

**The Impact of the Bankruptcy Abuse Prevention and
Consumer Act of 2005 (“BAPCA”) on Small to Mid-Size
Business Reorganization Proceedings in the U.S.**

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CONSUMER ACT OF 2005 (“BAPCA”) ON SMALL TO MID-SIZED
BUSINESS REORGANIZATION PROCEEDINGS IN THE U.S.**

I. INTRODUCTION.

On October 17, 2005, the U.S. Congress enacted the Bankruptcy Abuse Prevention and Consumer Act (“BAPCA”). BAPCA substantially amended and revised the United States Bankruptcy Code, 11 U.S.C. § 101, et seq. (the “Code”). This presentation details the impact of select provisions of BAPCA on commercial Chapter 11 proceedings in the United States over the last two years. It is not intended as a comprehensive overview of BAPCA (which contains many amendments and additions to the Code related to commercial and consumer bankruptcies) but does touch on many of the amendments which have directly affected the ability of Chapter 11 debtors to reorganize their businesses as well as the rights of creditors in these cases. Interwoven in this presentation, at times, is a more specific discussion of the impact of BAPCA on the reorganization efforts of small to mid-size businesses in the United States since October of 2005.

II. TIGHTENING OF DEBTOR’S EXCLUSIVITY UNDER BAPCA.

Under BAPCA, the Court may not extend the debtor’s exclusive time to file a plan of reorganization beyond 18 months from the petition date. 11 U.S.C. 1121(d). The Court may not extend the debtor’s time to solicit acceptances of the plan beyond 20 months from the petition date. 1121(e) of the Code contains an even shorter time period for a small business debtor to file its disclosure statement and plan (300 days from the petition date).

Although one primary objective of BAPCA was to shorten the time period for large debtors to reorganize (i.e., airlines), the practical effect has been to decrease the time for all Chapter 11 business debtors to file and obtain acceptances of a plan of reorganization or liquidation. Since BAPCA was not effective until October 2005, the impact of this revision to the law did not hit home with debtors and their constituencies until mid-April of 2007 (a debtor who filed a case in late October of 2005 would lose the right to extend exclusivity under BAPCA beyond April of 2007).

Throughout 2006 and 2007, Chapter 11 filings have decreased markedly from prior years. The average number of Chapter 11 filings ranged in the two years prior to BAPCA from 10,000 to 11,000 per year. News Releases, Administrative Office of the U.S. Courts (November 14, 2003, December 3, 2004). In 2006 and 2007 combined, less than 11,000 total Chapter 11 cases were filed nationwide. Dow Jones Daily Bankruptcy Review (January 4, 2008). Many of the filings since BAPCA have involved pre-packaged cases or immediate sales of the debtor’s assets under 11 U.S.C. 363(b)(f) (provisions allowing a debtor to sell its assets free and clear of liens outside of the ordinary course under certain terms and conditions after notice and court approval). See, Law Fosters Prepacks in Business Reorganizations, N.Y.L.J. (October 15, 2007).

Prior to BAPCA, a debtor could languish in Chapter 11, often taking years to file a plan of reorganization. On February 1, 2006, United emerged from Chapter 11 bankruptcy protection



under which it had operated since December 9, 2002, the largest and longest airline bankruptcy case in history. Wikipedia, http://en.wikipedia.org/wiki/United_Airlines (last visited 2008). Prior to BAPCA, debtors of all sizes were frequently able to take advantage of fluctuations in business cycles during the bankruptcy case by gambling that the particular industry or sector would improve over time. The time constraints imposed by BAPCA under §1121(d) require debtors of every size to carefully consider and plan their objectives in filing a Chapter 11. These considerations entail pre-bankruptcy planning and most often retention of a wide array of professionals earlier in the Chapter 11 to shepherd the case.

The cost of the expedited process to the small to medium size Chapter 11 debtor is an increasing consideration under BAPCA. The debtor now must incur more of its professional administrative costs earlier in cases. This places a financial strain on all debtors but particularly those who do not typically budget large dollars each year for professional fees. In his landmark ABI Chapter 11 Professional Fee Study, Stephen J. Lubben presents a comprehensive analysis of the correlation of professional fees in Chapter 11 proceedings to numerous factors including case length, size of debtor assets and liabilities, number of professionals employed, committees and examiners appointed and other factors. ABI Chapter 11 Professional Fee Study, Stephen J. Lubben, Reporter (November, 2007). This is said to be the most comprehensive Chapter 11 fee study conducted to date.

Unfortunately, the case sampling utilized by Lubben (over 1,000 Chapter 11 cases) was taken from filings in 2004 prior to BAPCA. It is clear to most Chapter 11 practitioners that BAPCA's expedited processes have increased the costs of Chapter 11 for the small to mid-size debtor. See, Faster, but Not Cheaper, Trends and Decisions in Business Bankruptcies Under BAPCPA, Elizabeth M. Bohn, ABA Section of Business Law, Volume 17, Number 1 (September/October, 2007).

III. KERPS (KEY EMPLOYEE RETENTION PLANS) - 11 U.S.C. 503(C) - THE VIRTUAL ELIMINATION OF INSIDER DEALS AND GOLDEN PARACHUTES.

Section 503(c) is an addition to the Code under BAPCA aimed squarely at preventing insiders of the debtor in key positions from rewarding themselves during the case with large compensation packages in the guise of retention bonuses. This section also severely limits the debtor's ability to provide "sweetheart" severance packages to departing insiders. The debtor must now prove under BAPCA that the payment to the insider is essential to retain that person because that person has a bona fide offer from another business at the same or greater rate of compensation. 11 U.S.C. §503(c)(1)(A). The debtor must also show that the services provided by the person to be retained are essential for the debtor's survival. 11 U.S.C. §503(c)(1)(B). These are significant burdens for the debtor. Even if these hurdles are met, the debtor is limited in the amount of retention compensation by §503(c)(1)(C)(i) to no more than 10 times the amount of similar compensation paid to the average non-management employee during the year or, if no such payments were made, the payment cannot be greater than 25% of the amount of a similar payment made to the insider during the prior year. 11 U.S. C. §503(c)(1)(C)(ii).

Since BAPCA, debtors have tried to avoid the proof issues presented by structuring performance incentive plans for key management. In the matter of In re Dana Corporation, 351



B.R. 96 (Bkrcty. S.D.N.Y. 2006) (“Dana Case” and “Dana Court”), the debtor requested the Dana Court’s approval of a management retention plan where the executives were to receive additional compensation for remaining with the company through confirmation of a reorganization plan provided that they met certain “performance targets.” The Dana Court denied the plan finding that the performance targets in some instances did not exist and in others were very likely to be met. Essentially, the Court found that the plan was exactly the type of KERP which BAPCA sought to prevent.

The Dana Court also denied the debtor’s proposed severance plan to compensate executives in exchange for non-complete agreements where the executive was involuntarily dismissed or resigned for good cause. Section 503(c)(2) was added to the Code under BAPCA to prohibit the Court from approving a severance payment to an insider where the debtor does not have a similar program in place for non-management and the payment is limited to 10 times the amount of the average severance payment given to non-management employees during the calendar year of the payment. The Court may also deny a payment to an insider where the transfer or obligation is outside of the ordinary course of business of the debtor and not warranted by the facts and circumstances of the case. §503(c)(3).

In a second attempt, the debtor in the Dana Case presented a retention plan that was not largely based upon retention or severance pay. The Court approved the plan. See, In re Dana Corp., 2006 WL 3479406 (Bkrcty. S.D.N.Y. 2006); See, also, In re Global Home Products, LLC, 2007 WL 689747 (Bkrcty. D.Del. 2007). The foregoing cases involved large debtors with significant assets and personnel. However, the standard of proof for small to mid-size debtors seeking to retain key employees is the same under BAPCA. The standard posted by two of the leading bankruptcy courts in the U.S. is clearly that the court will look beyond the form of the compensation plan to its substance to determine whether the KERP violates BAPCA.

IV. THE 11 U.S.C. 503(B)(9) DILEMMA FOR COMMERCIAL DEBTORS.

11 USC § 503(b)(9) was added to the Bankruptcy Code (“Code”) under BAPCA. This section protects vendors who supply products to a debtor with 20 days of the date of the debtor’s bankruptcy filing. Vendors who supply products to the debtor within this time period (and who have not received payment) are afforded administrative claims in the bankruptcy proceedings for the value of those goods sold in the ordinary course to the debtor prior to the bankruptcy filing. The goods must have been delivered to the debtor prior to the filing. This is the case although the vendor’s claim arises pre-petition and would therefore ordinarily be classified as an unsecured claim subject to certain potential reclamation rights by the vendor under state law if such rights were properly preserved by the vendor as to the goods delivered before the bankruptcy.

Many issues have arisen over the last few years under this new Code provision. These include the date of delivery for claim purposes, the value of the goods to the debtor, and payment requirements. The issue of timing of payment is perhaps the most difficult one for debtors to reconcile. If the debtor chooses to pay 503(b)(9) claims at the outset of the case it invariably will not have sufficient cash to operate. If the debtor waits until confirmation to pay these claims, the cumulative administrative expenses of the case may prevent reorganization.



As with all administrative claims, an allowed 503(b)(9) claim must be satisfied in full by the debtor upon the effective date of a confirmed reorganization plan unless the claimant accepts other treatment. Prior to the 2005 amendment to the Code, a vendor who supplied products to the debtor immediately before the bankruptcy filing, had to take fairly quick action to preserve its rights to assert an administrative claim.

A vendor was previously forced to send an insolvent debtor a reclamation demand for return of the unpaid goods within 10 days (expanded to 45 days under the amended Code) after the debtor received the goods. Uniform Commercial Code, 2-702 (2007); 11 U.S.C. § 546(c). The notice period is extended to 20 days in the event of a bankruptcy filing provided that the original period has not expired as of the date of the filing. See, 11 U.S.C. § 546(c).

If timely reclamation notice was given by the vendor to the debtor, the debtor would then have the opportunity to return the goods to the vendor. If the goods were not returned, the vendor could then assert an administrative claim in the bankruptcy proceeding for the goods. However, vendors were often unaware of such rights. Frequently, debtors would contest these claims, even where the vendors had asserted them in a timely fashion, arguing that the goods were otherwise subject to a paramount secured claim or that the debtor was not insolvent when the goods were delivered.

Section 503(b)(9) essentially streamlines the administrative claims process by requiring a vendor with a legitimate 20 day reclamation claim to file only written proof of its administrative claim in the bankruptcy proceeding with a request for payment. The legislative history behind section 503(b)(9) “suggests that it was aimed at providing relief to sellers of goods who fail to give the required notice under the reclamation provisions of section 546(c).” In re Brown & Cold Stores, LLC, 375 B.R. 873 (9th Cir. BAP 2007).

Vendors now routinely file their “503(b)(9) claims” early in a Chapter 11 proceeding. They also typically demand immediate payment of their claims arguing that the debtor has the ability to pay administrative claimants in the ordinary course. Case law is scarce on the issue of whether the debtor must make immediate payment of allowed 503(b)(9) claims. The issue of timing of payment can be critical to the debtor’s survival in Chapter 11.

In the matter of In re Bookbinders, 2006 WL 3858020 (Bankr. E.D.Pa.) (“Bookbinders” or “Bookbinders Case”), a creditor argued that it was entitled to immediate payment of an asserted 503(b)(9) claim. The creditor argued that an inherent part of the reorganization process is the debtor’s obligation to pay its post-petition operating expenses in the ordinary course. Id. at 3. The claimant asserted that the debtor had sufficient available cash from operations to pay its claim. Id. at 3-4.

The debtor took the position that the timing of payment of administrative expenses is within the discretion of the Court. Id. The debtor noted that cash was not sufficient to permit payment of all potential 503(b)(9) claims and allow the debtor to continue with its ordinary course operations. Id. The debtor contended “that requiring immediate payment of Blue Crab’s administrative expense (with the possible consequence that other §503(b)(9) creditors might then



make the same demand for immediate payment) could impair its cash position to the point of jeopardizing its reorganization.” *Id.*

The Court in Bookbinders (“Bookbinder Court”) posited four points in time during a Chapter 11 case when a 503(b)(9) claim may be paid. These points include upon filing, upon allowance, during the case at the debtor’s discretion or upon the plan of reorganization becoming effective. *Id.* at 5. Prior to enactment of 11 U.S.C. 503(b)(9), the court clearly had discretion in determining when an allowed administrative expense claim would be paid. *Id.*; See, In re Colortex Industries, 19 F.3d 1371, 1384 (11th Cir. 1994). The court must consider various factors in this determination including the goal of bankruptcy to effect an orderly and equitable distribution among creditors and the need to prevent a race to a debtor’s assets. *Id.* at 6. Prejudice to the debtor, hardship to the claimant and the potential detriment to other creditors are all significant factors. *Id.*

The Bookbinder Court questioned whether §503(b)(9) of the Code was intended to alter existing practice of leaving to the court’s discretion the timing of payment of an allowed administrative expense. *Id.* at 6. The Bookbinder Court concluded that §503(b)(9) of the Code was not intended to remove discretion from the court. *Id.* “[T]he bankruptcy Code should not be read to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.” *Id.*; Pennsylvania Dep’t. of Public Welfare v. Davenport, 495 U.S. 552, 563 (1990).

The Bookbinder Court commented that there is nothing in the language of section 503(b)(9) to indicate that the claimant was entitled to immediate payment in derogation of the accepted principal and that the court maintains discretion regarding the timing of payment of an allowed administrative claim. *Id.* Importantly, the Bookbinder Court stated that there is nothing in the text of the statute which would indicate that a claim under §503(b)(9) of the Code is entitled to better treatment than any other allowed 503(b) administrative expenses. *Id.* “There is no disparate treatment of different types of 503(b) expenses.” *Id.* at 7.

The Bookbinder Court did mention that in certain cases it might be inequitable to permit payment of certain administrative creditors’ claims while not paying others. *Id.* at 7. However, the Bookbinder Court went on to distinguish payment of creditors in the ordinary course of the debtor’s business under § 363(c)(1) of the Code (ordinary course post-petition vendor claims for instance) from those under §503(b)(9) which require court approval. *Id.*

The Bookbinder Court referenced §365(d)(3) of the Code as an example of a new Code section added in 1984 where Congress specifically intended landlords to receive timely payments of post-petition rent from debtors until the underlying lease was assumed or rejected. *Id.* As such, most courts have enforced this section of the Code as requiring immediate payment of post-petition rent when due. *Id.* The Bookbinder Court concluded that had Congress intended section 503(b)(9) claims to receive an enhanced immediate right to payment, it would have “made its intent express in the statute.” *Id.*

The Bankruptcy Court in the matter of In re Global Home Products, LLC (“Global Case”) similarly held that absent a showing of immediate hardship to the 503(b)(9) claimant (and lack of prejudice to the debtor and other creditors), the court was not required to permit



immediate payment of a 503(b)(9) allowed claim. 2006 WL 3791955 (Bkrtcy. D. Del.). The Court in the Global Case (“Global Court”) noted that the evidence presented by the debtor demonstrated that the debtor had insufficient cash to pay all allowed 503(b)(9) claims and did not have sufficient borrowing ability to pay such claims. *Id.* at page 4. The debtor’s principal testified that if the debtor were required to pay all 503(b)(9) claims in full, its “reorganization efforts would collapse.” *Id.*

Under the amended Code section 503(b)(9), the typical Chapter 11 debtor is faced with the dilemma of arguing poverty early on in its reorganization case knowing that eventually it must have sufficient cash resources at the time of confirmation to pay all of its 503(b)(9) claimants in full. This dilemma presents a particularly difficult issue for debtors who previously (under the pre-BAPCA amendments to the Code) may have limited their exposure to reclamation type administrative claims as a result of the difficult burden placed on the reclamation creditor to preserve its administration claim as well as viable defenses available to the debtor against these claims as detailed above. Now, the debtor must either strap its cash reserves early in the case in order to pay 503(b)(9) claims or toil in the reorganization proceeding knowing that a plan cannot be confirmed absent the 503(b)(9) claimants being paid in full on the effective date of the plan or those claimants accepting other treatment of their allowed claims. See, 11 U.S.C. § 1129(a)(9).

A debtor can seek to limit the number of 503(b)(9) claims by requesting the court to enter an order setting a bar date for filing of 503(b)(9) claims. See, *In re Dana Corp.*, 2007 WL 1577763 (Bkrtcy. S.D.N.Y.). Claims filed beyond the bar date after notice are routinely disallowed. *Id.*

Another potential option for an operating debtor would be for it to escrow cash over time during the case for the eventual payment of allowed 503(b)(9) claims on the effective date of the confirmed plan. Resistance to this concept will come from secured lenders and other claimants who may have superior(or co-equal) interests in the cash being escrowed. This procedure necessarily reduces the amount of cash for the debtor’s ongoing operations. It also subjects the debtor to claims at the end of the case by other unpaid administrative claimants asserting rights to the escrowed funds.

Ultimately, the 503(b)(9) dilemma will have the unfortunate effect of preventing some small to mid-sized companies from reorganizing. They simply will not have the cash available to pay 503(b)(9) administrative claims at the outset of the case or generate sufficient cash to pay these claims during the case. In the end, a debtor’s ability to find acceptable exit financing to emerge from a Chapter 11 proceeding will be even more difficult with the increased cash requirements created by 11 U.S.C. § 503(b)(9).

V. RECLAMATION CLAIMS UNDER BAPCA AND REVISED § 546(C) OF THE CODE.

As noted above, BAPCA expanded the time for a creditor to make a reclamation claim upon the insolvent debtor for the return of shipped goods. The reclamation creditor under revised section 546(c) now has the right to make demand upon the debtor for return of the goods delivered to the debtor up to 45 days prior to the petition, provided that such claim is made by



the creditor upon the insolvent debtor within 45 days of delivery of the goods and, in any event, no later than 20 days after the bankruptcy filing if the 45 day notice period has not expired prior to the petition date. See, 11 U.S.C. 546(c)(1)(A)(B). This revision was initially regarded as an attempt by Congress to provide reclamation creditors with a larger window of time to preserve its reclamation rights against the debtor.

However, another revision to §546(c)(1) has produced quite the opposite effect. Prior to BAPCA, the rights of a trustee (or debtor-in-possession under 11 U.S.C. 1107) under the Code were expressly subject to any state-law created statutory or common law rights of a reclamation creditor under section 546(c). Section 546(c)(1) essentially codified prior rulings of some bankruptcy courts which held that the reclamation claimant's rights under Uniform Commercial Code ("UCC") are subject to the rights of the holder of a prior floating lien on the debtor's inventory. Under Article 2, section 702 of the UCC, the seller's right of reclamation is subject to the rights of a good faith purchaser of the buyer. Prior to BAPCA, most courts interpreted this right to include the prior right of a floating lien creditor on the debtor's inventory. See, In re Arlco, Inc., 239 B.R. 261, 267-8 (Bkrcty. S.D.N.Y. 1999). Some courts held that even where the pre-petition lien holder's floating lien is satisfied by a post-petition financing, the reclamation claimant's rights were rendered worthless. In re Dairy Mart Convenience Stores, Inc., 302 B.R. 128, 135-36 (Bkrcty. S.D.N.Y. 2003)(pre-petition creditors claim secured by floating lien on inventory of debtor paid from post-petition proceeds of bankruptcy financing secured by new floating lien effectively disposes of the pre-petition goods securing the debt and renders the reclamation creditor's claim worthless).

In the Dana Case, the Bankruptcy Court for the Southern District of New York affirmed that the reclamation rights of sellers are subject to the prior rights of lenders in such goods. In re Dana Corp., 2007 WL 1577763; 367 B.R. 409,418 (Bkrcty. S.D.N.Y.). A seller of goods to the insolvent debtor is not entitled to any greater right of recovery in bankruptcy than that which would be available under non-bankruptcy law. In the Dana Case, the debtors obtained a \$377 million post-petition credit facility which was utilized by them to pay pre-petition liens on substantially all of the debtors' assets including goods subject to hundreds of reclamation demands.

The reclamation claimants in the Dana Case asserted that they held a subordinate lien to the pre-petition secured lender which was allegedly over-secured. The Dana Court held that the reclamation claims were valueless. Bankruptcy Judge Lifland noted that "a reclaiming seller is entitled to a lien or administrative expense claim only to the extent that the value of the specific inventory in which the reclaiming seller asserts an interest exceeds the amount of the floating lien in the debtor's inventory." Id. The Dana Court found that the secured lender's lien amount exceeded the value of its collateral and concluded that the reclamation claimants had worthless claims. Id. Importantly, the Dana Court rejected a prior ruling of the Bankruptcy Court in Ohio. In re Phar-Mor, Inc., 301 B.R. 482 (Bkrcty. N.D. Ohio 2003)(the "Phar-Mor Court").

The Phar-Mor Court held that where the debtor's pre-petition lender was satisfied through a post-petition DIP loan, the creditors holding reclamation claims retained their claims with value. The Dana Court clearly rejected this rationale holding that the goods were not released from the pre-petition lien but were in fact liquidated in satisfaction of the pre-petition



lien or the goods and their proceeds were pledged as collateral for the replacement post-petition lien. Id.

Reclamation claims under BAPCA have been rendered meaningless where a secured lender is under-collateralized in the subject goods on the date of filing. The new law places a substantial burden on reclamation claimants. They must not only provide timely notice of their claims to the insolvent debtor but now must also prove that the value of the assets of the debtor securing pre-petition liens exceed the debt secured by those assets. Many reclamation claimants will not have sufficiently large claims which would warrant retention of experts and large expenditures for litigation costs. Unless the reclamation claimant delivered unpaid goods to the insolvent debtor within 20 days of the bankruptcy filing (such that they might assert a §503(b)(9) claim in the case), they may hold nothing more than a general unsecured claim against the debtor.

VI. BAPCA PROVISIONS AFFECTING REAL ESTATE.

At least 21 provisions of BAPCA relate in some manner to real estate. The amendments have impacted debtors as tenants, landlords, single asset real estate debtors, and avoidance actions under Chapter 5 of the Code.

A. Section 365(d)(4) of the amended Code under BAPCA.

Section 365(d)(4) of the Code now provides:

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender 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.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause....

BAPCA requires the debtor with leased non-residential space to examine prior to filing which leased locations it may reject in the case. 11 U.S.C. 365(d)(4) was amended under BAPCA to enlarge the time for the debtor to assume or reject a real property lease (or executory contract) from 60 days to 120 days or confirmation of a plan, whichever first occurs. This amendment was thought to aid the debtor by providing them with additional time to make the election to assume or reject. However, BAPCA limits the total time for the debtor to assume or reject a lease to 210 days. Only the lessor, not the Court can extend this time period. The debtor cannot assume or reject leases under BAPCA beyond the time of confirmation of a plan.

In practice, this amendment has forced debtors with multiple leased locations to plan ahead. Landlords and general creditors invariably ask the debtor early in the case which leased locations it intends to assume. In the past, the debtor could seek multiple extensions of time from the court prior to making this decision often exposing its landlords and creditors to substantial administrative claims in the case. The debtor under BAPCA must now make its decision to assume or reject non-residential real estate leases in the early stages of its case. It must also obtain Court approval for an extension in some jurisdictions prior to the expiration of the 120 day deadline. See, In re Tubular Technologies, LLC, 362 B.R. 243,245-6 (Bkrcty. D.S.C. 2006)(holding that where the hearing on the debtor's extension request did not occur until 144 days after the petition date, the lease was deemed rejected). The debtor failed to request an expedited hearing prior to 120 days from the filing.

The Code requires the debtor to maintain lease obligations on a current basis post-petition. 11 U.S.C. § 365(d)(3). "The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, *until such lease is assumed or rejected*, notwithstanding section 503(b)(1) of this title." Adelphia Business Solutions, Inc. vs. Abnos, 482 F. 3d 602 (2d Cir. 2007) Assumption of a lease by a debtor entitles a landlord to assert its claims under the lease on a priority basis. Id. at 606. Rejection of an unexpired lease entitles the lessor to assert its damage claims as pre-petition claims against the debtor. Id. "From the foregoing, the importance of the lease rejection's effective date to the parties is obvious. Prior to that date, Abnos is entitled to full administrative rent on a priority basis; after that date, Abnos can only seek rent as an unsecured creditor through a subordinated claim for damages, with the attendant risk that he will receive only a fraction of the rent due under the lease." Id.

Section 503(b)(7) of the Code was amended under BAPCA in order to limit the lessor's priority administrative expense claim for rental to two years following rejection of the lease or turnover of the leased premises with respect to a lease previously assumed (excluding penalty provisions or failure to operate), minus sums received from other parties. Formerly, there was no such limit. Thereafter, the lessor's claim is unsecured and subject to a cap under section 502(b)(6)(one year's rent or three years, not to exceed 15% of the remaining term). This subsection was enacted to counteract the decreased time frame available to debtor-lessees to assume or reject leases, as provided in the amendments to Section 365(d)(4).

The decision of the debtor to accept or reject a non-residential real estate lease typically involves a detailed financial analysis including the value of the lease to the estate on a going forward basis as opposed to the impact to the estate from rejection damages. A debtor with a seasonal retail business may not have the luxury of filing for protection during its busy season. The requirement to assume or reject may be forced on the debtor without a corresponding opportunity of the debtor to evaluate whether the leased location is (or will be) profitable. The debtor must make its decisions in many cases to assume or reject based upon historical performance of the leased location. It must also determine whether it has the finances to cure pre-petition arrearages under the lease. The debtor will often retain an expert to value its locations to assist it in determining which leases to reject. All of this must now be accomplished within 210 days of filing the case absent the landlord agreeing to extend this period.

B. Other Amendments to §365 under BAPCA.

Amendments to section 365(b) of the Code under BAPCA now permit a debtor/tenant to cure a lease despite the existence of a pre-petition non-monetary default. Section 365(b)(1)(A) of the Code was amended to provide that an unexpired lease may be assumed notwithstanding the existence of a non-curable non-monetary default (other than a penalty rate or penalty provision). The lessor is entitled to compensation for the actual pecuniary loss resulting from such default. The lessee must cure a default caused by the failure to operate a non-residential lease by resuming operation at and after the date of assumption.

Section 365(b)(2)(D) was amended to provide that Section 365(b)(1) does not apply to a default under a provision relating to any penalty rate or *penalty* provision relating to a default arising from any failure by the debtor to perform non-monetary lease obligations. The majority of cases before BAPCA held that the trustee is not required to pay contractual penalty-interest rates *or* pay penalty provisions applicable to non-monetary defaults, and the amendment to Section 365(D)(2) has now ratified that interpretation. See, In re Claremont Acquisition Corp., Inc., 113 F.3d 1029, 1034 (9th Cir. 1997); In re Walden Ridge Dev. LLC, 292 B.R. 58, 67 & n.2 (Bkrcty. D.N.J. 2003).

Under Section 365(f)(1), shopping center lessors are now the beneficiaries of special protections. These special protections recognize the need of shopping center lessors to maintain the proper tenant “mix” to generate customer traffic, the interdependence of the tenants in providing different types of goods and services, and the importance of quickly determining whether the lease will be affirmed, rejected or assigned by the debtor-lessee. Section 365(b)(3) provides that, with respect to defaulted leases in a shopping center, the debtor-lessee’s right to assume or assign such leases is conditioned upon a heightened (as opposed to non-shopping center leases, which are covered by Section 365(b)(1)) standard for “adequate assurance of future performance.”

Under Section 365(b)(3), “adequate assurance of future performance” includes assurance of financial condition and operating performance and maintenance of percentage rent, as well as lack of disruption of the tenant mix and compliance with the provisions of the lease, such as radius, location, use, and exclusivity. This subsection prohibits the debtor-lessee from conducting a new or different business, or assigning the lease to a lessee that would conduct its business in a manner inconsistent with the existing permitted use(s) of the space or the existing lessee mix or theme of the shopping center. Section 365(f)(1) was amended to provide that the requirements of section 365(b)(3) take precedence over the “anti-assignment” provisions of section 365(f)(1), which permit assignment of a lease notwithstanding any lease provision that prohibits, restricts or conditions assignment of the lease.

Prior to the amendment of Section 365(f)(1), it was possible for a bankruptcy court to find that Section 365(b)(3) should be read in conjunction with Section 365(f)(1), so that the court would find unenforceable not only shopping center lease clauses that directly prohibit assignability, but also those provisions that are so restrictive in their scope and application that they constitute “de facto” prohibitions on assignment. See, e.g., In re Rickel Home Centers, 240 B.R. 826 (Del. 1998), which held that the anti-assignment provisions of Sec. 365(f)(1) override



the protections for shopping-center lessors provided in Sec. 365(b)(3). Contra, In re Trak Auto Center, 367 F.3d 237 (4th Cir. 2004).

The amendments to §365 of the Code have in practice benefited both the debtor and landlord, but perhaps in total lean more toward the landlord in practice since BAPCA was enacted. From the debtor's perspective, it now has at least an additional 60 days at the outset of the case to assume or reject a non-residential real estate lease or move within the 120 period for additional time to assume or reject up to 210 days. The landlord controls the ability of the debtor to extend the time to assume beyond this period. The landlord cannot prevent assumption based merely on a debtor's non-monetary pre-petition default but it can claim damages in the case for such default based upon actual expense and loss. The landlord of a shopping center can insist upon receiving from the debtor a heightened level of adequate assurance from the debtor of its future performance under the lease.

C. Single Asset Real Estate and Repeat Bad Faith Filings.

BAPCA implemented several amendments to the Code aimed at preventing, or at least slowing down, the repeat single asset debtor. Prior to BAPCA, many debtors owning single income producing real estate would file repeat "bad faith" petitions in Chapter 11, each time maintaining that refinancing or a sale was imminent. This would in turn delay the secured lender in recovering its collateral through foreclosure. The following amendments have made it much more difficult for a debtor with a single income producing property to delay foreclosure through repeat filings under the guise of Chapter 11.

Under revised Section 101(51)(B) of the Code, "single asset real estate" means:

[R]eal property constituting a single property or project, other than residential real property with fewer than 4 residential units, that generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental.

The amendment to Section 101(51)(B) deletes the former \$4 million debt cap that applied to single asset real estate, and also excludes a debtor who is a "family farmer." To qualify as single asset real estate, income must not be derived primarily from business operations at the property. The definition would exclude, for example, hospitals, hotels, casinos, manufacturing facilities, and marinas.

Section 362(b)(20) was added to the Code under BAPCA and provides that the automatic stay will not operate with respect to any act to enforce a lien against real property if an order for relief from stay was entered in a prior case under new Sec. 362(d)(4) for a period of two years after the entry of such order (except that the debtor may move for relief based on changed circumstances or for other "good cause shown").



Section 362(b)(21) of the Code now provides that the automatic stay will not operate with respect to any act to enforce any lien against or security interest in real property if the debtor is ineligible under Section 109(g) [which provides that no individual or family farmer may be a debtor if such individual was a debtor in another pending case at any time within the preceding 180 days and the case was dismissed because of willful violations of court orders by the debtor or the debtor requested and obtained a voluntary dismissal following a request for relief by a creditor from the automatic stay] to be a debtor or the present case was filed in violation of a prior bankruptcy court order prohibiting the debtor from being a debtor in another case.

Section 362 (c)(3) (Discouraging Bad Faith Repeat Filings) now provides that if an individual debtor's case under Chapter 7, 11, or 13 was pending but dismissed within the past year the automatic stay terminates, with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease, 30 days after the new filing (other than a case refiled under a chapter other than Chapter 7 after dismissal under Section 707(b)), unless an interested party requests a hearing within such time period and demonstrates good faith. Bad faith is presumed if the debtor filed more than one case in the past year or failed to take certain actions required by the court or the Code, including failure to provide adequate protection or perform the terms of a confirmed plan.

Section 362(c) (4)(A)(i) now provides that the stay will not go into effect if an individual has filed two or more bankruptcy cases within the past year that were dismissed (other than a case filed under Sec. 707(b)), and also provides that if a party in interest so requests, the court will issue an order confirming that no stay is in effect provided that if a party in interest, within 30 days of the bankruptcy filing, requests that the stay be imposed and demonstrates that the filing is in good faith the court may so order after proper notice and a hearing.

Section 362(d)(3) (Payment of Interest) was added to provide that a lender with a claim secured by single asset real estate (see the discussion of the amendment to Section 51(B) above) may obtain relief from the stay unless, before the later of 90 days after bankruptcy filing or 30 days after the court determines that the case involves single asset real estate, the debtor has filed a reorganization plan with a reasonable possibility of being confirmed within a reasonable time or has commenced monthly payments (which may be made from rents generated from the property) at the non-default contract interest rate on the value of the creditor's interest in the real estate. Prior to this amendment, interest was payable at the current fair market value rate, which often involved an evidentiary hearing and disputed testimony.

Section 362(d)(4) provides relief from the stay to a creditor with a claim secured by an interest in real property if the court finds the petition was part of a scheme to delay, hinder, and defraud creditors and involved either a non-consensual transfer of all or part of the debtor's interest in the property or involved multiple bankruptcy filings affecting the property.

Section 362(l) adds that the provisions of Section 362(b)(22) will apply on the date that is 30 days after the filing date unless, within such 30-day period, the debtor-lessee files with the court and serves on the lessor a certification that it has a right under applicable state law to cure the default, that it has cured the entire monetary default, and that it has deposited with the court



any rent that would become due during the 30-day period after the filing date, in which case the court may order that the rights of the lessor under Section 362(b)(22) will not apply.

The practical effect of the foregoing BAPCA provisions has been to essentially reduce the number of single asset real estate debtors who seek bankruptcy protection under Chapter 11. When this type of debtor does file, it now has one realistic opportunity to “get it right” since once the creditor obtains relief from stay or dismissal, the debtor has virtually no good faith basis to re-file.

VII. BAPCA’S EFFECT ON CHAPTER 5 AVOIDANCE ACTIONS.

A. Section 547 - Preference Claims.

Section 547(b) was amended to overturn the “*DePrizio* rule.” In Levitt v. Ingersoll Rand Finance Corp. (In re DePrizio), 874 F.2d 1186 (7th Cir. 1989), and its progeny, courts extended the preference rule from 90 days to a full year for non-insider creditors when the transfers in question nevertheless benefited an insider. (An insider is one who is a principal of, or related to, or affiliated with the debtor. 11 U.S.C. § 101(31)).

The 1994 Bankruptcy Code amendments revised Section 550 to prohibit recovery, from a non-insider creditor, of a transfer made for the benefit of an insider during the extended one-year “look back” preference period applicable to insider transfers. But the transfer could still be *avoided* under Section 547, and cases have so held. See, e.g., In re Williams, 234 B.R. 801 (Bankr. D.Or. 1999) (upholding claim of trustee that alleged preferential transfer, involving security interest of defendant in debtor’s mobile home, was for benefit of debtor’s wife, an insider, and that trustee could avoid perfection of security interest under “*DePrizio* rationale”); Suhar v. Burns (In re Burns), 322 F.3d 421 (6th Cir. 2003) (ruling that Section 550 was not applicable to avoided mortgage because trustee had not sought recovery of any property or its value from mortgage lender). Contra, Helbling v. Krueger (In re Krueger), 2001 Bankr. LEXIS 723, No. 98-18686, Adv. 99-1016 (Bankr. N.D. Ohio June 30, 2000).

Section 547(b) was amended to provide that a transfer made between 90 days and one year before the bankruptcy filing to an entity that is not an insider, but that results in a benefit to an insider, is recoverable only from the creditor that is an insider and not from the creditor that is not an insider (including a lender to the debtor).

Lenders are now more amenable to permitting guarantees by insiders of debtors. The amendment has also largely eliminated “*DePrizio* waivers” in guaranty agreements, which prohibit an insider guarantor from becoming a creditor of the debtor’s estate (thus preventing, hopefully, avoidance of the lender’s lien).

Section 547(c)(2) was amended to provide that in order to establish the “ordinary course of business” defense, the defendant need only demonstrate that the transfer was in payment of a debt incurred by the debtor in the ordinary course of business of the debtor and such transfer was (1) made in the ordinary course of business of the debtor and the transferee; or (2) made according to ordinary business terms (not both, as required before the amendment). The debtor



(trustee or committee asserting the preference claim) is no longer required to obtain expensive and time-consuming expert testimony regarding industry standards.

New section. 547 (c)(9) of the Code provides that preference actions in non-consumer cases cannot be brought in amounts less than \$5,000. Furthermore, section 1409(b) of title 28, United States Code (Venue of Certain Proceedings), was amended to provide that an action to recover a debt (other than a consumer debt) against a non-insider of the debtor that is less than \$10,000 must be brought in the district where the defendant resides. This amendment was intended to limit nuisance suits by the trustee and decrease costs formerly incurred by preference defendants who were required to appear in distant jurisdictions to defend small preference claims. In practice, it is not at all difficult or costly for a debtor, committee or trustee to retain local counsel in the defendant's jurisdiction to prosecute the claim.

Section 547(e)(2) (A), (B) and (C) of the Code was amended by extending the "safe harbor" statutory period for a secured party to perfect its lien (and obtain immunity from a preference attack by the trustee or debtor in possession) from ten days to 30 days. Security interests are voidable by a bankruptcy trustee or debtor in possession as preferential transfers if they were perfected within the preference period, and more than the applicable statutory period (formerly ten days), commencing after the security interest was granted. This change is consistent with the amendment to section 547(c)(3)(B), which extends from 20 to 30 days the period during which the holder of a purchase-money security interest in the debtor's property can perfect its interest and avoid a preference challenge under Section 547.

B. Section 548 - Fraudulent Transfers and Obligations.

Section 548(a)(1) was amended under BAPCA to extend the "reach back" period for avoidance of fraudulent transfers from one year to two years. Longer "reach back" periods under applicable state fraudulent conveyance statutes still apply, because (as noted earlier) Section 548 incorporates such statutes into the bankruptcy process. Section 544(a) of the Code gives the trustee or debtor in possession the status of a hypothetical lien creditor whose lien was perfected as of the date of the filing of the bankruptcy petition. Section 544(b) enables the trustee or debtor in possession to void any transfer of an interest of the debtor in property that is avoidable under applicable state law. For example, the Uniform Fraudulent Transfer Act, in effect in approximately 40 states, contains its own statute of limitations that extinguishes any claim not brought within four years after the transfer was made or the obligation was incurred. UFTA Section 9(a).

C. Section 549 - Post-petition Transactions.

Sec. 549(c) was amended to state as follows (the new language is underlined):

The trustee may not avoid under subsection (a) of this section [which permits a trustee to avoid a property transfer if it occurs after commencement of the case and is not otherwise authorized by the Bankruptcy Code or the court] a transfer of an interest in real property to a good faith purchaser without knowledge of the

commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of an interest in such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such real property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to such interest of such good faith purchaser.

Section 549 of the Code governs post-petition transactions. Section 549(a) provides that a bankruptcy trustee may avoid a transfer of property of the estate made after the commencement of the case that is not otherwise authorized under the Bankruptcy Code or by court action. Section 549(c), however, provides that the trustee may not avoid such a transfer to a good faith purchaser without knowledge of the commencement of the case, where present fair equivalent value has been received by the debtor. The term “purchaser” is defined, in section 101(43), of the Bankruptcy Code, as a transferee of a voluntary transfer (the definition of “transfer” also includes an “immediate or mediate transferee of such a transferee”). But it is unclear whether a mortgage lender qualifies as a purchaser for the purpose of Section 101(43).

In Thompson v. Margen (In re McConville), 110 F.3d 47 (9th Cir. 1997), cert. denied, 118 S.Ct. 412 (1997), the lenders made a mortgage loan to the debtors without specific knowledge that the debtors had previously filed a Chapter 11 bankruptcy petition. The trustee filed a complaint to avoid the lien of the mortgage as an unauthorized post-petition transfer under section 549(a) of the Code. The lenders argued that the lien could not be avoided because the mortgage was a transfer to them of real property and they were good faith purchasers without knowledge of the prior bankruptcy filing. The bankruptcy court agreed that the lenders were good faith purchasers, but held that the recordation of the mortgage violated the automatic stay of section 362(a)(4) and that the lenders were not purchasers under the exception (for good faith purchasers for value without knowledge of the bankruptcy petition) created by section 549(c). The lenders appealed to the district court, which held that the lenders were not “purchasers” within the meaning of section 101(43) or section 549(c) of the Code.

The lenders then appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit noted that both parties had “vigorously argued that the lien in favor of the Lenders was a transfer within the meaning of the bankruptcy code.” Id. at 49. The court further noted that the trustee had argued for avoidance of the transfer under Section 549(a), while the lenders argued that they qualified for the “good faith purchaser” exception under Section 549(c). Citing previous cases, the Ninth Circuit held that “whatever the abstract merits of these contentions, we find them both blocked by our precedents . . . which simply hold that the creation of a lien does not transfer property for purposes of section 549.” Id.; see, also, Jewell v. Beeler (In re Stanton), 248 B.R. 823, 828 (B.A.P. 9th Cir. 2000) (“Under Ninth Circuit authority, the postpetition creation of a lien on property of the estate is not a transfer of property for purposes of § 549”). The Ninth Circuit then found that the debtors had violated Section 364(c)(2) of the Bankruptcy Code, which prohibits a debtor from obtaining secured post-petition financing without prior bankruptcy court authorization. The court ruled that rescinding the unlawful loan transaction was an appropriate remedy. However, the court also considered the equities of the case, noting on the one hand that the parties had stipulated that the lenders had acted in good faith and that the loan enabled the



debtors to obtain the property for the benefit of the estate, but that on the other hand the lenders had to have known that the debtors' financial position was precarious and failed to take reasonable steps to determine the debtors' financial condition. Therefore, based on the equities of the case, the court limited the lenders' right of recovery from the proceeds of the sale of the property to the amount they had loaned less what they had already been paid on the debt, and granted the lenders a lien on the sale proceeds for that amount.

McConville is an important decision for mortgage lenders. If a mortgage were deemed not to be a transfer for purposes of Section 549(a) and the lender therefore was unable to rely on the "good faith purchaser" exception in Section 549(c), lenders would be justifiably afraid to make mortgage loans thereby "chilling" the availability of credit. The risk of subsequent avoidance of the transfer would be substantial in those instances where the borrower had previously filed bankruptcy in a jurisdiction other than that where the mortgage had been recorded, and such fact had not been disclosed to the lender or the title insurer by the borrower. It is virtually impossible for a mortgage lender or other party who advances funds to the debtor to search for bankruptcy filings in all fifty states at the time of closing.

The purpose of Section 549(c) under BAPCA is to protect a good-faith innocent party who gives valid consideration to an unscrupulous debtor, where the party has no knowledge of, or reasonable means of determining, the existence of pending bankruptcy proceedings filed by or against the debtor. Section 549 of the Code has also served to protect the integrity of state recording statutes by protecting lenders, buyers, lessees and other parties who advance money based on the status of title to the property as disclosed by an examination of the property records in the county where the property is located and such parties are without knowledge of a bankruptcy petition by or against the debtor in another jurisdiction. As the district court noted in McConville, "[h]istorically, the section has been invoked when the real estate has been sold in a county outside of where the bankruptcy proceeding is pending." Thompson v. Margen (In re McConville), 1994 U.S. Dist. LEXIS 18095 (Dec. 14, 1994), at *6.

It obviously is inequitable for the debtor to file for bankruptcy in another jurisdiction, obtain a mortgage loan secured by the debtor's property after failing to disclose the pending bankruptcy, and then avoid the mortgage lien. It also is inequitable, however, for the lender to make no attempt to ascertain the financial condition of the debtor or inquire whether there are any pending legal actions against the borrower prior to making the loan. The Ninth Circuit in McConville, at least with respect to the courts subject to its jurisdiction, obviated this analysis by holding that the creation of a mortgage lien is not a transfer for purposes of Section 549.

The ALTA reacted to this decision by proposing amendments to the Code that would overturn McConville and modify section 362(b) of the Code to clarify that a post-petition transfer of real property required to be perfected under Section 549(a) (and which would otherwise be immune from attack under Section 549) would be a valid transfer of a security interest in real property, and exempt from the Code's automatic-stay provisions (under section 362(a)), where notice of an undisclosed bankruptcy proceeding in another jurisdiction is not a matter of public record in that jurisdiction. The ALTA further suggested that Section 549(c) be amended to state that it applies to "transfers of interests in real property, including a security interest in real property," where the purchaser has given fair equivalent value without notice of a



pending bankruptcy proceeding by or against the debtor and has timely perfected that interest. To further clarify that Section 549(c) applies to mortgages and other real estate encumbrances, the ALTA proposed that the definition of “transfer” in Section 101(54) be amended by inserting “the creation of a lien.”

As amended by BAPCA, Section 549 now provides that the transfer of “an interest in” real property to a good faith purchaser for present fair equivalent value and without knowledge of the commencement of the debtor’s bankruptcy case cannot be set aside by the trustee or debtor in possession. Also, the definition of “transfer” under Section 101(54) has been amended to specifically include “the creation of a lien.”

It is worthwhile noting that BAPCA did not amend section 549 of the Code to include a safe harbor for the unknowing asset based lender to a Chapter 11 debtor. See, In re Cybridge Corp., 304 B.R. 681 (Bkrtcy. D. N.J. 2004); Bankruptcy Notice, How Critical Is it? Stephen M. Packman, New Jersey Law Journal, 175 N.J.L.J. 1089 (2004).

VIII. TAX CONSIDERATIONS UNDER BAPCA.

A. Shortening of Time to Pay Priority Tax Claims Under a Plan and Interest Rates.

11 U.S.C. 1129(a)(9)(C) was amended under BAPCA such that priority tax claims under §507(a)(8) of the Code now must be paid over a five (5) year period commencing from the date of the order for relief in the case 1129(a)(9)(C)(ii). Treatment of the priority tax claim under the plan cannot be less favorable than the most favorable treatment afforded under the plan to a general unsecured creditor. 1129(a)(9)(C)(iii). Secured tax claims appear to be subject to the same requirements. See, 11 U.S.C. 1129(a)(9)(D) (if the tax claim would otherwise meet the requirements of a priority claim under 507(a)(8), but for the fact that it is filed as a secured claim, the claim must be paid in cash payments over the period (5 years from the petition date) prescribed in 1129(a)(9)(C)(ii).

The foregoing is perhaps the most difficult requirement for a Chapter 11 debtor with substantial pre-petition tax debt to comply with under BAPCA. If the debtor elects to treat the tax claim as secured, it must pay accrued interest during the case and now pay the entire claim within 5 years of the bankruptcy filing. Previously, a debtor was permitted to pay an unsecured priority tax claim under a plan over 6 years from the date of assessment. This gave debtors the opportunity to pay priority tax claims over 6 years commencing on the date of confirmation of the plan.

The debtor can no longer pay a secured tax claim over many years similar to a mortgage. Previously, if the taxing authority filed a pre-petition tax lien, the debtor could propose to pay the taxing authorities “secured claim” in installments over a considerable period of time at an interest rate deemed reasonable by the court under bankruptcy law. The bankruptcy court no longer has discretion to set interest at a rate other than that prescribed by non-bankruptcy law. 11 U.S.C. § 511(a). Interest is now set at the prevailing federal or state rate utilized by the taxing authority at the time of confirmation of the plan. §511(b).

B. Adequate Disclosure.

11 U.S.C. 1125(a) was amended to require disclosure to plan participants of the Federal tax consequences of the plan to the debtor, any successor to the debtor and to a hypothetical investor typical of holders of claims and interests in the case. Accordingly, the debtor can no longer file a plan with a single statement in the disclosure statement to the effect that the plan may have tax effects and direct plan participants to seek their own tax advice. This is particularly burdensome for a small debtor who has not retained a financial advisor or accountant in the Chapter 11 case. This also presents a difficult disclosure issue for larger debtors since the tax implications of the plan for the debtor and its creditors and equity interests could be quite complex.

C. Filing of Post-Petition Returns and Payment of Post-Petition Taxes.

BAPCA makes it clear that the debtor must now be current in filing its post-petition returns and in the payment of all post-petition taxes in order to confirm a plan and avoid conversion or dismissal of its case. 11 U.S.C. 1112(b)(2)(I).

IX. CONCLUSIONS.

BAPCA has undoubtedly made it more difficult (but certainly not impossible) for the small to mid-sized business debtor to reorganize. Chapter 11 proceedings move more quickly under BAPCA and are routinely more expensive. It could also be argued that the Chapter 11 debtor has less flexibility under BAPCA in dealing with certain types of claims. There are now constraints on the Court as well limiting or prohibiting the court from exercising its discretion on certain issues.

The hurdles for the debtor under BAPCA are not insurmountable but the debtor must be well prepared going into the case. Obviously, the debtor must spend more time and expense now in pre-planning its bankruptcy filing. In fact, it may need to flush out much more of an outline of a plan before it files the case in order to ascertain whether a plan of reorganization is even feasible. The debtor no longer has the prospect of spending a considerable amount of time in Chapter 11 figuring out a turnaround strategy as the case moves along.

If a reorganization is not feasible, the debtor should consider other alternatives such as an out-of-court workout with its creditors. It could take advantage of state law remedies such as making an assignment for the benefit of its creditors or consent to the appointment of a receiver. The debtor might also negotiate a pre-packaged bankruptcy plan with its primary creditors or file a Chapter 11 with the purpose of proceeding quickly after the petition with a sale of its assets.

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