

MAJOR CONSUMER BANKRUPTCY EFFECTS OF BAPCPA

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The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 dramatically changed several aspects of individual consumer bankruptcy law. In many instances these changes are vague, confusing, and incomplete. In this article, United States Bankruptcy Judge Eugene Wedoff outlines what he considers to be the most significant changes to U.S. consumer bankruptcy laws brought on by BAPCPA. Judge Wedoff examines the changes and additions to the code for possible internal inconsistencies and illuminates points of tension among the provisions. Some of the changes affect chapters 7, 11, and 13 equally. Other changes impact only discrete types of consumer bankruptcy.

While avoiding any normative analysis of the overarching scheme, Judge Wedoff points out that some problematic language in BAPCPA may lead to confusion among consumers, judges, and lawyers. In discussing what the most rational reading of several sections might be, Judge Wedoff gives practitioners and academics alike a view of the new provisions from the bench.

On April 20, 2005, President Bush signed into law Senate bill number 256.¹ Titled the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,” and commonly referred to as BAPCPA,² this is the most substantial revision of bankruptcy law since the 1978 Bankruptcy Code. BAPCPA generally became effective as to cases filed on or after October 17, 2005.³ This paper discusses major changes in consumer bankruptcy law effected by BAPCPA.

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1. Press Release, The White House, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act, (Apr. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html> (last visited Oct. 27, 2006).

2. There is some question as to the best way of pronouncing this acronym. The simplest way that accounts for all of the components is “bap-cee-pah,” with the accent on the second syllable.

3. Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

I. CHANGES AFFECTING CONSUMER CASES
UNDER MULTIPLE CHAPTERS OF THE CODE

A. *Extended Time Between Discharges*

• *BAPCPA Section 312*

Section 727(a)(8) of Title 11 is amended to subject a chapter 7 debtor to denial of discharge if the debtor received a chapter 7 or 11 discharge in a case filed within eight years of the filing of the pending case.⁴

Section 1328 is amended to include new subsection (f) providing that a chapter 13 debtor will be denied discharge if the debtor received a discharge (1) “in a case filed under chapter 7, 11, or 12 . . . during the 4-year period preceding the date of the order for relief” in the pending case, or (2) “in a case filed under chapter 13 . . . during the 2-year period preceding the date of such order.”⁵ The resulting discharge system can be displayed in a table:

TABLE 1: DISCHARGE WAITING PERIODS

	Current case:		
	Chapter 7	Chapter 11	Chapter 13
Prior case: Chapter 7	8 years from prior case filing	None	4 years from prior case fil- ing (or prior case discharge)
Chapter 11	8 years from prior case filing	None	4 years from prior case fil- ing (or prior case discharge)
Chapter 13	Same as former (6 years from prior case fil- ing; none with defined pay- out)	None	2 years from prior case fil- ing (or prior case discharge)

4. BAPCPA § 312, 119 Stat. at 86–87 (amending 11 U.S.C. § 727(a)(8)).

5. *Id.* (adding 11 U.S.C. § 1328(f)). The quoted language is ambiguous. It denies discharge in a chapter 13 case if some triggering event occurred during the two- or four-year period before the case was filed, but it does not clearly identify that event. The triggering event could be either the *filing* of a prior bankruptcy case that resulted in a discharge or the *receipt of a discharge* in the prior case. Since the first verb before the phrase “during the . . . period” is “filed,” the grammatically correct interpretation is that discharge is denied if the prior case was “filed [under the relevant chapter] during the [two- or four-year] period preceding the date of the order for relief.” However, it is possible to read the provision as applying “if the debtor *received a discharge* [in a case filed under the relevant chapter] during the . . . period.” Policy arguments and legislative history might be advanced in support of the latter interpretation.

B. Production of Tax Returns and Other Documents; Dismissal on Nonproduction

• *BAPCPA Section 315(b)*

Section 521 has been amended to impose a number of new production requirements on debtors. First, new subparagraph (a)(1)(B) provides that unless the court orders otherwise, individual debtors must file, together with their schedules:

- a certificate of an attorney or petition preparer indicating that the debtor was given an informational notice required by amended § 342(b), or, in the case of a pro se debtor, a certificate of the debtor stating that the debtor has received and read the notice;⁶
- “copies of all payment advices or other evidence of payment received within 60 days before the filing of the petition, by the debtor from any employer of the debtor”;⁷
- “a statement of the amount of monthly net income, itemized to show how the amount is calculated”;⁸ and
- “a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition.”⁹

“Monthly net income” is not a term defined in the Code as amended by BAPCPA. The use of this term in § 521(a)(1)(B) could have at least three different meanings: (1) it could mean simply the debtor’s take-home pay (that is, gross income less payroll deductions); (2) it could mean the amount remaining after allowed deductions under the means test (discussed below in connection with changes to chapter 7); or (3) it could mean the difference between the debtor’s income reported on Schedule I and the expenses reported on Schedule J. Because this last “monthly net income” would be relevant to the feasibility of a chapter 11 or chapter 13 plan, as well as to the ability of the debtor to perform under a reaffirmation agreement, this may be the most reasonable interpretation.

Second, new subparagraph (e)(2)(A) requires that each debtor, at least seven days prior to the § 341 meeting, provides both to the trustee and to any creditor making a timely request a copy of the federal income tax return or transcript of the return (at the debtor’s option) for the pe-

6. BAPCPA § 315(b), 119 Stat. at 89 (adding 11 U.S.C. § 521(a)(1)(B)).

7. *Id.*

8. *Id.*

9. *Id.*

riod for which the return was most recently due and for which the debtor filed a return.¹⁰ This requirement may apply only to individual debtors in chapter 7 and 13 cases, since § 521(e)(1) (requiring the court to give copies of certain filings to creditors) is limited in this way.¹¹ A failure by the debtor to produce the return or transcript requires dismissal of the case (presumably on motion of the trustee or requesting creditor), unless the debtor demonstrates that the failure to produce the return or transcript was beyond the debtor's control.¹²

Third, new paragraphs (f)(1)–(3) provide that each individual debtor in a case under chapter 7, 11, or 13 must also, on request of a party in interest or the court, file with the court, at the same time filed with the IRS, copies of any federal income tax return (or at the debtor's option, a transcript of the return) for a tax year ending while the case is pending and for a tax year that ended during the three years before the case was filed.¹³ The debtor must also provide copies (or transcripts) of any amendments filed to these returns.¹⁴ New paragraph (g)(2) provides that the filed returns or transcripts are to be available to any party in interest, with the debtor's privacy protected by regulations to be adopted by the Director of the Administrative Office.¹⁵

- *BAPCPA Section 316*

New § 521(i) provides that if an individual debtor in a voluntary chapter 7 or a chapter 13 case fails to file all of the information required under § 521(a)(1) (including the new § 521(a)(1)(B) discussed above) within forty-five days after filing the petition, the case must be dismissed on the forty-sixth day, and any party in interest may request a court order to that effect.¹⁶ The court order must be entered within five days of the request.¹⁷ The automatic dismissal may be delayed for up to forty-five additional days on motion of the debtor made within the original forty-five-day period.¹⁸ It may also be delayed on motion of the trustee, filed prior to automatic dismissal, showing that the debtor attempted in good faith to file the debtor's payment advices and that the best interests of creditors would be served by administering the case.¹⁹ (It is unclear

10. *Id.* § 315(b)(2), 119 Stat. at 90 (adding 11 U.S.C. § 521(e)(2)(A)).

11. *Id.* (adding 11 U.S.C. § 521(e)(1)).

12. *Id.* (adding 11 U.S.C. § 521(f)(3)).

13. *Id.* (adding 11 U.S.C. § 521(f)(1)–(2)).

14. *Id.* (adding 11 U.S.C. § 521(f)(3)).

15. *Id.* (adding 11 U.S.C. § 521(g)(2)).

16. *Id.* § 316, 119 Stat. at 92 (adding 11 U.S.C. § 521(i)(1)–(2)).

17. *Id.* (adding 11 U.S.C. § 521(i)(2)).

18. *Id.* (adding 11 U.S.C. § 521(i)(3)).

19. *Id.* (adding 11 U.S.C. § 521(i)(4)).

whether this exception would apply only when the debtor has satisfied the other filing requirements of § 521(a)(1).²⁰

C. Audits

- *BAPCPA Section 603*

Section 603 of BAPCPA sets out an uncodified duty, imposed on the Attorney General (in districts served by U.S. trustees) and on the Judicial Conference of the United States (in districts served by bankruptcy administrators) to conduct audits (1) of all information provided by the debtors in at least 0.4% of individual chapter 7 and 13 cases, randomly selected, and (2) of any schedules of income and expenses that “reflect greater than average variances from the statistical norm of the district in which the schedules were filed if those variances occur by reason of higher income or higher expenses than the statistical norm of the district in which the schedules were filed.”²¹ The audits are to “determine the accuracy, veracity, and completeness of petitions, schedules, and other information that the debtor is required to provide under Sections 521 and 1322” of the Code.²² The audits are to be conducted by certified or licensed public accountants in accordance with generally accepted auditing standards, or under regulations adopted by the Attorney General (and the Judicial Conference in areas served by bankruptcy administrators).²³ Provisions are made for aggregate reports of the results of the audit and for criminal referrals in the event of material misstatements.²⁴ New § 727(d)(4) creates as a ground for revocation of discharge the failure by the debtor to cooperate with the auditor or to “explain satisfactorily a material misstatement in an audit.”²⁵ The latter phrase presumably refers to misstatements in filings of a debtor reflected in the audit, rather than misstatements in the audit itself; however, it is not clear what would constitute a “satisfactory” explanation of such a misstatement. There is no deadline for motions to revoke discharge based on § 727(d)(4).

20. The combination of the new requirement for production of “payment advices” in § 521(a)(1)(B)(iv) with the automatic dismissal provision of § 521(i) could lead to substantial problems of case administration, because it may not be apparent until after the first forty-five days of a bankruptcy that a debtor has not filed all payment advices received in the sixty days prior to filing the case. Such a failure, even if inadvertent and of no consequence to case administration, would require dismissal of the case. This result can be avoided by a standing court order providing that payment advices are not to be filed, but rather provided to the case trustee and requesting creditors prior to the § 341 meeting. Failure of the debtor to comply with this order would then be subject to flexible sanctions on motion by the trustee or other party in interest. The judges of the Northern District of Illinois Bankruptcy Court have adopted such a standing order. See Amended Standing Order, Filing of Payment Advances Pursuant to 11 U.S.C. § 521(a)(1)(B)(iv) (Bankr. N.D. Ill. July 18, 2006), available at http://www.ilnb.uscourts.gov/GeneralOrders/Filing_of_Payment_Advices_Pursuant.pdf.

21. See BAPCPA § 603(a)(2)(B)–(C), 119 Stat. at 122 (adding 28 U.S.C. § 586(a)(2)(B)–(C)).

22. *Id.* § 603(a)(1), 119 Stat. at 122 (adding 28 U.S.C. § 586(a)(1)).

23. *Id.*

24. See *id.* § 603(a)(2)(D) (adding 28 U.S.C. § 586(a)(2)(D)).

25. *Id.* § 603(d)(3), 119 Stat. at 123 (amending 11 U.S.C. § 727(d)(4)).

The Attorney General and the Judicial Conference are given two years from enactment of BAPCPA to develop bankruptcy auditing standards.²⁶ However, the auditing provisions themselves become effective eighteen months after enactment, that is, October 20, 2006, requiring development of bankruptcy auditing standards by that date to avoid the need to conduct the required audits under generally accepted auditing standards.

D. Credit Counseling and Debtor Education

- *BAPCPA Section 106(a)*

Under new § 109(h), individuals are ineligible for relief under any chapter of the Code unless, within 180 days of their bankruptcy filing, they received “an individual or group briefing” from a nonprofit budget and credit counseling agency approved by the U.S. trustee or bankruptcy administrator under standards set forth in new § 111 and published by the clerk of court.²⁷ Among these standards is a requirement that the agency provide its services without regard to the debtor’s ability to pay any fee.²⁸ The required briefing, which may take place by telephone or on the Internet, must “outline” the opportunities for credit counseling and “assist . . . in performing a related budget analysis.”²⁹ Exceptions are made (1) for districts in which adequate counseling services are determined by the U.S. trustee or bankruptcy administrator not to be available (a determination that must be reviewed annually);³⁰ (2) for debtors who submit to the court a certification describing exigent circumstances requiring immediate bankruptcy filing, which certifies, that the debtor had sought the required briefing at least five days prior to the bankruptcy filing without being able to obtain it (in which case the debtor is required to complete the counseling within thirty days after the bankruptcy filing);³¹ and (3) for debtors who are incapacitated, disabled, or on active military duty in a combat zone (with limiting definitions for incapacity and disability).³² The debtor is required to file a certificate from the credit counseling agency describing the services provided, and file any debt-repayment plan developed with the agency.³³ By making individu-

26. *Id.* § 603(a)(1), 119 Stat. at 122 (adding 28 U.S.C. § 586(a)(1)).

27. *Id.* § 106(a), 119 Stat. at 37 (adding 11 U.S.C. § 109(h)).

28. *Id.* § 106(e)(1), 119 Stat. at 38 (adding 11 U.S.C. § 111(e)(2)(B)).

29. *Id.* § 106(a), 119 Stat. at 37 (adding 11 U.S.C. § 109(h)(1)).

30. *Id.* (adding 11 U.S.C. § 109(h)(2)(A)).

31. *Id.* (adding 11 U.S.C. § 109(h)(3)). However, even if the debtor complies with all of these requirements for the exigent circumstances exception, a judge could still find the application not “satisfactory” and reject it. See *In re Dixon*, 338 B.R. 383, 387 (B.A.P. 8th Cir. 2006). There is a dispute among the cases as to whether a bankruptcy case filed by a debtor ineligible under § 109(h) should be dismissed or stricken. See *In re Ross*, 338 B.R. 134, 140–41 (Bankr. N.D. Ga. 2006) (collecting the authorities).

32. BAPCPA § 106(a), 119 Stat. at 37 (adding 11 U.S.C. § 109(h)(4)).

33. *Id.* § 106(d) (adding 11 U.S.C. § 521(b)).

als who have not received the defined briefing ineligible to be debtors, this change may have the effect of immunizing most individuals from involuntary bankruptcy cases. However, because the required briefing is to be received prior to the “filing of the petition by [the] individual [debtor],” it is more likely that the eligibility requirement applies only in voluntarily filed cases.³⁴

- *BAPCPA Section 105*

The Executive Director of the Office for United States Trustees is required to develop a financial management training curriculum and materials to educate individual debtors “on how to better manage their finances.”³⁵ The curriculum is to be tested in six judicial districts over an eighteen-month period, beginning no later than 270 days after enactment of BAPCPA.³⁶ The Director is required to evaluate the effectiveness of the curriculum and materials, as well as other consumer education programs, and report to Congress no later than three months after the end of the test period as to the effectiveness and cost of the programs.³⁷

- *BAPCPA Section 106(b) and (c)*

Even while the U.S. Trustees’ test program is being evaluated, debtors in both chapter 7 and 13 will be required to complete “an instructional course concerning personal financial management” in order to assure their discharge, as long as the U.S. trustee or bankruptcy administrator determines that there are adequate approved educational programs available and the debtor is not disabled or incapacitated (as defined in § 109(h)), or on active military duty in a combat zone.³⁸ Unless one of these exceptions of the requirement applied, failure to complete the instructional course would be a ground for denial of the chapter 7 discharge under new § 727(a)(11), and of the chapter 13 discharge under new § 1328(g).³⁹ Telephone and internet courses would be permissible “if . . . effective.”⁴⁰ As with credit-counseling agencies, the clerk of court must maintain a list of educational courses approved for each district by its U.S. trustee or bankruptcy administrator, under standards set out in new Section 111.⁴¹ Among the standards for approval is a requirement

34. This was the ruling in *In re Fagan*, No. 06-014863NLW, (Bankr. D.N.J. Aug. 14, 2006) (reported in 18 BNA News 747 (Aug. 17, 2006)).

35. BAPCPA § 105(a), 119 Stat. at 36 (adding 11 U.S.C. § 111).

36. *Id.* § 105(b), 119 Stat. at 36 (adding 11 U.S.C. § 111(b)(1)–(2)).

37. *Id.* § 105(c), 119 Stat. at 36–37 (adding 11 U.S.C. § 111(c)).

38. *Id.* § 106(a), 119 Stat. at 37–38 (adding 11 U.S.C. § 109(h)).

39. *Id.* § 106(b)–(c), 119 Stat. at 38 (adding 11 U.S.C. §§ 727(a), 1328(g)).

40. *Id.* § 106(e), 119 Stat. at 40 (adding 11 U.S.C. § 111(d)(1)(C)).

41. *See id.* (adding 11 U.S.C. § 111(d)).

that the course be provided without regard to the debtor's ability to pay any fee charged for the course.⁴²

E. Automatic Stay

- *BAPCPA Section 302; Serial Filings*

New § 362(c)(3) provides that if a chapter 7, 11, or 13 case is filed within one year of the dismissal of an earlier case (other than a chapter 11 or 13 case filed after a § 707(b) dismissal), the automatic stay in the second case terminates “with respect to the debtor” thirty days after the filing, unless a party in interest demonstrates that the second case was filed in good faith with respect to the creditor sought to be stayed.⁴³ If a second repeat filing takes place within the one-year period, the automatic stay will not go into effect, and the court is required promptly to enter an order confirming the inapplicability of the stay on request of a party in interest.⁴⁴ However, a party in interest may obtain imposition of the stay by demonstrating that the third filing is in good faith with respect to the creditor sought to be stayed.⁴⁵ For both second and third filings within one year, circumstances are described that generate a presumption that the new filing was not made in good faith, and such a presumption would be required to be rebutted by clear and convincing evidence.⁴⁶ Under new § 362(i), this presumption would not arise in “any subsequent case” if a debtor's case is dismissed “due to the creation of a debt repayment plan.”⁴⁷

- *BAPCPA Section 303; In Rem Relief; Ineligible Debtors*

“In rem” relief from the automatic stay is authorized by new § 362(d)(4).⁴⁸ In cases involving either (a) transfers of real property collateral without the consent of the secured creditor or court approval, or (b) multiple bankruptcy filings involving the same real property, the court may issue an order of relief from the automatic stay.⁴⁹ The order, once properly recorded, is binding on all owners of the property for two years from the date of entry.⁵⁰ A party in interest may file a request for imposition of the stay within thirty days of a subsequent case filing, and the court may impose the stay only if the party demonstrates that the

42. *See id.* (adding 11 U.S.C. § 111(d)(1)(E)).

43. *See id.* § 302(3), 119 Stat. at 75 (adding 11 U.S.C. § 362(c)(3)). The courts are in substantial disagreement as to the scope of the stay termination. *See In re Brandon*, 349 B.R. 130 (Bankr. M.D.N.C. 2006) (collecting authorities).

44. *See* BAPCPA § 302(3), 119 Stat. at 76–77 (adding 11 U.S.C. § 362(c)(4)(A)).

45. *See id.* (adding 11 U.S.C. § 362(c)(4)(B)).

46. *See id.* (adding 11 U.S.C. § 362(c)(3)(C)).

47. *See id.* § 106(f), 119 Stat. at 41 (adding 11 U.S.C. § 362(i)).

48. *See id.* § 303(a), 119 Stat. at 77–78 (adding 11 U.S.C. § 362(d)(4)).

49. *Id.* (adding 11 U.S.C. § 362(d)(4)(A)–(B)).

50. *Id.* (adding 11 U.S.C. § 362(d)(4)(B)).

case was filed in good faith as to the creditors sought to be stayed.⁵¹ Where in rem relief is effective, new § 362(b)(20) creates an exception to the automatic stay for lien enforcement activity in later cases.⁵²

New § 362(b)(21) excepts from the stay any act to enforce a lien or security interest in real property if the debtor was ineligible under § 109(g) or filed the case in violation of an order “prohibiting the debtor from being a debtor” in another case under Title 11.⁵³

- *BAPCPA Section 311; Exception for Leased Residential Real Estate*

Two new exceptions from the automatic stay are established for landlords seeking to evict tenants. The first, § 362(b)(22), allows the continuance of any eviction proceeding in which the landlord obtained a judgment of possession prior to the filing of the bankruptcy petition.⁵⁴ The second, § 362(b)(23), deals with evictions based on “endangerment” of the rented property or “illegal use of controlled substances” on the property.⁵⁵ Paragraph (b)(23) excepts the eviction proceeding from the stay if it was commenced before the filing of the bankruptcy case, or if the endangerment or illegal use occurred within the thirty days before the bankruptcy filing.⁵⁶ In either situation, the landlord would be required to file with the court and serve on the debtor a certificate setting out the facts giving rise to the exception.⁵⁷

New provisions in § 362(l)–(m) allow a debtor to contest the applicability of both of these new exceptions by filing timely certifications under penalty of perjury.⁵⁸ As to the § 362(b)(22) lease exception, the debtor would be able under § 362(l) to keep the stay in effect for an initial thirty days after the bankruptcy filing by certifying that applicable nonbankruptcy law allowed the lease to remain in effect upon the debtor’s cure of the default that was the basis of the eviction order.⁵⁹ The debtor can keep the stay in effect after thirty days by filing a further certification that the cure amount had been paid within the initial thirty days.⁶⁰ As to § 362(b)(23), new § 362(m) provides that if the debtor files a certificate denying the assertions in the landlord’s certificate, the court is required to conduct a hearing within ten days “to determine if the situation giving rise to the lessor’s certification . . . existed or has been remedied.”⁶¹

51. *Id.*

52. *Id.* § 303(b), 119 Stat. at 78 (adding 11 U.S.C § 362(b)(20)).

53. *Id.* (adding 11 U.S.C § 362(b)(21)).

54. *Id.* § 311(a), 119 Stat. at 84 (adding 11 U.S.C § 362(b)(22)).

55. *Id.* (adding 11 U.S.C § 362(b)(23)).

56. *Id.*

57. *Id.*

58. *Id.* § 311(b), 119 Stat. at 84–86 (adding 11 U.S.C. § 362(l)–(m)).

59. *Id.* (adding 11 U.S.C. § 362(l)(1)).

60. *Id.*

61. *Id.* (adding 11 U.S.C. § 362(m)(2)(B)).

• *BAPCPA Section 315(a); Notice to Creditors*

Section 342(c) is amended to remove the old provision that stated that a failure by the debtor to supply notice to creditors in the prescribed form did not invalidate the notice.⁶² Instead, new § 342(g)(1) limits the circumstances under which any notice provided to a creditor by the debtor or the court is “effective.”⁶³ To be effective, a notice must either (1) be provided “in accordance with” the preceding subsections of § 342, or (2) “be brought to the attention of the creditor.”⁶⁴ The preceding subsections of § 342, applicable to notices to creditors, contain both content and address requirements, as set out in the following table.

TABLE 2

Subpart of § 342	Applicable to what cases	Applicable to what notice-giver	Type of notice affected	Requirement
(a)	All	Not specified	Notice of an order for relief	Must be “appropriate”
(c)(1)	All	Debtor only	Notice under Title 11, other applicable law, rule, or court order	Must contain the debtor’s name, address, and the last four digits of the debtor’s taxpayer id
(c)(2)	All	Debtor only	Notice required by Title 11	Must contain the account number and be sent to the “correspondence” address specified in at least two timely “communications” to the debtor

(Continued on next page)

62. *Id.* § 315(a)(1)(B), 119 Stat. at 88 (amending 11 U.S.C. § 342(c)).

63. *Id.* § 315(a)(1)(C), 119 Stat. at 89 (adding 11 U.S.C. § 342(g)(1)).

64. *Id.*

TABLE 2—*Continued*

Subpart of § 342	Applicable to what cases	Applicable to what notice-giver	Type of notice affected	Requirement
(e)	Chapter 7 or 13	Debtor or the court	Any notice “in such case”	Must be sent to an address specified in a notice filed and served by the creditor, effective five days after the court and debtor receive notice of this address
(f)	Chapter 7 or 13 cases “pending in the courts”	All or any specified bankruptcy courts	Any notice required to be provided by a court	Subject to subsection (e), must be sent to an address specified in a notice filed by the creditor, effective 30 days after filing

Paragraph (g)(1) goes on to define a situation under which a notice that does not satisfy the first ground for effectiveness (compliance with the other provisions of § 342) will “not be considered” to meet the second ground—being “brought to the attention of the creditor.”⁶⁵ The noncompliant notice will not be considered “brought to the attention of the creditor” if three conditions are met: (1) designation by the creditor of a person or organizational subdivision for receipt of notices; (2) establishment by the creditor of “reasonable procedures” for delivery of notice to the designated person or subdivision; and (3) nonreceipt of the notice by the person or subdivision designated by the creditor.⁶⁶

Paragraph (g)(2) states only one consequence of a notice that is not “effective” under paragraph (g)(1). If the ineffective notice is of the order for relief, no “monetary penalty” can be imposed for violation of the automatic stay or failure to comply with turnover obligations.⁶⁷

65. *Id.*

66. *Id.*

67. *Id.* (adding 11 U.S.C. § 341(g)(2)).

F. Limiting Definition of Household Goods for Purposes of Lien Avoidance

- *BAPCPA Section 313*

New § 522(f)(4) limits the “household goods” as to which a nonpossessory, nonpurchase-money security interest can be avoided under § 521(f)(1)(B).⁶⁸ The new definition limits electronic equipment to one radio, one television, one VCR, and one personal computer with related equipment; it excludes (among other things) works of art not created by the debtor (or a relative), jewelry worth more than \$500 (except wedding rings), and motor vehicles.⁶⁹

G. Dischargeability

- *BAPCPA Section 310; Credit Card Debts*

The presumption of nondischargeability for fraud in the use of a credit card, set out in § 523(a)(2)(C), is expanded. The amount that the debtor must charge for “luxury goods” to invoke the presumption is reduced from \$1225 to \$500; the amount that the debtor must withdraw in cash advances to invoke the presumption is reduced from \$1225 to \$750.⁷⁰ The period of time prior to the bankruptcy filing in which these charges must be made for the presumption to apply is increased from sixty to ninety days for luxury goods, and from sixty to seventy days for cash advances.⁷¹

- *BAPCPA Section 220; Student Loans*

Section 523(a)(8) is amended to make student loans nondischargeable, in the absence of undue hardship, regardless of the nature of the lender, thus covering loans from nongovernmental and profit-making organizations.⁷²

H. Two-Year Residency Requirement for State or Local Exemption Law

- *BAPCPA Section 307*

New § 522(b)(3) specifies the state or local law governing the debtor’s exemption as the law of the place where the debtor’s domicile was located for 730 days before filing.⁷³ If the debtor did not maintain a

68. *Id.* § 313(a), 119 Stat. at 87 (adding 11 U.S.C. § 522(f)(4)(A)).

69. *Id.* (adding 11 U.S.C. § 522(f)(4)(B)).

70. *Id.* § 310, 119 Stat. at 84 (amending 11 U.S.C. § 523(a)(2)(C)).

71. *Id.*

72. *Id.* § 220, 119 Stat. at 59 (amending 11 U.S.C. § 523(a)(8)).

73. *Id.* § 307, 119 Stat. at 81 (amending 11 U.S.C. § 522(b)(3)(A)).

domicile in a single state for that period, the governing exemption law is that of the place of the debtor's domicile for the majority of the 180-day period preceding the 730 days before filing (that is, between two and two and one-half years before the filing).⁷⁴ If this new residency requirement would render the debtor ineligible for any exemption, the debtor is allowed to choose the federal exemptions.⁷⁵

I. Limits on Homestead Exemptions

Despite the delayed general effective date of Senate bill number 256, each of the following amendments, limiting the right to claim large homestead exemptions, applies in all cases filed on or after the date of its enactment, May 20, 2005.

- *BAPCPA Section 308; Reduction of Homestead Value for Fraudulent Additions*

New § 522(o) reduces the value of a debtor's homestead for purposes of a state homestead exemption. The value is reduced to the extent of any addition to the value of the homestead on account of a disposition of nonexempt property made by the debtor that is made with intent to hinder, delay, or defraud creditors during the ten years prior to the bankruptcy filing.⁷⁶

- *BAPCPA Section 322; Limitation on New Homestead Additions; Homestead Cap*

Under new § 522(p), any value in excess of \$125,000—regardless of the debtor's intent—that is added to a homestead during the 1215 days preceding the bankruptcy filing may not be included in a state homestead exemption, unless it was transferred from another homestead in the same state or the homestead is the principal residence of a family farmer.⁷⁷

Under new § 522(q), an absolute \$125,000 homestead cap applies if either (a) the court determines that the debtor has been convicted of a felony demonstrating that the filing of the case was an abuse of the provision of the Bankruptcy Code, or (b) the debtor owes a debt arising from a violation of federal or state securities laws, fiduciary fraud, racketeering, or crimes or intentional torts that caused serious bodily injury or death “in the preceding 5 years.”⁷⁸ However, this limitation is inappli-

74. *Id.* (amending 11 U.S.C. § 522(b)(3)(B)).

75. *Id.*

76. *Id.* § 308, 119 Stat. at 81–82 (adding 11 U.S.C. § 522(o)(4)).

77. *Id.* § 322(a), 119 Stat. at 96–97 (adding 11 U.S.C. § 522(p)).

78. *Id.* (adding 11 U.S.C. § 522(q)).

cable if the homestead property is “reasonably necessary for the support of the debtor and any dependent of the debtor.”⁷⁹

• *BAPCPA Section 330; Delay of Discharge to Determine Homestead Limits*

The discharge provisions of chapters 7, 11, and 13 are all amended to delay the grant of a discharge for a debtor who is subject to a proceeding that might give rise to a limitation of the homestead exemption under new § 522(q) (1), discussed above. In chapter 7, a new ground for not granting discharge is set out in § 727(a)(12), based on a finding by the court that such a § 522(q) proceeding is pending.⁸⁰ In chapter 11, new § 1141(d)(5)(C) appears to require, as a condition for discharge, that the court find no reason to believe that such a proceeding is pending.⁸¹ The chapter 11 provision is ambiguous because it is a long sentence fragment.⁸² In chapter 13, new § 1328(h) clearly provides that the court may not grant a discharge unless the court finds “no reasonable cause to believe” that there is pending a proceeding of the kind that would result in the limitation of an exemption under § 522(q).⁸³

All of these new provisions specify that the hearing they allow or require is to be conducted “not more than 10 days before the date of the entry of the order granting discharge.”⁸⁴ The apparent intent of these provisions is to allow a discharge order to be entered only if the court is able to find that no § 522(q) proceeding is pending, with the impact of delaying discharge until the conclusion of any such proceeding. The heading of § 330 of BAPCPA — “Delay of Discharge During Pendency of Certain Proceedings” — confirms this understanding.

J. Avoidance of Transfers to Asset-Protection Trusts

• *BAPCPA Section 1402*

New § 548(e) allows a trustee to avoid any transfer by the debtor to a self-settled trust or similar device made within ten years of filing the petition, 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

79. *Id.* (adding 11 U.S.C. § 522(q)(2)). Moreover, because the § 522(q) cap applies “as a result of electing” state exemptions under § 522(b)(3)(A), one court has found it inapplicable in opt-out states, where there would be no “election” of the state exemptions. *In re McNabb*, 326 B.R. 785 (Bankr. D. Ariz. 2005). This decision has not generally been followed. *See In re Kane*, 336 B.R. 477, 481 (Bankr. D. Nev. 2006) (collecting authorities).

80. BAPCPA § 330(a)(3), 119 Stat. at 101 (adding 11 U.S.C. § 727(a)(12)).

81. *Id.* § 330(b), 119 Stat. at 101 (adding 11 U.S.C. § 1141(d)(5)(C)).

82. *Id.*

83. *Id.* § 330(d)(3), 119 Stat. at 102 (adding 11 U.S.C. § 1328(h)).

84. *Id.* § 330(a)(3), 119 Stat. at 101 (adding 11 U.S.C. § 727(a)(12)); *id.* § 330(b), 119 Stat. at 101 (adding 11 U.S.C. § 1141(d)(5)(C)); *id.* § 330(d)(3), 119 Stat. at 102 (adding 11 U.S.C. § 1328(h)).

made, indebted.”⁸⁵ This provision would allow recovery of funds transferred by the debtor to an asset-protection trust, but apparently only if the trustee could establish that the transfer was made in response to a particular claim, rather than simply as a general asset-protection device.

K. Exclusions from Estate Property

- *BAPCPA Section 225; Educational Retirement Accounts; State Tuition Programs*

New paragraph (b)(5) is added to § 541. The new paragraph provides that funds placed in an educational retirement account at least 365 days prior to a bankruptcy filing, within the limits established by the Internal Revenue Code, and for the benefit of a child or grandchild of the debtor, are excluded from the debtor’s estate, with a \$5000 limit on funds contributed between one and two years before the filing.⁸⁶ New paragraph (b)(6) likewise excludes similar contributions to qualified state tuition programs, as defined in the Internal Revenue Code.⁸⁷

- *BAPCPA Section 323; Contributions to Employee Plans*

Another new exclusion from estate property, § 541(b)(7), applies to employee contributions to ERISA-qualified retirement plans, deferred compensation plans, tax-deferred annuities, and health insurance plans.⁸⁸

L. Bankruptcy Appeals

- *BAPCPA Section 1233*

Section 158 of the Judiciary Code is amended to provide the circuit courts with discretion to accept bankruptcy appeals without an intermediate appellate decision.⁸⁹ The circuit court may accept a direct appeal if the bankruptcy court, the district court, the Bankruptcy Appellate Panel, or the parties to the appeal acting jointly certify that direct appeal is necessary to resolve a matter of first impression, conflicting decisions, or public importance, or a matter that would materially advance the progress of the case.⁹⁰

85. *Id.* § 1402(4), 119 Stat. at 214 (adding 11 U.S.C. § 548(e)(1)).

86. *Id.* § 225(a)(1)(C), 119 Stat. at 65 (amending 11 U.S.C. § 541(b)(5)).

87. *Id.* (adding 11 U.S.C. § 541(b)(6)).

88. *Id.* § 323, 119 Stat. at 97–98 (adding 11 U.S.C. § 541(b)(7)).

89. *See id.* § 1233(a)(2)(B), 119 Stat. at 202–03 (adding 28 U.S.C. § 158(d)(2)).

90. *Id.*

M. Effective Date• *BAPCPA Section 1501*

The changes made by BAPCPA are generally effective only with respect to cases filed after its effective date, October 17, 2005 (180 days after the date of enactment, April 20, 2005). However, as noted above, the limitations on homestead exemptions set out in §§ 308, 322, and 330 are effective upon enactment, while the auditing requirements of § 603 are not effective until eighteen months after enactment.⁹¹

II. CHANGES AFFECTING CONSUMER CASES UNDER CHAPTER 7

A. *Means Testing—New 11 U.S.C. § 707(b)*• *BAPCPA Section 102(a)–(d)*

Section 707(b) of the Bankruptcy Code is amended to provide for dismissal of chapter 7 cases or conversion to chapter 13 (with the debtor's consent) upon a finding of abuse by an individual debtor with primarily consumer debts.⁹² Abuse can be found in one of two ways: first, through an un rebutted presumption of abuse, arising under a new means test⁹³; and second, on general grounds, including bad faith, determined under the totality of the circumstances.⁹⁴

1. Standing

New § 707(b)(1) generally allows any party in interest, as well as the court on its own initiative, to bring a motion seeking dismissal of a chapter 7 for abuse.⁹⁵ However, there are two safe harbors from this general standing. Section 707(b)(6) provides that only the judge, U.S. trustee or bankruptcy administrator may bring the motion if defined “current monthly income” or “CMI” (discussed below) does not exceed a defined state median.⁹⁶ Moreover, under § 707(b)(7), the means test presumption is completely inapplicable to debtors if defined CMI is below that median.⁹⁷ In addition, § 707(b)(2)(D) makes the means test inapplicable to certain disabled veterans.⁹⁸ The standing limitations can be summarized in a table:

91. Compare *id.* § 1501(a)(2), 119 Stat. at 216, with *id.* § 603(e), 119 Stat. at 123.

92. *Id.* § 102(a)(2), 119 Stat. at 27 (amending 11 U.S.C. § 707(b)). Section 707(b), as amended by BAPCPA, is more thoroughly discussed in Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L. REV. 231 (2005).

93. BAPCPA § 102(a)(2)(C), 119 Stat. at 27–30 (adding 11 U.S.C. § 707(b)(2)).

94. *Id.* (adding 11 U.S.C. § 707(b)(3)).

95. *Id.* § 102(a)(2)(B), 119 Stat. at 27 (adding 11 U.S.C. § 707(b)(1)).

96. *Id.* § 102(a)(2)(C), 119 Stat. at 31 (adding 11 U.S.C. § 707(b)(6)).

97. *Id.* (adding 11 U.S.C. § 707(b)(7)).

98. *Id.* (adding 11 U.S.C. § 707(b)(2)(D)).

TABLE 3

Safe harbor if CMI at or below median income	Income counted	Scope of the protection
§ 707(b)(6)	Only CMI of the debtor(s)	No § 707(b) motions by creditors or case trustees; judges, U.S. trustees, and bankruptcy administrators only
§ 707(b)(7)	“Combined” CMI of the debtor and debtor’s spouse	No means test motions by anyone; no need to complete means test form

To apply the standing limitations, it is necessary to determine both the relevant income and the applicable state median.

(a) Debtor’s Income

Generally, the debtor’s income, for purposes of standing to bring an abuse motion, is defined as the debtor’s “current monthly income” multiplied by twelve.⁹⁹ As discussed below, “current monthly income” is the debtor’s average monthly income over a six-month period.¹⁰⁰ However, for purposes of limiting the standing of judges, U.S. trustees, and bankruptcy administrators under § 707(b)(7)(B), the debtor’s current monthly income is augmented by that of the debtor’s spouse, even in a nonjoint case, unless the debtor submits a sworn statement reflecting that the spouses are separated.¹⁰¹

(b) Applicable Median Income

The median income applicable for determining standing to bring a motion under § 707(b) is as follows: (a) for a debtor in a household of one person, the median family income of the applicable state for one earner; (b) for a debtor in a household of two, three, or four individuals, the highest median family income of the applicable state for a family of the same or fewer persons; and (c) for a debtor in a household of more than four individuals, the highest median family income of the applicable

99. Wedoff, *supra* note 92, at 237.

100. See *infra* text accompanying note 112.

101. BAPCPA § 102(a)(C), 119 Stat. at 31–32 (adding 11 U.S.C. § 707(b)(7)(B)).

state for a family of four or fewer individuals, plus \$525 per month for each individual in excess of four.¹⁰² According to a new definition of “median family income” added to the Code as § 101(39A), these figures would be as “both calculated and reported by the Bureau of the Census in the then most recent year,” and if this calculation and reporting is not in the current year, then adjusted to “reflect the percentage change in the Consumer Price Index . . . during the period of years occurring after such most recent year and before such current year.”¹⁰³ The \$525 adjustment for larger families—with the other provisions of amended § 707(b)—is made subject to § 104 of the Code, and so would be increased (or decreased) in accordance with the cost of living on a triennial basis.¹⁰⁴ With the current \$525 monthly adjustment, the annual median income figure would be increased by \$6300 for each family member above four.

The Bureau has released income data reflecting the median family income figures required for purposes of § 707(b)(6)–(7). One report, “Income—Median Family Income in the Past 12 Months by Family Size,” provides the data relevant for households of two or more individuals.¹⁰⁵ Another, “Income—Median Family Income in the Past 12 Months by Number of Earners in Family,” provides the data for households of one person.¹⁰⁶ These reports use 2004 data, which the Bureau has adjusted for inflation through 2005.¹⁰⁷ Section 101(39A) directs inflation adjustment “annually” for the period after the last year in which the Bureau both calculated and reported median income, which would be 2004, and before the year of the bankruptcy filing.¹⁰⁸ Thus, in cases filed in 2006, the Census Bureau’s 2004 median income reports should be adjusted for inflation that occurred in 2005.¹⁰⁹ The U.S. Trustee Program has applied such an inflation adjustment to the 2005 Census Bureau median income figures.¹¹⁰ As an example of the range of applicable medians,

102. *Id.* (adding 11 U.S.C. § 707(b)(6)).

103. *Id.* § 102(k), 119 Stat. at 35 (adding 11 U.S.C. § 101(39A)).

104. *Id.* § 102(j), 119 Stat. at 35 (amending 11 U.S.C. § 104(b)).

105. U.S. Census Bureau, Income—Median Family Income in the Past 12 Months by Family Size, <http://www.census.gov/hhes/www/income/medinysizeandstate.html> (last visited Sept. 5, 2006). This data is also available on the Web site of the U.S. Trustee Program. See U.S. Trustee Program, Census Bureau Median Family Income by Family Size, http://www.usdoj.gov/ust/eo/bapcpa/20051017/bci_data/median_income_table.htm (last visited Sept. 5, 2006).

106. U.S. Census Bureau, Income—Median Family Income in the Past 12 Months by Number of Earners in Family, <http://www.census.gov/hhes/www/income/medinccarnersandstate.html> (last visited Sept. 5, 2006).

107. *Id.*

108. BAPCPA § 102(k), 119 Stat. at 35 (adding 11 U.S.C. § 101(39A)).

109. The Web site of the U.S. Trustee Program reports that the Census Bureau updated its data in September 2006. The updated data applies to cases filed on or after October 1, 2006. See U.S. Trustee Program, Census Bureau, IRS Data, and Administrative Expenses Multipliers, <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm> (last visited Oct. 13, 2006).

110. See U.S. Trustee Program, *supra* note 105. The U.S. Trustee Program increased the 2005 median incomes reported by the Census Bureau by 3.4%, reflecting the change from 2004 to 2005 in the annual Consumer Price Index for all urban consumers maintained by the U.S. Department of Labor, Bureau of Labor Statistics, and reported on the Bureau’s Web site. Bureau of Labor Statistics,

the following is the census information, as adjusted by the U.S. Trustee Program, for the State of Illinois:

TABLE 4

One-person household	\$43,012
Two-person families	\$53,320
Three-person families	\$64,286
Four-person families	\$72,742

2. Presumption of Abuse Under the Means Test

The presumption of abuse, set out in new § 707(b)(2), is governed by a means test, designed to determine the extent of a debtor's ability to repay general unsecured claims. The means test has three elements: (a) a definition of "current monthly income," measuring the total income a debtor is presumed to have available; (b) a list of allowed deductions from current monthly income, for purposes of support and repayment of higher priority debt; and (c) a defined "threshold of abuse," at which the income remaining after the allowed deductions would result in a presumption of abuse.¹¹¹

(a) Presumed Income

"Current monthly income" is defined in new § 101(10A) as a monthly average of all the income received by the debtor (and the debtor's spouse in a joint case)—including regular contributions to household expenses made by other persons, but excluding benefits under the Social Security Act and certain victim payments—during the six-month period ending with the last day of the calendar month preceding the filing, as long as the debtor files a Schedule I statement of current income.¹¹² Thus, for example, if a bankruptcy case were filed in March, as long as the debtor filed a Schedule I, current monthly income would be the average monthly income received by the debtor during the preceding September through February. However, if the debtor failed to file Schedule I, then the six-month period would end on the date that the court determines "current monthly income."

(b) Presumed Deductions

The deductions from current monthly income allowed under the means test are set out in § 707(b)(2)(A)(ii)–(iv) and can be categorized as follows.

Consumer Price Index for all urban consumers, <http://www.bls.gov/cpi/home.htm> (last visited Oct. 1, 2006).

111. BAPCPA § 102(a)(2)(C), 119 Stat. at 27–29 (adding 11 U.S.C. § 707(b)(2)).

112. *Id.* § 102(b), 119 Stat. at 32 (adding 11 U.S.C. § 101(10A)).

(i) Living Expenses Specified Under Standards of the Internal Revenue Service

The IRS has developed living expense standards to provide guidance for its officers in negotiating consensual payment of overdue taxes. The IRS's Web site explains the standards and links to tables of allowed expenses.¹¹³

The IRS sets out expense allowances of three types. First, "National Standards" establish allowances for food, clothing, personal care, and entertainment, depending on the taxpayer's family size, on a national basis (except for Alaska and Hawaii, which have higher allowances).¹¹⁴ The U.S. Trustee Program has set out the relevant National Standard allowances on its Web site.¹¹⁵

Second, the IRS's "Local Standards" establish allowances for transportation (on a regional basis) and housing (on a county-by-county basis).¹¹⁶ The U.S. Trustee Program's Web site includes tables of the IRS allowances applicable in each relevant geographical area.¹¹⁷ The means test requires that the amounts deducted by the debtor under both standards be reduced by whatever portion of the allowance reflects repayment of debt. Thus, repayment of a car loan would be deducted from the IRS Local Standard allowance for acquiring transportation. For purposes of tax collection, the IRS Local Standard for housing does not distinguish maintenance from acquisition costs. However, the IRS has provided a special, bankruptcy-only version of the housing standard, included in the information made available by the U.S. Trustee Program, which does separate the cost of acquiring housing (mortgage/rent) from maintenance costs.¹¹⁸ Use of this version of the Local Standard allows mortgage payments to be deducted in the manner required by the statute.

Third, the IRS recognizes a set of expenses ("Other Necessary Expenses"), for which it does not specify an allowed amount, in categories such as health care and taxes.¹¹⁹ The means test allows a deduction for "the debtor's actual monthly expenses for the categories specified" as other necessary expenses by the IRS.¹²⁰

113. See Internal Revenue Service, Collection Financial Standards, <http://www.irs.gov/individuals/article/0,,id=96543,00.html> (last visited Aug. 26, 2006).

114. *Id.*

115. See U.S. Trustee Program, IRS National Standards for Allowable Living Expenses, http://www.usdoj.gov/ust/eo/bapcpa/20051017/bci_data/national_expense_standards.htm (last visited Oct. 1, 2006).

116. See Internal Revenue Service, *supra* note 113.

117. See U.S. Trustee Program, *supra* note 109.

118. See *id.*

119. See I.R.S. INTERNAL REVENUE MANUAL, FINANCIAL ANALYSIS HANDBOOK § 5.15.1.10 (May 1, 2004), available at <http://www.irs.gov/irm/part5/ch15s01.html>.

120. BAPCPA § 102(a)(2)(C), 119 Stat. at 27–28 (adding 11 U.S.C. § 707(b)(2)(A)(ii)(I)).

(ii) Additional Living Expenses Specified by the Means Test Itself

In addition to the living expenses allowed by the IRS, § 707(b) specifies expenses in several categories that, with certain additional limitations, are allowed to the extent reasonable and necessary. These include:

- expenses for health insurance, disability insurance, and health savings account expenses;
- expenses for protection from family violence;
- continued contributions to the care of nondependent family members (including children, grandchildren, stepchildren, and step-grandchildren);
- expenses for grade and high school (up to \$125 per month, per child under eighteen years of age, but only if the debtor can document the reasonableness and necessity for the expenses and show that the expenses are not covered by the applicable IRS standards);
- additional home energy costs (again, with documentation that the expenses are reasonable and necessary and not covered by the IRS Local Standards); and
- an additional food and clothing allowance of up to 5% of those included in the IRS National Standard.¹²¹

The most significant of the statutory “extra” expenses may be the implicit deduction for charitable contributions. The pre-BAPCPA version of § 707(b) provided that courts could not consider in determining abuse of chapter 7 whether the debtor “has made, or continues to make” such contributions.¹²² No limit is placed on the amount of the contributions.

(iii) Deductions for Payment of Secured and Priority Debt

The final means test deductions from current monthly income are for repayment of debt that is either secured by collateral owned by the debtor or that is given a special priority of payment under the Bankruptcy Code. These deductions include:

- 1/60th of all secured debt that will become contractually due in the five years after filing;
- 1/60th of all additional payments on secured debt needed to retain possession of collateral necessary for the support of

121. *Id.* (adding 11 U.S.C. § 707(b)(2)(A)(ii)(I)–(V)).

122. *See* 11 U.S.C. § 707(b)(1) (2000).

the debtor or the debtor's dependents (that is, cure payments);

- 1/60th of all outstanding priority debts; and
- for debtors eligible for chapter 13, the actual expenses of administering a chapter 13 plan, up to 10% of projected plan payments, as determined by the Executive Office for United States Trustees.¹²³

(c) Abuse Threshold

Two distinct trigger points, set out in § 707(b)(2)(A)(i), establish the threshold of abuse for the means test presumption: (1) if the debtor has at least \$166.67 in current monthly income available after the allowed deductions (\$10,000 for five years), abuse is presumed regardless of the amount of the debtor's general unsecured debt, and (2) if the debtor has at least \$100 of such income (\$6000 for five years), abuse is presumed if the income is sufficient to pay at least 25% of the debtor's general unsecured debt over five years.¹²⁴ The impact of the abuse threshold can again be shown in a table:

TABLE 5

"Current monthly income" after defined deductions	Presumption of abuse
Less than \$100	Does not arise
\$100	Arises unless debt exceeds \$24,000
\$150	Arises unless debt exceeds \$36,000
\$166.66	Arises unless debt exceeds \$39,998.40
More than \$166.66	Always arises

(d) Rebuttal

To rebut the presumption, § 707(b)(2)(B) requires that a debtor swear to and document "special circumstances" that would decrease income or increase expenses so as to bring the debtor's income after expenses below the trigger points.¹²⁵

123. BAPCPA § 102(a)(2)(C), 119 Stat. at 27–28 (adding 11 U.S.C. § 707(b)(2)(A)).

124. *Id.* (adding 11 U.S.C. § 707(b)(2)(A)(i)).

125. *Id.* (adding 11 U.S.C. § 707(b)(2)(B)).

2. General Grounds for Abuse

The other basis for a finding of abuse, applicable under § 707(b)(3) where the presumption does not apply or has been rebutted, is that the debtor filed the petition in bad faith, or that the totality of the debtor's financial circumstances indicates abuse.¹²⁶ As noted above, the U.S. trustee, bankruptcy administrator, or judge can assert this basis for finding abuse in any case; creditors and case trustees are limited to asserting it in cases where the debtor's income is above the defined state median.¹²⁷

3. Procedure

Section 707(b)(2)(C) requires debtors to file a statement of their calculations under the means test as part of the schedule of current income and expenditures under § 521.¹²⁸ If the presumption arises, the court is required to notify creditors within ten days of the filing of the petition.¹²⁹ In addition, the U.S. trustee or bankruptcy administrator is required to review the debtor's materials and file with the court, within "10 days after the first meeting of creditors," a statement as to whether the presumption of abuse arises.¹³⁰ A copy of the statement must be provided to all creditors by the court.¹³¹ If the presumption arises, the U.S. trustee or bankruptcy administrator must file either a motion under § 707(b) or a statement explaining why the motion is not being filed.¹³²

B. Sanctions Imposed on Debtor's Counsel

- *BAPCPA Section 102(a)(2)*

Section 707(b) is amended to add several new duties and liabilities of debtors' counsel:

- Subparagraph (4)(A) allows the court to award costs and fees to a trustee who successfully pursues a § 707(b) motion, payable by debtor's counsel, if it finds that the chapter 7 filing violated Federal Rule of Bankruptcy Procedure 9011.¹³³
- Subparagraph (4)(B) specifies that if the court finds any violation of Rule 9011 by the debtor's attorney, it may award a civil penalty against the attorney, payable to the trustee,

126. *Id.*

127. *Id.* § 102(c)(2).

128. *Id.* § 102(a)(2)(C), 119 Stat. at 29 (adding 11 U.S.C. § 707(b)(2)(C)).

129. *Id.* § 102(d), 119 Stat. at 33 (adding 11 U.S.C. § 342(d)).

130. *Id.* § 102(c), 119 Stat. at 32–33 (adding 11 U.S.C. § 704(b)(1)(A)).

131. *Id.* (adding 11 U.S.C. § 704(b)(1)(B)).

132. *Id.* (adding 11 U.S.C. § 707(b)(2)).

133. *Id.* § 102(a)(2)(C), 119 Stat. at 30 (adding 11 U.S.C. § 707(b)(4)(A)).

U.S. trustee, or bankruptcy administrator.¹³⁴ Pursuant to § 103(b) of the Code, this provision would apply only in chapter 7 cases.¹³⁵

- Subparagraphs (4)(C) and (D) set out a statutory parallel to Federal Rule of Civil Procedure 11, providing that the signature of a debtor's attorney constitutes a certification that the attorney has "performed a reasonable investigation" and determined that the signed documents are well grounded in fact, that any chapter 7 petition is not an abuse under § 707(b), and that "the attorney has no knowledge after an inquiry that the information in the schedules filed with [the] petition is incorrect."¹³⁶ This statutory restatement of Rule 11 includes no provision for sanctions in the event that its signature certification is incorrect.

- *BAPCPA Sections 227–29*

Under new § 526, debtor's counsel are subject to loss of fees, damages, injunctive remedies, and imposition of costs for any failure to meet new disclosure and record-keeping requirements imposed on "debt relief agencies" in new §§ 527–528.¹³⁷ "Debt relief agency" is defined in new § 101(12A) as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration."¹³⁸ "Assisted person" is defined in new § 101(3) as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000."¹³⁹ Accordingly, bankruptcy lawyers who represent only nonpaying debtors or owners of businesses and other relatively wealthy individuals would not be covered. Among the new provisions are obligations to include specified statements in advertisements¹⁴⁰ and to retain for two years a copy of each of several notices required to be given to any "assisted person."¹⁴¹

C. Support Priority; Dischargeability of Property Settlements

- *BAPCPA Section 212*

Pursuant to an amendment to § 507(a), domestic support obligations of the debtor will have the first priority in distribution, subject to

134. *Id.* (adding 11 U.S.C. § 707(b)(4)(B)).

135. 11 U.S.C. § 103(b) (2000).

136. BAPCPA § 102(a)(2)(C), 119 Stat. at 30 (adding 11 U.S.C. § 707(b)(4)(C)–(D)).

137. *Id.* § 227(a), 119 Stat. at 67–68 (adding 11 U.S.C. § 526).

138. *Id.* § 226(a)(3), 119 Stat. at 67 (adding 11 U.S.C. § 101(12A)).

139. *Id.* § 226(a)(1), 119 Stat. at 66 (adding 11 U.S.C. § 101(3)).

140. *Id.* § 229(a), 119 Stat. at 71 (adding 11 U.S.C. § 528(a)(3)–(4)).

141. *Id.* § 228(a), 119 Stat. at 71 (adding 11 U.S.C. § 527(d)).

the expenses of a trustee in administering assets that might otherwise be used to pay the support obligations.¹⁴² Within this new first priority, support owed to or recoverable by a spouse, former spouse, or child is given priority over support obligations that have been assigned or owed directly to a governmental unit.¹⁴³

- *BAPCPA Section 215*

Section 523(a)(15) is amended to remove the affirmative defenses previously included. As a result, all property settlements arising from divorce or separation proceedings that are not covered by the support provisions of § 523(a)(5) are nondischargeable under (a)(15).¹⁴⁴

D. Reaffirmations

- *BAPCPA Section 203*

New paragraph (2) is added to § 524(c), requiring as a condition for the effectiveness of a reaffirmation agreement that the debtor receive an extensive set of disclosures, set out in new § 524(k).¹⁴⁵ Although these requirements for effectiveness are limited to the debtor's receipt of the disclosures, § 524(k)(6) requires the debtor to sign, prior to filing the reaffirmation agreement, a statement disclosing the debtor's income, the debtor's actual current monthly expenses, and the resulting balance available to pay the debt proposed to be reaffirmed.¹⁴⁶

New § 524(m)(1) provides that if the (k)(6) statement reflects insufficient income to make the payments scheduled in the proposed reaffirmation agreement, a presumption will arise that the agreement is an undue hardship on the debtor.¹⁴⁷ The presumption lasts for sixty days after the filing of the reaffirmation agreement, but may be extended during that sixty-day period, for cause, on court order after notice and a hearing.¹⁴⁸ The court is directed to review the presumption—a review that is apparently intended to take place while the presumption is in effect—and if the debtor has not rebutted the presumption in writing to the court's satisfaction, the court may “disapprove” the agreement.¹⁴⁹ However, § 524(m) also provides that disapproval can take place only with “notice and a hearing to the debtor and creditor” and that the hearing on disapproval must be concluded before the entry of the debtor's dis-

142. *Id.* § 212, 119 Stat. at 51 (adding 11 U.S.C. § 507(a)(1)).

143. *Id.*

144. *Id.* § 215, 119 Stat. at 54 (amending 11 U.S.C. § 523(a)(15)).

145. *Id.* § 203(a), 119 Stat. at 43 (adding 11 U.S.C. § 524(c)(2), (k)).

146. *Id.* (adding 11 U.S.C. § 524(k)(6)).

147. *Id.* (adding 11 U.S.C. § 523 (m)(1)).

148. *Id.*

149. *Id.*

charge.¹⁵⁰ There is currently no deadline for filing reaffirmation agreements. Thus, it may be possible for a reaffirmation agreement to be filed after the deadline for a judicial hearing on the presumption of undue hardship has passed. Section 524(m)(2) also entirely exempts credit union reaffirmations from disallowance based on a presumption arising from the debtor's (k)(6) statement.¹⁵¹

Under new § 524(l), creditors are allowed to receive payments both prior to the filing of a reaffirmation agreement and under agreements which "the creditor believes in good faith to be effective."¹⁵² Moreover, creditors' disclosure requirements are satisfied if "given in good faith."¹⁵³

E. Redemption

- *BAPCPA Section 304*

Section 722 of the Code is amended to make clear, in accord with the case law, that redemption requires full payment of an allowed secured claim at the time of the redemption.¹⁵⁴

- *BAPCPA Section 327*

New § 506(a)(2) reverses the majority interpretation that the value of collateral for purposes of redemption should be measured by what the creditor would receive upon repossession. The new provision requires that the value of personal property securing a claim in the case of an individual in chapter 7 will always be based on the cost to the debtor of replacing the property without deduction for costs of sale or marketing.¹⁵⁵ If the property was acquired for personal, family, or household purposes, this replacement cost will be the retail price for property of similar age and condition.¹⁵⁶

F. Ride-Through

BAPCPA resolves a circuit split by eliminating any option that a chapter 7 debtor might have had to retain collateral without redemption or reaffirmation, simply by maintaining current payments on the secured debt. However, it does so in two different sections of the Code, with inconsistent provisions.

150. *Id.*

151. *Id.* (adding 11 U.S.C. § 523(m)(2)).

152. *Id.* (adding 11 U.S.C. § 524(l)(2)).

153. *Id.* (adding 11 U.S.C. § 544(l)(3)).

154. *Id.* § 304(2), 119 Stat. at 79 (amending 11 U.S.C. § 722).

155. *Id.* § 327, 119 Stat. at 99–100 (adding 11 U.S.C. § 506(a)(2)).

156. *Id.*

- *BAPCPA Section 304*

Section 521 of the Code is amended to add new paragraph (a)(6), requiring that an individual debtor in a chapter 7 case “not retain” any personal property that is subject to a purchase money security interest, unless the debtor, “not later than 45 days after the first meeting of creditors,” either redeems the property or enters into a reaffirmation agreement with respect to the debt secured by the property.¹⁵⁷ It is unclear whether this forty-five-day period should run from the first date set for the meeting of creditors, the date that the meeting actually commences, or the date that it concludes. There is no provision for judicial extension of the forty-five-day period. Section 521(a)(6) goes on to provide that a failure to exercise one of these two options results in termination of the automatic stay and removal of the property from the estate unless the court (1) determines, on a motion filed by the trustee within the forty-five-day period, that the property is “of consequential value or benefit to the estate,” (2) orders appropriate adequate protection, and (3) orders the debtor to deliver the collateral to the trustee.¹⁵⁸

- *BAPCPA Section 305*

Section 362 is amended to add new subsection (h), applicable in individual bankruptcy cases, that terminates the automatic stay with respect to, and removes from, the estate, personal property that is collateral for any secured claim (not just property subject to purchase money security interests) or that is subject to an unexpired lease, in the event that the debtor fails either to file the statement of intent required by § 521(a)(2) within thirty days of the case filing or fails “to take timely the action specified in such statement . . . unless such statement specifies the debtor’s intention to reaffirm such debt on the original contract terms and the creditor refused to agree to the reaffirmation on such terms.”¹⁵⁹ Section 521(a)(2)(B) is amended to require performance of the debtor’s intention within thirty days of the first date set for the meeting of creditors unless during this thirty-day period the court extends the period for cause.¹⁶⁰ Barring such an extension by the court, the thirty-day period for debtor action in new § 362(h) would always end prior to the forty-five-day period specified for similar action in new § 521(a)(6). As under § 521(h), the automatic stay would remain in effect, and the property would remain in the estate, if the court (1) determined, on a motion filed by the trustee within the applicable period, that the property is “of consequential value or benefit to the estate,” (2) ordered appropriate ade-

157. *Id.* § 304(1)(C), 119 Stat. at 78–79 (adding 11 U.S.C. § 521(a)(6)).

158. *Id.* (adding 11 U.S.C. § 521(a)(6)(B)).

159. *Id.* § 305(1)(C), 119 Stat. at 79 (adding 11 U.S.C. § 362(h)).

160. *Id.* § 305(2), 119 Stat. at 80 (amending 11 U.S.C. § 521(a)(2)(B)).

quate protection, and (3) ordered the debtor to deliver the collateral to the trustee.¹⁶¹

G. Trustee Compensation

- *BAPCPA Section 407*

Section 330(a)(3) is amended to exclude chapter 7 trustees from the professionals whose compensation is to be based, among other things, on the time spent in providing their services.¹⁶² Rather, new § 330(a)(7) is added, providing that the reasonable compensation of “a trustee” shall be treated “as a commission, based on § 326.”¹⁶³ Although new paragraph (a)(7) is not limited by its terms to chapter 7 trustees, chapter 11 trustees are expressly included in the list of professionals subject to § 330(a)(3), and so it is doubtful the new paragraph applies to chapter 11 trustees.

- *BAPCPA Section 1224*

Section 1326 is amended to add new paragraph (b)(3), providing for payment of compensation awarded to a chapter 7 trustee in connection with the conversion or dismissal of a debtor’s case pursuant to § 707(b).¹⁶⁴ Any such compensation remaining unpaid during the chapter 13 case is to be paid over the remaining term of the chapter 13 plan, according to a limiting formula: no more than \$25 per month or 5% of the average monthly payment made to general unsecured creditors under the plan, whichever is greater.¹⁶⁵ Because most chapter 13 plans do not provide for more than \$500 per month in payments to general unsecured creditors, it is likely that trustees would be paid no more than \$25 per month under this formula—a maximum of \$1500 over a five-year plan.

H. Nonsubordination of Property Tax Liens to Family Support Claims

- *BAPCPA Section 701*

Section 724(b) is amended to limit the authorization of a chapter 7 trustee to pay priority claims from funds that would otherwise be used to satisfy a property tax lien (and subordinate the tax lien to other liens on the affected property).¹⁶⁶ Except for wage and employee benefit priority claims, this subordination is made inapplicable to perfected ad valorem

161. *Id.* § 305(1)(C), 119 Stat. at 79 (adding 11 U.S.C. § 362(h)(2)).

162. *Id.* § 407(1), 119 Stat. at 106 (adding 11 U.S.C. § 330(a)(7)).

163. *Id.*

164. *Id.* § 1224(1)(C), 119 Stat. at 199 (adding 11 U.S.C. § 1326(b)(3)).

165. *Id.*

166. *Id.* § 701(a)(1), 119 Stat. at 124 (amending 11 U.S.C. § 724(b)).

property taxes, the situation in which it most commonly arises.¹⁶⁷ Moreover, even for wage and benefit priorities, and even as to liens arising from a property tax assessed other than on the value of the property, subordination would be allowed under new § 724(e) only after the trustee had exhausted the unencumbered assets of the estate—including § 506(c) recoveries from holders of secured claims.¹⁶⁸ Thus, in contrast to the prior law, if a debtor owes both ad valorem property taxes secured by a lien on the debtor's property and support obligations, the proceeds of any sale of the property will now be used to pay the taxes before the support obligations.

The amendment contains a drafting error, referring to the administrative expense priority as § 507(a)(1).¹⁶⁹ As noted above, § 212 of BAPCPA makes support obligations the first priority, and has the effect of renumbering administrative expenses as paragraph (a)(2).¹⁷⁰

I. Treatment of Collateral on Conversion from Chapter 13

- *BAPCPA Section 309(a)*

Section 348(f)(1) is amended to provide that in a case converted to chapter 7 from chapter 13, (a) the property valuations in the chapter 13 case will not apply; (b) the lien of a secured creditor will continue to secure whatever part of the debt was not paid in the chapter 13 case (rather than securing only any unpaid portion of the bifurcated secured portion of the creditor's claim) and (c) the chapter 13 case will have no effect on the treatment of prepetition defaults unless they were fully cured at the time of the conversion.¹⁷¹ Thus, if a debtor increases the nonexempt equity in a home by paying down a mortgage under a chapter 13 plan, but then converts the case to chapter 7, the trustee in the chapter 7 case will be allowed to sell the home and distribute the additional equity to creditors. Similarly, a debtor who fully pays the amount of an auto lender's bifurcated secured claim in chapter 13, but converts the case before the unsecured portion is paid, will thereafter hold the automobile subject to a lien in the amount of whatever portion of the lender's total claim remained unpaid. Any equity above that claim (subject to the debtor's exemptions) would be available for the estate.

167. *Id.*

168. *Id.* (adding 11 U.S.C. § 724(e)).

169. *Id.*

170. *Id.* § 212(2), 119 Stat. at 51 (amending 11 U.S.C. § 507(a)).

171. *Id.* § 309(a) (amending 11 U.S.C. § 348(f)(1)).

III. CHANGES AFFECTING CONSUMER CASES UNDER CHAPTER 13

A. *Secured Claims*

- *BAPCPA Section 306(b); Eliminating Stripdown for Certain Secured Loans*

Section 1325(a) is amended to limit the power of chapter 13 plans to strip down secured claims to the value of the collateral under § 506(a).¹⁷² Although the amendment is not clearly drafted, it appears to provide that no stripdown would be allowed for purchase money security interests (1) in motor vehicles purchased within 910 days of the bankruptcy filing, or (2) in items other than motor vehicles purchased within one year of bankruptcy.¹⁷³

- *BAPCPA Section 327; Valuation of Secured Claims*

New § 506(a)(2), discussed above in connection with redemption, applies in chapter 13 as well as chapter 7. In chapter 13 it has the effect of requiring that the stripped-down value of a secured claim be based on the cost to the debtor of replacing the collateral—without deduction for costs of sale or marketing.¹⁷⁴ If the collateral was acquired for personal, family, or household purposes, this replacement cost is the retail price for property of similar age and condition.

- *BAPCPA Section 309(c); Payments Before and After Confirmation*¹⁷⁵

BAPCPA makes two changes requiring adequate protection payments on secured claims in chapter 13. First, § 1325(a)(5)(B) is amended by the addition of new subparagraph (iii) requiring that chapter 13 plans provide for payment of secured claims in equal installments, at least sufficient to provide adequate protection.¹⁷⁶ Second, § 1326(a)(1) is amended by the addition of new subparagraphs (B) and (C), which require that, prior to plan confirmation, and unless otherwise ordered by the court, the debtor must make adequate protection payments directly to the secured creditor, deduct the adequate protection payments from the preconfirmation plan payments made to the trustee, and give proof of the adequate protection payments to the trustee.¹⁷⁷ The amount required to be paid for preconfirmation adequate protection is not clearly defined, but it appears that the debtor might have the choice of paying either the amount called for by the plan or the amount due under the

172. *Id.* § 306(b), 119 Stat. at 80 (amending 11 U.S.C. § 1325(a)).

173. *Id.*

174. *Id.* § 327(2), 119 Stat. at 99 (adding 11 U.S.C. § 506(a)(2)).

175. *Id.* § 309(c), 119 Stat. at 83 (amending 11 U.S.C. § 1325(a)(5)(B)).

176. *Id.* (adding 11 U.S.C. § 1325(a)(5)(B)(iii)).

177. *Id.* (adding 11 U.S.C. § 1326(a)(1)(B)–(C)).

loan. Preconfirmation payments on personal property leases (primarily auto leases) would have to be paid directly to the lessor, with proof given to the trustee.¹⁷⁸ Because the provisions for preconfirmation payment of secured creditors and personal property lessors are subject to court order, it is possible to avoid confusion by adoption of a standing court order providing for the debtor to make full preconfirmation plan payments to the trustee. The trustee would then pay secured creditors or personal property lessors the required amounts from the debtor's payments.¹⁷⁹

- *BAPCPA Section 306(a); Lien Retention*

An amendment to § 1325(a)(5)(B)(i) precludes a chapter 13 plan from providing for release of a lien upon payment of a stripped-down secured claim.¹⁸⁰ Rather, the creditor must be allowed to retain the lien until the full amount of the claim is paid or the plan is completed.¹⁸¹

B. Disposable Income

- *BAPCPA Section 102(h)*

The best efforts test of § 1325(b) is amended to provide that chapter 13 plans (if objected to by the trustee or an unsecured creditor) either pay unsecured claims in full with interest or else provide that all of the debtor's "projected disposable income" will be contributed to payments of unsecured claims for the "applicable commitment period."¹⁸² Disposable income is defined in § 1325(b)(2) as "current monthly income," other than child support income, not necessary to provide support for the debtor or a dependent of the debtor.¹⁸³ For chapter 13 debtors whose income is more than the applicable median, the debtor's support needs are to be determined under the means test for the presumption of abuse under § 707(b).¹⁸⁴ As discussed above in connection with the means test, "current monthly income" is a defined term averaging the debtor's income over a six-month period, usually prior to the bankruptcy filing, and the applicable median income is determined according to the debtor's state and household or family size. The ambiguity created by applying the word "projected" to the retrospective concept of "current monthly income" has produced a range of judicial interpretations.¹⁸⁵

178. See Standing Order, Chapter 13 Pre-confirmation Adequate Protection Payments (Bankr. N.D. Ill. Aug. 15, 2006), available at http://www.ilnb.uscourts.gov/GeneralOrders/Ch13_Pre-conf_Adequate_Protection_Payments.pdf.

179. *Id.*

180. BAPCPA § 306(a), 119 Stat. at 80 (amending 11 U.S.C. § 1325(a)(5)(B)(i)).

181. *See id.*

182. *Id.* §§ 102(h), 318, 119 Stat. at 33, 93 (amending 11 U.S.C. § 1325(b)).

183. *See id.* § 102(h), 119 Stat. at 33 (adding 11 U.S.C. § 1325(b)(2)).

184. *See id.* (adding 11 U.S.C. § 1325(b)(3)).

185. *See In re Fuller*, 346 B.R. 472 (Bankr. S.D. Ill. 2006) (collecting authorities).

C. Plan Length

- *BAPCPA Section 318*

For debtors whose income is equal to or greater than the applicable median, the “best efforts” test of § 1325(b) is amended by the addition of new paragraph (4) requiring that, in the absence of earlier full payment of all claims, the “applicable commitment period” is five years.¹⁸⁶ For other debtors, the term is three years.

D. Discharge

- *BAPCPA Sections 314 and 707; Elimination of the Superdischarge*

The list of debts excepted from a chapter 13 discharge under former § 1328(a) is expanded to include debts defined by § 523(a)(1)(B)–(C) unfiled, late-filed, and fraudulent tax returns, § 523(a)(2) fraud, including credit card misuse, § 523(a)(3) failure to notify creditors of the bankruptcy in time to allow assertion of claims, § 523(a)(4) embezzlement, breach of fiduciary duty, and—insofar as personal injury or wrongful death is concerned—§ 523(a)(6).¹⁸⁷ However, where § 523(a)(6) provides that “willful *and* malicious” injury gives rise to nondischargeable debts in chapter 7 and 11 cases, revised § 1328(a)(4) excepts debts arising from “willful *or* malicious” injury, potentially creating a more limited discharge in chapter 13 than in chapter 7.¹⁸⁸ On the other hand, the chapter 13 exception in this respect applies only as to “restitution, or damages, awarded in a civil action against the debtor.”¹⁸⁹ So, if judgment on a personal injury or wrongful death action has not been entered prior to the bankruptcy filing, the exception may be available only if relief from the stay were granted to permit such a judgment to be obtained. The few debts still covered by the superdischarge include debts for willful and malicious injury to property under § 523(a)(6), debts incurred to pay nondischargeable tax obligations (§ 523(a)(14)), and debts arising from property settlements in divorce or separation proceedings (§ 523(a)(15)).¹⁹⁰

- *BAPCPA Section 213(9); Interest on Nondischargeable Debt*

A consequence of nondischargeability is that interest continues to accrue on the claims (a particular problem for the tax debts now excepted from discharge). New § 1322(b)(10) partially addresses this issue

186. *Id.* § 318(3), 119 Stat. at 93 (adding 11 U.S.C. § 1325(b)(4)).

187. *Id.* § 314(b), 119 Stat. at 88 (amending 11 U.S.C. § 1328(a)).

188. *Compare* 11 U.S.C. § 523(a)(6) (2000) (emphasis added), *with* BAPCPA § 314(b), 119 Stat. at 88 (emphasis added).

189. BAPCPA § 314(b), 119 Stat. at 88 (adding 11 U.S.C. § 1328(a)(4)).

190. *Compare* 11 U.S.C. § 523(a), *with* BAPCPA § 314(b), 119 Stat. at 88.

by allowing a chapter 13 plan to provide for payment of interest on non-dischargeable claims, but only “to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims.”¹⁹¹

E. Timing of Confirmation Hearing

- *BAPCPA Section 317*

New § 1324(b) requires that confirmation hearings not take place earlier than twenty days “after the date of the meeting of creditors under section 341(a),” unless the court determines that it would be in the best interests of creditors and the estate to hold an earlier confirmation hearing and there is no objection.¹⁹² It also requires that the confirmation hearing not take place later than forty-five days after the § 341 meeting date.¹⁹³ This provision does not specify whether the new hearing requirements are to be measured by the first date set for the meeting of creditors, the first date that the meeting of creditors actually takes place, or the date on which the meeting of creditors concludes. That question may be determined by rule.

F. Filing Requirements During the Case

- *BAPCPA Section 315(b); Annual Financial Statements*

New § 521(f)(4) provides that, on request of a party in interest or the judge, the debtor in a chapter 13 case must file a financial statement annually, under penalty of perjury, showing “income and expenditures of the debtor during the tax year . . . most recently concluded . . . and monthly income of the debtor.”¹⁹⁴ The annual statement must also show “how income, expenditures, and monthly income are calculated.”¹⁹⁵ New § 521(g)(1) specifies that this annual statement must disclose the “amount and sources of the income,” the “identity of any person responsible with the debtor for the support of any dependent of the debtor,” and “the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides.”¹⁹⁶

- *BAPCPA Section 716; Tax Returns*

In addition to the requirement of new § 521(f), discussed above, new § 1308(a) requires chapter 13 debtors to file with the appropriate

191. BAPCPA § 213(9), 119 Stat. at 53 (adding 11 U.S.C. § 1322(b)(10)).

192. *Id.* § 317, 119 Stat. at 92 (adding 11 U.S.C. § 1324(b)).

193. *Id.*

194. *Id.* § 315(b), 119 Stat. at 91 (adding 11 U.S.C. § 521(f)(4)).

195. *Id.*

196. *Id.* (adding 11 U.S.C. § 521(g)(1)).

taxing body, not later than the day before the § 341 meeting, any “tax return under applicable nonbankruptcy law” that was required to be filed for a taxable period ending within four years of the filing of the bankruptcy case.¹⁹⁷ If the debtor fails to comply with this requirement, new § 1308(b) provides that the trustee may continue the § 341 meeting to allow the debtor to file the returns, but not for more than 120 days, unless applicable nonbankruptcy law allows a longer time through automatic extensions that the debtor properly requests.¹⁹⁸ Thereafter, an extension of the filing requirement may be granted by the court only upon a showing of circumstances beyond the control of the debtor, and for a maximum of an additional thirty days.¹⁹⁹ Section 1307(e) provides that if the debtor fails to file a tax return as required under § 1308, the court may convert or dismiss the case on the motion of a party in interest or the U.S. trustee.²⁰⁰

G. *Treatment of Loans from Pension and Profit-sharing Plans*

- *BAPCPA Section 224*

New § 362(b)(19) excepts from the automatic stay wage deductions for repayment of loans to a pension or profit-sharing plan, and new § 1322(f) provides both that a chapter 13 plan may not “materially alter” the terms of such loans and that the amounts paid on such loans are not “disposable income” under § 1325.²⁰¹

H. *Treatment of Support Obligations*

- *BAPCPA Section 213; Payments Required for Confirmation and Discharge*

Sections 1325(a) is amended to provide that a plan will not be confirmed unless the debtor is current in payments of any postpetition domestic support obligations.²⁰² Section 1328(a) is amended to provide that a discharge will not be granted until a debtor who owes such obligations certifies that they are current.²⁰³ Failure to make postpetition support payments is made grounds for dismissal or conversion in new § 1307(c)(11).²⁰⁴ Support obligations that became due before the bankruptcy filing, and are owed directly to a family member continue to re-

197. *Id.* § 716(b)(1), 119 Stat. at 129 (adding 11 U.S.C. § 1308(a)).

198. *Id.* (adding 11 U.S.C. § 1308(b)(1)).

199. *Id.* (adding 11 U.S.C. § 1308(b)(2)).

200. *Id.* § 716(c)(2), 119 Stat. at 130 (adding 11 U.S.C. § 1307(e)).

201. *Id.* § 224(b)(3), 119 Stat. at 64 (adding 11 U.S.C. § 362(b)(19)); *id.* § 224(d), 119 Stat. at 65 (adding 11 U.S.C. § 1322(f)).

202. *Id.* § 213(10), 119 Stat. at 53 (adding 11 U.S.C. § 1325(a)(8)).

203. *Id.* § 213(11), 119 Stat. at 53–54 (amending 11 U.S.C. § 1328(a)).

204. *Id.* § 213(7), 119 Stat. at 53 (adding 11 U.S.C. § 1307(c)(11)).

quire payment in full as priority claims, but new § 1322(a)(4) allows less than full payment of support obligations directly owed or assigned to a governmental unit if the plan provides for all of the debtor's projected disposable income to be applied to payments under the plan for a five-year period.²⁰⁵

- *BAPCPA Section 214; Exceptions to the Automatic Stay*

Section 362(b)(2) is amended to add several new exceptions to the automatic stay for purposes of enforcing a debtor's obligation to make support payments. Subparagraph (C) excepts income withholding for support obligations, thereby eliminating such withheld income as a source for funding a chapter 13 plan.²⁰⁶ Subparagraph (D) excepts suspension of professional and driver's licenses on account of nonpayment of support, potentially threatening the debtor's ability to earn income necessary to fund a chapter 13 plan.²⁰⁷ And subparagraph (F) excepts the interception of tax refunds for payment of support obligations, again preventing other use of the refunds under a chapter 13 plan.²⁰⁸

IV. CHANGES AFFECTING CONSUMER CASES UNDER CHAPTER 11

A. *Individual Chapter 11 Cases*

- *BAPCPA Section 321*

In several different respects, chapter 11 is modified for cases brought by individuals so as to make the case much more like one under chapter 13. New § 1115 defines property of the estate for an individual chapter 11 case as including property acquired by the debtor postpetition.²⁰⁹ New § 1123(a)(8) provides for funding of the individual debtor's plan from the individual's future earnings.²¹⁰ New § 1129(a)(15) imposes a best efforts test, requiring a five-year minimum contribution of disposable income (as defined in § 1325(b)) upon the objection of any unsecured creditor.²¹¹ And new § 1141(d)(5) provides that individual chapter 11 debtors will receive a discharge only after completion of their plans.²¹²

205. *Id.* § 213(8), 119 Stat. at 53 (adding 11 U.S.C. § 1322(a)(4)).

206. *Id.* § 214, 119 Stat. at 54 (amending 11 U.S.C. § 362(b)(2)).

207. *Id.*

208. *Id.*

209. *Id.* § 321(a), 119 Stat. at 94–95 (adding 11 U.S.C. § 1115).

210. *Id.* § 321(b), 119 Stat. at 95 (adding 11 U.S.C. § 1123(a)(8)).

211. *Id.* § 321(c), 119 Stat. at 95 (adding 11 U.S.C. § 1129(a)(15)).

212. *Id.* § 321(d), 119 Stat. at 95–96 (adding 11 U.S.C. § 1141(d)(5)).

