

**CHAPTER 11 OF THE BANKRUPTCY  
CODE AFTER BAPCPA: IT'S MORE  
THAN CONSUMER CHANGES**

**By**

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# CHAPTER 11 OF THE BANKRUPTCY CODE AFTER BAPCPA: IT'S MORE THAN CONSUMER CHANGES

On April 20, 2005 (the "Enactment Date"), the President signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). BAPCPA section 1501 provides both that (a) BAPCPA will have a general effective date of 180 days from the Enactment Date, or October 17, 2005, and (b) BAPCPA is applicable only to bankruptcy cases filed on or after the "Effective Date." *In re OptinRealBig.com, LLC*, 345 B.R. 277 (Bankr. D. Colo. 2006) (BAPCPA does not apply where a bankruptcy case was filed before the Effective Date). Unless otherwise noted, the chapter 11 BAPCPA provisions apply to chapter 11 cases filed after the Effective Date or October 17, 2005. Even in cases filed before the Effective Date, however, some bankruptcy courts have found that BAPCPA is instructional. *See, e.g., In re Tom Foods Inc.*, 341 B.R. 82, 90 (Bankr. M.D. Ga. 2006); *In re Mirant Corporation*, 2006 Bankr. LEXIS 1125, at \*14-15 (Bankr. N.D. Tex. 2006).

## 1. CHANGES CONCERNING OFFICIAL COMMITTEES UNDER SECTION 1102

Section 1102 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"), deals with the appointment and duties of official committees. Under BAPCPA section 405, several changes were made to section 1102, as discussed below.

### (a) Committee Membership Disputes.

**Before BAPCPA.** Before BAPCPA, section 1102(a)(1) of the Bankruptcy Code provided that, as soon as practicable, the United States trustee (the "UST") shall appoint a committee of creditors holding unsecured claims, and "may" appoint additional committees of creditors or equity security holders, as the UST "deems appropriate." Section 1102(a)(2) further provided that the bankruptcy court, on request of a party in interest, may appoint additional committees of creditors or equity security holders "if necessary to assure adequate representation of creditors or of equity security holders." No parallel authorization existed for a party in interest to request, or the court to order, the UST to make changes in committee membership.

Based on the express language of section 1102(a)(1) and (a)(2), some courts found that only the UST could appoint members to an official committee, and that bankruptcy courts were without power to

become involved in any disputes regarding committee membership. Additionally, the Office of the UST took the position that, under section 1102 before BAPCPA, the bankruptcy court did not have authority over committee membership disputes.

**BAPCPA Provisions.** BAPCPA expressly authorizes the bankruptcy court to order the UST to change committee membership in order "to ensure adequate representation of creditors or equity security holders." BAPCPA § 405; amended § 1102(a)(4).

Because the UST has resolved most committee membership disputes, some creditors have been frustrated with the constitution of committees. Actively involving the courts in membership disputes, on the other hand, could be disruptive of the bankruptcy process. Unhappy with a member's position, or a committee's position, interested parties could raise membership issues as a litigation tactic designed to directly or indirectly attack legitimate committee decisions.

Interestingly, BAPCPA specifically requires "a notice and a hearing" before a court-ordered change in committee membership, whereas pre-BAPCPA section 1102(a)(2) did not expressly mention notice and hearing as a prerequisite to a court-ordered appointment of an additional committee. It seems doubtful, however, that this oversight in drafting will be interpreted as authority for dispensing with the notice and hearing requirements, as set forth in the Bankruptcy Rules or applicable local rules.

**(b) Membership of "Small Business Concerns."**

Apparently concerned that small businesses have been excluded from committee membership, BAPCPA now authorizes, but does not require, the UST "to increase the number of members of a committee [and] to include a creditor that is a small business concern," as described in Section 3(a)(1) of the Small Business Act. In order to require additional members (or, inclusion of a small business concern as an additional member, as the section should read), the court must determine that the "creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large" compared to that creditor's annual revenues. BAPCPA § 405; amended § 1102(a)(4).

These amended provisions raise a number of issues concerning how the UST will solicit committee membership, especially since the UST would not know whether creditors holding claims that are not listed in the List of Twenty Largest Unsecured Creditors are "small business concerns." In determining membership issues, the UST and perhaps the bankruptcy court will have the additional burden of both (a) trying to make a determination on whether the creditor constitutes a "small business concern" within the meaning of the Small Business Act, and (b) whether the creditor's claim is sufficiently large compared to its annual gross revenue in order to justify committee membership.

**(c) Information Sharing.**

BAPCPA provides that an official committees "shall . . . provide access to information" to non-committee members who hold claims of the kind represented by the committee. BAPCPA § 405; amended § 1102(b)(3)(A).

Before disseminating non-public, confidential or proprietary information, many debtors require committees to incorporate confidentiality provisions in their by-laws, or committee members to sign confidentiality agreements. Because the new access requirement is not expressly limited to public information, the access requirement will impact the extent to which debtors share non-public, confidential information with committees and their members. By way of example, the non-public information could include the debtor's business plans to expand into, or retreat from, highly competitive markets. Nor does BAPCPA address the situation where "access" is sought by a competitor who holds a claim against the debtor. While committee members have fiduciary duties to the committee constituents, even without being bound by confidentiality, non-members have no such duties.

Indeed, the uncertainties associated with amended section 1102(b)(3) have lead some committee's to file a motion for entry of an order that clarifies the committee's requirements to provide access to information and setting and fixing creditor information sharing procedures and protocol (the "Committee Motion"). Judge Brown recently granted such a Committee Motion in *In re OCA, Inc., et al.*, case no. 06-10179(B) (D.E. 370) on the docket of the United States Bankruptcy Court for the Eastern District of Louisiana (the "OCA Committee Motion"). Other examples of Committee Motions include *In re Premium Papers Holdco, LLC et al.*, case no. 06-10269 (CSS) on the docket of the United States Bankruptcy Court for Delaware, and In re

*Calpine Corporation*, case no. 05-060200 (BRL) on the docket of the United States Bankruptcy Court for the Southern District of New York.

In *Refco Inc.*, 336 B.R. 187, 190 (Bankr. S.D.N.Y. 2006), the court's first inclination was to deny a Committee Motion filed in that case only three days after the committee's appointment, because (a) there was "no case or controversy," and (b) no "adverse consequences" articulated for a failure to comply with amended section 1102. Ultimately, the court granted the Committee Motion, finding that it was "a large and rapidly moving case, and meaningful information may become stale before the completion of litigation over whether and how it should be provided." *Id.* (the order granting the Committee Motion is attached to the opinion). The court was also persuaded by the fact that "unsecured creditors apparently were pressing for information in ways that raised issues neither expressly addressed by statute nor, given the section's recent enactment, in the case law." *Id.*

Interestingly, the *Refco* court also found that the "access to information" language contained in amended section 1102(b)(3)(A) is similar to the requirements of section 704(7) of the Bankruptcy Code for bankruptcy trustees. *Refco*, 336 B.R. at 192. That section provides that the trustee shall, unless otherwise ordered, "furnish such information concerning the estate and the estate's administration as is requested by a party in interest." The court went on to conclude that the differences between amended section 1102(b)(3)(A) and section 704(7) are "immaterial," even though section 704(7) only requires the trustee to furnish information upon request. *Refco*, 336 B.R. at 192.

In *Refco*, the court discussed the importance of confidentiality and non-public, proprietary information, and concluded that "[m]aintaining the parties' reasonable expectations of confidentiality . . . is critical to a committee's performance of its oversight and negotiating functions, compliance with applicable securities laws, and the proper exercise of committee members' fiduciary duties." *Refco*, 336 B.R. at 197. In addition, "[m]aintaining confidentiality against unsecured creditors generally also may be necessary to preserve a committee's attorney-client privilege." *Id.* Therefore, the committee must "proceed cautiously concerning the disclosure of information that could reasonably have the effect of waiving the attorney-client or other privileges . . . , notwithstanding Bankruptcy Code section 1102(b)(3)." *Refco*, 336 B.R. at 197.

The *Refco* court also acknowledged that confidentiality concerns must be balanced against "the right of unsecured creditors to be informed of material developments in the case before they are presented with what in practical terms may be a *fait accompli*." *Id.* The court concluded that, by granting the Committee Motion, the "balance has been achieved by not requiring in the first instance -- that is without further court order -- the Committee's disclosure of information (a) that could reasonably be determined to be (a) that could reasonably be determined to be confidential and non-public or proprietary, (b) the disclosure of which could reasonably be determined to result in a general waiver of the attorney-client or other applicable privilege, or (c) whose disclosure could reasonably be determined to violate an agreement, order or law, including applicable securities laws." *Id.* at 198. On the other hand, the order also provides that, when deciding whether to release otherwise protected information, the committee must take into account the requesting party's willingness to agree to such constraints on confidentiality and/or trading constrains. *Id.* If a creditor disagrees with the committee's decision not to disclose protected information, the creditor is free to raise "any argument to show that the Committee's need to protect specified information is not outweighed by the creditor's legitimate need to receive it." *Id.*

**(d) "Additional Reports and Disclosures."**

BAPCPA also provides that the court may compel "additional reports or disclosures to be made to creditors." BAPCPA § 405; amended § 1102(b)(3)(C). In other words, it appears that committees may be "compelled" to prepare and disseminate "additional reports or disclosures." Further, the preparation and dissemination of "additional reports or disclosures" could be costly and time-consuming. If the estate is administratively insolvent, the committee may not have the resources to produce "additional reports or disclosures." In that instance, presumably the court would not compel the committee to make "any additional reports or disclosures." Again, this is an area that will be addressed in litigation.

Some of the Committee Motions contain provisions that outline the type of information (i.e., reports and disclosures) that will be provided to the constituents of the committee, typically via a password protected website. By way of example, additional reports and disclosure may include (i) quarterly reports summarizing recent proceedings, (ii) events and public financial information, (iii) highlights of significant and material events in the bankruptcy case, (iv) a calendar with upcoming significant and material events or hearings in



the bankruptcy case, (v) responses to creditor questions, and (vi) comments and requests for access to information. (Order granting the OCA Committee Motion, at Paragraph 4.)

**(e) Soliciting "Comments."**

BAPCPA also provides that the committee "shall . . . solicit and receive comments from the creditors" that the committee represents. BAPCPA § 405; amended § 1102(b)(3). The new section does not address the frequency of, reasons for, extent of, or format of, such "solicitations."

Some of the Committee Motions contain a provision that the committee is not required to solicit comments from any entity that has not demonstrated, to the satisfaction of the committee, "in its sole discretion, or to the Court, that it holds claims of the kind described in section 1102(b)(3) (meaning, creditors holding claims that are represented by the committee) (Order granting the OCA Committee Motion, at Paragraph 7).

## **2. CHANGES CONCERNING THE APPOINTMENT OF A TRUSTEE OR EXAMINER UNDER SECTION 1104**

Section 1104 of the Bankruptcy Code deals with the appointment of a trustee or examiner in a chapter 11 case. Under BAPCPA sections 416, 442(b), and 1405, several changes were made to section 1104, as discussed below.

**(a) Appointment of a Chapter 11 Trustee or Examiner In Lieu of Dismissal or Conversion.**

**Before BAPCPA.** Before BAPCPA, section 1104(a) provided that, on request of a party in interest or the UST, the court "shall" order the appointment of a trustee in a chapter 11 case "for cause," including certain examples such as fraud, dishonesty, incompetence or gross mismanagement.

**BAPCPA Provisions.** After BAPCPA, amended section 1104(a)(4) continues to contain a non-exhaustive list of the reasons supporting the appointment of a trustee. BAPCPA alters the examples to the non-exhaustive list, including a number of new examples.

After BAPCPA, the court "shall" order the appointment of a trustee "if grounds exist to convert or dismiss the case under amended section 1112, *but* the court determines that the appointment of a trustee or *examiner is in the best interests of creditors and the estate.*" BAPCPA § 416; amended § 1104(a)(3)(emphasis added). In other words, if the court finds that grounds exist to order conversion or dismissal, the court can appoint a trustee or examiner instead if such appointment would be in the best interests of creditors and the estate. This concept is incorporated into amended section 1112(b). BAPCPA § 442(a).

**(b) UST's Obligations to Seek Appointment of a Trustee in Cases of Suspected Fraud.**

**BAPCPA Provisions.** Under BAPCPA, the UST is obligated to seek the appointment of a trustee under amended section 1104(e) "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 report." BAPCPA section 1405, entitled, "Appointment of trustee in cases of suspected fraud;" amended section 1104(e) (emphasis added). This provision applies to all bankruptcy cases filed on or after the Enactment Date of April 20, 2005. It is unclear, however, whether the UST will be required to plead fraud with particularity, or whether section 1104(e) will be viewed as "trumping" Rule 9(b) of the Federal Rules of Civil Procedure.

After BAPCPA, the UST is under no obligation to seek the appointment of a trustee for any grounds other than for "fraud, dishonest, or criminal conduct" in managing the company, as specified in amended section 1104(e). Further, although the UST's obligations are triggered by "reasonable grounds to suspect," the bankruptcy court applies a different standard in deciding whether to appoint the trustee. That is, the court must conclude, as opposed to "suspect," that (i) cause exists for the appointment of a trustee, and (ii) the appointment is in the best interests of the creditors, stockholders, and the estate under amended section 1104(a).

**(c) Electing a Chapter 11 Trustee.**

**Before BAPCPA.** Before BAPCPA, under section 1104(b), on request of a party in interest made within 30 days after the court

orders the appointment of a trustee, the UST is obligated to convene a meeting to elect a disinterested person to serve as trustee.

**BAPCPA Provisions.** Under BAPCPA, if an election is held under amended section 1104(a), and an "eligible, disinterested trustee is elected," the UST must file a report certifying the election. BAPCPA 416; amended § 1104(b)(2)(A). The "selection and appointment" of the elected trustee is effective as soon as the UST's report is filed. BAPCPA § 415; amended § 1104(b)(2)(B)(i) and (ii). Further, the court must resolve any dispute about the trustee's election. BAPCPA § 416; amended § 1104(b)(2)(C).

### **3. DUTIES OF A TRUSTEE OR EXAMINER UNDER SECTION 1106**

**Before BAPCPA.** Section 1106 of the Bankruptcy Code deals with the duties of an examiner or trustee in a chapter 11 case.

**BAPCPA Provisions:** BAPCPA made a number of changes that cover individuals in chapter 11 cases. Included in those changes, amended section 1107 contains a number of provisions that require a chapter 11 trustee to give the requisite notice to state and federal agencies in the collection of "domestic support obligations." BAPCPA § 219(a); amended §§ 1105(a)(8) and 1105(c)(1) and (2). The term "domestic support obligation" is defined by BAPCPA in amended section 101(14)(A).

### **4. CONVERSION OR DISMISSAL UNDER SECTION 1112**

Section 1112 of the Bankruptcy Code deals with the conversion or dismissal of a chapter 11 case. Under BAPCPA section 442(a) (entitled, "Expanded Grounds for Dismissal or Conversion"), several changes were made to section 1112, as discussed below.

#### **(a) "Cause" for Conversion or Dismissal.**

**Before BAPCPA.** Before BAPCPA, section 1112 listed ten non-exclusive types of "cause" sufficient to support the conversion or dismissal of a chapter 11 case.

**BAPCPA Provisions.** BAPCPA contains expanded examples of “cause” to convert or dismiss, including the following:

- Substantial or continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation [adds the word "substantial"]
- Gross mismanagement of the estate [new]
- Failure to maintain appropriate insurance that poses a risk to the estate or the public [new]
- Unauthorized use of cash collateral "substantially harmful to one or more creditors" [new]
- Failure to comply with an order of the court [new]
- Unexcused failure to timely satisfy reporting requirements [new]
- Failure to attend section 341 meeting of creditors, or a Rule 2004 examination without "good cause" [new]
- Failure to provide information, or attend meetings, reasonably required by the UST [new]
- Failure to timely pay post-petition taxes, or file tax returns [new]
- Failure to file a disclosure statement within the time fixed by the Bankruptcy Code or the court [new]
- Failure to confirm a plan within the time fixed by the Code or the court [using the word "confirm" as opposed to "propose"]
- Failure to pay UST's quarterly fees [new]
- Revocation of a confirmation order [unchanged]
- Inability to effectuate "substantial consummation" of a confirmed plan [unchanged]

- Material default by the debtor with respect to a confirmed plan [unchanged]
- Termination of a confirmed plan by reason of the occurrence of a condition specified in the plan [unchanged]
- Failure to pay any post-petition domestic support obligations [new]

BAPCPA § 442(d); amended § 1112((b)(4). While courts have considered some or all of the foregoing examples of "cause" in determining whether to grant a motion to convert or dismiss, the inclusion of some of the examples of "cause," together with the other amendments to section 1112, will undoubtedly lead to more frequent motions to convert or dismiss.

In *In re TCR of Denver, LLC*, 338 B.R. 494, 500-01 (Bankr. D. Colo. 2006) (decided under BAPCPA), the court held that the use of "and" at new section 1112(b)(4)(P) (the last element listed) should be read in the disjunctive, as "or" instead of "and." In so ruling, the court found that the elements listed in section 1112(b)(4) are illustrative, not exhaustive, and that it would be virtually impossible for *each* of the 14 elements list in section 1112(b)(4) to be satisfied. *Id. Accord In re 3 Ram, Inc.*, 2006 Bankr. LEXIS 1377, at \*11 (Bankr. E.D. Pa. 2006).

In *3 Ram*, 2006 Bankr. LEXIS 1377, at \*11, the bankruptcy court found that, after BAPCPA, conversion or dismissal of a chapter 11 case is "appropriate where the court finds that the proposed plan is not feasible and that a feasible plan is not possible." In so ruling, the court expressly noted that the ability to propose a feasible plan is no longer an enumerated ground under amended section 1112(b)(4). The court in *3 Ram* nonetheless dismissed the case for "cause," after finding that "a confirmable plan is not possible in this case" and that "no reorganization was in process" because the bankruptcy was nothing more than a "two party dispute." *Id.* at \*16.

#### **(b) Deadlines to Commence the Hearing and Rule.**

Under BAPCPA, the court must commence a hearing on a motion to convert or dismiss no later than 30 days after the motion is filed, *and* the court must "decide the motion" no later than 15 days after the commencement of the hearing, unless (i) the movant expressly consents to a continuance "for a specific period of time," or

(ii) "compelling circumstances prevent the court from meeting the time deadlines of amended section 1112(b)(3). BAPCPA § 442(d); amended § 1112(b)(3).

**(c) "If the Movant Establishes Cause."**

Under BAPCPA, if the movant establishes "cause," the court "shall" (as opposed to "may") convert or dismiss the case, or appoint a trustee under amended section 1104(a)(3), BAPCPA section 416, depending on the best interests of creditors, unless the court "specifically" identifies "unusual circumstances" that "establish that the requested conversion or dismissal is not in the best interests of creditors and the estate." BAPCPA § 442(d); amended § 1112(b)(1). In addition, the debtor or another party opposing the motion must establish each of the following: (a) there "is a reasonable likelihood that a plan will be confirmed within the timeframes" established in the Bankruptcy Code (or, if those timeframes do not apply, within a reasonable time); (b) there is a reasonable justification for the act or omission that established the "cause"(except where "cause" is the substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation); and (c) that act or omission will be cured within a reasonable period of time fixed by the court. BAPCPA § 442(d); amended § 1112(b)(2).

## **5. RETIREE BENEFITS UNDER SECTION 1114**

**Before BAPCPA.** Section 1114 of the Bankruptcy Code prohibits a chapter 11 debtor from modifying benefits under a post-retirement health plan without complying with a lengthy negotiation process, somewhat like the process required with respect to a collective bargaining agreement. In addition, the debtor (a) must show the court that the modifications are necessary to permit the reorganization to succeed, and (b) treat retirees equitably as compared to other parties in interest. Because some retiree health plans permit an employer to unilaterally modify the plan, some courts have held that section 1114 supersedes the health plan provisions, and some courts have held that such provisions are not superseded by section 1114.

**BAPCPA Provisions.** BAPCPA provides that the bankruptcy court, upon a party in interest's motion, may reverse any modification made to retiree benefits during the 180 days before bankruptcy, *if* the debtor employer was insolvent at the time of the modification, *unless* "the court finds that the balance of the equities clearly favors such modification." BAPCPA § 1403; amended § 1114(l) (emphasis added). BAPCPA does not expressly

resolve the issue as to whether a retiree health plan that permits an employer debtor from unilaterally modifying a plan notwithstanding amended section 1114. BAPCPA section 1403 applies to bankruptcy cases filed on or after the Enactment Date of April 20, 2005.

In addition, BAPCPA specifically gives the UST the authority to appoint a committee of retired employees, if the bankruptcy court orders the formation of such a committee. BAPCPA § 1406; amended § 1114(d).

## **6. PROPERTY OF THE ESTATE UNDER NEW SECTION 1115 (WHERE THE DEBTOR IS AN INDIVIDUAL)**

**BAPCPA Provisions.** For an individual filing under chapter 11, "property of the estate" includes (a) all property defined in section 541 of the Bankruptcy Code, and (b) all property that is acquired *after* the commencement of the case, but before the case is closed, dismissed, or converted. "Property of the estate" also includes earnings from services performed by the debtor post-petition, *until the case is closed, dismissed or converted*. BAPCPA § 321(a); new § 1115(a)(1) and (2). New section 1115(a) is similar to the definition of property of the estate for chapter 13 cases. 11 U.S.C. § 1306(a)(1) and (2) ("until the case is closed, dismissed, or converted"). New section 1115(b) further provides that the debtor shall remain in possession of all property of the estate unless a trustee or examiner is appointed, or a confirmed plan or order confirming a plan removes the debtor from possession. BAPCPA § 321(a); new § 1115(b). As discussed below, section 1123 (contents of plan) was amended to provide that the chapter 11 plan of an individual (like the chapter 13 plan) must provide for the payment to creditors of all or such portion of post-petition earnings or income as is "necessary for the execution of the plan."

## **7. DUTIES OF TRUSTEE OR DEBTOR-IN-POSSESSION IN SMALL BUSINESS CASES UNDER NEW SECTION 1116**

**BAPCPA Provisions.** In addition to other duties imposed under the Bankruptcy Code, under BAPCPA, a small business debtor in possession, or the trustee for the small business estate, must comply with the following:

(a) Attach to the voluntary petition or file, if an involuntary petition is involved, the following items within 7 days after the date of order of relief--

(i) the debtor's most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or

(ii) a statement under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;

(b) Attend, through its senior management personnel and counsel, meetings scheduled by the court or the UST, including initial debtor interviews, scheduling conferences, and meetings of creditors convened under section 341 unless the court, after notice and a hearing, waives that requirement upon a finding of extraordinary and compelling circumstances;

(c) Timely file all schedules and statements of financial affairs, unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances;

(d) File all post-petition financial and other required reports;

(e) Maintain insurance customary and appropriate to the industry (see section 362(c)(2));

(f) (i) Timely file tax returns and other required government filings, and (ii) subject to section 363(c)(2), timely pay all taxes entitled to administrative expense priority except those being contested by appropriate proceedings being diligently prosecuted; and

(g) Allow the UST, or a designated representative of the UST, to inspect the debtor's business premises, books and records at reasonable times, after reasonable prior written notice, unless notice is waived by the debtor.

BAPCPA § 436(a); new § 1116.



## 8. FILING PLANS AND DISCLOSURE STATEMENTS UNDER SECTION 1121

**Before BAPCPA.** Section 1121 of the Bankruptcy Code limits the time within which a debtor has the exclusive right to file a plan and obtain acceptance of that plan. Before BAPCPA, extensions could be obtained "for cause" without limitation.

**BAPCPA Provisions.** Under BAPCPA, a court cannot extend (a) the debtor's exclusive right to file a plan *beyond 18 months* from the date the petition was filed, or (b) the debtor's exclusive right to solicit acceptances *beyond 20 months*. BAPCPA § 411; amended § 1121(d). There are no exceptions to these deadlines, except as to "small business" cases, as discussed below.

In a small business case, the debtor has the exclusive right to file a plan within the *180 days* period after entry of the order for relief (extending previous law by 80 days), unless, before the deadlines expire, the period is extended after notice and hearing, or the court, for cause, orders otherwise. BAPCPA § 437; amended § 1121(e)(1)(A) and (B). The small business debtor's plan and disclosure statement must be filed not later than *300 days* after entry of the order for relief (extending previous law by 140 days). BAPCPA § 437; amended § 1121(e) (2). In order to obtain an extension of the 180 or 300 day deadlines, (i) the small business debtor, after appropriate notice, must demonstrate, *by a preponderance of the evidence*, that it is more likely than not that the court will confirm a plan within a reasonable period of time, (ii) the order extending time must be signed before the existing deadline has expired, and (iii) the deadline must be imposed at the time the extension is granted. BAPCPA § 437; amended § 1121(e)(3). It should be noted that the deadline established in amended section 1129(e) may be extended if the foregoing requirements are satisfied. As discussed below, amended section 1129(e) provides that the bankruptcy court "shall" confirm a "small business" plan that complies with the applicable provisions of the Bankruptcy Code "not later than 45 days after the plan is filed." BAPCPA § 438; amended § 1129(e).

The BAPCPA limitations on extending exclusivity are intended to cause debtors to propose and confirm a plan more quickly than in the past. In large reorganizations, where debtors and committees are grappling with such complex issues as collective bargaining agreements, pension and retiree benefits, or mass tort liability, limitations on exclusivity may be detrimental to the negotiation of consensual plans.

## 9. CONTENTS OF AN INDIVIDUAL'S PLAN UNDER SECTION 1123

**Before BAPCPA.** Section 1123 of the Bankruptcy Code lists provisions that must be contained in a plan, and provisions that may be contained in a plan.

**BAPCPA Provisions.** Under BAPCPA, a chapter 11 plan of an individual must provide for the payment to creditors of all or such portion of earnings from personal services the debtor performs after bankruptcy, or other future income of the debtor, as is "necessary for the execution of the plan." BAPCPA § 321(b); amended § 1123(a)(8). This provision is a corollary to new section 1115, which section provides that property of the estate, in the case of an individual in chapter 11, includes post-petition income and earnings until the case is dismissed, converted, or closed. Interestingly, amended section 1123 does not require that the individual devote all of his or her disposal income to plan payments, as required in a Chapter 13 case. Notwithstanding this omission, amended section 1127 permits an unsecured creditor or the UST to seek to modify a confirmed plan of an individual at any time before completion of all plan payments. *See* BAPCPA §321(e); amended § 1127(e) (discussed below).

## 10. IMPAIRMENT UNDER SECTION 1124

**Before BAPCPA.** Section 1124 of the Bankruptcy Code addresses when a claim is "impaired" for purposes of plan confirmation.

**BAPCPA Provisions.** The BAPCPA amendments to section 1124 appear to conform to the BAPCPA amendments to section 365. Section 365 requires a debtor or trustee to cure, or provide adequate assurance of prompt cure, in order to assume an unexpired lease or executory contract. At times, based on "historical fact," nonmonetary defaults simply cannot be cured because history cannot be rewritten. For example, if a franchise agreement provides that the closing of the franchisee's operations is a default, and if the operations close, it is too late to cure that nonmonetary default. *See Worthington v. General Motors Corp.*, 113 F.3d 1202 (9th Cir. 1997) (ruling that a franchise could not be assumed because the nonmonetary default, caused by a closing of operations, could not be cured). The amendments to sections 365 and 1124 attempt to address nonmonetary defaults in unexpired leases and executory contracts, as discussed below.

Section 365(b)(2)(D) has been amended in BAPCPA to provide that the debtor or trustee is not required to cure "any penalty rate or penalty

provision related to a default arising from a nonmonetary default before assumption." BAPCPA § 328(a); amended § 365(b)(2)(D). BAPCPA's change of "other provisions" to "penalty provisions" should mean that the cure of a "penalty" arising from a nonmonetary default is not a required element of cure for assumption. By negative implication, courts should require the cure of *non-penalty*, non-monetary defaults.

Section 365(b)(1)(A) was also amended. After BAPCPA, that subsection contains the exceptions to when a non-penalty, nonmonetary default must be cured in connection with an assumption, as follows:

(a) Under amended section 365(b)(1)(A), the trustee or debtor is not required to cure a non-penalty, nonmonetary default of an *unexpired lease real property* (both residential and nonresidential) where it is impossible to cure that default by performing nonmonetary acts. If, however, the default arises from a failure to operate as required in a lease of *nonresidential real property (excluding residential leases)*, the debtor or trustee must perform under that lease "at and after" assumption. *Further, cure includes the payment of pecuniary losses caused by the nonmonetary default in a nonresidential lease of real property.* BAPCPA § 328; amended § 365(b)(1)(A).

(b) By negative implication, the debtor or trustee is required to cure non-penalty, nonmonetary defaults in executory contracts and unexpired leases of personal property. Therefore, the debtor or trustee will be precluded from assuming an executory contract or personal property lease where it is impossible to cure non-penalty, nonmonetary defaults. *See* BAPCPA § 328; amended § 365(b)(1)(A).

Corresponding to the foregoing amendments to section 365, BAPCPA also amends section 1124. Under BAPCPA, a claim is impaired if the claim is for pecuniary losses arising out of a nonmonetary default in a residential lease of real property. BAPCPA § 328(b); amended § 1124(2)(d). (BAPCPA likewise requires such pecuniary losses to be paid in connection with an assumption of a nonresidential real property lease.) More particularly, under pre-BAPCPA section 1124(2), a claim is not impaired, notwithstanding a contractual provision or applicable law that entitles the holder of that claim to demand or receive accelerated payment after default, where (a) the default is cured (unless cure is not required under §365), section 1124(2)(a), (b) the maturity of the claim is reinstated, section 1124(2)(b), (c) the claim holder is compensated for any damages incurred as a result of reasonable reliance of the contractual provision or applicable law that accelerated payment, section 1124(2)(c), and (d) the plan does not alter the holder's legal, equitable, or

contractual rights, section 1124(2)(d). Amended section 1124(2)(d) is consistent with amended §365(b)(1)(A).

Under amended section 1124(2)(d), a claim is not impaired if it arises from the failure to perform a nonmonetary obligation *other than* a claim that compensates actual pecuniary loss (except the loss of the debtor or an insider) resulting from the debtor's failure to operate a nonresidential real property lease. BAPCPA § 328(b); amended § 1124(2)(d). In other words, if the claim is for compensation for actual pecuniary loss, caused by a nonmonetary default in a nonresidential real property lease, the claim is impaired under the plan unless it is paid.

## **11. POST-PETITION DISCLOSURES AND SOLICITATIONS UNDER SECTION 1125**

Section 1125 of the Bankruptcy Code governs disclosure made in connection with the solicitation of a plan of reorganization. Under BAPCPA sections 408, 431, and 717, several changes were made to section 1125, as discussed below.

### **(a) More Flexible Rules for Disclosures.**

Amended section 1125(a) now provides that, in determining the adequacy of information, the court must “consider” (a) the complexity of the case, (b) the benefit of additional information to creditors and other parties in interest, and (c) the cost to provide the additional information. BAPCPA § 431 (entitled, “Flexible Rules for Disclosure Statements and Plans”); amended § 1125(a).

### **(b) Prepackaged Chapter 11 Plans.**

**Before BAPCPA.** Section 1125(b) of the Bankruptcy Code prohibited post-petition solicitations for the acceptances or rejections of a plan until the creditors received a court-approved disclosure statement. Before BAPCPA, this included post-petition solicitations of a “prepackaged plan.”

**BAPCPA Provisions.** Amended §1125(g) permits post-petition solicitations of holders of claims and interests, provided the solicitations comply with applicable nonbankruptcy law and the holder that is being solicited post-petition was solicited before the bankruptcy

“in a manner complying with applicable nonbankruptcy law.”  
BAPCPA § 408; amended § 1125(g).

**(c) Tax Disclosures.**

Amended section 1125(a)(1) specifically provides that adequate information includes disclosures regarding potential, material federal tax consequences of the plan on the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case. BAPCPA § 717; amended § 1125(a)(1).

**12. MODIFICATIONS TO PLANS OF  
INDIVIDUALS UNDER SECTION 1127**

Section 1127 of the Bankruptcy Code governs modifications to a chapter 11 plan before and after confirmation, but before substantial consummation of the plan. Under BAPCPA section 321(e), major changes were made to section 1127, as discussed below.

**(a) Expanded Ability to Modify Plans of  
Individuals in Chapter 11.**

Under amended section 1127(e), if the debtor is an individual, a plan “may” be modified *at any time* after confirmation “*until completion of payments under the plan,*” regardless of whether substantial consummation has occurred. (Emphasis added.) After confirmation, only the debtor, a chapter 11 trustee, the UST, or the “holder of an allowed unsecured claim” may move for such modification. The motion may seek to (i) increase or reduce the amount of payments on claims in a particular class, (ii) extend or reduce the time period for such payments, or (iii) alter plan payments to an individual creditor in order to account for payments received by that creditor from outside the plan. BAPCPA §321(e)(1)(2) and (3); amended § 1127(e). Not surprisingly, amended section 1127(e) is substantially similar to the section governing modifications of a chapter 13 plan. *See* 11 U.S.C. § 1329(a)(1)(2) and (3)(modifications of a chapter 13 plan after confirmation).

Obviously, if an individual debtor's income significantly increases, unsecured creditors may file a motion to increase plan payments. The amendment is unclear as to whether an unsecured creditor who is impaired under a plan, but who has received all plan payments due the class of unsecured creditors, may move to increase

plan payments to unsecured creditors where secured creditors, for example, have not received all plan payments. If so, because secured claims are often paid over much longer periods of time than unsecured claims, a confirmed chapter 11 plan of an individual would have no real finality.

Presumably creditors will negotiate for plan provisions that require more frequent or complete disclosures during the post-confirmation period. In this way, the creditors could better monitor any increases in the individual debtor's income. Since discharge is delayed until all plan payments are made, as discussed below with respect to amended section 1141, the individual debtor should have sufficient incentive to comply with any such post-confirmation reporting requirements.

**(b) Plan Modification Requirements.**

BAPCPA makes clear that (i) a modified plan is subject to the same requirements as an original plan, (ii) the modified plan requires disclosure under section 1125 (as the court may direct such disclosure), (iii) notice and hearing, and (iv) court approval of the modifications. BAPCPA § 321(e); amended § 1127(f)(1) and (2).

### **13. PLAN CONFIRMATION UNDER SECTION 1129**

To confirm a chapter 11 plan, the bankruptcy court must find that the plan satisfies each of the requirements of section 1129 of the Bankruptcy Code. Under BAPCPA sections 710, 213(1), 321(c), and 1221(b), major additions and amendments were made to section 1129, as discussed below.

**(a) Payment of Tax Claims.**

**Before BAPCPA.** Before BAPCPA, section 1129 provided that a plan could not be confirmed unless section 507(a)(8) unsecured tax claims received deferred cash payments, over a period not to exceed six years after the date of assessment, and the deferred payments must have had a value, as of the effective date of the plan, equal to the allowed amount of such claim.”

**BAPCPA Provisions.** Under BAPCPA, the plan must provide that section 507(a)(8) unsecured tax claims are paid (a) in regular installments (as opposed to “deferred cash payments”), (b) in full within five years from the order for relief (rather than six years from

the date of assessment), and (c) “in a manner not less favorable than other non-priority unsecured claims provided for in the plan” (a new provision). BAPCPA § 710; amended § 1129(a)(9). In addition, a secured tax claim that would be a section 507(a)(8) unsecured tax claim absent the collateral is entitled to the same treatment as an unsecured tax claim under amended section 1129(a)(9). After BAPCPA, new section 511 governs the determination of the appropriate interest of interest on tax claims and administrative expense tax claims. Under new subsection 511(a) interest "shall be the rate determined under applicable nonbankruptcy law," and, in the case of a confirmed plan, under new subsection 511(b), the rate "shall be determined as of the calendar month in which the plan is confirmed."

**(b) Domestic Support Obligations.**

Under BAPCPA, the chapter 11 plan of an individual cannot be confirmed unless the plan provides for the payment of post-petition domestic support obligations required by judicial or administrative order, or by statute. BAPCPA § 213(1); amended § 1129(a)(14).

**(c) Unsecured Debt of an Individual in Chapter 11 Plan.**

Under BAPCPA, the chapter 11 plan of an individual cannot be confirmed over the objection of an unsecured creditor unless the debtor shows that the value of the property to be distributed under the plan is not less than (i) the debtor’s projected *disposable income for five years*, or (ii) the period for payments that is proposed in the plan, whichever is longer. BAPCPA § 321(c); amended § 1129(a)(15).

**(d) Small Business Cases.**

Under BAPCPA, in a small business case, within 45 days of filing (unless the time for confirmation is extended as required by BAPCPA § 437l, at amended § 1121(e)(3)), the court must confirm a plan that complies with the requirements of the Bankruptcy Code, and was filed within the exclusivity period for small business debtors under amended section 1121. BAPCPA § 438; amended § 1129(e).

## **14. EFFECT OF CONFIRMATION UNDER SECTION 1141**

Section 1141 of the Bankruptcy Code deals with the effect of confirmation. Under BAPCPA sections 321(d), 330(b), and 708, three major changes were made to section 1141, as discussed below.

### **(a) Delay in Discharge of an Individual Pending Completion of Plan Payments**

Under BAPCPA, unless (after notice and hearing) the court orders otherwise “for cause,” confirmation of a chapter 11 case for an individual does not grant a discharge until the debtor has completed plan payments. BAPCPA § 321; amended § 1141(d)(5)(A). “Cause” is not defined.

After the plan payments are paid, the court will grant the individual debtor a discharge in accordance with the other provisions of the Bankruptcy Code. If all plan payments are not made, after notice and hearing, at any time after confirmation, the court *may* grant a discharge to the individual if (i) the plan payments that were made to that point exceeded what creditors would have received in a chapter 7 liquidation, and (ii) modification of the plan is “not practical.” BAPCPA § 321; amended § 1141(d)(5)(B).

### **(b) Delay in Discharge Pending Certain Proceedings.**

Under BAPCPA, the court will not delay entry of a discharge to an individual (see above) where the court finds that “there is no reasonable cause to believe” that there is a proceeding pending in which the debtor may be found guilty of (i) a felony, or (ii) liable for a debt arising from a violation of the (A) federal Securities Exchange Act, or similar state law, (B) criminal acts, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to an individual, or (C) civil RICO. BAPCPA § 330(b); amended § 1141(d)(5)(C).

### **(c) No Discharge of Fraudulent Taxes.**

Under BAPCPA section 708, confirmation of a plan does not discharge a corporation from (i) any debt owed to a governmental unit that is not dischargeable under amended section 532(a), amended section 1141(d)(6)(A), or (ii) a tax with respect to which the debtor



either (A) made a fraudulent return, or (B) willfully attempted to evade or defeat the tax, amended section 1141(d)(6)(A).