

**CHANGES CREATED BY  
THE BANKRUPTCY ABUSE PREVENTION  
AND CONSUMER PROTECTION ACT OF  
2005**

**(The Long-Awaited Bankruptcy Reform Legislation)**



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# **CHANGES CREATED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005**

## **I. INTRODUCTION**

The latest bankruptcy reform initiative took eight years being born, but the 109<sup>th</sup> Congress finally passed comprehensive legislation on April 20, 2005, which generally became effective October 17, 2005. The changes are sweeping and will substantially impact both business and personal bankruptcy cases. This presentation will be a rundown on the gamut of generally applicable changes from the perspective of a Creditors' Rights Specialist. Coverage of the material below includes the new concept of Chapter 7 means testing, new rules about repeat filings, the new small business "fast-track" Chapter 11, and new options for defending preferences.

## **II. THE BANKRUPTCY REFORM ACT OF 2005**

### **(Bankruptcy Abuse Prevention and Consumer Protection Act of 2005)**

Prior to the latest reform measures, the last major overhaul of the United States Bankruptcy Code (Title 11 of the United States Code) occurred in 1994. At that time, a blue-ribbon panel (the National Bankruptcy Review Commission) was assembled to review the entire federal bankruptcy system and make recommendations for further legislative reforms. Following four years of deliberation and the opportunity for public input and comment from various interested constituencies, the Commission issued its recommendations in 1998, proposing some 172 different statutory enhancements.

Every Congress following the 1998 recommendations (eight congressional session years!) entertained proposed bankruptcy reform legislation in both the House and Senate. Substantial reforms succeeded in one house or the other, and some concepts were even approved in both houses, but in spite of herculean efforts to achieve compromises and reach a consensus on a single piece of legislation, no single reform bill was passed and signed into law until April 20, 2005. Bankruptcy reform has clearly been a political football, and emotional "sideshow" issues such as abortion and farm aid repeatedly took the forefront while the real issues of bankruptcy law and case administration went begging.

The 2005 Act makes substantial changes to a comprehensive array of bankruptcy concepts, most of which changes went into effect on October 17, 2005. The business credit community is affected not only by the "business" bankruptcy revisions, but also by the "personal" or "consumer" bankruptcy amendments which will govern liquidation or reorganization of proprietorships and individual partners in a partnership, or personal guarantors of corporate obligations. The new Code changes are so significant

and complex that the legislation adds 28 new bankruptcy judgeships to those already existing across the country.

### III. MEANS TESTING AND CREDIT COUNSELING

1. **Dismissal for Abuse.** Chapter 7 (liquidation) of the Bankruptcy Code has been amended to state that a case may be dismissed for abuse, including the prospect of bad faith or abuse shown by the totality of the circumstances. For the first time in U.S. bankruptcy history, creditors and bankruptcy Trustees have the right to bring abuse motions against debtors whose incomes exceed a state median income standard.

§ 707. *Dismissal of a case or conversion to a case under chapter 11 or 13*

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, ~~but not at the request or suggestion of trustee (or bankruptcy administrator, if any), or any party in interest,~~ may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, *or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title,* if it finds that the granting of relief would be ~~a substantial~~ an abuse of the provisions of this chapter. ~~There shall be a presumption in favor of granting the relief requested by the debtor.~~

§ 707. *Dismissal of a case or conversion to a case under chapter 11 or 13*

(b)(7)(A) *No judge, United States trustee (or bankruptcy administrator, if any), trustee, or other party interest may file a motion under paragraph (2) if the current monthly income of the debtor, including a veteran (as that term is defined in section 101 of title 38), and the debtor's spouse combined, as of the date of the order for relief when multiplied by 12, is equal to or less than—*

- (i) *in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;*
- (ii) *in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or*
- (iii) *in the case of a debtor in a household exceeding 4 individuals, 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.*

**2004 Median Income Numbers for Texas**

	<u>Annual</u>	<u>Monthly</u>
1 person	\$30,013.00	\$2,501.08
2 persons	\$39,248.00	\$3,270.67
3 persons	\$48,483.00	\$4,040.25
4 persons	\$57,718.00	\$4,809.83

*Source—Bureau of the Census*

2. **Means Testing.** Individual debtors above the state median income standard are scrutinized under the “means test” to determine if they are presumed to be guilty of abuse in filing under Chapter 7. Current monthly income is reduced by expenses allowed under the IRS expense standards and other particular deductions, including the payments due on secured and priority debts over a period of sixty months following the filing of the bankruptcy petition. A presumption of Chapter 7 filing abuse applies if the net income over sixty months is at least the lesser of \$10,000.00 or 25% of the general unsecured claims, but not less than \$6,000.00. The presumption of abuse may be overcome if the debtor can show special circumstances for which there is no reasonable alternative (such as a serious medical condition or a call to active duty in the Armed Forces).

§ 101. Definitions

(10A) *The term “current monthly income”—*

(A) *means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—*

(i) *the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or*

(ii) *the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and*

(B) *includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor’s spouse), on a regular basis for the household expenses of the debtor or the debtor’s dependents (and in a joint case the debtor’s spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic*

*terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.*

§ 707. Dismissal of a case or conversion to a case under chapter 11 or 13

(b)(2)(A)(i) *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.*

(ii) (I) *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 for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonable necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.*

(II) *In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.*

(III) *In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.*

- (IV) *In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed \$1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).*
- (V) *In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.*
- (iii) *The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—*
- (I) *the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and*
- (II) *any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;*
- divided by 60.*
- (iv) *The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.*

**MEANS TEST**

**If**  $[I - (E + SD + PC)] \times 60 \geq A \text{ or } B$   
*(whichever is less)*

**then may file Chapter 13, but not Chapter 7.**

- I = *six-month average of debtor and spouse's current monthly income from all sources*
- E = *debtor's monthly expenses per IRS allowances (without any payment on any debt)*
- SD = *debtor's average monthly payment on all secured debts*
- PC = *debtor's expenses for payment of priority claims (such as taxes and child support)*
- A = *25% of the debtor's unsecured debt or \$6,000.00, whichever is greater*
- B = *\$10,000.00*

3. **Attorney Sanctions and Certifications.** When an attorney signs a petition, pleading, or motion, such attorney is certifying that he or she has performed a reasonable investigation, the signed paper is well-grounded in fact and warranted by existing law (or a good faith argument for a change in the law), and does not amount to abuse under § 707(b)(1) set forth above. When a debtor’s attorney signs a petition initiating a bankruptcy case, such attorney is also certifying that he or she has no knowledge, after inquiry, contradicting information on the debtor’s schedules. The Bankruptcy Court may order the debtor’s attorney to pay the Trustee’s costs and attorneys’ fees in prosecuting a successful Chapter 7 abuse motion if filing of the case violated the attorney’s certifications. However, the Court may award to the debtor costs and attorneys’ fees incurred in contesting an unsuccessful abuse motion filed by a creditor (not the Trustee), if the attorney filing the motion made false certifications.

§ 707. *Dismissal of a case or conversion to a case under chapter 11 or 13*

(b)(4)(A) *The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys’ fees, if—*

(i) *a trustee files a motion for dismissal or conversion under this subsection; and*

(ii) *the court—*

(I) *grants such motion; and*

(II) *finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.*

(B) *If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—*

(i) *the assessment of an appropriate civil penalty against the attorney for the debtor; and*

(ii) *the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).*

(C) *The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—*

(i) *performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and*

(ii) *determined that the petition, pleading, or written motion—*

(I) *is well grounded in fact; and*

(II) *is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).*

(D) *The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.*

§ 707. *Dismissal of a case or conversion to a case under chapter 11 or 13*

(b)(5)(A) *Except as provided in subparagraph (B) and subject to paragraph (6), the court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest (other than a trustee or United States trustee (or bankruptcy administrator, if any)) under this subsection if—*

(i) *the court does not grant the motion; and*

(ii) *the court finds that—*

(I) *the position of the party that filed the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or*

(II) *the attorney (if any) who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(C), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.*

4. **Notice of Bankruptcy Alternatives.** The notice to be given by the Bankruptcy Court Clerk to new bankruptcy debtors must educate them about their bankruptcy options as well as the bankruptcy system's expectations of truthfulness.

§ 342. Notice

(b) ~~Prior to~~ *Before* the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give ~~written notice~~ to such individual ~~that indicates each chapter of this title under which such individual may proceed:~~ *written notice containing—*

(1) *a brief description of—*

(A) *chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each of those chapters; and*

(B) *the types of services available from credit counseling agencies; and*

(2) *statements specifying that—*

(A) *a person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury in connection with a case under this title shall be subject to fine, imprisonment, or both; and*



(B) *all information supplied by a debtor in connection with a case under this title is subject to examination by the Attorney General.*

5. **Credit Counseling and Personal Financial Management.** To be eligible to file for bankruptcy protection, an individual debtor must receive a briefing on credit counseling and budget analysis. To be discharged of debts in either Chapter 7 or Chapter 13, an individual debtor must attend a personal financial management instructional course.

§ 109 Who may be a debtor

(h)(1) *Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.*

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(11) *after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses . . . .*

§ 1328. Discharge

(g)(1) *The court shall not grant a discharge under this section to a debtor unless after filing a petition the debtor has completed an instructional course concerning personal financial management described in section 111.*

#### **IV. VARIOUS CONSUMER BANKRUPTCY PROVISIONS**

1. **Reasonable Repayment Plans.** The Bankruptcy Court is empowered to reduce an unsecured dischargeable consumer claim by as much as 20% if the creditor refused to agree to a reasonable repayment plan with an approved credit counseling agency. However, payments made through approved credit counseling agencies are exempt from preference recovery.

§ 502. Allowance of claims or interests

(k)(1) *The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if—*

- (A) *the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budgeting and credit counseling agency described in section 111;*
  - (B) *the offer of the debtor under subparagraph (A)—*
    - (i) *was made at least 60 days before the date of the filing of the petition; and*
    - (ii) *provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and*
  - (C) *no part of the debt under the alternative repayment schedule is nondischargeable.*
- (2) *The debtor shall have the burden of proving, by clear and convincing evidence, that—*
- (A) *the creditor unreasonably refused to consider the debtor’s proposal; and*
  - (B) *the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).*

§ 547. Preferences

- (h) *The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budgeting and credit counseling agency.*

2. **Reaffirmation.** Lengthy new disclosures are required by Bankruptcy Code Section 524 to be given to any debtor who reaffirms a debt (*i.e.* contractually agrees to except the debt from bankruptcy discharge). Among such disclosures, the following are illustrative:

*“Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.”*

*“Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).”*

*“What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.”*

*“Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.”*

*“What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A “lien” is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State’s law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.”*

3. **Petition Preparers.** New requirements will apply to those who prepare bankruptcy petitions for a fee. Among other things, petition preparers must give more detailed disclosures of their inability to practice law or provide legal advice.

§ 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

(b)(2)(A) *Before preparing any document for filing or accepting any fees from a debtor, the bankruptcy petition preparer shall provide to the debtor a written notice which shall be on an official form prescribed by the Judicial Conference of the United States in accordance with rule 9009 of the Federal Rules of Bankruptcy Procedure.*

(B) *The notice under subparagraph (A)—*

(i) *shall inform the debtor in simple language that a bankruptcy petition preparer is not an attorney and may not practice law or give legal advice;*

(ii) *may contain a description of examples of legal advice that a bankruptcy petition preparer is not authorized to give, in addition to any advice that the preparer may not give by reason of subsection (e)(2); and*

(iii) *shall—*

(I) *be signed by the debtor and, under penalty of perjury, by the bankruptcy petition preparer; and*

(II) *be filed with any document for filing.*

4. **Debt Relief Agencies.** A “debt relief agency” is a bankruptcy petition preparer, attorney, law firm, or any other person that provides bankruptcy advice or services to an individual with primarily consumer debts and non-exempt property worth less than \$150,000.00. This new consumer protection concept entails numerous duties of diligence and candor, requires prescribed disclosures and a written contract, and limits misleading advertising.

§ 526. Restrictions on debt relief agencies

(a) *A debt relief agency shall not—*

- (1) *fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;*
- (2) *make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;*
- (3) *misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to—*
  - (A) *the services that such agency will provide to such person; or*
  - (B) *the benefits and risks that may result if such person becomes a debtor in a case under this title; or*
- (4) *advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.*

5. **Personal Information.** The Bankruptcy Court has new authority to enter orders protecting an individual from disclosure of such information as Social Security number, driver’s license number, or passport number that would create an undue risk of identity theft or other unlawful injury to an individual or his property.

§ 107. Public access to papers

- (c)(1) *The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual’s property:*
  - (A) *Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title.*
  - (B) *Other information contained in a paper described in subparagraph (A).*

**V. CONSUMER AND BUSINESS CHANGES**

1. **Serial Filers.** If a new bankruptcy is filed within one year after an earlier dismissed bankruptcy was pending, the automatic stay terminates 30 days after the new case is filed, unless the Court decides on motion to extend the stay on a finding that the new bankruptcy is filed in good faith. If a bankruptcy is filed after two or more dismissed bankruptcies were pending in the previous year, no

automatic stay goes into effect at all. On motion the Court may order that the stay take effect on a finding that the latest bankruptcy is filed in good faith.

§ 362. Automatic stay

(c) Except as provided in subsections (d), (e), (f), and (fh) of this section—

(3) *if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—*

(A) *the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30<sup>th</sup> day after the filing of the later case;*

(B) *on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed[.]*

§ 362. Automatic stay

(c) Except as provided in subsections (d), (e), (f), and (fh) of this section—

(4)(A)(i) *if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and*

(ii) *on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;*

(B) *if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed[.]*

2. **In Rem Orders as to Real Property.** A creditor secured by real property can move for an order to be placed in the real property records that modifies the stay for two years after the order was entered, if the bankruptcy is part of a scheme to delay, hinder, and defraud creditors involving a transfer of ownership interests or multiple bankruptcy filings affecting the property.

§ 362. Automatic stay

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(4) *with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either—*

(A) *transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval;*  
*or*

(B) *multiple bankruptcy filings affecting such real property.*

*If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.*

3. **Statement of Intention as to Personal Property.** An individual Chapter 7 debtor will not retain possession of personal property (such as a vehicle) in which a creditor has a purchase-money security interest, unless the debtor, within 45 days after the first meeting of creditors either enters into a reaffirmation agreement or redeems the property. Otherwise, the stay lifts.

§ 521. Debtor's duties

(a) The debtor shall—

(6) *in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—*

(A) *enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or*

(B) *redeems such property from the security interest pursuant to section 722.*

*If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection*

*of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee[.]*

4. **Liens in Chapter 13.** A Chapter 13 plan must provide that a secured creditor retains its lien until payment in full or discharge.

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if—

(5) with respect to each allowed secured claim provided for by the plan—

(B)(i) the plan provides that—

(I) the holder of such claim retain the lien securing such claim *until the earlier of—*

(aa) *the payment of the underlying debt determined under nonbankruptcy law; or*

(bb) *discharge under section 1328; and*

(II) *if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law[.]*

5. **Exemption State.** The debtor's exemptions, such as homestead, are based on the law of the state where the debtor has lived for the 730 days before the bankruptcy. If the debtor has not been in the same state for that period, then exemptions are based on the state where the debtor lived for the 180 days before that period (or the longest portion of the 180 days). This is important because the states vary widely on the extent of a homestead exemption: in Illinois, it is \$7,500.00 worth of property; in Texas, it is anything, regardless of value, that sits on less than ten acres.

§ 522. Exemptions

(b)(3) *Property listed in this paragraph is—*

(A) *subject to subsections (o) and (p) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the ~~180 days~~ 730 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place or if the debtor's domicile has not been located at a single State for such 730-day period, the place 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[.]*

6. **Homestead Limitation.** The homestead does not include non-exempt property that the debtor disposed of within 10 years before bankruptcy with the intent to hinder, delay or defraud creditors.

§ 522. Exemptions

(o) *For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in—*

(4) *real or personal property that the debtor or a dependent of the debtor claims as a homestead, shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.*

7. **Personal Property Leases.** If a lease of personal property is not assumed by a Chapter 7 Trustee within sixty days after the bankruptcy is filed, the property no longer belongs to the estate, and the automatic stay lifts. In a Chapter 13 or individual Chapter 11 case, a lease not assumed by a confirmed plan is deemed rejected, the property no longer belongs to the estate, and the stay lifts.

§ 365. Executory contracts and unexpired leases

(p)(1) *If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.*

§ 365. Executory contracts and unexpired leases

(p)(3) *In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.*

8. **Time Between Discharges.** The previous six year period is increased to subject a Chapter 7 debtor to denial of discharge if he received a Chapter 7 or 11 discharge in a case filed within eight years of the filing of the pending case.

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within ~~six~~ 8 years before the date of the filing of the petition[.]



Discharge waiting period	Current case:		
	Chapter 7	Chapter 11	Chapter 13
Prior case: Chapter 7	8 years from prior case filing	None	4 years from prior case filing (or prior case discharge)
Chapter 11	8 years from prior case filing	None	4 years from prior case filing (or prior case discharge)
Chapter 13	Current law (6 years from prior case filing; none with defined 70% min. payout)	None	2 years from prior case filing (or prior case discharge)

9. **Chapter 13 Discharge.** The Chapter 13 discharge is revised to now make fraud non-dischargeable. Section 523(a)(2) will (finally!) apply in Chapter 13 as well as in Chapter 7.

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive[.]

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]

10. **Bankruptcy Notice.** If a creditor, within 90 days before a voluntary bankruptcy, provides the debtor with an account number and a specified address, then any bankruptcy notice to be sent by the debtor to the creditor must be sent to that address and include the account number.

§ 342. Notice

(c)(2)(A) *If, within the 90 days before the commencement of a voluntary case, a creditor supplies the debtor in at least 2 communications sent to the debtor with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.*

11. **Tax Returns.** At least seven days before the first Creditors' Meeting, the debtor must provide the Trustee (and any creditor who requests one) a copy of the federal tax return for the most recent tax year before the year the case was filed. Failure to provide such copies will be sanctioned by the dismissal of the case. A Chapter 7, 11, or 13 individual debtor must also, if requested by the Trustee or a creditor, file with the Court federal tax returns for each year ending while the case is pending.

§ 521. Debtor's duties

(e)(2)(A) *The debtor shall provide—*

- (i) *not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and*
- (ii) *at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.*
- (B) *If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.*
- (C) *If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.*

§ 521. Debtor's duties

- (f) *At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—*
  - (1) *at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a*

*transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;*

- (2) *at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such authority as of the date of the commencement of the case and that was subsequently filed for any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;*
- (3) *a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2)[.]*

12. **Homestead Limitation.** A debtor may not exempt any part of his homestead exceeding \$125,000.00 that he acquires in the 1215 days before the bankruptcy, unless such debtor acquired such interest by transfer from a previous homestead in the same state. A debtor who has been convicted of a felony that demonstrates the bankruptcy filing to be an abuse may not exempt a homestead interest exceeding \$125,000.00.

§ 522. Exemptions

- (p)(1) *Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$125,000 in value in—*
  - (A) *real or personal property that the debtor or a dependent of the debtor uses as a residence;*
  - (B) *a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;*
  - (C) *a burial plot for the debtor or a dependent of the debtor; or*
  - (D) *real or personal property that the debtor or dependent of the debtor claims as a homestead.*
- (2) (A) *The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of such farmer.*
- (B) *For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.*

§ 522. Exemptions

- (q)(1) *As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in*

*subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate \$125,000 if—*

(A) *the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title[.]*

13. **Valuation of Collateral.** In an individual debtor's Chapter 7 or 13 case, retail replacement value is the standard for valuing person property liens.

§ 506. Determination of secured status

(a)(2) *If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.*

## **VI. GENERAL AND SMALL BUSINESS PROVISIONS**

1. **No Creditors' Meetings in Prepackaged Chapter 11's.** The Court may order that there will be no meeting of creditors if the debtor has filed a Chapter 11 plan which was promoted to creditors before bankruptcy.

§ 341. Meetings of creditors and equity security holders

(e) *Notwithstanding subsections (a) and (b), the court, on the request of a party in interest and after notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.*

2. **Assumption/Rejection of Commercial Real Property Leases.** A commercial real property lease in which the bankrupt is the lessee is deemed rejected, and the property must be surrendered, if the Trustee does not assume within 120 days after bankruptcy.

§ 365. Executory contracts and unexpired leases

(d)(4) ~~Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject (A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is shall be deemed rejected, and the trustee shall immediately surrender such that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—~~

- (i) *the date that is 120 days after the date of the order for relief; or*
- (ii) *the date of the entry of an order confirming a plan.*

3. **Preference Defense for “Ordinary Course of Business.”** The ordinary course defense is amended to require proof of only two elements: (1) the debt was incurred in the ordinary course, and (2) either (a) the payment was made in the ordinary course between the debtor and creditor, or (b) the payment was made according to ordinary business terms.

§ 547. Preferences

- (c) The trustee may not avoid under this section a transfer—
  - (2) to the extent that *such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—*
    - (A) ~~in payment of a debt incurred by the debtor~~ *made* in the ordinary course of business or financial affairs of the debtor and the transferee; *or*
    - (B) ~~made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made~~ according to ordinary business terms[.]

4. **Small Preferences in Business Cases.** If the bankrupt is not a consumer, a preference is not recoverable for less than \$5,000.00.

§ 547. Preferences

- (c) The trustee may not avoid under this section a transfer—
  - (9) *if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than \$5,000.*

5. **Insider Preferences.** The Deprizio Rule has been fully abolished. Non-insiders will not be subjected to a one-year preference look-back period merely because the transfer in question benefits an insider.

§ 547. Preferences

- (i) *If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.*

6. **Perfection of Purchase-Money Security Interests.** The provision which exempts from avoidance as a preference a purchase-money security interest if it is perfected within twenty days after the debtor receives possession has been amended to change the twenty days to thirty.

§ 547. Preferences

- (c) The trustee may not avoid under this section a transfer—

- (3) that creates a security interest in property acquired by the debtor—
  - (A) to the extent such security interest secures new value that was—
    - (i) given at or after the signing of a security agreement that contains a description of such property as collateral;
    - (ii) given by or on behalf of the secured party under such agreement;
    - (iii) given to enable the debtor to acquire such property; and
    - (iv) in fact used by the debtor to acquire such property; and
  - (B) that is perfected on or before ~~20~~ 30 days after the debtor receives possession of such property[.]

7. **Venue in Small Trustee Cases.** The only proper venue for Trustee litigation to recover money is the District where the Defendant resides, if the case is based on a consumer debt of less than \$15,000.00 or is against a non-insider based on a business debt of less than \$10,000.00.

28 U.S.C. § 1409. Venue of proceedings arising under title 11 or arising in or related to cases under title 11

- (b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than \$1,000 or a consumer debt of less than ~~\$5,000~~ 15,000, or a debt (excluding a consumer debt) against a noninsider of less than \$10,000, only in the district court for the district in which the defendant resides.

8. **Limitation on Exclusivity.** The exclusive period in which only the debtor may file a Chapter 11 plan may not be extended beyond the eighteenth month after the bankruptcy filing.

§ 1121. Who may file a plan

- (d) ~~On~~ (1) Subject to paragraph (2), on request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

~~(e) In a case in which the debtor is a small business and elects to be considered a small business—~~

~~(1) only the debtor may file a plan until after 100 days~~

(2)(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.

(B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.

9. **Creditor Representation at the Meeting of Creditors.** Non-attorneys may represent creditors at Creditors' Meetings in consumer cases under Chapters 7 and 13.

§ 341. Meetings of creditors and equity security holders

- (c) The court may not preside at, and may not attend, any meeting under this section including any final *meeting of creditors*. *Notwithstanding any local court rule, provision of a State constitution, any otherwise applicable nonbankruptcy law, or any other requirement that representation at the meeting of creditors under subsection (a) be by an attorney, a creditor holding a consumer debt or any representative of the creditor (which may include an entity or an employee of an entity and may be a representative for more than 1 creditor) shall be permitted to appear at and participate in the meeting of creditors in a case under chapter 7 or 13, either alone or in conjunction with an attorney for the creditor. Nothing in this subsection shall be construed to require any creditor to be represented by an attorney at any meeting of creditors.*

10. **Small Business Chapter 11's.** A small business Chapter 11, where the commercial debtor has less than \$2 million in total debts and there is no unsecured Creditors' Committee, will be subject to streamlined, "fast-track" procedures. A disclosure statement may not be necessary if the Court determines that the plan itself provides adequate information to creditors who will vote for or against the plan. If a disclosure statement is utilized, however, the Court may conditionally approve it and give final approval along with plan confirmation. Small business debtors will be required to file routine periodic financial reports (with no Creditors' Committee to "watchdog" the debtor-in-possession, you need more reporting!), and will have only 180 days after bankruptcy filing to present a debtor's plan. The outer boundary for the filing of *any* plan in a small business case is 300 days, and the Court must confirm the plan, if at all, within 45 days after it is filed.

§ 101. Definitions

(51)(D) *The term "small business debtor"—*

- (A) *subject to subparagraph (B), means a person engaged in commercial or business activities ~~(but does not include~~ including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property and or activities incidental thereto) whose that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition ~~do not exceed \$2,000,000; or the date of the order for relief in an amount not more than \$2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor[.]~~*

§ 1125. Postpetition disclosure and solicitation

- (f) *Notwithstanding subsection (b), in a ~~case in which the debtor has elected under section 1121(c) to be considered a small business case—~~*

- (1) the court may ~~conditionally approve a~~ *determine that the plan itself provides adequate information and that a separate disclosure statement* ~~subject to final approval after notice and a hearing is not necessary;~~
- (2) *the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28; and*
- (3) (A) *the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;*
  - (B) *acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement as long as if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed at least 10 not later than 25 days prior to before the date of the hearing on confirmation of the plan; and*
  - (3C) ~~a~~ *the hearing on the disclosure statement may be combined with a the hearing on confirmation of a plan.*

§ 1121. Who may file a plan

- (e) *In a small business case—*
  - ~~(2) all plans shall be filed within 160~~ (1) *only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is—*
    - (A) *extended as provided by this subsection, after notice and a hearing; or*
    - (B) *the court, for cause, orders otherwise;*
  - (2) *the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief[.]*

§ 1129. Confirmation of plan

- (e) *In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).*

In several respects, Chapter 11 has been modified for cases brought by individuals to make the case much more like one under Chapter 13. For example, individual Chapter 11 debtors must now devote all of their post-bankruptcy income to performance of their plan - just like a Chapter 13 debtor. Although a corporation receives a Chapter 11 discharge upon plan confirmation (provided the plan is not for liquidation), individual Chapter 11 debtors will receive a discharge only after completion of their plans.



§ 1123. Contents of plan

- (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
- (8) *in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.*

§ 1141. Effect of confirmation

- (d)(5) *In a case in which the debtor is an individual—*
- (A) *unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan[.]*

11. **Small Business Serial Filers (Chapter “22's”).** The automatic stay does not apply to a small business debtor who was a debtor in a previous small business case that was either dismissed or had a plan confirmed within the past two years.

§ 362. Automatic stay

- (n)(1) *Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—*
- (A) *is a debtor in a small business case pending at the time the petition is filed;*
- (B) *was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;*
- (C) *was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition[.]*

12. **Dismissal or Conversion of Chapter 11's.** “Cause” to dismiss or convert a Chapter 11 case includes newly-specified acts or omissions, such as unauthorized use of cash collateral. The Court is required to commence hearing a motion to dismiss or convert within thirty days after filing, and is required to decide the motion within fifteen days thereafter, unless the movant consents to delay or there are compelling circumstances.

§ 1112. Conversion or dismissal

- (b)(4) *For purposes of this subsection, the term “cause” includes—*
- (A) *substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;*
- (B) *gross mismanagement of the estate;*

- (C) failure to propose a plan under section 1121 of this title within any time fixed by the court; maintain appropriate insurance that poses a risk to the estate or to the public;
- (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;
- (E) failure to comply with an order of the court;
- (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
- (G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;
- (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);
- (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;
- (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;
- (K) failure to pay any fees or charges required under chapter 123 of title 28;
- ~~(5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;~~
- (6L) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
- ~~(7M)~~ inability to effectuate substantial consummation of a confirmed plan;
- (8N) material default by the debtor with respect to a confirmed plan;
- (9O) termination of a *confirmed* plan by reason of the occurrence of a condition specified in the plan; ~~or and~~
- ~~(10) nonpayment of any fees or charges required under chapter 123 of title 28.~~
- (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

§ 1112. Conversion or dismissal

- (b)(3) *The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.*

13. **Reclamation.** The Code has been amended to finally clarify that a seller's right of reclamation of goods delivered on the brink of bankruptcy is subject to the prior perfected rights of a lienholder with a security interest in such goods (previously, the caselaw was mixed). The timeframes for reclamation have also been relaxed. Reclamation will now be available as to goods received by the debtor within 45 days before bankruptcy. The seller will have until 45 days after receipt of the goods to demand reclamation, or within 20 days after commencement of bankruptcy if the 45 day period expires after bankruptcy. The Bankruptcy Court will no longer have the discretion to deny reclamation by granting an administrative priority to the seller, but even sellers who do not make a timely reclamation demand may have an administrative claim nonetheless as regards goods delivered within 20 days before bankruptcy, sold to the debtor in the ordinary course of business.

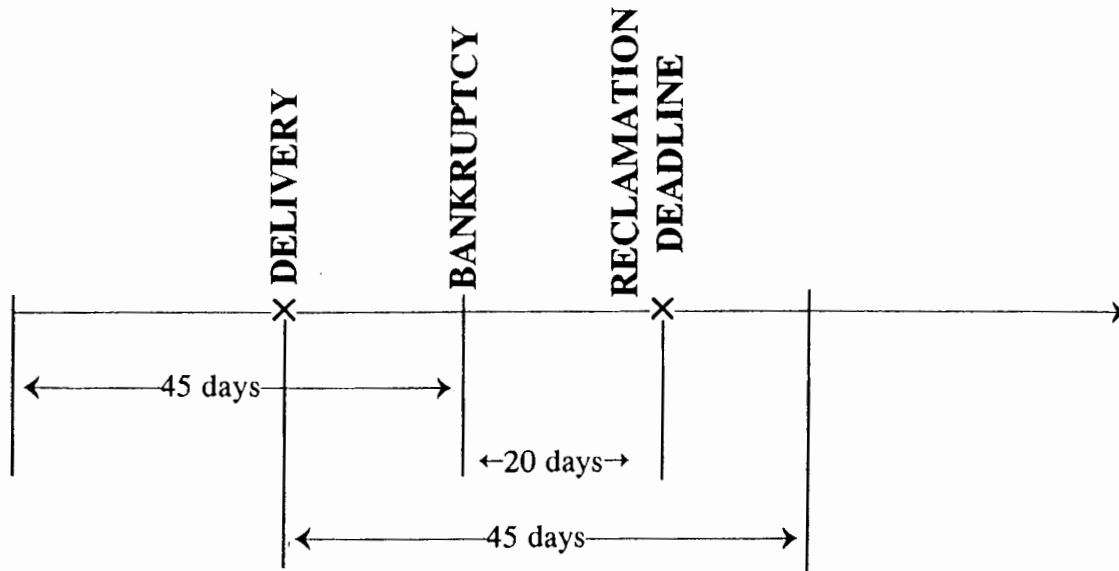
§ 546. Limitations on avoiding powers

- (c)(1) Except as provided in subsection (d) of this section *and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof,* the rights and powers of ~~a~~ *the* trustee under sections 544(a), 545, 547, and 549 ~~of this title~~ are subject to ~~any statutory or common law~~ *the* right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, *within 45 days before the date of the commencement of a case under this title,* but ~~—(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—~~
- (A) ~~before 10~~ *not later than 45 days after the date of receipt of such goods by the debtor; or*
- (B) ~~if such 10 not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and~~ *and*
- (2) ~~the court may deny reclamation to~~ *If a seller with such a right of reclamation that has made such a demand only if the court—* (A) ~~grants the claim of such a seller priority as a claim of a kind specified of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9) of this title, or~~ (B) ~~secures such claim by a lien.~~

§ 503. Allowance of administrative expenses

- (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—
- (9) *the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.*

## RECLAMATION



14. **Fraudulent Transfers.** The timeframe for which transfers intended to defraud creditors are recoverable is increased from one year to two years.

§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (*including any transfer to or for the benefit of an insider under an employment contract*) of an interest of the debtor in property, or any obligation (*including any obligation to or for the benefit of an insider under an employment contract*) incurred by the debtor, that was made or incurred on or within ~~one~~ **year 2 years** before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation 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 or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;  
**or**

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; *or*

- (IV) *made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.*

15. **Forward Contracts, Financial Derivatives, and Master Netting Agreements.** The “safe harbor” protection for forward contracts, as well as certain financial contracts, has been expanded. The usual black-letter bankruptcy rules concerning the effect of the automatic stay, preferences, pre- and post-bankruptcy setoffs, and unenforceability of bankruptcy default clauses are all abrogated in the case of forward contracts and financial derivatives.

§ 101. Definitions

(25) *The term “forward contract” ~~means a contract~~ means—*

- (A) *a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, ~~or any combined thereof or option thereon;~~ or any other similar agreement;*
- (B) *any combination of agreements or transactions referred to in subparagraphs (A) and (C);*
- (C) *any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);*
- (D) *a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or*
- (E) *any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562.*

§ 101. Definitions

- (26) *The term “forward contract merchant means a ~~person whose~~ Federal reserve bank, or an entity the business of which* consists in whole or in part of entering into forward contracts as or with merchants in a commodity, ~~(as defined in section 761(8) of this title,)~~ or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade;\_

## VII. CONCLUSION

The hope of this presentation and paper is that the reader will come away with a broad perspective and general awareness of the most important bankruptcy changes accomplished by the 2005 Act. However, since this material has been edited and abbreviated for educational purposes, it should not be relied upon as definitive or as legal advice. The 585 pages containing the new law have been considerably distilled for your enjoyment. Consult a Creditors' Rights Specialist with expertise and experience in these matters any time you are confronted with an actual or potential bankruptcy issue in your business or credit world.

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