The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

by

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Most press coverage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[1] has focused on the provisions affecting consumer debtors. However, over half of this 195-page law is devoted to business bankruptcy. The bill's business bankruptcy provisions, many of which are poorly drafted, make substantial changes to Chapter 11 reorganization law, changes that, for the most part, will adversely affect the ability of businesses to reorganize. In general, these changes reflect active lobbying by certain creditor groups to improve their positions in bankruptcy cases, particularly in Chapter 11, vis-à-vis debtors and other creditors and Congressional reaction (or overreaction) to the recent Enron, WorldCom, Adelphia and other scandals. Ironically, the increased burden placed on reorganizing debtors in favor of particular groups of creditors will likely reduce overall recoveries for all creditors, including the favored groups. Even the provisions of BAPCPA that could have had a salutary effect on some of the abuses and problems plaguing the reorganization process have been so poorly conceived or drafted that they are likely to do more harm than good, while increasing litigation costs and delay. The precise impact of BAPCPA on the success/failure rates of business reorganizations remains to be seen, but certainly in the short term one can expect increased litigation and costs as debtors and creditors spar over the meaning and application of BAPCPA's provisions.

.In Part I, we discuss a number of BAPCPA's provisions that will increase

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[1]Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005). All further references to BAPCPA will be to the codified provisions. Unless otherwise noted, the BAPCPA amendments are applicable only in cases filed on or after October 17, 2005, which is 180 days after BAPCPA's date of enactment (April 20, 2005). Pub. L. No. 109-8, § 1501, 119 Stat. 23, 216 (2005).

a debtor's direct costs, by requiring enhanced treatment for select creditor groups, to the detriment of other creditor groups. Clearly, by increasing the demands on a debtor's cash (or reducing cash availability), these provisions will adversely affect at least some debtors' prospects for a successful reorganization. Potentially even more harmful to the reorganization process and, in some cases, to a debtor's prospects for emergence from Chapter 11 are those provisions, discussed in Part II, dealing with management compensation and retention policies and corporate control; those discussed in Part III, dealing with a debtor's ability to manage its business and formulate a workable business plan; and those dealt with in Part IV, involving the relationship between the debtor, committees and other professionals. Part V discusses various BAPCPA provisions affecting formulation or confirmation of plans of reorganization, while Part VI discusses BAPCPA provisions affecting case management. Parts VII through X discuss respectively provisions affecting avoidance actions, patient protection in health care insolvencies, single asset real estate cases, and not-for-profit cases.[2]

I. PROVISIONS INCREASING COSTS, REDUCING CASH, OR RESTRICTING USE OF CASH

A. Claims of Sellers of Goods

In a blow to reorganizing debtors that purchase large quantities of inventory, BAPCPA grants substantial additional rights to those who sold goods to the debtor before bankruptcy. First, a claim for "the value of any goods" received by a debtor in the ordinary course of business within twenty days before commencement of the case will be entitled to administrative expense priority status, payable in "hundred cent dollars," rather than just general unsecured status.[3] This priority is available even if the seller of goods fails to give a written reclamation demand.[4] It is unclear from the amendment whether the debtor-in-possession must pay these administrative expenses, incurred prepetition, during the case or may wait until plan consummation to

[2]This Article does not address all BAPCPA amendments that are applicable to business bankruptcies, including (i) the extensive amendments, most of which simply clarify and modernize, to the treatment of financial contracts such as swaps, derivatives, repos, forward contracts, commodity contracts, and the like, both in and outside of bankruptcy (11 U.S.C. §§ 555, 556, 559, 560, 561 and 562 (2005)), (ii) new Chapter 15 of the Bankruptcy Code, which enacts the Model Law on Cross-Border Insolvencies promulgated by the United Nations and its Commission on International Trade Law (11 U.S.C. § 1501 et seq. (2005)), (iii) various tax provisions (11 U.S.C. § 346 (2005)), and (iv) provisions pertaining to a small business case (*see, e.g.*, 28 U.S.C. § 586(a)(3)(H), (7) (2005)). *See* Rhett Campbell, *Financial Markets Contract and BAPCPA*, 79 AM. BANKR. L.J. 697 (2005); Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713 (2005), and Thomas E. Carlson and Jennifer Frasier Hayes, *The Small Business Provisions in the 2005 Bankruptcy Amendments*, 79 AM. BANKR. L.J. 645 (2005).

[3]11 U.S.C. § 503(b)(9) (2005).

[4]11 U.S.C. § 546(c)(2) (2005).

pay. It is also unclear whether court approval is necessary before payment. Case law under the pre-BAPCPA Code suggests that the payment may wait, but it is far from settled law.[5]

Second, one who has sold goods that the debtor receives before the commencement of the case, at a time when the debtor was insolvent, may give a written reclamation demand to the debtor within forty-five days after the debtor receives the goods or within twenty days after commencement of the case, whichever is later.[6] The bankruptcy court's ability under pre-BAPCPA law to provide an administrative claim or a lien to the reclaiming creditor, in substitution for the reclamation right, arguably has been repealed,[7] suggesting that the seller has an absolute right to have its goods returned if it makes a reclamation demand, if the debtor has not yet sold the goods or incorporated them into its products before receiving the demand.

The financial impact of these amendments on certain types of debtors (for example, retailers) is likely to be substantial, as administrative expense claims must be paid in full in cash as a condition to confirming a plan. In addition, for many debtors, especially those in larger cases, setting up a system to monitor reclamation demands and to segregate or track reclaimed goods, even if possible, will create a substantial administrative burden in terms of time and expense that they will not be equipped to handle. Moreover, due to drafting ambiguities, litigation costs likely will increase as debtors and sellers argue over questions such as the following:

(1) Does revised § 546(c) create a federal right of reclamation, or must a seller of goods still rely on and comply with state reclamation laws, typically § 2-702 of the Uniform Commercial Code?

> Pre-amendment § 546(c) provided that a trustee's avoidance powers were subject to "any statutory or common-law right of a seller of goods" to reclaim. BAPCPA omits the reference to statutory or common law reclamation rights, providing instead that the trustee's powers are subject to "the right of a seller of goods . . . to reclaim."[8] In deleting the reference to statutory or common law reclamation rights, did Congress intend to create a right that does not exist under applicable nonbankruptcy law? Aside from the textual argument, the

[5]*See, e.g.*, CIT Comm. Fin. Corp. v. Midway Airlines Corp. (*In re* Midway Airlines Corp.), 406 F.3d 229 (4th Cir. 2005).

[6]11 U.S.C. § 546(c)(1)(A)-(B) (2005).

[7]Former § 546(c)(2) provided that the court could deny reclamation to a seller entitled thereto only if it granted the seller a § 503(b) priority or secured the claim with a lien. *See* disappearing 11 U.S.C. § 546(c)(2) (2000). BAPCPA deletes this provision, leading some practitioners to conclude that, post—BAPCPA, courts lack authority to substitute a priority or secured claim for reclamation.

[8]*Compare* 11 U.S.C. § 546(c) (2000) *with* 11 U.S.C. § 546(c)(1) (2005).

> timing change, from ten days to forty-five days, also supports such a reading: a nonbankruptcy reclamation right likely would have expired within ten days after the debtor received the goods, so the seller would not be able to assert such a right after bankruptcy for goods received more than ten days before bankruptcy. But, if there is a federal bankruptcy reclamation right, what are its contours and limitations? Will courts import nonbankruptcy reclamation law into the federal right? If so, by what authority? On the other hand, § 546 is entitled "Limitations on avoiding powers," and § 546(c) merely provides that "the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods . . . ." At least under prior law, if the seller followed the procedures set forth in § 546(c), the trustee could not avoid the reclamation right. Did Congress intend the revision to § 546(c) to continue merely as a limitation on avoiding powers, or did it intend to create a new federal right of reclamation?

(2) Do sellers really have an absolute right to return of their goods as a result of repeal of former § 546(c)(2)? Or can one read the repeal of § 546(c)(2) as expanding the circumstances under which a court may deny reclamation?

> Section 546(c)(2) was originally a limitation on the court's ability to deny reclamation, thus arguably making its repeal the repeal of a limitation rather than a repeal of a grant of authority.

(3) How will courts manage the inevitable problem when a debtor-in-possession sells goods shortly after the seller makes a reclamation demand but before the demand is communicated to the sales or warehouse floor? What will the seller's remedy be?

(4) Does the automatic stay preclude a reclaiming seller from physically retaking its goods?

> Notwithstanding the enhanced rights afforded sellers under revised § 546, § 362(b), which sets forth exceptions to the automatic stay, has not been amended to provide specific authority to a seller to reclaim without first seeking court approval. On the other hand, new § 362(b)(24) excepts from the automatic stay "any transfer that is not avoidable under

section 544 and . . . section 549."[9] Although that exception was designed to overrule a case dealing with unauthorized postpetition borrowing,[10] its literal language might apply to a seller's physical reclamation of goods, if such action can be characterized as a "transfer," at least of possession of the goods. If so, will the automatic stay exception still apply even if reclamation cannot be accomplished without the debtor-in-possession's consent?

(5) In determining a seller's allowable administrative expense claim under § 503(b)(9), how, as of when, and from whose perspective—the estate's or the seller's—will the "value" of goods be determined?

> Choices for determining the valuation date could include the date of shipment, receipt, the petition, the order for relief, plan confirmation, or plan consummation. The date for determining value can be important, as with holiday or seasonal merchandise, the value of which may drop precipitously once the holiday or season has passed.

(6) If a seller has reclaimed its goods, does it still have the right to an administrative expense claim?

> Section 503(b)(9), which affords a seller an administrative expense claim for the value of goods received by the debtor within twenty days before the commencement of a case, is not expressly dependent on the seller's not having reclaimed the goods. Indeed, § 503(b)(9) is so poorly drafted that it is not even expressly dependent on nonpayment prepetition (such as in a COD purchase). Thus, although § 502(b)(1) disallows claims that are not enforceable against "the debtor" (not the trustee or the estate),[11] it does not by its terms apply to disallow administrative expense claims allowable against the estate under § 503. It is difficult to imagine a court of equity allowing as an administrative expense a claim

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[9] 11 U.S.C. § 362(b)(24) (2005).

[10] Thompson v. Margen (*In re* McConville), 110 F.3d 47 (9th Cir. 1997); *see* H.R. Rep. No. 109-31, 75 n.86 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 143. The cited opinion withdrew the Ninth Circuit's prior opinion, which had held that although the granting of a lien to secure an unauthorized postpetition loan was not avoidable under § 549, it nevertheless was void for violation of the automatic stay. Thompson v. Margen (*In re* McConville), 97 F.3d 316 (9th Cir. 1996), *withdrawn and superseded*, 110 F.3d 47 (9th Cir. 1997). *See infra* discussion Part VI.C.

[11] *Cf.* Murdock v. Holquin, 323 B.R. 275 (N.D. Cal. 2005) (a postpetition loan to debtor to fund a Chapter 11 plan is not allowable as an administrative expense in the subsequent Chapter 7 case; distinguishing between allowable administrative expenses and claims against the debtor).

that was either paid prepetition or satisfied by reclamation postpetition. Yet, with the courts' heightened reliance on plain meaning statutory interpretation,[12] the seller could argue that it is entitled to an administrative expense even though this occurred, particularly if reclaimed inventory cannot be resold for the original invoice price.

B. Utility Service

1. *Adequate Assurance of Payment*

Section 366 of the Bankruptcy Code provides that "a utility may not alter, refuse, or discontinue service to, or discriminate against" a trustee or debtor for nonpayment of prebankruptcy bills, as long as the trustee or debtor provides "adequate assurance of payment, in the form of a deposit or other security," for postbankruptcy service.[13] In the past, courts have found that projected strong postbankruptcy cash flow, a history of timely prebankruptcy payments, or assurance of an administrative expense priority claim for postbankruptcy service may constitute adequate assurance of payment, without the need for a cash deposit or similar security. BAPCPA significantly changes this result for Chapter 11 cases[14] by defining adequate assurance of payment so as to require a cash or similar deposit, such as a letter of credit, certificate of deposit, or surety bond, no matter how sound the debtor-in-possession's business and projected cash flow and without regard to whether the utility had required a prebankruptcy deposit or been paid on time.[15] Indeed, BAPCPA provides that the court may not even *consider* timeliness of prepetition payments and the availability of an administrative expense priority when determining the adequacy of an assurance of payment under new § 366(c).[16]

It is unclear how soon the debtor-in-possession must furnish adequate assurance of payment to the utility under BAPCPA. Under § 366(c)(2), a utility may alter, refuse, or discontinue utility service if it does not receive adequate assurance of payment satisfactory to it within thirty days after the *filing of a Chapter 11 petition.* However, under subsection (b) of § 366, which was not amended by BAPCPA, a utility may alter, refuse, or discontinue service if it does not receive adequate assurance of payment in the form of a deposit or other security within twenty days after the *order for relief* for

[12]*See* United States v. Ron Pair Enters. Inc., 489 U.S. 235, 242-43 (1989).

[13]11 U.S.C. § 366(a), (b) (2000).

[14]Section 366(c)(4) (2005) applies "to a case subject to this subsection." Section 366(c)(2)'s provisions (2005), which are "[s]ubject to paragraphs (3) and (4)," apply to cases "filed under chapter 11."

[15]11 U.S.C. § 366(c)(1)(A) (2005).

[16]11 U.S.C. § 366(c)(3)(B)(ii), (iii) (2005).

service after that date. In an involuntary case the order for relief may be entered long after the filing date and well beyond § 366(c)'s thirty-day limitation. Moreover, "or other security," as used in § 366(b), might encompass an administrative expense claim or history of prompt payment.[17] Under new subsection (c), however, the form of assurance required is far more stringent than the assurance often required under prior law under subsection (b). Furthermore, new § 366(c)(2) requires that the assurance be satisfactory to the utility; § 366(b) contains no such requirement. And, while § 366(c)(3)(A) does contemplate a judicially ordered modification of the assurance demanded by the utility under § 366(c)(2), until such an order is entered, it appears that the assurance must be acceptable to the utility.

Could Congress have intended that in a voluntary Chapter 11 case, the traditional (i.e., pre-BAPCPA) form of assurance be tendered within twenty days after the order for relief, giving the debtor-in-possession an additional ten days in which to provide the stricter cash form of assurance? If so, such a procedure does not seem practical, and the fact that the stricter cash assurance applies within thirty days after an involuntary petition, even before an order for relief, suggests that was not what Congress had in mind. The drafting is sufficiently opaque that trustees, debtors-in-possession, and the courts will have to chart new territory.

A trustee or debtor-in-possession will still need to reach an agreement with, or obtain a court order preventing exercise of remedies by, a utility in the early stages of a case to prevent wholesale disruption of the business that likely would flow from disruptions in utility service. If the debtor-in-possession cannot reach an agreement, the court will resolve the dispute and determine the amount and form of assurance.[18] Retail companies, with numerous locations, will be particularly hard hit because of the large number of utilities from which they take service. Some have suggested that a blanket letter of credit or bond, for the benefit of all of the debtor-in-possession's utilities, might suffice. Undoubtedly, utilities will argue for individualized treatment. With the court expressly prohibited from taking into account the amount of prepetition deposit (if any), the debtor's payment history, or the availability of an administrative priority claim,[19] the utility industry has been given a powerful tool.

2. *Setoff*

BAPCPA also permits a utility to set-off or recover against a prepetition deposit "[n]otwithstanding any other provision of law" and "without notice

[17] 3 Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY ¶ 366.03 (15th rev. ed. 2005).

[18] 11 U.S.C. § 366(c)(3)(A) (2005).

[19] 11 U.S.C. § 366(c)(3)(B) (2005).

or order of the court."[20] Although not explicitly referenced in § 362(b),[21] § 366(c)(4) by its terms appears to be an exception to the automatic stay applicable in Chapter 11 cases,[22] and a debtor-in-possession wishing to prevent setoff by a utility will need to obtain a court order and serve it quickly to prevent the utility's exercise of setoff rights.[23]

BAPCPA does not address the status of a prepetition deposit procured by a utility during the ninety days before bankruptcy. While § 366(c)(4)'s "notwithstanding any other provision of law" language suggests that setoff or "recovery" is permitted even if the deposit was a preference, the question of whether the original deposit may be avoided as a preference is not addressed. Given BAPCPA's modifications to § 547, however, this will matter only if the preferential deposit exceeds $5000.[24]

These changes to § 366 will require careful prebankruptcy planning to assure the availability of adequate cash or DIP financing resources to post letters of credit (or perhaps a global letter of credit for the aggregate of all utility bills) or other security. They also will require quick action by the debtor-in-possession to prevent, at least temporarily, setoff or recovery of existing deposits.

C. Labor Issues

1. *Retiree Health Benefits*

Section 1114 of the Bankruptcy Code prohibits a Chapter 11 debtor-in-possession from modifying retiree health benefits (as defined in § 1114(a)) unless it complies with a potentially lengthy negotiation process akin to collective bargaining and demonstrates to the court that the modifications both are necessary to permit the reorganization to succeed and treat retirees equitably as compared to all other parties in interest in the case. Case law is split on whether this provision prevents modification of a retiree plan that by its terms permits unilateral modifications by the employer, with some courts

[20] 11 U.S.C. § 366(c)(4) (2005). By using the word "recover," § 366(c)(4) may be creating a right that does not exist under applicable nonbankruptcy setoff law.

[21] New § 362(b)(24) exempts from the scope of the automatic stay "any transfer that is not avoidable under § 544 and that is not avoidable under section 549." 11 U.S.C. § 362(b)(24) (2005). *See* discussion Part VI.C. Thus, utility setoff likely falls within § 362(b)(24), since the setoff, having been authorized by new § 366(c)(4), is not avoidable under § 549, 11 U.S.C. § 549(a)(2)(B) (2000), and § 544 does not address setoff at all. *See* 11 U.S.C §§ 544, 553 (2000).

[22] Section 366(c) applies only in Chapter 11 cases. *See supra* note 14. Thus, it would appear that utility setoff is stayed in non-Chapter 11 cases.

[23] Unlike other special interest provisions of the Bankruptcy Code that permit the postpetition exercise of various rights, such as contract termination, postpetition setoffs and netting, with respect to certain types of financial agreements (*see, e.g.*, 11 U.S.C. §§ 555, 556, 559, 560 and 561), new § 366(c)(4) does not explicitly preclude a court from entering an order staying setoff by a utility, thereby leaving open the possibility of obtaining a "first day" order enjoining setoff.

[24] *See infra* Part VII. A.3.

holding that § 1114 supersedes (i.e., nullifies) the unilateral modification provision of the retiree plan,[25] and other courts holding that unilateral modification in accordance with the terms of the plan is permissible.[26]

While BAPCPA does not directly address the issue, it does contain language that calls into question the debtor-in-possession's ability to rely upon a unilateral modification clause to make postpetition modifications to retiree benefits. BAPCPA requires the court, on motion of a party in interest and after notice and a hearing, to unwind any modification to a retiree health plan made within 180 days before the petition date if the debtor was insolvent at the time of the modification "unless the court finds that the balance of the equities clearly favors such modification."[27] If lawful prepetition modifications made in reliance upon a unilateral modification clause can be rescinded, it seems unlikely that such modifications are intended to be permitted postpetition without court approval under the standards of § 1114. Thus, in addition to potentially increasing a debtor's retiree benefit burden by authorizing the rescission of lawful modifications made within 180 days of the petition date, BAPCPA could well be found to abrogate a debtor-in-possession's right to reduce such benefits postpetition based upon a unilateral modification clause.

The provision, however, does not address the ability of the reorganized debtor to make modifications to a retiree plan after the effective date of a Chapter 11 plan. Presumably, unless the court has authorized modifications of retiree benefits under § 1114 during the case, the retiree plan will continue unaffected by the Chapter 11 case. After plan consummation, the retiree health plan would continue to contain the unilateral modification provision, on which the reorganized debtor should be able to rely, as long as the Chapter 11 plan provides for the continuation of benefits "for the duration of the period the debtor has obligated itself to provide such benefits," as required by § 1129(a)(13).[28]

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[25] *See In re* Farmland Indus., Inc., 294 B.R. 903, 917 (Bankr. W.D. Mo. 2003); *see also* Ames Dep't Stores, Inc. v. Employees' Comm. of Ames Dep't Stores, Inc. (*In re* Ames Department Stores, Inc.), 1992 WL 373492 at *1, 1992 U.S. Dist. LEXIS 18275, at *3-4 (S.D.N.Y. Nov. 30, 1992); *In re* Speco Corp., 195 B.R. 674, 678-79 (Bankr. S.D. Ohio 1996); *In re* N.Y. Trap Rock Corp., 126 B.R. 19, 22-24 (Bankr. S.D.N.Y. 1991).

[26] *In re* N. Am. Royalties, Inc., 276 B.R. 860 (Bankr. E.D. Tenn. 2002); *In re* Raytech Corp., 242 B.R. 222 (Bankr. D. Conn. 1999); *In re* Doskocil Cos., 130 B.R. 870 (Bankr. D. Kan. 1991); Daniel Keating, *Bankruptcy Code § 1114: Congress' Empty Response to the Retiree Plight*, 67 AM. BANKR. L.J. 17, 41-42 (1993).

[27] 11 U.S.C. § 1114(l) (2005). BAPCPA amendments to § 1114(l) apply in cases filed on or after April 20, 2005. *See* Pub. L. No. 109-8, § 1406(b)(1), 119 Stat. 23, 215-16 (2005).

[28] 11 U.S.C. § 1129(a)(13) (2000).

2. *Back Pay Awards*

Overruling some case law to the contrary,[29] BAPCPA makes back pay wage and benefit awards attributable to any postpetition period an administrative expense, even if the debtor's wrongful conduct giving rise to the award occurred prepetition, if the court concludes that payment of such awards will not substantially increase the probability of layoff or termination of current employees.[30] Thus, if the back pay award is issued after the bankruptcy filing, the award for the period of service that would have been rendered after bankruptcy will be entitled to administrative expense priority status. The amendment does not affect the prepetition status of the portion of the award for the prepetition period of service, nor does it affect the applicability of the wage priority[31] to such an award.

3. *Wage Priorities*

BAPCPA amends § 507(a) of the Bankruptcy Code, increasing the cap on so-called wage priority claims from $4000 (as adjusted under § 104, currently $4925)[32] to $10,000 (subject to continued future adjustment under § 104), and increasing from ninety days to 180 days the priority reachback period.[33] A comparable change, from $4000 (as adjusted, currently $4925) to $10,000 (subject to such future adjustment), was made to the formula for computing the priority for employee benefit plan contributions.[34]

D. Taxes and Nondischargeability

BAPCPA makes extensive changes in the taxation of debtors and estates, both individual and corporate, in bankruptcy cases and provides substantial additional protections for property tax claimants, which are usually local governments.[35] Most of these tax changes are beyond the scope of this Article. However, as discussed below, there are also significant changes in the treatment of tax claims in bankruptcy that may increase the amount or accelerate the payment of various types of tax claims.

1. *Interest on Tax Claims*

The interest rate on all tax claims paid under the Bankruptcy Code, whether by a trustee in a liquidating Chapter 7 case or under the terms of a

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[29]*E.g.*, Kapernekas v. Cont'l Airlines, Inc. (*In re* Cont'l Airlines, Inc.), 148 B.R. 207 (D. Del. 1992).

[30]11 U.S.C. § 503(b)(1)(A)(ii) (2005).

[31]11 U.S.C. § 507(a)(4) (2005). Note, however, that the wage priority is expanded. *See infra* Part I.C.3.

[32]Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(B) of the Code, 69 Fed. Reg. 8482-01 (Feb. 24, 2004); *see* 11 U.S.C. § 104(b).

[33]11 U.S.C. § 507(a)(4) (2005).

[34]11 U.S.C. § 507(a)(5)(B)(i) (2005). BAPCPA amendments to §§ 507(a)(4) and (5) are applicable in cases filed on or after April 20, 2005. *See* Pub. L. No. 109-8, § 1406(b)(1), 119 Stat. 23, 215-16 (2005).

[35]11 U.S.C. § 346 (2005).

Chapter 11 plan, will be the rate determined under applicable nonbankruptcy law.[36] If the taxes are paid under a confirmed plan, the interest rate must be determined as of the calendar month in which the plan is confirmed.[37] Interest is generally charged on taxes only when paid after the due date, that is, after default. Thus, in most instances, there will likely be only one applicable interest rate. However, if there is a difference under applicable nonbankruptcy law between a default (delinquency) and a nondefault rate, BAPCPA is not clear which rate applies. BAPCPA is also not clear whether the rate must be fixed as of the confirmation date or may float with the applicable rate, although the language strongly suggests that the rate must be fixed.

2. *Payment of Back Taxes Under a Chapter 11 Plan*

BAPCPA requires that certain priority taxes paid under a plan be paid (a) in "regular installment payments in cash" (formerly "deferred cash payments," with no regularity requirement), (b) over a period not to exceed five years from the date of the order for relief (formerly six years from the date of the assessment of the tax, whether that occurred before or after bankruptcy), and (c) "in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan," other than administrative convenience claims.[38] In some cases, where taxes have been assessed more than one year prepetition, the new provision might actually relieve some payment pressure on the reorganizing debtor. The likely effect of BAPCPA in many cases, however, is quicker payment of tax claims. Under prepackaged Chapter 11 plans, where many types of nonpriority unsecured claims ride through and are paid in full in cash on or shortly after consummation of the plan, BAPCPA likely will lead to payment of priority tax claims in full in cash on the plan's consummation date. Moreover, litigation over the phrases "in a manner not less favorable" and "most favored" seems likely in cases where tax claims are large and there are differences in the treatment of tax and other claims in terms of the form of consideration, timing of payments, percentage recoveries and other factors.

3. *Prepetition Property Taxes*

Formerly, property taxes last payable without penalty after one year before the petition date were afforded an administrative priority only if they were "assessed" prepetition.[39] The term "assessed" is used for federal taxes, but is not used in many local property tax laws.[40] To eliminate the uncer-

[36] 11 U.S.C. § 511(a) (2005).

[37] 11 U.S.C. § 511(b) (2005).

[38] 11 U.S.C. § 1129(a)(9)(C)(i)-(iii) (2005). *See also* 11 U.S.C. § 1122(b) (2000).

[39] 11 U.S.C. § 507(a)(8)(B) (2000).

[40] H.R. Rep. No. 109-31, at 101 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 165.

tainty this created, BAPCPA eliminates the requirement that the taxes have been assessed and substitutes the term "incurred."[41] For federal income taxes and others that are "assessed," no change in law is likely. For others for which the term "assessed" does not have any independent meaning, courts will need to determine, based on the policy behind separating pre- and postpetition claims, the date on which a tax is "incurred."

4. *Tax Refunds*

Under new § 362(b)(26), a taxing agency that owes the debtor an income tax refund with respect to a taxable period ending before the date of the order for relief will no longer be restricted by the automatic stay from offsetting that refund against any tax liability that the debtor may owe for a taxable period that also ends before the date of the order for relief.[42] If the setoff is not permitted under applicable nonbankruptcy law because of a "pending action" to determine the amount or legality of a tax liability, the government nevertheless may refuse to pay the refund pending the outcome of the action unless the court provides adequate protection of the government's setoff right. BAPCPA does not indicate whether a pending action includes internal IRS administrative proceedings. Thus, a reorganizing company that may be relying on a tax refund, perhaps resulting from recent losses that may be carried back to prior tax years, as an important source of cash may be prevented from receiving any cash until audits of all prior years have been completed. Much will likely depend on how the term "pending action" is construed, as well as on the position the IRS takes, whether through regulations or otherwise.

5. *Nondischargeability of Certain Governmental and Related Claims*

Under pre-BAPCPA law, a reorganizing corporation's discharge in a Chapter 11 case was pervasive.[43] All debts, no matter how incurred, were discharged upon confirmation.[44] BAPCPA makes the first inroads under the Bankruptcy Code on the pervasive corporate discharge by excepting from a corporation's[45] Chapter 11 discharge any debt owed to a domestic governmental unit that would be excepted from an individual's discharge under

[41] 11 U.S.C. § 507(a)(8)(B) (2005).

[42] 11 U.S.C. § 362(b)(26) (2005).

[43] 11 U.S.C. § 1141(d) (2000). *See* George M. Treister et al., Fundamentals of Bankruptcy Law, § 9.06, at 441 (5th ed. 2004, R. Levin ed.).

[44] *See, e.g.*, Beard v. A. H. Robins Co., Inc., 828 F.2d 1029 (4th Cir. 1987) (intentional torts, even if malicious, are dischargeable in a Chapter 11 case by confirmation of a corporate debtor's plan of reorganization).

[45] An individual does not receive a Chapter 11 discharge from any debts that are nondischargeable under § 523(a). 11 U.S.C. § 1141(d)(2) (2005). A partnership will continue to receive a discharge of such debts in Chapter 11 because new § 1141(d)(6)(A) does not apply to a partnership debtor.

§ 523(a)(2)(A) or (B).[46] Sections 523(a)(2)(A) and (B) except from an individual's discharge debts obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition," or based on a materially false financial statement "made or published with intent to deceive."[47] Thus, a corporation's debt to a domestic governmental unit, if incurred by any of those acts, is now excepted from the discharge issued in a Chapter 11 case.

An obvious candidate for governmental claims of nondischargeability is any government-sponsored loan program, such as a small business loan from or guaranteed by the Small Business Administration. Governments will now have an incentive not only to pursue collection but also to investigate whether the debtor engaged in any misrepresentations, either on a financial statement or otherwise, in securing the loan or an extension of the loan. It is unclear how much farther governmental units will push the provision, but some examples readily come to mind. A governmental unit may seek to have excepted from discharge amounts owing under a government contract, if the governmental unit can show that the debtor misrepresented either its financial condition or other ability to perform under the contract and the government reasonably relied on the representation in awarding the contract.[48] Defense and other federal government contractors could be particularly affected by this provision. Medicare and Medicaid providers are other obvious targets. To enforce this provision, however, the domestic governmental unit must file a complaint objecting to dischargeability not later than sixty days following the first date set for the meeting of creditors or within such later time as the court permits, if the request for a time extension is made before the expiration of the sixty-day period.[49]

BAPCPA added another provision in the same section, excepting from discharge in a corporate Chapter 11 case "any debt . . . owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute."[50] Subchapter III of chapter 37 of title 31 generally covers claims against the United States government. However, § 3730 permits a civil action, known as a *qui tam* action, by a private person in the name of the government to recover on behalf of the government any false claim that had been collected from the government.[51] Under § 3730, the person initiat-

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[46] 11 U.S.C. § 1141(d)(6)(A) (2005).

[47] 11 U.S.C. § 523(a)(2); *see* Cohen v. de la Cruz, 523 U.S. 213 (1998) (compensatory and punitive damages arising from fraud are nondischargeable).

[48] Field v. Mans, 516 U.S. 59 (1995) (creditor must show objectively reasonable reliance).

[49] 11 U.S.C. § 523(c) (2000); FED. R. BANKR. P. 4007(c).

[50] 11 U.S.C. § 1141(d)(6)(A) (2005).

[51] 31 U.S.C. § 3730(b).

ing the action is entitled to a portion of any recovery.[52] By the terms of § 1141(d)(6)(A), the portion owed to the private person is excepted from discharge in a corporate Chapter 11 case. Also nondischargeable are any debts owed to a "person" under "any similar State statute." Because the language excepts from discharge only a debt owed to a "person," the portion owed to the government is fully dischargeable as with any other claim.[53]

In enacting these nondischargeability provisions for corporate Chapter 11 debtors, Congress did not integrate them with other provisions of Chapter 11 to make them work together smoothly. For example, a nondischargeable debt must be paid after plan confirmation. May the debt be classified separately from other claims to permit the continued payment, or must the claim be paid independent of the plan? If the latter, the governmental unit may continue to pursue collection action against the reorganized debtor,[54] making plan implementation more challenging, to say the least. Section 1122 permits separate classification under certain circumstances, although the case law is decidedly mixed on the permissible circumstances.[55] Courts have permitted separate classification of nondischargeable debts in Chapter 13 cases, reasoning that separate classification that facilitates full payment carries out Congress' intent that such claims receive more favorable treatment.[56] This case law might be imported into Chapter 11 to permit separate classification. Separate classification into a class that provides for full payment could provide the reorganized debtor protection against post-effective date collection action, under the rationale of the Supreme Court's *Energy Resources* decision,[57] as the discharge injunction does not by its terms apply to a nondischargeable debt.[58]

Interest continues to accrue during a Chapter 11 case on a nondischargeable debt.[59] Therefore, the amount required to be paid after confirmation will include postpetition interest, which is not normally allowable in the Chapter 11 case.[60] Will the plan be able to provide for the payment of such a disallowed claim, or must the claim be paid independent of the plan, with all of the collection risk to the reorganized debtor that might entail?

Finally, will a reorganizing debtor be able to evade nondischargeability concerns by confirming a plan that transfers its assets and business to a new

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[52]31 U.S.C. § 3730(d)(1)-(3).

[53]11 U.S.C. § 101(41) (2000) ("person" does not include governmental unit).

[54]11 U.S.C. § 524(a) (2000) (discharge injunction applies only to discharged debts).

[55]*See* Boston Post Road Ltd. P'ship v. FDIC (*In re* Boston Post Road Ltd. P'ship), 21 F.3d 477, 481 (2d Cir. 1994).

[56]*See, e.g., In re* Freshley, 69 B.R. 96, 98 (Bankr. N.D. Ga. 1987).

[57]United States v. Energy Res. Co., 495 U.S. 545 (1990).

[58]11 U.S.C. § 524(a) (2000).

[59]Bruning v. United States, 376 U.S. 358, 361-63 (1964).

[60]11 U.S.C. § 502(b)(2) (2000).

entity? As Professor Vern Countryman of Harvard Law School often said, "A certificate of incorporation is a bankruptcy discharge in advance."

6. *Nondischargeability of Certain Taxes*

Following the same policy of nondischargeability of fraudulently incurred obligations to governmental units, BAPCPA makes nondischargeable in a corporate Chapter 11 case "a tax or customs duty with respect to which the debtor (i) made a fraudulent return; or (ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty."[61] Before BAPCPA, such taxes were nondischargeable under § 523(a)(1)(C) only in an individual's case, whether under Chapter 7 or Chapter 11.[62] The scope of the new corporate provision in Chapter 11 should be the same as the scope of § 523(a)(1)(C). Unlike debts that are nondischargeable under § 1141(d)(6)(A), taxes that are nondischargeable under § 1141(d)(6)(B) are not limited only to those owed to a domestic governmental unit; any such tax or customs duty is excepted from discharge.

It is unclear the extent to which this change will actually increase the amount of taxes that must be paid in Chapter 11 reorganizations. Under current law, taxes and customs duties incurred during the period between the filing of an involuntary petition and the order for relief and most taxes in a voluntary case are already entitled to priority.[63] Because of the breadth of those tax priority provisions, nearly all tax claims, except those that are stale, are entitled to priority, and must be paid in full under a Chapter 11 plan.[64] Therefore, many of the taxes covered by the new nondischargeability provision will already have been entitled to priority and payment in full under a Chapter 11 plan, so the ultimate economic effect of this change is probably minimal, except as to postpetition, preconfirmation interest.

As noted above for nondischargeable fraud claims, interest on nondischargeable taxes will continue to accrue during the case. However, the treatment of tax claims and interest on taxes under Chapter 11 differs from the treatment of nontax claims. Because priority taxes must be paid in full under a plan, they are not classified.[65] Postpetition, pre-effective date interest is not allowable under § 502(b)(2) and therefore is subject to the same payment problems as for interest on nondischargeable fraud debts, noted above. Even if it were allowed, such interest is not entitled to priority under § 507(a)(8) and therefore technically must be placed in a class of claims.[66] The interest claim would be a general unsecured claim and therefore might be placed in

[61] 11 U.S.C. § 1141(d)(6)(B) (2005).
[62] 11 U.S.C. §§ 523(a)(1)(C), 1141(d)(3) (2000).
[63] 11 U.S.C. §§ 507(a)(3), (a)(8) (2000).
[64] 11 U.S.C. § 1129(a)(9) (2000).
[65] 11 U.S.C. § 1123(a)(1) (2000).
[66] 11 U.S.C. § 1123(a)(1) (2000).

the same class as general unsecured claims against the debtor. However, because it is nondischargeable, separate classification may be appropriate, as for nondischargeable fraud claims, for the same reasons as in Chapter 13.[67]

II. PROVISIONS AFFECTING MANAGEMENT COMPENSATION AND RETENTION AND CORPORATE CONTROL

News coverage—sensational and otherwise—over the cataclysmic decline and fall of companies like Enron, Adelphia, WorldCom, and Polaroid highlighted the Chapter 11 process and created the impression that overpaid, corrupt executives are pillaging corporate America and lining their pockets while driving their companies into bankruptcy, at the expense of employees, creditors and innocent investors. Reacting to these highly publicized debacles, Congress included in BAPCPA a series of draconian provisions that will make it more difficult for debtors to attract and retain competent management, while increasing the likelihood of expensive and distracting litigation over corporate control.

A. Appointment of a Trustee

Although BAPCPA slightly changed the general standards to be applied by the court in determining whether to appoint a trustee,[68] it took a bigger step by requiring that the United States Trustee move for the appointment of a Chapter 11 trustee "if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting."[69]

By creating a vague "reasonable grounds to suspect" trigger requiring the United States Trustee to file a trustee motion, BAPCPA may lead to increased litigation and costs, as well as diversion of manpower and business disruption, in the early stages of many cases where financial reporting has

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[67] *Cf., e.g., In re* Freshley, 69 B.R. 96, 98 (Bankr. N.D. Ga. 1987).

[68] A court may order the appointment of a trustee (i) if cause exists for the appointment of a trustee, including fraud, dishonesty, incompetence or gross mismanagement by current management, either before or after the case is commenced, or similar cause, 11 U.S.C. § 1104(a)(1) (2000), or (ii) if the appointment of a trustee is in the interests of creditors, equity holders, and other interests of the estate. 11 U.S.C. § 1104(a)(2) (2000). BAPCPA adds a third ground, namely, if the court determines that grounds exist to convert or dismiss the case, but that appointment of a trustee, rather than conversion or dismissal, is in the best interests of creditors and the estate. 11 U.S.C. § 1104(a)(3) (2005). Section 1112, which addresses conversion and dismissal, has expanded the definition of "cause" for conversion or dismissal, thereby also expanding, albeit indirectly, the "cause" that will support appointment of a trustee or examiner. 11 U.S.C. § 1112(b)(4) (2005).

[69] 11 U.S.C. § 1104(e) (2005). BAPCPA amendments to § 1104(e) are applicable in cases filed on or after April 20, 2005. *See* Pub. L. No. 109-8, §§ 1405, 1406(b)(1), 119 Stat. 23, 215-16 (2005).

been, or is alleged to have been, deficient. Many public companies filing for Chapter 11 have restated their financials or are the subject of investigations or investor/bondholder lawsuits alleging securities laws violations (including fraud) in connection with public reporting. Does the existence of these restatements, investigations or lawsuits constitute "reasonable grounds to suspect" actual fraud, dishonesty or criminal conduct in the debtor's management or public reporting so as to require the United States Trustee to file a trustee motion? Does "actual fraud" include mistaken accounting judgments requiring a restatement? How many or which "members of the debtor's governing body" must have been involved? Does the involvement in the specific conduct of a single member of the board taint the debtor, or does the provision require a few or even a majority of members to have been involved in order for it to apply? If the existence of prepetition securities fraud litigation triggers "reasonable grounds to suspect," will the bankruptcy court then, in effect, be required to conduct a mini-trial on the merits of the securities fraud suits, thereby undermining the benefits of § 362(a), which automatically stays such suits as against the debtor? What are the res judicata and collateral estoppel effects of such a mini-trial? Should the United States Trustee investigate to determine whether "reasonable grounds to suspect" exist? When should the United States Trustee act under this provision? What if the grounds to suspect actual fraud, dishonesty, or criminal conduct are not uncovered until well into the case? Will the United States Trustee actually take the lead in prosecuting such a motion, or will discovery and other matters be handled primarily by other constituents and, if so, which ones? Who will pay for the prosecution of these motions? Does the "reasonable grounds to suspect" standard obviate the need to plead fraud with specificity?

Finally, will any of these interpretive questions ever receive a definitive answer? Do they need to? The provision changes neither the United States Trustee's ability to seek an order for the appointment of a trustee nor the standards for ordering appointment of a trustee. The United States Trustee may make such a motion at any time, whether or not required under this new subsection. It would seem, therefore, that the provision most likely will come into play when a party in interest wishes to supplant management and force the United States Trustee to seek appointment of a trustee. If the United States Trustee refuses to file a trustee motion, the party in interest might seek to compel the United States Trustee to do so by filing a motion with the court. Although a party in interest itself may move for the appointment of a trustee, a party in interest might prefer that the United States Trustee file and prosecute the motion because of the cost of investigation and expense to prove, not just reasonable grounds to suspect, but rather the full substantive grounds for the appointment. Sound administration suggests that the courts should not countenance such motions, but should leave the decision whether to seek the appointment of a trustee to the United States Trustee's discretion. And though the discretion should be exercised soundly, it is hard to see why the court should, as a practical matter, review the exercise of discretion, particularly since parties in interest can pursue their own motions for appointment of a trustee.

Nevertheless, given the time, manpower, costs and disruption associated with a contested trustee motion, and the potential uncertainty and harm to the business, boards of directors may be under increased pressure to act prepetition to remove CEOs and CFOs who were involved with the company's public reporting (or misreporting), regardless of whether their conduct rises to the level of fraud, dishonesty or criminal conduct. While turnaround management and work-out firms may become the beneficiaries of any need to replace senior management in connection with a bankruptcy filing, this, too, is likely to increase costs and reduce recoveries to the debtor's stakeholders. Attracting new management will be more difficult, however, because of the limitations on retention and severance plans that BAPCPA imposes.

B. Executive Compensation and Severance

BAPCPA severely limits administrative priority claims for certain types of executive compensation and severance in bankruptcy, regardless of the quality of management, the absence of alleged wrongful conduct, or the desires of the company's board of directors or constituents.[70]

1. *Retention Payments*

BAPCPA absolutely prohibits payments and obligations to an insider (in this context, generally officers and directors of the debtor) for the purpose of inducing the insider "to remain with the debtor's business" unless the court finds that the payment obligation "is essential to the retention of the person because the individual has a bona fide offer from another business at the same or greater rate of compensation," "the services provided by the person are essential to the survival of the business," and the amount does not exceed ten times the mean of similar payments made or obligations incurred to nonmanagement employees "for any purpose during the calendar year in which the transfer is made or obligation is incurred" or, if no such payments or obligations were made or incurred, twenty-five percent of any similar transfer made or obligation incurred to the insider for any purpose in the prior calendar year.[71] This is an extraordinarily difficult, if not impossible, standard to meet.

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[70] 11 U.S.C. § 503(c) (2005).

[71] 11 U.S.C. § 503(c)(1) (2005). In computing the maximum permissible retention, it is unclear whether the "for any purpose" language in § 503(c)(1)(C)(ii) supersedes the "similar transfer or obligation" language. In other words, is the percentage cap to be applied only to retention payments ("similar transfers") or to any compensation (transfers to an executive "for any purpose")? If the latter, then the limita-

The likely effect is to prohibit all insider retention payments. How likely is it that a key manager will seek another, bona fide job offer if his sole purpose is to use the offer to obtain a retention bonus from the debtor? If that is the purpose, is the resulting offer bona fide? If the offer is at higher compensation, will the manager remain with the debtor? Once having procured a better offer from a non-troubled company, why not accept the offer? Moreover, even if this prong of the BAPCPA test is satisfied, the debtor still must establish that the employee's services are "essential to the survival of the business."[72] This focus on survival is at odds with Chapter 11's goal, which is maximization of value, not just hobbling along on life support.[73]

2. *Severance*

BAPCPA also contains an express limitation on severance payments to insiders, allowing them only if (i) they are part of a severance program that is generally applicable to all full time employees and (ii) the insider's payments do not exceed ten times the mean severance pay given to nonmanagement employees in the same calendar year.[74] The problems with this test are the same as for the calculation of amounts payable under the retention provisions.[75]

3. *Incentive Compensation Plans*

BAPCPA does not preclude incentive bonus plans based on performance, rather than longevity or involuntary termination; nor does it set specific standards or rules for such plans. Section 503(c)(3) merely requires that such other transfers or obligations outside the ordinary course of business, including those to or for the benefit of officers, managers, or consultants hired postpetition, be "justified by the facts and circumstances of the case."[76] This would seem to be a far easier standard to satisfy for incentive compensation plans than those set forth in § 503(c)(1) and (2) for plans that are focused solely on retention. Thus, BAPCPA may simply result in recasting retention inducements as incentive bonus plans with low thresholds.

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tion might apply to all compensation, not just retention payments, although such a result seems unwarranted. If the former, what happens if neither the insider nor nonmanagement employees received or became entitled to retention payments in the relevant time period? Strict application of the formula would yield zero, since ten times zero is zero and twenty-five percent of zero is zero. This result also seems unwarranted.

Also, although intended mainly to limit retention bonuses to executives, the literal language of the provision could be read as prohibiting payment of even ordinary compensation to an insider unless he can show that he has a competing job offer at the same or a higher salary elsewhere. It seems unlikely, however, that the amendment will be so interpreted.

[72]11 U.S.C. § 503(c)(1)(B) (2005).

[73]*See, e.g.*, Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 352 (1985).

[74]11 U.S.C. § 503(c)(2) (2005).

[75]*See supra* note 71.

[76]11 U.S.C. § 503(c)(3) (2005).

4. *Avoidance of Prepetition Transfers or Obligations to Insiders*

a. Section 503

In addition to being unrealistically strict, BAPCPA's executive retention and severance provisions are poorly drafted and ambiguous. Although they are set forth in § 503, dealing with allowance and payment of administrative expenses, these BAPCPA provisions also purport to preclude the allowance and payment as an administrative expense of payments previously made, a topic normally addressed in the Bankruptcy Code's avoidance sections. Thus, § 503(c) states that notwithstanding § 503(b), which governs the allowance of administrative claims, "there shall neither be allowed, nor paid . . . (1) *a transfer made to* . . . an insider" for purposes of inducing him to remain with the debtor.[77] The concepts of allowance and payment, however, relate to outstanding claims, not to transfers that have already been made. Thus, if a transfer (*i.e.*, payment) was made prepetition, there is no claim to allow or pay unless the transfer is avoided and recovered as a preference or fraudulent transfer and the claim reinstated under § 502(h).[78] Even then it would be a prepetition claim. If a payment in violation of § 503(c)(1)'s standards is made postpetition, it presumably is voidable and recoverable under §§ 549 and 550, with any resulting reinstated claim then being subject to § 503(c)(1) or § 502(h). It is unclear whether Congress, in using the words "a transfer made" in § 503(c)(1), intended surreptitiously to create an additional avoidance power in § 503 or whether § 503 is just poorly drafted. The latter seems more likely.

Similarly, it is unclear whether Congress intended to deny an executive the right to a prepetition claim for unpaid obligations, or avoided payments, relating to executive severance or retention. The allowability of prepetition claims (or claims treated as such under § 502(h)) normally is addressed in § 502. Because § 502, unlike § 503, does not require their disallowance, such claims could be allowed as prepetition claims, subject to the same rules of allowance or disallowance that govern claims generally.

b. Executory Contract Assumption

BAPCPA does not directly address whether a debtor-in-possession may assume a prepetition agreement containing provisions that do not satisfy § 503(c)'s requirements. The implication seems to be, however, that assumption is not permissible. In any event, even if such a contract is assumed, if the contractual retention or severance payments come due during the course of

[77] 11 U.S.C. § 503(c)(1) (2005) (emphasis added).

[78] 11 U.S.C. § 502(h) (2000). Section 502(h) provides that "[a] claim arising from the recovery of property under section . . . 550 . . . of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section [502] . . . the same as if such claim had arisen before the date of the filing of the petition."

the case, they are subject to disallowance if they fail to meet the criteria or exceed the caps established by § 503(c).

c. Fraudulent Transfer

In addition to extending the fraudulent transfer reachback period to two years from one year[79] for cases commenced on or after April 21, 2006,[80] BAPCPA also permits the avoidance, as a fraudulent transfer or obligation, of a transfer made, or an obligation incurred, to or for the benefit of an insider under an employment contract, without regard to the debtor's solvency or financial condition at the time the transfer was made or the obligation incurred, if the transfer or obligation was not in the ordinary course of business and the debtor received less than reasonably equivalent value in exchange.[81] This provision will likely require careful scrutiny of executive compensation paid or obligations incurred within two years before bankruptcy.

III. PROVISIONS AFFECTING FORMULATION OF A BUSINESS PLAN

One of the most important tasks facing a Chapter 11 debtor is formulation of a business plan that can form the keystone of a Chapter 11 plan. BAPCPA contains a number of provisions that will affect (usually adversely) the ability of certain types of debtors to craft a viable business plan.

A. Real Property Leases

Under pre-BAPCPA law, a reorganizing debtor-in-possession had to decide whether to assume or reject an unexpired lease of nonresidential real property within sixty days after bankruptcy, which period could be extended by the court "for cause."[82] Pre-BAPCPA, the statute did not impose any limits on the number of extensions that the court could grant or on their length. Debtors-in-possession, particularly in retail cases involving dozens or hundreds of leases, historically received multiple extensions from the bankruptcy courts, often continuing until plan confirmation.

Although BAPCPA extends the initial sixty-day decision period to 120 days,[83] seemingly benefiting the debtor, it allows the court to grant only a single extension, for ninety days, on request of the debtor-in-possession or

[79] 11 U.S.C. § 548(a)(1) (2005).

[80] Pub. L. No. 109-8, § 1406(b)(2), 119 Stat. 23, 215-16 (2005).

[81] 11 U.S.C. § 548(a)(1)(B)(i), (ii)(IV) (2005). Although the BAPCPA amendment extending the reachback period from one year to two years applies only with respect to cases commenced more than one year after the date of enactment (*i.e.*, on or after April 21, 2006), the remainder of the amendment is effective in cases filed on or after April 20, 2005. *See* Pub. L. No. 109-8, § 1406(b)(1), 119 Stat. 23, 215-16 (2005).

[82] 11 U.S.C. § 365(d)(4) (2000).

[83] 11 U.S.C. § 365(d)(4)(A)(i) (2005).

lessor, for cause.[84] Any subsequent extension requires the lessor's prior written consent "in each instance," presumably requiring separate consents for each extension.[85]

BAPCPA shifts significant leverage to real property lessors, requiring debtors-in-possession to decide quickly which leases to assume or reject, thereby threatening the viability of restructurings of debtors with multiple locations, particularly retailers. A debtor-in-possession faced with recalcitrant landlords may have to reject potentially valuable leases prematurely, to the detriment of its ultimate business plan and creditor recoveries; assume leases prematurely, thereby creating priority administrative claims if assumption proves to have been improvident and the leases are later rejected; or pay the landlord a consent fee or make other concessions (with court approval) to obtain the landlord's written consent to each additional extension. In some situations, however, such as where a lease is at or below a current market rate, a landlord might be more willing to permit extensions to keep rent flowing; the debtor-in-possession might do so to preserve the space while it develops either a business plan or a plan to move. The latter may induce a landlord to compromise on rent or other terms.

BAPCPA does attempt to reduce the economic damage resulting from improvident assumption by limiting administrative expense claims arising from the rejection of previously assumed nonresidential real property leases to monetary obligations due in the two years following the later of turnover of the premises or rejection.[86] However, the general effect of these amendments is to force debtors to make early decisions that could prove detrimental to their overall business plans and creditor recoveries. If there is a decision to sell the company or its assets rather than reorganize, the debtor-in-possession must find a buyer quickly to avoid losing the lease value to the lessor. While BAPCPA does not preclude the practice that has developed of selling the right to designate an assignee of a lease,[87] it is likely to have a chilling effect on the sale of such designation rights because the time period for finding an assignee is shortened.

For debtors with significant numbers of leaseholds and seasonal businesses, such as retailers, BAPCPA also may result in a decision to time Chapter 11 filings so that the assumption/rejection deadline occurs after a busy season, which may not be optimal from a business or cash flow perspective. Clearly, the new statute will require careful prebankruptcy planning by and

[84] 11 U.S.C. § 365(d)(4)(B)(i) (2005).

[85] 11 U.S.C. § 365(d)(4)(B)(ii) (2005).

[86] 11 U.S.C. § 503(b)(7) (2005).

[87] *See, e.g.*, Weingarten Nostat, Inc. v. Serv. Merch. Co., 396 F.3d 737 (6th Cir. 2004).

input from the company, counsel, and either a financial advisor or a lease disposition expert.

B. Cure of Nonmonetary Defaults

BAPCPA amends the provisions of the Bankruptcy Code dealing with the debtor's ability to assume an unexpired lease or executory contract notwithstanding the existence of a noncurable nonmonetary default, such as violation of a "going dark" clause. Applying pre-BAPCPA law, some courts held that a debtor could not assume an unexpired lease or executory contract in the face of such a default.[88] BAPCPA, however, provides that the debtor need not cure "a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible . . . to cure such default by performing nonmonetary acts at and after the time of assumption."[89] In other words, BAPCPA provides (inartfully) that a debtor need not forfeit a real property lease solely because of the existence of an incurable default.[90] The BAPCPA amendment further provides that, if the default arises from the failure to operate in accordance with a nonresidential real property lease, the default must "be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default" must be paid.[91]

Unfortunately, BAPCPA does nothing to help a debtor who has an incurable nonmonetary default under a valuable personal property lease, license or other type of executory contract. BAPCPA's amendments to § 365(b)(1)(A) apply only to real property leases, not to executory contracts or personal property leases. The failure of the amendment to apply to executory contracts and personal property leases, coupled with the amendment to

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[88] *See, e.g.*, Worthington v. Gen. Motors Corp. (*In re* Claremont Acquisition Corp.), 113 F.3d 1029, 1034-35 (9th Cir. 1997).

[89] 11 U.S.C. § 365(b)(1)(A) (2005). Former § 365(b)(2) had provided that the debtor was not required to cure "a default that is a breach of a provision relating to . . . (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure . . . to perform nonmonetary obligations under the executory contract or unexpired lease." 11 U.S.C. § 365(b)(2) (2000). BAPCPA adds the word "penalty" in front of the word "provision," thereby undercutting the rationale of decisions holding that debtors need not cure nonmonetary defaults, regardless of whether such defaults related to a "penalty" provision or not. Courts so holding had concluded that "penalty" modified the word "rate" but not the word "provision." *See, e.g.*, Eagle Ins. Co. v. BankVest Capital Corp. (*In re* BankVest Capital Corp.), 360 F.3d 291, 296-302 (1st Cir.), *cert. denied*, 124 S. Ct. 2874 (2004). BAPCPA changes that.

[90] The parallel amendment to § 1124(2)(A) clarifies that to render a class of claims or interests unimpaired under a plan, one need not cure any default "of a kind that section 365(b)(2) expressly does not require to be cured." 11 U.S.C. § 1124(2)(A) (2005). However, since the cure provision appears in § 365(b)(1), it is not likely that it is covered by the amendment to § 1124(2)(A).

[91] 11 U.S.C. § 365(b)(1)(A) (2005).

§ 365(b)(2)(D), strongly suggest that cases such as *Bank Vest* have been overruled and that a debtor may not assume an executory contract or personal property lease, no matter how important or valuable that contract or lease may be, if there is an incurable nonmonetary default that the nondebtor party refuses to waive. Even if an executory contract or unexpired personal property lease cannot be assumed because of an incurable nonmonetary default, however, it does not follow that it must be rejected. Rather, the debtor may choose neither to assume nor to reject, leaving open the possibility of post-emergence litigation over whether the nondebtor party may terminate the contract or lease under applicable nonbankruptcy laws.[92]

C. Restrictions on Sale/Lease of Personally Identifiable Information

In an attempt to address consumer privacy concerns, BAPCPA amends § 363(b)(1) of the Bankruptcy Code to restrict the sale or lease of "personally identifiable information about individuals" in any case where (i) the debtor, in connection with offering a product or service to an individual, disclosed to that individual "a policy prohibiting the transfer" of such information to persons not affiliated with the debtor and (ii) such policy is in effect on the date of commencement of the case.[93] Any such sale or lease of "personally identifiable information" must be consistent with the debtor's policy,[94] unless, after appointment of a consumer privacy ombudsman under § 332, and after notice and a hearing, the court approves the sale or lease "giving due consideration to the facts, circumstances, and conditions of such sale or such lease" and "finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law."[95] "Personally identifiable information" is defined to include name, geographical address, e-mail or electronic address, residential telephone number, social security number, or credit card account number, if such information was provided by an individual to the debtor in connection with obtaining a product or service from the debtor primarily for personal, family or household purposes.[96] The definition also includes birth date or place of birth or other information that, if disclosed, will result in contacting or identifying such person physically or electronically, if such information was "identified in connection with 1 or more of the items of infor-

[92] *See In re* Hernandez, 287 B.R. 795 (Bankr. D. Ariz. 2002) (unassumed, unrejected contract rides through bankruptcy case).

[93] 11 U.S.C. § 363(b)(1) (2005).

[94] 11 U.S.C. § 363(b)(1)(A) (2005).

[95] 11 U.S.C. § 363(b)(1)(B) (2005). Note that the court does not have to find that the sale or lease does not violate applicable nonbankruptcy law, only that no such showing has been made. Thus, it appears that the debtor does not bear the burden of proof on this issue.

[96] 11 U.S.C. § 101(41A)(A) (2005).

mation specified in subparagraph (A)."[97]

If a sale or lease under § 363(b)(1) is not consistent with the debtor's prepetition policy regarding disclosure of "personally identifiable information about individuals," the court must order the United States Trustee to appoint a disinterested consumer privacy ombudsman under § 332.[98] The ombudsman, who must be appointed at least five days before the § 363(b)(1)(B) hearing,[99] must provide the court with information that will assist the court "in its consideration of the facts, circumstances, and conditions of the proposed sale or lease of personally identifiable information under section 363(b)(1)(B)."[100] Examples of the types of information that the ombudsman might present include the debtor's privacy policy, the potential losses or gains of privacy to consumers if the sale or lease occurs, and potential alternatives that would mitigate potential privacy losses or costs to consumers.[101] The consumer privacy ombudsman's compensation is subject to allowance under § 330(a).[102]

For debtors liquidating during their Chapter 11 case rather than under a confirmed plan, these new provisions could adversely affect the value received upon a sale of a business that depends upon customer lists, as well as increase transaction costs and the time needed to effectuate a § 363 sale. However, § 332 requires appointment of a consumer privacy ombudsman only in the context of sales or leases under § 363(b)(1),[103] not in the context of a sale under a Chapter 11 plan, and § 1123(a) of the Bankruptcy Code continues to allow a plan to provide for a transfer or sale of the debtor's property "[n]otwithstanding any otherwise applicable nonbankruptcy law."[104]

IV. PROVISIONS AFFECTING RELATIONSHIPS WITH CREDITORS' COMMITTEES AND INVESTMENT BANKERS

A. Official Committees

1. *Membership*

Until 1986, the Bankruptcy Code expressly granted the court the authority to change the membership of a committee "if the membership of such committee is not representative of the different kinds of claims or interests to

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97 11 U.S.C. § 101(41A)(B) (2005).
98 11 U.S.C. § 332(a) (2005).
99 11 U.S.C. § 332(a) (2005).
100 11 U.S.C. § 332(b) (2005).
101 11 U.S.C. § 332(b)(1)-(4) (2005).
102 11 U.S.C. § 330(a)(1) (2005).
103 11 U.S.C. § 332(a), (b) (2005).
104 11 U.S.C. § 1123(a)(5)(B), (D) (2000).

be represented."[105] The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986[106] repealed this provision, leaving substantial uncertainty and inconsistent case law on whether the court was prohibited from changing committee membership or retained authority to do so and, if so, under what standard.[107] BAPCPA returns at least some authority to the court, expressly authorizing the court to order the United States Trustee to "change the membership" of an official committee "if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders."[108] It is unclear, however, whether the court's order can actually name new committee members and remove existing members or whether the court is limited to ordering the United States Trustee to change the membership to ensure adequate representation. The battle for committee membership will thus be waged not only in the offices of the United States Trustee, but in court as well, with attendant increases in costs and uncertainty.

Under a provision apparently designed to protect small businesses, which often have been excluded from Chapter 11 creditors' committees because of the small size of their claims, BAPCPA authorizes, but does not require, the court to order the United States Trustee to appoint to a creditors' committee a "small business concern" as defined in the Small Business Act if the concern's claim, no matter how small in the scope of the Chapter 11 case, is disproportionately large compared to the concern's annual revenues.[109] It remains to be seen whether a small business concern will be willing to devote the time and attention to committee service in larger cases, so the actual effect of this provision is uncertain.

2. *Information Sharing*

In an amendment that is certain to increase expense and potentially change the extent to which, and manner in which, debtors-in-possession share confidential information with official committees, BAPCPA requires a committee to provide its non-committee member constituents access to information and subjects it to orders that require reports or disclosures to those constituents.[110] The statute gives no guidance on the extent of this obligation and raises difficult questions regarding the timing and circumstances under which nonpublic information must be shared. It is unclear, for example, whether a confidentiality agreement between the debtor-in-possession

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[105] 11 U.S.C. § 1102(c) (repealed Oct. 27, 1986).

[106] Pub. L. No. 99-554, § 221, 100 Stat. 3088, 3101 (1986).

[107] *See* 7 Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY ¶ 1102.07[2] (15th rev. ed. 2005).

[108] 11 U.S.C § 1102(a)(4) (2005).

[109] 11 U.S.C. § 1102(a)(4) (2005).

[110] 11 U.S.C. § 1102(a)(4) (2005).

and the committee or a court order can eliminate, or at least limit, the committee's information sharing obligation. It is unclear what kinds of protections can and should be established to prevent improper claims trading. Must the committee publish any information it disseminates to individual creditors, or does it need to supply it only to the requesting creditor? Will the answer differ depending on whether the debtor has issued securities that trade on a public market? How often must the committee prepare reports? If the debtor is a public company whose periodic reports on Forms 10-K, 10-Q and 8-K are current, can the committee satisfy its obligations by referring its constituents to those reports or must it spend time (and the estate's money) compiling additional reports? If so, what should those reports contain that is not already in the public SEC reports?

Committees also will be required to solicit and receive comments from their constituents.[111] Again, the statute gives no guidance on how often committees must solicit, what information or views they must solicit, or how any such solicitation will affect solicitation of plan acceptances, which may be made only after court approval and transmittal of a disclosure statement. Because of the value of information in any financial transaction, these provisions may generate significant litigation, especially in larger cases.

3. *Committee Member Attorneys*

Congress added § 503(b)(3)(F) to the Bankruptcy Code in 1994 to authorize the reimbursement of committee members' direct expenses incurred in serving on a Chapter 11 committee.[112] Because of the provision's placement, it was unclear whether that provision also authorized the reimbursement of a committee member for professional fees that the individual member incurred in connection with serving on the committee. The case law was split on the issue.[113] BAPCPA clarifies the law by eliminating the provision under which committee members could obtain payment from the estate for their own individual lawyers (as distinguished from the committee's lawyers).[114]

B. Investment Bankers

A debtor-in-possession may employ professionals, such as lawyers and financial advisors, only if they are, among other things, "disinterested."[115] Before BAPCPA, a financial advisor was not disinterested if it was an invest-

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[111] 11 U.S.C. § 1102(b)(3)(B) (2005).

[112] Pub. L. 103-394, § 110, 108 Stat. 4106, 4113 (1994).

[113] *Compare* First Merchants Acceptance Corp. v. J.C. Bradford & Co., 198 F.3d 394, 398-99 (3d Cir. 1999) (relying on plain meaning to allow reimbursement of professional fees incurred), *with In re* Firstplus Financial, Inc., 254 B.R. 888, 891-94 (Bankr. N.D. Tex. 2000) (declining to follow *First Merchants*), *and In re* County of Orange, 179 B.R. 195, 201-02 (Bankr. C.D. Cal. 1995) (finding section ambiguous).

[114] 11 U.S.C. § 503(b)(4) (2005).

[115] 11 U.S.C. § 327(a) (2000).

ment banker for (i) any of the debtor's outstanding securities or (ii) any securities offered, sold or issued within three years before bankruptcy, whether or not such securities were still outstanding.[116] A law firm was not disinterested if it acted as counsel for the investment banker in connection with the offer, sale or issuance of a security of the debtor within three years before the date of the filing of the petition.[117] BAPCPA repeals both of these provisions, thereby substantially increasing potential competition among the investment banks for financial advisory positions in Chapter 11 cases. Disinterestedness still requires, however, that an entity not be a creditor or equity security holder[118] and "not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason,"[119] thus leaving open the possibility that, in certain circumstances, a current or former investment banker still might not be disinterested. For example, if the advisor is a defendant in securities litigation involving the issuance of the debtor's securities and/or has an indemnification claim against the debtor, a court could conclude that the advisor has an interest materially adverse to the estate and therefore may not be retained.

V. PROVISIONS AFFECTING THE PLAN PROCESS

A. Prepackaged Chapter 11 Plans

While many, if not most, of BAPCPA's provisions make it more difficult or expensive for debtors in Chapter 11, BAPCPA's provisions relating to prepackaged plans—viz., plans that are negotiated and drafted, and as to which all votes are solicited, prepetition—encourage and foster their use.

1. *Solicitation*

Under current law, if a debtor has commenced solicitation of acceptances of a prepackaged plan but a bankruptcy petition is filed before the end of the solicitation period, whether a voluntary one, as for example by the debtor to obtain the protection of the automatic stay, or an involuntary one by creditors attempting to disrupt the solicitation, absent a court order approving a disclosure statement and continued solicitation, most practitioners believe the solicitation must stop.[120] This has the effect of affording a few dissenting creditors the power to stop a prepackaged plan in its tracks.

[116] 11 U.S.C. § 101(14)(B), (C) (2000).

[117] 11 U.S.C. § 101(14)(C) (2000).

[118] 11 U.S.C. § 101(14)(A) (2005); *see* United States Trustee v. PriceWaterhouse, 19 F.3d 138 (3d Cir. 1994).

[119] 11 U.S.C. § 101(14)(C) (2005).

[120] See 11 U.S.C. § 1125(b) (2000).

BAPCPA's provisions, however, foster prepackaged plans by permitting solicitation to continue after the filing of a bankruptcy petition, as long as the solicitation began before the filing and the solicitation complies with applicable nonbankruptcy law, typically the securities laws.[121] Thus, under BAPCPA, creditors opposing and wishing to derail a prepackaged plan by preventing continued solicitation will now need to file their involuntary petition before solicitation begins, and aggressive collection or other actions by dissident creditors, suppliers or customers that result in a voluntary filing by the debtor will no longer interfere with a solicitation of acceptances of a prepackaged plan that has already begun.

2. *341 Meetings*

To expedite the confirmation of plans in which the debtor has solicited acceptances before the filing of the petition, BAPCPA authorizes the court to order that a § 341 meeting of creditors not be held in such a case.[122] This changes the result in some jurisdictions, where United States Trustees, who call and convene creditors' meetings, had successfully argued that confirmation of a plan could not occur until the meeting of creditors was held.

B. Plan Exclusivity

Section 1121 gives the debtor an exclusive right to file a Chapter 11 plan for the first 120 days after an order for relief. The court may extend the period "for cause."[123] In response to criticisms that bankruptcy courts were extending for too long the period in which a debtor had an exclusive right to file a Chapter 11 plan, and that creditors were being held hostage as a result, BAPCPA absolutely prohibits an extension of the debtor's exclusive period in which to file a Chapter 11 plan beyond eighteen months after the order for relief (plus an additional two months to solicit acceptances).[124] Different time periods and procedures apply to small business cases, a topic beyond the scope of this Article.[125]

VI. PROVISIONS AFFECTING CASE MANAGEMENT

A. Notices

At least in part to deal with the possible confusion created by the large volume of notices that creditors in consumer cases receive, BAPCPA amends the Bankruptcy Code's notice section to simplify the process for the creditors

[121] 11 U.S.C. § 1125(g) (2005).
[122] 11 U.S.C. § 341(e) (2005).
[123] 11 U.S.C. § 1121(b), (d) (2000).
[124] 11 U.S.C. § 1121(d)(2)(A), (B) (2005).
[125] *See* 11 U.S.C. § 101(51C) for a definition of "small business case" and 11 U.S.C. § 1121(e) (2005) for time limitations applicable in such cases.

(but not for the consumer debtors). Some of the amendments, however, are not limited to notices in consumer cases and apply in business cases as well. Failure to comply with these new requirements may result in the notice not being effective, thereby jeopardizing the efficacy of various court orders and deadlines.

Under BAPCPA, if the creditor has supplied the debtor, in at least two communications within ninety days before bankruptcy, with the creditor's current account number and the address at which the creditor requests to receive correspondence, then bankruptcy notices must be sent to that address and include the account number.[126] Moreover, any notice "concern[ing] an amendment to the schedules of assets and liabilities" must include the full taxpayer identification number in the notice sent to the creditor, but only the last four digits of such number in the copy filed with the court.[127] If the notice is not sent to that address with the account number, then the notice, if provided by the debtor or the court, is not "effective notice until such notice is brought to the attention of such creditor."[128] A notice is considered brought to the creditor's attention when it is actually received by a person or organizational subdivision that the creditor designates, in reasonable internal procedures that it establishes, to be responsible for receiving bankruptcy notices.[129] The bankruptcy court may not impose a monetary sanction for violation of the automatic stay against a creditor that has not received effective notice by the time of the violation.[130]

This represents a marked change from former § 342(c), which provided that failure of a notice to contain the information required by § 342 "shall not invalidate the legal effect of such notice,"[131] and its effect is unclear. Constitutional due process requires adequate notice before a party's rights may be affected.[132] Congress may define the required notice for any particular proceeding, as long as the defined notice meets minimum constitutional standards. New § 342(g) could be read as such a definition. If so, failure to follow the precise notice requirements of new § 342(c) could vitiate the general effectiveness of notices in a bankruptcy case. For example, a creditor might argue that the claims bar date or the discharge does not apply if the notice is not "effective," as that term is used in § 342(g). If courts were to adopt that reading, then debtors would be at serious risk that any relief af-

[126] 11 U.S.C. § 342(c)(2)(A) (2005).

[127] 11 U.S.C. § 342(c)(1) (2005).

[128] 11 U.S.C. § 342(g)(1) (2005). Section 342(g)(1) applies only to notices sent by the debtor or the court, not by a trustee, committee, or other party-in-interest.

[129] 11 U.S.C. § 342(g)(1) (2005).

[130] 11 U.S.C. § 342(g)(2) (2005).

[131] 11 U.S.C. § 342(c) (2000).

[132] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

forded would not be binding on creditors to whom notice was not sent precisely in accordance with § 342(c). Debtors could possibly protect themselves against an inadequate notice by showing that the notice was "brought to the attention of such creditor" because the creditor designated "a person or an organizational subdivision of such creditor to be responsible for receiving notices under [the Bankruptcy Code] and establishe[d] reasonable procedures so that such notices receivable by such creditor are to be delivered to such person or such subdivision."[133] But making such a showing would be difficult at best, and, if the creditor never established such procedures, the debtor would be unable to obtain the benefit of this particular protection.

On the other hand, one could argue that § 342(g)(1) must be read in conjunction with, and arguably is limited by, § 342(g)(2), which precludes imposition of a monetary penalty on a creditor for a stay violation unless the violating conduct "occurs after such creditor receives notice effective under this section."[134] Because paragraph (2) specifies the effect of failure to give "effective notice," an argument can be made that all Congress intended by paragraph (1) was to provide the protection contained in paragraph (2), so that creditors are not monetarily penalized, perhaps unfairly in the minds of some, for conduct that occurs before a precise form of notice is received. Such a reading would be consistent with the *in rem* nature of a bankruptcy case, recognized by the Supreme Court only shortly before BAPCPA's enactment.[135] Thus, the automatic stay would continue to apply to actions taken by creditors who did not have "effective notice," so that any property seized in violation of the stay would have to be returned, but the court could not impose a monetary sanction on the violating creditor.

Any other reading could create difficulties for implementation of bankruptcy policy and would be inconsistent with the *in rem* nature of a bankruptcy case. For example, if the discharge did not apply to creditors who do not have "effective notice," even if they have actual notice, there would be tremendous gaps in the fresh start policy. Creditors dealing with property of the estate might be immune from the bankruptcy court's power to avoid unauthorized transactions. In sum, the latter reading is consistent with the language of § 342(g) and with the creditor protection policy it embodies and seems more consistent with the Bankruptcy Code as a whole.[136]

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[133] 11 U.S.C. § 342(g)(1) (2005).

[134] 11 U.S.C. § 342(g)(2) (2005).

[135] *See* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447-51 (2004); 28 U.S.C. § 1334(e) (court has exclusive jurisdiction of property).

[136] "Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ." United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

B. Automatic Stay (Securities Self-Regulatory Organizations)

BAPCPA exempts from the automatic stay: (i) investigations or actions by a securities self-regulatory organization to enforce its regulatory power;[137] (ii) the enforcement of an order or decision, other than for monetary sanctions, obtained in such an action;[138] and (iii) any act taken by such an organization to delist, delete or refuse to permit quotation of any stock that does not meet applicable regulatory requirements.[139] Note that the last item relates only to stock, not to securities generally. A "securities self-regulatory organization" is defined in new § 101(48A) as "either a securities association registered with the Securities and Exchange Commission under § 15A of the Securities Exchange Act of 1934 or a national securities exchange registered with the Securities and Exchange Commission under § 6 of the Securities Exchange Act of 1934."[140] NASDAQ, the New York Stock Exchange, and American Stock Exchange are included within this definition.

C. Automatic Stay (Nonavoidable Transfers)

BAPCPA amends § 362(b) to exclude from the scope of the automatic stay "any transfer that is not avoidable under section 544 and that is not avoidable under section 549."[141] The application of this provision is not entirely clear, although the House Report states that its purpose was to respond "to a 1997 Ninth Circuit case in which two purchase money lenders (without knowledge that the debtor had recently filed an undisclosed chapter 11 case that was later converted to chapter 7) funded the debtor's acquisition of an apartment complex and recorded the purchase-money deed of trust immediately following recordation of the deed to the debtors."[142] The footnote to this passage identifies the case as *In re McConville.*[143]

In *McConville*, the debtor contracted shortly before bankruptcy to purchase real property and fund the purchase price with a loan secured by a mortgage on the property. After the debtor filed for Chapter 11, the lender was unable to fund, and another lender, who had no knowledge of the Chapter 11 filing, was substituted. The sale and the loan closed shortly thereafter. Within weeks, the case converted to Chapter 7. The lender sought relief from the stay to foreclose; the trustee sought to avoid the lien under

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[137] 11 U.S.C. § 362(b)(25)(A) (2005).

[138] 11 U.S.C. § 362(b)(25)(B) (2005).

[139] 11 U.S.C. § 362(b)(25)(C) (2005). It is unclear which provision of the automatic stay in § 362(a) would apply to stay delisting of stock on an exchange.

[140] 11 U.S.C. § 101(48A) (2005).

[141] 11 U.S.C. § 362(b)(24) (2005).

[142] H.R. Rep. No. 109-31, 75 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 143 (footnote omitted).

[143] H.R. Rep. No. 109-31, 75 n.86 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 143; Thompson v. Margen (*In re* McConville), 110 F.3d 47 (9th Cir. 1997).

§ 549(a) as an invalid postpetition transfer. The lender argued that § 549(c)'s exception for a good faith purchaser for value without knowledge of the bankruptcy protected the lien. At first, the Ninth Circuit ruled, relying on prior precedent, that the granting of a lien was not a "transfer" for purposes of § 549.[144] It concluded, however, that the granting of the lien violated the automatic stay of § 362(a)(4) ("any act to create . . . any lien against property of the estate") and the lien was therefore void. Subsequently, the court withdrew that opinion, which was based on the applicability of the automatic stay, and ruled instead that the postpetition loan should be analyzed solely under § 364(c).[145] The House Report nevertheless cites the second opinion, which does not address the automatic stay at all.

Because the Ninth Circuit withdrew its automatic stay opinion, it is questionable whether BAPCPA needed to "respond" to that decision at all. Having done so, however, it seems apparent that the amendment should be read to address the original *McConville* opinion. When so read, § 362(b)(24) appears to overrule the withdrawn *McConville* opinion because the *McConville* lien grant (a) was not avoidable under § 549, either because (as the lender argued) it was protected by the good faith purchaser for value provision in § 549(c) or because (as the Ninth Circuit first ruled) a lien grant is not a transfer for purposes of § 549 and (b) having been perfected under applicable nonbankruptcy law, was not avoidable under either the strong-arm power of § 544(a) or the rights of creditors power of § 544(b). Because the lien grant "is not avoidable under section 549 and . . . is not avoidable under section 544," as the new automatic stay exception states, a court could no longer rely on § 362(a)(4) to void the lien grant.

Unfortunately, § 362(b)(24) seems to do more than overrule *McConville*, in ways that the authors probably did not intend and likely did not even contemplate. Some of these results are benign but some are less so. For example, the Ninth Circuit more recently ruled that a postpetition real property foreclosure sale that is insulated from avoidance under § 549(c), which protects a good faith purchaser without knowledge of the commencement of a case, may nevertheless be voided as a violation of the automatic stay, thereby partially vitiating the protections of § 549(c), because § 549(c) is not an exception to the automatic stay.[146] However, because such a sale is a "transfer that is not avoidable under section 544 [which generally applies to

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[144] Thompson v. Margen (*In re* McConville), 97 F.3d 316, 318 (9th Cir. 1996), *withdrawn and superseded*, 110 F.3d 47 (9th Cir. 1997). This ruling is highly questionable because § 101(54) defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property." 11 U.S.C. § 101(54) (2000); *see* Fidelity Fin. Servs. Inc. v. Fink, 522 U.S. 211 (1998) (granting of a lien was a voidable transfer).

[145] *In re* McConville, 110 F.3d at 50.

[146] 40235 Washington St. Corp. v. Lusardi, 329 F.3d 1076, 1080-83 (9th Cir. 2003).

prepetition transfers] and that is not avoidable under section 549," it would be protected under the new stay exception. Thus, under Ninth Circuit precedent, because a postpetition lien grant is not a transfer to which § 549 applies,[147] and because a judicial or statutory lien that a creditor obtains postpetition is not avoidable under § 544, which generally applies to prepetition transfers, the creditor's action in obtaining the lien would be exempt from the automatic stay. While this result is benign, other types of transfers or transactions might also come within the scope of new § 362(b)(24), in part because the exception applies to all of § 362(a)'s paragraphs, not just to § 362(a)(4), which stays acts to create, perfect or enforce liens against property of the estate. Thus, as discussed above,[148] reclaiming sellers might argue that their reclamation efforts are exempt from the automatic stay under § 362(b)(24).

Unfortunately, neither the amendment nor the House Report explains why § 362(b)(24) was not narrowly drafted to address only the *McConville* issue nor how broadly the new provision should be interpreted.

VII. PROVISIONS AFFECTING AVOIDANCE ACTIONS

A. Preferences

While preference recoveries and lien avoidances are not normally a source of operating cash for a debtor, they do sometimes create leverage and afford unsecured creditors an additional source of cash recovery. BAPCPA, however, enhances preference defenses, thereby potentially reducing cash recoveries and enabling creditors who received preferential payments, or who delayed in perfecting their liens, to retain their payments and liens.

1. *Ordinary Course of Business Defense*

Under pre-BAPCPA law, a creditor that received a payment within ninety days before bankruptcy could successfully defend against recovery of the payment as a preference by showing that (i) the payment was of a debt incurred in the ordinary course of business of both parties, (ii) the payment was made in the ordinary course of business of both parties, *and* (iii) the payment was made according to ordinary business terms.[149] While the ordinary course defense afforded some protection to creditors, it required that the creditor establish that the challenged payment was both in the ordinary course of both parties and according to ordinary business terms.

Over the years, courts moved toward a broader interpretation of what

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[147]*See* Schwartz v. United States (*In re* Schwartz), 954 F.2d 569, 574 (9th Cir. 1992); Phoenix Bond & Indem. Co. v. Shamblin (*In re* Shamblin), 890 F.2d 123, 127 (9th Cir. 1989).

[148]*Supra* Part I.A.

[149]11 U.S.C. § 547(c)(2) (2000).

was in the ordinary course,[150] thereby affording preference defendants additional protection. BAPCPA makes it easier still for a creditor to invoke the "ordinary course" defense successfully by eliminating the requirement that the creditor show that the challenged transfer was *both* in the ordinary course of business of both parties *and* was according to ordinary business terms. Under BAPCPA, the creditor need show only one or the other, not both.[151] This change 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. Alternatively, the creditor is protected if the challenged transfer was in the ordinary course of its dealings with the debtor, whether or not common in the industry. The likely effect of this expansion of the ordinary course defense is to reduce recoveries to other creditor groups and to increase litigation by causing creditors who might otherwise have settled to defend against those preference demands.

2. *Enabling Loan Defense and Relation Back of Delayed Perfection*

If a creditor extends credit to enable the debtor to acquire an asset in which the creditor will take a security interest, BAPCPA extends the period in which the creditor may perfect the security interest (such as by a UCC or mortgage filing) from twenty to thirty days after the debtor receives possession of the asset, thereby rendering the lien unavoidable on preference grounds if it was perfected within the thirty-day period.[152] Congress had extended this period from ten to twenty days in the 1994 amendments to align this preference defense more closely with some state law grace periods.[153] The Supreme Court ruled that the twenty-day rule took priority over any longer state-law grace period,[154] despite § 547(e)(2), which might be read to permit a longer state-authorized period to take precedence over the federal period. Congress did not in 1994, however, extend the ten-day grace period in § 547(e) to match the twenty-day period in § 547(c)(3)(B). BAPCPA brings the two periods into line again by an amendment to § 547(e)(2). Thus, for loans other than enabling loans, a creditor will be protected against preference attack if it perfects its lien within thirty (rather than ten) days after the lien grant takes effect between the debtor and the creditor.[155]

[150] *See* Ganis Credit Corp. v. Anderson (*In re* Jan Weilert R.V., Inc.), 315 F.3d 1192 (9th Cir. 2003), *amended*, 326 F.3d 1028 (2003); *In re* Tolona Pizza Products Corp., 3 F.3d 1029 (7th Cir. 1993).

[151] 11 U.S.C. § 547(c)(2) (2005).

[152] 11 U.S.C. § 547(c)(3)(B) (2005).

[153] Pub. L. 103-394, § 203(1), 109 Stat. 4106, 4121 (1994); *see* Fidelity Fin. Servs. Inc. v. Fink, 522 U.S. 211, 217-18 (1998).

[154] Fidelity Fin. Servs. Inc., 522 U.S. at 217-18.

[155] 11 U.S.C. § 547(e)(2) (2005).

3. *Small Transfer Exception*

The trustee may not avoid a transfer in a non-consumer case if "the aggregate value of all property that constitutes or is affected by such transfer is less than $5,000."[156] This monetary restriction does not preclude a trustee from suing for aggregate transfers under $5000; rather, the dollar restriction must be raised as an affirmative defense. More importantly, the restriction is unclear when there are multiple transfers. Although the statute refers to the "aggregate value," it also refers to "transfer" in the singular. It is unclear what the result may be if the aggregate value of each transfer is less than $5000, but the aggregate value of all transfers to the creditor exceeds $5000.

4. *DePrizio Redux*

BAPCPA puts the final nail in the *DePrizio* coffin, something that Congress tried, but failed, to do in the Bankruptcy Reform Act of 1994.[157] The problem was created by the Seventh Circuit's decision in *In re DePrizio*,[158] which addressed the appropriate preference period (*i.e.*, ninety days versus one-year) for a non-insider lender who received a payment more than ninety days but less than one year before bankruptcy on a loan guaranteed by an insider of the debtor.[159] *DePrizio* concluded that the non-insider lender was subject to a one-year preference period because the payment on the insider-guaranteed loan benefited the insider guarantor, who was also a creditor of the debtor because of his contingent claim for reimbursement. Although the 1994 amendment was intended to overturn this result and make it clear that non-insiders were not to be subjected to a one-year preference period, the 1994 legislation amended only § 550(c), which deals with recovery of an avoided transfer, and thus left open a loophole. A security interest granted to a non-insider on an antecedent debt could be avoided (though not "recovered") even if it were perfected more than ninety days before bankruptcy, if the security interest also benefited an insider. New § 547(i) closes this loophole, insulating the non-insider from preference attack.[160]

B. Fraudulent Transfers

BAPCPA makes a number of changes to § 548 of the Bankruptcy Code. In addition to adding provisions addressing retention and severance payments and extending the reachback period from one to two years from the filing of a petition,[161] BAPCPA grants the trustee an additional avoiding power. The

[156] 11 U.S.C. § 547(c)(9) (2005).

[157] Pub. L. No. 103-394, § 202, 108 Stat. 4106, 4121 (1994).

[158] Levitt v. Ingersoll Rand Financial Corp. (*In re* DePrizio), 874 F.2d 1186 (7th Cir. 1989).

[159] Levitt, 874 F.2d at 1189.

[160] 11 U.S.C. § 547(i) (2005). This amendment is applicable in cases pending or commenced on or after April 20, 2005. Pub. L. No. 109-8, § 1213(b), 119 Stat. 23, 195 (2005).

[161] *See supra* Part II.B.1, II.B.2, II.B.4(c).

trustee may avoid, in addition to any transfer the trustee may otherwise avoid, a transfer made on or within ten years before the petition date if (i) the transfer was made by the debtor to a self-settled trust or similar device, (ii) the debtor is "a beneficiary of such trust or similar device," and (iii) the debtor "made such transfer with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date such transfer was made, indebted."[162] There is no requirement that the debtor have been insolvent or undercapitalized at the time of the transfer, consistent with the "actual intent to hinder, delay or defraud"[163] portion of the fraudulent transfer statute in § 548(a)(1). The language of the amendment is not restricted to individual debtors, nor is it restricted to asset protection trusts in which the debtor is the sole or primary beneficiary. Any residual beneficial interest in the debtor might qualify the trust for review under this new provision.

More significant, however, is that for purposes of subsection (e), a transfer includes a transfer made "in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by" (i) any violation of federal or state securities laws (including regulations or orders issued thereunder) or (ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of securities registered under § 12 or 15(d) of the Securities Exchange Act of 1934 (as amended) or § 6 of the Securities Act of 1933.[164] At a technical level, the additional language adds nothing to the meaning of "transfer," creating a risk that courts, in an attempt to give meaning to this provision, will construe it not simply as giving an example of the meaning of "transfer," but rather as redefining (and lowering the standard of) "actual intent to hinder, delay, or defraud" in the context of securities law transgressions.

VIII. PROVISIONS AFFECTING HEALTH CARE INSOLVENCIES

BAPCPA contains a series of provisions designed to protect personal and confidential information about health care patients, as well as to protect the interests of patients and quality of their health care in the event of a health care business bankruptcy.

Central to these new protections is BAPCPA's creation of a new professional in health care cases, the patient care ombudsman. Under BAPCPA, Chapter 7, 9[165] and 11 debtors, debtors-in-possession and trustees in the

[162] 11 U.S.C. § 548(e)(1)(C)-(D) (2005).

[163] 11 U.S.C. § 548(a)(1)(A) (2005).

[164] 11 U.S.C. § 548(e)(2) (2005).

[165] 11 U.S.C. § 333(a)(1) refers specifically to Chapters 7, 9 and 11. However, § 901, which sets forth the applicability of other sections of Title 11 in municipal bankruptcies, does not refer to or incorporate

"health care business," as broadly defined in § 101(27A),[166] will now be subject to monitoring by a patient care ombudsman, whose appointment must be ordered by the court within thirty days after commencement of a case,[167] unless the court finds that appointment of such an ombudsman is not necessary for the protection of patients under the specific facts of the case.[168] If appointment of a patient care ombudsman is ordered, the United States Trustee must appoint one disinterested person to fill this role.[169] For long-term care providers, the United States Trustee may appoint the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965[170] for the state in which the bankruptcy case is pending.[171] A patient care ombudsman must: monitor the quality of patient[172] care to the extent necessary under the circumstances (including interviewing patients and doctors); within sixty days after his appointment, and at intervals no greater than sixty days thereafter, report to the court after notice to parties in interest, at a hearing or in writing, regarding the quality of patient care; and, upon making a determination that the quality of patient care is declining significantly or is being materially compromised, file a written report or motion, with notice to parties in interest.[173] Like that of the consumer privacy ombudsman, the patient care ombudsman's compensation is governed by § 330(a).[174]

If a health care business is being closed during the bankruptcy case, the Chapter 7 or Chapter 11 trustee or debtor-in-possession must "use all reasonable and best efforts" to transfer the patients to an appropriate facility that is near the one that is closing, that provides substantially similar services, and

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§ 333. 11 U.S.C. § 901(a) (2005). Under a strict reading of § 103(f), therefore, § 333 would not apply in a Chapter 9 case.

166"'Health care business' [is] any public or private entity [including profit and not for profit entities] that is primarily engaged in offering to the general public facilities and services for—

(i) the diagnosis or treatment of injury, deformity, or disease; and

(ii) surgical, drug treatment, psychiatric, or obstetric care."

11 U.S.C. § 101(27A) (2005). Section 101(27A) lists examples of health care businesses, including hospitals; ancillary ambulatory, emergency or surgical treatment facilities; hospices; home health agencies; long term care facilities, including facilities for skilled nursing care, intermediate care, assisted living, the aged, domiciliary care; and institutions related to long-term care facilities if they are "primarily engaged in offering room, board, laundry or personal assistance with activities of daily living and incidentals to activities of daily living." 11 U.S.C. § 101(27A) (2005).

167Thus, in an involuntary case, there could be a patient care ombudsman before an order for relief is entered.

168 11 U.S.C. § 333(a)(1) (2005).

169 11 U.S.C. § 333(a)(2)(A) (2005).

170 42 U.S.C. § 3058g (2000).

171 11 U.S.C. § 333(a)(2)(B) (2005).

172"Patient" is defined as "any individual who obtains or receives services from a health care business." 11 U.S.C. § 101(40A) (2005).

173 11 U.S.C. § 333(b) (2005).

174 11 U.S.C. § 330(a) (2005).

that maintains a reasonable quality of care.[175] Further, BAPCPA contains detailed provisions governing the disposal of "patient records," defined as "any written document relating to a patient or a record recorded in a magnetic, optical, or other form of electronic medium,"[176] in those cases where there are insufficient funds to store those records in accordance with applicable federal or state law.[177] The trustee must publish notice that records will be discarded after 365 days, attempt to notify each patient concerning disposal of the records, request permission from the appropriate federal agency to deposit the records with the agency, and destroy unclaimed records that no federal agency accepts for deposit. The destruction must be by shredding, burning, or some other method that makes the information irretrievable.

Finally, BAPCPA affords administrative expense claim priority to "the actual, necessary costs and expenses of closing a health care business"[178] incurred by a debtor-in-possession, trustee, federal agency,[179] or a department or agency of a State or political subdivision thereof.[180] Among the expenses granted priority are those incurred in disposing of patient records in accordance with § 351 or in transferring patients to another health care facility if their facility is being closed.[181]

IX. PROVISIONS AFFECTING SINGLE ASSET REAL ESTATE CASES

Pre-BAPCPA law defined a "single asset real estate" case to mean a case (i) involving "real property constituting a single property or project . . . which generates substantially all of the gross income of a debtor . . . and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto" and (ii) in which the debtor's aggregate noncontingent, liquidated secured debts are less than $4,000,000.[182] BAPCPA eliminates the $4 million secured debt limit, so larger properties and projects will now be included and treated under the

[175] 11 U.S.C. § 704(a)(12) (2005); 11 U.S.C. § 1106(a)(1) (2005). This duty is set forth in § 704(a)(12), which is incorporated into Chapter 11 cases by § 1106(a)(1). Section 704(a)(12), like § 333, is not incorporated into Chapter 9 cases by § 901, although it appears from the language of § 333 that it was intended to apply in Chapter 9 cases. 11 U.S.C. § 901(a) (2005).

[176] 11 U.S.C. § 101(40B) (2005). The latter half of the definition, "a record recorded in a magnetic, optical, or other form of electronic medium," is not expressly restricted to records "relating to a patient," as is the first half. One should expect the courts to read the restriction into the language so as not to expand the scope of § 351 to all electronic information that a health care business maintains, whether or not related to patients.

[177] 11 U.S.C. § 351 (2005).

[178] 11 U.S.C. § 503(b)(8) (2005).

[179] As defined in 5 U.S.C. § 551(1).

[180] 11 U.S.C. § 503(b)(8) (2005).

[181] 11 U.S.C. § 503(b)(8)(A), (B) (2005).

[182] 11 U.S.C. § 101(51B) (2000).

special provisions applicable to single asset real estate cases.[183] Rental properties, both residential and commercial, would qualify as single asset real estate; hotels generally would not, however, because a hotel is a substantial business in addition to the operation of the real property itself.[184]

Pre-BAPCPA law provided that in a single asset real estate case, a lender secured by the real property was entitled to relief from the automatic stay ninety days after the date of the order for relief, or such later date as the court determined for cause within such ninety-day period, unless the debtor had filed a plan that had a reasonable possibility of being confirmed within a reasonable time or the debtor made monthly payments to the secured creditor "in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate."[185] Under BAPCPA, if the court first determines more than ninety days after the date of the order for relief that the single asset real estate provisions apply to the debtor, the secured creditor is entitled to stay relief thirty days after the determination.[186] The required payments will now be calculated at the non-default contract interest rate under the creditor's loan. BAPCPA also expressly validates what is current practice in many courts, that the monthly payments may be made from rents or other income from the property notwithstanding § 363(c)(2) of the Bankruptcy Code, which generally prohibits use of cash collateral absent the secured creditor's consent or court order.[187] Left unanswered is the question of how such payments are to be applied—whether to interest or principal, or to both—for purposes of determining the creditor's allowable claim.[188]

X. PROVISIONS AFFECTING NONPROFIT DEBTORS

BAPCPA adds a new subsection (f) to § 541 of the Bankruptcy Code to address the conditions under which a nonprofit debtor may transfer its property. Section 541(f) authorizes the transfer of property held by a debtor that is a corporation described in § 501(c)(3), and exempt from tax under § 501(a), of the Internal Revenue Code to a nonexempt entity, "but only under the same conditions as would apply if the debtor had not filed" its bankruptcy case.[189]

Strangely, this amendment appears in § 541, which defines what consti-

[183] 11 U.S.C. § 101(51B) (2005).

[184] *See In re* Kkemko, Inc., 181 B.R. 47, 51 (Bankr. S.D. Ohio 1995) (marina that offers storage, repair, and winterizing services, pool and shower facilities, and food and other amenities is not a "single asset real estate" debtor).

[185] 11 U.S.C. § 362(d)(3) (2000).

[186] 11 U.S.C. § 362(d)(5) (2005).

[187] 11 U.S.C. § 362(d)(3)(B)(i) (2005).

[188] *See* 3 Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY ¶ 362.07[5] (15th rev. ed. 2005).

[189] 11 U.S.C. § 541(f) (2005).

tutes property of the estate, rather than in § 363, which governs the sale, lease and use of property of the estate. Because of its placement in § 541 (rather than § 363), it is unclear whether this provision is intended to prevent a tax exempt debtor's property from becoming property of the estate if the debtor would not have been able to transfer the property before bankruptcy, or whether it is a limitation on disposition of property of the estate. Section 541(c) generally renders anti-assignment provisions in nonbankruptcy law inapplicable, so that property comes into the estate without restriction. But new § 541(f) applies "notwithstanding any other provision of this title," rendering § 541(c) ineffective in this context. Thus, it could be read to prevent property from becoming property of the estate. Alternatively, it could and probably should be read as a limitation on disposition of property of the estate. Placement in § 363, which governs use, sale, or lease of property of the estate, would have been more appropriate to that end, but courts may still read it as such a restriction on disposition.

Similarly, § 363(d) has been amended to provide that a trustee or debtor-in-possession may use, sell or lease property under § 363(b) and (c) only "in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust."[190] These amendments apparently were enacted in response to the conflict between the debtor-in-possession and the Pennsylvania State Attorney General in the Chapter 11 cases of *In re Allegheny, Health, Education & Research Foundation* and its affiliates.[191] AHERF was a nonprofit hospital chain which disposed of assets in its Chapter 11 case without complying with applicable Pennsylvania law procedures for sale of assets of a nonprofit corporation.[192] Despite its obvious purpose, § 363(d)(1) is poorly drafted and could be read as applying to all debtors, although this would lead to absurd results. Courts should conclude, however, that state law governing non-profits does not constitute "*applicable* nonbankruptcy law" under § 363(d)(1) when the debtor is a "for profit" entity.

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[190]11 U.S.C. § 363(d)(1) (2005). The placement of these amendments in § 363 lends more support to the argument that the addition of § 541(f) was intended to restrict property from becoming property of the estate.

[191]*See In re* Bankruptcy Appeal of Allegheny, Health, Educ. & Res. Found. ("AHERF"), 252 B.R. 309, 315 (W.D. Pa. 1999) (suggesting that an Attorney General's action against nonprofit debtor for appointment of an interim trustee, removal of conflicted directors, and the amendment of articles of incorporation were not stayed by § 362).

[192]Both of these amendments are effective as to all cases pending on or filed on or after April 20, 2005, except that the court is not permitted to confirm a Chapter 11 plan "without considering whether [these amendments] would substantially affect the rights of a party in interest who first acquired rights with respect to the debtor after the date of the filing of the petition." Pub. L. No. 109-8, § 1221(d), 119 Stat. 23, 196 (2005). There is little explanation for this exception. One might conclude that it is designed to protect a purchaser of assets from a nonprofit debtor-in-possession who entered into the purchase agreement before BAPCPA's enactment date.

CONCLUSION

The reorganization process is difficult and expensive under the best of circumstances. BAPCPA makes it more so. By catering to special interest groups, intentionally not soliciting the views of those with significant Chapter 11 experience, and cobbling together a set of amendments that are poorly worded and thought out, Congress has ensured that Chapter 11 costs and litigation will increase, while doing little to foster reorganization and maximization of value of the estate.