

## BANKRUPTCY PRACTICE GROUP NEWSLETTER

APRIL 20, 2005

### BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

President Bush signed this afternoon into law, substantial amendments to the U.S. Bankruptcy Code. Most of the amendments will not take effect until 180 days from enactment. On the other hand, some changes are effective immediately, and apply to all bankruptcy cases filed starting today, and among these we have selected the following features as having substantial interest to our clients:

#### Unsecured Priority Claims

**·Domestic Support Obligations (Alimony, maintenance and support due to the spouse, ex-spouse, or child of the debtor) [507(a)(1)(A)]:** The amendment provides a first priority to domestic support obligations, moving them from seventh to first priority and "bumping" the intervening priorities one place down. If a trustee is appointed, the administrative expenses of the trustee shall be paid before payment of the domestic support obligations only to the extent that the trustee administers assets that are made available for the payment of such claims.

**·Unpaid Salary and Wages [507(a)(4)]:** [Formerly third priority, now fourth priority] The amendment raises to \$10,000 the limit of the wages /salaries earned by a debtor within 180 days (rather than 90 days) before the bankruptcy petition date

**·Contributions to Employee Benefit Plan [507(a)(5)]:** This amendment raises the limit on the fifth priority (formerly fourth priority) from \$4,925 to \$10,000 for contributions to an employee benefit plan, such as pensions, life insurance, or health insurance. The 180-day period remains the same.

**·Consumer Deposits [507(a)(7)]:** This amendment reduces from \$2,225 to \$1,800 the allowed unsecured claim of an individual who deposited money with the debtor in connection with the purchase or lease of consumer goods or the purchase of consumer services, and did not receive the goods or the services

**·Death and personal injury claims [507(a)(10)]:** This amendment affords a tenth priority to claims for personal injury or death resulting from the operation of a motor vehicle or vessel if debtor was intoxicated from using alcohol, drugs, or another substance

#### Retirement Benefits

**Payment of Insurance Benefits to Retired Employees [1114(l)]:** Under the amendment, the court may order debtor to reinstate any retiree benefits that were modified 180 days prior to the bankruptcy of debtor if insolvent on the date such benefits were modified.

#### Trustees

**Appointment of a trustee or examiner [1104(a)(3), (b) & (e)]:**The amended section provides that upon notice and a hearing, the court shall appoint a trustee if grounds exist under Section 1112 for the dismissal or conversion of a case but said alternatives are not in best interests of creditors or estate. Pursuant to the amended section, the U.S. Trustee shall move for appointment of a trustee if there are reasonable grounds to suspect that debtor's governing body participated in actual fraud, dishonesty or criminal conduct in management of debtor or public financial reporting. Finally, the amended section provides bankruptcy court jurisdiction over any dispute arising out of the creditor's election of a trustee.

**Fraudulent Transfers [548(a) & (b)]:** The section was amended to expand the avoidance powers of the trustee to reach transfers to an insider on account of an employment contract between the debtor and insider, within 2 (rather than 1) years and not in the ordinary course of business. The amended section also expands the trustee's avoidance powers to include a transfer made to any self-settled or similar trust within 10 years of the date the petition if (i) the transfer was made by the debtor; (ii) the debtor was the beneficiary; and (iii) the transfer was made with the actual intent to hinder, delay or defraud creditors. Although these amendments are effective as of the

date of the enactment with respect to cases commenced on or after said date, the two-year reach-back provision applies only in cases commenced more than one year after the date of the enactment.

**New Limitations on Discharge**

**Chapter 7 cases [§727(a)(8), (11)]:** The amendment precludes the discharge of a debtor who received a prior discharge 8 (not 6) years before the bankruptcy petition date; or fails to complete an instructional course in personal financial management.

**Chapter 11 cases [§1141(d)(5)(A), (B), & (C)]:** In the case that the debtor is an individual, confirmation of the plan does not discharge any debt until payments are completed, unless debtor demonstrates that (i) modification of the plan is not practicable; and (ii) the value of property distributed to unsecured claims is not less than what they would have been paid if the case had been liquidated under Chapter 7. In the case of an individual debtor, the court may delay the entry of discharge if there is an action pending in which the debtor may be found guilty of a felony, or liable for a debt arising from violation of federal Securities Exchange Act or similar state law; a criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to individual; or a RICO civil penalty.

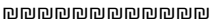
**Chapter 12 cases [§1228]:** Pursuant to the amendment, the court may not grant a discharge unless the debtor certifies that he has paid all postpetition domestic support obligations (including payments on prepetition obligations to the extent required by the plan). The court may also not grant a discharge if there is an action pending in which the debtor may be found guilty of a felony, or liable for a debt arising from violation of federal Securities Exchange Act or similar state law, criminal act, intentional tort, or willful or reckless misconduct causing serious physical injury or death to an individual or a RICO civil penalty.

**Chapter 13 cases [§1328]:** The amendment subjects discharge to debtor's certification that all postpetition domestic support obligations (including payments on prepetition obligations to the extent required by the plan) have been paid. The amendment includes as nondischargeable: debts for fraud (523(a)(2)); unsecured debts (523(a)(3)); fraud or defalcation by a fiduciary, embezzlement, larceny (523(a)(4)); and restitution or damages awarded in a civil action against a debtor as result of willful or malicious injury resulting in personal injury or death of an individual (1328(a)(4)). The amended section also bars a discharge if the debtor received a previous discharge (i) four years prior to the petition date in case under chapter 7, 11, or 12; or two years prior to the petition date in a case under chapter 13. Finally, the court will not grant a discharge unless the debtor has completed an instructional course in personal financial management

A major, well-publicized thrust of the amendments restricts some of the procedural advantages and presumptions in favor of bankruptcy debtors until now. These additional changes, while for the most part not effective until 180 days after enactment, affect the automatic bankruptcy stay, lease termination, avoidance of preferences, Chapter 11 plan filing, utilities cut-offs, Chapter 11 terminations or trusteeships, transnational insolvency cases, avoidance of certain fraudulent transfers, and other features. For further information or assistance in connection with these matters, please contact us:

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