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Richard C. Maxwell
Woods Rogers PLC

B. Webb King
Woods Rogers PLC

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ARTICLES

BANKRUPTCY LAW

Richard C. Maxwell *

B. Webb King **

I. INTRODUCTION

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Act”) was signed by the President on April 20, 2005.¹ The Act is the most important and comprehensive set of changes to the Bankruptcy Code (the “Code”)² since at least 1994 and probably since the Code was enacted in 1978. The Act contains approximately 500 pages of changes to the Code. The Judicial Conference’s Advisory Committee on Bankruptcy Rules and the Standing Committee on Rules of Practice and Procedure have proposed Interim Bankruptcy Rules to account for these changes.³

* Member, Woods Rogers PLC, Roanoke, Virginia. B.A., 1973, Lafayette College; M.B.A., 1977, Eastern Michigan University; J.D., 1984, University of Richmond School of Law.

** Associate, Woods Rogers PLC, Roanoke, Virginia. B.A., 1998, Roanoke College, *magna cum laude*; J.D., 2001, University of Richmond School of Law, *magna cum laude*.

1. Pub. L. No. 109-8, 119 Stat. 23.

2. 11 U.S.C. §§ 101-1330 (2000).

3. Bankruptcy courts are being urged to adopt the Interim Rules pending the completion of the process of making changes to the Federal Rules of Bankruptcy Procedure. The United States Bankruptcy Court for the Western District of Virginia adopted the Interim Rules by Order dated September 6, 2005. The United States Bankruptcy Court for the Eastern District of Virginia adopted the Interim Rules by Order dated September 15, 2005. In addition, new Official Forms to account for the changes in the Act were adopted by the Judicial Conference and took effect on October 17, 2005. The Interim Rules and new Official Forms are both available at <http://www.uscourts.gov/rules/interim.html> (last visited Oct. 1, 2005).

Due to the sheer number of changes to existing law incorporated in the Act, this article is not intended to discuss every new provision added to the Code.⁴ We have two goals: to provide an overview of the most significant changes in the Act and to discuss changes affecting Virginia attorneys who do not regularly practice bankruptcy law. The discussion focuses on the changes to the Code itself and sections of Title 28 that are related to the bankruptcy courts.⁵ There are a number of excellent resources for those seeking further information on or discussion of the Act.⁶

The changes have been grouped into three categories, General Matters, Consumer Provisions, and Business Provisions, with the understanding that the distinction between those categories is somewhat arbitrary.

The majority of the new provisions became effective on October 17, 2005 and only apply to cases commenced after the effective date.⁷ Some provisions have other effective dates. If a provision became effective other than on October 17, 2005 or applies to pending cases, that fact is specifically mentioned.

II. GENERAL MATTERS

A. *New and Revised Definitions*

The Act makes several changes to the definitions section of the Code.⁸ The definition of “debtor’s principal residence” has been broadened to include “a residential structure . . . without regard to whether that structure is attached to real property.”⁹ The defi-

4. As an example, this article contains only limited discussion of tax issues and no discussion of new rules regarding the netting of financial contracts, the new provisions regarding nonlawyer bankruptcy petition preparers, or involuntary petitions.

5. For example, the Act makes a number of changes to the Truth in Lending Act, mostly regarding required disclosures. See Pub. L. No. 109-8, §§ 1301-1306, -1309, 119 Stat. 23, 204-14 (2005). These changes will not be discussed in this article.

6. A good place to start is the website of the American Bankruptcy Institute, available at <http://www.abiworld.org> (last visited Oct. 1, 2005), and, in particular, the section of their website devoted to the Act, available at <http://abiworld.net/bankbill> (last visited Oct. 1, 2005).

7. The basic effective date for most provisions of the Act is 180 days after the Act was signed into law. See Pub. L. No. 109-8, § 1501(a), (b)(1), 119 Stat. 23, 216.

8. See 11 U.S.C. § 101.

9. Pub. L. No. 109-8, § 306(c)(1), 119 Stat. 23, 80-81 (to be codified at 11 U.S.C. § 101

inition “includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer.”¹⁰ A Chapter 13 debtor is barred from “cramming down” a lender that holds a lien secured by the debtor’s principal residence.¹¹ Therefore, the new definition broadens the types of loans for housing that a Chapter 13 debtor must either pay without alteration under the Chapter 13 plan or be prepared to surrender the home.¹²

The extension of more protections for those owed spousal or support debts is one of the major themes of the Act, and a major part of this extension is the addition of a definition of the term “domestic support obligation.”¹³ The definition includes any debt owed to “a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative” that is “in the nature of alimony, maintenance, or support . . . of such [person] without regard to whether such debt is expressly so designated.”¹⁴ The definition is lengthy but applies to any debt that accrues “before, on, or after” the beginning of the bankruptcy case and includes “interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of” the Code.¹⁵ The debt must be established by a “separation agreement, divorce decree, or property settlement agreement,” “an order of a court of record,” or “a determination made in accordance with applicable nonbankruptcy law by a governmental unit.”¹⁶ Finally, the debt cannot have been assigned to a nongovernmental entity, unless the obligation was voluntarily assigned by the appropriate person “for the purpose of collecting the debt.”¹⁷ This definition is broad enough to sweep up essentially any domestic relations obligation.

(13A)(A)).

10. *Id.* (to be codified at 11 U.S.C. § 101(13A)(B)).

11. *See* 11 U.S.C. § 1322(b)(2).

12. Subsection 1322(b)(2) provides that a debtor may “modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence.” *Id.* Since § 1322(b)(2) still contains a reference to real property, this may create a conflict with the new definition in § 101(13A).

13. Pub. L. No. 109-8, § 211(2), 119 Stat. 23, 50–51 (to be codified at 11 U.S.C. § 101(14A)).

14. *Id.* (to be codified at 11 U.S.C. § 101(14A)(A)(i), (B)).

15. *Id.* (to be codified at 11 U.S.C. § 101(14A)).

16. *Id.* (to be codified at 11 U.S.C. § 101(14A)(C)).

17. *Id.* (to be codified at 11 U.S.C. § 101(14A)(D)).

Protection of personal information is another theme in the Act. "Personally identifiable information" is defined in the Act to include certain information "in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes."¹⁸ The list of information covered is quite broad, including the individual's first and last name, physical address, social security number, and credit card numbers.¹⁹

B. *Other General Provisions*

As part of the Act, the United States District Court for the Eastern District of Virginia stands to get a new bankruptcy judge, although the Act also mandates that the next opening in the district that occurs five years after the appointment of the new judge not be filled.²⁰

Filing fees also changed on October 17, 2005.²¹ The Chapter 7 fee increased from \$209 to \$274, the Chapter 11 fee increased from \$839 to \$1039, and the Chapter 13 fee decreased from \$194 to \$189.²²

New section, 28 U.S.C. § 158(d)(2), permits the courts of appeals to have direct jurisdiction of appeals from bankruptcy courts in certain circumstances.²³ The case must involve an undecided point of law, and a direct appeal must materially advance the litigation.²⁴ The request may be made by the court (the bank-

18. *Id.* § 231(b), 119 Stat. at 73 (to be codified at 11 U.S.C. § 101(41A)(A)).

19. *See id.* (to be codified at 11 U.S.C. § 101(41A)(A)(i), (ii), (v), (vi)).

20. *See id.* § 1223(b)(1)(R), (2)(A), 119 Stat. at 197. This portion of the Act is effective on the date of enactment. *See id.* § 1123(e), 119 Stat. at 198.

21. The Act authorized changes to filing fees for Chapter 7, 11, and 13 cases. *See id.* § 325(a), 119 Stat. at 98 (to be codified at 28 U.S.C. § 1930(a)). The filing fee amounts also include adjustments from the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 6058, 119 Stat. 231, 297.

22. *See* Public Notice, United States Bankruptcy Court for the Eastern District of Virginia, *Specified Filing Fees Prescribed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and Emergency Supplemental Appropriations Act, The Global War on Terror, and Tsunami Relief, 2005* (June 1, 2005), available at <http://www.vaeb.uscourts.gov/notice/PubNotNewPetitionFees053105.pdf> (last visited Oct. 1, 2005); United States Bankruptcy Court for the Western District of Virginia, *Major Changes in Filing Fees*, available at <http://www.vawb.uscourts.gov/courtweb/main1.htm> (last visited Oct. 1, 2005).

23. *See* Pub. L. No. 109-8, § 1233(a), 119 Stat. 23, 202-03 (to be codified at 28 U.S.C. § 158(d)(2)(A)).

24. *Id.* (to be codified at 28 U.S.C. § 158(d)(2)(A)(i)-(iii)).

ruptcy court, the district court, or the bankruptcy appellate panel) or the parties jointly.²⁵ The court of appeals must authorize the appeal.²⁶

The Act makes Chapter 12 permanent.²⁷ The Act adds “family fisherman” after “family farmer,” which was covered by Chapter 12.²⁸ As Chapter 12 cases are exceedingly rare in Virginia, Chapter 12 will not receive more discussion in this article.²⁹

The Act adds an entirely new Chapter 15 to the Code regarding cross-border insolvency cases.³⁰ Discussion of this Chapter is beyond the scope of this article.

The Act amended 11 U.S.C. § 105(d)(1) to require the bankruptcy court to “hold such status conferences as are necessary to further the expeditious and economical resolution of the case.”³¹ Previously, the court was not required to hold such conferences, but was permitted to do so.

Subsection 328(a) has been amended to expressly permit professionals, including attorneys, to be compensated on a fixed or percentage fee basis.³²

Amendments to § 363(b)(1) limit the ability of a trustee or debtor-in-possession to sell or lease “personally identifiable information” compiled by the debtor.³³ New § 332 requires the United States Trustee to appoint a “consumer privacy ombudsman” to represent the privacy interests of the consumers if the

25. *Id.* (to be codified at 28 U.S.C. § 158(d)(2)(A)).

26. *Id.*

27. This portion of the Act became effective July 1, 2005. *See id.* § 1001(a)(2), 119 Stat. at 185.

28. *See id.* § 1007(b), 119 Stat. at 188 (to be codified at 11 U.S.C. § 109(f)).

29. According to the website for the United States Bankruptcy Court for the Eastern District of Virginia, there were no Chapter 12 filings in calendar year 2004 and only one to date in calendar year 2005. *See* United States Bankruptcy Court for the Eastern District of Virginia, <http://www.vaeb.uscourts.gov/stats/FiveYrStats/Dist2001-2005.htm> (last visited on Oct. 1, 2005). According to the website for the United States Bankruptcy Court for the Western District of Virginia, there were only two Chapter 12 filings in calendar year 2003, the last year for which statistics appear on the website. *See* United States Bankruptcy Court for the Western District of Virginia, <http://www.vawb.uscourts.gov/courtweb/enter1.html> (last visited on Oct. 1, 2005).

30. Pub. L. No. 109-8, § 801, 119 Stat. 23, 134.

31. *Id.* § 440(2), 119 Stat. at 114 (to be codified at 11 U.S.C. § 105(d)(1)).

32. *See id.* § 1206, 119 Stat. at 194 (to be codified at 11 U.S.C. § 328(a)). Percentage fee agreements were common for counsel in preference actions under prior law.

33. *Id.* § 231(a), 119 Stat. at 72-73 (to be codified at 11 U.S.C. § 363(b)(1)).

trustee or debtor-in-possession is seeking to sell or lease such information.³⁴

An amendment to § 548(a) extends the look-back period for recovering fraudulent conveyances from one to two years.³⁵ In addition, this subsection now sets out that a transfer may include an employment contract with an insider that is not made in the ordinary course of business.³⁶

The Act also adds new § 548(e), which permits a trustee to avoid any transfer made within ten years of filing the petition to a "self-settled trust or similar device" if the transfer was made by the debtor, the debtor is the beneficiary of the trust, and the transfer was made with the "intent to hinder, delay, or defraud any entity to which the debtor was" indebted at the time.³⁷

III. CONSUMER PROVISIONS

A. *New and Revised Requirements for Debtors to File for Bankruptcy*

The Act has also added a number of requirements to be a debtor and a number of filings and disclosures the debtor must make at the beginning of the case. Subsection 109(h)(1) states that a person "may not be a debtor under this title" unless that person has received, within 180 days before filing the petition, an "individual or group briefing" that outlines the opportunities for credit counseling and assists the person in performing a personal budget analysis.³⁸ These briefings may be done by phone or over

34. *See id.* § 232(a), 119 Stat. at 73–74 (to be codified at 11 U.S.C. § 332(a)-(b)). Another new section, § 333, requires the appointment of a patient care ombudsman in cases under Chapters 7, 9, or 11 where the debtor is a health care business. *Id.* § 1104(a), 119 Stat. at 191–92 (to be codified at 11 U.S.C. § 333(a)(1)).

35. *Id.* § 1402(1), 119 Stat. at 214 (to be codified at 11 U.S.C. § 548(a)-(b)). This amendment is effective on the date of enactment, but only applies to cases commenced more than one year after enactment. *Id.* § 1406(b)(2), 119 Stat. at 216.

36. *Id.* § 1402(3)(C), 119 Stat. at 214 (to be codified at 11 U.S.C. § 548(a)(1)(B)(ii)(IV)). This amendment is effective on the date of enactment, but only applies to cases commenced on or after the date of enactment. *See id.* § 1406(b)(2), 119 Stat. at 216.

37. *Id.* § 1402(4), 119 Stat. at 214–15 (to be codified at 11 U.S.C. § 548(e)(1)(A)-(D)). This amendment is effective on the date of enactment, but only applies to cases commenced on or after the date of enactment. *Id.* § 1406(b)(2), 119 Stat. at 216.

38. *Id.* § 106(a), 119 Stat. at 37–38 (to be codified at 11 U.S.C. § 109(h)(1)).

the Internet.³⁹ There are exceptions for districts in which the United States Trustee's office has determined that the services are not adequate or available, for exigent circumstances, and for "incapacity, disability, or active military duty in a military combat zone."⁴⁰ Subsection 521(b) requires the debtor to file a certificate from the credit counseling agency and a copy of any debt repayment plan developed through that process.⁴¹

Under § 521(a)(1), the debtor must also file with the petition wage records for the sixty days prior to filing, an itemized statement of monthly net income, and a statement showing any "reasonably anticipated increase in income or expenditures" over the next year.⁴² If an individual Chapter 7 or 13 debtor fails to file all of the information required by § 521(a)(1) within forty-five days after the date the petition is filed, the case "shall be automatically dismissed effective on the 46th day after the date of the filing of the petition."⁴³ The debtor may file a motion during the forty-five days to obtain an additional "period of not to exceed 45 days" to file the required information.⁴⁴ If the debtor has failed to comply, any party in interest may ask that the court enter an order dismissing the case and the court must do so within five days.⁴⁵

Under § 521(a)(2), an individual debtor must file his or her statement of intention with regard to debts secured by property of the estate within thirty days from the filing of the petition or on or before the § 341 meeting.⁴⁶ The statement of intention requires the debtor to state whether the debtor will surrender the property, redeem it, or reaffirm the debt.⁴⁷ The debtor must perform on his or her statement of intention within thirty days from the first date of the § 341 meeting.⁴⁸ If the debtor does not file the

39. *Id.*

40. *See id.* (to be codified at 11 U.S.C. § 109(h)(2)(A), (3)(A)(i), (4)).

41. *See id.* § 106(d), 119 Stat. at 38 (to be codified at 11 U.S.C. § 521(b)(1)-(2)).

42. *See id.* § 315(b)(1), 119 Stat. at 89-90 (to be codified at 11 U.S.C. § 521(a)(1)(B)(iv)-(vi)).

43. *Id.* § 316, 119 Stat. at 92 (to be codified at 11 U.S.C. § 521(i)(1)).

44. *Id.* (to be codified at 11 U.S.C. § 521(i)(3)). The court may also refuse to dismiss the case if the debtor attempted in good faith to file his or her wage information and the best interests of the creditors would be served by permitting the case to continue. *See id.* (to be codified at 11 U.S.C. § 521(i)(4)).

45. *Id.* (to be codified at 11 U.S.C. § 521(i)(2)).

46. *See id.* § 305(2), 119 Stat. at 80 (to be codified at 11 U.S.C. § 521(a)(2)(B)).

47. *See id.* § 305(1), 119 Stat. at 79 (to be codified at 11 U.S.C. § 362(h)(1)(A)).

48. *See id.* § 305(2), 119 Stat. at 80 (to be codified at 11 U.S.C. § 521(a)(2)(B)). This subsection will end the practice whereby the debtor retains the property by continuing to

statement of intent or perform on it within the required time, the automatic stay will no longer protect the property in most circumstances.⁴⁹

Under § 521(e)(2)(A), the debtor must, at least seven days before the § 341 meeting, provide the trustee with a copy of the debtor's most recent tax return or tax transcript.⁵⁰ The debtor must also give a copy of the return or transcript to any creditor that requests a copy.⁵¹ Failure to comply with these provisions requires the court to dismiss the case, unless the debtor can show that the failure to comply is due to circumstances beyond the control of the debtor.⁵²

Failure to file a tax return with the taxing authority or to obtain an extension to do so gives the taxing authority the right to file a motion to convert or dismiss the bankruptcy case.⁵³ If the debtor does not comply within ninety days after the request, "the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate."⁵⁴

In addition, under § 521(f), any party in interest, including the court, may request that the debtor file a copy of his or her tax returns with the court.⁵⁵ This includes the obligation to file tax returns required during the period the bankruptcy case is pending, returns filed late for the three years prior to the date of filing the bankruptcy case, and any amended returns filed.⁵⁶

In cases where no plan has been confirmed, § 521(f)(4) requires a Chapter 13 debtor to file within ninety days from the end of the tax year or one year after the commencement of the case, whichever is later, a statement of the income of the debtor.⁵⁷ The statement must include the debtor's income and expenses, how those amounts are calculated, the source of the debtor's income, the identity of any person responsible with the debtor for support of the debtor's dependents, and the identity and amount contrib-

make payments on the obligation without ever reaffirming the debt.

49. See *infra* Part II.D.

50. Pub. L. No. 109-8, § 315(b)(2), 119 Stat. 23, 89-90 (to be codified at 11 U.S.C. § 521(e)(2)(A)(i)).

51. *Id.* (to be codified at 11 U.S.C. § 521(e)(2)(A)(ii)).

52. *Id.* (to be codified at 11 U.S.C. § 521(e)(2)(B)-(C)).

53. See *id.* § 720, 119 Stat. at 133-34 (to be codified at 11 U.S.C. § 521(j)(1)).

54. *Id.* (to be codified at 11 U.S.C. § 521(j)(2)).

55. See *id.* § 315(b)(2), 119 Stat. at 90-91 (to be codified at 11 U.S.C. § 521(f)(1)-(3)).

56. See *id.*

57. *Id.* (to be codified at 11 U.S.C. § 521(f)(4)(A)).

uted by any person to the debtor's household.⁵⁸ These statements must also be filed annually after the plan is confirmed until the case is closed.⁵⁹ These statements must be filed under penalty of perjury.⁶⁰

B. *New Requirements for Debtors' Attorneys*

One of the most important changes in the Act is the significant burdens that will be placed on debtors' attorneys. There has been much speculation that these requirements, as well as the general complexity of the means test, will drive many attorneys who have represented bankruptcy debtors on a limited basis out of the field entirely and will cause those who continue to represent debtors to raise their fees.⁶¹

A change to § 707(b) places a duty on counsel for the debtor to certify a client's petition. Subsection 707(b)(4)(C) reads, in full, that:

The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1) [of 707(b)].⁶²

Subsection 707(b)(4)(D) reads, in full, that “[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.”⁶³

58. *Id.* (to be codified at 11 U.S.C. § 521(f)(4)-(g)(1)).

59. *Id.* (to be codified at 11 U.S.C. § 521(f)(4)(B)).

60. *Id.*

61. See, e.g., Terry Carter, *The Exodus Begins: Lawyers Wonder Whether Chapter 7 Will Be a Viable Practice Area Under New Law*, A.B.A. J., June 2005, at 12.

62. Pub. L. No. 109-8, § 102(a)(2)(c), 119 Stat. 23, 27–32 (to be codified at 11 U.S.C. § 707(b)(4)(C)).

63. *Id.* (to be codified at 11 U.S.C. § 707(b)(4)(D)).

Subsection 707(b)(4)(C) is essentially a restatement of Federal Rule of Civil Procedure 11 and Federal Rule of Bankruptcy Procedure 9011, except for the fact that these requirements also include the certification that the debtor is not committing an abuse of the provisions of Chapter 7.⁶⁴ It is unclear how this provision will be applied in practice.

A debtor's attorney may be held liable for reasonable costs, including attorney's fees, for an abuse motion filed under § 707(b).⁶⁵ That subsection provides that the court may award costs and attorney's fees to a trustee who prevails on a § 707(b) motion if the court finds that the attorney for the debtor violated Bankruptcy Rule 9011.⁶⁶ In addition, the court may award a civil penalty payable to the United States Trustee against an attorney found to have violated Bankruptcy Rule 9011.⁶⁷

Another series of changes in the Act requires the debtor's bankruptcy attorney to make certain disclosures to their clients. These changes begin with the definitions section. The Act adds a new definition, "debt relief agency," in § 101(12A).⁶⁸ A "debt relief agency" is defined as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110."⁶⁹ There are exemptions from this definition, including nonprofits, banks and credit unions, and creditors restructuring debt, but law firms will be covered.⁷⁰ "Assisted person" is defined as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000."⁷¹

Debt relief agencies are strictly regulated by §§ 526, 527, and 528. Section 526 states that any contract between a debt relief agency and a client is not enforceable, other than by the client, if

64. Compare *id.* (to be codified at 11 U.S.C. § 707(b)(4)(C)), with FED. R. CIV. P. 11 and FED R. BANKR. 9011.

65. See Pub. L. No. 109-8, § 102(a)(2)(c), 119 Stat. at 27-32 (to be codified at 11 U.S.C. § 707(b)(4)(A)); see also *infra* Part II.E (discussing abuse of motions).

66. See *id.* § 102(a)(2)(c), 119 Stat. 23, 27-32 (to be codified at 11 U.S.C. § 707(b)(4)(A)).

67. See *id.* (to be codified at 11 U.S.C. § 707(b)(4)(B)).

68. See *id.* § 226(a)(3), 119 Stat. at 67 (to be codified at 11 U.S.C. § 101(12A)).

69. *Id.*

70. See *id.* (to be codified at 11 U.S.C. § 101(12A)(A)-(E)).

71. *Id.* § 226(a)(1), 119 Stat. at 66 (to be codified at 11 U.S.C. § 101(3)).

it does not comply with §§ 526, 527, or 528.⁷² In addition, a debt relief agency may be held liable for damages and reasonable attorney's fees if a client's case is dismissed or converted due to the debt relief agency's intentional or negligent failure to file any required document.⁷³ Waiver of the rights afforded by § 526 is unenforceable.⁷⁴ Section 527 mandates extensive written disclosures for debt relief agencies and requires the debt relief agencies to maintain these records for two years.⁷⁵ Section 528 requires debt relief agencies to execute written employment contracts with clients, which include further mandated disclosures.⁷⁶ This section also includes mandatory language that must appear in advertisements for the debt relief agency.⁷⁷

Attorneys who plan to provide representation to individual debtors under the Act should carefully review and comply with these provisions.

C. New and Revised Matters Regarding Notices

The Act has increased burdens on the debtor to insure that the notices related to the bankruptcy case are sent to the proper address. Revisions to § 342(c) require that the debtor give notice to a creditor at the address set out in at least two communications from the creditor to the debtor within the ninety days prior to the commencement of a bankruptcy case.⁷⁸ Under the same subsection, if the notices from the creditor contain an account number, the debtor must include the account number in the notices to the creditor.⁷⁹ Under new § 342(e), in a Chapter 7 or 13 case, if the creditor files with the court and serves on the debtor a notice of address, all notices to the creditor made after five days from the notice must be sent to the designated address.⁸⁰

72. See *id.* § 227(a), 119 Stat. at 68 (to be codified at 11 U.S.C. § 526(c)(1)).

73. See *id.* (to be codified at 11 U.S.C. § 526(e)(2)(B)).

74. See *id.* (to be codified at 11 U.S.C. § 526(b)).

75. See *id.* § 228(a), 119 Stat. at 69–71 (to be codified at 11 U.S.C. § 527).

76. See *id.* § 229(a), 119 Stat. at 71–72 (to be codified at 11 U.S.C. § 528(a)(1)).

77. *Id.* (to be codified at 11 U.S.C. § 528(a)(3)-(4), (b)).

78. See *id.* § 315(a)(1)(C), 119 Stat. at 88 (to be codified at 11 U.S.C. § 342(c)(2)(A)).

79. See *id.* (to be codified at 11 U.S.C. § 342(c)(2)(B)).

80. See *id.* § 315(a)(2), 119 Stat. at 88–89 (to be codified at 11 U.S.C. § 342(e)(1)-(2)).

Subsection 342(f) permits an entity to file a notice of address with a bankruptcy court to be used by the court to provide the creditor notice in all cases under Chapters 7 and 13 in which it is a creditor.⁸¹ All notices required to be sent to that creditor after thirty days must be sent to the designated address to be "effective notices."⁸² Even if a general notice address is on file under § 342(f), the creditor may submit a different notice address for a specific case pursuant to § 342(e).⁸³

Perhaps most importantly, under new § 342(g), no sanctions can be entered against a creditor for violating the automatic stay or for failing to turn over property unless the action takes place after the creditor has received "effective notice" at the proper address.⁸⁴ The same subsection permits a creditor to designate a person or "organizational subdivision" to be responsible for receiving notices under the Code.⁸⁵ If the creditor establishes reasonable procedures so that such notices are delivered to that person or subdivision, then notice that is not received by that person or subdivision is ineffective.⁸⁶

Subsection 704(c) requires the trustee in a Chapter 7 case to provide certain written notices to holders of claims for domestic support obligations.⁸⁷ The trustee must also give notice to the state child support agency that there is a claimant in bankruptcy holding a domestic support obligation claim.⁸⁸ If the debtor is discharged, the trustee must send a notice of the discharge, the last known address of the debtor, the name of the debtor's last known employer, and the names of creditors holding claims that were reaffirmed or certain non-dischargeable claims to the holder of the domestic support claim and the state child support agency.⁸⁹ The holder of the domestic support claim or the state child support agency may request from the other creditors the last known

81. *See id.* (to be codified at 11 U.S.C. § 342(f)(1)).

82. *See id.* (to be codified at 11 U.S.C. § 342(f)(2)).

83. *See id.* (to be codified at 11 U.S.C. § 342(e)(1)).

84. *See id.* (to be codified at 11 U.S.C. § 342(g)(2)).

85. *See id.* (to be codified at 11 U.S.C. § 342(g)(1)).

86. *See id.*

87. *See id.* § 219(a)(2), 119 Stat. at 55–56 (to be codified at 11 U.S.C. § 704(c)(1)(A)(i)-(iii)).

88. *See id.* (to be codified at 11 U.S.C. § 704(c)(1)(B)(i)).

89. *See id.* (to be codified at 11 U.S.C. § 704(c)(1)(C)).

address of the debtor and those creditors cannot be held liable for releasing that information.⁹⁰

D. *New and Revised Provisions Related to the Automatic Stay*

The automatic stay of § 362 has traditionally been one of the most critical benefits afforded to a debtor. The automatic stay requires creditors to cease action against the debtor or property of the debtor once the bankruptcy case is filed and has traditionally only had very limited exceptions.⁹¹ The Act, however, contains a number of provisions that reduce the scope of the automatic stay and the protections afforded to debtors.⁹²

The Act makes clear that a number of domestic relations proceedings are not covered by the automatic stay. These changes appear in § 362(b)(2) and include civil actions regarding child custody or visitation, collection of domestic support obligations from property that is not part of the bankruptcy estate, divorce cases except to the extent that the action involves the division of property that is part of the bankruptcy estate and actions “regarding domestic violence.”⁹³ Subsection 362(b)(2)(C) also exempts “the withholding of income that is property of the estate or property of the debtor” (i.e., a garnishment) for the “payment of a domestic support obligation.”⁹⁴ Other provisions of § 362(b)(2) provide that other mechanisms of collecting support obligations, including suspension of a driver’s or professional license or the “interception of a tax refund” are also permitted.⁹⁵

Subsection 362(b)(18) has been modified so that the creation or perfection of a special tax or special assessment on real property, whether or not an ad valorem tax, if the tax or assessment comes due after the date of the filing of the bankruptcy petition, is not

90. *See id.* (to be codified at 11 U.S.C. § 704(c)(2)).

91. *See* 11 U.S.C. § 362(a)-(b).

92. *See* Pub. L. No. 109-8, § 214, 119 Stat. 23, 54 (to be codified at 11 U.S.C. § 362(b)).

93. *Id.* (to be codified at 11 U.S.C. § 362(b)(2)(A)).

94. *Id.* (to be codified at 11 U.S.C. § 362(b)(2)(C)).

95. *See id.* (to be codified at 11 U.S.C. § 362(b)(2)(D), (F)) (authorizing many of the tactics permitted under 42 U.S.C. §§ 464, 466(a)(3)).

subject to the stay.⁹⁶ Under old law, special assessments were not exempt from the stay.⁹⁷

New § 362(b)(19) permits a debtor's employer to withhold income from the debtor's wages, to the extent that such income goes to repay loans from profit-sharing plans or other similar plans, such as 401(k) plans.⁹⁸

Also, new § 362(c)(3) provides that the automatic stay expires thirty days after the filing of a bankruptcy petition under Chapters 7, 11, or 13 if the debtor had been a debtor in another case which was dismissed within the year before the filing.⁹⁹ If a case, however, has been dismissed under § 707(b) for an abuse of Chapter 7, that dismissal does not count for the purposes of this limitation on the stay if the debtor refiles under a Chapter other than Chapter 7.¹⁰⁰ Subsection 362(c)(3)(B) permits the court to extend the stay after notice and a hearing if the second case was filed in good faith but requires the hearing to be completed within thirty days of the filing.¹⁰¹ This subsection sets out circumstances that establish a presumption that the case was not filed in good faith.¹⁰² They include having filed more than one Chapter 7, 11, or 13 case within the preceding one-year period, having had a prior case dismissed for failure to comply with court orders or the terms of a plan, or having had no substantial change in the financial or personal affairs of the debtor since the prior filing.¹⁰³ The debtor can rebut this presumption but must do so by clear and convincing evidence.¹⁰⁴

Subsection 362(c)(4) provides that a stay will not go into effect at all if the debtor had been a debtor in two previous cases that had been dismissed within the last year.¹⁰⁵ There is an exemption

96. *See id.* § 1225, 119 Stat. at 199 (to be codified at 11 U.S.C. § 362(b)(18)).

97. *See* 11 U.S.C. § 362(b)(18).

98. *See* Pub. L. No. 109-8, § 224(b)(3), 119 Stat. 23, 64 (to be codified at 11 U.S.C. § 362(b)(19)).

99. *See id.* § 302(3), 199 Stat. at 75-76 (to be codified at 11 U.S.C. § 362(c)(3)(A)).

100. *See id.* (to be codified at 11 U.S.C. § 362(c)(3)).

101. *See id.* (to be codified at 11 U.S.C. § 362(c)(3)(B)).

102. *See id.* (to be codified at 11 U.S.C. § 362(c)(3)(C)).

103. *See id.* (to be codified at 11 U.S.C. § 362(c)(3)(C)(i)). Subsection 362(i) also provides that if a case commenced under Chapters 7, 11, or 13 is dismissed "due to the creation of a debt repayment plan . . . [.] any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith" for purposes of § 362(c)(3). *See id.* § 106(f), 119 Stat. at 41 (to be codified at 11 U.S.C. § 362(i)).

104. *See id.* § 302(3), 119 Stat. at 75-77 (to be codified at 11 U.S.C. § 362(c)(3)(C)).

105. *See id.* § 302(3), 119 Stat. at 76-77 (to be codified at 11 U.S.C. § 362(c)(4)(A)(i)).

under this subsection as well for cases filed under a Chapter other than Chapter 7 following a dismissal under § 707(b).¹⁰⁶ Subsection 362(c)(4)(A)(ii) provides that the court shall “on request of a party in interest . . . promptly enter an order confirming that no stay is in effect.”¹⁰⁷ The Act, however, does provide that any party in interest, including the debtor, may request that the court impose a stay, with regard to one or all creditors, within thirty days of the filing.¹⁰⁸ This party must demonstrate that the case was filed in good faith “as to the creditors to be stayed.”¹⁰⁹

Subsection 362(c)(4)(D) establishes that such a case is presumptively not filed in good faith if certain criteria are met, but allows that presumption to be rebutted by clear and convincing evidence.¹¹⁰ The criteria are essentially the same as those under § 362(c)(3)(C) and include whether the debtor complied with court orders in the prior cases, whether the debtor complied with the terms of a confirmed plan, and whether there has been a substantial change in the financial or personal circumstances of the debtor.¹¹¹ This subsection also provides that the presumption that the case was not filed in good faith exists as to a creditor if that creditor had filed a motion to lift the stay in the previous case and that motion was either “pending or had been resolved by terminating, conditioning, or limiting the stay” with regard to the creditor.¹¹²

The Act also contains a number of provisions that give relief for creditors seeking to foreclose on real property. These sections are designed to prevent abuses of the bankruptcy system, such as repeated filings, that some debtors have used to attempt to delay foreclosures.¹¹³ Subsection 362(d)(4) provides that the court shall grant relief from the stay with respect to an act against real property by a creditor whose claim is secured by an interest in the property “if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors” involving ei-

106. *See id.*

107. *Id.* (to be codified at 11 U.S.C. § 362(c)(4)(A)(ii)).

108. *See id.* (to be codified at 11 U.S.C. § 362(c)(4)(B)).

109. *Id.*

110. *See id.* (to be codified at 11 U.S.C. § 362(c)(4)(D)).

111. *See id.* (to be codified at 11 U.S.C. § 362(c)(4)(D)(i)(II)-(III)).

112. *See id.* (to be codified at 11 U.S.C. § 362(c)(4)(D)(ii)).

113. *See generally* Constantine Dean Pourakis, *Note: Final Report of the Bankruptcy Foreclosure Scam Task Force*, 7 AM. BANKR. INST. L. REV. 341 (1999).

ther the transfer of an interest in the property without the secured party's consent or multiple bankruptcy filings affecting the real property.¹¹⁴ If such an order granting in rem relief is recorded in the land records, the order will be binding on other bankruptcy cases for two years from the date of the entry of the order.¹¹⁵ That subsection further provides that the debtor may, in a subsequent bankruptcy case, seek relief from the order based on "changed circumstances or for good cause shown, after notice and a hearing."¹¹⁶

Subsection 362(b)(20) provides that the stay of § 362(a) does not apply to "any act to enforce any lien against or security interest in real property" after entry of an order under § 362(d)(4) in a prior bankruptcy case "for a period of 2 years after the date of the entry of such an order."¹¹⁷ This subsection does not require that such an order be recorded, although given the terms of § 362(d)(4), the better practice would be to record such orders. Like § 362(d)(4), § 362(b)(20) also provides that the debtor may move for relief from a § 362(d)(4) order based on "changed circumstances or for other good cause shown, after notice and a hearing."¹¹⁸

Subsection 362(b)(21) exempts "any act to enforce any lien against or security interest in real property" from the stay when the debtor is not eligible to be a debtor under § 109(g) or where the bankruptcy case was filed in violation of a bankruptcy court order banning another filing.¹¹⁹ Subsection 109(g), which is unchanged by the Act, states that a person may not be a debtor if they have been a debtor in a previous case within 180 days and that case was dismissed for willful failure to follow court orders or dismissed at the request of the debtor when a motion to lift the automatic stay was pending.¹²⁰ This change will have the effect of permitting foreclosure sales of property owned by certain ineligi-

114. Pub L. No. 109-8, § 303(a)(3), 119 Stat. 23, 77-78 (to be codified at 11 U.S.C. § 362(d)(4)).

115. *See id.*

116. *See id.*

117. *See id.* § 303(b), 119 Stat. at 78 (to be codified at 11 U.S.C. § 362(b)(20)).

118. *Id.*

119. *See id.* (to be codified at 11 U.S.C. § 362(b)(21)). One method frequently used to put a stop to repeated filings is an order from the bankruptcy court barring the debtor from filing a petition for a sufficient period of time to permit the foreclosure to take place.

120. *See* 11 U.S.C. § 109(g).

ble debtors and will give lenders further protection against individuals who file multiple bankruptcies to avoid foreclosure sales.

Two new provisions give landlords of residential properties exemptions from the automatic stay in certain circumstances. Subsection 362(b)(22) provides that a landlord may continue an unlawful detainer action “involving residential property in which the debtor resides as a tenant under a lease or rental agreement” when the landlord has obtained a judgment of possession for the property against the debtor before the filing of the bankruptcy petition.¹²¹ Subsection 362(b)(22) is subject to the terms of § 362(l).¹²² Subsection 362(l) provides that the landlord must wait to proceed with an eviction under § 362(b)(22) for thirty days after the bankruptcy petition is filed if the debtor files a certification, subject to the penalties of perjury, that: “there are circumstances under which the debtor would be permitted to cure the entire monetary default . . . after th[e] judgment for possession was entered” and “the debtor (or an adult dependent of the debtor) has deposited with the clerk of the [bankruptcy] court, any rent that would become due during the 30-day period after the filing of [a] bankruptcy petition.”¹²³ This subsection requires the debtor to file a certification regarding the ability to cure with the petition and provides that if the debtor does not do so that the landlord may proceed as authorized by § 362(b)(22).¹²⁴ If the debtor cures the lease arrearage and files a certification to that effect under penalty of perjury, § 362(b)(22) shall not apply.¹²⁵ Subsection 362(l)(3) provides for the landlord to file an objection to the debtor’s certifications and requires the court to hold a hearing within ten days if the landlord does so.¹²⁶ Under Virginia landlord tenant law, a debtor’s ability to cure after a judgment for possession is highly limited and most landlords should be able to go forward with obtaining a writ of possession and evicting a tenant after a judgment for possession is granted even if the tenant files for bankruptcy.¹²⁷

121. See Pub. L. No. 109-8, § 311(a), 119 Stat. 23, 84 (to be codified at 11 U.S.C. § 362(b)(22)).

122. *Id.*

123. *Id.* § 311(b), 119 Stat. at 85 (to be codified at 11 U.S.C. § 362(l)(1)).

124. *Id.* § 311(b), 119 Stat. at 84–85 (to be codified at 11 U.S.C. § 362(l)(1)-(2)).

125. See *id.* (to be codified at 11 U.S.C. § 362(l)(2)).

126. See *id.* (to be codified at 11 U.S.C. § 362(l)(3)(A)).

127. See VA. CODE ANN. § 55-248.34:1(B) (Repl. Vol. 2003) (providing that a landlord

Subsections 362(b)(23) and (m) also apply to residential landlords and tenants. Subsection 362(b)(23) permits a landlord to seek possession of residential property where the debtor resides as tenant under a lease or rental agreement "based on endangerment of [the] property or the illegal use of controlled substances on such property."¹²⁸ This subsection requires the landlord to file a certification, under the penalty of perjury, and serve it on the debtor, which provides "that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property."¹²⁹ Subsection 362(m)(1) states that the stay will lift under § 362(b)(23) fifteen days after the lessor files and serves the certification.¹³⁰ The debtor is given fifteen days to object to this certification under § 362(m)(3).¹³¹ If the debtor files such an objection, the court must hold a hearing within ten days "to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied."¹³² The debtor must demonstrate "to the satisfaction of the court" that the situation did not exist or has been remedied.¹³³ If the debtor can do this, the stay remains in place.¹³⁴ If the debtor cannot make that showing, the lessor may proceed with the eviction.¹³⁵ If the debtor does not file his objection within fifteen days, the exception to the stay found in § 362(b)(23) applies immediately and "relief from the stay provided under subsection (a)(3) shall not be required."¹³⁶ These subsections will probably only have limited applicability, unless courts adopt an expansive reading of the phrase "endangerment of the property," which is not defined in the Code or the Act.

subject to the Virginia Residential Landlord Tenant Act may evict a tenant after receiving a judgment for possession even if the tenant pays the full amount due provided the landlord gives the tenant a reservation of rights notice within five business days of the receipt of the payment).

128. See Pub. L. No. 109-8, § 311(a), 119 Stat. 23, 84 (to be codified at 11 U.S.C. § 362(b)(23)).

129. See *id.*

130. *Id.* § 311(b), 119 Stat. at 86 (to be codified at 11 U.S.C. § 362(m)(1)).

131. See *id.* (to be codified at 11 U.S.C. § 362(m)(3)).

132. See *id.* (to be codified at 11 U.S.C. § 362(m)(2)(B)).

133. *Id.* (to be codified at 11 U.S.C. § 362(m)(2)(C)).

134. *Id.*

135. See *id.* (to be codified at 11 U.S.C. § 362(m)(2)(D)(i)).

136. *Id.* (to be codified at 11 U.S.C. § 362(m)(3)(A)).

New § 362(e)(2) provides that the stay will terminate in a Chapter 7, 11, or 13 case sixty days after a request is made under § 362(d).¹³⁷ There are exceptions for final decisions being rendered by the court within that sixty-day period, for extensions made with the agreement of all parties, or for extensions made by the court for a “specific period of time as the court finds is required for good cause, as described in findings made by the court.”¹³⁸ Under prior law, the court was already required to hold a hearing on a motion for relief from the stay within thirty days and was required to hold a final hearing on the motion within thirty days from the first hearing, so § 362(e)(2) is unlikely to have a significant effect in practice.¹³⁹

New § 362(h) establishes new limits to the automatic stay for personal property.¹⁴⁰ The subsection applies to personal property that secures a claim or is leased, in cases where the debtor is an individual.¹⁴¹ The subsection provides that the stay terminates as to such property if the debtor fails to timely file a statement of intention within thirty days from the creditor’s meeting or if the debtor fails to comply with that statement.¹⁴² The subsection provides that the trustee may file a motion within the thirty-day period and ask the court to retain the stay if the personal property is of benefit to the estate.¹⁴³ If the court grants the trustee’s motion, its order must require that the debtor turn over possession of the property to the trustee and that the creditor receive adequate protection.¹⁴⁴ This subsection should force debtors to either surrender personal property, redeem the property, or reaffirm the agreement with the creditor.

Subsection 362(j) provides that “[o]n request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.”¹⁴⁵ This pro-

137. *Id.* § 320(2), 119 Stat. at 94 (to be codified at 11 U.S.C. § 362(e)(2)).

138. *Id.* (to be codified at 11 U.S.C. § 362(e)(2)(A)-(B)).

139. The prior law was codified at § 362(e). Due to the addition of § 362(e)(2), it now appears at § 362(e)(1).

140. *See id.* § 305(1)(c)-(2), 119 Stat. at 79–80 (to be codified at 11 U.S.C. § 362(h)).

141. *See id.* § 305(1)(c), 119 Stat. at 79 (to be codified at 11 U.S.C. § 362(h)(1)).

142. *See id.* (to be codified at 11 U.S.C. § 362(h)(1)(A)-(B)).

143. *See id.* (to be codified at 11 U.S.C. § 362(h)(2)).

144. *See id.*

145. *Id.* § 106(f), 119 Stat. at 41–42 (to be codified at 11 U.S.C. § 362(j)).

vides a vehicle for creditors to determine if a stay is in place before they take action against the debtor or the debtor's property.

E. *The Means Test for Individual Chapter 7 Debtors*

One of the changes in the Act that has received the most attention is the introduction of a "means test" for Chapter 7 debtors.¹⁴⁶ The goal of the means test is to divert Chapter 7 filings, where the creditors will likely receive nothing, to Chapter 13, where the debtor will have to make some payment to creditors.¹⁴⁷ The means test only applies to individual debtors "whose debts are primarily consumer debts."¹⁴⁸ Despite the amount of attention that it has received, the means test will probably have less impact in practice than many other portions of the Act because it does not apply to a debtor whose income is below the state median.¹⁴⁹ The median family income for a family of four in Virginia for calendar year 2003 was \$71,697.¹⁵⁰

The core of the means test appears in § 707(b)(1) and is straightforward. The means test provides that the court presumes that an abuse of the provisions of Chapter 7 exists when the debtor's "current monthly income," less certain allowable expenses, when multiplied by sixty exceeds \$10,000.¹⁵¹ Abuse also exists, when income less expenses exceeds twenty-five percent of the nonpriority unsecured claims, or \$6000, whichever is greater.¹⁵² Therefore, for most debtors, having more than \$166.67 in "excess" income above allowed expenses will trigger the presumption of abuse. Some debtors with as little as \$100 in "excess"

146. See, e.g., Lawrence A. Friedman, *Seize the Opportunity to Improve America's Bankruptcy System*, 24-4 AM. BANKR. INST. J. 14, 14 (2005); Patricia Manson, *New Bankruptcy Law Fallout: Lots of Work*, CHI. DAILY L. BULL., May 25, 2005, at 1.

147. See Stephen Labaton, *House Passes Bankruptcy Bill: Overhaul Now Awaits President's Signature*, N.Y. TIMES, Apr. 14, 2005, at C5.

148. 11 U.S.C. § 707(b).

149. Pub. L. No. 109-8, § 102(a)(2)(c), 119 Stat. 23, 31 (to be codified at 11 U.S.C. § 707(b)(7)(A)). The state "median family income" is now defined under § 101(39A) as the median family income reported by the Bureau of the Census for the most recent year and adjusted, if necessary, by the Consumer Price Index for All Urban Consumers to the current year. See *id.* § 102(k), 119 Stat. at 35 (to be codified at 11 U.S.C. § 101(39A)).

150. See U.S. Census Bureau, *Median Income for 4-Person Families, by State*, available at <http://www.census.gov/hhes/income/4person.html> (last visited Oct. 1, 2005).

151. See Pub. L. No. 109-8, § 102(a)(2)(C), 119 Stat. 23, 27-32 (to be codified at 11 U.S.C. § 707(b)(2)(A)(i)(II)).

152. *Id.* (to be codified at 11 U.S.C. § 707(b)(2)(A)(i)(I)).

income will trigger the presumption of abuse, provided that this amount over five years would repay twenty-five percent of unsecured claims.

The debtor's "current monthly income" is defined as "the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income" in the six months prior to the case being filed.¹⁵³ This amount includes "any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents."¹⁵⁴ Benefits received under the Social Security Act, however, are excluded, as are payments to victims of war crimes or international terrorism.¹⁵⁵

The core of what expenses are deducted from the income of the debtor is determined by reference to parts of the Collection Financial Standards that the Internal Revenue Service ("IRS") developed to evaluate offers from taxpayers to settle tax liability.¹⁵⁶ These are known as the National Standards, the Local Standards, and the Other Necessary Expenses.¹⁵⁷ The National Standards establish allowable amounts for food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous expenses.¹⁵⁸ The National Standards are based on the number of persons in the household and income level.¹⁵⁹ Under the National Standards, a family of four with an income of less than \$833 per month would be permitted \$881 for all categories.¹⁶⁰ The same family with an income of over \$5834 would be permitted \$1564 for all categories.¹⁶¹

153. *Id.* § 102(b), 119 Stat. at 32 (to be codified at 11 U.S.C. § 101(10A)(A)).

154. *Id.* (to be codified at 11 U.S.C. § 101(10A)(B)).

155. *See id.*

156. Information on the Collection Financial Standards can be found on the IRS website at <http://www.irs.gov/individuals> under the heading "Collection Financial Standards."

157. *See* Internal Revenue Service, Department of the Treasury, Collection Financial Standards, available at <http://www.irs.gov/individuals/article/0,,id=96543,00.html> (last visited Oct. 1, 2005).

158. *Id.*

159. *Id.*

160. Internal Revenue Service, Department of the Treasury, National Standards for Allowable Living Expenses, available at <http://www.irs.gov/businesses/small/article/0,,id=104627,00.html> (last visited Oct. 1, 2005).

161. *Id.*

The Local Standards apply to housing and utilities and are broken down by city and county.¹⁶² In Virginia, under the Local Standards, a family of four or more is allowed \$2399 in Alexandria City and \$819 in Lee County.¹⁶³ The Local Standards also break down transportation costs on a regional basis.¹⁶⁴ The majority of Virginia is given an allowance of \$197 for persons without a car, \$242 for one car, and \$336 for two cars.¹⁶⁵ Residents of certain Northern Virginia jurisdictions are allowed \$289 if they have no car, \$313 for one car, and \$407 for two cars.¹⁶⁶

Finally, debtors are permitted to subtract Other Necessary Expenses from income.¹⁶⁷ The Other Necessary Expenses are found in the Financial Analysis Handbook section of the Internal Revenue Manual.¹⁶⁸ Other Necessary Expenses are those that “provide for the health and welfare of the taxpayer and/or his or her family or [are] for the production of income.”¹⁶⁹ They include payments made for charitable contributions, if a condition of employment, reasonable child care, court-ordered payments including child support, dependent care, health care, involuntary deductions required for employment such as union dues, term life insurance, payments on secured debts, and tax withholding.¹⁷⁰ The Other Necessary Expenses are expected to have limited applicability as the largest categories of the expenses are expressly listed as allowable expenses to be subtracted from income under the Act.

In addition to the IRS Standards, “allowable expenses” to be subtracted from income include the following:

162. See Internal Revenue Service, Department of the Treasury, Virginia-Housing and Utilities Allowable Living Expenses, available at <http://www.irs.gov/businesses/small/article/0,,id=104,822,00.html> (last visited Oct. 1, 2005).

163. See *id.*

164. See Internal Revenue Service, Department of the Treasury, Allowable Living Expenses for Transportation, available at <http://www.irs.gov/businesses/small/0,,id=104623,00.html> (last visited Oct. 1, 2005).

165. *Id.*

166. *Id.*

167. See Pub. L. No. 109-8, § 102(a)(2)(C), 119 Stat. 23, 27–32 (to be codified at 11 U.S.C. § 707(b)(2)(A)(ii)(D)).

168. See Internal Revenue Service, Department of Treasury, Internal Revenue Manual §§ 5.15.1, 15.5.1.10, available at <http://www.irs.gov/irm/part5/ch15s01.html> (last visited Oct. 1, 2005).

169. *Id.* § 5.15.1.10(1).

170. See *id.* § 5.15.1.10(3).

1) “necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor;”¹⁷¹

2) “reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence” as defined under federal law;¹⁷²

3) “if it is demonstrated that it is reasonable and necessary,” the allowable expenses may include “an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards;”¹⁷³

4) “the continuation of actual expenses . . . that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor’s immediate family . . . who is unable to pay for such reasonable and necessary expenses;”¹⁷⁴

5) if the debtor is eligible for Chapter 13, the actual administrative expenses of administering a Chapter 13 plan, up to ten percent of the plan payments, determined by district and to be based on schedules to be issued by the United States Trustee’s office;¹⁷⁵

6) an amount “not to exceed \$1,500.00 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary,” and why such expenses have not been accounted for under the National Standards, Local Standards, or Other Necessary Expenses;¹⁷⁶ and

7) an allowance for housing and utilities, above the Local Standards, based on the debtor’s actual home energy costs, if the debtor provides documentation and the expenses are reasonable and necessary.¹⁷⁷

171. Pub. L. No. 109-8, § 102(a)(2)(C), 119 Stat. 23, 27–32 (to be codified at 11 U.S.C. § 707(b)(2)(A)(ii)(I)).

172. *Id.*

173. *Id.*

174. *Id.* (to be codified at 11 U.S.C. § 707(b)(2)(A)(ii)(II)).

175. *Id.* (to be codified at 11 U.S.C. § 707(b)(2)(A)(ii)(III)).

176. *Id.* (to be codified at 11 U.S.C. § 707(b)(2)(A)(ii)(IV)).

177. *Id.* (to be codified at 11 U.S.C. § 707(b)(2)(A)(ii)(V)).

In addition, the debtor can subtract the "debtor's average monthly payments on account of secured debts" from income.¹⁷⁸ This amount is calculated by taking the sum of all payments due to secured creditors, including amounts necessary to retain possession of certain necessary property, due over the next sixty months and divided by sixty.¹⁷⁹ The final subtraction from income is for the total amount of priority debt, including priority child support and alimony claims, divided by sixty.¹⁸⁰

The exceptions to the means test are extremely limited. Subsection 707(b)(2)(D) states that the means test does not apply to "disabled veteran[s]" when the "indebtedness occurred primarily" when the debtor was on active duty or performing "homeland defense activity."¹⁸¹

Under § 342(d), the clerk must give all creditors notice within ten days of the petition date if the presumption of abuse arises.¹⁸² The United States Trustee's office must also file a statement of whether the presumption of abuse has arisen under the means test within ten days of the § 341 meeting.¹⁸³ Further, if the presumption has been triggered, the United States Trustee's office is required to either file a motion to dismiss or convert or file "a statement setting forth the reasons [it] does not consider such a motion to be appropriate" within thirty days from the date of its statement.¹⁸⁴

Once a presumption of abuse has arisen, that presumption will be difficult to rebut. Subsection 707(b)(2)(B) provides that the presumption of abuse "may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no rea-

178. *See id.* (to be codified at 11 U.S.C. § 707(b)(2)(A)(iii)).

179. *See id.* (to be codified at 11 U.S.C. § 707(b)(2)(A)(iii)(I)-(II)).

180. *Id.* (to be codified at 11 U.S.C. § 707(b)(2)(A)(iv)).

181. *Id.* (to be codified at 11 U.S.C. § 707(b)(2)(D)).

182. *Id.* § 102(d), 119 Stat. at 33 (to be codified at 11 U.S.C. § 342(d)). It is unclear how this will work in practice. The debtor must file a statement with their petition with the means test calculations. *See id.* § 102(a)(2)(C), 119 Stat. at 29 (to be codified at 11 U.S.C. § 707(b)(2)(C)). The question remains, will each clerk's office have to review each petition filed to determine if the debtor has properly applied the various standards?

183. *Id.* § 102(c), 119 Stat. at 32 (to be codified at 11 U.S.C. § 704(b)(1)(A)).

184. *Id.* (to be codified at 11 U.S.C. § 704(b)(2)).

sonable alternative.”¹⁸⁵ If a debtor wishes to proceed under this subsection, he or she must document those additional expenses, provide a detailed explanation of the circumstances, and attest to those matters under oath.¹⁸⁶ Even if a debtor does not trigger the means test, a motion to dismiss or convert may be filed on the basis that the totality of the circumstances surrounding the debtor’s filing is “an abuse” of Chapter 7.¹⁸⁷

Subsections 707(b)(1), (b)(6) and (b)(7) govern who may file a motion to dismiss or convert based on abuse of Chapter 7, whether under the means test or otherwise. Subsection 707(b)(1) grants the court, the United States Trustee, the bankruptcy trustee, or “any party in interest” (i.e., creditors), the right to file a motion to dismiss or convert for abuse of the provisions of Chapter 7.¹⁸⁸ In considering the motion, a court may not consider “whether a debtor has made, or continues to make, charitable contributions [up to fifteen percent of gross income] to any qualified religious or charitable entity or organization.”¹⁸⁹

There is an important caveat to this discussion. Subsections 707(b)(6) and (b)(7) establish that only the court or the United States Trustee, and not creditors, may file a motion to dismiss or convert the case when the debtor’s income is below the state median and may only do so under the totality of the circumstances test and not based on the means test.¹⁹⁰ Further, the Chapter 7 trustee and creditors do not have the right to bring an abuse motion regardless of the theory, against a debtor whose income is below the state median.¹⁹¹ In other words, the means test does not apply if the debtor’s income is below the state median income.

185. *Id.* § 102(a)(2)(C), 119 Stat. at 29 (to be codified at 11 U.S.C. § 707(b)(2)(B)(i)).

186. *See id.* (to be codified at 11 U.S.C. § 707(b)(2)(B)(ii)).

187. *See id.* § 102(a)(2)(B)(i)(I)-(III), 119 Stat. at 27 (to be codified at 11 U.S.C. § 707(b)(1)). Prior law required that a motion to dismiss or convert could be brought only by the court or the United States Trustee if the totality of the circumstances established a “substantial abuse” of Chapter 7. *See* 11 U.S.C. § 707(b). It remains to be seen how the courts will interpret “abuse” versus “substantial abuse.” One related section, § 707(a), is unchanged by the Act. *See* 11 U.S.C. § 707(a). That section allows the court to dismiss a Chapter 7 case for “cause” including delay or failure to pay fees. *See id.*

188. *See* Pub. L. No. 109-8, § 102(a)(2)(B)(i)(I)-(III), 119 Stat. 23, 27 (to be codified at 11 U.S.C. § 707(b)(1)).

189. 11 U.S.C. § 707(b).

190. *See* Pub. L. No. 109-8, § 102(a)(2)(C), 119 Stat. 23, 31 (to be codified at 11 U.S.C. § 707(b)(6)).

191. *Id.* (to be codified at 11 U.S.C. § 707(b)(7)(A)).

In addition, a debtor faced with a motion to dismiss or convert based on abuse must consent for the case to be converted to Chapter 11 or 13.¹⁹²

F. New and Revised Provisions Related to Exemptions

The Act makes changes to the exemptions available to the debtor. Virginia is an “opt-out” state, which means that it has not adopted the federal bankruptcy exemptions.¹⁹³ With a few exceptions, Virginia debtors may exempt property protected by Virginia law and by federal nonbankruptcy law.¹⁹⁴ Under the Act, property exempt in bankruptcy for Virginia debtors is found at § 522(b)(3).¹⁹⁵

The Act changes the method of determining the debtor’s domicile for exemptions purposes. Subsection 522(b)(3)(A) provides that the law applicable is the place where the debtor’s domicile has been located for the 730 days immediately preceding the date of the filing of the petition.¹⁹⁶ The subsection provides that:

[I]f the debtor’s domicile has not been located at a single State for such 730-day period, the [debtor’s domicile is] the place in which the debtor’s domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place.¹⁹⁷

This subsection will create many more situations where Virginia lawyers will have to look at the exemption laws of other states.

Assuming the Virginia exemptions will apply to the debtor, the Act still adds some property to that protected from the creditors. The exemption for property owned as a tenant by the entirety, to the extent such property is exempt from creditor process under nonbankruptcy law, remains.¹⁹⁸ The major change is the addition of an exemption for “retirement funds to the extent that those

192. *Id.* § 102(a)(2)(B)(II), 119 Stat. at 27 (to be codified at 11 U.S.C. § 707(b)(1)).

193. *See* VA. CODE ANN. § 34-3.1 (Repl. Vol. 2005).

194. *See* Pub. L. No. 109-8, § 224(a)(1)(A)(iv)-(B), 119 Stat. 23, 62–63 (to be codified at 11 U.S.C. § 522(b)(2)-(3)).

195. *See id.*

196. *Id.* § 307(1)(A), 119 Stat. at 81 (to be codified at 11 U.S.C. § 522(b)(3)(A)).

197. *Id.* § 307(1)(B), 119 Stat. at 81 (to be codified at 11 U.S.C. § 522(b)(3)(A)).

198. *Id.* § 308, 119 Stat. at 81 (to be codified at 11 U.S.C. § 522(a)(3)(B)).

funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.¹⁹⁹ This addition should remove some of the confusion surrounding the application of Virginia Code section 34-34.²⁰⁰ The Act does place an upper limit on the exemption for “assets in individual retirement accounts described in section 408 [traditional IRAs] or 408A [Roth IRAs]” in § 522(n).²⁰¹ The aggregate value of such assets is capped at \$1 million in an individual case.²⁰² The subsection, however, states that “such amount may be increased if the interests of justice so require.”²⁰³

In some situations, a debtor is entitled to avoid a lien that impairs his or her exemptions. New § 522(f)(4)(A) defines the term “household goods” for determining when a debtor may avoid a nonpossessory, nonpurchase-money security interest that impairs an exemption.²⁰⁴ The definition includes one radio, one television, one VCR, and one personal computer.²⁰⁵ It excludes works of art unless by the debtor or a relative of the debtor, electronic entertainment equipment with a fair market value of more than \$500, “items acquired as antiques” with a fair market value of more than \$500, jewelry with a fair market value of more than \$500 other than wedding rings, and motor vehicles including tractors or lawn tractors, boats, watercraft, or aircraft.²⁰⁶

New § 522(o) limits a debtor’s exemptions in certain types of real or personal property, including property protected by the homestead exemption, when the debtor has transferred “any portion of any property” in a ten-year period prior to bankruptcy with the “intent to hinder, delay, or defraud a creditor” and the debtor could not exempt the property transferred.²⁰⁷

199. *Id.* § 224(a)(1)(A)(iii), 119 Stat. at 63 (to be codified at 11 U.S.C. § 522(b)(2)(C)).

200. *See* VA. CODE ANN. § 34-34 (Repl. Vol. 2005).

201. Pub. L. No. 109-8, § 224(e)(1), 119 Stat. 23, 65 (to be codified at 11 U.S.C. § 522(n)).

202. *Id.*

203. *Id.*

204. *Id.* § 313(a), 119 Stat. at 87 (to be codified at 11 U.S.C. § 522(f)(4)(A)).

205. *Id.* (to be codified at 11 U.S.C. § 522(f)(4)(A)(iv)-(vi), (xv)).

206. *Id.* (to be codified at 11 U.S.C. § 522(f)(4)(B)(i)-(v)).

207. *Id.* § 308(2), 119 Stat. at 81-82 (to be codified at 11 U.S.C. § 522(o)). This amendment is effective as of the date of enactment and applies to cases commenced on or after the date of enactment. *See id.* § 1501(b)(2), 119 Stat. at 216.

New §§ 522(p) and (q) apply to limit the debtor's ability to elect to exempt under state law certain types of interests in real property that exceed \$125,000 acquired by the debtor in the 1215-day period before filing the bankruptcy petition.²⁰⁸ These subsections will not apply in Virginia as Virginia residents must take the Virginia exemptions and cannot elect to do so, and the Virginia exemption is limited to \$5000.²⁰⁹

In addition, the Act adds certain items to the list of property that is not included in the bankruptcy estate. Although, these are not technically exemptions, the result is essentially the same because the trustee cannot administer those assets for the creditors.²¹⁰ New §§ 541(b)(5) and (b)(6) define certain contributions to education, individual retirement accounts, and pre-paid tuition plans as not being property of the estate.²¹¹ Subsection 541(b)(7) defines certain wage withholdings and contributions to retirement plans or health insurance as not being property of the estate.²¹²

G. *New and Revised Provisions Related to Reaffirmation Agreements*

Changes to § 524 make extensive alterations to the process whereby a debtor agrees to reaffirm debts. The majority of these changes are found in § 524(k).²¹³ The subsection requires extensive disclosures that outline the rights of the debtor and specify the amount of the debt being reaffirmed, any additional charges or costs imposed on the debtor, the annual percentage rate, the simple interest rate applicable to the amount reaffirmed, a statement of the repayment schedule (if elected by the creditor), a description of the debtor's repayment obligations with some specificity, the right to consult an attorney, the need to file the reaf-

208. See *id.* § 332(a), 119 Stat. at 96–97 (to be codified at 11 U.S.C. § 522(p)-(q)). New subsections (p) and (q) are effective as of the date of enactment and apply to cases commenced on or after the date of enactment. See *id.* § 1501(b)(2), 119 Stat. at 216.

209. See VA. CODE ANN. § 34-4 (Repl. Vol. 2005).

210. On the other hand, property that is not part of the bankruptcy estate may not be protected by the automatic stay.

211. See Pub. L. No. 109-8, § 225(a)(1), 119 Stat. 23, 65–66 (to be codified at 11 U.S.C. § 541(b)(5)-(6)).

212. See *id.* § 323, 119 Stat. at 97–98 (to be codified at 11 U.S.C. § 541(b)(7)).

213. See *id.* § 203(a), 119 Stat. at 43–49 (to be codified at 11 U.S.C. § 524(k)).

firmation with the court before it becomes effective, and the right to rescind the reaffirmation within sixty days of the filing of the agreement with the court.²¹⁴ The subsection sets out in extensive detail the required language.²¹⁵

As under prior law, counsel for debtors must certify that they have counseled their clients regarding the reaffirmation agreement.²¹⁶ If a debtor's monthly income is less than the debtor's monthly expenses shown on the debtor's signed statement in favor of the agreement, the reaffirmation agreement is presumed to be an undue hardship for the debtor.²¹⁷ In these cases, the debtor's attorney must certify that the attorney believes that the debtor can make the payment.²¹⁸ The debtor must file a statement in support of the reaffirmation agreement that includes statements that the debtor can afford to make the required payments and sets out the debtor's income and expenses.²¹⁹ The court must approve reaffirmation agreements where a presumption of undue hardship exists in a hearing held before confirmation.²²⁰ The debtor may rebut the presumption of undue hardship by presenting a written statement showing other sources of funds.²²¹

H. *New and Revised Provisions Related to Priorities*

Prior to the Act, administrative expenses received first priority for payment under § 507(a).²²² The Act places "domestic support obligations" in first position and demotes administrative expenses

214. *See id.* The specifics of the required disclosures are contained in § 524(k)(3).

215. *See id.* § 203(a)(2), 119 Stat. at 45–47 (to be codified at 11 U.S.C. § 524(k)(3)(J)).

216. *See id.* § 203(a)(2), 119 Stat. at 47 (to be codified at 11 U.S.C. § 524(k)(5)).

217. *Id.* § 203(a)(2), 119 Stat. at 48 (to be codified at 11 U.S.C. § 524(m)(1)).

218. *Id.* § 203(a)(2), 119 Stat. at 47 (to be codified at 11 U.S.C. § 524(k)(5)(B)). We do not believe that many attorneys will be likely or willing to make such certifications.

219. *See id.* § 203(a)(2), 119 Stat. at 47–48 (to be codified at 11 U.S.C. § 524(k)(6)(A)).

220. *See id.* § 203(a)(2), 119 Stat. at 48–49 (to be codified at 11 U.S.C. § 524(m)(1)). This undue hardship determination does not apply to agreements where the creditor is a credit union under § 524(m)(2). *See id.* § 203(a)(2), 119 Stat. at 49 (to be codified at 11 U.S.C. § 524(m)(2)). If a debtor is not represented by an attorney, all of his or her reaffirmation agreements must be approved by the court. *See id.* § 203(a)(2), 119 Stat. at 48 (to be codified at 11 U.S.C. § 524(7)).

221. *Id.* § 203(a)(2), 119 Stat. at 49 (to be codified at 11 U.S.C. § 524(m)(1)).

222. *See* 11 U.S.C. § 507(a). What exactly is an "administrative expense" is defined by case law, but essentially it is any expense that adds value to the estate or is incurred by the estate in the course of operating its business. *See, e.g.* Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 3 (2000).

to second rank.²²³ The one caveat is that the administrative expenses incurred by a trustee, including the trustee's commission, are to be paid ahead of the support obligation, if the trustee recovers assets that will be used to pay the support obligation.²²⁴

The amount of wage claims that receive priority has been increased from \$4925 to \$10,000.²²⁵ Creditors will also be able to make a claim for wages earned in the 180 days before filing, an increase from the ninety days allowed prior to the Act.²²⁶ Wage claims have fourth priority under the Act.²²⁷ Fifth priority claims, for employee benefits, have also been increased from \$4925 to \$10,000.²²⁸ Subsection 507(a)(8), giving eighth priority to tax claims, has been revised in a number of minor ways, including extending the time period entitled to priority when there was a stay of collection.²²⁹ Finally, claims for death or personal injury resulting from drunken driving or boating "if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance" are a tenth priority.²³⁰

I. New and Revised Provisions Regarding the Discharge

The Act modifies the dischargeability of certain debts and establishes new requirements that debtors must meet before they receive a discharge. Under § 523(a)(2)(C), consumer debts aggregating more than \$500 for "luxury goods or services" incurred by an individual on or within ninety days before the beginning of the case are presumed to be nondischargeable.²³¹ The old limit was \$1225 within sixty days.²³² Also, the same subsection is modified

223. See Pub. L. No. 109-8, § 212(3), (9), 119 Stat. 23, 51-52 (to be codified at 11 U.S.C. § 507(a)(1)(A)-(B), (a)(2)).

224. *Id.* § 212(9), 119 Stat. at 51-52 (to be codified at 11 U.S.C. § 507(a)(1)(C)).

225. See *id.* § 1401, 119 Stat. at 214 (to be codified at 11 U.S.C. § 507(a)(4)). This amendment is effective on the date of enactment, but only applies to cases commenced on or after the date of enactment. *Id.* § 1406 (b)(1), 119 Stat. at 216.

226. See *id.* § 1401(1), 119 Stat. at 214 (to be codified at 11 U.S.C. § 507(a)(4)).

227. See *id.* § 212(5)(A), 119 Stat. at 51 (to be codified at 11 U.S.C. § 507(a)(4)).

228. See *id.* § 1401(2), 119 Stat. at 214 (to be codified at 11 U.S.C. § 507(a)(5)). This amendment is effective on the date of enactment, but only applies to cases commenced on or after the date of enactment. See *id.* § 1406(a)-(b)(1), 119 Stat. at 215-16.

229. See *id.* § 705, 119 Stat. at 126 (to be codified at 11 U.S.C. § 507(a)(8)(A)).

230. *Id.* § 223, 119 Stat. at 62 (to be codified at 11 U.S.C. § 507(a)(10)).

231. *Id.* § 310, 119 Stat. at 84 (to be codified at 11 U.S.C. § 523(a)(2)(C)(i)(I)).

232. See 11 U.S.C. § 523(a)(2)(C).

so that cash advances aggregating more than \$750 on or within seventy days of the beginning of the case are presumed to be non-dischargeable.²³³ The old limit was also \$1225 within sixty days.²³⁴

Revisions to § 523(a)(8) change the types of student loans that cannot be discharged. Subsection 523(a)(8) now states that any educational loan as defined in the Internal Revenue Code are nondischargeable.²³⁵ This means that loans from private lenders will in most cases be nondischargeable.

Under new § 523(a)(14A), the Act makes debts incurred to pay taxes to any governmental unit, other than the United States, nondischargeable to the same extent as if they were federal taxes.²³⁶

The Act extends the time between Chapter 7 discharges from six to eight years by modifying § 727(a)(8).²³⁷ New § 1328(f) provides that the court shall not grant a Chapter 13 discharge when the debtor has received a discharge in a Chapter 7, 11, or 12 case "during the 4-year period preceding the date of" the commencement of the bankruptcy case.²³⁸ In addition, the debtor shall not receive a discharge if he or she has received a discharge in a Chapter 13 case during the two years preceding the date of the commencement of the new Chapter 13 case.²³⁹

New § 727(a)(11) states that a debtor may not receive a discharge if the debtor does not complete, after filing the petition, "an instructional course concerning personal financial management."²⁴⁰ There are exceptions to this requirement for debtors who live in districts where there are inadequate courses for debtors, incapacitated debtors, disabled debtors, and debtors on active duty in a military combat zone.²⁴¹ New § 1328(g) mirrors §

233. Pub. L. No. 109-8, § 310, 119 Stat. 23, 84 (to be codified at 11 U.S.C. § 523(a)(2)(C)(i)(II)).

234. See 11 U.S.C. § 523(a)(2)(C).

235. See *id.* § 220, 119 Stat. at 59 (to be codified at 11 U.S.C. § 523(a)(8)(B)).

236. See *id.* § 314(a), 119 Stat. at 88 (to be codified at 11 U.S.C. § 523(a)(14A)).

237. See *id.* § 312(1), 119 Stat. at 87 (to be codified at 11 U.S.C. § 727(a)(8)).

238. *Id.* § 312(2), 119 Stat. at 87 (to be codified at 11 U.S.C. § 1328(f)(1)).

239. See *id.* (to be codified at 11 U.S.C. § 1328(f)(2)).

240. *Id.* § 106(b)(3), 119 Stat. at 38 (to be codified at 11 U.S.C. § 727(a)(11)).

241. See *id.* § 106(a), (b)(3), 119 Stat. at 37-38 (to be codified at 11 U.S.C. §§ 109(h)(4), 727(a)(11)).

727(a)(11) and requires completion of such a course for Chapter 13 debtors.²⁴²

Prior to the Act, debtors who completed Chapter 13 had more types of debts discharged than debtors who received a Chapter 7 discharge.²⁴³ This “super discharge” was considered a trade-off to debtors who were willing to repay a portion of their debts and an incentive to file for Chapter 13 as opposed to Chapter 7. The Act substantially reduces the types of debts that are included in a Chapter 13 discharge. The Act amends § 1328 and adds the following types of debts to those that are not discharged by Chapter 13: 1) debts for trust fund taxes under § 507(a)(8)(C); 2) unfiled, late-filed, and fraudulent tax returns under § 523(a)(1); 3) money or property obtained by fraud under § 523(a)(2); 4) debts that were not listed or scheduled in the bankruptcy case in time to give the creditor the right to file a proof of claim under § 523(a)(3); 5) debts for larceny, embezzlement, or breach of fiduciary duty under § 523(a)(4); 6) “restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual” under § 1328(a)(4).²⁴⁴

Receiving a Chapter 13 discharge is also contingent on the debtor certifying that he or she has paid all amounts payable towards a “domestic support obligation.”²⁴⁵ This includes both pre-petition obligations, to the extent provided for in the plan, and post-petition obligations.²⁴⁶

J. Other New and Revised Consumer Provisions

Subsection 341(c) has been modified to permit creditors to appear at § 341 meetings through nonattorney representatives.²⁴⁷ The amended subsection states, in part, that:

242. See *id.* § 106(c), 119 Stat. at 38 (to be codified at 11 U.S.C. § 1328(g)(1)).

243. See A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1729 n.5 (2004).

244. See Pub. L. No. 109-8, § 314(b), 119 Stat. 23, 88 (to be codified at 11 U.S.C. § 1328(a)).

245. See *id.* § 213(11), 119 Stat. at 53–54 (to be codified at 11 U.S.C. § 1328(a)).

246. See *id.*

247. See *id.* § 413, 119 Stat. at 107 (to be codified at 11 U.S.C. § 341(c)).

Notwithstanding any local court rule, provision of a State constitution, any otherwise applicable nonbankruptcy law, or any other requirement that representation at the meeting of creditors under subsection (a) be by an attorney, a creditor holding a consumer debt or any representative of the creditor (which may include an entity or an employee of an entity and may be a representative for more than 1 creditor) shall be permitted to appear at and participate in the meeting of creditors in a case under chapter 7 or 13, either alone or in conjunction with an attorney for the creditor. Nothing in this subsection shall be construed to require any creditor to be represented by an attorney at any meeting of creditors.²⁴⁸

Subsection 365(b)(1)(A) has been modified so that a trustee is not required to cure nonmonetary defaults in real property leases before assuming those leases if it would be impossible for the trustee to do so.²⁴⁹ If the default is the failure to operate a business under a nonresidential lease, then that default can be cured by operating at and after the time of assumption of the lease.²⁵⁰ Defaults based on failure to operate can be cured by paying actual pecuniary losses.²⁵¹

Subsection 365(p) sets out rules for what happens when a lease for personal property is rejected or not timely assumed.²⁵² Under § 365(p)(1), if the lease is rejected or not timely assumed, the property “is no longer property of the estate” and the automatic stay is lifted as to that property.²⁵³ Subsection 365(p)(2) permits a Chapter 7 debtor to assume the lease, with the lessor’s permission, and mandates that the lease will be the responsibility of the debtor and not the estate under those circumstances.²⁵⁴

IV. BUSINESS PROVISIONS

A. *New and Revised Provisions Related to Avoidance Actions*

The Act contains a number of changes to the Code in the area of avoidance actions. While some of these new provisions will ap-

248. *Id.*

249. *See id.* § 328(a)(1)(A), 119 Stat. at 100 (to be codified at 11 U.S.C. § 365(b)(1)(A)).

250. *See id.*

251. *See id.*

252. *See id.* § 309(b), 119 Stat. at 82 (to be codified at 11 U.S.C. § 365(p)(1)).

253. *Id.*

254. *See id.* (to be codified at 11 U.S.C. § 365(p)(2)).

ply to cases where the debtor is an individual, they have most of their application in business cases.

New § 546(c)(1) establishes a new right of reclamation.²⁵⁵ Under that subsection, the trustee's avoidance powers are subject to the right of a seller to reclaim goods received by the debtor within forty-five days of the bankruptcy filing.²⁵⁶ Subsections 546(c)(1)(A) and (B) set out the notice requirements that the seller must comply with in order to be able to exercise the right.²⁵⁷ The subsection, however, expressly provides that if the seller fails to comply with the notice requirements, it may still seek an administrative claim.²⁵⁸

New § 546(i) provides protection for warehouseman's liens.²⁵⁹ The subsection provides that a "trustee may not avoid a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods."²⁶⁰

The Act adds new § 547(c)(9), which establishes that a transfer of less than \$5000 is not recoverable as a preference in "a case filed by a debtor whose debts are not primarily consumer debts."²⁶¹ This subsection should completely eliminate small preference actions in business Chapter 11 cases.

An important amendment alters § 547(c)(2), the "ordinary course of business" defense to preference actions.²⁶² The amended subsection provides that a transfer is not a preference if it was incurred in the "ordinary course of business or financial affairs of the debtor and the transferee" or "made according to ordinary business terms."²⁶³ Prior to the Act, the defense required proof that the transfer was both made in the ordinary course of the relationship between the debtor and the transferee (a subjective test) and that the transfer was consistent with ordinary business

255. See *id.* § 1227(a), 119 Stat. at 199–200 (to be codified at 11 U.S.C. § 546(c)(1)).

256. See *id.*

257. See *id.* (to be codified at 11 U.S.C. § 546(c)(1)(A)-(B)).

258. See *id.* (to be codified at 11 U.S.C. § 546(c)(2)).

259. See *id.* § 406(3), 119 Stat. at 105–06 (to be codified at 11 U.S.C. § 546(i)(1)).

260. *Id.*

261. *Id.* § 409(3), 119 Stat. at 106 (to be codified at 11 U.S.C. § 547(c)(9)).

262. See *id.* § 409(1), 119 Stat. at 106 (to be codified at 11 U.S.C. § 547(c)(2)).

263. *Id.* (to be codified at 11 U.S.C. § 547(c)(2)(A)-(B)).

terms in the debtor's industry (an objective test).²⁶⁴ This simple change will greatly strengthen the hand of defendants in preference actions.

The Act alters 28 U.S.C. § 1409(b) to provide that any action, including preference actions, brought by the trustee or debtor-in-possession seeking a judgment of less than \$10,000, must be brought in the district court where the defendant resides.²⁶⁵ This limitation does not apply to actions against insiders.²⁶⁶ In cases involving insiders, only actions seeking less than \$1000 must be brought in the defendant's home district.²⁶⁷ This amendment also provides that actions on consumer debts of less than \$15,000, increased from \$5000, must be brought in the defendant's home district.²⁶⁸

Two amendments synchronize deadlines for creditors to take security interests in property without being subject to an avoidance action. Amended 11 U.S.C. § 547(c)(3) gives creditors thirty days from the debtor taking possession of property to perfect a security interest in that property.²⁶⁹ The old deadline was twenty days.²⁷⁰ Subsection 547(e)(2), which defines "transfer" for the purposes of the section, is amended by extending the "relation-back" period for perfecting a security interest from ten days to thirty days.²⁷¹

Continuing the heightened protections for creditors owed "domestic support obligations," § 547(c)(7) exempts any bona fide payment of a debt for such obligations from being recovered in a preference action.²⁷²

Under new § 547(h), any payments made to a creditor through an "alternative repayment schedule between the debtor and any

264. See *Advo-System, Inc. v. Maxway Corp.*, 37 F.3d 1044, 1047, 1050 (4th Cir. 1994).

265. See Pub. L. No. 109-8, § 410, 119 Stat. 23, 106 (to be codified at 28 U.S.C. § 1409(b)).

266. See *id.*

267. See 28 U.S.C. § 1409(b).

268. See Pub. L. No. 109-8, § 410, 119 Stat. at 106 (to be codified at 28 U.S.C. § 1409(b)).

269. See *id.* § 1222, 119 Stat. at 196 (to be codified at 11 U.S.C. § 547(c)(3)(B)).

270. See 11 U.S.C. § 547(c)(3)(B).

271. See Pub. L. No. 109-8, § 403, 119 Stat. 23, 104 (to be codified at 11 U.S.C. § 547(e)(2)(A)-(C)).

272. See *id.* § 217, 119 Stat. at 55 (to be codified at 11 U.S.C. § 547(c)(7)).

creditor of the debtor created by an approved nonprofit budgeting and credit counseling agency” are not avoidable.²⁷³

B. *New and Revised Provisions Regarding Chapter 11*

Section 1102 has been amended to add several new provisions regarding creditors and equity security holders committees. New § 1102(a)(4) has been added and confirms the court’s authority to order the United States Trustee to change the membership of a committee.²⁷⁴ The same subsection also permits the court to order the United States Trustee to add a creditor that is a small business to the creditor’s committee if the court determines that the creditor holds a claim that is disproportionately large when compared to its own annual gross revenue.²⁷⁵ As committee members are usually drawn from the creditors holding the claims with the highest dollar value, this provision will permit a small business that holds a claim that is not large when compared to larger creditors, but is particularly significant to the small business, to be appointed to a committee. New § 1102(b)(3) sets forth particular duties for committees, including the obligation to provide information to creditors that are not on the committee and to “solicit and receive comments” from the other creditors.²⁷⁶

The Act makes some revisions to § 1112(b) regarding the dismissal or conversion of Chapter 11 cases.²⁷⁷ Essentially, the changes add a list of examples of what continues “cause” to dismiss or convert a Chapter 11 case.²⁷⁸ Subsection 1112(b)(2) now provides that a court may deny a motion to dismiss or convert based on the objection of the debtor or another party but must find “unusual circumstances specifically identified by the court that establish that such relief is not in the best interests of creditors and the estate” in order to do so.²⁷⁹ The party objecting must establish that there is a reasonable likelihood that a plan will be timely confirmed and, if the motion is based on a failure of the debtor, that there is a reasonable justification for the failure and

273. See *id.* § 201(b), 119 Stat. at 42 (to be codified at 11 U.S.C. § 547(h)).

274. See *id.* § 405(a), 119 Stat. at 105 (to be codified at 11 U.S.C. § 1102(a)(4)).

275. See *id.*

276. See *id.* § 405(b), 119 Stat. at 105 (to be codified at 11 U.S.C. § 1102(b)(3)).

277. See *id.* § 442(a), 119 Stat. at 115–16 (to be codified at 11 U.S.C. § 1112(b)).

278. See *id.* (to be codified at 11 U.S.C. § 1112(b)(4)).

279. See *id.* § 442(a), 119 Stat. at 115 (to be codified at 11 U.S.C. § 1112(b)(2)).

the failure will be cured within a reasonable time.²⁸⁰ The court is also authorized to appoint a trustee or examiner in lieu of dismissing or converting a case.²⁸¹

Revisions to § 1121 limit the practice of extending the exclusivity period when only the debtor can file and solicit acceptances of a Chapter 11 plan.²⁸² The debtor retains the exclusive right to file a plan for the first 120 days and the exclusive right to solicit acceptances during the first 180 days after the date the case begins.²⁸³ The changes from the Act, however, prevent the court from granting extensions to the 120-day period past eighteen months and to the 180-day period past twenty months after the case begins.²⁸⁴ Extensions prior to that period can still be granted "for cause" as under the old law.²⁸⁵

Finally, the Act requires the Judicial Conference to establish a Bankruptcy Rule and forms for Chapter 11 debtors making required disclosures regarding the "value, operations, and profitability of any closely held corporation, partnership, or of any other entity in which the debtor holds a substantial or controlling interest."²⁸⁶

C. New "Small Business" Provisions

The Act adds a number of specialized provisions regarding "small business" bankruptcies.²⁸⁷ Included among these changes is a new definition of "small business debtor."²⁸⁸ A "small business debtor" is "a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under

280. *See id.* (to be codified at 11 U.S.C. § 1112(b)(2)(A)-(B)).

281. *See id.* § 442(b)(3), 119 Stat. at 116 (to be codified at 11 U.S.C. § 1104(a)(3)).

282. *See id.* § 411(2), 119 Stat. at 106-07 (to be codified at 11 U.S.C. § 1121(d)(2)(A)-(B)).

283. *See id.*

284. *See id.*

285. *See* 11 U.S.C. § 1121(d).

286. *See* Pub. L. No. 109-8, § 419(a), 119 Stat. 23, 109; *supra* note 3 and accompanying text.

287. Title IV(B) of the Act, which is called "Small Business Bankruptcy Provisions," actually contains a number of provisions that apply in all cases, not just in small business cases. The portions of the Act discussed in this section of the article only discuss the new provisions relevant to small business cases. Other portions of Title IV(B) of the Act are discussed elsewhere in the Article.

288. *See* Pub. L. No. 109-8, § 432(a), 119 Stat. 23, 110 (to be codified at 11 U.S.C. § 101(51D)).

this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto).²⁸⁹ A small business debtor must have no more than \$2 million in debt, excluding debts owed to affiliates or insiders.²⁹⁰ Further, if an unsecured creditor's committee is appointed, that debtor is not a small business debtor unless the court determines that the committee "is not sufficiently active and representative to provide effective oversight of the debtor."²⁹¹

The most significant change alters the method of approving a Chapter 11 plan for a small business debtor.²⁹² These changes presumably simplify the process and decrease the number of hearings, which should lower the cost of proceedings. Changes to § 1125(f) permit the court to waive the filing of a separate disclosure statement if there is sufficient information in the plan itself.²⁹³ The subsection also permits the plan to be submitted on standard forms, which has been the practice in Chapter 13 cases.²⁹⁴ The Act mandates that the Judicial Conference develop these forms within a reasonable time after passage.²⁹⁵ Finally, the Act permits a disclosure statement to be conditionally approved and permits a hearing on the approval of the disclosure statement to be combined with the hearing on the approval of the plan itself.²⁹⁶

Under new § 308, a small business debtor must file periodic reports setting out certain financial information, including the debtor's profitability.²⁹⁷ The reports must also include approximations of projected cash receipts and disbursements, comparisons of actual receipts and disbursements with previous projections, statements that the debtor is complying with the Bankruptcy Rules, various government filings, including taxes, and paying

289. *Id.* (to be codified at 11 U.S.C. § 101(51D)(A)).

290. *Id.* A group of affiliated debtors that has a total of more than \$2 million is excluded from the definition of "small business debtor." *Id.* (to be codified at 11 U.S.C. § 101(51D)(B)).

291. *Id.* (to be codified at 11 U.S.C. § 101(51D)(A)).

292. *See id.* § 431, 119 Stat. at 109-10 (to be codified at 11 U.S.C. § 1125).

293. *See id.* § 431(2), 119 Stat. at 110 (to be codified at 11 U.S.C. § 1125(f)(1)).

294. *See id.* (to be codified at 11 U.S.C. § 1125(f)(2)).

295. *See id.* § 433, 119 Stat. 110-11; *supra* note 3 and accompanying text.

296. *See id.* § 431(2), 119 Stat. at 110 (to be codified at 11 U.S.C. § 1125(f)(3)(A), (C)).

297. *See id.* § 434(a)(1), 119 Stat. at 111 (to be codified at 11 U.S.C. § 308(b)).

taxes when due.²⁹⁸ The Act requires the Judicial Conference to prescribe the forms to be used under this section.²⁹⁹

New § 362(n) limits the protection of the automatic stay to repeat small business filers.³⁰⁰ Essentially, the subsection states that the automatic stay will not apply to a small business debtor who had a case dismissed within the previous two years or confirmed a plan within two years of the new case.³⁰¹ The stay would also not apply to an entity that acquired substantially all of the assets of a small business debtor that would otherwise be subject to the limitation.³⁰² There are exceptions, however, such as when the debtor can establish that the filing of the current bankruptcy case was due to circumstances beyond the debtors control and that the court will confirm a feasible plan (not a plan of liquidation) within a reasonable period of time.³⁰³

New § 1116 establishes a list of duties for trustees or debtors-in-possession in small business cases, in addition to the typical obligations of a debtor.³⁰⁴ Among the duties are the obligations to include certain financial statements with a voluntary bankruptcy filing, to maintain insurance, and to permit the United States Trustee's office to inspect the debtor's books, records, and premises on reasonable notice.³⁰⁵ As the definition of "small business debtor" is vague,³⁰⁶ counsel should err on the side of caution and be prepared to comply with § 1116 in doubtful cases.

New § 1121(e) gives a small business debtor an exclusive period of 180 days to file a plan but requires a plan be filed within 300 days.³⁰⁷ Extending this time period requires the debtor to show, by a preponderance of the evidence, that it is more likely than not

298. *Id.* (to be codified at 11 U.S.C. § 308(b)(2)-(4)).

299. *See id.* § 435(a), 119 Stat. at 111-12; *supra* note 3 and accompanying text. The section does not become effective until sixty days after rules are prescribed to establish the forms to be used to submit the required information. *See* Pub. L. No. 109-8, § 434(b), 119 Stat. 23, 111.

300. *See* Pub. L. No. 109-8, § 441(2), 119 Stat. 23, 114-15 (to be codified at 11 U.S.C. § 362(n)(1)).

301. *See id.* (to be codified at 11 U.S.C. § 362(n)(1)(B)-(C)).

302. *See id.* (to be codified at 11 U.S.C. § 362(n)(1)(D)).

303. *See id.* (to be codified at 11 U.S.C. § 362(n)(2)(B)).

304. *See id.* § 436(a), 119 Stat. at 112-13 (to be codified at 11 U.S.C. § 1116).

305. *See id.* (to be codified at 11 U.S.C. § 1116(1), (5), (7)).

306. *See supra* note 289 and accompanying text.

307. *See* Pub. L. No. 109-8, § 437, 119 Stat. 23, 113 (to be codified at 11 U.S.C. § 1121(e)(1)-(2)).

that the court will confirm a plan within a reasonable period of time, that a new deadline is imposed at the time the extension is granted, and that the order granting the extension is signed before the existing deadline has passed.³⁰⁸ New § 1129(e) provides that the plan of a small business debtor must be confirmed "not later than 45 days after the plan is filed" unless the time is extended by meeting the same standards as are required for § 1121(e)(3).³⁰⁹

Finally, changes to 28 U.S.C. § 586(a) require the United States Trustee's offices to hold a meeting with a small business debtor before the § 341 meeting with the creditors to evaluate the debtor's business plan and financial strength and to inform the debtor of the various filing requirements.³¹⁰ That subsection has also been changed to require the United States Trustee's office to move for conversion or dismissal of the case promptly under § 1112 if warranted.³¹¹

D. *Other Business Provisions of Interest*

Amendments to 11 U.S.C. § 365(d) grant the trustee or the debtor-in-possession additional time to assume a lease of nonresidential real property that is deemed rejected.³¹² The amendments provide that such a lease is rejected unless the trustee assumes or rejects the lease within the earlier of 120 days from the beginning of the case or the time an order confirming a plan is entered.³¹³ Prior law permitted the trustee sixty days.³¹⁴ The Act, however, limits the duration of extensions the trustee may obtain to this period.³¹⁵ The subsection permits the court to extend this period, "for cause," prior to its expiration, for ninety days on the motion of the trustee or lessor.³¹⁶ Any extensions beyond the first, can

308. *Id.* (to be codified at 11 U.S.C. § 1121(e)(3)).

309. *Id.* § 438, 119 Stat. at 113 (to be codified at 11 U.S.C. § 1129(e)).

310. *See id.* § 439(4), 119 Stat. at 114 (to be codified at 28 U.S.C. § 586(a)(7)(A)).

311. *See id.* (to be codified at 28 U.S.C. § 586(a)(8)).

312. *See id.* § 404(a), 119 Stat. at 104-05 (to be codified at 11 U.S.C. § 365(d)(4)(A)-(B)).

313. *See id.* (to be codified at 11 U.S.C. § 365(d)(4)(A)).

314. *See* 11 U.S.C. § 365(d)(4).

315. *See* Pub. L. No. 109-8, § 404(a), 119 Stat. 23, 104-05 (to be codified at 11 U.S.C. § 365(d)(4)).

316. *See id.* (to be codified at 11 U.S.C. § 365(d)(4)(B)(i)).

only be granted with the prior written consent of the lessor.³¹⁷ Under prior law, the court could grant the trustee additional time, with no outer limit, as long as the court established that period within the sixty days.³¹⁸ Subsection 365(d)(1) still provides that leases of residential real property and personal property in Chapter 7 are automatically rejected unless the trustee assumes the lease within sixty days.³¹⁹

New § 503(b)(7) provides that an administrative claim for rejection of a lease for nonresidential real property that was previously assumed is limited to a period of two years from the later of the date the lease is rejected or the actual turnover of the premises.³²⁰ Amounts received from parties other than the debtor must be credited against this amount.³²¹ The remaining sums due under the lease are subject to the limitations on rent claims established by § 502(b)(6).³²²

New § 503(c) limits the ability of debtors to pay retention bonuses or severance pay to key employees by limiting payment of those claims as administrative expenses.³²³ Retention payments cannot be made unless retaining the person receiving the payment is essential “because the individual has a bona fide job offer from another business at the same or greater rate of compensation,” “the services provided by the person are essential to the survival of the business,” and the amount of the transfer does not exceed ten times the amount of a similar payment to a nonmanagement employee during the calendar year or, if there has been no such payment to a nonmanagement employee, does not exceed twenty-five percent of the amount of any similar transfer to an insider in the calendar year preceding the case.³²⁴

317. *See id.* (to be codified at 11 U.S.C. § 365(d)(4)(B)(ii)).

318. *See* 11 U.S.C. § 365(d)(4).

319. *See id.* § 365(d)(1).

320. *See* Pub. L. No. 109-8, § 445(3), 119 Stat. 23, 117–18 (to be codified at 11 U.S.C. § 503(b)(7)).

321. *See id.*

322. *See id.*

323. *See id.* § 331, 119 Stat. at 102–03 (to be codified at 11 U.S.C. § 503(c)).

324. *See id.* (to be codified at 11 U.S.C. § 503(c)(1)).

V. CONCLUSION

As can be expected for the first major change to the Code since 1994, the Act contains a wide variety of changes and will effect all aspects of bankruptcy practice. There are several themes that run through the changes, including heightened protection for child support creditors, increased protections for privacy, and an intention to resolve Chapter 11 cases more quickly and less expensively. The effect of the many changes for individual debtors, including the means test, the restrictions on the automatic stay, and the changes to the discharge sections will be determined by how the Act is applied in practice. Most nonbankruptcy lawyers will see little impact, although lawyers that represent creditors and landlords can apply the new exceptions to the automatic stay, and domestic relations lawyers will have to grapple with the new provisions regarding support debts. The Act also has the potential to drastically alter the make-up of the debtor's bar, as attorneys who represented debtors cope with new certification and disclosure requirements.