CHANGES IN THE CODE AND AT THE COURT

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January, 2006

Students of economic history know that change, rather than stasis, is a hallmark of American bankruptcy law. However that comes as rather small comfort when facing the sort of upheaval in policy, procedure and substantive law encountered this past year.

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").[1] Following over eight years of debate[2] and millions of dollars in campaign contributions and lobbying investment,[3] this legislation ran over 500 pages, with fifteen separate titles and over 200 sections. It impacts virtually every aspect of bankruptcy practice.

Though certain BAPCPA provisions were immediately effective, the vast majority of the changes were to go into effect 180 days after the President's execution. Thus October 17, 2005, loomed as one of the most seismic dates in the history of American bankruptcy law, rivaling the effective date of the Bankruptcy Reform Act of 1978.[4]

To some, a lag time of 180 days would seem ample. To those inside the system, it was ludicrously short.

Most lawyers were generally aware of the sweeping scope of the reform proposals. But they had seen similar legislation rise and fall over many years without enactment.[5] Many had ceased trying to become expert in the minutiae of the proposed bills since it was uncertain if the effort would be worthwhile. That 2005 would be the year, and this the bill, wasn't a cinch. But in late 2004 and very early 2005, passage began to look more and more certain.

Those who started deep and close reading and analysis of BAPCPA were challenged by the number and complexity of its changes. The devil indeed was in the details, and the details were many. Unfortunately, the details were often in densely worded, arguably inconsistent, and sometimes indecipherable new provisions.

And worse, though BAPCPA substantially altered both major and minor aspects of daily bankruptcy practice, Congress' approach left much of the heavy lifting to others – the courts, the Administrative Office of the U.S. Courts (the "AO"), the U.S. Trustee, and the federal rule-making apparatus under the aegis of the Supreme Court.

For example, the Federal Rules of Bankruptcy Procedure, which serve a critical role, were in several ways rendered obsolete or inapplicable by BAPCPA. Other BAPCPA provisions made new implementing rules absolutely necessary. But amendment of the Rules before October 17 could not occur given the deliberate, usually three year, federal rule-making processes.

National committees, groups of judges and lawyers, and the AO all strove to quickly understand the procedural changes BAPCPA expressly or impliedly required, and to figure out what was needed to implement them. When concerns arose that each District might idiosyncratically adapt its practice to what it saw in BAPCPA, leading if not to a national nightmare then at least to something less than the "uniform Laws on the subject of Bankruptcies" envisioned in the Constitution,[6] proposed changes to the Federal Rules of Bankruptcy Procedure called "Interim Rules" were prepared, and local bankruptcy courts – including the District of Idaho – adopted them by General Order[7] so as to deal with some of the more pressing problems.[8]

It wasn't just a question of rules. Over 1,500,000 new cases had been filed in the

nation's bankruptcy courts in 2004, and in each there were dozens if not hundreds of pages of documents. To be sure, most of the bankruptcy courts had, at some point during the preceding several years, gone "paperless" by implementing "electronic case filing" (ECF) and case management. Idaho joined that group in 2005, in one of the bankruptcy system's last waves of conversion.[9] Paperless didn't mean, however, that bankruptcies were any less document intensive.

Those documents – schedules, statements and other materials – are at the heart of bankruptcy administration. Their required filing triggers innumerable and varying deadlines that must be tracked and enforced. This is, of course, a highly computerized process given the volume of cases filed, and the ripple effect any one document's filing or absence could have on other matters. Though Congress evidently didn't appreciate it, what BAPCPA required was a complete review and revision of all the hundreds of detailed policies and procedures used in the administration of cases, and a substantial rewriting of the programs that controlled how the bankruptcy courts did their work.

Our court's technical staff is sophisticated and talented. Rewriting programs is something they do well. They could not do so, however, until the court decided how to construe and implement the myriad changes BAPCPA required. This is not an easy task.

Just how procedures needed to change was decidedly unclear. The Interim Rules, and new national forms (which could be promulgated without the three-year lag that applied to the Rules) were finalized only shortly before BAPCPA's effective date.[10] And even with Interim Rules and new forms in place, practical problems abounded: Was the absence of form "X" or disclosure "Y" or certification "Z" a curable defect? When? What was the consequence of failure to cure? How were the deadlines and deficiencies to be monitored? Who was to raise a

question of noncompliance?[11]

The issues were and are complicated by the intricately interwoven but often irreconcilable provisions of the enactment. Even for an area of law where competing policies abound,[12] BAPCPA can be extraordinarily confusing. Though certain themes are discernable upon even a cursory review of BAPCPA, they are not invariably followed. In some provisions, just which (or what) policy or goal is intended to be served is not at all clear. Though in some cases this may have been intentional, in many others it appears a result of exceedingly poor draftsmanship.[13]

Observers and commentators have not been at all kind to Congress when reviewing what was passed. One, an editor of a well-respected bankruptcy law treatise, lambasted the "atrocious drafting" and also characterized a signature BAPCPA provision – the "means test" – as "a construct of which Rube Goldberg would be proud."[14] Even judges, in attempting to construe and apply the new provisions, have expressed concern and frustration with the long-winded but inexact and confusing language, and the complex and often confounding structure of the new law.[15]

So, in preparing for the October 17 implementation, there was a need for courts to invest a huge amount of time and effort to parse the language of BAPCPA and its "hundreds of provisions, exceptions, qualifications and requirements . . . along with a host of uncodified duties and pronouncements,"[16] to determine how it might alter the existing and already complex processes of bankruptcy liquidations and reorganizations, to predict how the Code changes might ultimately be construed (without, of course, handcuffing the judges) and, as best possible given the abstract nature of the exercise, to accommodate the new law.

At the very same time, the courts had to administer thousands of already pending pre-

BAPCPA cases[17] – as well as all the new cases that would be filed before October 17. Given the increased burdens placed on consumers filing under BAPCPA, it was universally accepted that filings would increase as October 17 approached and individuals[18] attempted to beat the clock. No one accurately predicted the magnitude.[19]

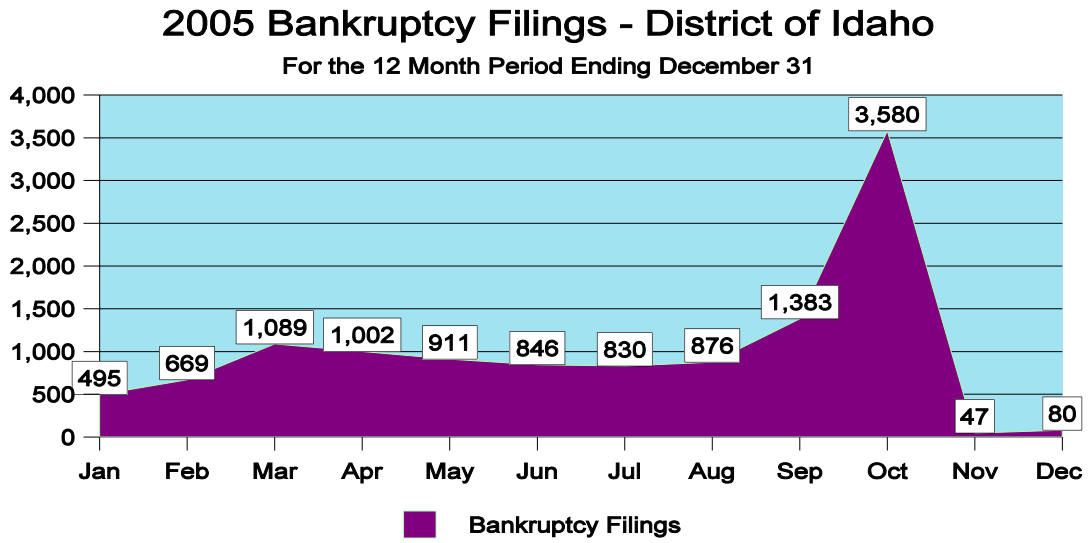
In the two-month period from July 1 to August 30, 2005, 1,706 new cases were opened in Idaho. We had a total of 1,564 new cases filed in the same period in 2004, and this growth was not particularly exceptional. But in September, 2005, after mainstream news media noted the impending change in the law and the increased cost and difficulty of filing, things changed. That month, the number of new cases jumped to 1,383, an increase of 83% over the 760 cases filed in September, 2004.

Then, from October 1 to October 16, bankruptcy filings throughout the nation went through the roof (or, more literally, down the hall, out the door, and around the block). Courts put on extra staffing at public counters and behind the scenes where petitions filed electronically or through the mails were first handled. Courts' clerks worked overtime to handle the load.[20]

In Idaho, 3,553 cases were filed in the first two weeks of October, 2005. In the prior year, only 376 cases were filed in the same period of time. To put these 3,553 cases in further context, one might note that in all of 2004 a total of 9,297 cases were filed. So, in just these two weeks of October 2005, enough cases were filed to equal over 38% of the filings for the entire preceding year.[21]

The change in filings after October 17 was equally breathtaking. After BAPCPA went into effect, only 27 more cases were filed in Idaho the entire balance of October. In November, only 47 cases were filed, far different from the 695 filed in November, 2004. In December, 2005, 80 cases were filed, compared to 772 in December of 2004.

In full, the total of 11,808 cases filed in 2005 in Idaho set a new record, beating by 2,511 the 9,297 cases filed in 2004.



Just when we might see a return to historical filing levels and patterns remains to be seen. Some BAPCPA proponents expect and project that they will never return to pre-2005 levels because the Act will prevent bankruptcy "abuse" and encourage alternate approaches to dealing with debt.[22] Others believe that the "reform" measures are simply punitive and fail to address underlying economic realities, and feel that filings will quickly return to "normal."[23]

As noted, the new provisions enacted in BAPCPA are extensive and complicated. It is beyond the scope of this article to attempt to address them. However, there is a wealth of analysis available, such as the volumes of the American Bankruptcy Law Journal, published by the National Conference of Bankruptcy Judges, cited in the endnotes. Also, the January, 2006 issue of *The Advocate* published by the Idaho State Bar contains several articles analyzing various aspects of BAPCPA by members of the I.S.B.'s Commercial Law and Bankruptcy Section. I would highly recommend these sources as a starting point for those interested in further understanding what has happened, and what will or might yet change.

1. Pub. L. No. 109-8, 199 Stat. 23 (2005).

2. The National Bankruptcy Review Commission was created by Congress in 1994. In charging the NBRC to closely review the statute, Congress had pronounced itself "generally satisfied with the basic framework established in the current Bankruptcy Code" and directed to NBRC "not [to] disturb the fundamental tenets of current law." The NBRC complied, returning a 1,300 page report to Congress on October 20, 1997 entitled "Bankruptcy: The Next Twenty Years" which made more than 170 detailed and focused recommendations to "restore balance" to the Code by carefully addressing discrete issues. Several commissioners issued "dissents" from specific recommendations, notably commissioner Hon. Edith Jones of the 5th Circuit (now that Circuit's Chief Judge) who wrote some 225 pages of dissent. The NBRC minority views galvanized creditor interests, and many of their suggestions – including the oft-debated "means test" for consumer filings – found their way into proposed legislation from 1997 forward despite rejection by the NBRC as a whole. *See, e.g.*, Hon. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005). Congress' comfort with the basic structure of the Code clearly changed between its charge to the NBRC in 1994 and its passage of BAPCPA in 2005.

3. Reports of just how much was spent vary, but most indicate tens of millions of dollars *yearly* came from creditor interests in the form of direct political contributions and lobbyist expense during the multi-year effort to obtain passage of the reform legislation. One public interest organization indicates finance and credit card companies contributed more than $8.2 million in the 2004 election cycle alone and that the primary banking industry lobby contributed another $2.2 million that same year. The Christian Science Monitor noted a total of $29 million as coming from "financial institutions" in the same period though, of course, bankruptcy reform was not the sole issue on their legislative agenda. It is hard to reconcile all the various reported figures. Still, it is clear that the flow of money in support of the reform legislation was staggering. And it is similarly clear that contributions went to members of both parties, and BAPCPA was passed with bipartisan support.

4. The 1978 Reform Act became effective on October 1, 1979, and restructured not just the Bankruptcy Code but also the bankruptcy courts. Though amended on a serial basis, with major changes in 1984, 1986 and 1994, the basic form of the Code remained intact.

5. Differences between Senate and House versions proved difficult to overcome. At times, these differences were less of economic philosophy or bankruptcy policy than of other political concerns – including even abortion rights, which were implicated by the question of nondischargeability of judgments entered against abortion clinic protestors. In December, 2000, both houses of Congress came to an agreement on the legislation, but it was pocket vetoed by President Clinton. *See generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 70 AM. BANKR. L.J. 485 (2005).

6. U.S. CONST., Art. I, § 8, cl. 4. *See Cent. Virginia Cmty. Coll. v. Katz*, No. 04-885, 2006 WL 151985 (Jan. 23, 2006) (a fascinating 5-4 decision of the United States Supreme Court discussing and construing the bankruptcy clause in its historical context).

7. *See* General Order No. 199 (October 14, 2005); *see also* General Order No. 204 (January 5, 2006) (adopting a preliminary revised model chapter 13 plan).

8. This District's Advisory Committee on Local Bankruptcy Rules has commenced the process of adapting local rules and forms to BAPCPA. Though able to respond more quickly than its national counterparts, the LBR Committee has determined it best to proceed cautiously. It clearly has much hard work left before it.

9. Delaying implementation was an intentional decision, designed in part to learn from the experiences of the other courts. Moreover, because adoption of the national CM/ECF system would require that PACER (Public Access to Court Electronic Records) fees be charged, delay preserved for as long as possible the unlimited free Internet access to imaged bankruptcy files we had provided for years.

10. The forms, and the general order with links to the Interim Rules, are available on the court's website at www.id.uscourts.gov.

11. Courts have taken many different approaches to such thorny problems, and most have yet to resolve several important issues. Actual experience in cases filed under BAPCPA will prove invaluable to courts in attempting to make the right decisions. As I've previously observed regarding BAPCPA implementation, we're in a marathon, not a sprint.

12. On the one hand, bankruptcy law is a debt collection system benefitting creditors by creating a single comprehensive venue and establishing rules of priority and distribution of limited assets among all of a debtor's creditors. On the other, it is a system of debtor relief and renewal, marked by a discharge of debt and an economic "fresh start." As one author stated in a work addressing bankruptcy in the late 1700's and early 1800's:

> The fundamental dilemma of bankruptcy law has always been whether it is about death or rebirth. Is it a system for picking a debtor's bones in a more orderly fashion? Or is it an economic and social safety net that allows debtors to return to the world? The fact that it is both has never slowed debate that it should be primarily one or the other.

BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 255 (Harvard Univ. Press 2002). That these two fundamental policies are often in conflict is not surprising, and examples of line-drawing – some rough and others of finer distinction and degree – can be found throughout the Code.

13. We are, of course, not at liberty to simply rewrite ungrammatical or otherwise poorly drafted laws in the context or guise of construction, even if doing so will further an evident legislative purpose. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004).

14. Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under The "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"*, 79 AM. BANKR. L.J. 191 at 191, 193 (2005). Sommer is an Editor in Chief of COLLIER ON BANKRUPTCY (15th ed. rev. 2005).

15. *See, e.g., In re Paschal*, No. 05-06133-5-ATS (Bankr. E.D.N.C. Jan. 6, 2006) ("In an Act in which head-scratching opportunities abound for both attorneys and judges alike [the subject

section] stands out. It uses [an] amorphous phrase . . . a total of four times in short order and raises questions about the meaning of [other words]. The language of the statute is susceptible to conflicting interpretations, and if read literally, would apply to virtually no cases at all. In sum, it's a puzzler."). I noted in *In re Rodriguez*, No. 05-05694-TLM, 2005 WL 3676825, at *4 (Bankr. D. Idaho Dec. 9, 2005), that in BAPCPA "it is hard to tell whether terminology is used with active intention or sloppy inattention." With only a few exceptions, *see, e.g.*, *In re Sosa*, No. 05-20097-FM, 2005 WL 3627817 (Bankr. W.D. Tex. Dec. 22, 2005), judicial comment even when pointed has generally been more restrained than that found in law review articles and similar fora (including numerous blogs), and appropriately so. Judges poorly serve their oath of office or the public by belittling the laws they construe and apply (though critique and criticism when attempting to interpret such laws, if measured, can be appropriate especially if provided for the benefit of appellate court review or possible future Congressional action).

16. Melissa B. Jacoby, *Ripple or Revolution: the Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 170-71 (2005).

17. For example, at the end of April, 2005, this court had 5,402 pending liquidation cases and 2,984 cases pending under the three reorganization chapters (11, 12 and 13) of the Code. In addition to these 8,386 cases, there also were pending 187 adversary proceedings (lawsuits on discrete issues within a bankruptcy case). Idaho was then, and remains, 10th in the country in terms of per capita bankruptcy filings.

18. Many of the notorious changes, such as the means test, credit counseling as a precondition of filing, and financial education as a precondition for discharge, apply to "individuals" and not business entities. However, BAPCPA also makes substantial changes in how businesses are treated, in both "small business" and large chapter 11 cases. That Northwest Airlines, Delta Airlines, Delphi Corp. and hundreds of smaller companies decided to file before October 17 was no coincidence.

19. Those underestimating the surge included the credit card and banking industry, the primary backer of reform. Multiple news articles have noted the billions in charge-offs, above reserves, required due to the unexpected magnitude of pre-BAPCPA filings. As examples, MBNA's public filings show a $764,000,000 "restructuring" charge related to BAPCPA. (MBNA 's filings with the SEC, investor reports, and press releases are accessible through www.mbna.com). J.P. Morgan Chase, the nation's third largest bank, reported $650,000,000 in pre-tax net loan losses and reversals of revenue related to increased bankruptcies, and $575,000,000 in bankruptcy-related charge-offs. (Filings, investor reports and press releases accessible through www.jpmorganchase.com). On January 23, 2006, both TheStreet.com and Bloomburg.com reported that Bank of America, the second-largest U.S. Bank, suffered $524,000,000 in charge-offs attributable to the surge in bankruptcy filings.

20. The court in Idaho worked around the clock on the last weekend before Monday, October 17, not just to handle the rising flood of new pre-BAPCPA cases, but also to install, test, and implement the software needed to handle cases under BAPCPA. The performance of court employees under the direction of Court Executive Cameron Burke and his managers, on this weekend and indeed throughout the period from April's enactment through October's implementation, was nothing short of exceptional. Additional credit for surviving the transition

goes to the bar, most of whom were proactive in getting filings in before the last minute and understanding while coping with the fully-loaded systems they encountered; the hard-working trustees in the District who assumed the burden of administering the cases after opening; and the lawyers and staff at the U.S. Trustee, an office with critical roles in both pre- and post-BAPCPA bankruptcy administration.

21. The experience throughout the country was consistent. For example, the first two weeks of October found 27,074 cases filed in the Central District of California, the nation's largest, compared to 2,292 for the same period in 2004. (On Friday, October 14, that district set an all-time record with 7,766 petitions. It had only 225 on the same date in 2004.) Over 600,000 cases were filed nationwide in October, 2005, compared to a total of 130,679 for the same month in 2004. Total filings in the United States for the year 2005 were over 2,000,000 compared to 1,553,000 in 2004.

22. BAPCPA advocates note disincentives to filing such as limits on the existence, extent or duration of the automatic stay, increased grounds for nondischargeability, and longer periods between successive discharges. These advocates also claim that mandatory credit and budget counseling before filing is allowed, and required financial education before receiving a discharge and existing bankruptcy should eventually reduce filings.

23. Armed with data and analysis that indicate most bankruptcies are triggered by job loss, divorce, uninsured medical expense and similar factors, opponents of BAPCPA argue that nothing in the legislation addressed any of the true causes for the majority of filings but instead focused on what they believe is only a small portion of cases, perhaps 10%, where debtors have an ability to pay some or all debts but file for chapter 7 relief, or are otherwise gaming the bankruptcy system.