AN OVERVIEW OF THE MAJOR CONSUMER BANKRUPTCY EFFECTS OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

On April 20, 2005, President Bush signed into law S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[1] This article will provide an overview of selected changes the Act will have on consumer cases. The most discussed aspects of the new law have been the Chapter 7 means testing provisions, but as will be seen the Act makes significant revisions to the Bankruptcy Code that go well beyond means testing.

October 17, 2005 is the effective date of the Act. With certain exceptions, the new law is generally applicable only to cases filed on or after this date. Exceptions to the effective date that are relevant to consumer filings will be discussed more below.

OVERVIEW OF SELECTED CHANGES

Chapter 7 and Chapter 13 Filing Restrictions

Section 727(a)(8) is amended to extend the six year bar to discharge in Chapter 7 cases to eight years. The new law subjects a Chapter 7 debtor to denial of discharge if the debtor received a Chapter 7 or 11 discharge in a case commenced within 8 years before the filing date of the pending case.

Section 1328 includes a new subsection (f) pursuant to which a Chapter 13 debtor is barred from discharge if the debtor has received a discharge–

> (1) in a case filed under chapter 7, 11, or 12 of this title *during the 4-year period* preceding the date of the order for relief under this

[1] P.L. No. 109-8, 199 Stat. 23

chapter, or

(2) in a case filed under chapter 13 of this title *during the 2-year period* preceding the date of such order.[2]

New § 1328(f) amends Chapter 13 to disallow discharge if the debtor received a discharge in a prior bankruptcy case *filed* during the relevant time period prior to the current Chapter 13 filing.[3]

Debtor's Duties

***Filing requirements expanded*:** The Act amends § 521 to expand a debtor's filing requirements and other § 521 duties. Section 521 must be carefully read because certain subsections apply to *all* debtors whereas other subsections apply to *all individual* debtors, and other subsections apply to *individual* debtors under one or more chapters of the Bankruptcy Code.

Unless the court orders otherwise, § 521(a)(1)(B) requires *all* debtors to file with the court:

- evidence of payments received from any employer within 60 days before the petition date;[4]
- an itemized statement of net monthly income;[5] and
- a statement disclosing any anticipated increase in income or expenses reasonably expected during the 12 month period after the petition date;[6]

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[2] 11 U.S.C. § 1328(f)(1),(2).

[3] *See* CRS Report RL32765, *The "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," S.256, in the 109th Congress*, by Robin Jeweler (2005).

[4] 11 U.S.C. § 521(a)(1)(B)(iv).

[5] 11 U.S.C. § 521(a)(1)(B)(v).

[6] 11 U.S.C. § 521(a)(1)(B)(vi).

Section 521(a)(1)(B)(iii) further requires *all individual* debtors to file a certificate signed by the debtor's attorney or petition preparer stating that the professional provided the debtor with the notice required by 11 U.S.C. § 342(b), or, if the debtor is pro se, a certificate signed by the debtor stating that the debtor received and read the § 342(b) notice.[7] Amended § 342(b) requires notice be given to consumer debtors describing the chapters of the Bankruptcy Code and the types of available credit counseling services. The notice includes an additional statement informing consumer debtors of the consequences related to knowingly and fraudulently concealing assets or making a false statement under penalty of perjury.

Automatic dismissal for failure to file required documents: If an *individual Chapter 7 or Chapter 13* debtor fails to file all of the information required by § 521(a)(1) within 45 days after the petition filing date, the case will be automatically dismissed effective on the 46th day.[8] Any party in interest may request that the court enter an order dismissing the case for failure to file required documents within the 45 day period, and the court must enter the dismissal order no later than 5 days after the request is made.[9]

There are two exceptions to the automatic dismissal required by § 521(i)(1). First, if the debtor files a motion to extend the time for filing during the initial 45 day period and the court finds justification for extending same, the court may enter an order extending the time for an additional 45 days.[10] The second exception appears to only apply in situations in which the debtor fails to file

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7 11 U.S.C. § 521(a)(1)(B)(iii)(I),(II).

8 11 U.S.C. § 521(i)(1).

9 11 U.S.C. § 521(i)(2).

10 11 U.S.C. § 521(i)(3).

the information required by § 521(a)(1)(B)(iv), evidence of payments received from any employer 60 days prior to filing. Section 521(i)(4) permits the trustee in that circumstance to file a motion to not dismiss the case. The trustee must file the motion prior to the expiration of the original 45 day period or, if extended, prior to the expiration of the extended time period. If the court finds that the debtor made a good faith effort to file the payment evidence and finds that administration of the case would be in the creditors' best interest, the court may decline to dismiss the case.[11]

Statement of intention: § 521(a)(2)(A) is amended to require *an individual Chapter 7 debtor* to file a statement of intention as to secured property *within 30 days after the petition date*. Amended § 521(a)(2) applies to all secured debts of an individual Chapter 7 debtor. Unless the court grants additional time for cause, § 521(a)(2)(B) requires debtors to perform their stated intention to surrender, redeem, or reaffirm within *30 days after the first date set for the meeting of creditors*.[12] Before the amendment, debtors had 45 days to perform after filing the notice of intent. Pursuant to § 362(h)(1)(A) of the Bankruptcy Code, the stay will lift with respect to personal property that is collateral for any secured claim, or that is subject to an unexpired lease, if the debtor fails to timely perform under § 521(a)(2), unless the trustee files a motion to enforce the stay. The stay will then terminate at the conclusion of the hearing on the trustee's motion unless the court finds that the property is of benefit or value to the estate, orders adequate protection, and orders the debtor to deliver the collateral to the trustee.[13]

Newly added § 521(a)(6) applies to all debts of an individual Chapter 7 debtor secured by

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[11] 11 U.S.C. § 521(i)(4).

[12] 11 U.S.C. § 521(a)(2)(B).

[13] 11 U.S.C. § 362(h)(2).

a PMSI. Section 521(a)(6) is added to require *individual Chapter 7 debtors* no later than 45 days after the first meeting of creditors to either surrender, reaffirm, or redeem personal property that secures in whole or in part a creditor's allowed claim for the purchase price of same i.e. purchase-money collateral. The stay is terminated with respect to the property if the debtor fails to act within the 45 day period unless the Chapter 7 trustee files a motion to enforce the stay before the end of the 45 day period and the court determines, after notice and hearing, that the property has value, orders adequate protection, and orders the debtor to deliver the property to the trustee.[14]

The 30 day time period that is set out in § 521(a)(2)(B) for performing the debtor's stated intention with respect to all secured debts conflicts with the 45 day time period in § 521(a)(6) for performing the debtor's stated intention with respect to collateral securing a PMSI. Under § 521(a)(6) the stay lifts if the debtor fails to surrender, redeem, or reaffirm collateral that secures a PMSI, within 45 after the first meeting of creditors. However, under § 362(h)(1) the stay will terminate with respect to any property that is collateral for a secured claim, including property that secures a PMSI, if the debtor fails to either file the statement of intent within 30 days after the petition date or fails to perform the stated intent within 30 days after the first date set for the meeting of creditors, unless the creditor refused to reaffirm the debt on the original contract terms or the trustee filed a motion to enjoin the stay from lifting. There will be situations where the stay will have already lifted under § 362(h) with respect to collateral securing a PMSI even though the 45 day period for performing has not yet ran under § 521(a)(6). This result would render § 521(a)(6) inoperable any time the debtor failed to perform within 30 days after the first date set for the meeting of creditors. To harmonize this conflict, one commentator has suggested that the rules of statutory

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[14] 11 U.S.C. § 521(a)(6).

construction pursuant to which a "statute should be interpreted so as not to render one part inoperative," mandate that § 521(a)(2) and (a)(6) must be construed so that § 521(a)(6) applies to PMSIs and § 521(a)(2) applies to all other secured debts.[15]

The triggering date in § 521(a)(2) and (a)(6) also differ. In § 521(a)(2) the date is 30 days *after the first date set for the meeting of creditors* while § 521(a)(6) requires the debtor to perform not later than 45 days *after the first meeting of creditors.* The first date set for the meeting of creditors as used in § 521(a)(2) will often differ from the date the meeting of creditors is actually held.

Tax returns: The debtor must now file certain tax returns with the trustee and other tax returns with the court. Section 521(e)(2)(A) requires the debtor to file with the trustee seven days before the first date set for the first meeting of creditors a copy of the debtor's Federal income tax return or a transcript of same for the most recent tax year ending immediately before the petition date. The debtor must also provide a copy of the return or transcript to any creditor that timely requests a copy of the tax return. Failure to provide either the trustee or the creditor with the tax return will result in dismissal of the debtor's case unless the debtor is able to demonstrate that the failure was due to circumstances beyond the debtor's control.[16]

Section 521(e)(2)(A) appears to apply only to *individual Chapter 7 and 13 debtors*. Subsection (e)(1) requires the court to make available upon creditor request a copy of an individual Chapter 7 or Chapter 13 debtor's petition, schedules, and statement of financial affairs. Subsection

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[15] TOM YERBICH, STATEMENT OF INTENT UNDER NEW CODE § 521(a)(2) AND (a)(6) OR "WHO GETS THE CAR?," ABI COMM. NEWS(2005), http://abiworld.net/newsletter/consumerbank/vol3num3/car.html.

[16] 11 U.S.C. § 521(e)(2)(B), (C).

(e)(2) provides that the "debtor shall provide –" certain tax documents to the trustee. Although the subsection does not specifically state that it is limited to individual Chapter 7 and Chapter13 debtors, it appears to be so limited because subsection (e)(1) is limited to individual Chapter 7 and Chapter 13 debtors.

Sections 521(f)(1), (2) and (3) apply to *individual Chapter 7, 11 and 13 debtors*. Upon request by the court, trustee, or any party in interest, individual Chapter 7, 11 and 13 debtors are required to file with the court a copy of each Federal tax return or transcript when filed with the government while the case is pending and each Federal tax return that had not previously been filed as of the petition date that the debtor files post-petition for any tax year in the 3-year period ending on the petition date. The debtor must also file a copy of any related amendment.

The debtor's post-petition duty to file tax returns is reinforced by § 521(j)(1) and (2) pursuant to which the taxing authority may request an order converting or dismissing a case if the debtor fails to file a return when due or to obtain an extension of the time for doing so. The court must dismiss or convert the case if the debtor fails to file the return or obtain an extension within 90 days after the request is filed.

Section 1308(a) requires Chapter 13 debtors to file, not later than the day before the first date set for the § 341 meeting, any "tax return under applicable nonbankruptcy law" that was required for a taxable period ending within four years of the petition date. If the debtor fails to file the required tax returns prior to the date on which the meeting of creditors is first scheduled, the trustee may hold the meeting open for a limited time period to allow the debtor additional time to comply with § 1308(a).[17]

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[17] 11 U.S.C. § 1308(b)(1).

Miscellaneous filing requirements: § 521(b) is added to require *an individual debtor* to file a credit counseling certificate describing the services provided to the debtor along with a copy of the debt repayment plan, if any, developed through the agency;[18]

Section 521(c) requires *all* debtors to file with the court a record of the debtor's interest in a state tuition program or education individual retirement account.[19]

Chapter 13 debtors must file with the court, upon request of the court, trustee, or any party in interest, an annual statement of income and expenditures under § 521(f)(4). The first report, if requested, is due the later of 90 days after the end of the tax year or 1 year after the petition date if a plan is not confirmed before the later date. Post-confirmation, the report is due annually until the case is closed. Annual reports must be filed no later than 45 days before the anniversary date of the confirmation order. The Chapter 13 financial statements must disclose the amount and sources of income, the identity of persons responsible with the debtor for the support of a dependent, and the identity of anyone who contributed to the debtor's household.[20]

If requested by the trustee, *all* debtors must also provide a drivers license or some form of picture identification to establish the debtor's identity.[21]

Mandatory Credit Counseling

Section 109(h)(1) requires individual debtors to receive a credit counseling briefing from an

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[18] 11 U.S.C. § 521(b)(1)(2).

[19] 11 U.S.C. § 521(c).

[20] 11 U.S.C. § 521(g)(1).

[21] 11 U.S.C. § 521(h).

approved agency during the 180 day period preceding the petition date. The debtor may receive the briefing in either an individual or group format. The briefing may be conducted by telephone or over the internet. The briefing must outline the debtor's opportunities for credit counseling and assist the debtor in performing a budget analysis.

The clerk of the court will maintain a list of approved credit counseling agencies.[22] It is anticipated that the list will be posted on the court's website along with a hard copy available at the clerk's office.

The U.S. Trustee or bankruptcy administrator is responsible for overseeing and approving nonprofit credit counseling agencies. To qualify the agencies must provide services without regard to ability to pay if a fee is charged.

A debtor that fails to obtain credit counseling is not be eligible to file bankruptcy unless the debtor resides in a district where the U.S. Trustee or bankruptcy administrator has determined that approved agencies are not reasonably able to provide counseling services to additional individuals.[23]

The mandatory counseling requirement does not apply to a debtor who is unable to comply because of "incapacity, disability, or active military duty in a military combat zone."[24] Incapacity is defined as impairment by reason of mental illness or deficiency, and disability refers to a physical impairment that would prohibit the debtor from participating in person, over the phone, or through the internet.[25] The exception to mandatory credit counseling requires a court determination made

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[22] 11 U.S.C. § 111(a).

[23] 11 U.S.C. § 109(h)((2)(A).

[24] 11 U.S.C. § 109(h)(4).

[25] 11 U.S.C. § 109(h)(4).

after notice and hearing.

Prepetition credit counseling may be waived by the court for a 30 day period, if the debtor submits a certification describing exigent circumstances that prevented the debtor from obtaining counseling prior to filing.[26] Possible exigent circumstances may include pending evictions or foreclosures. The certificate must also state that the debtor requested credit counseling, but was unable to obtain the services "during the 5-day period beginning on the date on which the debtor made that request."[27] The court may, for cause, extend the 30 day wavier for an additional 15 days.[28]

Debtor Education

Newly added § 727(a)(11) of the Bankruptcy Code bars the Chapter 7 discharge unless the debtor completes a post-petition instructional course on personal financial management. A similar bar to the Chapter 13 discharge is provided in § 1328(g)(1) of the Bankruptcy Code. The bar to discharge does not apply if the debtor is unable to comply because of incapacity, disability, or active military duty in a military combat zone as described in § 109(h)(4). The debtor will also be excused if the bankruptcy administrator determines that the approved instructional course is not currently available for additional individuals.[29] The personal financial management course is described in § 111 of the Bankruptcy Code. The amendments require the approved instructional course to provide debtors with "learning materials and teaching methodologies designed to assist debtors in

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[26] 11 U.S.C. § 109(h)(3).

[27] 11 U.S.C. § 109(h)(3)(A)(ii).

[28] 11 U.S.C. § 109(h)(3)(B).

[29] 11 U.S.C. § 727(a)(11).

understanding personal financial management . . . ."[30]

Notice Requirements

The notice requirements under § 342 of the Bankruptcy Code are substantially amended. Section 342(c)(1) provides that any notice that must be given to a creditor must include the debtors name, address, and the last four digits of the debtor's tax identification number. If a creditor has supplied the debtor in at least two communications during the 90 days preceding the petition date with communications that included the debtor's account number and the address to which the creditor requested correspondence be sent, then any required notice must be sent to that address and include the account number.[31]

Newly added § 342(e) permits a creditor to file with the court and serve the debtor with a notice of the creditor's preferred address. Five days after the court and debtor receive the notice, any further notice to the creditor must be provided to the preferred address.

Newly added § 342(f)(1) provides that a creditor may file "a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts . . . to provide notice to such entity in all cases under chapter 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor." Future notices must be sent to this address effective 30 days after the notice is filed with the court. Notice under subsection (e) supersedes the notice requirement in subsection (f) if the creditor files a different preferred address in a specific case.

Notice will not be effective if § 342(c) is not complied with until the notice is brought to the

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[30] 11 U.S.C. § 111(d)(1)(B).

[31] 11 U.S.C. § 342(c)(2)(A).

attention of the creditor.[32] If the creditor has designated a person as responsible for receiving notices or designated a subdivision as being responsible for receiving notices, any notice provided to such creditor shall not be considered as having been brought to the attention of the creditor until such notice is received by the person or subdivision designated to receive notice.

Automatic Stay: Automatic Dismissals

The scope of the automatic stay has historically been very broad. The new law expands the statutory exceptions to the automatic stay under § 362(b), limits the duration of the stay in serial filing cases, limits stay violation damages, and provides in rem relief under certain circumstances.

***Domestic relations exceptions*:** Prior to the amendments, § 362(b)(2) excepted from the stay actions for the establishment of paternity and the establishment or modification of an order for support. Section 362(b)(2) also permitted the collection of alimony, maintenance, or support from property that is not property of the estate. Subsection (b)(2) is amended to further exclude from the stay: (1) actions concerning child custody, visitation and domestic violence;[33] and (2) divorce proceedings except to the extent that they seek to divide property that is property of the estate.[34] To facilitate the collection of amounts due for domestic support obligations, §362(b)(2)(C) and (D) permit the withholding of income that is property of the estate for the payment of domestic support obligations, as well, as the withholding of the debtor's drivers license or a professional license. Section 362(b)(2)(E) and (F) permit the interception of a tax refund and the reporting of overdue

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[32] 11 U.S.C. § 342(g)(1).

[33] 11 U.S.C. § 362(b)(2)(A)(iii), (v).

[34] 11 U.S.C. § 362(b)(2)(A)(iv).

child support.[35] The final domestic support exception applies to the enforcement of medial obligations as specified under the Social Security Act.[36]

Pension loan exception: § 362(b)(19) permits the withholding of income from a debtor's wages to repay a loan from an ERISA qualified pension plan sponsored by the debtor's employer.[37]

In rem exception: Any act to enforce a lien against real property as to which the court lifted the stay in a prior case under § 362(d)(4) for a period of 2 years after the date of the entry of such order. Subsection (d)(4) permits the court to terminate the stay with respect to real property if the court finds that the petition was filed as part of a scheme to delay, hinder, and defraud creditors that involved the transfer of real property or multiple filings affecting such real property.[38]

Eviction actions: The continuation of an eviction or unlawful detainer action against a debtor tenant is excepted from the stay as follows:

> **Prepetition judgment for possession:** § 362(b)(22) provides that the stay does not apply when a lessor has obtained a prepetition judgment for possession against a debtor tenant. Refer then to § 362(l)(1) which provides that subsection (b)(22) applies 30 days after the petition is filed if the debtor files **with the petition** and serves the lessor with a certification that: (1) nonbankruptcy law would allow the debtor to cure the entire default; and (2) the debtor deposits with the bankruptcy clerk any rent that would become due during the 30 day period following the filing

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[35] 11 U.S.C. § 362(b)(2)(E),(F).

[36] 11 U.S.C. § 362(b)(2)(G).

[37] 11 U.S.C. § 362(b)(19).

[38] 11 U.S.C. § 362(b)(20), (d)(4).

date. Next, subsection (l)(2) provides that subsection (b)(22) does not apply (unless ordered by the court) if the debtor complies with (l)(1) and files and serves a **further certification** that the debtor has cured the entire monetary default. If the lessor files an objection to the certification, § 362(l)(3) requires the court to hold a hearing within 10 days to determine if the certification is true. If the court sustains the objection, (b)(22) automatically applies and relief from the stay is not required. If the debtor indicates on the petition that a lessor took a prepetition judgment for possession but fails to file a certification that cure is permitted, (b)(22) applies immediately and the clerk must immediately serve the lessor and debtor with a certified copy of the docket and notice that the stay does not apply.

Eviction action based on endangerment/controlled substances: § 362(b)(23) provides that the stay does not apply to an eviction action against a debtor tenant based on endangerment of property or the illegal use of a controlled substance. For subsection (b)(23) to apply, the lessor must file a certification that the action has been filed or that the debtor has committed such act within 30 days preceding the certification date. Section 362(m) provides that subsection (b)(23) applies 15 days after the date the lessor files and serves the certification. If the debtor files an objection to the certification, the court must hold a hearing within 10 days after the filing to determine if the situation giving rise to the certification existed or has been remedied. If the situation did not exist or has been remedied, the stay shall remain in effect. If the debtor cannot demonstrate that the situation giving rise to the certification did not exist or has been remedied, relief from the stay is not required.

If the debtor does not object to the certification, (b)(23) immediately applies and relief from stay is not required.

Miscellaneous actions:

- Any act to enforce a lien against real property if the debtor is ineligible under § 109(g) to be a debtor or if the debtor filed the case in violation of an order in a prior case prohibiting the debtor from refiling.[39]

- Any transfer that is not avoidable by the trustee under either § 544 (trustee strong-arm power to avoid unperfected liens) or § 549 (transfers of property after the commencement of the case).[40]

- Certain actions taken by a securities self regulatory organization.[41]

- The setoff of an income tax refund for a taxable period ending prior to the order for relief against an income tax liability for a taxable period ending before the order for relief.[42]

- The setoff by a master netting agreement of a mutual debt and claim.[43]

- The exclusion of the debtor from participation in medicare or federal health care programs.[44]

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[39] 11 U.S.C. § 362(b)(21).

[40] 11 U.S.C. § 362(b)(24).

[41] 11 U.S.C. § 362(b)(25).

[42] 11 U.S.C. § 362(b)(26).

[43] 11 U.S.C. § 362(b)(27).

[44] 11 U.S.C. § 362(b)(28).

Automatic stay duration limited: Previously under § 362(c), the automatic stay continued in effect until the time the case was closed, dismissed, or the time a discharge was granted or denied. Under newly added § 362(c)(3), the automatic stay terminates on the 30th day after the filing of the case if a Chapter 7, 11, or 13 case is filed within one year after a prior case is dismissed unless the prior case was dismissed pursuant to § 707(b).[45] The court may extend the stay as to any or all creditors upon motion by a party in interest if the movant demonstrates that the debtor filed the new case in good faith. The court must hold a hearing on the motion before the 30 day period terminates.[46]

There is a presumption against finding good faith that arises as to all creditors if:

(1) the new petition is a second repeat filing during a one year period;[47]

(2) during the preceding year a prior case was dismissed after the debtor failed to:

(a) amend the petition or file required documents without substantial excuse;

(b) provide court ordered adequate protection; or

(c) perform the terms of a confirmed plan; **OR**

(3) there has not been a substantial change in the debtor's financial or personal circumstances since the last dismissal or any other reason to conclude that the current case will result with a discharge in a Chapter 7 case or a fully performed confirmed Chapter 13 plan.[48]

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45 11 U.S.C. § 362(c)(3)(A).

46 11 U.S.C. § 362(c)(3)(B).

47 11 U.S.C. § 362(c)(3)(C)(i)(I).

48 11 U.S.C. § 362(c)(3)(C)(i)(II),(III).

A presumption that the case was not filed in good faith arises with respect to a single creditor that filed a lift stay motion in a previous case if the motion was still pending when the prior case was dismissed or if the motion "had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor.[49] The presumption may be rebutted only by clear and convincing evidence.[50] For purposes of § 362(c)(3), a case will not be presumed to be filed not in good faith if the previous case was dismissed "due to the creation of a debt repayment plan."[51]

Under § 362(c)(4), the automatic stay does not go into effect if the debtor has had two or more cases pending within the previous year that were dismissed "other than a case refiled under section 707(b) . . ." The court is required to promptly enter an order confirming that no stay is in effect on request by a party in interest.[52] On motion filed within 30 days after the new petition is filed, the court may impose the stay as to any or all creditors after notice and hearing if the movant is able to demonstrate that the new case was filed in good faith.[53] A presumption against finding that the case was filed in good faith arises under § 362(c)(4)(D) that is similar to the presumption outlined under § 362(c)(3)(C).

Section 362(j) provides that the court will issue an order under subsection (c) confirming that the automatic stay has been terminated.

Damages: Under § 362(k)(1), a debtor may recover actual and punitive damages for any

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[49] 11 U.S.C. § 362(c)(3)(C)(ii).

[50] 11 U.S.C. § 362(c)(3)(C).

[51] 11 U.S.C. § 362(i).

[52] 11 U.S.C. § 362(c)(4)(A)(ii).

[53] 11 U.S.C. § 362(c)(4)(B).

willful violation of the stay. Damages are limited to actual damages under § 362(k)(2) if the violation was based on action taken in good faith belief that the stay was terminated under § 362(h) for failure to comply with the statement of intention requirements under § 521(a)(2).

Damages are further limited by the application of the new notice requirements under § 342 previously discussed. Section 342(g)(2) provides that monetary damages may not be imposed on a creditor for violating the stay under § 362(a), including monetary penalties imposed under § 362(k), unless the violation occurs after the creditor receives notice as required by § 342. This would apparently restrict the debtor from even receiving actual damages under § 362(k), not just punitive damages.

In rem relief: As discussed above, § 362(d)(4) provides that the court may enter an in rem order with respect to real property, which if properly recorded, is binding on owners of the subject property for two years from the date of entry. A debtor in a subsequent case may move for relief from the order based on changed circumstances or for good cause shown after notice and hearing.

Household Goods Defined

Newly added § 522(f)(4) defines the term household goods for purposes of § 522(f)(1)(B) to include:

> (i) clothing; (ii) furniture; (iii) appliances; (iv) 1 radio; (v) 1 television; (vi) 1 VCR; (vii) linens; (viii) china; (ix) crockery; (x) kitchenware; (xi) educational material and educational equipment primarily for the use of minor dependent children of the debtor; (xii) medical equipment and supplies; (xiv) personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependents of the debtor; and (xv) 1 personal computer and related equipment.

Excluded from the definition are works of art unless created by the debtor or the debtor's relative;

electronic equipment with an aggregate value of more than $500 except 1 television, radio and VCR; antiques with an aggregate fair market value of more than $500; jewelry with a fair market value exceeding $500 exclusive of a debtor's wedding ring; a computer except as otherwise provided for above; and motorized devices including vehicles, tractors, lawn tractors, boats, recreational vehicles, watercrafts and aircrafts.[54]

Avoidance of Transfers to Self-Settled Trusts

Newly added § 548(e)(1) allows the trustee to avoid any transfer of property that was made on or within 10 years before the petition date if the debtor made the transfer to a self-settled trust, the debtor is the beneficiary of the trust, and the debtor made the transfer "with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted."

Exclusions From Property of the Estate

Added to the list of exclusions under § 541(b) from property of the estate are funds placed in an education retirement account or state tuition credit account at least 365 days prior to the petition date if the funds are designated for the benefit of the debtor's child, stepchild, grandchild or step-grandchild. There is a $5,000 limit placed on funds contributed "not earlier than 720 days nor later than 365 days" before the filing date.[55]

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[54] 11 U.S.C. § 522(f)(4)(B).

[55] 11 U.S.C. § 541(b)(5), (6).

Further excluded from property of the estate are wages withheld by an employer for payment as contribution to ERISA-qualified retirement plans, deferred compensation plans, tax-deferred annuities, and health insurance plans.[56] The exclusion is for "any amount" withheld from wages.

Exemptions

Residency reqirement: The residency requirement is amended under § 522(b)(3)(A) to mandate that a debtor reside in a state for a period of 730 days (2 years) prior to filing bankruptcy under that state's exemption laws. If the debtor's domicile has been located in more than a single state during the 730 day time period, § 522(b)(3) mandates that the governing exemption law will be the state in which the debtor's domicile was located for 180 days immediately preceding the 730 day period "or for a longer portion of such 180 day period than in any other place." If the new residency requirement renders the debtor ineligible for any exemption, § 522(b)(3) provides that the debtor may elect the federal exemptions under § 522(d).

Homestead exemption: Under § 522(d) the federal homestead exemption is limited to $18,450.00. For purposes of a state homestead exemption, newly added § 522(o) imposes a 10-year look-back period for fraudulent asset conversions. Under § 522(o) the state homestead exemption must be reduced to the extent the debtor obtained the interest during the 10 year period ending on the petition date by converting nonexempt assets into the debtor's homestead with the "intent to hinder, delay, or defraud a creditor . . ."[57]

If the debtor elects state exemptions under § 522(b)(3)(A), new § 522(p)(1) limits the

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[56] 11 U.S.C. § 541(b)(7).

[57] 11 U.S.C. § 522(o).

debtor's homestead exemption to $125,000.00 if the debtor's interest was acquired during the 1215 day period (3 1/3 years) preceding the petition date. The $125,000.00 cap does not apply if: (1) the debtor acquired the homestead interest from the debtor's previous residence; (2) the debtor's previous residence and current residence are located in the same state; and (3) the debtor acquired the previous residence prior to the beginning of the 1215 day period. Section 522(p)(1) extends the two year look-back period under § 522(b)(3)(A) for claiming a state's homestead exemption so that even if a debtor satisfies the two year domicile requirement, the debtor must still reside in the new residence for a little over three years before the debtor is eligible to claim the new state's homestead exemption in excess of $125,000.00. Family farmers are exempt from this subsection.

If the debtor elects state exemptions under § 522(b)(3)(A), new § 522(q)(1) further imposes a $125,000.00 homestead limit regardless of when the debtor acquired the interest if: (1) the court determines that the debtor has been convicted of a felony that demonstrates that the filing of the case was an abuse of the Bankruptcy Code; or (2) the debtor owes a debt arising from the violation of securities laws, criminal acts, intentional torts, or reckless misconduct that caused serious physical injury or death within five years preceding the bankruptcy filing. The cap does not apply to the extent the property is "reasonably necessary" for the debtor's support.[58]

Subsections 522(o), (p) and (q) apply to all cases filed on or after April 20, 2005.

Dischargeability

***Credit card debts*:** § 523(a)(2)(C) is amended so that consumer debts owed to a single

[58] 11 U.S.C. § 522(q)(2).

creditor for more than $500 for luxury goods incurred within 90 days of filing and cash advances for more than $750 within 70 days of filing are presumed to be nondischargeable. Luxury goods are defined to exclude goods and services reasonably necessary for support or maintenance.[59]

Student loan debts: § 523(a)(8) is amended to expand the definition of student loans to include qualified educational loans as defined under § 221(d)(1) of the Internal Revenue Code.

Property settlements: § 523(a)(15) is amended so that all property settlements not covered by § 523(a)(5) are nondischargeable.

Priority

Section 507(a) is amended to give first priority to allowed unsecured claims for domestic support obligations owed to the debtor, a child of the debtor, and governmental units. The first priority given domestic support owed to individuals and governmental units is subject to the expenses of a trustee in administering assets that are otherwise available for the payment of such claims.[60]

Newly added § 507(a)(10) provides tenth priority for claims for death or personal injury incurred by the debtor while driving under the influence of drugs or alcohol.

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[59] 11 U.S.C. § 523(a)(2)(C)(ii)(II).

[60] 11 U.S.C. § 507(a)(1)(C).

SELECTED CHANGES AFFECTING CHAPTER 7 CASES

Means Testing: § 707(b)

The means test changes the historical presumption that honest but unfortunate debtors are entitled to a fresh start. The court is now required to presume abuse exists in an individual Chapter 7 case if the debtor is able to pay a threshold level of general unsecured debts as set forth in § 707(b)(2)(A)(i) which provides:

> In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of–
>
> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or
>
> (II) $10,000.

The presumption of abuse will always arise under § 707(b)(2)(A)(i) when the debtor's current monthly income less deductions equals or exceeds $166.67 because that amount, when multiplied by 60, will allow the debtor to payback at least $10,000 over five years. The presumption does not arise when the debtor's current monthly income less deductions is less than $100.00 per month. When the debtor's current monthly income less deductions falls between $100.00 and $166.66, the presumption of abuse will arise if the monthly balance available after taking allowed deductions is sufficient to repay 25% of the debtor's unsecured debt over 60 months. Charitable contributions made by the debtor continue to be excluded from consideration under § 707(b). ***Current monthly income:*** Current monthly income is defined in § 101(10A)(A) as the average monthly income received by the debtor and the debtor's spouse in a joint case during the six month period ending on the last day of the month preceding the petition filing date. For a debtor who files on October 17,

2005, the debtor's current monthly income will be the average monthly income earned by the debtor from April through September. If, however, the debtor fails to file the schedule of income required by § 521(a)(1)(B)(ii), the six month average will be based on the period ending on the "date on which current income is determined by the court . . ."[61] Current monthly income includes any amount paid from any source on a regular basis for household expenses by someone other than the debtor, but excludes Social Security benefits.[62]

Monthly expenses: Once the debtor's current monthly income is calculated, the debtor is entitled to reduce the figure by an extensive list of monthly expenses enumerated in § 707(b)(2)(A)(ii)-(iv). The first set of deductions is based on standards used by the IRS to determine a taxpayer's ability to pay delinquent taxes. Subsection (ii)(I) states that the "debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service . . ." The Bankruptcy Code does not appear to require amounts specified under the applicable National and Local IRS Standards to be reduced if the debtor's actual expenditures are less than the standards. It may be argued, however, that these are not to exceed amounts and that the debtor cannot deduct the full amount if actual expenses are lower than those allowed by the IRS standards.

The IRS divides monthly living expenses into three basic categories: (1) National standards for allowable living expenses (food, clothing, and miscellaneous); (2) Local standards for housing and utilities expenses; and (3) National and regional standards for transportation expenses.

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[61] 11 U.S.C. § 101(10A)(A)(ii).

[62] 11 U.S.C. § 101(10A)(B).

The National Standards for Allowable Living Expenses is available on the internet at http://www.irs.gov/businesses/small/article/0,,id=104627,00.html. The chart covers expenses for food, housekeeping supplies, apparel and services, personal care products and services, and an allowance for other miscellaneous living expenses. The IRS calculates these expenses based on the number of people living in the household and gross monthly income. For a single debtor with no other person living in the household, the allowed amount is $403.00 based on gross monthly income less than $833.00. For a family of four with gross monthly income less than $833.00, the allowed amount is $881.00. For a family of four with gross monthly income of $5,834.00 and over, the allowed amount is $1,564.00.

Housing and Utilities Allowable Living Expenses standards are available at http://www.irs.gov/businesses/small/article/0,,id=104696,00.html. The housing and utilities allowance is calculated geographically based on the number of persons in the household. For Morgan County, the maximum monthly allowance is $858.00 for a family of 2 or less, $1,010.00 for a family of 3, and $1,161.00 for a family of 4 or more.

Allowable Living Expenses for Transportation standards are available at http://www.irs.gov/businesses/small/article/0,,id=104623,00.html. The transportation category includes a national ownership costs category and a regional operating costs category. Nationally, ownership costs for one car is $475.00 and $338.00 for a second car. Additional operating costs for states located in the South Region, including Alabama, are allowed at $197.00 if the debtor does not own a car and uses public transportation, $242.00 for one car, and $336.00 for two cars.

Subsection 707(b)(2)(A)(ii)(I) further provides that '[n]otwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include payments for debts." It is unclear

whether this statement requires the debtor to reduce the IRS allowances for housing expenses and the ownership costs of transportation by the amounts actually paid by the debtor for mortgage payments and the repayment of car loans. One article on this topic suggests that a debtor is allowed to reduce monthly income by the applicable housing allowance and transportation expenses under subsection (ii), and then further reduce monthly income under subsection (iii) which provides for the reduction of monthly income by the debtor's average monthly payments on secured debts.[63] Another report prepared for Congress by the Congressional Research Service suggests that the debtor's average monthly payments on secured debts for home mortgages and car loans are in addition to the IRS allowances.[64] The report notes that the additional allowance appears to create a significant advantage for homeowners over renters because renters will not have a mortgage payment to deduct in addition to the allowed housing expenses. Other commentators assert that the notwithstanding clause in § 707(b)(2)(A)(ii)(I) requires the amounts deducted by the debtor under the IRS standards be reduced by the amount the allowance reflects the actual repayment of debt.[65] In addition to the expenses calculated using the IRS standards, § 707(b)(2)(A)(ii) provides that the debtor's monthly expenses shall include:

- health insurance, disability insurance, and health savings account expenses;
- expenses incurred to protect the debtor from family violence;

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[63] Norman W. Pressman and Robert A. Breidenbach, *What Did Congress Mean by the "Means Test" and Does It Matter What It Meant ?*, NORTON BANKR. L. ADVISOR (June 2005).

[64] *See* CRS Report RS22058, *Bankruptcy Reform: The Means Test*, by Mark Jickling (2005).

[65] Judge Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of the 2005 Reform Legislation*, *available at* abiworld.net (revised June 2, 2005).

- an additional allowance for food and clothing, if reasonable and necessary, of up to 5% of the allowance provided for by the National Standards issued by the IRS;
- actual administrative expenses of administering a chapter 13 plan in the debtor's district if the debtor is eligible for Chapter 13 relief;
- actual expenses up to $1,500.00 per year for each child to attend school if the debtor documents why the expenses are not already included in the IRS allowances;
- actual utility expenses in excess of the allowance specified by the IRS allowances for housing and utility expenses; and
- the amount of actual expenses paid for the support of an elderly, chronically ill, or disabled member of the debtor's immediate family or household.

Subsection (iii) provides for the deduction of the "debtor's average monthly payments on account of secured debts" calculated based on the total of all amounts contractually due to secured creditors in each of the 60 months following the petition date and divided by 60. The deduction for the payment of secured debts under subsection (iii) includes any additional payments that would be required for the debtor in filing a Chapter 13 plan to retain property that serves as collateral for a secured debt.

Finally, under § 707(b)(2)(A)(iv) the debtor's monthly expenses include the payment of the total amount of all priority claims divided by 60.

Once all deductions are applied and the means test calculation is made, if the debtor has current monthly income remaining after the allowed deductions that is sufficient to pay the threshold level of unsecured debts set out in § 707(b)(2)(A)(i) and the presumption of abuse arises, the court may dismiss the case, or, if the debtor consents, convert the case to Chapter 13 or 11.[66] The debtor may rebut the presumption of abuse by demonstrating that special circumstances exist that would

[66] 11 U.S.C. § 707(b)(1).

decrease the debtor's income or increase expenses in an amount that would bring the debtor below the threshold trigger points for the presumption of abuse. The debtor must be able to document the expense or income adjustments and attest under oath to the accuracy of same.[67] If the debtor is able to rebut the presumption of abuse or if the presumption does not arise under § 707(b)(2), the court must still consider on motion brought by a party in interest or upon the court's own motion under § 707(b)(1) whether the Chapter 7 petition was filed in bad faith and whether granting relief would be an *abuse* based on the totality of the circumstances.[68] Note that substantial abuse is no longer required.

Procedure

All individual debtors will now file a three page form entitled Statement of Current Monthly Income and if the debtor's income exceeds the applicable median income, the debtor will complete a second form entitled Means Test/Disposable Income Calculation Form. This applies to all individual debtor's filing under Chapters 7, 13 and 11. The debtor will also be required to indicate by marking a checkbox on the petition whether there is a presumption of abuse.

It is anticipated that the § 341 notice will include the 10 day notice the clerk is required to send stating whether there is a presumption of abuse or that the proper forms have not been filed to determine whether abuse is presumed.

Not later than 10 days after the conclusion of the § 341 meeting, the bankruptcy administrator

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[67] 11 U.S.C. § 707(b)(2)(B)(iv).

[68] 11 U.S.C. § 707(b)(3).

will file a statement with the court if there is a presumption of abuse.[69] It is anticipated that the BA will only file the statement if there is a presumption of abuse. Not later than 5 days after the BA files the notice, the clerk will provide a copy of the statement to all creditors.[70] Not later than 30 days after the BA files the presumption of abuse notice, the BA is required by § 704(b)(2) to file a motion to dismiss or convert under § 707(b) or file a statement why the BA does not consider such motion to be appropriate.

Standing: Safe Harbor Provisions

Given the extensive list of allowed expense deductions from monthly income, it is apparent that whether or not a debtor will be allowed to file a Chapter 7 does not depend entirely on income alone. Standing to file a motion to dismiss the debtor's Chapter 7 petition is, however, based on income without regard to the debtor's allowed expenses.

Standing to file a motion to dismiss based on the means test presumption under § 707(b)(2) is determined using both the debtor's current monthly income and that of the debtor's spouse, even if the case is not a joint case, unless the debtor and spouse are separated or living apart.[71] If the debtor's income and the combined income of the debtor's spouse does not exceed the applicable state median income, no one has standing to file a motion to dismiss based on the means test presumption.

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[69] 11 U.S.C. § 704(b)(1)(A).

[70] 11 U.S.C. § 704(b)(1)(B).

[71] 11 U.S.C. § 707(b)(7)(A), (B).

If the debtor's income, or in a joint case the combined income of the debtor and the debtor's spouse, does not exceed the applicable state median income, standing to file a motion to dismiss on the grounds of abuse under § 707(b)(1) is limited to the court, U.S. trustee, and bankruptcy administrator.[72]

Applicable median family income is calculated as follows: (1) in the case of a debtor in a household of 1 person, the median family income of the applicable state for 1 earner; (2) in a household of 2, 3, or 4, the highest median family income of the applicable state for a family of the same number or fewer individuals; and (3) in a household with more than 4, the highest median family income of the applicable state for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4. The Bankruptcy Code now defines median family income to be that as reported by the Bureau of the Census in the most recent year.[73] If reported median income for the current filing year is not available, then the most recent census figure must be adjusted for changes in the Consumer Price Index.[74] Median income values for the means test are available at: www.usdoj.gov/ust/. In Alabama, the applicable median family income in 2004 inflation adjusted dollars is $32,762 for 1 earner, $39,755 for 2 people, $48,957 for 3 people, and $54,338 for 4 people. For each individual in excess of four, add $6,300.00.

Disabled veterans are exempt from the means test if the veteran's debts were incurred while on active duty or performing a homeland defense activity.[75]

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[72] 11 U.S.C. § 707(b)(6).

[73] 11 U.S.C. § 101(39A)(A).

[74] 11 U.S.C. § 101(39A)(B).

[75] 11 U.S.C. § 707(b)(2)(D).

Attorney Sanctions

Under new § 707(b)(4)(A) and (B), the court, on its own motion or the motion of any party in interest may order the debtor's attorney to reimburse the trustee for costs, attorneys' fees, and civil penalties if the trustee filed a motion to dismiss or convert under § 707(b) that the court granted and the court finds that the attorney violated Rule 9011 in filing the case.

The debtor's attorney is charged under § 707(b)(4)(C) with the duty to perform a "reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion" signed by the attorney. Under § 707(b)(4)(C)(ii), the attorney's signature constitutes a certification that the petition, pleading, or written motion is well grounded in fact and warranted by existing law or good faith argument for altering the law. Finally, the attorney's signature is a certification that the attorney "has no knowledge after an inquiry that the information in the schedules filed with" the petition is incorrect.[76]

If a party in interest, other than the trustee, files a motion under § 707(b) and the court does not grant the motion, the court may award the debtor all reasonable costs in contesting the motion upon finding that the party violated Rule 9011.[77] The court may also award the debtor costs if the attorney who filed the motion did not comply with § 707(b)(4)(C)(i) and (ii), and the court finds that the motion was made to coerce a debtor into waiving a right guaranteed by the Bankruptcy Code. A small business creditor with a claim that is less than $1,000.00 is not liable for sanctions under § 707(b)(5)(A)(ii)(I).

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[76] 11 U.S.C. § 707(b)(4)(D).

[77] 11 U.S.C. § 707(b)(5)(A)(i), (ii).

Reaffirmation Agreements

To be enforceable, a reaffirmation agreement must: (1) be made before the granting of the discharge; (2) the debtor must receive an extensive set of new disclosures; (3) the agreement must be filed with the court along with an attorney declaration, if applicable; (4) the debtor must not rescind the agreement prior to discharge or within 60 days after the agreement is filed; (5) § 524(d) must be fully complied with;[78] and (6) if the debtor is not represented by an attorney, the court must approve the agreement.[79]

For the reaffirmation agreement to be enforceable, revised § 524(c)(2) provides that the debtor must receive expanded disclosures described in newly added § 524(k) either at or before the time the debtor signs the reaffirmation agreement. The debtor must receive a disclosure statement concerning the amount reaffirmed, the annual percentage rate, and a statement of the repayment schedule as described in § 524(k)(3)(A)-(H). Additional disclosure statement requirements are set forth in § 524(k)(3)(J)(i). These disclosures relate to the debtor's signing, filing, and rescinding reaffirmation agreements, as well as the legal consequences of entering into a reaffirmation agreement.

Prior to filing the reaffirmation agreement, the debtor must sign and date a statement in support of the reaffirmation agreement.[80] The statement must disclose the debtor's monthly income,

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[78] Under § 524(d), if the debtor was not represented by an attorney and the debtor wishes to reaffirm a debt, the debtor must appear before the court and the court must advise the debtor of the legal consequences of the agreement and that reaffirmation is not required.

[79] 11 U.S.C. § 524(c)(1)-(6).

[80] 11U.S.C. § 524(k)(6)(A).

current monthly expenses, and the balance left to make reaffirmation payments. If the debtor's income less expenses does not leave enough to make the payments, a presumption of undue hardship arises for a period of 60 days after the agreement is filed and the reaffirmation agreement must be reviewed by the court.[81] The debtor may overcome the presumption, if the debtor is able to explain to the satisfaction of the court in writing how the debtor will be able to make the payments.[82]

Under § 524(m)(2), credit unions are exempt from this subsection.

If the presumption is not rebutted, the court may disapprove the agreement, but only after notice and hearing. The hearing must be concluded before the entry of the debtor's discharge.[83] It is anticipated that the presumption of undue hardship will prevent the automatic entry of discharge when the reaffirmation agreement and statement in support of reaffirmation are filed prior to the discharge date. A problem may arise, however, when a reaffirmation agreement is filed after the case is discharged. The amendments do not impose a deadline for filing a reaffirmation agreement. Although the Bankruptcy Code requires a reaffirmation agreement to be "made" before the granting of the discharge,[84] the Bankruptcy Code does not require the parties to file the agreement prior to the discharge date.[85] Thus, if the debtor is represented by an attorney and enters into a reaffirmation agreement prior to discharge, but does not file the agreement until after the discharge order is entered, technically the date for the holding a hearing to approve the reaffirmation agreement will

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[81] 11 U.S.C. § 524(m)(1).

[82] 11 U.S.C. § 524(m)(1).

[83] 11 U.S.C. § 524(m)(1).

[84] 11 U.S.C. § 524(c)(1).

[85] 11 U.S.C. § 524(c)(1).

have expired pursuant to § 524(m)(1) which provides that "[n]o agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge." If the agreement is filed prior to the entry of the discharge order, the clerk's office will flag the case to prevent the discharge from automatically being entered to facilitate the reaffirmation hearing in compliance with § 524(m)(1). The time for complying with § 524(m)(1) will have expired, however, in the case in which the parties file a reaffirmation agreement post-discharge.

If there is a presumption of undue hardship and the debtor is represented by an attorney, § 524(k)(5) provides that the attorney's declaration required by § 524(c)(3) shall state that in the attorney's opinion, the debtor is able to make the payments. If the debtor is not represented by an attorney, § 524(k)(7) requires the motion to approve the reaffirmation agreement to include a statement by the debtor affirming that the debtor believes the agreement is in the debtor's best interest.

Newly added § 524(l)(3) provides that the § 524(c)(2) and (k) disclosure requirements are satisfied if given in good faith. Creditors may now accept payments from a debtor before and after the filing of a reaffirmation agreement pursuant to § 524(l)(1) and may accept payments under such agreement that the creditor believes in good faith to be effective.[86]

Redemption and Valuation Issues

Section 722 of the Bankruptcy Code is amended to clarify that the debtor must pay the full amount of an allowed secured claim at the time of redemption. Prior to the Bankruptcy amendments

[86] 11 U.S.C. § 524(l)(2).

a majority of courts held that the proper starting point for valuing collateral in the Chapter 7 redemption context was the collateral's liquidation value. That is the amount that a secured creditor would receive if it repossessed the collateral and sold same in the most beneficial manner possible. That majority opinion is reversed by newly added § 506(a)(2) which provides that in an individual Chapter 7 or 13 case, an allowed secured claim shall be determined based on the replacement value of the collateral *as of the petition date* without taking a deduction for the cost of sale or marketing. For "property acquired for personal, family, or household purposes, replacement value" is further defined as the price a retail merchant would charge for the property *"at the time value is determined"* considering the age and condition of the property.[87] It is important to note that § 506(a)(2) establishes two different valuation dates depending on the type of property being valued. For property acquired for personal, family, or household purposes, the valuation date is "at the time value is determined." For all other personal property the valuation date is "as of the date of the filing of the petition."[88]

As previously discussed, newly added § 521(a)(6) resolves the ride-through issue by requiring debtors to either reaffirm, redeem, or surrender personal property secured by a PMSI "not later than 45 days after the first meeting of creditors . . . ." The stay lifts on the personal property if the debtor fails to act within the 45 day period unless the court determines on the motion of the trustee filed before the 45 day period expires that the property has consequential value, grants the creditor adequate protection, and orders the debtor to deliver the property to the trustee.[89]

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[87] 11 U.S.C. § 506(a)(2).

[88] 11 U.S.C. § 506(a)(2).

[89] 11 U.S.C. § 521(a)(6)(B).

SELECTED CHANGES AFFECTING CHAPTER 13 CASES

Confirmation Hearing

Newly added § 1324(b) requires the court to hold Chapter 13 confirmation hearings not earlier than 20 days and not later than 45 days "after the date of the meeting of creditors." It is not clear whether this time period is to be measured from the first date set for the meeting of creditors, or a later date if the meeting is continued. The court may hold an earlier confirmation hearing if there is no objection to the earlier hearing date.

Length of Plan

Plan contents: § 1322(d)(1) is amended to provide that if the "current monthly income" of the debtor and the debtor's spouse combined when multiplied by 12 , is not less than the applicable state median family income, the plan may not provide for payments over a period that is longer than five years. If the combined current monthly income of the debtor and the debtor's spouse when multiplied by 12 is less than the applicable state median family income, the plan may not provide for payments over a period that is longer than three years unless the court approves a longer time period that does not exceed five years.[90]

Plan confirmation: §1325(b)(1) is amended to provide that upon objection of the trustee or the holder of an allowed unsecured claim, the court may not confirm a plan unless: (1) the amount

[90] 11 U.S.C. § 1322(d)(2).

to be distributed under the plan is no less than the amount of such claim; or (2) the plan provides that all of the debtor's projected disposable income to be received during the "applicable commitment period"will be applied to make payments to unsecured creditors. Section 1325(b)(4) defines the term "applicable commitment period" as: (i) 3 years; (ii) not less than 5 years if the current monthly income of the debtor and the debtor's spouse combined when multiplied by 12 is not less than the applicable state median family income; or (iii) a period that is less than 3 years or 5 years, whichever is otherwise applicable, if the plan provides for full payment of all allowed unsecured claims.

Disposable Income

Section 1325(b)(2) defines disposable income for purposes of plan confirmation as the debtor's current monthly income, other than child support, less the debtor's reasonably necessary expenses for maintenance or support, charitable contributions, and business expenses if the debtor is engaged in business. If the debtor's currently monthly income, when multiplied by 12, is greater than the applicable state median income, § 1325(b)(3) provides that the debtor's expenses are to be determined in accordance with the means test under § 707(b)(2)(A) and (B).

Secured Claims

Pursuant to amended § 1325(a)(5), the confirmation requirement for a secured claim may be satisfied in one of three ways. The plan may be confirmed if the secured creditor has accepted the plan or the debtor surrenders the property securing the creditor's claim.[91] Otherwise, the plan must

[91] 11 U.S.C. § 1325(a)(5)(A), (C).

provide that:

> (i) the creditor will retain its lien until the underlying debt is paid or the court enters the Chapter 13 discharge order;
>
> (ii) the creditor will receive payments with a present value as of the effective date of the plan of not less than the allowed amount of the secured claim; and
>
> (iii) if the plan provides for periodic payments, the payments must be in equal monthly payments; and if the creditor is secured by personal property the periodic payments must adequately protect the creditor's interest during the period of the plan.[92]

Under § 1325(a)(5)(B)(i), a creditor will retain its lien until the full amount of the claim is paid or the plan is completed. This change will prevent the Chapter 13 plan from providing for the release of a lien upon the payment of a stripped-down secured claim.

Section 1325(a) is further amended to limit the power of Chapter 13 plans to strip down certain secured claims by providing that § 506 does not apply to: (1) a purchase money security interest in a motor vehicle acquired for personal use if purchased within 910 days prior to the petition date; or (2) to all other purchase money security interest incurred during the 1 year period preceding the petition date. In all other situations, newly added § 506(a)(2), which applies to individuals in both Chapter 7 and 13 cases, has the effect of requiring that the stripped down value of a secured claim be based on the replacement value, that is the cost to the debtor to replace the collateral, without deducting for the costs of sale or marketing. Section 506(a)(2) further provides that the replacement costs for property acquired for personal, family, or household purposes shall be the retail

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[92] 11 U.S.C. § 1325(a)(5)(B).

price for property of similar age and condition "at the time value is determined."

Adequate Protection Payments

In addition to the requirement in § 1325(a)(5)(B)(iii) that the holder of a claim secured by personal property must receive periodic payments that are at least sufficient to provide adequate protection for confirmation purposes, § 1326(a)(1) is amended to require the debtor to commence making preconfirmation adequate protection payments to secured creditors no later than 30 days after the petition date. Section 1326(a)(1)(A) requires the debtor to commence plan payments to the trustee within 30 days, except the debtor is directed by § 1326(a)(1)(C) to reduce the proposed plan payments made to the trustee by the amount of adequate protection payments paid directly to secured creditors prior to confirmation. The debtor must make adequate protection payments directly to a creditor holding an allowed claim secured by personal property "to the extent the claim is attributable to the purchase of the property . . ."[93] The debtor must furnish the trustee with evidence of any adequate protection payments, including the amount and date, made to secured creditors. Under § 1326(a)(1)(B), the debtor is required to commence not later than 30 days after the petition date all scheduled lease payments on personal property directly to the lessor and provide the trustee with proof of payment.

The Chapter 13 Discharge

[93] 11 U.S.C. § 1326(a)(1)(C).

Now excepted from the Chapter 13 discharge are certain tax debts of the kind described in § 507(a)(8)(C) and § 523(a)(1)(B), (C) for unfiled, late-filed, and fraudulent tax returns. In addition to the debts previously excepted from the Chapter 13 super-discharge of the kind specified in § 523(a) (5), (8), and (9), § 1328(a)(2) is amended to further exclude debts of the kind specified in § 523(a)(2), (3), and (4) for fraud, failure to notify creditors of the bankruptcy petition, and breach of fiduciary duty. Under § 1328(a)(4), debts "for restitution, or damages, awarded in a civil action against the debtor as a result of willful *or* malicious injury by the debtor that caused personal injury . . ." are excepted from the super discharge. This exception differs from the exception to discharge found in § 523(a)(6) which excludes debts for willful *and* malicious injury. The exception also differs in that § 523(a)(6) applies to *any* debt arising from willful and malicious injury, whereas the § 1328(a)(4) exception applies to debts for restitution, or damages *awarded in a civil action* against the debtor.

Newly added § 1322(b)(10) provides that the Chapter 13 plan may provide for the payment of interest accruing on unsecured claims that are nondischargeable claims under § 1328(a), but only to the "extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims." This is particularly important for unsecured tax claims that are now excepted from the Chapter 13 discharge.

The debtor's discharge may be delayed under §1328(a) until the debtor certifies that all amounts due under any order or statue for domestic support obligations, "including amounts due before the petition was filed, but only to the extent provided for by the plan" have been paid.

Plan Treatment of Certain Loans and Obligations

Newly added § 1322(f) provides that a Chapter 13 plan may not materially alter the terms of a loan described in § 362(b)(19). As previously discussed, § 362(b)(19) provides that the stay does not apply to the withholding of income from a debtor's wages for payments related to loans from pension and profit-sharing plans. Section 1322(f) further provides that any amounts required to pay such loans do not constitute disposable income under § 1325.

For confirmation, § 1325(a)(8) provides that the plan will not be confirmed unless the debtor has paid all amounts required by order or statute under a domestic support obligation that first become payable after the petition date. As discussed above, the Chapter 13 discharge must also be held until all such payments have been satisfied. Failure to make such payments is now also grounds under § 1307(c)(11) for converting or dismissing a debtor's case.