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INTRODUCTION

The Winter 2005 issue of the *American Bankruptcy Institute Law Review* is a symposium issue on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The symposium consists of fifteen articles and one "Recent Development." In addition, the issue contains one reply, one LL.M. thesis, and a student note.

Most of the provisions of BAPCPA, which the President signed on April 20, 2005, became effective on October 17, 2005. The effective date ushered in the most significant amendments to the Bankruptcy Code since it was adopted in 1978. We asked twenty-one authors, each an expert in his or her field, to write either individually or jointly on a specific area of bankruptcy law affected by BAPCPA. We asked the authors to dig deep "under the surface" of BAPCPA and to identify issues that are likely to arise as a result of the changes it made to the Code. The outcome is a collection of enlightening articles on topics ranging from the most controversial changes to the Code to the seemingly innocuous ones. In the next few years, as courts are deciding how to apply the amended provisions of the Code, judges and attorneys alike will find a great resource in this symposium.

This issue is dedicated to the late Chief Judge Conrad B. Duberstein of the United States Bankruptcy Court of the Eastern District of New York. Judge Duberstein was an alumnus and dear friend of St. John's University School of Law. As a special feature, this issue includes a pair of tributes to Judge Duberstein. One is authored by Prof. Robert M. Zinman, our faculty advisor, and the other by Hon. Melanie L. Cyganowski, Judge Duberstein's successor as Chief Judge.

BAPCPA introduced seven amendments to the law of preferences. In *The Brave New World of Bankruptcy Preferences*, the first symposium article, Charles J. Tabb explores these amendments. The author first reviews the impetus for the amendments, then explains how they might be applied by posing hypotheticals. He discusses the new safe harbor for small preferences; the change to the ordinary course defense; the expanded grace period for perfecting purchase money security interests; and other important changes. Congress apparently made these amendments to curb preference litigation and the author believes that they will indeed reduce litigation and recovery.

The next article in the symposium, Rash *and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral under the 2005 Act*, was authored by Jean Braucher. BAPCPA answered many questions, and settled a circuit split, regarding ride-through. The new law puts an end to court protected ride-through but it condones ride-through by creditor acquiescence. The author explains that BAPCPA also leaves many questions unanswered—it does not specifically address ride-through with respect to real property. The author also discusses the legislation's effect on the *Rash* decision, where the Supreme Court addressed valuation of collateral retained by a chapter 13 debtor.

The next article, *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, by Robert J. Keach, highlights complications that could arise from the new involuntary individual chapter 11. The article explains that when Congress established chapter 13, where a debtor must contribute post-petition income to fund a plan, it included several protections for the debtor that it deemed necessary to avoid violation of the Thirteenth Amendment's prohibition against involuntary servitude. Congress did not provide those same protections in chapter 11. Now that chapter 11 cases, which also require the debtor to contribute post-petition income, can be filed involuntarily against an individual, constitutional issues will surely arise.

Next, Jay Lawrence Westbrook delves into the complicated world of international bankruptcies in *Chapter 15 and Discharge*. The author tries to answer the difficult question of whether a foreign discharge would be recognized in the United States, an issue not addressed by the new chapter 15. Prof. Westbrook discusses the limited case law on the subject and raises important questions that will have to be answered as multinational reorganizations increase.

BAPCPA relaxed the disinterestedness standard of section 101(14) by eliminating the prohibition of the employment of certain investment bankers. That was a bad idea, says Nancy B. Rapoport in her article, *Enron and the New Disinterestedness—The Foxes Are Guarding the Henhouse*. Congress wanted to give investment bankers the same standard that applies to lawyers. But, the author points out, investment bankers are not bound to code of ethics like lawyers are and, unlike lawyers, it is not important that investment bankers have an intimate knowledge of debtor's former business.

In the sixth article in our symposium, Henry E. Hildebrand writes about BAPCPA's changes to the notice provisions of the Code in *Getting Noticed: The New Notice Requirements of Section 342*. The author tells us how the amendments relaxed some of the notice rules and established a detailed system of providing notice that may prove difficult to implement. With the new universal notice requirement imposed on the courts, Congress created a cumbersome and potentially unmanageable system.

Trying to educate debtors on financial management before and after bankruptcy sounds like a good idea, say authors Karen Gross and Susan Block-Lieb in their article, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*. But the authors are troubled that abusive and deceptive practices were recently revealed in the same industry charged with educating debtors. Determined to make the best of the new system, the authors present standards for the United States Trustee to use in monitoring credit counselors.

Next, Peter C. Alexander examines how the Code amendments will affect low-income families in *"Herstory" Repeats: The Bankruptcy Code Harms Women and Children*. The author predicts that the new means test, and other provisions, will make it harder and more expensive for debtors to file. The benefits given to "domestic support obligations" by the new legislation will be of no use to those who are discouraged from filing in the first place. The obstacles to filing might even lead to an increase in family violence.

The next article is *Homestead and Other Exemptions under the Bankruptcy Abuse Prevention and Consumer Protection Act: Observations on "Asset Protection" after 2005*, by Lawrence R Ahern. The article reviews BAPCPA's attempt to clean up homestead exemptions. The new law limits venue-shopping for homestead and exemption planners and restricts a debtor's ability to transfer wealth into exempt property in anticipation of bankruptcy. But, the author notes, the new law does little to impede the determined asset protection planner that uses offshore vehicles.

David G. Epstein and Lisa Normand wrote the next article, entitled *"Real-World" and "Academic" Questions About Nonmonetary Obligations under the 2005 Version of 365(b)*. The authors interpret the new language in 365(b) regarding defaults on "nonmonetary obligations under [] unexpired lease[s] of real property." The article reviews the history of the new language and explains how it would likely be applied to a series of hypotheticals.

The next article in the symposium actually has something good to say about BAPCPA. In *Financial Contracts and the New Bankruptcy Code: Insulating Markets from Bankrupt Debtors and Bankruptcy Judges*, authors Edward R. Morrison and Joerg Riegel argue that the new law has strengthened derivatives markets by changing the focus of the Code's safe harbors. The new Code adopts a form over substance approach, focusing on the transactions themselves rather than merely granting protection to certain counterparties to financial contracts.

The twelfth article in our symposium, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, by Marianne B. Culhane and Michaela M. White, discusses the most debated of all the BAPCPA amendments. Some commentators have remarked that the means test is not strict enough because the majority of chapter 7 filers will pass easily. Nevertheless, the authors contend that means test is the only standard by which a judge may dismiss a chapter 7 based on the debtor's ability to pay. Judges may not, therefore, dismiss a chapter 7 filing for bad faith because the debtor had the ability to pay his creditors.

The next article, *Tax Consequences of Post-Petition Income as Property of the Estate in an Individual Debtor Chapter 11 Case and Tax Disclosure in Chapter 11*, was co-authored by Jack F. Williams and Jacob L. Todres. Much confusion already exists about taxation of bankruptcy estates. According to Prof. Williams, Congress may have added to the confusion when it amended the Bankruptcy Code but neglected to amend the Tax Code provisions that apply to individual chapter 11 estates. The BAPCPA amendments specifically require that federal tax consequences be discussed in disclosure statements. Prof. Todres opines that the addition of this language did not expand disclosure; instead, it may have inadvertently narrowed disclosure requirements.

Does the garnishment limitation statute apply to individual debtor chapter 11 cases? That is question analyzed in the next article, *Garnishment Restrictions and the Involuntary Chapter 11: Rethinking* Kokoszka *in a Means Test World* by G. Ray Warner. According to the author, for years we have been reading *Kokoszka*, a 1974 Supreme Court case, too broadly for the proposition that garnishment restrictions do not apply in bankruptcy. Now that the law of individual bankruptcy has been significantly changed by BAPCPA, we will have to re-evaluate the scope of *Kokoszka*.

The next article, *Taking Exception to the New Corporate Discharge Exceptions*, by Ralph Brubaker, discusses the BAPCPA amendments that make certain corporate fraud debts non-dischargeable. Although, on its face, the change seems like sound policy, the author emphasizes that the function of a corporate discharge is very different than an individual discharge. Excepting certain debts from a corporate discharge could have the effect of punishing innocent creditors for the debtor's misconduct and leaving uncertainty surrounding corporate reorganizations.

The last article in our symposium also discusses a recent Supreme Court case and, thus, is part of our "Recent Developments" section. Rousey *and the New Retirement Funds Exemption*, by John Hennigan, explores the *Rousey* decision, which was codified and expanded by BAPCPA, and identifies situations where it still may be applicable.

In the next article, *Asbestos Pre-Packaged Bankruptcies: Apply the Brakes Carefully and Retain Flexibility for Debtors*, authors Todd R. Snyder and Deanne C. Siemer reply to an article written by Ronald Barliant et al., *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*.[1] The Barliant article criticized the Patronus Technique, a method for resolving asbestos liability through bankruptcy, which was the topic of a previous article by Snyder and Siemer. In this article, the authors defend the Patronus Technique and assert that Barliant failed to identify the source of abuse in asbestos bankruptcies.

Next is the LL.M Thesis, *Modification of Collective Bargaining Agreements: Does a Breach Bar Rejection?*, by Bill D. Bensinger. This thesis takes a hard look at section 1113, which governs rejection of collective bargaining agreements. The author identifies different approaches that courts have taken with respect to section 1113. Some courts have held that unilateral modification of an agreement before it is rejected amounts to constructive assumption. Other courts have found that a breach forecloses the debtor-in-possession's right to reject the collective bargaining agreement. This thesis resolves the debate with a sound theory on how to interpret and apply section 1113.

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[1] 12 AM BANKR. INST L. REV. 441 (2004).

Finally, the issue concludes with *"Leap of Faith" into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese's Bankruptcy Estate*, a student note written by Executive Notes & Comments Editor, Felicia A. Nadborny. The note examines the corporate structure of the Catholic Church in determining what exactly should become part of a Diocese's bankruptcy estate. The note addresses a number of issues that will become more important as the Church seeks to resolve increasing tort liability through bankruptcy.

Thank you to all of the authors for contributing to a great issue of the *American Bankruptcy Institute Law Review*. Further, thanks to the editors, our faculty advisors, Robert M. Zinman and G. Ray Warner, and the staff of the *Law Review*, without whose efforts none of this would be possible.

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Editor-in-Chief