

DEBTOR/CREDITOR

July 2005

New Day Dawns October 17, 2005

After many years of discussion and intensive lobbying by various interest groups, Congress has passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Although the substantial changes in consumer bankruptcy law have garnered most of the media attention, significant changes were also made to the rules affecting business cases. With a few exceptions, the changes take effect with cases filed on or after October 17, 2005. This, and succeeding newsletters, will highlight some of these changes.

Commercial Leases. As originally enacted in 1978, the federal bankruptcy statute permitted a Chapter 11 debtor to assume or reject a lease, without limiting the time within which debtor could do so. In 1984, Congress amended the statute to require a tenant debtor under a commercial lease to assume or reject the lease within 60 days after filing a voluntary petition. Failure to do so resulted in an automatic rejection and required the debtor to surrender the premises to the landlord. However, the statute permitted the court to extend the period of time within which the debtor could decide to assume or reject the lease. Many courts routinely extended that time until confirmation of a plan of reorganization, which could be years later.

The BAPCPA requires the Chapter 11 debtor to assume a commercial lease by the earlier of 120 days after the voluntary petition is filed or confirmation of a plan. The court may extend that 120-day period an additional 90 days for cause. However, no further extension may be granted by the court without the prior written consent of the landlord for each extension. The change will give commercial landlords greater leverage in a tenant's Chapter 11 case.

Creditors' Committees. Under current law, the office of the United States Trustee (a division of the Justice Department) has exclusive authority to appoint creditors to a creditors' committee in a Chapter 11 case. Current practice

of the United States Trustee is to favor the appointment of the largest creditors to the committee, because of their greater financial stake in the outcome of the case.

The BAPCPA will permit the court to increase the size of the creditors' committee to include a creditor that is a small business concern, if the court determines that "the creditor holds claims ... the aggregate amount of which, in comparison to the annual gross revenue that creditor, is disproportionately large." The intent of this change is to permit the judge to add a smaller creditor that wishes to serve on the committee, where the financial effect of the bankruptcy on that creditor is proportionately greater than on larger creditors.

Additionally, the amendments require a creditors' committee to provide non-committee member creditors with access to information obtained by the committee. Committees will also be required to consult with the creditors represented by the committee. Although this change appears innocuous, it may have unintended negative consequences. For example, a creditor who is a direct competitor of the debtor, and who could be excluded from committee membership on those grounds, might be able to obtain confidential financial information about the debtor through the committee. As a result, a debtor may be less willing to share information with a committee, which will hamper the committee's ability to protect creditor interests in the case.

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This newsletter is intended to inform its readers of developments in the area of debtor/creditor relations. It is not legal advice or a legal opinion regarding any specific matter. You should consult a lawyer regarding any questions relating to your particular situation.

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