minimum *length* of a Chapter 13 plan and does not merely create a formula for ascertaining the minimum *amount* that a debtor is generally required to pay to unsecured creditors. The "applicable commitment period" is three years for debtors whose incomes are below the State's median income, and five years if above. A debtor is required to commit all of his or her projected disposable income to a Chapter 13 plan during the "applicable commitment period" unless unsecured creditors will otherwise be satisfied in full in a shorter period.

Facts & Analysis: Prior to the BAPCPA, the duration of a Chapter 13 plan was controlled by two Code sections. Former Code § 1322(d), governing the contents of a plan, provided that a Chapter 13 plan could "not provide for payments over a period that is longer than three years unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years."[370] Section 1325(b)(1)(B), the "best efforts" test, required all of the debtor's projected disposable income to be committed to the plan for a "three-year period" if an unsecured creditor or

366. 339 B.R. 784 (Bankr. D. Utah 2006).

367. *In re* Clay, 339 B.R. at 785.

368. *Id.* at 788.

369. *Id. Accord In re* Vigil, 344 B.R. 624, 630 (Bankr. D.N.M. 2006) (opining that there is no general rule requiring showing of compelling circumstances in order to confirm a direct payment plan).

370. 11 U.S.C. § 1322(d) (1994).

the trustee objected to the plan.[371] The BAPCPA has changed the requirements for Chapter 13 plans and introduced the term "applicable commitment period." Section 1322(d) of the Code deleted the former language and replaced it with an entirely new provision. The statute now provides that if the combined "current monthly income"[372] of the debtor and the debtor's spouse is above the applicable State median income, the debtor's plan may not be longer than five years.[373] If less, then the debtor's Chapter 13 plan may not be longer than three years (unless the court, for cause, approves a longer period that can not exceed five years).[374] Section 1325(b)(4) has been added to the Code to reflect the "applicable commitment period" required for a Chapter 13 plan based upon the debtor's income.[375]

The Chapter 13 debtor in *In re Davis*[376] had annualized income exceeding the State's median income.[377] The parties agreed that the "applicable commitment period" calculation under Code § 1325(b)(4) resulted in a period of five years. The debtor's plan proposed to pay creditors the greater of $2,200 or an amount derived from the payment of bi-weekly payments for a period of three years. The Chapter 13 trustee objected to confirmation, arguing that the debtor was required to commit disposable income to a plan that was not less than five years in duration. The debtor responded by contending § 1325 does not set a temporal requirement that imposes minimum plan length but, rather, only provides an arithmetic formula for determining the minimum amount required to be paid under a plan.[378]

The court rejected the debtor's interpretation of the "applicable commitment period" and argued that the statute imposes merely a monetary, rather than a temporal, obligation. The court found that Congress's use of the term "applicable commitment *period*" has a temporal meaning.[379] The statute's plain language describing and defining the scope of the commitment of disposable income that a debtor is required to devote to a plan indicates that the commitment is temporal in nature. A monetary interpretation of the term "applicable commitment period" renders the § 1325(b)(4)

371. *Id*. § 1325(b)(1)(B).
372. *See* 11 U.S.C. § 101(10A) (2006) (defining the term "current monthly income").
373. *Id*. § 1322(d)(1).
374. *Id*. § 1322(d)(2).
375. *See id*. § 1325(b)(4).
376. 2006 WL 2391138 (Bankr. E.D. Mich. Aug. 21, 2006).
377. *In re* Davis, 2006 WL 2391138, at *1.
378. *Id*.
379. *Id*. at *5.

awkward, if not meaningless.[380] The court also noted that such an interpretation would also represent a gross departure from pre-BAPCPA law that is justified neither by the structure nor the language of the statute.[381] The court concluded that a debtor's applicable commitment period for purposes of Chapter 13 imposes a minimum plan length, and accordingly sustained the trustee's objection to confirmation.[382]

As a practical matter, the court believed that the debtor's position would enable an individual in a Chapter 13 case to have the right to obtain a discharge and "cash out" unsecured creditors at a discount by paying a pre-determined amount any time after confirmation.[383] The legislative history that exists "strongly suggests" that Congress intended the phrase "applicable commitment period" to impose a minimum plan length based upon income and not a mathematical formula for determining the amount of payments.[384]

4. *"Applicable Commitment Period" Defines Monetary Obligation*

Case Name: *In re* Fuger, 2006 WL 2389688 (Bankr. D. Utah June 29, 2006)

Ruling: The term "applicable commitment period" requires a Chapter 13 debtor to only commit to a specific return to general unsecured creditors, not to a specific period of time.

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380. *Id.* at *6. The monetary approach advocated by the debtor requires debtors to multiply their disposable income times thirty-six or sixty unless multiplying by a lesser number results in full payment to unsecured creditors. *Id.*

381. *Id.* at *7.

382. *Id.* at *9. *Accord In re* Crittendon, 2006 WL 2547102 (Bankr. M.D.N.C. Sept. 1, 2006); *In re* Alexander, 344 B.R. 742 (Bankr. E.D.N.C. 2006); *In re* Dew, 344 B.R. 655 (Bankr. N.D. Ala. 2006); *In re* Gress, 344 B.R. 919 (Bankr. W.D. Mo. 2006); *In re* McGuire, 342 B.R. 608 (Bankr. W.D. Mo. 2006); *In re* Schanuth, 342 B.R. 601 (Bankr. W.D. Mo. 2006); Alane A. Becket & Thomas A. Lee, *Applicable Commitment Period: Time or Money?*, 25 AM. BANKR. INST. J. 16 (March, 2006). *But see In re* Fuger, 2006 WL 2389688 (Bankr. D. Utah June 29, 2006); KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY §§ 493.1, 500.1 (3d ed. 2000 & Supp. 2006).

383. *In re* Davis, 2006 WL 2391138, at *8.

384. *Id.*

> Sec. 318. Chapter 13 Plans to Have a Five-Year Duration in Certain Cases. Paragraph (1) of § 318 of the Act amends Bankruptcy Code §§ 1322(d) and 1325(b) to specify that a chapter 13 plan not provide for payments over a period that is not less than five years if the current monthly income of the debtor and the debtor's spouse combined exceeds certain monetary thresholds. If the current monthly income of the debtor and the debtor's spouse fall below these thresholds, then the duration of the plan may not be longer than three years unless the court, for cause, approves a longer commitment period up to five years. The applicable commitment period may be less if the plan provides for payment in full of all allowed unsecured claims over a short period.

H.R. REP. NO. 109-31(I) (April 8, 2005).

Facts & Analysis: The Chapter 13 trustee in *In re Fuger*[385] objected to confirmation of the debtors' plan because it did not commit the debtors to payments lasting five years. The trustee contended that the debtors, whose incomes exceeded the applicable State median income, could obtain a discharge earlier than five years by paying off the total amount due under the plan. The trustee contended that the term "applicable commitment period" in Code § 1325(b) is a durational requirement that requires a debtor to stay in bankruptcy for the entire period. The debtors contended that the term described a monetary amount that must be committed to the plan.

The court opined that Code § 1325(b) is focused on the amount a debtor will be required to return to unsecured creditors, rather than on the amount of time it would take a debtor to perform under the plan.[386] Under the BAPCPA, a debtor is required to compute his or her projected disposable income over a five-year period if their current monthly income exceeds the applicable State median income. The court indicated that term "applicable commitment period" is not purely a temporal requirement—it simultaneously serves both temporal and monetary functions.[387] The new law is "monetary" in the sense that requires debtors to commit to pay unsecured creditors a specified return, and is temporal in the sense that the return is determined by projecting over a specified time period within which the return must be made.[388] The court disagreed with contrary case law on the subject holding that the term "applicable commitment period" is strictly a temporal requirement governing plan length.[389]

5. *Confirmation of Chapter 13 Plan Denied and Case Dismissed Since "Petition" Not "Filed" in Good Faith*

Case Name: *In re* Hall, 2006 WL 2129593 (Bankr. W.D. Ky. July 31, 2006)

Ruling: The court under the BAPCPA has the specific authority to deny confirmation of a Chapter 13 plan if the "petition" is not filed in good faith. The new statute provides an alternative remedy to the dismissal of the bankruptcy case.

Facts & Analysis: The Chapter 13 debtor's bankruptcy filing in *In re Hall*[390] was precipitated by the collection activities of a single creditor that

385. 2006 WL 2389688 (Bankr. D. Utah June 29, 2006).
386. *In re* Fuger, 2006 WL 2389688, at *3.
387. *Id.* at *4.
388. *Id.*
389. *Id.* at *4-5.
390. 2006 WL 2129593 (Bankr. W.D. Ky. July 31, 2006).

included efforts to realize upon a judgment.[391] The debtor's prepetition conduct evidenced a pattern of dealings that appeared calculated to thwart the creditor's legitimate collection efforts. The debtor proposed multiple plans, none of which were feasible. His testimony in the proceedings and postpetition conduct evidenced a lack of candor with the court. The creditor objected to confirmation.

The BAPCPA has amended Code § 1325(a)(7) to now permit the court to deny confirmation of a Chapter 13 plan if it concludes that the "petition" was not "filed" in good faith.[392] This provision is separate from Code § 1325(a)(3)'s preexisting requirement that the "plan" be "proposed" in good faith. The court in *Hall* indicated that the inclusion of the good faith filing standard into the confirmation requirements evidences Congress's intention to provide denial of confirmation as an alternative remedy to the harsh dismissal of a case under § 1307(c).[393] The court analyzed "good faith" in accordance with the "totality of the circumstances test" under developed law and concluded that the petition was not filed in good faith.[394] The court also found that dismissal of the case was appropriate under the circumstances and barred the creditor from refiling under Chapter 13 for a period of one year.[395]

6. *"Projected Disposable Income" Must Be Based upon Debtor's Anticipated Income During Plan's Applicable Commitment Period*

Case Name: *In re* Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006)

Ruling: A Chapter 13 debtor is required to devote his or her "*projected* disposable income" to the plan during the applicable commitment period. This necessarily requires an examination of both future and historical finances for plan confirmation purposes.

Facts & Analysis: The Chapter 13 debtor in *In re Hardacre*[396] had income in excess of the applicable median family income under the "means test" and filed a plan that provided no return to unsecured creditors.[397] The

391. *In re* Hall, 2006 WL 2129593, at*1.

392. 11 U.S.C. § 1325(a)(7) (2006) (the debtor has the burden of proving as part of plan confirmation that "the action of the debtor in filing the petition was in good faith").

393. *In re* Hall, 2006 WL 2129593, at *4. It would, however, seem unlikely for a court to reach a conclusion that the "petition" was not "filed" in good faith—thereby warranting some remedy other than dismissal—and not contemporaneously conclude that the case should, as in *Hall*, be dismissed as well.

394. *Id*. at *5.

395. *Id*. at *8.

396. 338 B.R. 718 (Bankr. N.D. Tex. 2006).

397. *In re* Hardacre, 338 B.R. at 721-23.

trustee objected contending that the debtor failed to commit to the plan all of her projected disposable income as required by Code § 1325(b)(1)(B). In calculating disposable income for plan confirmation purposes, the trustee asserted that the debtor took an impermissible double deduction for mortgage and automobile loan expenses. The undisputed effect of this "double dip" was to reduce the debtor's projected disposable income by approximately $1,000 per month. All creditors would be paid in full if that amount was committed to the Chapter 13 plan.

A Chapter 13 plan cannot be confirmed over the objection of unsecured creditors unless the plan commits all of the debtor's "projected disposable income" to the plan during the applicable term.[398] The issue was whether the calculation for plan purposes should be based upon the debtor's average income as determined under the "means test" for the six months *preceding* the bankruptcy filing, or whether it should be determined in accordance with the debtor's financial circumstances on the effective date of the plan. The court noted that the definition of "disposable income" was defined under Code § 1325(b)(2) as "current monthly income" less enumerated categories of expenses.[399] The Code's definition of "current monthly income" is, however, defined as the debtor's average income for the six-month period "prior to" the bankruptcy filing.[400] In analyzing the confirmation requirements for Chapter 13 plans, the court found the Code's reference to "*projected* disposable income *to be received*" during the term of the plan to be instructive.[401] The phrase used by Congress was forward-looking. The court concluded that although "disposable income" could be calculated under the "means test" solely with reference to historical earnings aimed at determining whether a presumption of abuse has arisen, the term "projected disposable income" for plan confirmation purposes requires an analysis of a debtor's anticipated income during the life of the plan.[402] Not all courts are in agreement with the conclusions reached in *Hardacre*, however.

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398. 11 U.S.C. § 1325(b)(1)(B) (2006).

399. *In re* Hardacre, 338 B.R. at 722.

400. *Id*. at 722 (citing 11 U.S.C. § 101(10A)).

401. *Id*. at 723 (referencing 11 U.S.C. § 1325(b)(1)(B)) (emphasis added). The court indicated that Congress could have simply used "disposable income," rather than "projected disposable income" if a backwards-looking test for Chapter 13 plan confirmation purposes was intended. *See id*.

402. *Id*. at 728. *Accord In re* LaSota, 2006 WL 268748 (Bankr. W.D.N.Y. Sept. 19, 2006); Risher, 2006 WL 1974726 (Bankr. W.D. Ky. July 12, 2006); *In re* Dew, 344 B.R. 655 (Bankr. N.D. Ala. 2006); *In re* Kibbe, 2006 WL 130093 (Bankr. D.N.H. Apr. 14, 2006); *In re* Grady, 2006 WL 1689324 (Bankr. N.D. Ga. June 21, 2006); *In re* Jass, 340 B.R. 411 (Bankr. D. Utah 2006); *In re* Fuller, 2006 WL 2096484 (Bankr. S.D. Ill. June 21, 2006). *But see In re* Alexander, 2006 WL 1876527 (Bankr. E.D.N.C. June 30, 2006) (disagreeing with the interpretation of the phrase

7. *Counsel for Chapter 13 Debtors Should Be Paid More*

Case Name: *In re* Mullings, 2006 WL 2130648 (Bankr. E.D. Okla. July 26, 2006)

Ruling: The new requirements imposed by the BAPCPA justify an increase in the standard compensation awarded to professionals in consumer bankruptcy cases.

Facts & Analysis: Counsel for the Chapter 13 debtors in *In re Mullings*[403] filed an application for the payment of fees that exceeded the presumptive, or "no look," fee for Chapter 13 cases in the district.[404] The Chapter 13 trustee objected.

The court in *Mullings* opined that "[b]ankruptcy attorneys face many more new requirements under BAPCPA that have a significant impact on the time spent on routine bankruptcy cases."[405] The court observed that attorneys are now required to spend additional time on "reviewing the case, preparing additional forms, reviewing bank statements and other financial statements, verifying information provided by debtors, and preparing plans."[406] The new requirements visited upon counsel for consumer debtors under the BAPCPA justified an adjustment upward of the amount of standard compensation awarded to such professionals.

L. REAL ESTATE AND THE AUTOMATIC STAY

Implicated Code Sections: 11 U.S.C. § 362(b)(20)-(22)(d)(4), (l)

Summary of Changes to Law: Congress amended the Code's automatic stay provisions to, among other things, prevent repetitive and abusive filings. The new legislation provides significant new protections for landlords under residential real estate leases and for holders of mortgages secured by real estate. These protections were adopted, in large part, to reduce abusive and serial filings aimed at forestalling a creditor's realization on its interest in real property.

"projected disposable income" accorded by the court in *Hardacre*); *In re* Barr, 341 B.R. 181 (Bankr. M.D.N.C. 2006); *In re* Rotunda, 2006 WL 268749 (Bankr. N.D.N.Y. Sept. 1, 2006) (denying trustee's objection to confirmation even though the debtors were not devoting all of their disposable income as calculated on Schedules I and I to payments under the Chapter 13 plan).

403. 2006 WL 2130648 (Bankr. E.D. Okla. July 26, 2006).

404. *In re* Mullings, 2006 WL 2130648, at *1.

405. *Id. See In re* McNally, 2006 WL 2348687 (Bankr. D. Colo. Aug. 10, 2006) (opining that certain tasks performed pre-BAPCPA that were characterized as "clerical" may now no longer be so).

406. *In re* Mullings, 2006 WL 2130648, at *2.

With respect to residential real estate leases, Code § 362(b)(22) provides that the automatic stay does not apply to the "continuation of any eviction, unlawful detainer action, or similar proceeding" by a landlord who obtained a judgment of possession prior to the commencement of the bankruptcy case.[407] However, an exception is made in Code § 362(l)(1) if the debtor files a certification under penalty of perjury along with the bankruptcy petition that there are circumstances under which the debtor would be permitted to cure the defaults, and the debtor deposits with the clerk any rent that would become due during the 30-day period following the commencement of the case.[408]

New Code § 362(d)(4) permits the bankruptcy court to grant *in rem* relief from the automatic stay in order to address schemes aimed at using bankruptcy to thwart legitimate foreclosure efforts through one or more transfers of an interest in real property.[409] In other words, the court now specifically has the authority to grant relief with respect to *"an act against real property"* securing a creditor's claim that continues prospectively for a period of "2 years."[410] Such relief will be granted as to real property if the court finds that the bankruptcy case was filed as part of a "scheme to delay, hinder, and defraud creditors" (note that the language is "and" rather than "or" as in other sections of the Code) either by transfer of all or part of an interest in real estate without the mortgage holder's consent or by multiple bankruptcy filings that impact the property.[411] An exception to the applicability of the automatic stay has also been made in Code § 362(b)(20) to make it clear that the automatic stay does not apply with respect to real property involved in any bankruptcy case in which the court granted *in rem* relief.[412]

1. *Chapter 7 Debtor Not Entitled to Return of Funds Delivered by Clerk's Office to Landlord in Connection with Unsuccessful Attempt to Resist Eviction*

Case Name: *In re* Silverman, 2006 WL 686854 (Bankr. S.D.N.Y. Mar. 10, 2006)

Ruling: Section 362(l)(5)(D) of the Code requires the clerk of court to arrange for the prompt transmittal of the rent deposited with the court to the lessor upon a proper and successful challenge to the debtor's certification.

407. 11 U.S.C. § 362(b)(22) (2006).
408. *Id.* § 362(l)(1).
409. *Id.* § 362(d)(4).
410. *Id.* (emphasis added).
411. *Id.*
412. *Id.* § 362(b)(20).

Facts & Analysis: The Chapter 7 debtor in *In re Silverman*[413] sought to vacate an order granting the landlord's motion to turnover sums deposited by the debtor with the court.[414] The court overruled the debtor's motion. The result is consistent with the intent of Congress to protect a landlord from, among other things, the postpetition accrual of rent under circumstances in which the landlord is entitled to possession of the property and the debtor has obtained the protection of the automatic stay.[415]

2. In Rem *Relief Not Warranted under Circumstances*

Case Name: *In re* Muhaimin, 343 B.R. 159 (Bankr. D. Md. 2006)

Ruling: A creditor seeking prospective *in rem* relief against real estate under Code § 362(d)(4) must make a *prima facie* showing of all elements required by the statute.

Facts & Analysis: The creditors in the bankruptcy cases of *In re Muhaimin*[416] sought relief from the automatic stay that was accompanied by a request for relief under Code § 362(d)(4) against residential real property owned by the debtors.[417] None of the debtors appeared at the hearing set on the motion and none of the secured creditor's allegations were rebutted in any way. Each case involved multiple bankruptcy filings within relatively short periods of time, implicating residential real property and the frustration of scheduled foreclosure sales.

The court parsed Code § 362(d)(4) and found that three elements must be present in order to obtain *in rem* relief under the statute. First, the debtor's current bankruptcy filing must be part of a plan, in other words a "scheme."[418] Second, the objective of the scheme must be "to hinder, delay *and* defraud."[419] Finally, a party must demonstrate that the scheme "involved either" the transfer of some interest in real property without consent of the secured party or court approval or multiple bankruptcy filings

413. 2006 WL 686854 (Bankr. S.D.N.Y. Mar. 10, 2006).

414. *In re* Silverman, 2006 WL 686845, at *1.

415. *Id.*

416. 343 B.R. 159 (Bankr. D. Md. 2006).

417. *In re* Muhaimin, 343 B.R. at 166.

418. *Id.* at 167.

419. *Id.* (quoting 11 U.S.C § 362(d)(4) (emphasis added)). The court found that Congress's use of the conjunctive "and" rather than the disjunctive "or" in the statute was deliberate. *Id.* As such, the court must find that the filing of the instant bankruptcy case was part of a scheme to delay (i.e., postpone), to hinder (i.e., get in the way) and to defraud (i.e., common law fraud). *Id.* *Accord In re* Gould, 2006 WL 2403562 (Bankr. D. Mass. Aug. 18, 2006) (finding that bankruptcy filings were intended to hinder and delay imminent foreclosure sales, but denying motion for *in rem* relief, without prejudice, since the circumstances constituting "fraud" were not pled with particularity).

affecting the property.[420] In sum, the court concluded that for § 362(d)(4) relief to be granted, it is incumbent on the court to find that the bankruptcy filing "was part of a plan or program of action to postpone and to get in the way of and to defraud creditors, that was connected to or included more than one or numerous bankruptcy filings that affected the subject property."[421]

A movant is not entitled to the relief under the statute simply because it asks for it. The court must affirmatively find that the three elements of the statute are present.[422] The movant bears the initial burden of going forward with evidence to establish a *prima faci*e entitlement to relief. In the instant cases, none of the movants came forward with sufficient evidence. The court, therefore, denied the requested relief.[423]

M. DOMESTIC SUPPORT OBLIGATIONS

Implicated Code Sections: 11 U.S.C. §§ 101(14A), 507(a)(1)

Summary of Changes to Law: The BAPCPA has made a number of amendments to the Code that is designed to improve the treatment of and protection for "domestic support obligations" in the event of bankruptcy.[424]

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420. *In re* Muhaimin, 343 B.R. at 168.

421. *Id.* at 169.

422. *Id.* at 167. The court indicated that

> [b]y seeking relief under BAPCPA § 362(d)(4), the creditor requests specific prospective protection, not only against the debtor but also binding every non-debtor, co-owner and subsequent owner of the property. If granted, Section 362(d)(4) relief would nullify the ability of the Debtor and any other third party with an interest in the property to obtain the benefits provided by the automatic stay in future bankruptcy cases for a period of two years.

Id. at 169.

423. *Id.* at 173.

424. The phrase "domestic support obligation" means any "debt that accrues before, on or after the date of the order for relief" in a case under Title 11 of the United States Code (including interest accruing on such debt under applicable nonbankruptcy law), that is—

> (A) owed to or recoverable by—
>
> > (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> >
> > (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provision of—
>
> > (i) a separation agreement, divorce decree, or property settlement agreement;
> >
> > (ii) an order of a court of record; or
> >
> > (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

The amendments, among other things, now elevate such claims to a first-tier priority claim under Code § 507(a)(1).

1. *"First" Does Not Necessarily Mean "First"*

Case Name: *In re* Reid, 2006 WL 2077572 (Bankr. M.D.N.C. July 19, 2006)

Ruling: A Chapter 13 plan can still provide for the payment of domestic support obligations in deferred cash payments at the same time payments are made to other creditors. The fact that Code § 507(a)(1) now provides first-tier priority status to such claims does not mean that other junior priority claims could not be paid in Chapter 13 before the domestic support obligations are satisfied.

Facts & Analysis: The Chapter 13 debtor in *In re Reid*[425] proposed a Chapter 13 plan that provided for the payment of attorneys' fees owed in connection with the bankruptcy proceeding before or at the time of the payment of domestic support obligations.[426] The debtor owed sums to county child support enforcement agencies for past due child support obligations. The Chapter 13 plan provided for the payment of the domestic support obligations in deferred payments, without interest. The plan contemplated that payments to the child support creditors would be made contemporaneously with the claims of other secured and priority creditors, including the claim for fees owed to the debtor's bankruptcy attorney in connection with the case. The issue before the court was whether the treatment proposed in the Chapter 13 plan for the debtor's domestic support obligations satisfied the requirements of the BAPCPA.

Prior to the adoption of the BAPCPA, a Chapter 13 debtor was allowed to pay domestic support obligations in deferred cash payments over the life of the plan. Did the BAPCPA change this to require the full payment of these obligations prior to the payment of other priority claims? According to the court in *Reid*, the answer is "no." The BAPCPA amended the Code's priority scheme to provide allowed unsecured domestic support obligations with first-tier priority treatment.[427] That priority is, however, subject to displacement by certain administrative expenses incurred by a trustee and

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> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A) (2006).

425. 2006 WL 2077572 (Bankr. M.D.N.C. July 19, 2006).

426. *In re* Reid, 2006 WL 2077572, at *1.

427. 11 U.S.C. § 507(a)(1) (2006).

by provisions specific to Chapter 13.[428] The court in *Reid* indicated that the amendments to Chapter 13 that allow for the payment of second-tier administrative expenses, such as attorneys' fees, to be made "before or at the time of each payment to creditors under the plan" evidenced a Congressional desire to maintain pre-BAPCPA treatment.[429] As such the court indicated that domestic support obligations did not need to be paid in full before payment to other priority creditors.[430] The court did, however, require the plan to provide for the payment of any interest accruing on these claims under nonbankruptcy law.[431]

III. BUSINESS BANKRUPTCY

The BAPCPA creates a number of new rules for businesses seeking to reorganize under Chapter 11 of the Code.[432] Many of the changes are designed to limit judicial discretion, streamline the Chapter 11 process, and expedite the resolution of business bankruptcy cases.

A. CONVERSION OR DISMISSAL

Implicated Code Sections: 11 U.S.C. § 1112(b)

Summary of Changes to Law: Section 1112 of the Code governs the conversion or dismissal of a Chapter 11 bankruptcy case. The pre-amendment version of the statute established a number of benchmarks under which the court "may" convert or dismiss a case.[433] The BAPCPA amends Code § 1112 in a number of material respects. First, the amendments significantly expand the definition of "cause" for dismissal or conversion to include additional enumerated grounds.[434] Second, the revised statute limits

428. *Id.* §§ 507(a)(1)(C), 1322, 1326.

429. *In re* Reid, 2006 WL 2077572, at *2 (quoting 11 U.S.C. § 1326(b)(1)) (noting that the statute was changed by the BAPCPA to replace Code § 507(1) with a reference to § 507(a)(2)).

430. *Id. Accord In re* Sanders, 2006 WL 2382004 (N.D. Ala. July 17, 2006) (affirming bankruptcy court and ruling that provisions in Chapter contemplate concurrent, rather than sequential payments of claims, including those entitled to priority under Code § 507); *In re* Vinnie, 2006 WL 1731150 (Bankr. M.D. Ala. June 23, 2006) (finding that sequential rules of distribution in accordance with the priorities established in Code § 507 and applicable in a priority case to subordinate payments of claims lower in priority are not applicable in Chapter 13 cases).

431. *In re* Reid, 2006 WL 2077572, at *3.

432. *See generally* George H. Singer, *The New Rules of Bankruptcy for Chapter 11 Business Reorganizations Under the B.A.P.C.P.A.*, 28 CALIF. BANKR. L.J. 194 (2006) (providing a section-by-section analysis of the BAPCPA amendments impacting Chapter 11 business reorganization cases).

433. *See* 11 U.S.C. § 1112(b) (2004).

434. *See* 11 U.S.C. § 1112(b) (2006). The definition of "cause" remains, however, a searching inquiry as it was under pre-amendment law. *See In re* 3 Ram, Inc., 343 B.R. 113, 117 (Bankr. E.D. Pa. 2006) (indicating that while the enumerated examples of "cause" have changed under the BAPCPA amendments, "the fact that they are illustrative, not exhaustive has not").

judicial discretion and changes the heightened burden of proof required to dismiss or convert a case that developed under pre-amendment law in many jurisdictions.[435] The statute *directs* the court to convert or dismiss a case upon a showing of "cause" absent a finding that (1) "unusual circumstances specifically identified by the court existed;" (2) the act constituting "cause" will be cured within a "reasonable period of time fixed by the court;" and (3) there is a reasonable likelihood that a plan will be confirmed within the time parameters mandated by the Code or, otherwise, in a reasonable period of time.[436] Third, the BAPCPA imposes time frames within which a motion to dismiss or convert the case must be heard and resolved, which is new.[437]

1. *Dismissal or Conversion of Chapter 11 Case Does Not Require Each and Every Ground to Be Established Despite Statute's Plain Meaning: "And" Means "Or"*

Case Name: *In re* TCR of Denver, L.L.C., 338 B.R. 494 (Bankr. D. Colo. 2006)

Ruling: The amended statutory list of circumstances constituting "cause" for dismissal or conversion of a Chapter 11 bankruptcy case does not require a "perfect storm" of all sixteen circumstances listed in the statute before a case can be converted or dismissed; although Congress replaced the conjunction "or" with the conjunction "and" immediately before the final circumstance in the grounds listed in Code § 1112(b)(4).

Facts & Analysis: The Chapter 11 debtor in *In re TCR of Denver, L.L.C.*[438] moved to voluntarily dismiss its Chapter 11 bankruptcy case and the creditor moved for emergency action on the debtor's motion.[439] The court noted that the BAPCPA amended Code § 1112(b)(4) to purposefully place more stringent requirements on the conversion or dismissal of the case.[440] The statute now contains sixteen separate grounds constituting "cause" for conversion or dismissal, the last circumstance being connected with the conjunction "and" rather than "or" as under prior law.

The court, noting that an application of all sixteen specifically identified factors demonstrating "cause" as directed by the plain meaning of

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435. *See* 11 U.S.C. § 1112(b)(2).

436. *Id.*

437. *Id.* The statute provides that the court "shall commence" a hearing on a motion to dismiss or convert a Chapter 11 case "not later than 30 days" after the motion is filed and "shall decide" the motion within 15 days after the commencement of the hearing unless the movant consents to a continuance for a specified period or "compelling circumstances prevent the court from meeting the time limits established" by the statute. *Id.* § 1112(b)(3).

438. 338 B.R. 494 (Bankr. D. Colo. 2006).

439. *In re* TCR of Denver, L.L.C., 338 B.R. at 494.

440. *Id.* at 499.

the statute would lead to an absurd result. The court doubted that any corporate Chapter 11 case could ever be dismissed if all elements of Code § 1112(b)(4) had to be fulfilled.[441] Since a literal application of the statute as written would render the provision a nullity, the court ruled that a party in interest does need to establish *all* of the items constituting "cause" before a case can be dismissed or converted by the court.[442] The court's ruling is clearly consistent with what the drafters intended and the approach under pre-amendment law. The language chosen to incorporate the desired amendments to the statute is illustrative of drafting imperfections contained in the BAPCPA.[443]

B. AVOIDANCE ACTIONS

Implicated Code Sections: 11 U.S.C. § 547(c)(2), (i)

Summary of Changes to Law: The BAPCPA amended the preferential transfer provisions of the Code in a number of respects. In the aggregate, these changes will enable creditors to retain more payments and other transfers received shortly before a debtor's bankruptcy filing.[444] Among the amendments in this area are changes that provide more clarity and protection for payments made to a lender in connection with debt guaranteed by an insider and changes to the "ordinary course of business" defense under Code § 547(c)(2).

In 1994, Congress amended the Code to, among other things, overrule the line of cases following *Deprizio v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989). In *Deprizio*, the bankruptcy trustee was able to successfully recover from a lender, payments the lender received between 90 days and one year of the debtor's bankruptcy filing (i.e., the extended insider preference period) to the extent that the insider-guarantor's potential liability had been reduced. The BAPCPA amended the Code (again) to make it clear that a transfer made during the extended preference period by the debtor to a creditor that is not an insider is not avoidable with respect to the non-insider creditor, even if the transfer was made for the insider's benefit.[445] Unlike the majority of the BAPCPA's provisions, this amendment became effective immediately on the date of enactment—April 20, 2005.

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441. *Id.*
442. *Id.*
443. *See generally infra* Part IV.
444. *See generally* Singer, *supra* note 432, at 205 (discussing the changes to the preferential transfer provisions of the Code).
445. *See* 11 U.S.C. § 547(i) (2006).

The BAPCPA also amended the "ordinary course of business" defense in Code § 547(c)(2). The amendment to the statute makes it generally easier for a creditor to avail itself of this defense.[446] Previously, a creditor had to show that the subject preference period payment was *both* consistent with the parties' historical relationship (i.e., subjective test) *and* ordinary in the particular industry (i.e., objective test). Expert testimony is typically required to establish the relevant industry standard. The BAPCPA has altered the standard to only require a showing of one "or" the other. In other words, a challenged payment is not avoidable under § 547 if it was made in a manner consistent with the parties' relationship *or* otherwise consistent with relevant industry standards.[447] The law now effectively affords the defendant a preference of two separate and distinct defenses to avoidance under the "ordinary" umbrella.

1. *Deprizio Fix Is Retroactive and Applies to Pre-Enactment Cases*

Case Name: Committee v. Bank of America, N.A. (*In re* ABC-NACO, Inc.), 331 B.R. 773 (Bankr. N.D. Ill. 2005)

Ruling: Retroactive application of amendment to Code § 547(i), the result of which was to render judgment in favor of the non-insider creditor, did not deprive plaintiff of property interest or violate its substantive due process rights.

Facts & Analysis: The unsecured creditors committee in *Committee v. Bank of America, N.A.* (*In re ABC-NACO, Inc.*)[448] commenced a *Deprizio*-type of cause of action against lender to avoid, as preferential, mortgage liens that Chapter 11 debtor granted to lender more than 90 days prior to bankruptcy filing based upon the belief that these mortgages were made specifically to benefit the insider guarantors.[449] The adversary proceeding was commenced and pending *prior* to the enactment of the BAPCPA. Upon the enactment of the new legislation, the lender moved for a judgment

446. The change made by the BAPCPA to § 547(c)(2) "substantially lightens the creditor's burden of proof, by allowing the creditor protection from preference recovery if the transfer meets industry standards, regardless of whether it was in the ordinary course of business of the debtor and the creditor." Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 603, 637 (2005).

447. *See* 11 U.S.C. § 547(c)(2). The BAPCPA amended Code § 547(c)(2) by changing an "and" to an "or." The legislative history reveals that the tests under the BAPCPA are disjunctive defenses, not a single conjunctive test, and a preferential transfer recipient can now establish "*either*" of these grounds to prevail. *See* ALAN N. RESNICK & HENRY J. SOMMER, E-2 COLLIER ON BANKRUPTCY App. Pt. 10(b), at App. Pt. 10-355 (15th ed. rev. 2005).

448. 331 B.R. 773 (Bankr. N.D. Ill. 2005).

449. *In re* ABC-NACO, Inc., 331 B.R. at 781-82.

as a matter of law based upon the retroactive application of the statute. The court, rejecting the committee's constitutional arguments, ruled in favor of the lender and dismissed the suit.[450] The court found that the new legislation applied to pending cases and resulted in a final disposition of *Deprizio* actions.

2. *"Ordinary Course of Business" and "Ordinary Business Terms" Defenses under BAPCPA*

Case Name: *In re* National Gas Distributors, L.L.C., 346 B.R. 394 (Bankr. E.D.N.C. 2006)

Ruling: The "ordinary course of business" and "ordinary business terms" are disjunctive defenses under the BAPCPA, rather than a single, conjunctive test.

Facts & Analysis: The Chapter 11 trustee in *In re National Gas Distributors, L.L.C.*[451] commenced an adversary proceeding seeking the recovery of preferential transfers under Code §§ 547 and 550 from a lender.[452] There was no evidence that the payments were made in accordance with the historical dealings between the parties. As such, the defendant did not pursue a defense based on the "ordinary course of business" defense under § 547(c)(2)(A). Rather, the defendant contended that the payments were not avoidable because they were "made according to ordinary business terms" under § 547(c)(2)(B).

Prior to the enactment of the BAPCPA, the two components of the ordinary course of business test under Code § 547(c)(2)(A) and "ordinary business terms" test under Code § 547(c)(2)(B) were dual components of a single defense. The court recognized that Congress in the BAPCPA has substantially reconfigured the analysis under § 547(c)(2) even though the language of the statute has not changed dramatically.[453] The court correctly pointed out that the revised statute does not capture the framer's objective of limiting the use of a "'hard-to-prove objective test' to those rare cases where 'there was insufficient pre-petition conduct between the parties to establish a course of dealing,'" since the statute does not contain such a limitation.[454] The disjunctive structure of the statute under the BAPCPA

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450. *Id*. at 783.

451. 436 B.R. 394 (Bankr. E.D.N.C. 2006).

452. *In re* Nat'l Gas Distribs., L.L.C., 346 B.R. at 396.

453. *Id*. at 402.

454. *Id*. The amendment emanated in substantial part from the work of the National Bankruptcy Review Commission (the "Commission"). *See* FINAL REPORT OF THE NAT'L BANKRUPTCY REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, ¶ 3.2.3. at 800 (October 20, 1997). The Commission recommended that Code § 547(c)(2) be amended to provide a disjunctive test and adopted a view that the conduct and dealings between the parties should be

provides two separate and distinct defenses. As such, the objective "ordinary business terms" defense can now be used in circumstances where a course of dealing existed and "even where the transfers at issue clearly deviated from that course of conduct."[455]

The court opined that the BAPCPA, which now creates a separate stand alone (and equal) statutory defense for "ordinary business terms" under § 547(c)(2), renders cases decided under the pre-amendment version of the statute less instructive. Many courts prior to the BAPCPA subordinated the significance of "ordinary business terms" test in cases where the parties had an extensive course of dealings.[456] In addition, the courts have not been uniform on whether it is the "debtor's" industry or the "creditor's" industry that is the focus of the "ordinary business terms" analysis.[457] The court in *National Gas* ruled that the analysis under the new law must be examined under the "industry standards of *both* the debtor and its creditors."[458] In addition, the court indicated that "there are general business standards that are common to all business transactions in all industries that must be met."[459] While the *creditor* apparently "did nothing out of the ordinary," the transaction, examined from the *debtor's* perspective and general business standards, was found not to support the defense.[460] As such, the court entered judgment against the creditor.

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determinative provided that there is a sufficient prepetition relationship to establish a course of dealings. *Id.* at 802.

> A disjunctive test telescopes the ordinary course inquiry on the course of conduct between the parties. In the event there is not sufficient prepetition conduct to establish a course of dealing, then industry standards should supply the ordinary course benchmark. Quite often industry standards are extremely difficult to ascertain outside bankruptcy and difficult to prove in the context of preference litigation. Thus, it is more accurate to rely on the relationship between the parties.

Id.

455. *In re* Nat'l Gas Distribs., L.L.C., 346 B.R. at 402.

456. *Id.* at 403. The court opined that:

> The yolk between the "ordinary course of business" . . . and the "ordinary business terms" components of § 547(c)(2) has been removed by BAPCPA, and [the] "ordinary business terms" has been released from the controlling influence of the ordinary course of business subsection. The "ordinary business terms" defense is now the equal of the "ordinary course of business" defense, and that change affects pre-BAPCPA case law construing the meaning of "ordinary business terms."

Id.

457. *Compare In re* Accessair, Inc., 314 B.R. 386, 394 (B.A.P. 8th Cir. 2004) (opining that it is the "debtor's" industry that is determinative), *aff'd*, 163 Fed. Appx. 445 (8th Cir. 2006) *with* Advo-System, Inc. v. Maxway Corp., 37 F.3d 1044, 1048 (4th Cir. 1994) (concluding that courts are required to examine the norm in the "creditor's" industry).

458. *In re* Nat'l Gas Distribs., L.L.C., 346 B.R. at 404 (emphasis added).

459. *Id.*

460. *Id.* at 405.

> It is clear what was going on here: [the debtor] was going out of business and was paying off those debts for which [were guaranteed] and for which [one of the

C. UTILITIES AND "ADEQUATE ASSURANCE OF PAYMENT"

Implicated Code Sections: 11 U.S.C. § 366

Summary of Changes to Law: Section 366 of the Code prevents a utility from altering, refusing, or discontinuing service if the debtor or trustee furnishes "adequate assurance of payment" for postpetition services within the time provided in the statute.[461] The amendments to the Code now define, with specificity, the phrase "assurance of payment." The statute provides that "for purposes of" of subsection (c) of § 366, the phrase "assurance of payment" means: cash deposit, letter of credit, surety bond, certificate of deposit, prepayment of consumption, or another form of security that is acceptable to the utility.[462] In the context of a case filed under Chapter 11, the forms of adequate assurance of payment other than that specified in the statute must be "satisfactory to the utility."[463] The changes in the law strengthen the rights of utility companies in bankruptcy proceedings.

1. *Chapter 12 Debtors Can Provide "Adequate Assurance of Payment" to Electric Utility through Means Other than that Specified in Statute for Chapter 11 Debtors*

Case Name: *In re* Astle, 338 B.R. 855 (Bankr. D. Idaho 2006)

Ruling: Despite the general applicability of Chapter 3 of the Code to all other chapters, the specification of acceptable forms of adequate assurance of payment to a utility under Code § 366(c)(2) is confined in its applicability by its own terms to cases filed under Chapter 11. In determining whether a Chapter 12 debtor has provided adequate assurance of payment, a bankruptcy court is "afforded significant discretion" based upon the facts of each case.

Facts & Analysis: The Chapter 12 debtors in *In re Astle*,[464] who were engaged in dairy operations, moved to provide the electric utility with a first position, secured lien in an amount of $44,162 in the cattle as adequate

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> guarantor's] assets stood as collateral. These payments were not made "according to ordinary business terms" and are not the type of transfers that the "ordinary business terms" defense is designed to protect.

Id.

461. 11 U.S.C. § 366(b) (2006).

462. *Id.* The statute makes clear that the grant of administrative expense priority is not sufficient and overrules pre-amendment case law that found such priority to satisfy the requirement of adequate assurances of payment, at least in the context of a Chapter 11 case. *See* 11 U.S.C. § 366(c)(2).

463. *Id.*

464. 338 B.R. 855 (Bankr. D. Idaho 2006).

assurance under Code § 366 for future electric service.[465] The bankruptcy court rejected the utility's argument that the amendments to the Code setting forth defined and specific forms of assurances that could be provided applied in cases other than Chapter 11.[466] The court found that the proposed lien arrangement satisfied the requirements of § 366 and provided the utility with adequate assurances of payment for postpetition services.[467]

2. *"Adequate Assurance of Payment" under § 366(c) Must Be (Reasonably) Satisfactory to Utility Provider*

Case Name: *In re* Lucre, Inc., 333 B.R. 151 (Bankr. W.D. Mich. 2005)

Ruling: The bankruptcy court has no discretion under Code § 366 to continue for more than 30 days after the commencement of the case for the automatic injunction against a utility provider's termination of service simply because the providers failed to respond to offer of adequate assurance of payment or refused to accept the offer. The adequate assurance required under § 366 to prohibit a utility from discontinuing service must be satisfactory to the utility; however, a good faith requirement "might" exist that may require the utility to bargain in good faith with the trustee or debtor in possession before electing to discontinue utility service.[468]

Facts & Analysis: The Chapter 11 debtor in *In re Lucre, Inc*.[469] was a telecommunications provider that moved for authority to provide adequate assurances of future payment to utilities that, prepetition, notified the debtor that they intended to discontinue service.[470] The debtor offered cash deposits and administrative expense priority as adequate assurance. Only one utility responded to the proposal, rejecting it and demanding additional sums. As part of the relief requested, the debtor sought to have the § 366(c) injunction continued because of the failure of one provider to respond to the proposal and the disagreement with the other provider. The bankruptcy court concluded that it had no discretion to continue the injunction absent satisfactory agreement on the part of the debtor and the utility with respect to the offered assurances.

465. *In re* Astle, 338 B.R. at 856.
466. *Id*. at 859.
467. *Id*. at 861.
468. *In re* Lucre, Inc., 333 B.R. 151 (Bankr. W.D. Mich. 2005).
469. 333 B.R. 151 (Bankr. W.D. Mich. 2005).
470. *In re* Lucre, Inc., 333 B.R. at 151.

D. NEW DUTIES OF COMMITTEES

Implicated Code Sections: 11 U.S.C. §§ 105,1102(b)(3)

Summary of Changes to Law: Under pre-amendment law, neither the Bankruptcy Code nor the Bankruptcy Rules required that any information obtained by a committee in the case be shared with the larger constituency. The Code now affirmatively requires committees to "provide access" to information and "solicit and receive" comments from those constituents who are not committee members.[471] In addition, the statute directs committees to make additional "reports" and "disclosures" required by court order.[472] But key words, "access," "information," "solicit," "reports," and "disclosures" are not defined. The statute's language permits a broad construction. The new provisions could be interpreted to impose obligations that conflict with other applicable laws and a committee's fiduciary duties. The statute's shortcomings have left it to committee counsel and the courts to address issues such as confidentiality, cost, and the burden of developing and managing a system to deal with the information sharing requirements that are now imposed under the new law.

1. *Protective Order Appropriate in Connection with First-Day Motions*

Case Name: *In re* FLYi, Inc., BKY Case No. 05-20011 (Bankr. D. Del. 2005)

Ruling: Comfort order was appropriate in connection with the debtor's first-day motions in order to protect material, nonpublic information, and define the disclosure obligations of the committee of unsecured creditors under new Code § 1102(b)(3).

Facts & Analysis: The Chapter 11 debtor in *In re FLYi, Inc.*[473] was a public company that filed for relief on November 7, 2005, less than a month after the effective date of the BAPCPA.[474] The debtor moved for an order from the court that provided guidelines limiting the dissemination of information from the creditors' committee to its constituencies in connection with its first-day motions.[475] The debtor contended that it operated in a

471. 11 U.S.C. § 1102(b)(3) (2006).

472. *Id.*

473. BKY Case No. 05-20011 (Bankr. D. Del. 2005) (Chief Judge Mary F. Walrath).

474. *In re* FLYi, Inc., BKY Case No. 05-20011.

475. Motions of the Debtors for an Order Providing that Creditors' Committees Are Not Authorized or Required to Provide Access to Confidential Information of the Debtors or Required to Provide Access to Confidential Information of the Debtor or [sic] Privileged Information, *In re* FLYi, Inc., BKY Case No. 05-20011 (Nov. 7, 2005) [docket entry no. 23].

very competitive industry and that the dissemination of confidential information such as compensation levels and business strategies to parties not bound by a confidentiality obligation could be disastrous for the company and its reorganization prospects and would provide competitors with an unfair advantage. In addition, the debtor contended that the risk of disclosure would deter the debtor from sharing any meaningful strategies, planned initiatives, or other material information with the committee. The debtor indicated that, without a comfort order, the committee would face an inherent conflict between the duties now imposed by the BAPCPA under Code § 1102(b) and any confidentiality arrangement it had made with the debtor. Finally, the debtor contended that its obligations as a public company to disclose "material nonpublic information" under the federal securities laws required the company and the committee to be in a position to make confidential and protected disclosures without violating the obligations imposed under nonbankruptcy law. In light of the foregoing, the debtor requested an order from the court that provided protection to the debtor and the committee and defined the obligations relative to confidential information.

The court entered an order defining what information constituted "confidential information" and indicated that the committee would not be "authorized or required pursuant to section 1102(b)(3)(A) of the Bankruptcy Code to provide access to any Privileged Information of any creditor it represents."[476] The order also defined some of the duties of the committee, including a requirement that the committee respond to certain written and telephonic inquires and comments received from its constituents, and encouraged the use of a web site in order to afford creditors with access to public documents and other information that the committee believed "in its reasonable business judgment" would provide information to creditors.[477]

2. *Comfort Order Approving Protocol Warranted Due to Size and Complexity of Chapter 11 Case, Existence of Information Requests Raising Issues Unaddressed by Statute or Existing Case Law*

Case Name: *In re* Refco, Inc., 336 B.R. 187 (Bankr. S.D.N.Y. 2006)

Ruling: The Official Committee of Unsecured Creditors would not be required, without further court order, to disclose confidential, nonpublic,

476. BKY Case No. 05-20011 (Bankr. D. Del. Nov. 17, 2005) (Chief Judge Mary F. Walrath) [docket entry no. 145].

477. *Id.*

proprietary, privileged, and other protected information, but would be required to "proactively" provide other types of information.

Facts & Analysis: The committee in *In re Refco, Inc.*,[478] which was engaged in tasks early in the Chapter 11 cases that required it to exchange confidential information with the debtors and other parties, moved three days after its appointment for approval of a protocol for complying with its statutory requirements under Code § 1102(b)(3).[479] The court indicated that its "first inclination, particularly given the process contemplated by [the statute], the absence from the statute of any adverse consequences for an initial failure to comply, and the qualified immunity accorded to official committees and their professionals, was to deny the motion as not raising a case or controversy."[480] However, the circumstances of the case (which included the size and complexity of the case, the fact that the motion did not arise in a vacuum since unsecured creditors appeared to be pressing for information in ways that raised issues that were neither addressed in the statute or existing case) warranted the relief requested.[481] The court nevertheless cautioned that "the need for comfort orders should end" as the law develops.[482]

Notwithstanding the statute's ambiguity, the court noted that there are sources for construing a committee's information obligations under Code § 1102(b)(3).[483] First, § 704(7), which applies to trustees and debtors in possession, requires a trustee to "furnish such information concerning the estate and the estate's administration as is requested by a party in interest" unless the court orders otherwise.[484] The differences between §§ 704(7) and 1102(b)(3) do not appear to materially differ in practical terms. Second, the right to obtain a protective order with respect to that information, which is confidential, privileged, or protected is available to committees.[485] Finally, the committee's obligation under Code § 1102 should be informed by its fiduciary duties and the functions it is authorized to perform.[486] The court entered an order balancing the committee's need to restrict access to sensitive information, protect the attorney-client privilege, and to comply with securities laws, with the rights of creditors to

478. 336 B.R. 187 (Bankr. S.D.N.Y. 2006).
479. *In re* Refco, Inc., 336 B.R. at 191-92.
480. *Id*. at 190.
481. *Id*. at 199-203.
482. *Id*. at 190.
483. *Id*. at 192.
484. *Id*.
485. *Id*. at 193.
486. *Id*.

be informed of material developments.[487] The order approved a detailed protocol for disclosing information and satisfying the requirements of the new legislation.[488] The court's order in *Refco* provides a useful roadmap for committees and counsel to follow when attempting to comply with the requirements imposed under the BAPCPA by Code § 1102(b)(3).

3. *Order Approving Committee Protocol Appropriate Where Potential for Costs to Get Out of Hand Was Significant and to Deal with Claims Traders*

Case Name: *In re* Airway Indus., Inc., BKY Case No. 06-20224 (Bankr. W.D. Pa. Feb. 10, 2006)

Ruling: The court in *Airway* approved a protocol for dealing with the committee's obligations under Code § 1102(b)(3) in order to avoid the anticipated drain on the committee's time and debtor's estate and concerns with respect to claims trading.

Facts & Analysis: The court's order in *In re Airway Indus., Inc*.[489] allowed the committee to establish a process for managing information requests, which included a registration and e-mail address notification process along with a password protected Internet–accessed website for the benefit of constituent creditors.[490] In addition, the order contained special rules guiding the sharing of information with claims traders: "The Requesting Creditor must file a document with the Court, and serve upon counsel to the Committee, the Debtor and the United States Trustee confirming that the it has established an information screening barrier . . . that will be enforced, that no Confidential Information will be revealed to claims traders, trading desk or any person or entities involved in trading . . . ."[491] The order also set forth special rules for competitors: "If the Requesting Creditor is a competitor of the Debtor (or is a prospective competitor) and the information requested may impair the Debtor, no

487. *See id*. at 199-203.

488. *See id*. *See generally* Howard Seife, *Creditors' Committees Sharing Information: How Much Is Enough?*, 123 BANKING L.J. 354 (2006).

489. *In re* Airway Indus., Inc., BKY Case No. 06-20224 (Bankr. W.D. Pa. Mar. 8, 2006) [docket entry no. 188].

490. *See* Emergency Motion by Official Committee of Unsecured Creditors for Entry of an Order, Nunc Pro Tunc to Date of Appointment of Committee, Pursuant to 11 U.S.C. §§ 105(a), 1102(b)(3)(A), and 1103(c), Clarifying the Requirement to Provide Access to Information and Setting and Fixing Creditor Information Sharing Procedures and Protocols, *In re* Airway Indus., Inc., BKY Case No. 06-20224 (Feb. 10, 2006) [docket entry no. 147].

491. *In re* Airbus Indus., Inc., BKY Case No. 06-20224, at 6 (Bankr. W.D. Pa. Mar. 8, 2006) [docket entry no. 188].

information will be disclosed unless the Court orders such disclosure after notice and hearing."[492]

E. KEY EMPLOYEE RETENTION/INCENTIVE PLANS

Implicated Code Sections: 11 U.S.C. §§ 503(c), 548

Summary of New Law: Prior to the adoption of the BAPCPA, Key Employee Retention Plans ("KERPs") and other retention and incentive programs had been approved in the discretion of the courts as nonordinary course transactions under Code §§ 105 and 363 if the debtor used "proper business judgment" in adopting the plan and the plan was "fair and reasonable."[493] All too often, however, such plans

> have been used to lavishly reward—at the expense of the creditor body—the very executives whose bad decisions or lack of foresight were responsible for the debtor's financial plight. But even where external circumstances rather than the executives are to blame, there is something unseemly in the effort to insulate the executives from the financial risks all other stakeholders face in the bankruptcy process.[494]

Congressional concern over such arrangements has been reflected in the BAPCPA, which now places significant limits on judicial discretion and a Chapter 11 debtor's ability to implement retention, severance, and other similar arrangements.

The new law adds § 503(c) to the Code to address three different situations. First, subsection (c)(1) prohibits the allowance and payment of sums to "insiders" "*for the purpose* of inducing such person to *remain*"

492. *Id.* at 7. *Accord In re* AmCast Automotive of Indiana, Inc., BKY Case No. 05-33322 (Bankr. S.D. Ind. 2005) [docket entry no 358] (approving information-sharing procedures relating to the transmittal of information to creditors and providing that the committee has no obligation to share any confidential, nonpublic, or attorney-client privileged information—giving the committee the discretion to decide whether to share such information).

493. *See In re* U.S. Airways, Inc., 329 B.R. 793, 797 (Bankr. E.D. Va. 2005); *In re* Georgetown Steel Co., 306 B.R. 549 (Bankr. D.S.C. 2004); *In re* Montgomery Ward Holding Corp., 242 B.R. 147 (D. Del. 1999).

494. *In re* U.S. Airways, Inc., 329 B.R. at 797. In a written statement released on March 8, 2005, Sen. Edward Kennedy, who proposed the amendment to Code § 503 as a last-minute addition to the bill, expressed his concern over the "glaring abuses of the bankruptcy system by the executives of giant companies like Enron Corp. and WorldCom Inc. and Polaroid Corp., who lined their own pockets, but left thousands of employees and retirees out in the cold." Other members of Congress were concerned that Sen. Kennedy's amendment would prevent responsible companies that needed to retain key employees from reorganizing successfully and suggested that Code § 503(c) should only prevent payments to insiders in the event of fraud, mismanagement, and conduct contributing to the debtor's insolvency. *See* CONG. REC. S2341 (Mar. 9, 2005) (statement of Sen. Orrin G. Hatch); CONG. REC. H2050-51 (Apr. 14, 2005) (statement of Rep. Chris Cannon).

with the business "absent a finding by the court based on the evidence in the record" that (1) the payment is "essential" to the retention of the individual "because the individual has a bona fide job offer from another business at the same or greater rate of compensation;" and (2) the services of that individual are "*essential* to the *survival* of the debtor's business."[495] The statute also fixes the measure of acceptable retention bonuses for insiders by linking them to a multiple of bonuses available to nonmanagement employees.[496] Second, subsection (c)(2) places similar restrictions on "severance" arrangements.[497] Finally, subsection (c)(3) of the statute prohibits the allowance and payment of sums on account of "other transfers or obligations" (i.e., not retention bonuses or severance payments) "that are outside the ordinary course of business and not justified by the circumstances of the case," including those made for the benefit of "officers," "managers," or "consultants hired after the date of the filing of the petition."[498]

The stringent requirements now imposed by the BAPCPA on KERPs have led professionals to develop "work arounds" in order to compensate executives and others whose services are deemed necessary to the Chapter 11 case. New incentive and performance-based programs have been structured and implemented since the effective date of the legislation in order to accomplish this objective. The programs that have emerged to date are based on the idea that Code § 503(c)(1) and (c)(2) restrictions can be avoided if the compensation plan is based upon reaching specific performance-based goals that are not tied to retention. The United States Trustee has objected to a number of these programs as "disguised KERPs" that amount to "pay-to-stay" programs designed to circumvent the letter and spirit of the new law.

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495. 11 U.S.C. § 503(c)(1) (2006) (emphasis added).

496. *See id.*

497. 11 U.S.C. § 503(c)(2). A postpetition severance payment to an "insider" is now expressly prohibited unless: (1) the payment is part of a program generally applicable to all full-time employees; and (2) the amount of the payment is no greater than 10 times the amount of the mean pay provided to non-management employees. *Id.*

498. 11 U.S.C. § 503(c)(3). The fraudulent transfer provisions of the Code have also been amended to expressly allow the avoidance of prepetition transfers to insiders under an employment contract, even if the company was not insolvent at the time of the arrangement, provided that the contractual arrangement was not made in the ordinary course of business. *See id.* § 548.

1. *Compensation Plan Fails to Pass Muster under § 503(c)*

Case Name: *In re* Dana Corp., 2006 WL 2563458 (Bankr. S.D.N.Y. Sept. 5, 2006) (Judge Burton R. Lifland)

Ruling: Section 503(c)(3) is not limited to executives and other insiders hired by the debtor *post*position. An incentivizing compensation plan may be structured to pass muster under Code § 503(c) despite the fact that it has a retentive effect. However, the business judgment rule and standards for approving non-ordinary course transactions under Code § 363 are not applicable to compensation arrangements that are in reality more akin to retention and severance arrangements.

Facts & Analysis: The Chapter 11 debtors in *In re Dana Corp.*[499] sought authority to enter into employment agreements with the company's Chief Executive Officer and five other senior executives pursuant to Code §§ 363, 365, and 105.[500] The United States Trustee, committees representing creditor and equity interests, and unions all lodged objections to the compensation arrangements.[501] The debtors contended that the Chapter 11 proceedings served to "disenfranchise" the debtors' senior management team by impairing their employment arrangements, many of which were only recently negotiated.[502] The compensation motion indicated that the debtors needed assurance that their executive management team would remain in place to work, independently, through a "difficult and demanding restructuring effort and that [the] management team will be sufficiently protected so that members can dedicate themselves to the objectives of maximizing values for all of the Debtor's competing constituents without

499. 2006 WL 2563458 (Bankr. S.D.N.Y. Sept. 5, 2006) (Judge Burton R. Lifland).

500. *In re* Dana Corp., 2006 WL 2563458 at *1. The debtor's pleadings did not address how the proposed payments satisfy the new BAPCPA restrictions on KERPs. Rather, the debtors relied on the bankruptcy court's broad powers to authorize non-ordinary course transactions under the business judgment rule.

501. Objection of the United States Trustee to Motion of Dana Corporation to: (A) Enter into Employment Agreements with Michael Burns, President and Chief Executive Officer, and Five Executives of His Core Management Team, (B) Assume Certain Changes in Control Agreements, As Amended, *In re* Dana Corp., BKY Case No. 06-10354, ¶ 1 at 1 (Aug. 29, 2006) [docket entry no. 3245]. The United States Trustee framed the issue as follows: "Can debtors circumvent the restrictions and evidentiary burdens enacted by Congress in sections 503(c)(1) and 503(c)(2)—provisions designed specifically to limit and restrict lavish insider retention and severance burdens—by avoiding the mere mention of the statute and transparency recharacterizing these payments as 'incentive' payments?" *Id.*

502. Motion of the Debtor Dana Corp, Pursuant to Sections 363, 365, and 105 of the Bankruptcy Code for An Order Authorizing Dana Corp to (A) Enter into Employment Agreements with Michael J. Burns, Its President and Chief Executive Office, an Key Executives of His Core Management Team, and (B) Assume Certain Change of Control Agreements, As Amended, ¶ 17 at 9, *In re* Dana Corp., BKY Case No. 06-10354 (June 29, 2006) [docket entry no. 1601].

distraction from the imminent risk to their futures."[503] The proposed arrangements were developed with the assistance of an outside human resources consulting firm and based upon components that included base salaries, annual incentive plan bonuses, completion bonuses, and non-competition arrangements.

The court framed the issue as follows: "is this a 'Pay to Stay' compensation plan (also known as Key Employee Retention Plan or 'KERP') subject to the limitations of section 503(c) of the Bankruptcy Code or can it be construed to be an *incentivizing* 'Produce Value for Pay' plan to be scrutinized though the business judgment lens of section 363?"[504] The court found that elements of both were present in the proposed compensation arrangements but refused to approve the requested relief.

Under the Annual Incentive Plan, the executives' right to receive annual bonuses was conditioned upon the debtors' short-term financial performance and based upon whether threshold, target, or superior performance goals established by the compensation committee were achieved. The debtors' Completion Bonus Plan was designed to *replace* incentive compensation that the executive officers were eligible to receive under prepetition contracts and lost as a result of bankruptcy.[505] The completion bonus consisted of two components, fixed and variable. Under the fixed component, the executives were eligible to receive an amount that was payable upon the effective date of a plan of reorganization without regard to company performance or creditor recovery. The executives were only eligible to receive the fixed component if still employed by the debtors on the effective date. Under the variable component, the executives were entitled to receive compensation based upon the total enterprise value of the reorganized debtors six months after the effective date of the plan. The executives were also entitled to receive severance payments in the event of an involuntary termination and in other events under the debtors' compensation plan in exchange for entering into a noncompete agreement.

The court found that to the extent that a compensation arrangement falls within subsection (c)(1) or (c)(2) of Code § 503, the business judgment rule attending to non-ordinary course transactions under § 363 simply does not apply "irrespective of whether a sound business purpose may actually exist."[506] The Code does not, however, prevent the application of the

503. *In re* Dana Corp., 2006 WL 2563458, at *1 (quoting Motion, at 13).

504. *Id*. at *2 (emphasis in original).

505. Under the prepetition arrangement, the debtors' Chief Executive Officer was eligible for long-term incentive in the form of equity-based awards targeted at providing approximately $4 million per year. *Id*.

506. *Id*. at *3.

business judgment rule to transactions structured under subsection (c)(3) of the statute.[507] The court rejected the United States Trustee's argument that the debtors could rely only on subsection (c)(1) and (c)(2) in this case since the participation executives were all hired prepetition and subsection (c)(3) of the § 503 references transfers to postpetition hires as an example of possible allowed beneficiaries.[508] The court concluded that, while it was possible to structure an incentivizing compensation arrangement that passes muster under the business judgment rule of Code § 363 and the limitations of § 503(c), the proposed compensation plans did neither.[509]

The court noted that "incentivizing plans which may have *some* components that arguably have a retentive effective" do not necessarily violate Code § 503(c)'s requirements.[510] However, the Completion Bonus Plan's inclusion of amounts payable to executives based upon the debtor's emergence from Chapter 11, without regard to the outcome of the cases, is nothing more than a pure § 503(c)(1) retention plan.[511] Similarly, the amounts payable to the executives characterized as "payments in exchange for non-compete agreements" are nothing more than severance payments subject to § 503(c)(2). The court found that the debtors failed to meet their burden of demonstrating that the payments did not constitute *retention* and *severance* payments for purposes of § 503(c) or that the evidentiary requirements for those sections were satisfied with respect to the plan and, accordingly, denied the relief requested in debtor's motion.[512]

2. *Judicial Discretion and Flexibility Permitted in Connection with Compensation Arrangement under § 503(c)(3) (Nonretention and Nonseverance Compensation)*

Case Name: *In re* Nobex Corp., BKY Case No 05-20050 (Bankr. D. Del. Jan. 20, 2006) (Chief Judge Mary F. Walrath)

Ruling: Section 503(c)(3) of the Code is a "catch-all" provision that applies to insiders hired prepetition and postpetition. The standard under subsection (c)(3) is "nothing more than a reiteration of the standard under 363," namely whether the particular compensation plan reflected the debtor's sound business judgment based upon the circumstances of the case.

507. *Id*. at *5.
508. *Id*. at *4.
509. *Id*. at *5.
510. *Id*.
511. *Id*. at *5. "If it walks like a duck (KERP) and quacks like a duck (KERP), it's a duck (KERP)." *Id*. at *5 n.3.
512. *Id*. at *5.

Facts & Analysis: The debtor in *In re Nobex Corp.*[513] entered into bankruptcy to pursue a sale of substantially all of its assets and sought the approval of an incentive plan over the objection of the United States Trustee.[514] The compensation under the incentive plan was based upon a percentage of sale proceeds over certain defined benchmarks and provided that the final offer was greater than the stalking horse bid. The debtor sought authority to pay executives hired prepetition up to a maximum amount subject to the "board's ultimate conclusions about the post-petition contributions of each to successful implementation of the sale procedure, including obtaining approval of and closing [of] a Sale."[515] The debtor took the position that the incentive pay plan was neither intended nor structured as a "retention" plan or "severance" arrangement, but rather was "designed and intended to ensure complete implementation of the sale procedure."[516]

The United States Trustee argued, among other things, that the plan, despite the artful drafting of counsel, was nothing more than a disguised retention program in that it served as an inducement to retain management.[517] The fact that the debtor had filed a motion to shorten the notice of the incentive plan motion supported his view that the plan was designed to assure the participating members of senior management as soon as possible that they would receive compensation for staying on board.[518] The Trustee further argued that Code § 503(c)(3), the provision upon which the debtor was relying, was inapplicable to insiders because the language only mentions "officers, managers, or consultants hired after the date of the filing of the petition" and the management participants had been hired prepetition.[519] The Trustee contended that the specified list of individuals was exclusive and that § 503(c)(3) should be narrowly construed in order to facilitate the intent of Congress and ensure that the subsection does not become the means by which the prohibitions set forth in other parts of the statute are circumscribed.[520]

The court overruled the objection and approved the plan. The court held that the plan did not provide payment to senior management "for the

513. BKY Case No. 05-20050 (Bankr. D. Del. Jan. 20, 2006) (Chief Judge Mary F. Walrath).

514. *In re* Nobex Corp., BKY Case No. 05-20050.

515. *Id.* at 5. Motion for Order Authorizing Payment of Sale-Related Incentive Pay to Senior Management Pursuant to 11 U.S.C. Sections 105, 363(b) and 503(c)(3), *In re* Nobex Corp., BKY No. 05-20050 (Bankr. D. Del. Dec. 9, 2005) [docket entry no. 51].

516. *Id.* at 8.

517. Transcript of Hearing, at 65-67, *In re* Nobex Corp., BKY Case No. 05-20050 (Bankr. D. Del. Jan. 30, 2006) [docket entry no. 194].

518. *Id.*

519. *Id.* at 64, 69-71.

520. *Id.* at 64.

purpose" of inducing executives to remain, but rather provided incentives to improve upon the stalking horse bid and maximize recoveries to creditors.[521] Similarly, the court did not view the plan as a disguised severance arrangement since the employees could leave the day after the sale and still receive the incentive payment.[522] In addition, the court did not agree that the language of § 503(c)(3) was intended to limit its applicability to officers, managers, or consultants hired postpetition.[523] Rather, the court construed Code § 503(c)(3) as a catch-all provision for all transfers or obligations not covered by subsections (c)(1) or (c)(2).[524] Since the statute provided no additional guidance, the court concluded that Code § 503(c)(3) was "nothing more than a reiteration of the standard under 363 . . . under which courts had previously authorized transfers outside the ordinary course of business . . . based on the business judgment of the debtor."[525]

The court, noting that the incentive plan had been negotiated with and approved by the creditor's committee, approved the plan.[526] The court found that the plan was designed to incentivize senior management to go beyond what was required to maximize recovery since no additional compensation would be made to insiders unless the final sale price exceeded the stalking horse bid.[527] The court, therefore, found the incentive plan to be justified under the particular circumstances.

3. *KECP Plan Approved in Liquidating Chapter 11, Arguably Easier Burden*

Case Name: *In re* Refco, Inc., BKY Case No. 05-60006 (Bankr. S.D.N.Y. Jan. 10, 2006) (Judge Robert D. Drain)

Ruling: The court, in a liquidating Chapter 11 case, approved a Key Employee Compensation Plan ("KECP") and found that Code § 503(c)(1) was inapplicable because none of the employee participants under the plan were "insiders" at the time. The court also concluded that the employees were not being paid "for the purpose of being induced to remain" with an ongoing "business," as no business will exist after the cessation of operations.

521. *Id.* at 87.
522. *Id.*
523. *Id.* at 86-87.
524. *Id.*
525. *Id.*
526. *Id.* at 88.
527. *Id.*

Facts & Analysis: The debtor adopted a KECP in which some of the employees in the liquidating Chapter 11 case of *In re Refco, Inc*.[528] that may have had decision-making prepetition were participants. The debtor sought approval of the KECP under Code §§ 105 and 363. The KECP was "designed [to] retain certain employees key to the successful wind-down of the Debtor's business operations by providing a financial incentive for certain employees . . . to remain employees . . . and to provide security against unanticipated termination of employment."[529] An ad hoc committee of major customers objected to the implementation of the plan, contending that the payments were governed by the standards set forth in Code § 503(c) and the debtors failed to make an appropriate evidentiary record supporting the requested relief.[530] The creditors' committee and others supported the KECP.

The court posited that the employees identified by the customer group as insiders due to the prepetition decision-making authority no longer had that authority and, therefore, were no longer insiders.[531] Moreover, the court found significant the fundamental difference between being paid to continue to work as part of a team in a growing business, and being rewarded for performing tasks designed to liquidate that business.[532] Section 503(c)(1) of the Code does not prohibit an arrangement that compensates employees who were working themselves out of a job through the facilitation of an orderly liquidation.[533]

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528. BKY Case No. 05-60006 (Bankr. S.D.N.Y. Jan. 10, 2006) (Judge Robert D. Drain).

529. *Id*. at 3.

530. *See* Moving Customer Group's Objection to Debtor's Motion for Order under 11 U.S.C. §§ 105 and 363 Authorizing Implementation of Key Employee Compensation Program, *In re* Refco, Inc., BKY Case No. 05-60006 (Jan. 9, 2006) [docket entry no. 957].

531. Transcript of Hearing Before Hon. Robert D. Drain, United States Bankruptcy Court, *In re* Refco, Inc., BKY Case No. 05-60006, at 29-30 (Bankr. S.D.N.Y. Jan. 10, 2006) [docket entry no. 1065]. The court found significant the fact that the plan participants *no longer* had the decision-making authority contemplated by § 503(c): The fact that such employees "may or may not have had certain decision-making authority pre-petition [is not the point], if they had such authority they don't have it now." *Id*. at 30.

532. *Id*.

533. *Id*. at 30. *See* Order under 11 U.S.C. §§ 105 and 363 Approving Implementation of Key Employee Compensation Program, *In re* Refco, Inc., BKY Case No. 05-60006 (Bankr. S.D.N.Y. Jan. 17, 2006) [docket entry no. 1011].

4. *Prepetition Incentive Plan (Partially) Approved in Chapter 11 Reorganization*

Case Name: *In re* Werner Holding Co. (DE), Inc., BKY Case No. 06-10578 (Bankr. D. Del. Aug. 22, 2006) (Judge Kevin J. Carey)

Ruling: Prepetition incentive plan was partially approved by the court in Chapter 11 reorganization cases in which the debtors continued to operate and liquidation was not contemplated. The court approved the process under which final approval of payments made to insiders under the incentive plan could be obtained.

Facts & Analysis: The Chapter 11 debtors in *In re Werner Holding Co. (DE), Inc.*[534] sought bankruptcy court approval of incentive-based bonus plans adopted *prior* to the commencement of the bankruptcy cases.[535] Under the debtors' Business Optimization Bonus Plan, 116 participants were eligible to receive bonuses ranging between 10% to 75% of their annual base salaries at an estimated cost of $4 million. The Business Optimization Bonus Plan required both eligible employees to meet individual performance goals and the company to achieve specified performance objectives.[536] Under the debtors' Plant Transition Bonus Plan, 81 participants were eligible to receive bonuses ranging between 8% to 100% of their annual base salaries at an estimated cost of $2.6 million.[537] The debtors, acknowledging that the bonus plans "properly incentivize the employees to remain with the [d]ebtors" and were necessary to "retain employees,"[538] sought approval of the plans pursuant to Code § 363(b) and

534. BKY Case No. 06-10578 (Bankr. D. Del. Aug. 22, 2006) (Judge Kevin J. Carey).

535. *In re* Werner Holding Co. (DE), Inc., BKY Case No. 06-10578. The debtors' motion was filed approximately two weeks after the commencement of the bankruptcy cases.

536. Debtors' Motion for Entry of Order Authorizing Debtors to Honor Prepetition Incentive-Based Bonus Plans Pursuant to Code Sections 363 and 105 of the Bankruptcy Code, *In re* Werner Holding Co. (DE), Inc., BKY Case No. 06-10578, at 5 (June 30, 2006) [docket entry no. 138].

537. *Id.* at 6.

538. *Id.* at 9, 10.

> The Debtors' employees are critical to their business operation and their ability to restructure successfully. Concerns over a sudden loss of income might prompt employees to look elsewhere for employment. Replacing employees would be extremely difficult for the Debtors and would place enormous burdens on the remaining employees. Indeed, certain employees have unique experiences and historical Company knowledge that are irreplaceable. In addition, the filing of a chapter 11 petition is a stressful and uncertain time for a debtor's employees. Such stress and uncertainty often dampens employee morale just at a critical time when a debtor most needs its employees' loyalty. Accordingly, the Debtors believe that it is imperative to continue the Bonus Plans to bolster employee morale, encourage high caliber performance and retain employees during this period of uncertainty.

Id. at 9.

§ 105.[539] The debtors made no reference to Code § 503(c) in their original pleadings, contending that the plans should be approved since the plans were "supported by the sound business judgment of management" and the circumstances. The United States Trustee and the Official Committee of Unsecured Creditors objected to the approval of the plans.

The United States Trustee contended that the bonus plans were "nothing more than key employee retention plans in disguise" and should not be approved under the standards set by Congress in the BAPCPA.[540] The Trustee argued that notwithstanding the debtors' "attempts to characterize their bonus plans as being performance-based, such a characterization is but window dressing for a key employee retention program."[541] The Trustee also objected to the debtors' motion since the moving papers failed to disclose adequate information so that parties in interest could evaluate the plans.[542]

The creditors' committee was "unanimously supportive of providing incentive compensation to key employees" but had a number of objections to the bonus plans as proposed.[543] The committee argued that the Business Optimization Bonus Plan provided "substantial bonuses to insiders for merely continuing to work for the Debtors doing their current jobs" and that one-half of the Business Optimization Bonus Plan benefited only the top 12 executives, while over 100 employees were eligible to share in the remaining half.[544] Such a "top-heavy" plan with large insider payments

539. *See id.* at 10. The debtors contended that the bonus plans under consideration were necessary to preserve the value of the estates and pointed to similar plans that were adopted in Delaware post-BAPCPA. *Id.* (citing *In re* Premium Papers Holdco, L.L.C., BKY Case No. 06-10269 (Bankr. D. Del. 2006) (approving the adoption of a retention and incentive plan) and *In re* Pliant Corp., BKY Case No. 06-10001 (Bankr. D. Del. 2006) (approving payment of incentive compensation to eligible employees)).

540. United State's Trustee's Objection to Debtor's Motion for Entry of Order Authorizing Debtors to Honor Prepetition Incentive-Based Bonus Plans Pursuant to Sections 363 and 105 of the Bankruptcy Code, *In re* Warner Holding Co. (DE), Inc., BKY Case No. 06-10578, at 2 (July 18, 2006) [docket entry no. 207].

541. *Id.* at 6. The United States Trustee contended that the debtors "could not have made clearer the real purpose of the bonus plans: they need authority to make the bonus payments in order to induce participating employees to remain in the [d]ebtor's employ." *Id.*

542. *Id.* at 2-3. The United States Trustee contended that the moving papers did not, among other things: (a) attach copies of the plans; (b) identify eligible employees and corresponding eligible amounts; (c) disclose performance objectives; (d) indicate whether employees were required to perform at an objectively higher level than in the past in order to receive bonus compensation; (e) disclose pre- and postpetition compensation levels; or (f) disclose whether eligible recipients were insiders. *Id.*

543. Objection of the Official Committee of Unsecured Creditors to Debtors' Motion for Authorization to Honor Prepetition Incentive Based Bonus Plans and Request for Continuance, at 2, *In re* Werner Holding Co. (DE), Inc., BKY Case No. 06-10578 (Bankr. D. Del. July 24, 2006) [docket entry no. 236].

544. *Id.* at 2-3.

should, according to the committee, be closely scrutinized.[545] The committee, which believed that further negotiations, greater clarity, and more specificity relative to performance goals were necessary, also contended that the plans violate the BAPCPA: "Absent agreement among the creditor constituencies as to actual objective performance targets, the Plans are just thinly disguised KERP bonuses masquerading as 'performance incentives' and 'transition incentives' that violate . . . [newly enacted Code § 503(c)]."[546]

The debtors disputed the contentions of the United States Trustee and the creditors' committee that the plans were disguised KERPs governed by Code § 503(c)(1). The debtors asserted that the fact that its bonus plans would have the "indirect effect" of reducing attrition of covered employees does not convert the plans to KERPs. "Every incentive-based plan—if crafted correctly—will incentivize eligible employees to remain with a debtor because the performance objectives set in such plans are reasonable."[547] The debtors also contended that, to the extent new Code § 503(c)(3) governed the approval of the bonus plans, the standard for approving plans under that section is essentially the same as the standard that has developed under existing case law for the approval of similar non-ordinary course transactions under Code § 363(b).[548]

The court held a hearing on the debtors' motion and approved the Transition Plan.[549] The court also authorized the debtors to make the payments due under the Business Optimization Plan as of July 31, 2006, to

545. *Id.* at 3.

546. *Id.* at 4.

547. Debtors' Reply to United States Trustee's Objection to Debtors' Motion for Entry of Order Authorizing Debtors to Honor Prepetition Incentive-Based Bonus Plans Pursuant to Sections 363 and 105 of the Bankruptcy Code, at 3, *In re* Werner Holding Co. (DE), Inc., BKY Case No. 06-10578 (Bankr. D. Del. July 21, 2006) [docket entry no. 238].

548. *Id. See, e.g.*, *In re* Phoenix Steel Corp., 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (opining that transactions under Code § 363(b) should be approved when supported by the sound business judgment of management). *See also supra* note 493 and accompanying text.

549. The debtors moved the court to seal the record at the hearing with respect to matters concerning its incentive-based bonus plans, contending that matters relating to performance objectives, employee compensations, plan participants, and other matters were highly sensitive and would, if disclosed, put the debtors in a competitive disadvantage since they related to the debtors' overall business strategies. *See* Debtors' Motion, Pursuant to Bankruptcy Code Section 107(b) and Fed. R. Bankr. P. 9018, to Seal Record of Proceedings Relating to the Debtors' Motion for Entry of Order Authorizing Debtors to Honor Prepetition Incentive-Based Bonus Plan Pursuant to Sections 363 and 105 of the Bankruptcy Code, at 5-6, *In re* Werner Holding Co. (DE), Inc., BKY Case No. 06-10578 (Bankr. D. Del. Aug. 2, 2006) [docket entry no. 265]. The court ordered the record sealed and authorized the debtors to exclude third parties other than lenders and objecting parties from the courtroom and directed all non-debtor parties attending the hearing to keep any information relating to the incentive plans confidential.

all plan participants, but made special provisions for insiders.[550] The court approved a process under which the 10 participants in the Business Optimization Bonus Plan that were members of the debtors' executive leadership team and/or insiders could receive payments.[551] The debtors were required to complete written evaluations for each insider beneficiary under the Business Optimization Bonus Plan, with such evaluations to provide a detailed justification for the July payments, and provide copies to the creditors' committee.[552] The insider payments were authorized under the court order unless the committee objected, in which event the court would resolve the objection.[553] The court, however, deferred making a decision on any future payments under the Business Optimization Bonus Plan pending future hearings. Prior to the approval of any future payments under the Business Optimization Bonus Plan, to insiders or other participants, the debtors were required to retain an employee benefits consultant to evaluate and advise the debtors on the incentive program and market standards and to "propose and negotiate" a compensation program for insiders which could, but was not required to, include provisions currently incorporated into the current Business Optimization Bonus Plan.[554]

F. UNEXPIRED LEASES

Implicated Code Sections: 11 U.S.C. § 365(d)(4)

Summary of Changes to Law: Prior to the BAPCPA, a business debtor had sixty days from the commencement of the bankruptcy case to decide whether to assume or reject commercial real estate leases. The courts routinely extended this time frame in Chapter 11 cases under the "for cause" discretionary standard (i.e., a legitimate reason). Under pre-amendment law, it was not uncommon for debtors to seek multiple extensions and defer decisions with respect to assumption or rejection of real estate leases for as long as possible. The BAPCPA has made a number of changes to the Code in order to strengthen the protections afforded landlords in Chapter 11 cases. The law now provides that the initial period

550. *In re* Werner Holding Co. (DE), Inc., BKY Case No. 06-10578 (Bankr. D. Del. July 28, 2006) [docket entry no. 259] (approving debtors' Transition Plan on an interim basis and Business Optimization Bonus Plan for all participants other than nine participants that were members of the debtors' executive leadership team/insiders).

551. *In re* Werner Holding Co. (DE), Inc., BKY Case No. 06-10578 (Bankr. D. Del. Aug. 22, 2006) [docket entry no. 357].

552. *Id.* at 2-3.

553. *Id.* at 3.

554. *Id.* at 3-4.

of time to assume or reject a commercial real estate lease is extended to 120 days after the order of relief or the order confirming a plan, whichever is earlier.[555] A debtor, under the BAPCPA, may only receive one additional 90-day extension, with any additional extensions to be granted only if the landlord in each instance consents to the extension in advance and in writing.[556] "In other words, the new law places an absolute cap of 210 days on a debtor's decision to assume or reject—absent the consent of the landlord."[557] The BAPCPA has eliminated the court's discretion to enlarge the absolute time period now mandated by the statute. "The purposes of the change is 'to establish a firm, bright line deadline' by which a lease must be assumed or rejected."[558]

1. *Order Extending the Time to Assume or Reject under § 365(d)(4) Must Be Entered Prior to the Expiration of the Statutory Period*

Case Name: *In re Tubular Technologies, L.L.C.*, 2006 WL 2405711 (Bankr. D.S.C. June 21, 2006)

Ruling: A debtor must affirmatively and definitively act within the time specified by the statute in order to preserve the right to assume or reject a commercial real estate lease after 120 days of the commencement of the case. A motion to extend the 120-day time period specified in Code § 365(d)(4) must be ruled upon prior to the expiration of that period as the statute is self-executing and the lease is deemed rejected as a matter of law upon the lapse thereof.

Facts & Analysis: The Chapter 11 debtor in *In re Tubular Technologies, L.L.C.*[559] filed a motion to extend the 120-day period within which to assume or reject its lease of nonresidential real property.[560] The

555. 11 U.S.C. § 365(d)(4) (2006). As under pre-amendment law, a debtor is required to "immediately surrender" the premises upon rejection of the lease. *Id.*

556. *Id.* § 365(d)(4)(B).

557. Singer, *supra* note 432, at 213.

558. *Id.* The legislative history to Code § 365(d)(4), as amended by the BAPCPA, provides that the new law

> is designed to remove the bankruptcy judge's discretion to grant extensions of time for the . . . debtor to decide whether to assume or reject a lease after a maximum possible period of 210 days from the time of the entry of the order for relief. Beyond that maximum period, the judge has no authority to grant further time unless the lessor has agreed in writing to the extension.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, REPORT OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES § 404, 109th Cong., 1st Sess. (Apr. 8, 2005).

559. 2006 WL 2405711 (Bankr. D.S.C. June 21, 2006).

560. *In re* Tubular Techs., L.L.C., 2006 WL 2405711, at *1.

motion was filed 112 days after the case was commenced (i.e., 8 days *prior* to the expiration of the 120-day period). However, the debtor did not seek expedited relief. The hearing on the motion was not held until 144 days after the date the petition commencing the case was filed (i.e., 24 days *after* the expiration of the 120-day period).

The court concluded that Code § 365(d)(4)(B)(i) "plainly requires the Court to *enter* an order extending the time for Debtor to assume the lease *prior to the expiration* of the time period set forth in [the statute]."[561] Under the BAPCPA, § 365 does not allow the debtor to obtain an extension of time after the deadline to assume the lease has already lapsed or a *nunc pro tunc* order.[562] The court found that the BAPCPA has unequivocally displaced pre-amendment case law granting extensions as long as the motion requesting the relief was filed within the applicable period. The statute is now plainly self-executing and deems rejection to occur by operation of law after the expiration of the periods specified in the statute. The court, therefore, denied the debtor's motion as a matter of law since the requested relief could not be provided after the applicable deadline set forth in the statute had lapsed.[563] The debtor was required to immediately surrender the premises to the landlord. The court recognized that it's ruling would undoubtedly impact the debtor's ability to successfully reorganize, but indicated the result was the consequence of failing to timely act.[564] In a supplemental order, the court denied the debtor's motion for a stay pending appeal.[565] The court indicated that the BAPCPA makes the intent of Congress clear. Section 365(d)(4) "encourages debtors to make a prompt decision about their leases and punishes debtors who fail to timely act."[566]

IV. VIEWS FROM THE BENCH

The BAPCPA amendments have, in a number of cases, created more, rather than less, uncertainty in the interpretation, administration and application of the bankruptcy laws. Faced with provisions in the BAPCPA, that are sometimes confusing and unclear, bankruptcy judges around the country are using their rulings to express their opinions.

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561. *Id.* at *2 (emphasis added).

562. *Id.*

563. *Id.* The court in *Tubular* rejected counsel's excusable neglect argument and request for a *nunc pro tunc* order, opining that excusable neglect could not be invoked to obtain relief from what is essentially a statute of limitations. *Id.* at *3.

564. *Id.*

565. *In re* Tubular Techs., L.L.C., BKY Case No. 06-00228-JW (July 18, 2006).

566. *Id.* at 14.

A. THE LEGISLATION SIMPLY STINKS!

Implicated Code Sections: 11 U.S.C. §§ 101 *et seq*. (as amended)
Case Name: *In re* Sosa, 336 B.R. 113 (Bankr. W.D. Tex. 2005)
Opinion: In *In re Sosa*,[567] Judge Frank R. Monroe delivered a scathing opinion regarding the pre-filing credit counseling requirement of the Code, which he dubbed as "[o]ne of the more absurd provisions" of the new legislation.[568] He wrote:

> Those responsible for the passing of the Act did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing the passage of the Act had their own agenda. It was apparently an agenda to make more money off the backs of the consumers in this country.[569]

Judge Monroe continued, "to call the Act a 'consumer protection' act is the grossest of misnomers" that was obviously borne out of "a great sense of frustration."[570] "It should be obvious . . . how truly concerned Congress is for the individual consumer in this country. Apparently, it is not the individual consumers of this country that make donations to the members of Congress that allow them to be elected and re-elected and re-elected and re-elected."[571] The new legislation represents a "very unjust result" for consumers who are not abusing the Code.[572]

B. WHAT WERE THEY THINKING?

Implicated Code Sections: 11 U.S.C. § 1112(b)
Case Name: *In re* TCR of Denver, L.L.C., 338 B.R. 494 (Bankr. D. Colo. 2006)
Opinion: In *In re TCR of Denver, L.L.C.*,[573] Judge Sidney Brooks criticized Congress for shoddy drafting when the drafters now used the word "and," rather than the word "or" as under pre-amendment law, in

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567. 336 B.R. 113 (Bankr. W.D. Tex. 2005).
568. *In re* Sosa, 336 B.R. at 114.
569. *Id.*
570. *Id.*
571. *Id.* at 115.
572. *Id.*
573. 338 B.R. 494 (Bankr. D. Colo. 2006).

setting forth the factors requiring conversion or dismissal of a Chapter 11 case in Code § 1112(b):

> This is a case where the language of the BAPCPA passed by Congress tends to defy logic and clash with common sense. This is an example of a specific revision to the Bankruptcy Code, if followed by the Court and applied as Congress seems to intend—i.e., by way of strict construction—would result in an absurd decision and totally unworkable legal precedent. These drafting problems have the potential of bringing the bankruptcy system to a halt while debtors, creditors, and the courts try to figure out just exactly what Congress intended. This Court would add that it appears that the largely overlooked changes to the bankruptcy provisions related to non-consumer cases, such as the case presently before the Court, may sometimes equal the poor crafting of the consumer provisions. Moreover, serious and consequential constitutional questions may be looming on the horizon because of inartful drafting.[574]

C. DID THEY REALLY MEAN WHAT THEY SAID?

Implicated Code Sections: 11 U.S.C. § 362(c)(3)

Case Name: *In re* Paschal, 337 B.R. 274 (Bankr. E.D.N.C. 2006)

Opinion: In *In re Paschal*,[575] Judge A. Thomas Small wrote: "In an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out" as "[t]he language of the statute is susceptible to conflicting interpretations, and if read literally, would apply to virtually no cases at all. In sum, it's a puzzler."[576]

D. WHAT DID THEY MEAN TO ACCOMPLISH?

Implicated Code Sections: 11 U.S.C. § 109

Case Name: *In re* Valdez, 335 B.R. 801(Bankr. S.D. Fla. 2005)

Opinion: In dismissing a case filed by a pro se debtor who was unaware of the credit counseling requirement, Chief Judge A. Jay Cristol posited in *In re Valdez*[577] as follows:

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574. *In re* TCR of Denver, L.L.C., 338 B.R. at 495-96.

575. 337 B.R. 274 (Bankr. E.D.N.C. 2006).

576. *In re* Paschal, 337 B.R. at 277. *Accord In re* Collins, 334 B.R. 655, 658 (Bankr. D. Minn. 2005) (Hon. Chief Judge Gregory F. Kishel) (indicating that the relevant provisions of Code § 362(c) are "clumsily drafted"); *In re* Kane, 336 B.R. 477, 481& n.7 (Bankr. D. Nev. 2006) (Hon. Bruce A. Markell) (indicating that the new legislation has a number of "unfortunate choice[s] of words" and providing examples of "poor drafting").

577. 335 B.R. 801 (Bankr. S.D. Fla. 2005).

> The court wonders what exactly was intended by Congress in regard to this Code section. Is it the intent of Congress that poor, ignorant persons who do not know the law and cannot afford to obtain the advice of counsel are to be denied [the] protection and assistance of the Bankruptcy Code, which is available to more affluent and better educated persons?

Judge Cristol went on to conclude that, "[s]adly, the language in the Code does not clearly reveal Congress' (sic) intent; either the Code language is inartfully drafted or the congressional intent was indeed the former less compassionate, harsher result.[578] Judge Cristol has not been shy about expressing his dissatisfaction with other aspects of the legislation in opinions, even when no party in interest has moved the court for relief.[579]

E. DON'T TREAD ON MY DISCRETION, 'SAM I AM'!

Implicated Code Sections: 11 U.S.C. § 521

Case Name: *In re* Riddle, 344 B.R. 702 (Bankr. S.D. Fla. 2006)

Opinion: The new legislation requires a consumer bankruptcy case to be "automatically dismissed" if the debtor fails to file all the information required under the new law.[580] In *In re Riddle*,[581] Chief Judge A. Jay Cristol reviewed the docket and papers filed by the debtors in order to determine whether or not the file was complete and whether the debtors had complied with the information requirements imposed by the BAPCPA.[582] The file appeared to be complete. Judge Cristol nevertheless felt "compelled to comment on the unusual and confusing language of the statutory provision" and criticized the automatic dismissal provision and other aspects of the statute.[583] In homage to Dr. Seuss' "Green Eggs and Ham," he issued an order sua sponte that provided as follows:

> I do not like dismissal automatic, It seems to me to be traumatic. I do not like it in this case, I do not like it any place.
>
> As a judge I am most keen to understand, *What does it mean? How can any person know* what the docket does not show?
>
> What is the clue on the 46th day? Is the case still here, or gone away?

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578. *In re* Valdez, 335 B.R. at 803.
579. *See infra* notes 580-83 and accompanying text.
580. *See supra* notes 146-49 and accompanying text.
581. 344 B.R. 702 (Bankr. S.D. Fla. 2006).
582. *In re* Riddle, 344 B.R. at 702-03.
583. *Id.*

And if a debtor did not do what the Code had told him to and no concerned party knew it, Still the Code says the debtor blew it. Well that is what it seems to say: the debtor's case is then *"Oy vay!"*

This kind of law is symptomatic of something very problematic. For if the Trustee does not know then which way should the trustee go?

Should the trustee's view prismatic continue to search the debtor's attic and collect debtors' assets in his fist for distribution in a case that stands dismissed? After a dismissal automatic would this not be a bit erratic?

The poor trustee cannot know the docket does not dismissal show. What's a poor trustee to do—except perhaps to say, "Boo hoo!"

And if the case goes on as normal and debtor gets a discharge formal, what if a year later some fanatic claims the case was dismissed automatic?

Was there a case, or wasn't there one? How do you undo what's been done? Debtor's property is gone as if by a thief, and Debtor is stripped but gets no relief.

I do not like dismissal automatic. On this point I am emphatic!

I do not wish to be dramatic, but I can not endure this static. Something more in 521 is needed for dismissal automatic to be heeded.

Dismissal automatic is not understood. For all concerned this is not good.

Before this problem gets too old it would be good if we were told:

What does automatic dismissal mean? And by what means can it been seen? Are we only left to guess? Oh please Congress, fix this mess!

Until it's fixed what should I do? How can I explain this mess to you?

If the Code required an old fashioned order, that would create a legal border, with complying debtors' cases defended and 521 violators' cases ended, from the unknown status of dismissal automatic, to the certainty of a status charismatic. The dismissal automatic problem would be gone, and debtors, trustees and courts could move on.

As to this case, how should I proceed? Review of the record is warranted, indeed. A very careful record review, tells this Court what it should do.

Was this case dismissed automatic? It definitely was NOT and that's emphatic.[584]

F. THE LEGISLATION DOES NOT ACCOMPLISH ITS PURPOSE!

Implicated Code Sections: 11 U.S.C. § 101 *et seq*.
Case Name: *In re* Mullings, 2006 WL 2130648 (Bankr. E.D. Okla. July 26, 2006)
Opinion: Judge Tom R. Cornish expressed significant concerns in *In re Mullings*[585] about the costs associated with the administration of bankruptcy cases under the BAPCPA and opined that the legislation does not accomplish its objectives:

> What was touted by Congress as much-needed bankruptcy reform appears to have fallen short of its lofty goals. This was a comprehensive revamping of the bankruptcy law which was principally supported and financed by credit card companies and banking institutions, with the objectives of cleaning up a bankruptcy system that had run afoul of eliminating fraud and the ability of unscrupulous people to receive benefits from the bankruptcy system. This Court's observation is that these goals and objectives have not been met. To the contrary, in this District, many debtors' lawyers have ceased practicing bankruptcy law and many debtors are filing and appearing before this Court pro se. Because of many pitfalls and loopholes and additional requirements of the new law, many of these pro se debtors have not been able to keep their cases viable in bankruptcy in order to obtain a discharge. To the contrary, whether it was intended or not, the effect of BAPCPA is to limit access to the courts for those that need bankruptcy relief the most.[586]

584. *Id*. at 703.
585. 2006 WL 2130648 (Bankr. E.D. Okla. July 26, 2006).
586. *In re* Mullings, 2006 WL 2130648, at *1 (italics omitted).

V. CONCLUSION

The BAPCPA has made literally hundreds of changes to bankruptcy law and procedure. Indeed, the Bankruptcy Code, the Judicial Code, and the Federal Rules of Bankruptcy are replete with countless new provisions, exceptions, qualifications, and requirements, a great number of which have already created interpretive challenges and divisions of authority. The legislation remains, however, in its infancy and a maturation of the law will be necessary to resolve the numerous questions of statutory interpretation and legislative intent.