

Creditor Bankruptcy
Debtor Bankruptcy

Estate Planning
and Probate

Real Estate

Business Law
and Commercial
Transactions

Civil Litigation

Collections and
Foreclosures

Highlights of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

By Beverly L. Edwards, Esq. and Dwight Taylor, Esq.

On April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act"). Most of its provisions will go into effect on October 17, 2005, although some technical provisions go into effect immediately. The 500 page Act is a comprehensive overhaul of the bankruptcy laws, and contains the most sweeping reforms in 25 years. Although the consumer provisions have been the most publicized, there are numerous changes to the bankruptcy laws applying to businesses and farmers as well. The sheer number of changes, and the complexity of some of the amendments, will not allow the authors to address all of the provisions of the Act in this article. In this article, the authors will focus on the changes most immediately relevant to the IBC's member banks. Additional changes will be addressed in subsequent articles.

Means Testing

Perhaps the single most significant change in consumer bankruptcy is the establishment of a system of means testing to determine a debtor's eligibility for relief under Chapter 7. The Act mandates a presumption of bankruptcy abuse if the debtor's currently monthly income (using an average of the previous 6 months) will allow the debtor to repay creditors at least \$100 per month in a 5 year Chapter 13 Plan. This determination is through a formula that will not be repeated here. Income threshold is measured by the state median income, which also consid-

ers the number of earners and the number of people living in the debtor's household. The current median income of a two-earner household in Colorado is currently about \$71,000.00, so this test will apply only to relatively high income households. If it is determined that abuse is present, then the Chapter 7 bankruptcy case will either be dismissed or it will be converted to a Chapter 13 where the debtor will develop a plan to repay some portion of the debtor's financial obligation.

Motor Vehicle Loans

The Act prohibits lien stripping, where debtors had attempted to require a creditor to release its lien after completion of payments of the secured portion of the creditor's debt. This presented problems for creditors when, for example, the bankruptcy was dismissed and the debtor did not receive a discharge of the debt. Where a creditor holds a security interest in a motor vehicle purchased within 2 ½ years prior to the date of the bankruptcy filing, the Chapter 13 Plan must provide that the secured creditor will retain its lien until payment of the entire indebtedness, not just the secured portion of the debt.

The Act limits the debtor's ability to cram down a secured creditor on a purchase money car loan under a Chapter 13 Plan. The debtor cannot cram down the secured creditor on a purchase money car loan where the car was purchased within 2 ½ years prior to the date of the bankruptcy filing.



Serial Filing

In an effort to curb serial filings (also referred to as Chapter 20, as in 7 plus 13), the Act attempts to limit the discharge available in the subsequent case. The Act provides that a discharge will not be granted in a Chapter 13 case if the debtor obtained a discharge under a Chapter 7, 11 or 12 case, within the 4 years prior to the date of the filing of the pending case, or in a Chapter 13 case within 2 years prior to the date of the filing of the pending case. Even though the debtor would not be able to obtain a discharge under the subsequent Chapter 13, the debtor could still file a Chapter 13 and receive the benefits of the automatic stay and the ability to make payments to cure the arrearages on secured claims under a Chapter 13 Plan.

Time Between Discharge

Under current law a debtor cannot receive a discharge under a Chapter 7 if a prior discharge had been granted within 6 years. Under the Act that period has been extended to 8 years.

Debtors Statement of Intent

Under previous law a consumer debtor was required to file a Statement of Intent to surrender, redeem, or reaffirm with respect to debts secured by property of the bankruptcy estate. Within 45 days after the filing of the Statement of Intent, the debtor was required to perform that intention. Unfortunately, there was no remedy available for the debtor's failure to perform, and the creditor was required to move for relief from stay or wait until the bankruptcy case was closed before acting to protect its collateral. The Act has given this provision some teeth. Within 30 days after the date set for the meeting of creditors, the debtor is required to perform the intention.

(i.e., redeem, reaffirm or surrender.) With respect to personal property secured by a purchase money security interest, within 45 days after the first meeting of creditors the debtor must either surrender the property, reaffirm the debt or redeem the property. If the debtor fails to do so, the automatic stay terminates as to said property.

In Colorado, a "fourth option" had developed under case law of "retain and pay" if the debtor was current on the date of filing. This was also known as a "ride through." The case law allowing this fourth option has been overruled by the Act and will now be prohibited. A debtor will only be allowed to surrender, redeem or reaffirm secured property.

Chapter 12

Ever since Chapter 12 was enacted in 1986, it has sunset, risen again, sunset again, been reenacted, and lapsed. The Act makes Chapter 12 a permanent chapter of the Bankruptcy Code, effective July 1, 2005. It also amends the definition of "family farmer" to increase the debt eligibility limit from \$1,500,000.00 to \$3,237,000.00. The Act also reduces the percentage of the family farmer's liability's which much arise out of the farming operations from 80% to 50%.

Under the previous provisions of Chapter 12, the debtor and the debtor's spouse are required to receive over 50% of their income from the farming operation in the year prior to the bankruptcy. The Act changes this provision to provide that the threshold percentage may be met in either, 1) the taxable year preceding the bankruptcy filing or, 2) each of the 2nd and 3rd taxable years preceding the bankruptcy filing. ❖

Highlights of
the Bankruptcy
Abuse
Prevention
and Consumer
Protection
Act of 2005