

# BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

## *Abridged*

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**O**n April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Many lawyers who regularly represent debtors see nothing about BAPCPA that warrants the title of “consumer protection.” Many creditors’ counsel may find that the intended creditor protections are also illusory in terms of a meaningful increase in financial return. Both camps should agree that BAPCPA is certain to increase the cost of insolvency remedies and insolvency-related litigation for both debtors and creditors alike.

In a system of checks and balances new legislation is a raw material to be tested and tempered by creative lawyering and judicial interpretation. In the final analysis, the inability of a debtor to file or sustain a bankruptcy may not result in increased payment to creditors, and may not increase a debtor’s assets from which a creditor might be repaid. Even the most effective creditor’s lawyer often must admit that transforming a claim or even a judgment into repayment is akin to spinning floss into gold.

It is impossible in an article of this length to even touch upon the highlights of legislation as expansive and complicated as BAPCPA. Many things about the new law are uncertain; however, it is absolutely certain that increased litigation, increased responsibilities for debtors and lawyers, increased oversight by governmental agencies and courts will, ironically, vastly increase the cost of insolvency.

Selected provisions of BAPCPA include:

- Mandatory third-party credit counseling for all potential consumer debtors, the cost of which is to be paid by the consumer debtor;
- “Means Testing” for any consumer debtor whose monthly income exceeds the median income of the state in which that debtor resides. Those debtors whose income is below the median retain the choice of a Chapter 7 liquidation, with a “fresh start” discharge of debt, or a potential Chapter 13 repayment plan if they otherwise qualify for a Chapter 13. Those debtors with income exceeding the state’s median income will face increased scrutiny and eligibility requirements for the Chapter 7 remedy;
- Required factual certifications by debtor’s counsel requiring increased and documented pre-filing due diligence;
- Additional review and documentation responsibilities for both the United States Trustee and Chapter 7 Panel Trustees with the attendant additional costs;
- Heightened requirements for Chapter 13 confirmation, including changes in how a Chapter 13 Plan may or must treat certain types of claims such as domestic support claims, pension plan loans and claims secured by purchase money security interests in motor vehicles and certain other personal property;
- Loss of certain protections for repeat filers; expansion of both the amount and types of claims entitled to priority treatment; and, expansion of the types of claims which are statutorily non-dischargeable.
- The ability to request an order eliminating a meeting of creditors if a “pre-packaged” plan is filed in Chapter 11 cases;
- A 120 day limit with the possibility of an additional 90 day extension, of the time during which a debtor may assume or reject a lease of non-residential real estate, and further extensions only with the consent of the lessor;

- Increased ability to change the makeup of statutory committees to reflect their supposed constituencies;
- Required venue at a defendant’s location for consumer collection actions in amounts of \$15,000 or less and business avoidance actions of \$10,000 or less, if the defendant is not an “insider;”
- Limitation of the exclusive period for filing a plan under Chapter 11 to a maximum of 18 months from the order for relief, including extensions;
- Enhanced adequate assurance of payment for utilities;
- Providing stricter limitations on key employee retention plans.
- Expanded bases for dismissal or conversion of Chapter 11 cases;
- Small businesses, defined as certain businesses having no more than \$2,000,000 in liquidated, non-contingent, non-insider debt, in cases for which no Creditors Committee has been appointed or an appointed Creditors Committee is not “sufficiently active and representative to provide effective oversight” are subject to increased reporting requirements and heightened scrutiny by the United States Trustee. The new reporting requirements include reports setting forth the business’ “profitability;”
- Limitation of the exclusive period during which only a debtor may file a Chapter 11 plan to 180 days after the order for relief and limitation of the time during which a plan and disclosure statement must be filed in any event to 300 days after the order for relief, with confirmation no later than 45 days after plan filing.
- Priority treatment of claims of certain sellers of goods to whose claims arose shortly before the petition date;
- Increased rights to creditors with reclamation claims;
- Expansion of the “ordinary course defense” in preference actions providing that the “subjective” test, (i.e., the ordinary course of dealings between the parties) and the “objective” test, (i.e., ordinary course in accordance with relevant industry standards) are alternative defenses other than conjunctive defenses;
- New Chapter 15 provisions for cross-border insolvencies;
- Reinstatement of the protections of Chapter 12 for family farmers and extension of similar remedies for “family fishermen;”
- Increase of the “look back,” period for fraudulent transfer actions under §548 from one year to two years.

Whether BAPCPA is good or bad, fair or unfair, is now the debate for legal theorists. For practicing lawyers, BAPCPA is the law and the challenge of zealous representation remains unchanged. BAPCPA says what it says, but what does it mean?



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