

# BANKRUPTCY ACT OF 2005-BROWN BAG LUNCH AND LEARN<sup>1</sup>

## PART VI-MISCELLANEOUS

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### I. MISCELLANEOUS

#### A. APPEALS DIRECT TO CIRCUIT (Maybe)

- a. Parties can appeal directly to the Court of Appeals if
  - a. The appellants and the appellees ask the bankruptcy court, the district court, or the BAP involved to certify it, or
  - b. The bankruptcy court, the district court, or the BAP *sua sponte* certifies that:
    - (1) The order involves either
      - (a) A question of law as to which there is no controlling decision in the relevant circuit or the Supreme Court; or
      - (b) A matter of public importance;
    - (2) The order involves a question of law requiring resolution of conflicting decisions; or
    - (3) An immediate appeal to the circuit may materially advance the progress of the case or proceeding in which the appeal is taken.
  - c. and the circuit authorizes a direct appeal. (28 U.S.C. § 158)
  - d. Comment: Jurisdiction for a direct appeal will exist only if the court of appeals authorizes a direct appeal. And, only when there are unresolved questions of law, conflicting decisions, public issues, the need to advance the case, and a binding decision with *stare decisis* value is needed.

#### B. CONVERSION OF CHAPTER 11 CASES (Section 1112)

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<sup>1</sup>Based in part on a paper prepared by Mark A. Shaiken of Stinson Morrison Hecker L.L.P., entitled *BANKRUPTCY REFORM ACT OF 2005-(A) HOMESTEAD AND (B) SELECTED BUSINESS AMENDMENTS-THE THIRD MAJOR REVISION OF THE 1978 ACT.*

- a. The court has no discretion as to whether to convert or dismiss a Chapter 11 case if cause is shown, unless conversion or dismissal is not in the best interest of creditors or the estate (not the debtor).
  - a. Cause
    - (1) Continuing loss or diminution and absence of reasonable likelihood a plan can be confirmed.
    - (2) Gross mismanagement of the estate.
    - (3) Lack of insurance that poses risk to the estate or the public.
    - (4) Unauthorized use of cash collateral that harms a creditor.
    - (5) Failure to comply with an order of the court.
    - (6) Unexcused failure file timely file a report or document
    - (7) Failure to satisfy any requirement of the Code or Rules
    - (8) Failure to attend a meeting of creditors
    - (9) Failure to timely provide information or attend meetings requested by the UST.
    - (10) Failure to pay taxes owed post petition or to file tax returns post petition.
    - (11) Failure to file disclosure statement or to file or confirm a plan within time fixed by the Code or the court.
    - (12) Failure to pay any fees or charges required.
    - (13) If the order of confirmation is revoked.
    - (14) Inability to substantially consummate the confirmed plan.
    - (15) Material default of a confirmed plan.
    - (16) Termination of confirmed plan by reason of an occurrence specified in the plan.
    - (17) Failure to pay any domestic support obligation that come due post petition.
  - b. Court must commence a hearing within 30 days of the motion to convert and rule same within 15 days of the hearing unless movant consents or there are compelling circumstances.
  - c. Conversion or Dismissal not in the Best Interest of Creditors or the Estate.
    - (1) Reasonable likelihood that a plan will be confirmed
    - (2) Cause resulted from an omission and there is a reasonable justification for the omission and a reasonable likelihood that it can be cured within a reasonable period of time.

C. DOMESTIC RELATIONS (Sections 507(a)(1) and 707(b)(2)(A)(iv) and 1322(a)(4))

- a. Unsecured claims for alimony and child support due and owing on the date the petition is filed are given first priority status subject only to the

fees to be paid to the trustee distributing the funds.

- b. Claims assigned to governmental units are similarly given first priority status unless such claims were voluntarily assigned to such governmental units.
- c. Assigned claims entitled to priority status need not be paid in full if the plan provides that all disposable income will be applied to the plan for 5 years after the first payment is due. Note that this is an exception to §1322(a)(2), which continues to require the plan to provide for full payment of all priority claims.

D. HOMESTEAD EXEMPTION RESTRICTIONS (Sections 522(b)(3), 522(p)(1) and 522(o)(4))

- 1. This provision went into effect on April 20, 2005, the date the President signed the bill.
- 2. No effect in Missouri if debtor has owned home for more than 1215 days.
- 3. If domicile is not in a single state for 730 days prepetition, debtor is allowed to claim exemptions in the state where debtor lived for the majority of 180 days prior to 730 days. (Section 522(b)(3)).
- 4. If debtor acquired a homestead interest in a state within 1215 days, and move to that state from a state with a higher homestead exemption, debtor is limited to a cap of \$125,000.
  - a. Note that one case has already held that the \$125,000 limitation does not apply to states that have elected to opt out of the Federal exemptions. *In re McNabb*, 326 B.R. 785 (Bankr. D. Az. 2005).
- 5. But then, a debtor's homestead exemption (even Missouri's \$15,000) is reduced to the extent the value is attributable to any nonexempt property the debtor disposed of within the previous ten years with an intent to hinder, delay, or defraud creditors.
- 6. Example
  - a. 1214 days prepetition debtor purchases a home in Dodge City, Kansas for \$500,000 cash.
  - b. Debtor starts a Country & Western band and becomes the talk of Dodge City.
  - c. 729 days prepetition debtor moves to Branson, Missouri to begin a recording career, and puts the \$500,000 into a new home there.
  - d. Debtor is entitled to claim the Kansas homestead exemption as to the Branson home, but that exemption is limited to \$125,000, UNLESS EITHER
    - 1. The analysis in *McNabb* is correct, in which case debtor could claim the unlimited Kansas homestead, or
    - 2. Within 10 years pre-filing, debtor disposed of property

with the intent to hinder, delay, or defraud creditors, in which case it is reduced by the value of the property disposed of.

7. The language is not clear. It refers to both value and equity. The assumption is that value here refers to the equity after deducting secured claims.

E. PREFERENCES(Sections 547(c)(9) and 547(c)(2)(B) and (c))

1. If debtor's debts are not primarily consumer debts, aggregate transfers of less than \$5000 are exempt from preference recovery. Suits by a trustee against noninsiders, for less than \$10,000, must be brought in the district in which the defendant resides.
2. *Deprizio* is no longer the law, retroactive to any case on file on the date the President signed the Act. (April 20, 2005)
3. The ordinary course of business defense in a preference action is broadened to allow a defendant to prove that; (1) the debt was incurred in the ordinary course of the business of the debtor; and either (2) the transfer was made in the ordinary course of the business of debtor and the transferee; OR (as opposed to *and*) (3) the transfer was made according to ordinary business terms.
4. *Beasley* is no longer the law, since a lien will now relate back provided it is perfected within 30 days after the lien is granted.

F. RECLAMATION (Section 503(b)(9) and 546(c)(1) and (2))

1. The value of goods received by the debtor within 20 days of filing in the ordinary course is an allowed administrative claim, regardless of compliance with the reclamation requirements.
2. Reclamation rights are expressly made subject to the prior rights of secured creditors.
3. A seller with reclamation rights can reclaim goods if:
  - a. The debtor received the goods while insolvent within 45 days of filing.
  - b. Seller made a written demand for reclamation within 45 days of receipt of goods by debtor, or
  - c. Within 20 days after the petition was filed if the 45-day period had not run as of the filing date. Query? Is the demand made to the debtor or to the court? Would it violate the automatic stay to make demand of the debtor?

G. SANCTIONS (Section 707(b)(4))

1. Court or any party in interest may bring a motion for sanctions pursuant to Rule 9011.
2. If a case is dismissed for abuse the court may
  - a. Order debtor's attorney to pay the trustee's cost for bringing the

- action or
        - b. Assess a civil penalty against the attorney.
  - 3. Attorney's certification means he or she:
    - a. Performed a reasonable investigation of facts in petition
    - b. Determined the petition is well-grounded in fact
    - c. Certifies that the petition is warranted by existing law or good faith argument for extension, modification, or reversal of relevant law.
  - 4. Signature of attorney on petition is a certification that attorney has no knowledge, after inquiry, that information in schedules is incorrect.
  - 5. Questions?
    - What represents an inquiry?
    - What documents must be examined?
    - If the attorney has some responsibility for inaccuracies, does this affect the debtor's culpability under 727(a)(4)?
8. SELF-SETTLED TRUST AND OTHER FRAUDULENT CONVEYANCES (Section 548(a)(1) and 548(e)(1) and (2))
- 1. For cases commenced after April 20, 2006, the trustee's lookback period for fraudulent conveyances is extended to two years
  - 2. For cases filed after April 20, 2005, transfers made to self-settled trusts within ten years of the date of the petition can be avoided if the transfers were made in anticipation of judgments or penalties incurred as a result of violations of securities laws.
  - 3. For cases filed after April 20, 2005, transfers, for purposes of the ten-year look back include transfers made in anticipation of any money judgment, criminal fine, or similar obligation that debtor believed would have incurred as a result of a violation of securities laws or regulations or on account of fraud, deceit, or manipulation in fiduciary capacity or in connection with the purchase or sale of a security under specified provisions of securities laws.
  - 4. It is not clear what "in anticipation" means. Must a suit be pending or notice sent or settlement discussed? It is also not clear if the fraud, deceit, or manipulation in a fiduciary capacity is only in connection with the purchase or sale of securities.
9. SINGLE ASSET REAL ESTATE (Sections 101(51)(B), 362(d)(3))
- 1. All passive owners of single asset real estate, regardless of its value, must either file a plan that has a reasonable prospect of confirmation, or begin making payments on secured debt within 90 days of the filing of the case.
  - 2. The definition of single asset real estate excludes family farmers.
  - 3. Payments may be made from rents or other income generated by the property and must be in an amount equal to interest at the nondefault

contract rate on the value of the creditor's interest.

10. **SMALL BUSINESS BANKRUPTCY** (Sections 10151(c), 1116, and 1125(f)(1)).
  1. A small business debtor is a debtor engaged in commercial or business activities, other than real estate, who has aggregate, noncontingent, liquidated, secured and unsecured debt in an amount not to exceed \$2 million, excluding debt to affiliates or insiders, where the UST has not appointed an unsecured creditors committee.
  2. The small business debtor (the trustee or debtor in possession) must attach to the petition the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax returns, or
  3. A statement under oath that any or all of these documents does not exist.
  4. Senior management and counsel must attend all meetings, scheduling conferences, and meetings of creditors unless the Court waives this requirement for extraordinary and compelling circumstances.
  5. Debtor must file all schedules and statements of financial affairs no later than 30 days after the petition date. No extensions beyond that time period absent extraordinary and compelling circumstances.
  6. Debtor must file all required postpetition financial and other reports.
  7. Debtor must maintain insurance customary and appropriate to the industry.
  8. Debtor must timely file all tax returns and timely pay all taxes entitled to administrative priority.
  9. Debtor must allow the UST to inspect the business premises and all records at reasonable times with reasonable notice.
  10. Chapter 11 debtors, be they small debtors or not, can no longer obtain extensions for cause to file a plan and solicit acceptances of same beyond 18 and 20 months respectively. The court can determine in a small business case that the plan can serve as the disclosure statement.
  11. Comment: Most Chapter 11 cases are filed by small business debtors, and the new provisions are designed to weed out small business debtors who are not likely to reorganize.