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BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention And Consumer Protection Act of 2005 (the "Act"). The Act makes sweeping changes to bankruptcy law, the most extensive since the present United States Bankruptcy Code (title 11, U.S.C., §101, et. seq.) was enacted in 1978. Generally, most provisions of the Act take effect on October 17, 2005, and will apply only to bankruptcy cases filed after that date. However, a limited number of its provisions take effect immediately.

This Client Alert highlights some of the provisions of the Act which principally impact creditors in, and other parties to, Chapter 11 business reorganization cases. There are, additionally, extensive provisions of the Act which impact consumer bankruptcies.

Despite the fact that business bankruptcy changes account for about half of the new legislation, the consumer law amendments have received significantly greater press coverage. While a very limited discussion of some of the consumer bankruptcy provisions included in the Act is provided herein, a discussion of the many changes in consumer bankruptcy law is outside the scope of this Client Alert.

To read a detailed outline on the issues presented in this alert click [here](#). You may also contact **David B. Tatge**, the head of EBG's Creditors' Rights and Financial Restructuring Practice, in the **Washington, D.C.** office at 202/861-1875 or dtatge@ebglaw.com, or request guidance from the EBG partners and associates with whom you regularly work.

The detailed outline addresses the following legislative changes:

I. GENERAL BUSINESS BANKRUPTCY PROVISIONS OF THE ACT

The Act (a) changes "preference" law to, among other things, strengthen the "ordinary course of business" defense; (b) limits the debtor's "exclusivity", i.e., the period in which the debtor, alone, can propose and confirm a reorganization plan to a maximum of 18 months; (c) strengthens the position in bankruptcy of landlords under commercial real estate leases,

requiring leases to be assumed or rejected in 180 days, at most; (d) enhances the ability of smaller creditors to sit on creditors' committees, and enhances information flow from the committee to its constituents; (e) relaxes the rule that investment bankers to the debtor must be disinterested persons; (f) provides for mandatory appointment of a chapter 11 trustee in the case of pre-petition management fraud; (g) strengthens the debtor's ability to avoid fraudulent conveyances; (h) places limits on, and enhances the debtor's ability to challenge, executive pay; (i) expands the right of unpaid sellers to demand reclamation from the debtor; (j) makes enforcement actions by securities regulatory bodies an exception to the "automatic stay"; (k) allows the debtor to avoid, post-petition, modifications to retiree health plans adopted within 180 days of the petition date; (l) raises the size of employee wage and benefit "priority" claims, and continues plan administration by the debtor post-petition, in most cases; (m) adds an exception to the automatic stay for repayment of pension plan loans; (n) expands the debtor's post-petition obligations to utility providers; (o) conforms chapter 11 plans of individual debtors to the treatment of chapter 13 plans by including post-petition personal service income as property of the estate, and by delaying the debtor's discharge under the plan; (p) changes bankruptcy taxation in several areas; (q) permits the post-petition solicitation of votes for pre-packaged plans negotiated pre-petition; (r) makes numerous changes to speed the reorganizations of small business debtors, which may make it harder for them to successfully reorganize; (s) eliminates the \$4 million cap on single asset real estate bankruptcy cases; (t) adopts special rules on how creditors are to be noticed in bankruptcy cases; (u) changes the treatment of derivatives and financial instruments; (v) adds Chapter 15 to the Bankruptcy Code, to deal more effectively, and uniformly, with cross-border insolvency cases; (w) requires that asset transfers by non-debtors in bankruptcy comply with otherwise applicable state law, including Attorney General approval, and (x) permits direct appeals of certain bankruptcy court rulings to the circuit court of appeals.

II. SPECIAL RULES APPLICABLE TO HEALTH CARE BUSINESSES

The Act makes several changes applicable to "Health Care Businesses". It (a) defines them; (b) adopts special rules for the disposition of patient records in a health care business bankruptcy case; (c) provides that costs to close the business receive priority administrative claim treatment in bankruptcy; (d) requires appointment of a patient ombudsman/advocate; (e) sets requirements for patient transfers in Chapter 7 cases and (f) provides that governmental termination of a debtor from a federal government healthcare program, such as Medicare, does not violate the automatic stay.

III. CONSUMER BANKRUPTCY AMENDMENTS

The Act, among many other changes not discussed here, (a) adopts "means testing" for consumer debtors, as a way to force more consumers to discharge their debts only via chapter 13 wage earner reorganization plans, generally requiring payment over 5 years, as opposed to discharging debts immediately in a chapter 7 liquidation; (b) requires debtors to have received credit counseling prior to filing for bankruptcy; (c) limits the homestead exemptions of individual debtors; (d) expands the protection of retirement savings in bankruptcy; (e) modifies the law governing the ability of an individual debtor to "exempt" property from his or her creditors, to make it harder to accomplish pre-bankruptcy planning in this area and (f) increases the time within which successive bankruptcy discharges can be obtained.

IV. CHAPTER 12 REORGANIZATIONS

The Act restores Chapter 12 to the Bankruptcy Code, governing reorganizations of family farmers, and expands its coverage to include reorganization of family fishermen.

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If you have any questions about these issues or any other developments on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, please contact **David B. Tatge**, in our Creditors' Rights and Financial Restructuring practice, in the **Washington, D.C.** office at 202/861-1875 or dtatge@ebglaw.com.

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