

A Summary of Significant Amendments
to the Bankruptcy Code
Contained in BAPCPA 2005

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This is a summary of the significant amendments to the Bankruptcy Code included in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Many changes are not included in this material. For a complete list of amendments, review BAPCPA carefully. Prepared by Edward P. Jackson, 255 N.

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1. Mandatory Credit Counseling Before Filing

An individual must obtain a briefing from an accredited credit counseling agency within 180-day period preceding filing the petition. This counseling may be telephonic or on internet. Briefing must outline the opportunities for available credit counseling and assist in performing a related budget analysis.

The briefing may be waived if residing in district where U.S. trustee has determined that approved agencies are not reasonably able to provide counseling services.

U.S. Trustee must approve credit counseling agency.

Credit counseling may be waived for period of 30 days postpetition if debtor requested but was unable to obtain counseling within 5 days of the filing date. Additionally, the Court may, for cause, extend the deadline for an additional 15 days.

Credit counseling is not required for individuals who are incapacitated, disabled, or on active military duty in a war zone.

The debtor must file with the court a certificate of the credit counseling agency that provided the services describing the services provided, and a copy of the plan, if any, developed by the credit counseling agency.

11 U.S.C. § 111, 11 U.S.C. § 521(b)

2. Bankruptcy Attorney as “Debt Relief Agency”

Anyone who provides bankruptcy assistance to a consumer debtor for consideration is defined as a debt relief agency. Debt relief agencies must include a legend in all advertising in substantially the following form “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”

Debt relief agencies must provide a § 527(b) notice within 3 days of providing any assistance. Debt relief agencies may have to give the § 527(c) notice, but this probably only applies to bankruptcy petition preparers, not attorneys.

11 U.S.C. § 101(12A), 11 U.S.C. § 526, 11 U.S.C. § 527

3. Stricter Eligibility for Chapter 7 Filing to Encourage More Filings under Chapter 13.

An individual with mostly consumer debts may be forced into filing a Chapter 13 if income is too high. This is a two part test.

“Current Monthly Income” (CMI) is the average gross monthly income for the preceding six calendar months before filing. A filing on July 17 would use income from January 1 through June 30.

Income includes income from all sources, except Social Security and most payments received by victims of war crimes and terrorism. Unemployment compensation may also be excluded.

The Median Income Test is done on Parts I, II, and III of Bankruptcy Form 22A (B22A) - If CMI times 12 is less than Median Family Income for the debtor’s state, as

determined by the Census Bureau, the debtor qualifies for Chapter 7. If the debtor passes the Median Income Test, he would not need to complete the remainder of the form. Median income figures for Florida, as of August 30, 2005 were:

Family of 1 - \$35,883

Family of 2 - \$44,831

Family of 3 - \$49,612

Family of 4 - \$59,798

For families larger than four, \$6,300 is added for each additional individual. See http://www.usdoj.gov/ust/bapcpa/bci_data/median_income_table.htm for updates or the figures for other states.

The Means Test- If the debtor's income exceeds the median income for his state and family size (Median Income Test), then the debtor must complete the remainder of form B22A to determine his disposable net income (DNI). These forms use IRS Collection Standards amounts to determine most of the debtor's allowable expenses. These allowable expenses are posted at <http://www.usdoj.gov/ust/bapcpa/meanstesting.htm>. If DNI is less than \$100.00, the debtor can file a Chapter 7. If DNI exceeds \$166.66, the debtor probably cannot file a Chapter 7. If DNI is between these amounts, the debtor can file a Chapter 7 if DNI times 60 is less than 25% of non-priority unsecured debt.

If the debtor fails both tests, there is a presumption that the filing of a Chapter 7 is an abuse that should result in a dismissal, or, with the debtor's consent, a conversion to Chapter 11 or 13.

11 U.S.C. § 707(b)

4. Fewer Debts Discharged in Bankruptcy

Additional debts have been added to the list of debts not dischargeable in a Chapter 7.

Cash advances totaling more than \$750.00 on a credit card within 70 days of filing are presumed to be nondischargeable as fraudulent. Charges of luxury goods or services totaling more than \$500.00 on a credit card within 90 days of filing are presumed to be nondischargeable as fraudulent.

Drunk driving damages, currently nondischargeable, are expanded to include vessels and aircraft.

Student loans were not dischargeable under former law. This is expanded to include all education loans for which the interest is tax deductible.

Obligations to a former spouse in a divorce or separation agreement are not dischargeable. This may include orders to pay third party debts, such as credit cards.

Monies borrowed to pay nondischargeable federal taxes are not dischargeable under former law. This is expanded to include state taxes.

Pension plan loans are now nondischargeable.

11 U.S.C. § 523(a)

5. Notice to Creditors Must be to Address Designated by Creditor

If a creditor designates an address in a bill to the debtor within 90 days of filing, then this address must be used on all notices. This provision probably does not affect dischargeability of a debt, but may provide a defense to a creditor who violates the automatic stay.

11 U.S.C. § 342(b)

6. State Exemptions Limited

If the debtor has not been domiciled in a state for 730 days (two years) he is not entitled to that state's exemptions in bankruptcy. The state the debtor was domiciled in the most in the period from 730 days ago to 910 days ago (the six month period just prior to 2 years ago) is the state whose exemptions he can use. If this state does not allow exemptions for non-residents, then the debtor is entitled to the 11 U.S.C. § 522 bankruptcy exemptions.

Homestead exemption is limited to \$125,000.00 (presumably per person) unless the debtor has owned the property for more than 1215 days (40 months). The debtor can sell a homestead and use the proceeds to buy another homestead in the same state and add the two ownership periods together. The \$125,000.00 homestead cap is also in place for debtors who owe debts for violations of securities laws, debts for civil remedies under § 1964 of Title 18, or debts for serious physical injury or death causes by a criminal act, intentional tort, or willful or reckless misconduct in the previous 5 years.

The IRA exemption is limited to \$1,000,000.00.

The protections for IRS qualified retirement plans are clarified.

11 U.S.C. § 522

7. Tax Returns and Proof of Income Required

In a Chapters 7 and 13, the last tax return which the debtor was required to file (or return transcript) must be provided to the trustee at least 7 days prior to the § 341 Meeting of Creditors.

If a creditor timely requests, the same document must also be provided to that creditor.

If any party in interest requests, any federal income tax return or amendment filed during case must also be filed with the court.

In a Chapter 13, the debtor must also annually file a statement of monthly income and expenses until the case is closed.

In a Chapter 13 all past due tax returns (state and federal) must be filed with the appropriate taxing authority at least one day before the § 341 meeting of creditors.

Copies of all pay stubs received in the 60 days prior to filing bankruptcy must be filed with the court.

Failure to file or provide these documents may result in dismissal of the bankruptcy.

11 U.S.C. § 521, 11 U.S.C. § 1308

8. Quicker Confirmation of Chapter 13 Plans

The Chapter 13 confirmation hearing must be held no sooner than 20 days, but no later than 45 days after the meeting of creditors. Because the deadline for creditors to file claims occurs after confirmation, in most cases the confirmed plan will need to be modified after the claims deadline.

11 U.S.C. § 1324(b)

9. Tighter Definition of Disposable Income under Chapter 13

A debtor filing a Chapter 13 uses "CMI" calculation instead of actual income, and expense allowances instead of actual expenses, in determining disposable income to fund a Chapter 13 plan. Expense allowances are the same as those used in the § 707(b)(2) Means Test, except that additional deductions are allowed for support income, qualified retirement contributions and qualified retirement loan repayments. The calculation for Chapter 13 disposable income is done on form B22C.

11 U.S.C. § 1325(b)(2), 11 U.S.C. § 1322(f)

10. Mandatory 5 year Chapter 13 Plan if Over Median Income

If "CMI" is over the median income for the same size household in the debtor's state of domicile, then a Chapter 13 plan is based on a 60 month "commitment period". The Debtor must pay an amount equal to Chapter 13 disposable income times 60 into the plan. A debtor whose "CMI" is below the median income for the same size household in the debtor's state of domicile, has a "commitment period" of 36 months and need only pay an amount equal to Chapter 13 disposable income times 36 into the plan. Because child support and social security is extra income that is not counted in calculating Chapter 13 disposable income, it is possible to pay the plan in full in less time than the "commitment period".

11 U.S.C. § 1325(b)(3)

11. Chapter 13 "Cram Down" of Secured Loans is Limited

In a Chapter 13, a purchase money security interest in a motor vehicle acquired for the personal use of the debtor within 910 days of filing must be surrendered or paid in full. For all other collateral this limit only applies if the debt was incurred within 1 year of filing. The interest rate can still be reduced to the federal rate plus 1% to 3%.

11.U.S.C. § 1325(a)(9)

12. Fewer "Automatic Stay" Protections for Filers

In a Chapter 13 filed within 1 year of the dismissal of a previous bankruptcy, except a §707(b) dismissal, the automatic stay is only for 30 days unless the court extends the stay. A third filing in one year creates no automatic stay, but the court can impose a stay.

The court can enter an in rem order preventing the automatic stay from applying to a parcel of real property for two years. This order must be recorded in the county land records. This provision can be used against serial filers or those who transfer property to other people to avoid the limitations on multiple filings.

There is no automatic stay to stop residential evictions after a judgment of possession is entered unless back rent is paid. There is no automatic stay for residential evictions if there is illegal use of controlled substance or if there is endangerment to the property.

If reaffirmation or redemption of secured claim is not “performed” within 45 days after the §341 meeting of creditors, the stay is lifted. “Performed”, as to redemption, probably means to file a motion to redeem. The code does not address the situation where a creditor does not propose a reaffirmation at all or proposes one more than thirty days after the § 341 meeting of creditors.

11 U.S.C. § 362(d)(4), 11 U.S.C. § 362(h), 11 U.S.C. § 362(k),
11 U.S.C. § 521(a)(2)(B)

13. Chapter 13 A.P. Payments Start Without a Motion

Unless the court orders otherwise the debtor must commence direct payments to the creditor of any personal property lease payments which come due post-petition and provide the trustee with proof of payment. Payments start no later than 30 days after bankruptcy filed.

Unless the court orders otherwise the debtor must commence direct adequate protection payments within 30 days after filing to all creditors who have an allowed secured claim on personal property and provide the trustee with proof of payment. Since creditor must file a claim to have an allowed secured claim, it will not always be possible to start the payments within 30 days of the date the bankruptcy is filed.

Of course, the debtor does not have to make payments on property which is being surrendered.

Proof of insurance must be provided to the lessor or secured creditor within 60 days after bankruptcy is filed.

11 U.S.C. § 1326(a)

14. New Protections for Unpaid Child Support and Alimony

Child support and alimony were moved from a § 507(a)(7) priority to a § 507(a)(1) priority debt.

Trustees are required to notify support obligees of their rights under bankruptcy and the debtor’s last known address and last known employer.

Filing bankruptcy may waive the protections of exempt property against alimony and child support collection, depending on how courts interpret 11 U.S.C. § 522(c)(1).

Debtors in Chapter 13 must stay current on post-petition support to confirm a Chapter 13 Plan, to avoid dismissal during the plan and to obtain a discharge at the end of the plan.

Automatic stay exceptions for support and divorce are clarified. Although this is

not a change, the § 362(b) automatic stay exceptions now clearly say that the automatic stay does not prevent a dissolution of marriage, an order on custody or visitation, a domestic violence order, interception of a tax refund for support, reporting of overdue support to the credit bureau, or the suspension of a license (driver, professional or occupational) for failure to pay support.

11 U.S.C. § 362(b)(2), 11 U.S.C. § 507(a)(1), 11 U.S.C. § 522(c)(1),
11 U.S.C. § 704(a)(10), 11 U.S.C. § 1302(d), 11 U.S.C. § 1307(c)(11),
11 U.S.C. § 1325(a)(8), 11 U.S.C. § 1328(a)

15. Creditors Must Apply Payments as stated in Chapter 13 Plan

If a creditor willfully fails to apply Chapter 13 plan payments as provided in the plan, the creditor may be in violation of the discharge injunction and subject to damages. This does not apply if the case is dismissed or the plan is in default.

11 U.S.C. § 524(l)

16. More Disclosures Required in a Reaffirmation Agreement

Reaffirmation agreements must disclose the amount being reaffirmed, the APR, and provide a summary of the reaffirmation agreement. Because of additional disclosures and calculations of a debtor's ability to pay the reaffirmed debt, the new reaffirmation agreements are lengthy and complicated.

11 U.S.C. § 524(k)

17. Mandatory Financial Management Education after Filing

Debtors cannot receive a discharge in Chapter 13 or Chapter 7 until a U.S. Trustee approved financial management class is completed.

11 U.S.C. § 111, 11 U.S.C. § 727(a)(11), 11 U.S.C. § 1328(g)

18. Time Between Chapter 7 Filings Increased to 8 Years

Debtors cannot receive a discharge in a Chapter 7 if a previous Chapter 7 was filed less than 8 years prior to when a new Chapter 7 is filed. Former law was 6 years.

11 U.S.C. § 727(a)(8)