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Bankruptcy Reform

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BANKRUPTCY
REFORM
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THE BANKRUPTCY REFORM ACT OF 1994

H. R. 5116

Public Law 103 - 394

October 22, 1994

SECTION A

**One Hundred Third Congress
of the
United States of America**

AT THE SECOND SESSION

*Begun and held at the City of Washington on Tuesday,
the twenty-fifth day of January, one thousand nine hundred and ninety-four*

An Act

To amend title 11 of the United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

(a) **SHORT TITLE.**—This Act may be cited as the “Bankruptcy Reform Act of 1994”.

(b) **TABLE OF CONTENTS.**—The table of contents is as follows:

Sec. 1. Short title.

TITLE I—IMPROVED BANKRUPTCY ADMINISTRATION

- Sec. 101. Expedited hearing on automatic stay.
- Sec. 102. Jurisdiction to review interlocutory orders increasing or reducing certain time periods for filing plan.
- Sec. 103. Expedited procedure for reaffirmation of debts.
- Sec. 104. Powers of bankruptcy courts.
- Sec. 105. Participation by bankruptcy administrator at meetings of creditors and equity security holders.
- Sec. 106. Definition relating to eligibility to serve on chapter 11 committees.
- Sec. 107. Increased incentive compensation for trustees.
- Sec. 108. Dollar adjustments.
- Sec. 109. Premerger notification.
- Sec. 110. Allowance of creditor committee expenses.
- Sec. 111. Supplemental injunctions.
- Sec. 112. Authority of bankruptcy judges to conduct jury trials in civil proceedings.
- Sec. 113. Sovereign immunity.
- Sec. 114. Service of process in bankruptcy proceedings on an insured depository institution.
- Sec. 115. Meetings of creditors and equity security holders.
- Sec. 116. Tax assessment.
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TITLE II—COMMERCIAL BANKRUPTCY ISSUES

- Sec. 201. Aircraft equipment and vessels; rolling stock equipment.
- Sec. 202. Limitation on liability of non-insider transferee for avoided transfer.
- Sec. 203. Perfection of purchase-money security interest.
- Sec. 204. Continued perfection.
- Sec. 205. Rejection of unexpired leases of real property or timeshare interests.
- Sec. 206. Contents of plan.
- Sec. 207. Priority for independent sales representatives.
- Sec. 208. Exclusion from the estate of interests in liquid and gaseous hydrocarbons transferred by the debtor pursuant to production payment agreements.
- Sec. 209. Seller's right to reclaim goods.
- Sec. 210. Investment of money of the estate.
- Sec. 211. Election of trustee under chapter 11.
- Sec. 212. Rights of partnership trustee against general partners.
- Sec. 213. Impairment of claims and interests.
- Sec. 214. Protection of security interest in post-petition rents and lodging payments.
- Sec. 215. Amendment to definition of swap agreement.
- Sec. 216. Limitation on avoiding powers.
- Sec. 217. Small businesses.
- Sec. 218. Single asset real estate.
- Sec. 219. Leases of personal property.
- Sec. 220. Exemption for small business investment companies.
- Sec. 221. Payment of taxes with borrowed funds.
- Sec. 222. Return of goods.
- Sec. 223. Proceeds of money order agreements.
- Sec. 224. Trustee duties; professional fees.
- Sec. 225. Notices to creditors.

TITLE III—CONSUMER BANKRUPTCY ISSUES

- Sec. 301. Period for curing default relating to principal residence.
- Sec. 302. Nondischargeability of fine under chapter 13.
- Sec. 303. Impairment of exemptions.
- Sec. 304. Protection of child support and alimony.
- Sec. 305. Interest on interest.
- Sec. 306. Exception to discharge.
- Sec. 307. Payments under chapter 13.
- Sec. 308. Bankruptcy petition preparers.
- Sec. 309. Fairness to condominium and cooperative owners.
- Sec. 310. Nonavoidability of fixing of lien on tools and implements of trade, animals, and crops.
- Sec. 311. Conversion of case under chapter 13.
- Sec. 312. Bankruptcy fraud.
- Sec. 313. Protection against discriminatory treatment of applications for student loans.

TITLE IV—GOVERNMENTAL BANKRUPTCY ISSUES

- Sec. 401. Exception from automatic stay for post-petition property taxes.
- Sec. 402. Municipal bankruptcy.

TITLE V—TECHNICAL CORRECTIONS

- Sec. 501. Amendments to bankruptcy definitions, necessitated by enactment of Public Law 101-647.
- Sec. 502. Title 28 of the United States Code.

TITLE VI—BANKRUPTCY REVIEW COMMISSION

- Sec. 601. Short title.
- Sec. 602. Establishment.
- Sec. 603. Duties of the Commission.
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- Sec. 607. Powers of the Commission.
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TITLE VII—SEVERABILITY; EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

- Sec. 701. Severability.
- Sec. 702. Effective date; application of amendments.

TITLE I—IMPROVED BANKRUPTCY ADMINISTRATION

SEC. 101. EXPEDITED HEARING ON AUTOMATIC STAY.

The last sentence of section 362(e) of title 11, United States Code, is amended—

- (1) by striking “commenced” and inserting “concluded”, and
- (2) by inserting before the period at the end the following:

“, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances”.

SEC. 102. JURISDICTION TO REVIEW INTERLOCUTORY ORDERS INCREASING OR REDUCING CERTAIN TIME PERIODS FOR FILING PLAN.

Section 158(a) of title 28, United States Code, is amended by striking “from” the first place it appears and all that follows through “decrees,” and inserting the following:

- “(1) from final judgments, orders, and decrees;
- “(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
- “(3) with leave of the court, from other interlocutory orders and decrees;”.

SEC. 103. EXPEDITED PROCEDURE FOR REAFFIRMATION OF DEBTS.

(a) REAFFIRMATION.—Section 524(c) of title 11, United States Code, is amended—

- (1) in paragraph (2)—
 - (A) by inserting “(A)” after “(2)”,
 - (B) by adding “and” at the end, and
 - (C) by inserting after subparagraph (A), as so designated, the following:

“(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;”, and

- (2) in paragraph (3)—
 - (A) in the matter preceding subparagraph (A) by striking “such agreement” the last place it appears,
 - (B) in subparagraph (A)—
 - (i) by inserting “such agreement” after “(A)”, and
 - (ii) by striking “and” at the end,
 - (C) in subparagraph (B)—

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- (i) by inserting "such agreement" after "(B)", and
- (ii) by adding "and" at the end, and
- (3) by adding at the end the following:
 - "(C) the attorney fully advised the debtor of the legal effect and consequences of—
 - "(i) an agreement of the kind specified in this subsection; and
 - "(ii) any default under such an agreement;"

(b) **EFFECT OF DISCHARGE.**—The third sentence of section 524(d) of title 11, United States Code, is amended in the matter preceding paragraph (1) by inserting "and was not represented by an attorney during the course of negotiating such agreement" after "this section".

SEC. 104. POWERS OF BANKRUPTCY COURTS.

(a) **STATUS CONFERENCES.**—Section 105 of title 11, United States Code, is amended by adding at the end the following:

"(d) The court, on its own motion or on the request of a party in interest, may—

"(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and

"(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

"(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

"(B) in a case under chapter 11 of this title—

"(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

"(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

"(iii) sets the date by which a party in interest other than a debtor may file a plan;

"(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

"(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

"(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan."

(b) **ABSTENTION.**—Section 1334 of title 28, United States Code, is amended—

(1) by redesignating subsection (d) as subsection (e), and

(2) in the second sentence of subsection (c)(2)—

(A) by inserting "(other than a decision not to abstain in a proceeding described in subsection (c)(2))" after "subsection", and

(B) by striking "Any" and inserting the following:

"(d) Any".

(c) **ESTABLISHMENT, OPERATION, AND TERMINATION OF BANKRUPTCY APPELLATE PANEL SERVICE.**—Section 158(b) of title 28, United States Code, is amended—

(1) by striking paragraphs (3) and (4),

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(2) by redesignating paragraph (2) as paragraph (4),

(3) by striking paragraph (1) and inserting the following:

“(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

“(A) there are insufficient judicial resources available in the circuit;

or

“(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

“(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

“(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

“(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

“(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

“(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.”, and

(4) by inserting after paragraph (4), as so redesignated, the following:

“(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

“(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.”.

(d) APPEALS TO BE HEARD BY BANKRUPTCY APPELLATE PANEL SERVICE.—Section 158 of title 28, United States Code, is amended—

(1) in subsection (c) by striking “(c)” and inserting “(2)”, and

(2) by inserting after subsection (b) the following:

“(c)(1) Subject to subsection (b), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

“(A) the appellant elects at the time of filing the appeal; or

“(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.”.

(e) RULES OF PROCEDURE AND EVIDENCE; METHOD OF PRESCRIBING.—Section 2073 of title 28, United States Code, is amended—

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(1) in subsection (a)(2) by striking "section 2072" and inserting "sections 2072 and 2075", and

(2) in subsections (d) and (e) by inserting "or 2075" after "2072" each place it appears.

(f) EFFECTIVE DATE OF BANKRUPTCY RULES.—The third undesignated paragraph of section 2075 of title 28, United States Code, is amended to read as follows:

"The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law."

SEC. 105. PARTICIPATION BY BANKRUPTCY ADMINISTRATOR AT MEETINGS OF CREDITORS AND EQUITY SECURITY HOLDERS.

(a) PRESIDING OFFICER.—A bankruptcy administrator appointed under section 302(d)(3)(I) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (28 U.S.C. 581 note; Public Law 99-554; 100 Stat. 3123), as amended by section 317(a) of the Federal Courts Study Committee Implementation Act of 1990 (Public Law 101-650; 104 Stat. 5115), or the bankruptcy administrator's designee may preside at the meeting of creditors convened under section 341(a) of title 11, United States Code. The bankruptcy administrator or the bankruptcy administrator's designee may preside at any meeting of equity security holders convened under section 341(b) of title 11, United States Code.

(b) EXAMINATION OF THE DEBTOR.—The bankruptcy administrator or the bankruptcy administrator's designee may examine the debtor at the meeting of creditors and may administer the oath required under section 343 of title 11, United States Code.

SEC. 106. DEFINITION RELATING TO ELIGIBILITY TO SERVE ON CHAPTER 11 COMMITTEES.

Section 101(41) of title 11, United States Code, is amended to read as follows:

"(41) 'person' includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that—

"(A) acquires an asset from a person—

"(i) as a result of the operation of a loan guarantee agreement; or

"(ii) as receiver or liquidating agent of a person;

"(B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or

"(C) is the legal or beneficial owner of an asset of—

"(i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or

"(ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit;"

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SEC. 107. INCREASED INCENTIVE COMPENSATION FOR TRUSTEES.

Section 326(a) of title 11, United States Code, is amended by striking "fifteen" and all that follows through "\$3,000" the last place it appears, and inserting the following:

"25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000".

SEC. 108. DOLLAR ADJUSTMENTS.

(a) WHO MAY BE A DEBTOR UNDER CHAPTER 13.—Section 109(e) of title 11, United States Code, is amended—

(1) by striking "\$100,000" each place it appears and inserting "\$250,000", and

(2) by striking "\$350,000" each place it appears and inserting "\$750,000".

(b) INVOLUNTARY CASES.—Section 303(b) of title 11, United States Code, is amended—

(1) in paragraph (1) by striking "\$5,000" and inserting "\$10,000", and

(2) in paragraph (2) by striking "\$5,000" and inserting "\$10,000".

(c) PRIORITIES.—Section 507(a) of title 11, United States Code, is amended—

(1) in paragraph (4)(B)(i) by striking "\$2,000" and inserting "\$4,000",

(2) in paragraph (5) by striking "\$2,000" and inserting "\$4,000", and

(3) in paragraph (6) by striking "\$900" and inserting "\$1,800".

(d) EXEMPTIONS.—Section 522(d) of title 11, United States Code, is amended—

(1) in paragraph (1) by striking "\$7,500" and inserting "\$15,000",

(2) in paragraph (2) by striking "\$1,200" and inserting "\$2,400",

(3) in paragraph (3)—

(A) by striking "\$200" and inserting "\$400", and

(B) by striking "\$4,000" and inserting "\$8,000",

(4) in paragraph (4) by striking "\$500" and inserting "\$1,000",

(5) in paragraph (5)—

(A) by striking "\$400" and inserting "\$800", and

(B) by striking "\$3,750" and inserting "\$7,500",

(6) in paragraph (6) by striking "\$750" and inserting "\$1,500",

(7) in paragraph (8) by striking "\$4,000" and inserting "\$8,000",

and

(8) in paragraph (11)(D) by striking "\$7,500" and inserting "\$15,000".

(e) FUTURE ADJUSTMENTS.—Section 104 of title 11, United States Code, is amended—

(1) by inserting "(a)" before "The", and

(2) by adding at the end the following:

"(b)(1) On April 1, 1998, and at each 3-year interval ending on April 1 thereafter, each dollar amount in effect under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) immediately before such April 1 shall be adjusted—

"(A) to reflect the change in the Consumer Price Index for All Urban Consumers, published by the Department of Labor, for the most recent

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3-year period ending immediately before January 1 preceding such April 1, and

“(B) to round to the nearest \$25 the dollar amount that represents such change.

“(2) Not later than March 1, 1998, and at each 3-year interval ending on March 1 thereafter, the Judicial Conference of the United States shall publish in the Federal Register the dollar amounts that will become effective on such April 1 under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) of this title.

“(3) Adjustments made in accordance with paragraph (1) shall not apply with respect to cases commenced before the date of such adjustments.”.

SEC. 109. PREMERGER NOTIFICATION.

Subparagraphs (A) and (B) of section 363(b)(2) of title 11, United States Code, are amended to read as follows:

“(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

“(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

“(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

“(ii) pursuant to subsection (g)(2) of such section; or

“(iii) by the court after notice and a hearing.”.

SEC. 110. ALLOWANCE OF CREDITOR COMMITTEE EXPENSES.

Section 503(b)(3) of title 11, United States Code, is amended—

(1) in subparagraph (D) by striking “or” at the end,

(2) in subparagraph (E) by inserting “or” at the end, and

(3) by adding at the end the following:

“(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;”.

SEC. 111. SUPPLEMENTAL INJUNCTIONS.

(a) SUPPLEMENTAL INJUNCTIONS.—Section 524 of title 11, United States Code, is amended by adding at the end the following:

“(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

“(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

“(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection

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with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

“(B) The requirements of this subparagraph are that —

“(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

“(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

“(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

“(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

“(aa) each such debtor;

“(bb) the parent corporation of each such debtor; or

“(cc) a subsidiary of each such debtor that is also a debtor; and

“(IV) is to use its assets or income to pay claims and demands; and

“(ii) subject to subsection (h), the court determines that—

“(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

“(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

“(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan’s purpose to deal equitably with claims and future demands;

“(IV) as part of the process of seeking confirmation of such plan—

“(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

“(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

“(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

“(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court

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that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

“(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

“(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

“(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

“(B) Subparagraph (A) shall not be construed to—

“(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

“(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

“(iii) relieve a debtor of the debtor’s obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

“(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

“(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

“(I) the third party’s ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

“(II) the third party’s involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

“(III) the third party’s provision of insurance to the debtor or a related party; or

“(IV) the third party’s involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

“(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

“(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

“(iii) As used in this subparagraph, the term ‘related party’ means—

“(I) a past or present affiliate of the debtor;

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“(II) a predecessor in interest of the debtor; or

“(III) any entity that owned a financial interest in—

“(aa) the debtor;

“(bb) a past or present affiliate of the debtor; or

“(cc) a predecessor in interest of the debtor.

“(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

“(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

“(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

“(5) In this subsection, the term ‘demand’ means a demand for payment, present or future, that—

“(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

“(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

“(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

“(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

“(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

“(h) APPLICATION TO EXISTING INJUNCTIONS.—For purposes of subsection (g)—

“(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—

“(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

“(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

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“(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

“(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

“(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

“(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.”.

(b) **RULE OF CONSTRUCTION.**—Nothing in subsection (a), or in the amendments made by subsection (a), shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.

SEC. 112. AUTHORITY OF BANKRUPTCY JUDGES TO CONDUCT JURY TRIALS IN CIVIL PROCEEDINGS.

Section 157 of title 28, United States Code, is amended by adding at the end the following:

“(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.”.

SEC. 113. SOVEREIGN IMMUNITY.

Section 106 of title 11, United States Code, is amended to read as follows:

“§ 106. Waiver of sovereign immunity

“(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

“(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

“(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

“(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

“(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

“(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

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“(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

“(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.”.

SEC. 114. SERVICE OF PROCESS IN BANKRUPTCY PROCEEDINGS ON AN INSURED DEPOSITORY INSTITUTION.

Rule 7004 of the Federal Rules of Bankruptcy Procedure is amended—

(1) in subdivision (b) by striking “In addition” and inserting “Except as provided in subdivision (h), in addition”, and

(2) by adding at the end the following:

“(h) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION.— Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—

“(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

“(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

“(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.”.

SEC. 115. MEETINGS OF CREDITORS AND EQUITY SECURITY HOLDERS.

Section 341 of title 11, United States Code, is amended by adding at the end the following:

“(d) Prior to the conclusion of the meeting of creditors or equity security holders, the trustee shall orally examine the debtor to ensure that the debtor in a case under chapter 7 of this title is aware of—

“(1) the potential consequences of seeking a discharge in bankruptcy, including the effects on credit history;

“(2) the debtor’s ability to file a petition under a different chapter of this title;

“(3) the effect of receiving a discharge of debts under this title; and

“(4) the effect of reaffirming a debt, including the debtor’s knowledge of the provisions of section 524(d) of this title.”.

SEC. 116. TAX ASSESSMENT.

Section 362(b)(9) of title 11, United States Code, is amended to read as follows:

“(9) under subsection (a), of—

“(A) an audit by a governmental unit to determine tax liability;

“(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

“(C) a demand for tax returns; or

“(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by

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reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor.”.

SEC. 117. ADDITIONAL TRUSTEE COMPENSATION.

Section 330(b) of title 11, United States Code, is amended—

(1) by inserting “(1)” after “(b)”, and

(2) by adding at the end thereof the following:

“(2) The Judicial Conference of the United States—

“(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

“(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title;

to pay \$15 to trustees serving in cases after such trustees’ services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such \$15 shall be paid in addition to the amount paid under paragraph (1).”.

TITLE II—COMMERCIAL BANKRUPTCY ISSUES

SEC. 201. AIRCRAFT EQUIPMENT AND VESSELS; ROLLING STOCK EQUIPMENT.

(a) AMENDMENT OF SECTION 1110.—Section 1110 of title 11, United States Code, is amended to read as follows:

“§ 1110. Aircraft equipment and vessels

“(a)(1) The right of a secured party with a security interest in equipment described in paragraph (2) or of a lessor or conditional vendor of such equipment to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract is not affected by section 362, 363, or 1129 or by any power of the court to enjoin the taking of possession unless—

“(A) before the date that is 60 days after the date of the order for relief under this chapter, the trustee, subject to the court’s approval, agrees to perform all obligations of the debtor that become due on or after the date of the order under such security agreement, lease, or conditional sale contract; and

“(B) any default, other than a default of a kind specified in section 365(b)(2), under such security agreement, lease, or conditional sale contract—

“(i) that occurs before the date of the order is cured before the expiration of such 60-day period; and

“(ii) that occurs after the date of the order is cured before the later of—

“(I) the date that is 30 days after the date of the default;

or

“(II) the expiration of such 60-day period.

“(2) Equipment is described in this paragraph if it is—

“(A) an aircraft, aircraft engine, propeller, appliance, or spare part (as defined in section 40102 of title 49) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a citizen of the United States (as defined in section 40102 of title 49) holding an air carrier operating certificate issued by the Secretary of Transportation pur-

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suant to chapter 447 of title 49 for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo; or

“(B) a documented vessel (as defined in section 30101(1) of title 46) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission.

“(3) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

“(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the court’s approval, to extend the 60-day period specified in subsection (a)(1).

“(c) With respect to equipment first placed in service on or prior to the date of enactment of this subsection, for purposes of this section—

“(1) the term ‘lease’ includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the agreement or in a substantially contemporaneous writing that the agreement is to be treated as a lease for Federal income tax purposes; and

“(2) the term ‘security interest’ means a purchase-money equipment security interest.”.

(b) AMENDMENT OF SECTION 1168.—Section 1168 of title 11, United States Code, is amended to read as follows:

“§ 1168. Rolling stock equipment

“(a)(1) The right of a secured party with a security interest in or of a lessor or conditional vendor of equipment described in paragraph (2) to take possession of such equipment in compliance with an equipment security agreement, lease, or conditional sale contract is not affected by section 362, 363, or 1129 or by any power of the court to enjoin the taking of possession, unless—

“(A) before the date that is 60 days after the date of commencement of a case under this chapter, the trustee, subject to the court’s approval, agrees to perform all obligations of the debtor that become due on or after the date of commencement of the case under such security agreement, lease, or conditional sale contract; and

“(B) any default, other than a default of a kind described in section 365(b)(2), under such security agreement, lease, or conditional sale contract—

“(i) that occurs before the date of commencement of the case and is an event of default therewith is cured before the expiration of such 60-day period; and

“(ii) that occurs or becomes an event of default after the date of commencement of the case is cured before the later of—

“(I) the date that is 30 days after the date of the default or event of default; or

“(II) the expiration of such 60-day period.

“(2) Equipment is described in this paragraph if it is rolling stock equipment or accessories used on such equipment, including superstructures and racks, that is subject to a security interest granted by, leased to, or conditionally sold to the debtor.

“(3) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

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“(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the court’s approval, to extend the 60-day period specified in subsection (a)(1).

“(c) With respect to equipment first placed in service on or prior to the date of enactment of this subsection, for purposes of this section—

“(1) the term ‘lease’ includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the agreement or in a substantially contemporaneous writing that the agreement is to be treated as a lease for Federal income tax purposes; and

“(2) the term ‘security interest’ means a purchase-money equipment security interest.

“(d) With respect to equipment first placed in service after the date of enactment of this subsection, for purposes of this section, the term ‘rolling stock equipment’ includes rolling stock equipment that is substantially rebuilt and accessories used on such equipment.”.

SEC. 202. LIMITATION ON LIABILITY OF NON-INSIDER TRANSFEREE FOR AVOIDED TRANSFER.

Section 550 of title 11, United States Code, is amended—

(1) by redesignating subsections (c), (d), and (e) as subsections (d), (e), and (f), respectively, and

(2) by inserting after subsection (b) the following:

“(c) If a transfer made between 90 days and one year before the filing of the petition—

“(1) is avoided under section 547(b) of this title; and

“(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.”.

SEC. 203. PERFECTION OF PURCHASE-MONEY SECURITY INTEREST.

Section 547 of title 11, United States Code, is amended—

(1) in subsection (c)(3)(B) by striking “10” and inserting “20”, and

(2) in subsection (e)(2)(A) by inserting “, except as provided in subsection (c)(3)(B)” before the semicolon at the end.

SEC. 204. CONTINUED PERFECTION.

(a) **AUTOMATIC STAY.**—Section 362(b)(3) of title 11, United States Code, is amended by inserting “, or to maintain or continue the perfection of,” after “to perfect”.

(b) **LIMITATIONS ON AVOIDING POWERS.**—Section 546(b) of title 11, United States Code, is amended to read as follows:

“(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—

“(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

“(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

“(2) If—

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“(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and

“(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.”.

SEC. 205. REJECTION OF UNEXPIRED LEASES OF REAL PROPERTY OR TIMESHARE INTERESTS.

(a) AMENDMENT TO SECTION 365.—Section 365(h) of title 11, United States Code, is amended to read as follows:

“(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

“(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

“(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

“(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

“(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

“(D) In this paragraph, ‘lessee’ includes any successor, assign, or mortgagee permitted under the terms of such lease.

“(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

“(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

“(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of

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such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

“(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.”.

(b) **TECHNICAL AMENDMENT.**—Section 553(b)(1) of title 11, United States Code, is amended by striking “365(h)(2)” and inserting “365(h)”.

SEC. 206. CONTENTS OF PLAN.

Section 1123(b) of title 11, United States Code, is amended—

- (1) in paragraph (4) by striking “and” at the end,
- (2) by redesignating paragraph (5) as paragraph (6), and
- (3) by inserting after paragraph (4) the following:

“(5) 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, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and”.

SEC. 207. PRIORITY FOR INDEPENDENT SALES REPRESENTATIVES.

Section 507(a)(3) of title 11, United States Code, is amended to read as follows:

“(3) **Third**, allowed unsecured claims, but only to the extent of \$4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor’s business, whichever occurs first, for—

“(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

“(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor’s business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor;”.

SEC. 208. EXCLUSION FROM THE ESTATE OF INTERESTS IN LIQUID AND GASEOUS HYDROCARBONS TRANSFERRED BY THE DEBTOR PURSUANT TO PRODUCTION PAYMENT AGREEMENTS.

(a) **DEFINITION.**—Section 101 of title 11, United States Code, is amended—

- (1) by inserting after paragraph (42) the following:

“(42A) ‘production payment’ means a term overriding royalty satisfiable in cash or in kind—

“(A) contingent on the production of a liquid or gaseous hydrocarbon from particular real property; and

“(B) from a specified volume, or a specified value, from the liquid or gaseous hydrocarbon produced from such property, and determined without regard to production costs;”, and

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(2) by inserting after the first paragraph (56) the following:

“(56A) ‘term overriding royalty’ means an interest in liquid or gaseous hydrocarbons in place or to be produced from particular real property that entitles the owner thereof to a share of production, or the value thereof, for a term limited by time, quantity, or value realized;”.

(b) PROPERTY OF THE ESTATE.—Section 541(b)(4) of title 11, United States Code, is amended—

(1) in subparagraph (A) by striking “(A)” and inserting “(A)(i)”,

(2) in subparagraph (B)—

(A) by striking “(B)” and inserting “(ii)”,

(B) by striking “such interest” and inserting “the interest referred to in clause (i)”, and

(C) by striking the period at the end and inserting “; or”, and

(3) by adding at the end the following:

“(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

“(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title;”.

SEC. 209. SELLER’S RIGHT TO RECLAIM GOODS.

Section 546(c)(1) of title 11, United States Code, is amended to read as follows:

“(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—

“(A) before 10 days after receipt of such goods by the debtor;

or

“(B) if such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and”.

SEC. 210. INVESTMENT OF MONEY OF THE ESTATE.

Section 345(b) of title 11, United States Code, is amended—

(1) in paragraph (2) by striking the period at the end and inserting a semicolon, and

(2) by adding at the end the following:

“unless the court for cause orders otherwise.”.

SEC. 211. ELECTION OF TRUSTEE UNDER CHAPTER 11.

(a) ELECTION AUTHORIZED.—Section 1104 of title 11 of the United States Code is amended—

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively, and

(2) by inserting after subsection (a) the following:

“(b) Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.”.

(b) CONFORMING AMENDMENT.—Section 1106(b) of title 11, United States Code, is amended by striking “1104(c)” and inserting “1104(d)”.

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SEC. 212. RIGHTS OF PARTNERSHIP TRUSTEE AGAINST GENERAL PARTNERS.

Section 723(a) of title 11, United States Code, is amended by striking "for the full amount of the deficiency" and inserting "to the extent that under applicable nonbankruptcy law such general partner is personally liable for such deficiency".

SEC. 213. IMPAIRMENT OF CLAIMS AND INTERESTS.

(a) **OBJECTION TO CLAIMS FILED UNTIMELY.**—Section 502(b) of title 11, United States Code, is amended—

(1) in paragraph (7) by striking "or" at the end,

(2) in paragraph (8) by striking the period at the end and inserting "; or", and

(3) by adding at the end the following:

"(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide."

(b) **TARDILY FILED PRIORITY CLAIMS.**—Section 726(a)(1) of title 11, United States Code, is amended by adding before the semicolon the following: ", proof of which is timely filed under section 501 of this title or tardily filed before the date on which the trustee commences distribution under this section".

(c) **FILING OF REQUEST FOR ADMINISTRATIVE EXPENSES.**—Section 503(a) of title 11, United States Code, is amended—

(1) by inserting "timely" after "may", and

(2) by inserting ", or may tardily file such request if permitted by the court for cause" before the period at the end.

(d) **IMPAIRMENT OF CLAIMS OR INTERESTS.**—Section 1124 of title 11, United States Code, is amended—

(1) in paragraph (1) by inserting "or" at the end,

(2) in paragraph (2) by striking "; or" at the end and inserting a period, and

(3) by striking paragraph (3).

SEC. 214. PROTECTION OF SECURITY INTEREST IN POST-PETITION RENTS AND LODGING PAYMENTS.

(a) **POSTPETITION EFFECT OF SECURITY INTEREST.**—Section 552(b) of title 11, United States Code, is amended—

(1) by inserting "(1)" after "(b)",

(2) by striking "rents," each place it appears, and

(3) by adding at the end the following:

"(2) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such secu-

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rity agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.”

(b) **USE SALE, OR LEASE OF PROPERTY.**—Section 363(a) of title 11, United States Code, is amended by inserting: “and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties” after “property”.

SEC. 215. AMENDMENT TO DEFINITION OF SWAP AGREEMENT.

Subparagraph (A) of the first paragraph (55) of section 101 of title 11, United States Code, is amended by inserting “spot foreign exchange agreement,” after “forward foreign exchange agreement,”.

SEC. 216. LIMITATION ON AVOIDING POWERS.

Section 546(a)(1) of title 11, United States Code, is amended to read as follows:

“(1) the later of—

“(A) 2 years after the entry of the order for relief; or

“(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or”.

SEC. 217. SMALL BUSINESSES.

(a) **DEFINITION.**—Section 101 of title 11, United States Code, is amended by inserting after paragraph (51) the following:

“(51C) ‘small business’ means a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed \$2,000,000;”.

(b) **CREDITORS’ COMMITTEES.**—Section 1102(a) of title 11, United States Code, is amended—

(1) in paragraph (1) by striking “As” and inserting “Except as provided in paragraph (3), as”; and

(2) by adding at the end the following:

“(3) On request of a party in interest in a case in which the debtor is a small business and for cause, the court may order that a committee of creditors not be appointed.”.

(c) **CONVERSION OR DISMISSAL.**—Section 1112(b) of title 11, United States Code, is amended by inserting “or bankruptcy administrator” after “United States trustee”.

(d) **WHO MAY FILE A PLAN.**—Section 1121 of title 11, United States Code, is amended by adding at the end the following:

“(e) In a case in which the debtor is a small business and elects to be considered a small business—

“(1) only the debtor may file a plan until after 100 days after the date of the order for relief under this chapter;

“(2) all plans shall be filed within 160 days after the date of the order for relief; and

“(3) on request of a party in interest made within the respective periods specified in paragraphs (1) and (2) and after notice and a hearing, the court may—

“(A) reduce the 100-day period or the 160-day period specified in paragraph (1) or (2) for cause; and

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“(B) increase the 100-day period specified in paragraph (1) if the debtor shows that the need for an increase is caused by circumstances for which the debtor should not be held accountable.”

(e) **POSTPETITION DISCLOSURE.**—Section 1125 of title 11, United States Code, is amended by adding at the end the following:

“(f) Notwithstanding subsection (b), in a case in which the debtor has elected under section 1121(e) to be considered a small business—

“(1) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

“(2) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement as long as the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed at least 10 days prior to the date of the hearing on confirmation of the plan; and

“(3) a hearing on the disclosure statement may be combined with a hearing on confirmation of a plan.”

SEC. 218. SINGLE ASSET REAL ESTATE.

(a) **DEFINITION.**—Section 101 of title 11, United States Code, is amended by inserting after paragraph (51) the following:

“(51B) ‘single asset real estate’ means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent, liquidated secured debts in an amount no more than \$4,000,000;”

(b) **AUTOMATIC STAY.**—Section 362(d) of title 11, United States Code, is amended—

(1) in paragraph (1) by striking “or” at the end,

(2) in paragraph (2) by striking the period at the end and inserting “; or”, and

(3) by adding at the end the following:

“(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)—

“(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

“(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor’s interest in the real estate.”

SEC. 219. LEASES OF PERSONAL PROPERTY.

(a) **ASSUMPTION.**—Section 365(b)(2) of title 11, United States Code, is amended—

(1) in subparagraph (B) by striking “or” at the end,

(2) in subparagraph (C) by striking the period and inserting “; or”,

(3) by adding at the end the following:

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“(D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.”

(b) PERFORMANCE.—Section 365(d) of title 11, United States Code, is amended by adding at the end the following:

“(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee’s obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor’s rights under such lease or under this title.”

(c) LIMITATION.—Section 363(e) of title 11, United States Code is amended by adding at the end the following:

“This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).”

SEC. 220. EXEMPTION FOR SMALL BUSINESS INVESTMENT COMPANIES.

Section 109(b)(2) of title 11, United States Code, is amended by inserting after “homestead association,” the following: “a small business investment company licensed by the Small Business Administration under subsection (c) or (d) of section 301 of the Small Business Investment Act of 1958,”

SEC. 221. PAYMENT OF TAXES WITH BORROWED FUNDS.

Section 523(a) of title 11, United States Code, is amended—

(1) in paragraph (13) by striking the period at the end and inserting a semicolon, and

(2) by adding at the end the following:

“(14) incurred to pay a tax to the United States that would be non-dischargeable pursuant to paragraph (1);”

SEC. 222. RETURN OF GOODS.

(a) LIMITATION ON AVOIDING POWERS.—Section 546 of title 11, United States Code, is amended by adding at the end the following:

“(g) Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.”

(b) SETOFF.—Section 553(b)(1) is amended by inserting “546(h),” after “365(h),”

SEC. 223. PROCEEDS OF MONEY ORDER AGREEMENTS.

Section 541(b) of title 11, United States Code, is amended—

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(1) in paragraph (3) by striking "or" at the end and inserting a semicolon,

(2) in paragraph (4) by striking the period at the end and inserting "; or", and

(3) by inserting after paragraph (4) the following:

"(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

"(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

"(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition."

SEC. 224. TRUSTEE DUTIES; PROFESSIONAL FEES.

(a) **TRUSTEE'S DUTIES.**—Section 586(a)(3)(A) of title 28, United States Code, is amended to read as follows:

"(A)(i) reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustee (which guidelines shall be applied uniformly by the United States trustee except when circumstances warrant different treatment), applications filed for compensation and reimbursement under section 330 of title 11; and

"(ii) filing with the court comments with respect to such application and, if the United States Trustee considers it to be appropriate, objections to such application."

(b) **PROFESSIONAL FEES.**—Section 330(a) of title 11, United States Code, is amended to read as follows:

"(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—

"(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

"(B) reimbursement for actual, necessary expenses.

"(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

"(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

"(A) the time spent on such services;

"(B) the rates charged for such services;

"(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

"(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

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“(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

“(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

“(i) unnecessary duplication of services; or

“(ii) services that were not—

“(I) reasonably likely to benefit the debtor’s estate; or

“(II) necessary to the administration of the case.

“(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor’s attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

“(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

“(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.”.

SEC. 225. NOTICES TO CREDITORS.

Section 342 of title 11, United States Code, is amended by adding at the end the following:

“(c) If notice is required to be given by the debtor to a creditor under this title, any rule, any applicable law, or any order of the court, such notice shall contain the name, address, and taxpayer identification number of the debtor, but the failure of such notice to contain such information shall not invalidate the legal effect of such notice.”.

TITLE III—CONSUMER BANKRUPTCY ISSUES

SEC. 301. PERIOD FOR CURING DEFAULT RELATING TO PRINCIPAL RESIDENCE.

Section 1322 of title 11, United States Code, is amended—

(1) by redesignating subsection (c) as subsection (d), and

(2) by inserting after subsection (b) the following:

“(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

“(1) a default with respect to, or that gave rise to, a lien on the debtor’s principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

“(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor’s principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.”.

SEC. 302. NONDISCHARGEABILITY OF FINE UNDER CHAPTER 13.

Section 1328(a)(3) of title 11, United States Code, is amended by inserting “. or a criminal fine,” after “restitution”.

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SEC. 303. IMPAIRMENT OF EXEMPTIONS.

Section 522(f) of title 11, United States Code, is amended—

(1) in paragraph (2)—

(A) by redesignating subparagraphs (A), (B), and (C) as clauses (i), (ii), and (iii), respectively, and

(B) by striking “(2)” and inserting “(B)”;

(2) by redesignating paragraph (1) as subparagraph (A),

(3) by inserting “(1)” before “Notwithstanding”, and

(4) by adding at the end the following:

“(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—

“(i) the lien;

“(ii) all other liens on the property; and

“(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor’s interest in the property would have in the absence of any liens.

“(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

“(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.”.

SEC. 304. PROTECTION OF CHILD SUPPORT AND ALIMONY.

(a) DEFINITION.—Section 101 of title 11, United States Code, is amended by inserting after paragraph (12) the following:

“(12A) ‘debt for child support’ means a debt of a kind specified in section 523(a)(5) of this title for maintenance or support of a child of the debtor;”.

(b) RELIEF FROM AUTOMATIC STAY.—Section 362(b)(2) of title 11, United States Code, is amended to read as follows:

“(2) under subsection (a) of this section—

“(A) of the commencement or continuation of an action or proceeding for—

“(i) the establishment of paternity; or

“(ii) the establishment or modification of an order for alimony, maintenance, or support; or

“(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;”.

(c) PRIORITY OF CLAIMS.—Section 507(a) of title 11, United States Code, is amended—

(1) in paragraph (8) by striking “(8) Eighth” and inserting “(9) Ninth”,

(2) in paragraph (7) by striking “(7) Seventh” and inserting “(8) Eighth”, and

(3) by inserting after paragraph (6) the following:

“(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

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“(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

“(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.”.

(d) PROTECTION OF LIENS.—Section 522(f)(1)(A) of title 11, United States Code, as amended by section 303, is amended by inserting after “lien” the following:

“, other than a judicial lien that secures a debt—

“(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

“(ii) to the extent that such debt—

“(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

“(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.”.

(e) EXCEPTION TO DISCHARGE.—Section 523 of title 11, United States Code, as amended by section 221, is amended by adding at the end the following:

“(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

“(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

“(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;”, and

(2) in subsection (c)(1) by striking “or (6)” each place it appears and inserting “(6), or (15)”.

(f) PROTECTION AGAINST TRUSTEE AVOIDANCE.—Section 547(c) of title 11, United States Code, is amended—

(1) in paragraph (6) by striking “or” at the end,

(2) by redesignating paragraph (7) as paragraph (8), and

(3) by inserting after paragraph (6) the following:

“(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

“(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

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“(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or”.

(g) **APPEARANCE BEFORE COURT.**—Child support creditors or their representatives shall be permitted to appear and intervene without charge, and without meeting any special local court rule requirement for attorney appearances, in any bankruptcy case or proceeding in any bankruptcy court or district court of the United States if such creditors or representatives file a form in such court that contains information detailing the child support debt, its status, and other characteristics.

(h) **CONFORMING AMENDMENTS.**—Title 11 of the United States Code is amended—

(1) in section 502(i) by striking “507(a)(7)” and inserting “507(a)(8)”,

(2) in section 503(b)(1)(B)(i) by striking “507(a)(7)” and inserting “507(a)(8)”,

(3) in section 523(a)(1)(A) by striking “507(a)(7)” and inserting “507(a)(8)”,

(4) in section 724(b)(2) by striking “or 507(a)(6)” and inserting “507(a)(6), or 507(a)(7)”,

(5) in section 726(b) by striking “or (7)” and inserting “, (7), or (8)”,

(6) in section 1123(a)(1) by striking “507(a)(7)” and inserting “507(a)(8)”,

(7) in section 1129(a)(9)—

(i) in subparagraph (B) by striking “or 507(a)(6)” and inserting “, 507(a)(6), or 507(a)(7)”, and

(ii) in subparagraph (C) by striking “507(a)(7)” and inserting “507(a)(8)”.

SEC. 305. INTEREST ON INTEREST.

(a) **CHAPTER 11.**—Section 1123 of title 11, United States Code, is amended by adding at the end the following:

“(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.”.

(b) **CHAPTER 12.**—Section 1222 of title 11, United States Code, is amended by adding at the end the following:

“(d) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1225(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.”.

(c) **CHAPTER 13.**—Section 1322 of title 11, United States Code, is amended by adding at the end the following:

“(e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.”.

SEC. 306. EXCEPTION TO DISCHARGE.

Section 523(a)(2)(C) of title 11, United States Code, is amended—

(1) by striking “\$500” and inserting “\$1,000”,

(2) by striking “forty” and inserting “60”, and

(3) by striking “twenty” and inserting “60”.

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SEC. 307. PAYMENTS UNDER CHAPTER 13.

Section 1326(a)(2) of title 11, United States Code, is amended in the second sentence by striking the period and inserting "as soon as practicable."

SEC. 308. BANKRUPTCY PETITION PREPARERS.

(a) AMENDMENT OF CHAPTER 1.—Chapter 1 of title 11, United States Code, is amended by adding at the end the following:

"§ 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

"(a) In this section—

"(1) 'bankruptcy petition preparer' means a person, other than an attorney or an employee of an attorney, who prepares for compensation a document for filing; and

"(2) 'document for filing' means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.

"(b)(1) A bankruptcy petition preparer who prepares a document for filing shall sign the document and print on the document the preparer's name and address.

"(2) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than \$500 for each such failure unless the failure is due to reasonable cause.

"(c)(1) A bankruptcy petition preparer who prepares a document for filing shall place on the document, after the preparer's signature, an identifying number that identifies individuals who prepared the document.

"(2) For purposes of this section, the identifying number of a bankruptcy petition preparer shall be the Social Security account number of each individual who prepared the document or assisted in its preparation.

"(3) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than \$500 for each such failure unless the failure is due to reasonable cause.

"(d)(1) A bankruptcy petition preparer shall, not later than the time at which a document for filing is presented for the debtor's signature, furnish to the debtor a copy of the document.

"(2) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than \$500 for each such failure unless the failure is due to reasonable cause.

"(e)(1) A bankruptcy petition preparer shall not execute any document on behalf of a debtor.

"(2) A bankruptcy petition preparer may be fined not more than \$500 for each document executed in violation of paragraph (1).

"(f)(1) A bankruptcy petition preparer shall not use the word 'legal' or any similar term in any advertisements, or advertise under any category that includes the word 'legal' or any similar term.

"(2) A bankruptcy petition preparer shall be fined not more than \$500 for each violation of paragraph (1).

"(g)(1) A bankruptcy petition preparer shall not collect or receive any payment from the debtor or on behalf of the debtor for the court fees in connection with filing the petition.

"(2) A bankruptcy petition preparer shall be fined not more than \$500 for each violation of paragraph (1).

"(h)(1) Within 10 days after the date of the filing of a petition, a bankruptcy petition preparer shall file a declaration under penalty of perjury disclos-

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ing any fee received from or on behalf of the debtor within 12 months immediately prior to the filing of the case, and any unpaid fee charged to the debtor.

“(2) The court shall disallow and order the immediate turnover to the bankruptcy trustee of any fee referred to in paragraph (1) found to be in excess of the value of services rendered for the documents prepared. An individual debtor may exempt any funds so recovered under section 522(b).

“(3) The debtor, the trustee, a creditor, or the United States trustee may file a motion for an order under paragraph (2).

“(4) A bankruptcy petition preparer shall be fined not more than \$500 for each failure to comply with a court order to turn over funds within 30 days of service of such order.

“(i)(1) If a bankruptcy case or related proceeding is dismissed because of the failure to file bankruptcy papers, including papers specified in section 521(1) of this title, the negligence or intentional disregard of this title or the Federal Rules of Bankruptcy Procedure by a bankruptcy petition preparer, or if a bankruptcy petition preparer violates this section or commits any fraudulent, unfair, or deceptive act, the bankruptcy court shall certify that fact to the district court, and the district court, on motion of the debtor, the trustee, or a creditor and after a hearing, shall order the bankruptcy petition preparer to pay to the debtor—

“(A) the debtor’s actual damages;

“(B) the greater of—

“(i) \$2,000; or

“(ii) twice the amount paid by the debtor to the bankruptcy petition preparer for the preparer’s services; and

“(C) reasonable attorneys’ fees and costs in moving for damages under this subsection.

“(2) If the trustee or creditor moves for damages on behalf of the debtor under this subsection, the bankruptcy petition preparer shall be ordered to pay the movant the additional amount of \$1,000 plus reasonable attorneys’ fees and costs incurred.

“(j)(1) A debtor for whom a bankruptcy petition preparer has prepared a document for filing, the trustee, a creditor, or the United States trustee in the district in which the bankruptcy petition preparer resides, has conducted business, or the United States trustee in any other district in which the debtor resides may bring a civil action to enjoin a bankruptcy petition preparer from engaging in any conduct in violation of this section or from further acting as a bankruptcy petition preparer.

“(2)(A) In an action under paragraph (1), if the court finds that—

“(i) a bankruptcy petition preparer has—

“(I) engaged in conduct in violation of this section or of any provision of this title a violation of which subjects a person to criminal penalty;

“(II) misrepresented the preparer’s experience or education as a bankruptcy petition preparer; or

“(III) engaged in any other fraudulent, unfair, or deceptive conduct; and

“(ii) injunctive relief is appropriate to prevent the recurrence of such conduct,

the court may enjoin the bankruptcy petition preparer from engaging in such conduct.

“(B) If the court finds that a bankruptcy petition preparer has continually engaged in conduct described in subclause (I), (II), or (III) of clause (i) and that an injunction prohibiting such conduct would not be sufficient to prevent

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such person's interference with the proper administration of this title, or has not paid a penalty imposed under this section, the court may enjoin the person from acting as a bankruptcy petition preparer.

"(3) The court shall award to a debtor, trustee, or creditor that brings a successful action under this subsection reasonable attorney's fees and costs of the action, to be paid by the bankruptcy petition preparer.

"(k) Nothing in this section shall be construed to permit activities that are otherwise prohibited by law, including rules and laws that prohibit the unauthorized practice of law."

(b) The chapter analysis for chapter 1 of title 11, United States Code, is amended by adding at the end the following new item:

"110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions."

SEC. 309. FAIRNESS TO CONDOMINIUM AND COOPERATIVE OWNERS.

Section 523(a) of title 11, United States Code, as amended by sections 221 and 304, is amended by adding at the end the following:

"(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which—

"(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

"(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,

but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case."

SEC. 310. NONAVOIDABILITY OF FIXING OF LIEN ON TOOLS AND IMPLEMENTS OF TRADE, ANIMALS, AND CROPS.

Section 522(f) of title 11, United States Code, as amended by sections 303 and 304, is amended—

(1) in paragraph (1) by inserting "but subject to paragraph (3)" after "waiver of exemptions", and

(2) by adding at the end the following:

"(3) In a case in which State law that is applicable to the debtor—

"(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

"(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property;

the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds \$5,000."

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SEC. 311. CONVERSION OF CASE UNDER CHAPTER 13.

Section 348 of title 11, United States Code, is amended by adding at the end the following:

“(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

“(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and

“(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

“(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.”

SEC. 312. BANKRUPTCY FRAUD.

(a) IN GENERAL.—

(1) OFFENSES.—Chapter 9 of title 18, United States Code, is amended—

(A) by amending sections 152, 153, and 154 to read as follows:

“§ 152. Concealment of assets; false oaths and claims; bribery

“A person who—

“(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

“(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

“(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

“(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

“(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

“(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

“(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

“(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, docu-

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ments, records, and papers) relating to the property or financial affairs of a debtor; or

“(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined not more than \$5,000, imprisoned not more than 5 years, or both.

“§ 153. Embezzlement against estate

“(a) OFFENSE.—A person described in subsection (b) who knowingly and fraudulently appropriates to the person’s own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor shall be fined not more than \$5,000, imprisoned not more than 5 years, or both.

“(b) PERSON TO WHOM SECTION APPLIES.—A person described in this subsection is one who has access to property or documents belonging to an estate by virtue of the person’s participation in the administration of the estate as a trustee, custodian, marshal, attorney, or other officer of the court or as an agent, employee, or other person engaged by such an officer to perform a service with respect to the estate.

“§ 154. Adverse interest and conduct of officers

“A person who, being a custodian, trustee, marshal, or other officer of the court—

“(1) knowingly purchases, directly or indirectly, any property of the estate of which the person is such an officer in a case under title 11;

“(2) knowingly refuses to permit a reasonable opportunity for the inspection by parties in interest of the documents and accounts relating to the affairs of estates in the person’s charge by parties when directed by the court to do so; or

“(3) knowingly refuses to permit a reasonable opportunity for the inspection by the United States Trustee of the documents and accounts relating to the affairs of an estate in the person’s charge,

shall be fined not more than \$5,000 and shall forfeit the person’s office, which shall thereupon become vacant.”; and

(B) by adding at the end the following:

“§ 156. Knowing disregard of bankruptcy law or rule

“(a) DEFINITIONS.—In this section—

“ ‘bankruptcy petition preparer’ means a person, other than the debtor’s attorney or an employee of such an attorney, who prepares for compensation a document for filing.

“ ‘document for filing’ means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.

“(b) OFFENSE.—If a bankruptcy case or related proceeding is dismissed because of a knowing attempt by a bankruptcy petition preparer in any manner to disregard the requirements of title 11, United States Code, or the Federal Rules of Bankruptcy Procedure, the bankruptcy petition preparer shall be fined under this title, imprisoned not more than 1 year, or both.

“§ 157. Bankruptcy fraud

“A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so—

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“(1) files a petition under title 11;

“(2) files a document in a proceeding under title 11; or

“(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.”.

(2) TECHNICAL AMENDMENTS.—The chapter analysis for chapter 9 of title 18, United States Code, is amended—

(A) by amending the item relating to section 153 to read as follows:

“Sec. 153. Embezzlement against estate.”;

and

(B) by adding at the end the following new items:

“Sec. 156. Knowing disregard of bankruptcy law or rule.

“Sec. 157. Bankruptcy fraud.”.

(b) RICO.—Section 1961(1)(D) of title 18, United States Code, is amended by inserting “(except a case under section 157 of that title)” after “title 11”.

SEC. 313. PROTECTION AGAINST DISCRIMINATORY TREATMENT OF APPLICATIONS FOR STUDENT LOANS.

Section 525 of title 11, United States Code, is amended by adding at the end the following:

“(c)(1) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of a case under this title or during the pendency of the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

“(2) In this section, ‘student loan program’ means the program operated under part B, D, or E of title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.”.

TITLE IV—GOVERNMENTAL BANKRUPTCY ISSUES

SEC. 401. EXCEPTION FROM AUTOMATIC STAY FOR POST-PETITION PROPERTY TAXES.

Section 362(b) of title 11, United States Code, is amended by inserting after paragraph (16) the following:

“(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.”.

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SEC. 402. MUNICIPAL BANKRUPTCY.

Section 109(c)(2) of title 11, United States Code, is amended by striking "generally authorized" and inserting "specifically authorized, in its capacity as a municipality or by name,".

TITLE V—TECHNICAL CORRECTIONS

SEC. 501. AMENDMENTS TO BANKRUPTCY DEFINITIONS, NECESSITATED BY ENACTMENT OF PUBLIC LAW 101-647.

(a) ALPHABETIZING AND REDESIGNATING DEFINITIONS.—Section 101 of title 11 of the United States Code, as amended by sections 208, 217, 218, and 304, is amended—

(1) by redesignating paragraph (3) as paragraph (21B) and transferring such paragraph so as to insert it after paragraph (21A),

(2) by redesignating paragraph (39) as paragraph (51A) and transferring such paragraph so as to insert it after paragraph (51),

(3) by redesignating paragraphs (54) through (57), as so redesignated by section 2522(e) of Public Law 101-647, as paragraphs (53A) through (53D), respectively,

(4) by redesignating paragraph (56) as in effect immediately before the enactment of Public Law 101-647, as paragraph (35A) and transferring such paragraph so as to insert it after paragraph (35), and

(5) by redesignating paragraph (57), as in effect immediately before the enactment of Public Law 101-647, as paragraph (39) and transferring such paragraph so as to insert it after paragraph (38).

(b) CONFORMING AND RELATED AMENDMENTS TO TITLE 11 OF THE UNITED STATES CODE, BASED ON REDESIGNATED DEFINITIONS.—(1) Section 101 of title 11 of the United States Code, as amended by subsection (a), is amended—

(A) in paragraph (6) by striking "section 761(9)" and inserting "section 761",

(B) in paragraph (22) by striking "section 741(7)" and inserting "section 741",

(C) in paragraph (35)(B) by striking "paragraphs (3)" and inserting "paragraphs (21B)",

(D) in paragraph (49)(B)(ii) by striking "section 761(13)" and inserting "section 761", and

(E) in paragraph (53A)(A), as so redesignated, by striking "section 741(2)" and inserting "section 741".

(2) Section 362(b) of title 11, United States Code, is amended—

(A) in paragraph (6)—

(i) by striking "section 761(4)" and inserting "section 761",

(ii) by striking "section 741(7)" and inserting "section 741",

(iii) by striking "section 101(34), 741(5), or 761(15)" and inserting "section 101, 741, or 761", and

(iv) by striking "section 101(35) or 741(8)" and inserting "section 101 or 741", and

(B) in paragraph (7)—

(i) by striking "section 741(5) or 761(15)" and inserting "section 741 or 761", and

(ii) by striking "section 741(8)" and inserting "section 741".

(3) Section 507(a)(5) of title 11, United States Code, is amended—

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- and
- (A) by striking "section 557(b)(1)" and inserting "section 557(b)",
 - (B) by striking "section 557(b)(2)" and inserting "section 557(b)".
- (4) Section 546 of title 11, United States Code, is amended—
- (A) in subsection (e)—
 - (i) by striking "section 101(34), 741(5), or 761(15)" and inserting "section 101, 741, or 761", and
 - (ii) by striking "section 101(35) or 741(8)" and inserting "section 101 or 741", and
 - (B) in subsection (f)—
 - (i) by striking "section 741(5) or 761(15)" and inserting "section 741 or 761", and
 - (ii) by striking "section 741(8)" and inserting "section 741".
- (5) Section 548(d)(2) of title 11, United States Code, is amended—
- (A) in subparagraph (B)—
 - (i) by striking "section 101(34), 741(5) or 761(15)" and inserting "section 101, 741, or 761", and
 - (ii) by striking "section 101(35) or 741(8)" and inserting "section 101 or 741", and
 - (B) in subparagraph (C)—
 - (i) by striking "section 741(5) or 761(15)" and inserting "section 741 or 761", and
 - (ii) by striking "section 741(8)" and inserting "section 741".
- (6) Section 555 of title 11, United States Code, is amended by striking "section 741(7)" and inserting "section 741 of this title".
- (7) Section 556 of title 11, United States Code, is amended by striking "section 761(4)" and inserting "section 761 of this title".
- (c) CONFORMING AMENDMENTS TO OTHER LAWS BASED ON REDESIGNATED DEFINITIONS.—(1) Section 207(c)(8)(D) of the Federal Credit Union Act (12 U.S.C. 1787(c)(8)(D)) is amended—
- (A) in clause (ii)(I) by striking "section 741(7)" and inserting "section 741",
 - (B) in clause (iii) by striking "section 101(24)" and inserting "section 101",
 - (C) in clause (iv)(I) by striking "section 101(41)" and inserting "section 101", and
 - (D) in clause (v) by striking "section 101(50)" and inserting "section 101".
- (2) Section 11(e)(8)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)) is amended—
- (A) in clause (ii)(I) by striking "section 741(7)" and inserting "section 741",
 - (B) in clause (iii) by striking "section 761(4)" and inserting "section 761",
 - (C) in clause (iv) by striking "section 101(24)" and inserting "section 101",
 - (D) in clause (v)(I) by striking "section 101(41)" and inserting "section 101", and
 - (E) in clause (viii) by striking "section 101(50)" and inserting "section 101".
- (d) OTHER TECHNICAL AMENDMENTS.—Title 11 of the United States Code is amended—
- (1) in section 101—

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- (A) in paragraph (33)—
 - (i) in subparagraph (A) by striking “(12 U.S.C. 1813(u))”, and
 - (ii) in subparagraph (B) by striking “(12 U.S.C. 1786(r))”,
- (B) in paragraph (34) by striking “(12 U.S.C. 1752(7))”,
- (C) in paragraph (35)(A) by striking “(12 U.S.C. 1813(c)(2))”,
- (D) in paragraph (48)—
 - (i) by striking “(15 U.S.C. 78q-1)”, and
 - (ii) by striking “(15 U.S.C. 78c(12))”,
- (E) in paragraph (49)—
 - (i) in subparagraph (A)(xii)—
 - (I) by striking “(15 U.S.C. 77a et seq.)”, and
 - (II) by striking “(15 U.S.C. 77c(b))”, and
 - (ii) in subparagraph (B)(vi) by striking “(15 U.S.C. 77c(b))”, and
- (F) in paragraph (53D), as so redesignated by subsection (a), by striking the period at the end and inserting a semicolon,
- (2) in section 109(b)(2) by striking “(12 U.S.C. 1813(h))”,
- (3) in section 322(a) by striking “1302, or 1202” and inserting “1202, or 1302”,
- (4) in section 346—
 - (A) in subsection (a) by striking “Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.)” and inserting “Internal Revenue Code of 1986”, and
 - (B) in subsection (g)(1)(C) by striking “Internal Revenue Code of 1954 (26 U.S.C. 371)” and inserting “Internal Revenue Code of 1986”,
- (5) in section 348—
 - (A) in subsection (b) by striking “1301(a), 1305(a), 1201(a), 1221, and 1228(a)” and inserting “1201(a), 1221, 1228(a), 1301(a), and 1305(a)”, and
 - (B) in subsections (b), (c), (d), and (e) by striking “1307, or 1208” each place it appears and inserting “1208, or 1307”,
- (6) in section 349(a) by striking “109(f)” and inserting “109(g)”,
- (7) in section 362—
 - (A) in subsection (a) by striking “(15 U.S.C. 78eee(a)(3))”, and
 - (B) in subsection (b)—
 - (i) by striking “(15 U.S.C. 78eee(a)(3))”,
 - (ii) in paragraph (10) by striking “or” at the end,
 - (iii) in paragraph (12)—
 - (I) by striking “the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.)” and inserting “section 31325 of title 46”, and
 - (II) by striking “(46 App. U.S.C. 1117 and 1271 et seq., respectively)”,
 - (iv) in paragraph (13)—
 - (I) by striking “the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.)” each place it appears and inserting “section 31325 of title 46”,

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- (II) by striking “(46 App. U.S.C. 1117 and 1271 et seq., respectively)”, and
- (III) by striking “or” at the end,
- (v) in paragraph (15), as added by Public Law 101-508, by striking “or” at the end,
- (vi) in paragraph (16), as added by Public Law 101-508—
 - (I) by striking “(20 U.S.C. 1001 et seq.)”, and
 - (II) by striking the period at the end and inserting a semicolon, and
 - (vii) in paragraph (14), as added by Public Law 101-311—
 - (I) by striking the period at the end and inserting “; or”,
 - (II) by redesignating such paragraph as paragraph (17), and
 - (III) by transferring such paragraph so as to insert such paragraph after paragraph (16),
- (8) in section 363—
 - (A) in subsection (b)(2) by striking “(15 U.S.C. 18a)”, and
 - (B) in subsection (c)(1) by striking “1304, 1203, or 1204” and inserting “1203, 1204, or 1304”,
- (9) in section 364—
 - (A) in subsection (a) by striking “1304, 1203, or 1204” and inserting “1203, 1204, or 1304”, and
 - (B) in subsection (f)—
 - (i) by striking “(15 U.S.C. 77e)”, and
 - (ii) by striking “(15 U.S.C. 77aaa et seq.)”,
- (10) in section 365—
 - (A) in subsection (d)(6)(C) by striking “the Federal Aviation Act of 1958 (49 U.S.C. 1301)” and inserting “section 40102 of title 49”,
 - (B) in subparagraphs (A) and (B) of subsection (g)(2) by striking “1307, or 1208” each place it appears and inserting “1208, or 1307”,
 - (C) in subsection (n)(1)(B) by striking “to to” and inserting “to”,
 - (D) in subsection (o) by striking “the Federal” the first place it appears and all that follows through “successors,”, and inserting “a Federal depository institutions regulatory agency (or predecessor to such agency)”, and
 - (E) by striking subsection (p),
- (11) in section 507, as amended by section 304—
 - (A) in subsection (a)(9) by striking “the Federal” the first place it appears and all that follows through “successors,”, and inserting “a Federal depository institutions regulatory agency (or predecessor to such agency)”, and
 - (B) in subsection (d) by striking “or (a)(6)” and inserting “(a)(6), (a)(7), (a)(8), or (a)(9)”,
- (12) in section 522—
 - (A) in subsection (b) by striking “Bankruptcy Rules” and inserting “Federal Rules of Bankruptcy Procedure”, and

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- (B) in subsection (d)(10)(E)(iii)—
 - (i) by striking “408, or 409” the first place it appears and inserting “or 408”, and
 - (ii) by striking “Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409)” and inserting “Internal Revenue Code of 1986”,
- (13) in section 523—
 - (A) in subsection (a)—
 - (i) by striking “1141,,” and inserting “1141,,” and
 - (ii) in paragraph (2)(C) by striking “(15 U.S.C. 1601 et seq.)”,
 - (B) in subsection (b)—
 - (i) by striking “(20 U.S.C. 1087-3)”, and
 - (ii) by striking “(42 U.S.C. 294f)”, and
 - (C) in subsection (e) by striking “depository institution or insured credit union” and inserting “insured depository institution”,
- (14) in section 524—
 - (A) in subsection (a)(3) by striking “1328(c)(1)” and inserting “1328(a)(1)”,
 - (B) in subsection (c)(4) by striking “rescission” and inserting “rescission”, and
 - (C) in subsection (d)(1)(B)(ii) by adding “and” at the end,
- (15) in section 525(a)—
 - (A) by striking “(7 U.S.C. 499a-499s)”,
 - (B) by striking “(7 U.S.C. 181-229)”, and
 - (C) by striking “(57 Stat. 422; 7 U.S.C. 204)”,
- (16) in section 542(e) by striking “to to” and inserting “to”,
- (17) in section 543(d)(1) by striking “section,” and inserting “section”,
- (18) in section 549(b) inserting “the trustee may not avoid under subsection (a) of this section” after “involuntary case,”,
- (19) in section 553—
 - (A) in subsection (a)(1) by striking “other than under section 502(b)(3) of this title”, and
 - (B) in subsection (b)(1) by striking “362(b)(14),,” and inserting “362(b)(14),”,
- (20) in section 555 by striking “(15 U.S.C. 78aaa et seq.)”,
- (21) in section 559 by striking “(15 U.S.C. 78aaa et seq.)”,
- (22) in section 706(a) by striking “1307, or 1208” and inserting “1208, or 1307”,
- (23) in section 724(d) by striking “Internal Revenue Code of 1954 (26 U.S.C. 6323)” and inserting “Internal Revenue Code of 1986”,
- (24) in section 726(b)—
 - (A) inserting a comma after “section 1112”, and
 - (B) by inserting “1009,” after “chapter under section”,
- (25) in section 741(4)(A)(iii) by striking “(15 U.S.C. 78a et seq.)”,
- (26) in section 742 by striking “(15 U.S.C. 78aaa et seq.)”,
- (27) in section 743 by striking “342(a)” and inserting “342”,
- (28) in section 745(c) by striking “Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.)” and inserting “Internal Revenue Code of 1986”,
- (29) in section 761—
 - (A) in paragraph (1) by striking “(7 U.S.C. 1 et seq.)”,

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- (B) in paragraph (5) by striking “(7 U.S.C. 6c(b))”, and
- (C) in paragraph (13) by striking “(7 U.S.C. 23)”,
- (30) in section 1104(d), as redesignated by section 211, inserting a comma after “interest”,
- (31) in section 1123(a)(1) inserting a comma after “title” the last place it appears,
- (32) in section 1129—
 - (A) in subsection (a)—
 - (i) in paragraph (4) by striking the semicolon at the end and inserting a period, and
 - (ii) in paragraph (12) inserting “of title 28” after “section 1930”, and
 - (B) in subsection (d) by striking “(15 U.S.C. 77e)”,
- (33) in section 1145—
 - (A) in subsection (a)—
 - (i) by striking “does” and inserting “do”,
 - (ii) by striking “(15 U.S.C. 77e)”, and
 - (iii) in paragraph (3)(B)(i) by striking “(15 U.S.C. 78m or 78o(d))”,
 - (B) in subsection (b)(1) by striking “(15 U.S.C. 77b(11))”,and
 - (C) in subsection (d) by striking “(15 U.S.C. 77aaa et seq.)”,
- (34) in section 1166(2) by striking “(45 U.S.C. 791(b))”,
- (35) in section 1167—
 - (A) by striking “(45 U.S.C. 151 et seq.)”, and
 - (B) by striking “(45 U.S.C. 156)”,
- (36) in section 1226(b)(2)—
 - (A) by striking “1202(d)” and inserting “1202(c)”, and
 - (B) by striking “1202(e)” and inserting “1202(d)”,
- (37) in section 1302(b)(3) by striking “and” at the end,
- (38) in section 1328(a)—
 - (A) in paragraph (2) by striking “(5) or (8)” and inserting “(5), (8), or (9)”, and
 - (B) by striking the last paragraph (3), and
- (39) in the table of chapters by striking the item relating to chapter

15.

SEC. 502. TITLE 28 OF THE UNITED STATES CODE.

Section 586(a)(3) of title 28, United States Code, is amended in the matter preceding subparagraph (A) by inserting “12,” after “11,”.

TITLE VI—BANKRUPTCY REVIEW COMMISSION

SEC. 601. SHORT TITLE.

This title may be cited as the “National Bankruptcy Review Commission Act”.

SEC. 602. ESTABLISHMENT.

There is established the National Bankruptcy Review Commission (referred to as the “Commission”).

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SEC. 603. DUTIES OF THE COMMISSION.

The duties of the Commission are—

- (1) to investigate and study issues and problems relating to title 11, United States Code (commonly known as the "Bankruptcy Code");
- (2) to evaluate the advisability of proposals and current arrangements with respect to such issues and problems;
- (3) to prepare and submit to the Congress, the Chief Justice, and the President a report in accordance with section 608; and
- (4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system.

SEC. 604. MEMBERSHIP.

(a) **NUMBER AND APPOINTMENT.**—The Commission shall be composed of 9 members as follows:

- (1) Three members appointed by the President, 1 of whom shall be designated as chairman by the President.
- (2) One member shall be appointed by the President pro tempore of the Senate.
- (3) One member shall be appointed by the Minority Leader of the Senate.
- (4) One member shall be appointed by the Speaker of the House of Representatives.
- (5) One member shall be appointed by the Minority Leader of the House of Representatives.
- (6) Two members appointed by the Chief Justice.

Members of Congress, and officers and employees of the executive branch, shall be ineligible for appointment to the Commission.

(b) **TERM.**—Members of the Commission shall be appointed for the life of the Commission.

(c) **QUORUM.**—Five members of the Commission shall constitute a quorum, but a lesser number may conduct meetings.

(d) **APPOINTMENT DEADLINE.**—The first appointments made under subsection (a) shall be made within 60 days after the date of enactment of this Act.

(e) **FIRST MEETING.**—The first meeting of the Commission shall be called by the chairman and shall be held within 210 days after the date of enactment of this Act.

(f) **VACANCY.**—A vacancy on the Commission resulting from the death or resignation of a member shall not affect its powers and shall be filled in the same manner in which the original appointment was made.

(g) **CONTINUATION OF MEMBERSHIP.**—If any member of the Commission who was appointed to the Commission as an officer or employee of a government leaves that office, or if any member of the Commission who was not appointed in such a capacity becomes an officer or employee of a government, the member may continue as a member of the Commission for not longer than the 90-day period beginning on the date the member leaves that office or becomes such an officer or employee, as the case may be.

(h) **CONSULTATION PRIOR TO APPOINTMENT.**—Prior to the appointment of members of the Commission, the President, the President pro tempore of the Senate, the Speaker of the House of Representatives, and the Chief Justice shall consult with each other to ensure fair and equitable representation of various points of view in the Commission and its staff.

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SEC. 605. COMPENSATION OF THE COMMISSION.

(a) PAY.—

(1) **NONGOVERNMENT EMPLOYEES.**—Each member of the Commission who is not otherwise employed by the United States Government shall be entitled to receive the daily equivalent of the annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which he or she is engaged in the actual performance of duties as a member of the Commission.

(2) **GOVERNMENT EMPLOYEES.**—A member of the Commission who is an officer or employee of the United States Government shall serve without additional compensation.

(b) **TRAVEL.**—Members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

SEC. 606. STAFF OF COMMISSION; EXPERTS AND CONSULTANTS.

(a) STAFF.—

(1) **APPOINTMENT.**—The chairman of the Commission may, without regard to the civil service laws and regulations, appoint, and terminate an executive director and such other personnel as are necessary to enable the Commission to perform its duties. The employment of an executive director shall be subject to confirmation by the Commission.

(2) **COMPENSATION.**—The chairman of the Commission may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter II of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates, except that the rate of pay for the executive director and other personnel may not exceed the rate payable for level V of the Executive Schedule under section 5316 of that title.

(b) **EXPERTS AND CONSULTANTS.**—The Commission may procure temporary and intermittent services of experts and consultants under section 3109(b) of title 5, United States Code.

SEC. 607. POWERS OF THE COMMISSION.

(a) **HEARINGS AND MEETINGS.**—The Commission or, on authorization of the Commission, a member of the Commission, may hold such hearings, sit and act at such time and places, take such testimony, and receive such evidence, as the Commission considers appropriate. The Commission or a member of the Commission may administer oaths or affirmations to witnesses appearing before it.

(b) **OFFICIAL DATA.**—The Commission may secure directly from any Federal department, agency, or court information necessary to enable it to carry out this title. Upon request of the chairman of the Commission, the head of a Federal department or agency or chief judge of a Federal court shall furnish such information, consistent with law, to the Commission.

(c) **FACILITIES AND SUPPORT SERVICES.**—The Administrator of General Services shall provide to the Commission on a reimbursable basis such facilities and support services as the Commission may request. Upon request of the Commission, the head of a Federal department or agency may make any of the facilities or services of the agency available to the Commission to assist the Commission in carrying out its duties under this title.

(d) **EXPENDITURES AND CONTRACTS.**—The Commission or, on authorization of the Commission, a member of the Commission may make expenditures and enter into contracts for the procurement of such supplies, services, and property as the Commission or member considers appropriate for the purposes

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of carrying out the duties of the Commission. Such expenditures and contracts may be made only to such extent or in such amounts as are provided in appropriation Acts.

(e) **MAILS.**—The Commission may use the United States mails in the same manner and under the same conditions as other Federal departments and agencies of the United States.

(f) **GIFTS.**—The Commission may accept, use, and dispose of gifts or donations of services or property.

SEC. 608. REPORT.

The Commission shall submit to the Congress, the Chief Justice, and the President a report not later than 2 years after the date of its first meeting. The report shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislative or administrative action as it considers appropriate.

SEC. 609. TERMINATION.

The Commission shall cease to exist on the date that is 30 days after the date on which it submits its report under section 608.

SEC. 610. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated \$1,500,000 to carry out this title.

TITLE VII—SEVERABILITY; EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

SEC. 701. SEVERABILITY.

If any provision of this Act or amendment made by this Act or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remaining provisions of and amendments made by this Act and the application of such other provisions and amendments to any person or circumstance shall not be affected thereby.

SEC. 702. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) **EFFECTIVE DATE.**—Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act.

(b) **APPLICATION OF AMENDMENTS.**—(1) Except as provided in paragraph (2), the amendments made by this Act shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.

(2)(A) Paragraph (1) shall not apply with respect to the amendment made by section 111.

(B) The amendments made by sections 113 and 117 shall apply with respect to cases commenced under title 11 of the United States Code before, on, and after the date of the enactment of this Act.

(C) Section 1110 of title 11, United States Code, as amended by section 201 of this Act, shall apply with respect to any lease, as defined in such section 1110(c) as so amended, entered into in connection with a settlement of any proceeding in any case pending under title 11 of the United States Code on the date of the enactment of this Act.

(D) The amendments made by section 305 shall apply only to agreements entered into after the date of enactment of this Act.



BANKRUPTCY REFORM ACT OF 1994

- Section By Section Description -

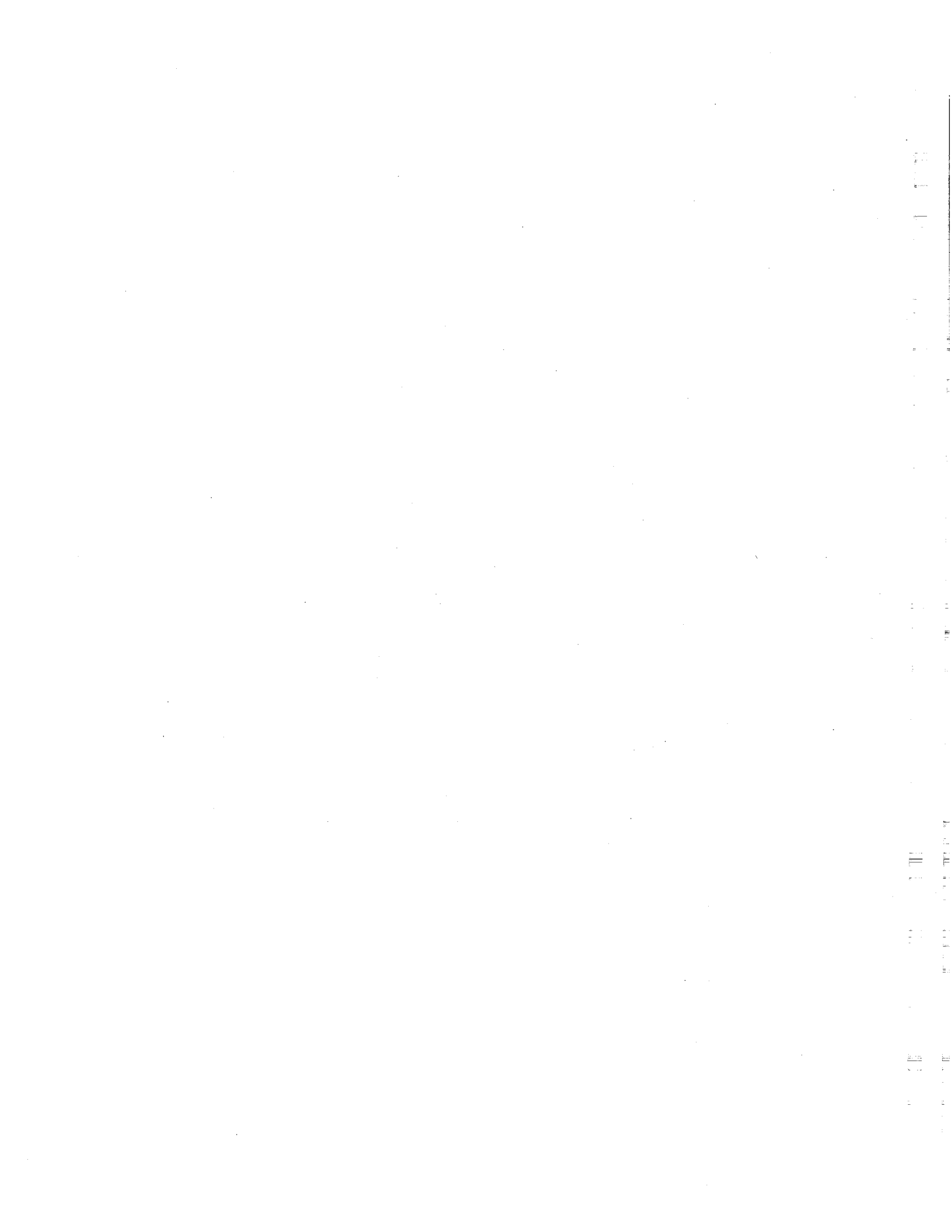
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SECTION B



BANKRUPTCY REFORM ACT OF 1994

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BANKRUPTCY REFORM ACT OF 1994

SECTION-BY-SECTION DESCRIPTION

TITLE I. IMPROVED BANKRUPTCY ADMINISTRATION

Section 101. Expedited hearing on automatic stay.

Section 362(e) of the Bankruptcy Code provides that a preliminary hearing on a motion to lift the automatic stay must conclude within 30 days, with the final hearing to commence within 30 days thereafter. Under many court interpretations, there is no specific limitation on when the final hearing on the motion to lift the stay must conclude. See, e.g., In re ML Barge Pool, 98 B.R. 957 (Bankr. E.D. Mo. 1989); In re Bogosian, 112 B.R. 2 (Bankr. D.R.I. 1990).

This section provides that the final hearing must conclude within 30 days of the preliminary hearing, unless extended by consent of the parties or for a specific time which the court finds is required by compelling circumstances. Under this standard, for example, an extension should not be available where the debtor was merely seeking to delay the bankruptcy process or had neglected to consummate a pending contract. Compelling circumstances that might justify an extension might include, for example, the bona fide illness of any party or the judge or the occurrence of an event beyond the parties' control. Such a finding must be balanced with the legitimate property rights at stake in each particular case. The Committee believes speedy conclusion of hearings on the automatic stay will reduce the time and cost of bankruptcy proceedings by preventing unjustified or unwarranted postponements of final action.

Section 102. Expedited filing of plans under chapter 11.

Section 1121 of the Code, currently in effect, grants a debtor the exclusive right to file a plan during the initial 120 days after an order for relief under chapter 11. This exclusive period expires either at the end of the 120 day period if the debtor has not filed a plan, or, if the debtor has filed a plan and the plan has not been accepted by creditors, within 180 days after the order for relief. Thereafter, any party-in-interest may file a plan. The bankruptcy court may extend or shorten the exclusive period at the request of the debtor or any other party-in-interest upon a showing of "cause." Exclusivity is intended to promote an environment in which the debtor's business may be rehabilitated and a consensual plan may be negotiated. However, undue extension can result in excessively, prolonged and costly delay, to the detriment of the creditors. See, e.g., "When Firms Go Bust," The Economist, August 1, 1992.

Under current law, an order extending the debtor's exclusive period to file a plan is an interlocutory order. 28 U.S.C. § 158(a) provides that appeals from interlocutory orders of a bankruptcy judge may be made to the district court only upon leave of the district court, and not as a matter of right. Section 102 of the bill would amend 28 U.S.C. § 158 so as to provide for an immediate appeal as of right to the district court from a bankruptcy court's order extending or reducing that debtor's exclusive period in which to file a plan. This will prevent those parties who feel they were harmed by an extension, or a failure to extend, to obtain possible recourse in the district court. The Committee intends that the district court carefully consider the circumstances of each case so appealed with a view to encouraging a fair and equitable resolution of the bankruptcy.

Section 103. Expedited procedure for reaffirmation of debts.

Some uncertainty exists under current law regarding whether a separate hearing is required for a debtor to reaffirm a debt, even when the debtor is represented by an attorney who files an affidavit stating that the reaffirmation was voluntary and that it would not impose an undue hardship on the debtor. See In re Richardson, 102 B.R. 254 (Bankr. M.D. Fla. 1989); In re Churchill, 89 B.R. 878 (Bankr. D. Colo. 1988); In re James, 120 B.R. 582 (Bankr. W.D. Okla. 1990) (cases holding reaffirmation hearing is required); In re Carey, 51 B.R. 294 (Bankr. D.D.C. 1985); In re Reidenbach, 59 B.R. 248 (Bankr. N.D. Ohio 1986); In re Pendlebury, 94 B.R. 120 (Bankr. E.D. Tenn. 1988) (cases holding reaffirmation hearing is not required).

This section clarifies that a separate hearing is not mandatory in order to reaffirm a debt where the debtor is adequately represented by counsel. In addition, the section supplements existing safeguards by requiring that the reaffirmation agreement advise the debtor that reaffirmation is not required, and by mandating that the attorney's affidavit indicate that the debtor has been fully advised of the ramifications of the reaffirmation agreement and any default thereunder. The Committee intends that such understandings be appropriately highlighted in the agreement to ensure adequate notice to the debtor. In each of the above circumstances, the Committee intends that before the debtor agrees to a reaffirmation, that the debtor be made fully aware of his or her rights under the Bankruptcy Code to discharge the debt and of the effect of a reaffirmation to continue the debt obligation as though a bankruptcy petition had not been filed.

Section 104. Powers of bankruptcy courts.

This section makes a number of changes to clarify the powers of bankruptcy courts in managing bankruptcy cases. Several of these changes are based on the recommendations of the Federal Courts Study Commission. Subsection (a) authorizes bankruptcy court judges to hold status conferences in bankruptcy cases and thereby manage their dockets in a more efficient and expeditious manner. Notwithstanding the adoption of Bankruptcy Rule 7016 (relating to pretrial conferences), some judges have appeared reluctant to do so without clear and explicit statutory authorization. This provision clarifies that such authority exists in the Bankruptcy Code in adversary and nonadversary proceedings. Subsection (b) allows the full appeal of certain bankruptcy court refusals to abstain in State law legal proceedings. As with most other portions of this Act, subsection (b) operates prospectively and applies only to cases filed after the effective date of the Act. Accordingly, it does not make any existing orders appealable. Any future decisions not to abstain, if made in cases filed before the effective date of the Act, would also be governed by present law and thus would not be appealable to the Circuit Court of Appeals. Subsection (c) provides for the establishment in each judicial circuit of a bankruptcy appellate panels, composed of sitting bankruptcy judges, to serve in place of the district court in reviewing bankruptcy court decisions. Under this subsection, the judicial council of each circuit would be required to establish a bankruptcy appellate panel service for this purpose, unless the council finds that there are insufficient judicial resources available in the circuit or that establishment would result in undue delay or increased cost to the parties. Subsection (d) provides that all appeals from bankruptcy courts shall be heard by a bankruptcy appellate panel, if established and in operation as provided in

28 U.S.C. 158(b), unless a party makes a timely election to have an appeal heard by a district court. Subsections (e) and (f) conform the rulemaking procedure for bankruptcy courts to the existing procedure for other Federal courts.

Section 105. Participation by Bankruptcy Administrator at meetings of creditors and equity security holders.

This section clarifies that for the States in which the bankruptcy system is administered by a Bankruptcy Administrator instead of a U.S. Trustee, the Bankruptcy Administrator would have the same power as a U.S. Trustee to preside at creditors' meetings and conduct examinations of the debtor.

Section 106. Definition relating to eligibility to serve on chapter 11 committees.

This section amends the Bankruptcy Code to include pension benefit guarantors and certain pension plans within the definition of a "person" for purposes of section 1102 of the Code. This section is intended to clarify that the Pension Benefit Guaranty Corporation and State employee pension funds are authorized to serve on chapter 11 committees.

Section 107. Increased incentive compensation for trustees.

Private trustees are responsible for supervising chapter 7 cases, and, in some instances, chapter 11 cases, as well as for distributing funds to creditors. This section provides for an increase in the court-approved compensation payable to private trustees. Under current law, the private bankruptcy trustees may receive 15 percent of the first \$1,000 disbursed in the case; 6 percent of the next \$2,000 disbursed; and 3 percent of any additional monies

disbursed. The section increases the maximum compensation to 25 percent of the first \$5,000 in disbursements to creditors; 10 percent of additional amounts up to \$50,000; 5 percent of additional amounts up to \$1 million; and 3 percent of any amounts in excess of \$1 million. This increased compensation is not borne by the Federal Treasury, but is to be paid by those involved in the bankruptcy system. The American Bankruptcy Institute has issued a report recommending increased trustee compensation. See Am. Bankr. Inst., American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases (G.R. Warner rept. 1991).

Section 108. Dollar adjustments.

Subsection (a) revises the current debt limits applicable to a chapter 13 filing from a maximum of \$100,000 of unsecured debt and \$350,000 of secured debt to \$250,000 of unsecured debt and \$750,000 of secured debt. These changes should help encourage individual debtors to elect chapter 13 repayment over chapter 7 liquidation. Creditors generally benefit when a debtor elects chapter 13. Notwithstanding the fee increases in chapter 13 cases, the Committee does not intend for debtors to be able to utilize chapter 13 as an artifice solely to obtain discharge from certain liabilities. For example, it is not contemplated that an individual who committed a heinous crime would be able in good faith to use chapter 13 solely as a means of discharging a civil obligation owing to a harmed party. Among other things, the remaining subsections increase the current dollar limitations applicable to involuntary filings, bankruptcy priorities, and bankruptcy exemptions based on

recommendations received from the Judicial Conference. This provision also provides for automatic increases in response to future inflation every 3 years.

Section 109. Premerger notification.

This section conforms section 363(b)(2) of the Bankruptcy Code more closely to the requirements for antitrust review of transactions under section 7A of the Clayton Act (15 U.S.C. 18(a)). Section 7A requires parties to a merger or acquisition to notify the Department of Justice and the Federal Trade Commission and wait a specified period of time before completing the transaction, to allow for review of its competitive implications. Generally, the waiting period terminates 30 days after the filing requirement is met, but the period can be extended by a request from the Department or the FTC for additional information.

Under section 363(b)(2) of the Code, however, the section 7A waiting period for mergers and acquisitions involving assets in bankruptcy is shortened to 10 days, and could be shortened even further by order of the bankruptcy court. See, e.g., CNBC/FNN matter, FTC File No. 911-0067.

Section 109 of the bill extends the initial waiting period for transactions in bankruptcy to 15 days after the Department of Justice and the FTC receive the notification required under section 7A(a). The provision also clarifies that this waiting period can never be shortened, but only extended. Finally, the provision specifies three ways in which the 15-day waiting period can be extended: pursuant to section 7A(e)(2), if the Justice Department or the FTC makes a "second request"; pursuant to section 7A(g)(2), if the parties fail to

comply; and by the court, for bankruptcy-related or other reasons. The provision also makes a number of other minor clarifying changes to section 363(b)(2) of the Code.

Section 110. Allowance of creditor committee expenses.

The current Bankruptcy Code is silent regarding whether members of official committees appointed in chapter 11 cases are entitled to reimbursement of their out-of-pocket expenses (such as travel and lodging), and the courts have split on the question of allowing reimbursement. See e.g., In re Lyons Machinery Co., Inc., 28 B.R. 600 (Bankr. E.D. Ark. 1983); In re Mason's Nursing Center, Inc., 73 B.R. 360 (Bankr. S.D. Fla. 1987) (cases prohibiting reimbursement); In re J.E. Jennings, Inc., 96 B.R. 500 (Bankr. E.D. Pa. 1989); In re Aviation Technical Support, Inc., 72 B.R. 32 (Bankr. W.D. Tex. 1987) (cases permitting reimbursement).

This section of the bill amends section 503(b) of the Bankruptcy Code to specifically permit members of chapter 11 committees to receive court-approved reimbursement of their actual and necessary out-of-pocket expenses. The new provision would not allow the payment of compensation for services rendered by or to committee members.

Section 111. Bankruptcy court injunctions.

This section adds a new subsection (g) to section 524 of the Code, establishing a procedure for dealing in a chapter 11 reorganization proceeding with future personal injury claims against the debtor based on exposure to asbestos-containing products. The procedure

involves the establishment of a trust to pay the future claims, coupled with an injunction to prevent future claimants from suing the debtor.

The procedure is modeled on the trust/injunction in the Johns-Manville case, which pioneered the approach a decade ago in response to the flood of asbestos lawsuits; it was facing. Asbestos-related disease has a long latency period--up to 30 years or more--and many of the exposures from the 1940's, when asbestos was in widespread use as an insulating material, had become the personal injury lawsuits of the 1970's and 1980's. In 1982, when Johns-Manville filed for bankruptcy, it had been named in 12,500 lawsuits, and epidemiologists estimated that 50,000 to 100,000 more could be expected, with a potential liability totalling \$2 billion. Kane v. Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988).

From the beginning, a central element of the case was how to deal with future claimants--those who were not yet before the court, because their disease had not yet manifested itself. The parties in the Manville case devised a creative solution to help protect the future asbestos claimants, in the form of a trust into which would be placed stock of the emerging debtor company and a portion of future profits, along with contributions from Johns-Manville's insurers. Present, as well as future, asbestos personal injury claimants would bring their actions against the trust. In connection with the trust, an injunction would be issued barring new asbestos claims against the emerging debtor company. Asbestos claimants would have a stake in Johns-Manville's successful reorganization, because the company's success would increase both the value of the stock held by the trust and the company profits set aside for it.

The bankruptcy court appointed a special representative for the future claimants; this special representative was centrally involved in formulating the plan and negotiating support for it among the other creditors. The Johns-Manville plan was confirmed and upheld on appeal. Kane v. Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986), aff'd in part, rev'd in part, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, 843 F.2d 636 (2d Cir. 1988).

Nevertheless, lingering uncertainty in the financial community as to whether the injunction can withstand all challenges has apparently made it more difficult for the company to meet its needs for capital and has depressed the value of its stock. This has undermined the "fresh start" objectives of bankruptcy and the goals of the trust arrangement.

Meanwhile, following Johns-Manville's lead, another asbestos manufacturer, UNR, has resolved its chapter 11 reorganization with a similar trust/injunction arrangement. And other asbestos manufacturers are reportedly considering the same approach.

The Committee remains concerned that full consideration be accorded to the interests of future claimants, who, by definition, do not have their own voice. Nevertheless, the Committee also recognizes that the interests of future claimants are ill-served if Johns-Manville and other asbestos companies are forced into liquidation and lose their ability to generate stock value and profits that can be used to satisfy claims. Thus, the tension present in the trust/injunction mechanism is not unlike the tension present in bankruptcy generally.

The Committee has approved section 111 of the bill in order to strengthen the Manville and UNR trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering

cases. The Committee believes Johns-Manville and UNR were aided in meeting these high standards, in part at least, by the perceived legal uncertainty surrounding this mechanism, which created strong incentives to take exceptional precautions at every stage of the proceeding. The Committee has concluded, therefore, that creating greater certitude regarding the validity of the trust/injunction mechanism must be accompanied by explicit requirements simulating those met in the Manville case.

Section 111 requires, in order for present claimants to be bound by a trust/injunction, that the trust have the capability of owning a majority of the shares of the debtor or its parent or of a subsidiary; that the debtor prove that it is likely to be subject to substantial future asbestos claims, the number of which cannot be easily predicted, and that the trust is needed in order to deal equitably with present and future claims; and that a separate creditor class be established for those with present claims, which must vote by a 75 percent margin to approve the plan.

In order for future claimants to be bound by a trust/injunction, section 111 requires that the trust operate in a structure and manner necessary to give reasonable assurance that the trust will value, and be able to pay, similar present and future claims in substantially the same manner.

The asbestos trust/injunction mechanism established in the bill is available for use by any asbestos company facing a similarly overwhelming liability. It is written, however, so that Johns-Manville and UNR, both of which have met and surpassed the standards imposed in this section, will be able to take advantage of the certainty it provides without having to reopen their cases.

Section 111 contains a rule of construction to make clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan or reorganization. Indeed, Johns-Manville and UNR firmly believe that the court in their cases had full authority to approve the trust/injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas.

Section 112. Authority of bankruptcy judges to conduct Jury trials in civil proceedings.

This section would amend title 28 of the United States Code to clarify that bankruptcy judges may conduct jury trials and enter appropriate orders consistent with those trials if designated by the district court and with the express consent of all parties to the bankruptcy proceeding.

This amendment would clarify a recent Supreme Court decision and resolve conflicting opinions among the different circuits regarding this issue. The Supreme Court in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), held that in bankruptcy core proceedings, there is a constitutional right to a trial by jury.

The Granfinanciera court had no finding on whether bankruptcy judges could conduct civil trials, and the circuits have reached contrary opinions regarding this issue. Five circuits have held that, in the absence of enabling legislation, bankruptcy judges could not hold jury trials. See Official Committee of Unsecured Creditors v. Schwartzman (In re Stansbury Poplar Place, Inc.), 13 F.3d 122 (4th Cir. 1993); In re Grabill Corp., 987 F.2d 1153, reh'g en banc denied, 976 F.2d 1126 (7th Cir. 1992); Rafoth v. National Union Fire Insurance Co. (In re Baker & Getty Financial Services Inc.), 954 F.2d 1169 (6th Cir. 1992); Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.), 911 F.2d 380 (10th Cir. 1990); In re United Missouri Bank of Kansas City, N.A., 901 F.2d 1449 (8th Cir. 1990). The Second Circuit has been the lone circuit to hold that bankruptcy judges have implicit authority to conduct jury trials. See In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990).

Section 113. Sovereign immunity.

This section would effectively overrule two Supreme Court cases that have held that the States and Federal Government are not deemed to have waived their sovereign immunity by virtue of enacting section 106(c) of the Bankruptcy Code. In enacting section 106(c), Congress intended to make provisions of title 11 that encompassed the words "creditor," "entity," or "governmental unit" applicable to the States. Congress also intended to make the States subject to a money judgment. But the Supreme Court in Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989), held that even if the State did not file a claim, the trustee in bankruptcy may not recover a money judgment from the State notwithstanding section 106(c). This holding had the effect of providing that preferences

could not be recovered from the States. In using such a narrow construction, the Court held that use of the "trigger words" would only bind the States, and not make them subject to a money judgment. The Court did not find in the text of the statute an "unmistakenly clear" intent of Congress to waive sovereign immunity in accordance with the language promulgated in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).

The Court applied this reasoning in United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992), in not allowing a trustee to recover a postpetition payment by a chapter 11 debtor to the Internal Revenue Service. The Court found that there was no such waiver expressly provided within the text of the statute.

This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief. It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the Federal Government in this regard. Of course the entire Bankruptcy Code is applicable to governmental units where sovereign immunity is not or cannot be asserted. As suggested by the Supreme Court, section 106(a)(1) specifically lists those sections of title 11 with respect to which sovereign immunity is abrogated. This allows the assertion of bankruptcy causes of action, but specifically excludes causes of action belonging to the debtor that become property of the estate under section 541. The bankruptcy and appellate courts will have jurisdiction to apply the specified sections to any kind of governmental unit as provided in section 106(a)(2). The bankruptcy court may issue any kind of legal or equitable order, process, or judgment against a governmental unit authorized by these sections or the rules,

but may not enter an award for punitive damages. Furthermore, in awarding fees or costs under the Bankruptcy Code or under the Bankruptcy Rules, the award is subject to the hourly rate limitations contained in section 2412(d)(2)(a), title 28, United States Code, and these limitations are applicable to all governmental units, not just the Federal Government. Section 106(a)(4) permits an order, process, or judgment to be enforced against a governmental unit in accordance with appropriate nonbankruptcy law. Thus, an order against a governmental unit will not be enforceable by attachment or seizure of government assets, but will be subject to collection in the same manner and subject to the same nonbankruptcy law procedures as other judgments that are enforceable against governmental units. Of course, the court retains ample authority to enforce nonmonetary orders and judgments. Nothing in this section is intended to create substantive claims for relief or causes of action not otherwise existing under title 11, the Bankruptcy Rules, or nonbankruptcy law.

Section 106(b) is clarified by allowing a compulsory counterclaim to be asserted against a governmental unit only where such unit has actually filed a proof of claim in the bankruptcy case. This has the effect of overruling contrary case law, such as Sullivan v. Town & Country Nursing Home Services, Inc., 963 F.2d 1146 (9th Cir. 1992); In re Gribben, 158 B.R. 920 (S.D.N.Y. 1993); and In re the Craftsman, Inc., 163 B.R. 88 (Bankr. W.D. Tex. 1994), that interpreted section 106(a) of current law.

Section 114. Service of process in bankruptcy proceedings on an insured depository institution.

This section operates to amend bankruptcy rule 7004 to require that service of process to an insured depository institution be accomplished by certified mail in a contested matter or adversary proceeding. The rule that is presently in operation only requires that service be achieved by first class mail.

Section 115. Meetings of creditors and equity security holders.

This section, applicable only in chapter 7 cases, requires the trustee to orally examine the debtor to ensure that he or she is informed about the effects of bankruptcy, both positive and negative. Its purpose is solely informational; it is not intended to be an interrogation to which the debtor must give any specific answers or which could be used against the debtor in some later proceeding. No separate record need be kept of the examination since it will be preserved along with the remainder of the record of the meeting, which normally is recorded on tape.

The trustee conducting the meeting of creditors is directed to orally inquire whether the debtor is aware of the consequences of bankruptcy, including protections such as those provided by the discharge and the automatic stay, as well as the fact that the bankruptcy filing will appear on the debtor's credit history. Since different creditors treat bankruptcy debtors differently, the trustee is not expected to predict whether the bankruptcy filing will make it more or less difficult for the debtor to obtain credit; some creditors may treat the debtor more favorably after bankruptcy has removed all other debts, and many creditors consider a bankruptcy filing a barrier to new credit only if it occurred in the 2 or 3 years prior to the credit application. For the same reasons, it is not expected that the trustee would

predict whether a dismissal or conversion of the bankruptcy which has already been filed would improve the debtor's chances of obtaining credit.

The trustee must also verify that the debtor has knowingly signed the section of the bankruptcy petition stating the debtor's awareness of the right to file under other chapters of the Code.

Finally, the trustee must make sure the debtor is aware of the effect of reaffirming a debt. Since section 103 of the bill eliminates for most debtors the warnings and explanations concerning reaffirmation previously given by the court at the discharge hearing, it is important that trustees explain not only the procedures for reaffirmation, but also the potential risks of reaffirmation and the fact that the debtor may voluntarily choose to repay any debt to a creditor without reaffirming the debt, as provided in Bankruptcy Code section 524(f).

In view of the amount of information involved and the limits on the time available for meetings of creditors, trustees or courts may provide written information on these topics at or in advance of the meeting and the trustee may then ask questions to ensure that the debtor is aware of the information.

Section 116. Tax assessment.

This section expands the tax exception to the automatic stay that is contained in 11 U.S.C. § 362(b)(9). This section will lift the automatic stay as it applies to a tax audit, a demand for tax returns, assessment of an uncontested tax liability, or the making of certain assessments of tax and issuance of a notice and demand for payment for such assessment.

The language of this provision is only intended to apply to sales or transfers to the debtor. It has no application to sales or transfers to third parties, such as in sales free and clear of tax liens under section 363(f).

Section 117. Additional trustee compensation.

This section provides an additional \$15 compensation for the services of a trustee in a chapter 7 case in addition to the \$45 already provided for in Bankruptcy Code section 330(b). To obtain the funds to pay the additional fees, the Judicial Conference of the United States is required to prescribe additional fees payable by parties as provided in section 1914(b) of title 28; the Judicial Conference of the United States is also authorized to prescribe fees for notices of appearances filed by parties-in-interest after a bankruptcy case is filed and fees to be charged against distributions to creditors. The latter fees would be deducted, by trustees or other entities making distributions, from the monies payable to creditors, constituting user fees charged to those who participate in bankruptcy cases by receiving distributions. Since the fees are payable by the creditors from funds to be distributed to them, such deductions would not affect the application of the best interests of creditors test or other tests for confirmation in chapters 11, 12 or 13. No higher payment from the debtor would be necessary to meet these tests due to the deduction. It is the Committee's intention that the funds for this increase not be borne by the Federal Treasury or by debtors in chapter 7 or 13 cases.

TITLE II. COMMERCIAL BANKRUPTCY ISSUES

Section 201. Aircraft equipment and vessels; rolling stock equipment.

Section 201 would effectuate a number of changes. It would amend both sections 1110 and 1168 to delete the phrase "purchase-money equipment" in order to clarify that these sections protect all lease financing agreements and all debt financings that involve a security interest, not only security interests obtained at the time the equipment is acquired. This change would be phased in so that only new equipment first placed in service after enactment of the amendment would be affected. Once this rule is fully phased in, the distinction between leases and loans would no longer be relevant for the purposes of these sections.

During the time before this rule is phased in, a safe harbor definition of the term "lease" for equipment first placed in service prior to the date of enactment would apply. Under the safe harbor, a lease would receive section 1110 or section 1168 protection if the lessor and the debtor, as lessee, have expressed in the lease agreement, or a substantially contemporaneous writing, that such agreement is to be treated as a lease for Federal income tax purposes. This section also clarifies that the rights of a section 1110 or section 1168 creditor would not be affected by section 1129 "cram-down."

Section 202. Limitation on liability of non-insider transferee for avoided transfer.

Section 547 of the Bankruptcy Code authorizes trustees to recapture preferential payments made to creditors within 90 days prior to a bankruptcy filing. Because of the concern that corporate insiders (such as officers and directors) who are creditors of their own corporation have an unfair advantage over outside creditors, section 547 of the Bankruptcy

Code further authorizes trustees to recapture preferential payments made to such insiders in their capacity as creditors a full year prior to a bankruptcy filing. Several recent court decisions have allowed trustees to recapture payments made to non-insider creditors a full year prior to the bankruptcy filing, if an insider benefits from the transfer in some way. See Levit v. Ingersoll Rand Financial Corp. (In re V.N. DePrizio Construction Co.), 874 F.2d 1186 (7th Cir. 1989); Ray v. City Bank & Trust Co. (In re C&L Cartage Co.), 899 F.2d 1490 (6th Cir. 1990); Manufacturers Hanover Leasing Corp. v. Lowrey (In re Robinson Brothers Drilling), 892 F.2d 850 (10th Cir. 1989). Although the creditor is not an insider in these cases, the courts have reasoned that because the repayment benefitted a corporate insider (namely the officer who signed the guarantee) the non-insider transferee should be liable for returning the transfer to the bankrupt estate as if it were an insider as well. This section overrules the DePrizio line of cases and clarifies that non-insider transferees should not be subject to the preference provisions of the Bankruptcy Code beyond the 90-day statutory period.

Section 203. Perfection of purchase-money security interest.

Section 547(c)(3) of the Bankruptcy Code provides that a trustee may not avoid the perfection of purchase-money security interest as a preference if it occurs within 10 days of the debtor receiving possession of the property. This section conforms bankruptcy law practices to most States' practice by granting purchase-money security lenders a 20-day period in which to perfect their security interest.

Section 204. Continued perfection.

This section sets forth an amendment to sections 362 and 546 of the Bankruptcy Code to confirm that certain actions taken during bankruptcy proceedings pursuant to the Uniform Commercial Code to maintain a secured creditor's position as it was at the commencement of the case do not violate the automatic stay. Such actions could include the filing of a continuation statement and the filing of a financing statement. The steps taken by a secured creditor to ensure continued perfection merely maintain the status quo and do not improve the position of the secured creditor.

Section 205. Impact of lease rejection on leases.

This section clarifies section 365 of the Bankruptcy Code to mandate that lessees cannot have their rights stripped away if a debtor rejects its obligations as a lessor in bankruptcy. This section expressly provides guidance in the interpretation of the term "possession" in the context of the statute. The term has been interpreted by some courts in recent cases to be only a right of possession. See In re Carlton Restaurant, Inc., 151 B.R. 353 (Bankr. E.D. Pa. 1993)(preventing a tenant from assigning the lease); Home Express, Inc. v. Arden Associates, Ltd. (In re Arden and Howe Associates, Ltd.), 152 B.R. 971 (Bankr. E.D. Cal. 1993)(preventing a tenant from enforcing restrictive covenants in the lease); In re Harborview Development 1986 Limited Partnership, 152 B.R. 897 (D.S.C. 1993)(holding that "possession" contemplated by the Code was physical possession of the premises denying a holder of a ground lease protection under the Code). This section will enable the lessee to retain its rights that are appurtenant to its leasehold. These rights

include the amount and timing of payment of rent or other amounts payable by the lessee, the right to use, possess, quiet enjoyment, sublet, or assign.

Section 206. Contents of plan.

This amendment conforms the treatment of residential mortgages in chapter 11 to that in chapter 13, preventing the modification of the rights of a holder of a claim secured only by a security interest in the debtor's principal residence. Since it is intended to apply only to home mortgages, it applies only when the debtor is an individual. It does not apply to a commercial property, or to any transaction in which the creditor acquired a lien on property other than real property used as the debtor's residence. See In re Hammond, 27 F.3d 52 (3d Cir. 1994); In re Rameriz, 62 B.R. 668 (Bankr.S.D.Cal. 1986).

Section 207. Priority for independent sales representatives.

This section clarifies that independent sales representatives of a bankrupt debtor are entitled to the same priority as the employees of the debtor codifying In re Wang Laboratories, Inc., 164 B.R. 404 (Bankr. Mass. 1994). This section modifies section 507 of title 11 to include such representatives in the section's third priority as employees for the purposes of claims of a bankrupt debtor. The section specifies that in order to be treated as an employee for the purposes of priority, at least 75 percent of the income of the independent sales representative must have been earned as an independent contracting entity from the bankrupt debtor.

Section 208. Production payments.

A production payment is an interest in the product of an oil or gas producer that lasts for a limited period of time and that is not affected by production costs. The owner has no other interest in the property or business of the producer other than the interest in the product that is produced. These payments, often transferred by way of oil and gas leases, represent a means by which capital-strapped oil producers may generate income from their property without giving up operating control of their business. Although a number of states use the ownership theory by treating production payments as conveying interests in real property (See In re Simasko Production Co., 74 B.R. 947 (D. Colo. 1987) (production payment treated as separate property interest)), it is not clear that this treatment will necessarily apply in all States in case of bankruptcy. As a result, this section modifies section 541 of the Bankruptcy Code to exclude production payments sold by the debtor prior to a bankruptcy filing from the debtor's estate in bankruptcy.

Section 209. Seller's rights to reclaim goods.

Section 209 addresses the concerns of trade creditors who claim they often have insufficient notice to exercise their reclamation rights. Section 209 amends section 546(c)(1) of the Bankruptcy Code to give trade creditors up to 10 extra days to utilize reclamation rights after the commencement of a bankruptcy case.

Section 210. Investment of money of the estate.

Section 345 of the Code governs investments of the funds of bankrupt estates. The purpose is to make sure that the funds of a bankrupt that are obligated to creditors are invested prudently and safely with the eventual goal of being able to satisfy all claims against the bankrupt estate. Under current law, all investments are required to be FDIC insured, collateralized or bonded. While this requirement is wise in the case of a smaller debtor with limited funds that cannot afford a risky investment to be lost, it can work to needlessly handcuff larger, more sophisticated debtors. This section would amend the Code to allow the courts to approve investments other than those permitted by section 345(b) for just cause, thereby overruling In re Columbia Gas Systems, Inc., 1994 WL 463514 (3rd Cir. (Del).

Section 211. Selection of private trustees in chapter 11 cases.

This section will conform selection of private trustees in chapter 11 cases to the selection process in chapter 7 cases, thereby allowing creditors in a chapter 11 case to elect their own trustee under section 1104 of chapter 11.

Section 212. Limited liability partnerships.

Section 723 of the Bankruptcy Code addresses the personal liability of general partners for the debts of the partnership. Section 723 grants the trustee a claim against "any general partner" for the full partnership deficiency owing to creditors to the extent the partner would be personally liable for claims against the partnership. It is unclear how this provision would be construed to apply with regard to registered limited liability partnerships

which have been authorized by a number of States since the advent of the 1978 Bankruptcy Code. This section clarifies that a partner of a registered limited liability partnership would only be liable in bankruptcy to the extent a partner would be personally liable for a deficiency according to the registered limited liability statute under which the partnership was formed.

Section 213. Impairment of Claims and Interests.

The principal change in this section is set forth in subsection (d) and relates to the award of postpetition interest. In a recent Bankruptcy Court decision in In re New Valley Corp., 168 B.R. 73 (Bankr. D.N.J. 1994), unsecured creditors were denied the right to receive postpetition interest on their allowed claims even though the debtor was liquidation and reorganization solvent. The New Valley decision applied section 1124(3) of the Bankruptcy Code literally by asserting, in a decision granting a declaratory judgment, that a class that is paid the allowed amount of its claims in cash on the effective date of a plan is unimpaired under section 1124(3), therefore is not entitled to vote, and is not entitled to receive postpetition interest. The Court left open whether the good faith plan proposal requirement of section 1129(a)(3) would require the payment of or provision for postpetition interest. In order to preclude this unfair result in the future, the Committee finds it appropriate to delete section 1124(3) from the Bankruptcy Code.

As a result of this change, if a plan proposed to pay a class of claims in cash in the full allowed amount of the claims, the class would be impaired entitling creditors to vote for or against the plan of reorganization. If creditors vote for the plan of reorganization, it can

be confirmed over the vote of a dissenting class of creditors only if it complies with the "fair and equitable" test under section 1129(b)(2) of the Bankruptcy Code and it can be confirmed over the vote of dissenting individual creditors only if it complies with the "best interests of creditors" test under section 1129(a)(7) of the Bankruptcy Code.

The words "fair and equitable" are terms of art that have a well established meaning under the case law of the Bankruptcy Act as well as under the Bankruptcy Code.

Specifically, courts have held that where an estate is solvent, in order for a plan to be fair and equitable, unsecured and undersecured creditors' claims must be paid in full, including postpetition interest, before equity holders may participate in any recovery. See, e.g., Consolidated Rock Products Co. v. Dubois, 312 U.S. 510, 527, 61 S.Ct. 675, 685 (1941); Dentureholders Protective Committee of Continental Inv. Corp., 679 F.2d 264 (1st Cir.), cert. denied, 459 U.S. 894 (1982) and cases cited therein.

With respect to section 1124(1) and (2), subsection (d) would not change the beneficial 1984 amendment to section 1129(a)(7) of the Bankruptcy Code, which excluded from application of the best interests of creditors test classes that are unimpaired under section 1124.

The other subsections deal with the issue of late-filed claims. The amendment to section 502(b) is designed to overrule In re Hausladen, 146 B.R. 557 (Bankr. D. Minn. 1992), and its progeny by disallowing claims that are not timely filed. The amendment also specifies rules relating to the filing of certain governmental claims. These changes are not intended to detract from the ability of the court to extend the bar date for claims when authorized to do so under the Federal Rules of Bankruptcy Procedure. The amendments to

section 726(a) of the Code, governing the distribution of property of the estate in a chapter 7 liquidation, conform to the amendments to section 1129(b) and 502(b). The amendments to paragraphs (2) and (3) of section 726(a) assure that the disallowance of late-filed claims under new section 502(b)(4) does not affect their treatment under section 726(a).

Section 214. Protection of security interest in postpetition rents.

Under current section 552 of the Bankruptcy Code, real estate lenders are deemed to have a security interest in postpetition rents only to the extent their security interest has been "perfected" under applicable State law procedures. Butner v. United States, 440 U.S. 48 (1979). Inclusion under section 552, in turn, allows such proceeds to be treated as "cash collateral" under section 363(a) of the Bankruptcy Code, which prohibits a trustee or debtor-in-possession from using such proceeds without the consent of the lender or authorization by the court. In a number of States, however, it is not feasible for real estate lenders to perfect their security interest prior to a bankruptcy filing; and, as a result, courts have denied lenders having interests in postpetition rents the protection offered under sections 552 and 363 of the Bankruptcy Code. See, e.g., In re Multi-Group III Ltd. Partnership, 99 B.R. 5 (Bankr. D. Ariz. 1989); In re Association Center Ltd. Partnership, 87 B.R. 142 (Bankr. W.D. Wash. 1988); In re TM Carlton House Partners, Ltd., 91 B.R. 349 (Bankr. E.D. Pa. 1988); In re Metro Square, 93 B.R. 990 (Bankr. D. Minn. 1988). Section 214 provides that lenders may have valid security interests in postpetition rents for bankruptcy purposes notwithstanding their failure to have fully perfected their security interest under applicable State law. This is accomplished by adding a new provision to section 552 of the

Bankruptcy Code, applicable to lenders having a valid security interest which extends to the underlying property and the postpetition rents.

Section 214 also clarifies the bankruptcy treatment of hotel revenues which have been used to secure loans to hotels and other lodging accommodations. These revenue streams, while critical to a hotel's continued operations, are also the most liquid and most valuable collateral the hotel can provide to its financiers. When the hotel experiences financial distress, the interests of the hotel operations, including employment for clerks, maids, and other workers can collide with the interests of persons to whom the revenues are pledged. Section 214 recognizes the importance of of this revenue stream for the two competing interests and attempts to strike a fair balance between them. Thus, subsection (a) expressly includes hotel revenues in the category of collateral in which postpetition revenues are subject to prepetition security interests, and subsection (b) includes such revenues in "cash collateral" as defined in section 363.

These clarifications of the rights of hotel financiers are, however, circumscribed. A critical limit is the "equities of the case" provision in subsection (a) which is designed, among other things, to prevent windfalls for secured creditors and to give the courts broad discretion to balance the protection of secured creditors, on the one hand, against the strong public policies favoring continuation of jobs, preservation of going concern values and rehabilitation of distressed debtors, generally. Further circumscription is supplied by the list of exceptions at the beginning of subsection (a). Thus, among other things, the reference to section 363 permits use of pledged revenues if adequate protection is provided; the reference to section 506(c) permits broad categories of operating expenses — such as the cost of

cleaning and repair services, utilities, employee payroll and the like -- to be charged against pledged revenues; the reference to section 522 protects individual debtors' rights; and the reference to sections 544, 545, 547 and 548 protect the debtor's right to use all its avoiding powers against the lienholder. These rights, preserved by the list of sections, would not be waivable by the debtor, either pre- or postpetition.

Section 215. Netting of swap agreements.

Parties active in the foreign exchange market generally document spot and forward foreign exchange transactions under a netting agreement. The Bankruptcy Code's definition of "swap agreement" refers only to foreign exchange contracts, but is silent as to whether spot transactions fall within the definition. This section confirms the market understanding that spot foreign exchange contracts are included in the term "swap agreement." It is expected that contracts that mature in a period of time equalling 2 days or less will fall under the umbrella of "swap agreements."

Section 216. Limitation of avoiding powers.

This section clarifies section 546(a)(1) of the Bankruptcy Code which imposes a 2-year statute of limitations within which an appointed trustee must bring an avoidance action. The purpose of a statute of limitations is to define the period of time that a party is at risk of suit. This section defines the applicable statute of limitations as 2 years from the entry of an order of relief or 1 year after the appointment of the first trustee if such appointment occurs before the expiration of the original 2-year period. The section is not intended to affect the

validity of any tolling agreement or to have any bearing on the equitable tolling doctrine where there has been fraud determined to have occurred. The time limits are not intended to be jurisdictional and can be extended by stipulation between the necessary parties to the action or proceeding.

Section 217. Small business.

This section amends title 11 to expedite the process by which small businesses may reorganize under chapter 11. For the purposes of this section, a small business is defined as one whose aggregate noncontingent liquidated secured and unsecured debts are less than \$2,000,000 as of the date of the bankruptcy filing. A qualified small business debtor who elects coverage under this provision would be permitted to dispense with creditor committees; would have an exclusivity period for filing a plan of 100 days; and would be subject to more liberal provisions for disclosure and solicitation of acceptances for a proposed reorganization plan under Code section 1125. The section permits an extension with respect to the debtor's original filing time if the debtor shows there were circumstances beyond its control.

Section 218. Single asset real estate.

This section will add a new definition to the Code for "single asset real estate," meaning real property that constitutes a single property or project (other than residential property with fewer than four units) which generates substantially all of the gross income of the debtor and has aggregate noncontingent, liquidated secured debts in an amount up to \$4

million. It amends the automatic stay provision of section 362 to provide special circumstances under which creditors of a single asset real estate debtor may have the stay lifted if the debtor has not filed a "feasible" reorganization plan within 90 days of filing, or has not commenced monthly payments to secured creditors.

Section 219. Leases of personal property.

Under current law, when a debtor files for bankruptcy, it has an unspecified period of time to determine whether to assume or reject a lease of personal property. Pending a decision to assume or reject, lessors are permitted to petition the court to require the lessee to make lease payments to the extent use of the property actually benefits the estate. Section 219 responds to concerns that this procedure may be unduly burdensome on lessors of personal property, while safeguarding the debtors ability to make orderly decisions regarding assumption or rejection. The section amends section 365(d) to specify that 60 days after the order for relief the debtor must perform all obligations under an equipment lease, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise. This will shift to the debtor the burden of bringing a motion while allowing the debtor sufficient breathing room after the bankruptcy petition to make an informed decision. Section 363(e) is also amended to clarify that the lessor's interest is subject to "adequate protection." Such remedy is to the exclusion of the lessor's being able to seek to lift the automatic stay under section 363. Finally, section 365(b) is clarified to provide that when sought by a debtor, a lease can be cured at a nondefault rate (i.e., it would not need to pay penalty rates).

Section 220. Exemption for small business investment companies.

This section specifies that small business investment companies are ineligible to file for bankruptcy protection. This will prevent such filings from being utilized to subordinate the interests of the Small Business Administration to other creditors.

Section 221. Payment of taxes with borrowed funds.

This section makes loans that are used to pay Federal taxes nondischargeable under section 523. This will facilitate individuals' ability to use their credit cards to pay their Federal taxes.

Section 222. Return of goods.

This section clarifies section 546 of the Bankruptcy Code by adding a subsection (b) permitting a bankruptcy court to hold a hearing and allow a buyer to return to the seller goods shipped before the commencement of the case if it is in the best interests of the estate. This will allow debtors to return unsold goods in order to offset their debts. The notion may only be made by the trustee and must be made within 120 days after the order for relief.

Section 223. Proceeds of money order agreements.

This section excludes from the debtor's estate proceeds from money orders sold within 14 days of the filing of the bankruptcy pursuant to an agreement prohibiting the commingling of such sale proceeds with property of the debtor. To benefit from this section, the money order issuer must have acted, prior to the petition, to require compliance with the commingling prohibition.

Section 224. Trustee duties; professional fees.

Subsection (a) requires the United States Trustee to invoke procedural guidelines regarding fees in bankruptcy cases and file comments with fee applications. The section also clarifies the standards for court award of professional fees in bankruptcy cases. These changes should help foster greater uniformity in the application for and processing and approval of fee applications.

Section 225. Notice to creditors.

This section amends section 342 of the Bankruptcy Code to require that notices to creditors set forth the debtor's name, address, and taxpayer identification (or social security) number. The failure of a notice to contain such information will not invalidate its legal effect, for example, such failure could not result in a debtor failing to obtain a discharge with respect to a particular creditor.

The Committee anticipates that the Official Bankruptcy Forms will be amended to provide that the information required by this section will become a part of the caption on every notice given in a bankruptcy case. As with other similar requirements, the court retains the authority to waive this requirement in compelling circumstances, such as those of a domestic violence victim who must conceal her residence for her own safety.

TITLE III. CONSUMER BANKRUPTCY ISSUES

Section 301. Period for curing default relating to principal residence.

Section 1322(b)(3) and (5) of the Bankruptcy Code permit a debtor to cure defaults in connection with a chapter 13 plan, including defaults on a home mortgage loan. Until the Third Circuit's decision in Matter of Roach, 824 F.2d 1370 (3d Cir. 1987), all of the Federal Circuit Courts of Appeal had held that such right continues at least up until the time

of the foreclosure sale. See In re Glenn, 760 F.2d 1428 (6th Cir. 1985), cert. denied, 474 U.S. 849 (1985); Matter of Clark, 738 F.2d 869 (7th Cir. 1984), cert. denied, 474 U.S. 849 (1985). The Roach case, however, held that the debtor's right to cure was extinguished at the time of the foreclosure judgment, which occurs in advance of the foreclosure sale. This decision is in conflict with the fundamental bankruptcy principle allowing the debtor a fresh start through bankruptcy.

This section of the bill safeguards a debtor's rights in a chapter 13 case by allowing the debtor to cure home mortgage defaults at least through completion of a foreclosure sale under applicable nonbankruptcy law. However, if the State provides the debtor more extensive "cure" rights (through, for example, some later redemption period), the debtor would continue to enjoy such rights in bankruptcy. The changes made by this section, in conjunction with those made in section 305 of this bill, would also overrule the result in First National Fidelity Corp. v. Perry, 945 F.2d 61 (3d Cir. 1991) with respect to mortgages on which the last payment on the original payment schedule is due before the date on which the final payment under the plan is due. In that case, the Third Circuit held that subsequent to foreclosure judgment, a chapter 13 debtor cannot provide for a mortgage debt by paying the full amount of the allowed secured claim in accordance with Bankruptcy Code section 1325(a)(5), because doing so would constitute an impermissible modification of the mortgage holder's right to immediate payment under section 1322(b)(2) of the Bankruptcy Code.

Section 302. Nondischargeability of fine under chapter 13.

This section adds criminal fines to the list of obligations which may not be discharged pursuant to a chapter 13 case.

Section 303. Impairment of exemptions.

Because the Bankruptcy Code does not currently define the meaning of the words "impair an exemption" in section 522(f), several court decisions have, in recent years, reached results that were not intended by Congress when it drafted the Code. This amendment would provide a simple arithmetic test to determine whether a lien impairs an exemption, based upon a decision, In re Brantz, 106 B.R. 62 (Bankr.E.D.Pa. 1989), that was favorably cited by the Supreme Court in Owen v. Owen, 111 S.Ct. 1833, 1838, n.5.

The decisions that would be overruled involve several scenarios. The first is where the debtor has no equity in a property over and above a lien senior to the judicial lien the debtor is attempting to avoid, as in the case, for example, of a debtor with a home worth \$40,000 and a \$40,000 mortgage. Most courts and commentators had understood that in that situation the debtor is entitled to exempt his or her residual interests, such as a possessory interest in the property, and avoid a judicial lien or other lien of a type subject to avoidance, in any amount, that attaches to that interest. Otherwise, the creditor would retain the lien after bankruptcy and could threaten to deprive the debtor of the exemption Congress meant to protect, by executing on the lien. Unfortunately, a minority of court decisions, such as In re Gonzales, 149 B.R. 9 (Bankr.D.Mass. 1993), have interpreted section 522(f) as not permitting avoidance of liens in this situation. The formula in the section would make clear that the liens are avoidable.

The second situation is where the judicial lien the debtor seeks to avoid is partially secured. Again, in an example where the debtor has a \$10,000 homestead exemption, a \$50,000 house and a \$40,000 first mortgage, most commentators and courts would have said that a judicial lien of \$20,000 could be avoided in its entirety. Otherwise, the creditor would retain all or part of the lien and be able to threaten postbankruptcy execution against the

debtor's interest which, at the time of the bankruptcy is totally exempt. However, a few courts, including the Ninth Circuit in In re Chabot, 992 F.2d 891 (9th Cir. 1992), held that the debtor could only avoid \$10,000 of the judicial lien in this situation, leaving the creditor after bankruptcy with a \$10,000 lien attached to the debtor's exempt interest in property. This in turn will result, at a minimum, in any equity created by mortgage payments from the debtor's postpetition income -- income which the fresh start is supposed to protect -- going to the benefit of the lienholder. It may also prevent the debtor from selling his or her home after bankruptcy without paying the lienholder, even if that payment must come from the debtor's \$10,000 exempt interest. The formula in the section would not permit this result.

The third situation is in the Sixth Circuit, where the Court of Appeals, in In re Dixon, 885 F.2d 327 (6th Cir. 1989), has ruled that the Ohio homestead exemption only applies in execution sale situations. Thus, the court ruled that the debtor's exemption was never impaired in a bankruptcy and could never be avoided, totally eliminating the right to avoid liens. This leaves the debtor in the situation where, if he or she wishes to sell the house after bankruptcy, that can be done only by paying the lienholder out of equity that should have been protected as exempt property. By focusing on the dollar amount of the exemption and defining "impaired," the amendment should correct this problem. By defining "impairment," the amendment also clarifies that a judicial lien on a property can impair an exemption even if the lien cannot be enforced through an execution sale, thereby supporting the result in In re Henderson, 18 F.3d 1305 (5th Cir. 1994), which permitted a debtor to avoid a lien that impaired the homestead exemption even though the lien could not be enforced through a judicial sale.

The amendment also overrules In re Simonson, 758 F.2d 103 (3d Cir. 1985), in which the Third Circuit Court of Appeals held that a judicial lien could not be avoided in a case in

which it was senior to a nonavoidable mortgage and the mortgages on the property exceeded the value of the property. The position of the dissent in that case is adopted.

Section 304. Protection of child support and alimony.

This section is intended to provide greater protection for alimony, maintenance, and support obligations owing to a spouse, former spouse or child of a debtor in bankruptcy. The Committee believes that a debtor should not use the protection of a bankruptcy filing in order to avoid legitimate marital and child support obligations.

The section modifies several provisions of the Bankruptcy Code. Subsection (b) specifies that the automatic stay does not apply to a proceeding that seeks only the establishment of paternity or the establishment or modification of an order for alimony, maintenance, and support. Subsection (c) provides a new bankruptcy priority relating to debts for alimony, maintenance or support obligations. Subsection (d) provides that section 522(f) (1) of the Bankruptcy Code may not be used to avoid judicial liens securing alimony, maintenance, or support obligations. (This subsection is intended to supplement the reach of Farrey v. Sanderfoot, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991), which held that a former husband could not avoid a judicial lien on a house previously owned with his wife.)

Subsection (e) adds a new exception to discharge for some debts arising out of a divorce decree or separation agreement that are not in the nature of alimony, maintenance or support. In some instances, divorcing spouses have agreed to make payments of marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony payments. In other cases, spouses have agreed to lower alimony based on a larger property settlement. If such "hold harmless" and property settlement obligations are not found to be in the nature of alimony, maintenance, or support, they are dischargeable under

current law. The nondebtor spouse may be saddled with substantial debt and little or no alimony or support. This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts. In other words, the debt will remain dischargeable if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents. The Committee believes that payment of support needs must take precedence over property settlement debts. The debt will also be discharged if the benefit to the debtor of discharging it outweighs the harm to the obligee. For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would be discharged. The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start.

The new exception to discharge, like the exceptions under Bankruptcy Code section 523(a)(2), (4), and (6) must be raised in an adversary proceeding during the bankruptcy case within the time permitted by the Federal Rules of Bankruptcy Procedure. Otherwise the debt in question is discharged. The exception applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and can be asserted only by the other party to the divorce or separation. If the debtor agrees to pay marital debts that were owed to third parties, those third parties do not have standing to assert this exception, since the obligations to them were incurred prior to the divorce or separation agreement. It is only the obligation owed to the spouse or former spouse -- an obligation to hold the spouse or former

spouse harmless -- which is within the scope of this section. See In re MacDonald, 69 B.R. 259, 278 (Bankr.D.N.J. 1986).

Subsection (f) specifies that bona fide alimony, maintenance or support payments are not subject to avoidance under section 547 of the Bankruptcy Code. Subsection (g) provides that child support creditors or their representatives are permitted to appear at bankruptcy court proceedings.

Section 305. Interest on interest.

This section will have the effect of overruling the decision of the Supreme Court in Rake v. Wade, 113 S.Ct. 2187 (1993). In that case, the Court held that the Bankruptcy Code required that interest be paid on mortgage arrearages paid by debtors curing defaults on their mortgages. Notwithstanding State law, this case has had the effect of providing a windfall to secured creditors at the expense of unsecured creditors by forcing debtors to pay the bulk of their income to satisfy the secured creditors' claims. This had the effect of giving secured creditors interest on interest payments, and interest on the late charges and other fees, even where applicable law prohibits such interest and even when it was something that was not contemplated by either party in the original transaction. This provision will be applicable prospectively only, i.e., it will be applicable to all future contracts, including transactions that refinance existing contracts. It will limit the secured creditor to the benefit of the initial bargain with no court contrived windfall. It is the Committee's intention that a cure pursuant to a plan should operate to put the debtor in the same position as if the default had never occurred.

Section 306. Exception to discharge.

This section extends from 40 to 60 days the period in which a consumer debt to acquire "luxury goods or services" may be presumed nondischargeable in a proceeding under section 523(a)(2) of the Bankruptcy Code . The section also increases from 20 to 60 days the period in which cash advances under an open end credit plan may be presumed nondischargeable in such a proceeding. In addition, the dollar amount necessary to trigger such a presumption in the case of luxury goods is increased from \$500 to \$1,000.

Section 307. Payments under chapter 13.

Currently, the practice of making payouts under a chapter 13 plan varies from one court to another. This section clarifies Congressional intent that the trustee should commence making the payments "as soon as practicable" after the confirmation of the chapter 13 plan. Such payments should be made even prior to the bar date for filing claims, but only if the trustee can provide adequate protection against any prejudice to later filing claimants caused by distributions prior to the bar date.

Section 308. Bankruptcy petition preparers.

This section adds a new section to chapter 1 of title 11 United States Code to create standards and penalties pertaining to bankruptcy petition preparers. Bankruptcy petition preparers not employed or supervised by any attorney have proliferated across the country. While it is permissible for a petition preparer to provide services solely limited to typing, far too many of them also attempt to provide legal advice and legal services to debtors. These preparers often lack the necessary legal training and ethics regulation to provide such services in an adequate and appropriate manner. These services may take unfair advantage of persons who are ignorant of their rights both inside and outside the bankruptcy system.

This section requires all bankruptcy preparation services to provide their relevant personal identifying information on the bankruptcy filing. It requires copies of all bankruptcy documents to be given to the debtor and signed by the debtor. The section also provides that if the petition is dismissed as the result of fraud or incompetence on the preparer's account, or if the preparer commits an inappropriate or deceptive act, the debtor is entitled to receive actual damages, plus statutory damages of \$2,000 or twice the amount paid to the preparer, whichever is greater, plus reasonable attorney's fees and costs in seeking such relief. The bankruptcy preparer is also subject to injunctive action preventing the preparer from further work in the bankruptcy preparation business.

Section 309. Fairness to condominium and cooperative owners.

This section amends section 523(a) of the Bankruptcy Code to except from discharge those fees that become due to condominiums, cooperatives, or similar membership associations after the filing of a petition, but only to the extent that the fee is payable for time during which the debtor either lived in or received rent for the condominium or cooperative unit. Except to the extent that the debt is nondischargeable under this section, obligations to pay such fees would be dischargeable. See Matter of Rosteck, 899 F.2d 694 (7th Cir. 1990).

Section 310. Nonavoidability of security interests on tools and implements of trade, animals, and crops.

This section adds a limited exception to the debtor's ability to avoid nonpossessory nonpurchase-money security interests in implements, professional books, or tools of trade of the debtor or a dependent of the debtor, or farm animals or crops of the debtor or a

dependent of the debtor. It applies only in cases in which the debtor has voluntarily chosen the State exemptions rather than the Federal bankruptcy exemptions or has been required to utilize State exemptions because a State has opted out of the Federal exemptions. In such cases, if the State allows unlimited exemption of property or prohibits avoidance of a consensual lien on property that could otherwise be claimed as exempt, the debtor may not avoid a security interest on the types of property specified above under Bankruptcy Code section 522(f)(2) to the extent the value of the such property is in excess of \$5,000. This section has no applicability if the debtor chooses the Federal bankruptcy exemptions, which cannot be waived. Like other exemption provisions, the new provision applies separately to each debtor in a joint case.

Section 311. Conversion of case under chapter 13.

This amendment would clarify the Code to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 (and chapter 12), any property acquired after the petition becomes property of the estate, at least until confirmation of a plan. Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate do not apply to chapter 7. Other courts have held that property of the estate in a converted case is the property the debtor had when the original chapter 13 petition was filed.

These latter courts have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had \$10,000 equity in a home at the beginning of the case, in a State with a \$10,000 homestead exemption, would have to

be counseled concerning the risk that after he or she paid off a \$10,000 second mortgage in the chapter 13 case, creating \$10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the \$10,000 in equity for the unsecured creditors and the debtor would lose the home.

This amendment overrules the holding in cases such as Matter of Lybrook, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of In re Bobroff, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

Section 312. Bankruptcy fraud.

This section sets out criminal penalties for any person who knowingly, fraudulently, and with specific intent to defraud uses the filing of a bankruptcy petition or document, or makes a false representation, for the purpose of carrying out a fraudulent scheme. An essential element of the new fraud action, as with other fraud actions, is a requirement of proof beyond a reasonable doubt of a specific intent to defraud. Under no circumstance is this section to be operative if the defendant is adjudicated as having committed the act alleged to constitute fraud for a lawful purpose.

The section would not apply to a person who makes a misrepresentation on a financial statement, and then subsequently files a bankruptcy case, so long as the debtor had not at the time of the misrepresentation planned the bankruptcy filing as part of a scheme in connection with this misrepresentation. This would be the case, for example, where the

misrepresentation occurred a considerable period of time before the bankruptcy filing, and the primary motivation for the bankruptcy filing was not related to the misrepresentation or fraud. It would also not be a crime under this section for a person to make a false statement or promise concerning a proceeding under title 11, as long as that false statement or promise was not made as part of a scheme to defraud involving the bankruptcy proceeding.

Similarly, a person who conveys incorrect information about the pendency of a bankruptcy or the planned filing of a bankruptcy case would not be within the scope of this section unless that information was conveyed fraudulently and to further a fraudulent scheme.

The provision could, however, apply to creditors as well as debtors. For example, if a creditor, as part of a scheme to defraud a debtor or debtors, knowingly made false statements to a debtor concerning the debtor's rights in connection with a bankruptcy case, that creditor could be subject to this section.

Section 313. Protection against discriminatory treatment of applications for student loans.

This section clarifies the antidiscrimination provisions of the Bankruptcy Code to ensure that applicants for student loans or grants are not denied those benefits due to a prior bankruptcy. The section overrules In re Goldrich, 771 F.2d 28 (2d Cir. 1985), which gave an unduly narrow interpretation to Code section 525. Like section 525 itself, this section is not meant to limit in any way other situations in which discrimination should be prohibited. Under this section, as under section 525 generally, a debtor should not be treated differently based solely on the fact that the debtor once owed a student loan which was not paid because it was discharged; the debtor should be treated the same as if the prior student loan had never existed.

TITLE IV. GOVERNMENTAL BANKRUPTCY ISSUES

Section 401. Exception from automatic stay for postpetition property taxes.

Local governments rely on real property taxes to constitute one of their principal sources of revenue. These taxes are, in turn, typically secured by statutory liens. Both the property owner and any mortgage holder recognize that their interest in real property is subject to the local government's right to collect such property taxes. However, several circuit courts have held that the automatic stay prevents local governments from attaching a statutory lien to property taxes accruing subsequent to a bankruptcy filing. See, e.g., In re Paar Meadows, 880 F.2d 1540 (2d Cir. 1989), cert. denied, 110 S.Ct. 869 (1990); Makaroff v. City of Lockport, 916 F.2d 890 (3d Cir. 1990). These decisions create a windfall for secured lenders, who would otherwise be subordinated to such tax liens, and significantly impair the revenue collecting capability of local governments. This section overrules these cases and allow local governments to utilize their statutory property tax liens in order to secure the payment of property taxes.

Section 402. Municipal bankruptcy.

Under section 901 of the Bankruptcy Code, a municipality may file for bankruptcy if, among other things, it is "generally authorized" to do so under State law. The courts have split regarding whether this provision requires express statutory authorization by State law in order for a municipality to file for bankruptcy. See In re Pleasant View Utility District, 24 B.R. 632 (Bankr. M.D. Tenn. 1982); In re City of Wellston, 43 B.R. 348 (Bankr. E.D. Mo. 1984); In re Greene County Hospital, 59 B.R. 388 (Bankr. S.D. Miss. 1986); In re City of Bridgeport, 128 B.R. 688 (Bankr. D. Conn. 1991) (cases not requiring express authorization); but see In re Carroll Township Authority, 119 B.R. 61 (Bankr. W.D. Pa.

1990); In re North and South Shenango Joint Municipal Authority, 80 B.R. 57 (Bankr. W.D. Pa. 1982) (cases requiring express authorization). This section clarifies the eligibility requirements applicable to municipal bankruptcy filings by requiring that municipalities be specifically authorized by the State in order to be eligible to file for bankruptcy.

TITLE V. TECHNICAL CORRECTIONS

This title makes a number of technical corrections to the Bankruptcy Code.

TITLE VI. BANKRUPTCY REVIEW COMMISSION

This title establishes a National Bankruptcy Review Commission. The Commission is empowered to review the Bankruptcy Code and to prepare a report based upon its findings and opinions. Although no exclusive list is set forth, the Commission should be aware that Congress is generally satisfied with the basic framework established in the current Bankruptcy Code. Therefore, the work of the Commission should be based upon reviewing, improving, and updating the Code in ways which do not disturb the fundamental tenets and balance of current law.

The title mandates a nine-member Commission, Congress appointing four members, the President appointing three members, and the Chief Justice of the U.S. Supreme Court appointing two members. The members of the Commission should be knowledgeable in bankruptcy law, with diversity of background and opinion considered in their selection. The first meeting of the Commission shall be held 210 days after the date of enactment. No Member of Congress or officer or employee of the executive branch may be appointed to serve on the Commission.

TITLE VII. SEVERABILITY; EFFECTIVE DATE

Section 701 provides that if any provision of the Act is held to be unconstitutional, the remaining provisions shall not be affected thereby. Section 702 provides that the amendments made by the Act shall only apply prospectively, except as otherwise and specifically noted therein.

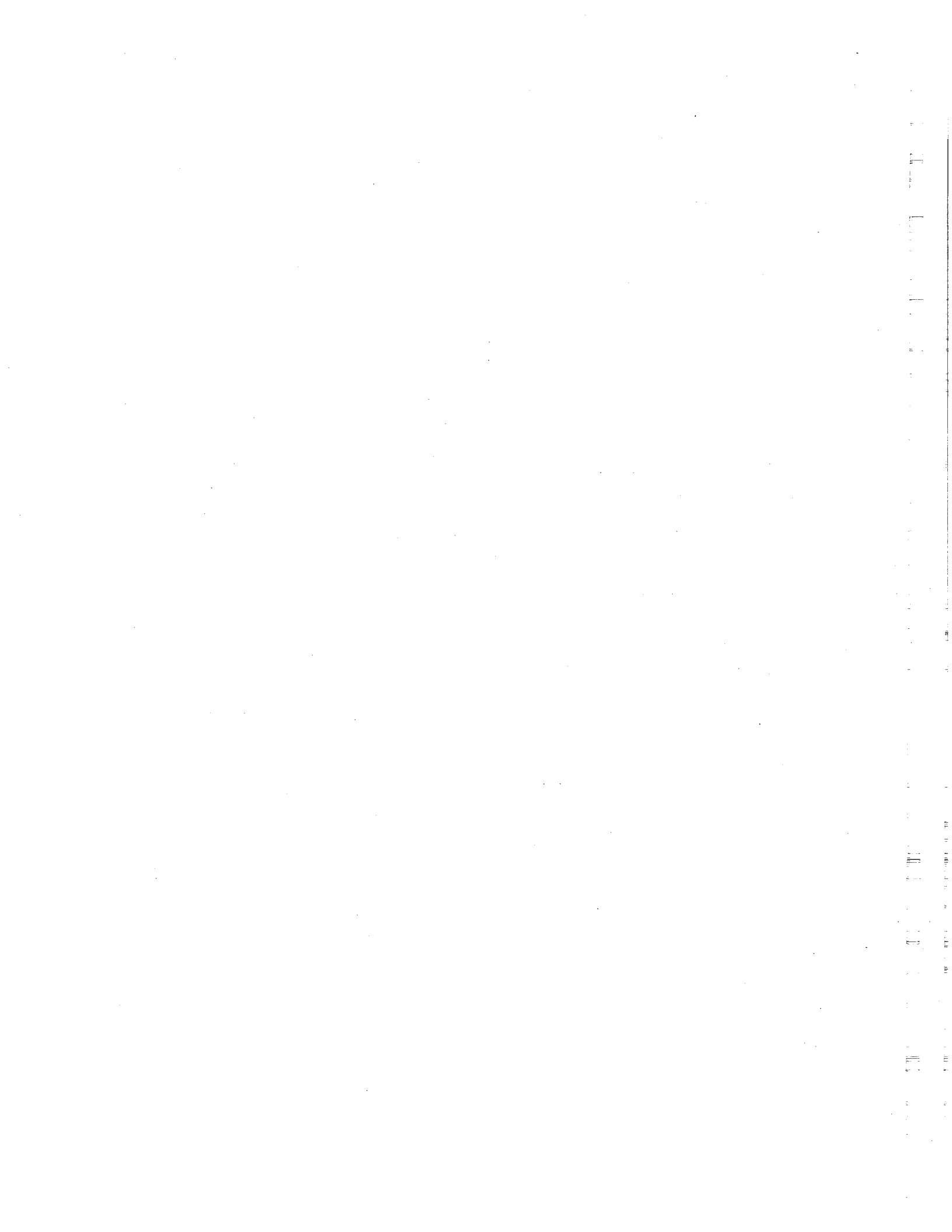
**AN OVERVIEW OF
THE BANKRUPTCY REFORM ACT OF 1994**

Administrative Office of the United States Courts

Bankruptcy Judges Division

**Prepared by and provided through the courtesy of
The Administrative Office of the United States Courts, Bankruptcy Judges Division
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SECTION C



AN OVERVIEW OF THE BANKRUPTCY REFORM ACT OF 1994

Administrative Office of the United States Courts
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AN OVERVIEW OF THE BANKRUPTCY REFORM ACT OF 1994

Prepared by the Bankruptcy Judges Division

I. SUMMARY OF PROVISIONS OF SPECIFIC INTEREST TO THE FEDERAL JUDICIARY

Authorization for Bankruptcy Judges to Conduct Jury Trials

Section 157 of title 28 is amended to provide explicitly that, if a right to a jury trial exists in a section 157 proceeding before a bankruptcy judge, then the bankruptcy judge may conduct the jury trial if specifically designated to do so by the district court and with the express consent of all the parties. This provision appears to be in response to the case law in a majority of the circuits which has held that, absent statutory authorization, bankruptcy judges are not authorized to conduct jury trials.

Creation of Bankruptcy Appellate Panels

Section 158 of title 28 is amended to provide that, unless certain specific conditions exist, the judicial councils "shall" create a bankruptcy appellate panel. These conditions are insufficient judicial resources available within the circuit or that the establishment of such a service would result in undue delay or increased cost to the parties.

Review Commission

A two-year, nine-member National Bankruptcy Review Commission is created to investigate and study issues and problems with the Bankruptcy Code. Members of Congress and officers and employees of the executive branch are prohibited from serving on this commission. The Chief Justice appoints two of the nine members.

Small Business

Originally, the legislation called for the creation of an eight-court, two-year pilot chapter 10 for small businesses. This provision was controversial, strongly opposed by the credit community as being too debtor oriented and strongly objected to by the Department of Justice as violating the Constitution's mandate for uniform bankruptcy laws. The separate chapter and pilot language were dropped and numerous changes were made to chapter 11 in lieu thereof.

Increased Chapter 7 Trustee Compensation

The compensation paid to chapter 7 trustees is increased from \$45 to \$60 per case. This additional \$15 is estimated to cost \$8 to \$10 million annually. It is specifically provided that this increase is not effective until one year after the bill's enactment to allow the judiciary time to impose new fees to pay for this increase. In addition to "miscellaneous fees," the Judicial Conference is authorized in the bill, in its discretion, to prescribe appearance fees in bankruptcy cases and to impose fees against distributions. The new fees will apply to pending cases to enable the collection of the necessary funds, and the legislation provides for such application.

Sovereign Immunity No Longer Defense for Violating Automatic Stay

Sovereign immunity is abrogated in connection with numerous Code provisions. For example, sovereign immunity no longer constitutes a defense for violating the automatic stay in tax cases. Two Supreme Court decisions, Hoffman v. Connecticut Department of Income Maintenance and United States v. Nordic Village, Inc., are effectively overruled by this bill. In addition, the bill explicitly authorizes the court to issue a money judgment against a governmental unit.

Supplemental Injunctions

Bankruptcy judges are specifically authorized to issue injunctions binding present and future claimants and to set up trusts to handle mass tort claims in asbestos cases.

Uniform Effective Date for all Federal Rules

Corrective language provides that the Federal Rules of Bankruptcy Procedure will have an effective date of December 1, consistent with all other federal rules.

Immediate Appeal to District Court

Appeals from bankruptcy court orders enlarging or reducing the exclusivity period in chapter 11 cases are now immediately appealable to the district court and not subject to leave of the district court.



II. DETAILED ANALYSIS OF EACH SECTION

The Bankruptcy Reform Act of 1994 is the first major, comprehensive bankruptcy reform legislation since 1984. Areas involving judicial administration, governmental, commercial, and consumer issues are all addressed in this Act. Each provision is discussed below.

Title I - IMPROVED BANKRUPTCY ADMINISTRATION

Section 101, "Expedited Hearing On Automatic Stay," provides that the final hearing on a motion for relief from the automatic stay as provided for in section 362(e) of the Bankruptcy Code must now be concluded, as opposed to commenced, within 30 days after the conclusion of the preliminary hearing. The 30-day period may be extended if all parties in interest consent or for a specific time due to a court finding of "compelling circumstances." The section by section analysis prepared by the House Judiciary Committee states that this language should prevent an extension when the debtor is seeking to delay the proceeding or has neglected to consummate a pending contract. A bona fide illness is given as an example of why an extension should be granted. Even so, the courts are urged to balance the need for such an extension with the property rights involved, on a case by case basis. The House Judiciary Committee stated a belief that quick conclusions of these hearings will reduce the time and cost of bankruptcy proceedings by preventing "unjustified or unwarranted" delays.

"Jurisdiction to Review Interlocutory Orders Increasing or Reducing Certain Time Periods for Filing Plans" is addressed in section 102 of the bill. This provision amends section 158(a) of title 28 to provide that interlocutory orders and decrees issued under section 1121(d) of title 11 (increasing or reducing the time in which to file a plan) may be appealed to the district court as a matter of right, and leave of court is no longer required. Other interlocutory orders and decrees may be appealed with leave of the district court. Virtually all versions of a bankruptcy bill addressed the exclusivity period. However, most past versions set certain time limits.

The topic of reaffirmation agreements pursuant to the advice of an attorney had been an area of concern in both houses during the last two congresses. This issue is addressed, in part, in section 103, "Expedited Procedure for Reaffirmation of Debts." This section amends the discharge provision of the Code, specifically section 524(c), by adding new subsections which require the reaffirmation agreement to contain an explicit statement advising the debtor that the agreement is not required by either bankruptcy or non-bankruptcy law, and require the attorney to advise the debtor of the legal effect and

consequences of such an agreement, including a default under such an agreement. Subsection (d) of section 524 would also be amended to require the court to hold a reaffirmation hearing and to advise the debtor of the consequences and effects of such a reaffirmation agreement only if the debtor has not been represented by an attorney during the negotiating of the agreement.

Section 104, "Powers of Bankruptcy Courts," is of considerable interest to the federal judiciary. First, in subsection (a), section 105 of the Bankruptcy Code is amended to provide that bankruptcy courts are specifically authorized to initiate and hold status conferences, essentially as a case management device, and to issue appropriate orders.

Specifically, a new subsection (d) is added to 11 U.S.C. § 105 which provides that the court may hold a status conference and issue any orders that may be necessary

to ensure that a case is handled expeditiously and economically, including an order that—

- (A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or
- (B) in a case under chapter 11 [of title 11], an order that:
 - (i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;
 - (ii) sets a date by which the debtor, or trustee . . . shall solicit acceptances of a plan;
 - (iii) sets the date by which a party in interest other than a debtor may file a plan;
 - (iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;
 - (v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

- (vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

The new subsection requires that these orders must be consistent with other title 11 provisions and applicable Federal Rules of Bankruptcy Procedure.

The section by section analysis states that many recommendations from the Federal Courts Study Committee were incorporated into this section. This analysis also noted that notwithstanding the adoption of Fed. R. Bankr. P. 7016 there appeared to be some judicial reluctance to use pretrial conferences as a docket management tool without clear and explicit statutory authorization to do so. The analysis for this section states that this provision clarifies the existence of such authority in both adversary and nonadversary proceedings.

Another area frequently addressed by bankruptcy bills is abstention. Section 104(b) amends section 1334 of title 28 by providing that a decision not to abstain from hearing certain state law causes of action related to but not arising under a title 11 case filed after the effective date of the Act is reviewable by the court of appeals and by the Supreme Court. The causes of action concerning when a refusal to abstain is appealable are those which could not have been commenced in a court of the United States absent jurisdiction under section 1334(c)(2) and which are commenced in an appropriate state forum where they can be timely adjudicated. Abstention from hearing these claims is mandatory under section 1334(c)(2). A decision not to abstain made in any case filed prior to the effective date of this Act is not affected by this provision and cannot be appealed beyond the district court.

Subsection (c) of section 104 addresses the creation of bankruptcy appellate panel services (BAPS). The subsection will require the establishment of a BAP unless the judicial council finds that 1) there are insufficient judicial resources available within the circuit, or 2) establishment of such a service would result in undue delay or increased cost to parties in title 11 cases. A judicial council may reconsider its decision to create or not to create a BAP at any time.

One year after the creation of a BAP, a majority of the district judges may request review of the situation by the judicial council to determine if, under the statutory criteria, the BAP is still required. Three years after a BAP is created, a judicial council may, on its own motion, review the situation to determine if the BAP is still statutorily required. If a judicial council determines that a BAP is no longer required, it shall arrange for completion

of pending appeals and the termination of the panel service.

It is further provided that bankruptcy judges appointed to serve on a BAP may also be reappointed to the BAP. An appellant is permitted to "opt-out" of having an appeal heard by the BAP by electing at the time of filing the notice of appeal to have the appeal heard by the district court. Any other party to the proceeding may also "opt out" of having the appeal reviewed by the BAP by so electing, within 30 days after service of the notice of appeal. As is presently provided, appeals are to be heard by a panel of three, and no judge may hear an appeal originating from the district in which that judge is appointed or designated. Also as presently provided, the district judges for the district in which the appeals occur, must authorize, by majority vote, the BAP to hear and determine appeals within that district.

The section by section analysis states that this subsection "provides for the establishment in each judicial circuit of a bankruptcy appellate panels [sic], composed of sitting bankruptcy judges, to serve in place of the district court in reviewing bankruptcy court decisions."

Section 104(e) addresses bankruptcy rulemaking. Specifically, it amends section 2073 of title 28 to include authorization for a committee on bankruptcy rules and to make all procedures under the Rules Enabling Act applicable to the committee and its activities. The second change is directed to the effective date of the Federal Rules of Bankruptcy Procedure and amends section 2075 of title 28 to conform that date to the effective date of the other federal procedural rules which is "no earlier than December 1 of the year" in which the rules are transmitted. 28 U.S.C. § 2074(a).

Section 105 of the bill is of particular interest to the six judicial districts in Alabama and North Carolina that are served by the bankruptcy administrator program. This section explicitly authorizes a bankruptcy administrator or designee to preside at the section 341 meeting of creditors and to examine the debtor under oath. Additionally, the bankruptcy administrator is authorized to administer the oath required by section 343 of the Code. The administrator is also authorized to preside at any meeting of equity security holders.

The Pension Benefit Guarantee Corporation and state pension funds are authorized, pursuant to section 106 of the bill, to serve on creditor committees when employee pension fund assets are at issue in a case. The bill accomplishes this authorization by expanding the definition of "person" in section 101 of the Code to include pension funds and guarantors of pension funds.

Trustee compensation is addressed by section 107 which amends section 326(a) of title 11 to increase the percentage compensation rate in accordance with a graduated scale. Compensation will be allowed as follows: "25 percent on the first \$5,000 or less, 10 percent

on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000, but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000." (The present compensation rate is "fifteen percent on the first \$1,000 or less, six percent on any amount in excess of \$1,000 but not in excess of \$3,000, and three percent on any amount in excess of \$3,000.")

Section 108 is titled "Dollar Adjustments" and covers many areas. First, it amends section 109(e) of the Code to increase the chapter 13 eligibility levels to persons who owe noncontingent, liquidated, unsecured debts of less than \$250,000 and noncontingent, liquidated, secured debts of less than \$750,000. (Currently, the unsecured and secured limits are \$100,000 and \$350,000, respectively.)

Dollar amounts in involuntary cases as prescribed in section 303 of title 11 also are increased to require that involuntary petitions by three or more creditors must aggregate claims of at least \$10,000 more than the value of any lien (present language provides for \$5,000), and if there are fewer than 12 creditors, by one or more creditors holding a claim in the aggregate of at least \$10,000 of such claims (present language provides for \$5,000 of such claims).

The dollar amounts with respect to priorities as established in section 507(a) of the Code are also amended, with dollar amounts being doubled. The limits are doubled for amounts in the third priority (unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay), the fourth priority (unsecured claims for contributions to an employee benefit plan), the fifth priority ("unsecured claims of persons engaged in the production or raising of grain...against a debtor who owns or operates a grain storage facility" or "engaged as a United States fisherman against a debtor who...is engaged in operating a fish produce storage or processing facility"), and the sixth priority (unsecured claims for money deposited for purchase, lease, or rental of property or purchase of services for personal, household, or family use). (The Senate had included language in past versions which had "clarified" that the sixth priority (consumer deposits) was intended for one household. This language is not in the final version.)

An interesting new provision, not contained in any past House or Senate version, is section 108(e), entitled "Future Adjustments." This language amends section 104 of title 11 to provide that on April 1, 1998, and at each three-year interval ending on April 1 thereafter, each of these dollar amounts shall be adjusted to reflect the change in the Consumer Price Index (CPI), rounded to the nearest \$25. Currently, pursuant to 11 U.S.C. § 104, every six years the Judicial Conference transmits to Congress recommendations for these dollar adjustments. The Conference will still be required to recommend such adjustments. Additionally, the Conference will be required to implement the CPI adjustment by publishing the automatic CPI increase in the Federal Register on March 1, 1998, and at each three-year interval ending on March 1 thereafter.

Section 109, entitled "Premerger Notification," amends section 363 of the Code. Section 363(b)(2) now provides that any Clayton Act notifications required to be given by the debtor are to be given by the trustee. Additionally, the amendment provides that the waiting period required following the notification, which is shorter for parties in bankruptcy cases than for other entities seeking to merge, is extended from 10 days to 15 days after the Department of Justice and the Federal Trade Commission receive the notification. The waiting time after notification may be extended either under the terms of the Clayton Act or by the court, after notice and a hearing. This amendment is said to clarify the relationship between bankruptcy proceedings and antitrust procedures under the Clayton Act for the review of proposed transactions by federal antitrust authorities. The section by section analysis also states that the amendment clarifies that the waiting period can be extended but not shortened.

The allowance of creditor committee expenses is covered by section 110 of the bill. Specifically, section 503 of the Code is amended by the addition of a new paragraph which permits creditor committee members to receive reimbursement for actual and necessary expenses incurred in the performance of their duties. The section by section analysis explicitly states that this provision will not allow compensation for services rendered by or to the committee members.

"Supplemental Injunctions" is the title of section 111 which amends section 524 of the Code to authorize bankruptcy courts to issue injunctions barring claims against the debtor by present and future claimants with asbestos-related claims in chapter 11 cases and instead requiring these claims to be handled by a trust, funded by the plan of reorganization. Bankruptcy courts may enjoin persons and governmental units from taking legal action to collect claims, except as provided by the injunction, the confirmation order, or the confirmed plan.

The section by section analysis for this provision states that its purpose is to resolve any possible uncertainty as to a bankruptcy court's authority to issue these "Manville-type" injunctions. The amendment states, and the section by section analysis reiterates, that the inclusion of this explicit authorization is not to be construed as indicating that the bankruptcy courts may not already possess the authority to issue injunctions in connection with a plan of reorganization. The House Judiciary Committee noted that this provision may help the committee decide whether the concept should be extended into areas other than asbestos. These amendments to section 524 apply to pending cases.

Another new section not contained in any previous versions of a bankruptcy bill is section 112, titled "Authority of Bankruptcy Judges to Conduct Jury Trials in Civil Proceedings." Specifically, section 157 of title 28 is amended to provide that in any proceeding heard by a bankruptcy judge under that section in which the cause of action contains the right to a jury trial, the bankruptcy judge may conduct the jury trial if

specifically designated to exercise such jurisdiction by the district court and if the parties give their express consent. The section by section analysis makes clear that the purpose of this explicit statutory authorization is twofold: 1) to resolve the question left unanswered by the Supreme Court in the Granfinanciera case as to whether bankruptcy judges may conduct jury trials, and 2) to resolve that same question for the circuits.

Yet another new provision is section 113, "Sovereign Immunity." Very strong language was used in the section by section analysis to make clear that this provision's purpose is to override two recent Supreme Court cases, i.e., Hoffman v. Connecticut Department of Income Maintenance and United States v. Nordic Village, Inc. According to the House Judiciary Committee, these two cases have held that the federal government and the states have not waived their sovereign immunity by virtue of the enactment of section 106(c) of the Bankruptcy Code. Consequently, the section by section analysis explains that the purpose of the amendment is to make section 106 conform to the congressional intent of the 1978 Act by waiving the sovereign immunity of the federal government and the states.

Specifically, the bill rewrites section 106 entirely to provide that sovereign immunity is abrogated, as detailed below, for the following Code provisions:

- 1) section 105 – Power of the Court;
- 2) section 106 – Waiver of Sovereign Immunity;
- 3) section 107 – Public Access to Papers;
- 4) section 108 – Extension of Time;
- 5) section 303 – Involuntary Cases;
- 6) section 346 – Special Tax Provisions;
- 7) section 362 – Automatic Stay;
- 8) section 363 – Use, Sale, or Lease of Property;
- 9) section 364 – Obtaining Credit;
- 10) section 365 – Executory Contracts and Unexpired Leases;
- 11) section 366 – Utility Service;
- 12) section 502 – Allowance of Claims or Interests;
- 13) section 503 – Allowance of Administrative Expenses;
- 14) section 505 – Determination of Tax Liability;
- 15) section 506 – Determination of Secured Status;
- 16) section 510 – Subordination;
- 17) section 522 – Exemptions;
- 18) section 523 – Exceptions to Discharge;
- 19) section 524 – Effect of Discharge;
- 20) section 525 – Protection Against Discriminatory Treatment;
- 21) section 542 – Turnover of Property to the Estate;
- 22) section 543 – Turnover of Property by a Custodian;

- 23) section 544 – Trustee as Lien Creditor and as Successor to
Certain Creditors and Purchasers;
- 24) section 545 – Statutory Liens;
- 25) section 546 – Limitations on Avoiding Powers;
- 26) section 547 – Preferences;
- 27) section 548 – Fraudulent Transfers and Obligations;
- 28) section 549 – Postpetition Transactions;
- 29) section 550 – Liability of Transferee of Avoided Transfer;
- 30) section 551 – Automatic Preservation of Avoided Transfer;
- 31) section 552 – Postpetition Effect of Security Interest;
- 32) section 553 – Setoff;
- 33) section 722 – Redemption;
- 34) section 724 – Treatment of Certain Liens;
- 35) section 726 – Distribution of Property of the Estate;
- 36) section 728 – Special Tax Provisions;
- 37) section 744 – Executory Contracts;
- 38) section 749 – Voidable Transfers (Stockbrokers);
- 39) section 764 – also Voidable Transfers (Commodity Brokers);
- 40) section 901 – Applicability of Other Sections of this Title;
- 41) section 922 – Automatic Stay of Enforcement of Claims Against the
Debtor;
- 42) section 926 – Avoiding Powers;
- 43) section 928 – Post Petition Effect of Security Interest;
- 44) section 929 – Municipal Leases;
- 45) section 944 – Effect of Confirmation;
- 46) section 1107 – Rights, Powers, and Duties of Debtor in
Possession;
- 47) section 1141 – Effect of Confirmation;
- 48) section 1142 – Implementation of Plan;
- 49) section 1143 – Distribution;
- 50) section 1146 – Special Tax Provisions;
- 51) section 1201 – Stay of Action against Codebtor;
- 52) section 1203 – Rights and Powers of Debtor;
- 53) section 1205 – Adequate Protection;
- 54) section 1206 – Sales Free of Interests;
- 55) section 1227 – Effect of Confirmation;
- 56) section 1231 – Special Tax Provisions;
- 57) section 1301 – Stay of Action against Codebtor;
- 58) section 1303 – Rights and Powers of Debtor;
- 59) section 1305 – Filing and Allowance of Postpetition Claims;
and
- 60) section 1327 – Effect of Confirmation.

The new section 106 provides that the court may hear and determine any issue arising with respect to the application of the cited sections of the Code to governmental units. The amendments also authorize the court to issue an order, process, or judgment against a governmental unit under the sections cited above or under the Federal Rules of Bankruptcy Procedure including a money recovery order or judgment. Awards of punitive damages may not be made. Orders and judgments for costs or fees are allowed against a governmental unit, but such an award must be consistent with the provisions and limitations of 28 U.S.C. § 2412(d)(2)(A) (fees and expenses allowed under the Equal Access to Justice Act).

Two further provisions of this section are noteworthy. In particular, a governmental unit which has filed a proof of claim is deemed to have waived sovereign immunity with respect to any claim against the governmental unit that arose out of the same transaction or occurrence. Further, notwithstanding any assertion of sovereign immunity, there shall be offset against a claim or interest of the governmental unit any claim against the governmental unit that is property of the estate.

The amendments to section 106 of the Code apply to pending cases.

Service of process is addressed by section 114 of the bill. This provision would amend Rule 7004 of the Federal Rules of Bankruptcy Procedure, adding a new subdivision (h) titled "Service of Process On An Insured Depository Institution." This subdivision provides that service on an insured depository institution (as defined by the Federal Deposit Insurance Act - 12 U.S.C. § 1813) shall be made by certified mail addressed to a designated officer of the institution unless: 1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail; 2) the court orders otherwise, after service upon the institution by certified mail of notice of an application to permit service by first class mail sent to a designated officer of the institution; or 3) the institution has waived, in writing, its entitlement to service by certified mail by designating an officer to receive service of process.

The federal judiciary objected to the amendment to Rule 7004 as violative of the Rules Enabling Act, unnecessary, and an added expense of administering the estate.

Section 115 of the bill is titled "Meetings of Creditors and Equity Security Holders." This provision amends section 341 of the Bankruptcy Code to add a new subsection which would require the trustee to examine the debtor orally at the section 341 meeting of creditors to ensure that the debtor is aware of the potential consequences of seeking a discharge in bankruptcy, including the effects on credit history, the ability to file a petition under a different chapter of the Code, the effect of receiving a discharge of debts, and the effect of reaffirming a debt, including the debtor's knowledge of potential rights under

subsection (d) of section 524.

Earlier versions of this section had called for the trustee to make recommendations on a preserved record regarding the debtor's knowledge. Also deleted were provisions requiring the trustee to ensure the debtor's knowledge of his or her duties under section 521 of title 11 and the potential penalties for committing fraud or other abuses. The section by section analysis states that this provision is purely informational and is not intended to be an interrogation. Rather, its purpose is to ensure that the debtor understands the positive and negative aspects of filing for bankruptcy. The section by section analysis continues by noting that it "is important that trustees explain not only the procedures for reaffirmation, but also the risks." Further, the trustee is to advise the debtor that he or she may choose to repay any creditor without reaffirming the debt.

Trustees and court personnel have expressed concern over this provision and the time that could be consumed attempting to comply with it, especially at crowded section 341 meetings. The final paragraph of the section by section analysis, in its entirety, reads as follows:

In view of the amount of information involved and the limits on the time available for meetings of creditors, trustees or courts may provide written information on these topics at or in advance of the meeting and the trustee may then ask questions to ensure that the debtor is aware of the information.

Section 116, titled "Tax Assessment," amends section 362 of the Code to provide that an audit, a demand for tax returns, or an issuance of a notice of tax deficiency is not prevented or stopped by the automatic stay provisions. Additionally, the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment is not prevented or stopped by the automatic stay provision. The section by section analysis explains that this provision is only intended to apply to sales or transfers to the debtor, and has no application to sales or transfers to third parties.

Section 117, titled "Additional Trustee Compensation," will have a significant effect upon the judiciary and the parties. Specifically, this section amends 11 U.S.C. § 330(b) to increase the compensation of chapter 7 trustees by \$15, from \$45 to \$60 per case. However, this increase is estimated to cost \$8 to \$10 million dollars annually. The section by section analysis states that the House Judiciary Committee intends that this increase not be funded out of the Federal Treasury or by debtors in chapter 7 or 13 cases. Instead, this new section directs the Judicial Conference to prescribe additional fees "payable by parties" pursuant to 28 U.S.C. § 1914(b), (see 28 U.S.C. § 1930(b)), i.e., the Miscellaneous Fee

Schedule. In addition to being directed to prescribe additional miscellaneous fees, the Judicial Conference is "authorized" to 1) prescribe notice of appearance fees, which according to the section by section analysis are "filed by parties-in-interest after a bankruptcy case is filed"; and 2) prescribe fees to be charged against distributions to creditors. These fees, according to the section by section analysis, would be deducted by the trustee, or other person making distributions, from the monies payable to the creditors. According to the House Judiciary Committee analysis, such fees constitute user fees on those who participate in the bankruptcy process by receiving distributions. Since these fees come from distributions, their deduction will not affect the application of the best interests of creditors test or other tests for confirmation in chapters 11, 12, or 13, according to the section by section analysis. Finally, the section by section analysis states that no higher payment from the debtor is necessary to meet these tests.

To enable the judiciary to begin the process of prescribing, implementing and collecting these new fees before disbursement begins, the \$15 increase will not be effective until one year after enactment. However, also to ensure that the judiciary has adequate funds to meet this new directive, the newly prescribed fees will apply to pending cases.

TITLE II - COMMERCIAL BANKRUPTCY ISSUES

Aircraft equipment, vessels, and rolling stock equipment are addressed in section 201. The amendments made by this provision appear to be in the nature of clarifying and updating existing sections 1110 and 1168 of the Code, and also somewhat expanding their scope. Language has also been inserted to ensure that secured loans are included as well as leases and lease financing or conditional sales contracts. The definition of the type of airline covered also is amended to ensure that small carriers receive the same treatment as large carriers.

A special "application" section states that these amendments will not apply to cases commenced under title 11 prior to enactment, except that the definition of lease in the newly enacted section 1110 (c) of the Code will apply to any settlement reached in a proceeding in a pending case.

The section by section analysis advises that the phrase "purchase-money equipment" has been deleted from sections 1110 and 1168 to clarify that all lease financing agreements and debt financing that involve a security interest are covered, not just security interests obtained at the time the equipment is acquired. This change is to be phased in, affecting new equipment first. Eventually, the section by section analysis advises, there will be no relevant distinction between leases and loans for purposes of sections 1110 and 1168.

During the transition period, a so-called "safe harbor" definition of the term "lease" will apply for equipment first placed in service prior to the date of enactment. Under this definition, a lease would be protected under these sections if the lessor and the debtor have expressed in the agreement that the agreement is to be treated as a lease for federal tax purposes.

The so-called Deprizio case is overruled by section 202, which is titled "Limitation on Liability of Non-Insider Transferee for Avoided Transfer." Specifically, this provision amends section 550 of the Bankruptcy Code to provide that the trustee may not recover from a transferee that was not an insider if the transfer was made between 90 days and 1 year before the petition was filed and was avoided under section 547(b) even if it benefitted a creditor that was an insider at the time of the transfer.

Section 203, "Perfection of Purchase-Money Security Interest," extends from 10 days to 20 days the time in which a secured creditor must have perfected a security interest to prevent avoidance of the interest by the trustee in a preference action under section 547 of the Code.

Section 204, "Continued Perfection," amends sections 362 and 546 of the Code to provide that actions taken to perfect, maintain, or continue the perfection of a security interest do not violate the automatic stay and are explicitly covered under the trustee's rights and powers. The section by section analysis notes that the steps taken by a secured creditor to continue perfection merely maintain the status quo and do not improve the secured creditor's position.

The "Rejection of Unexpired Leases of Real Property or Timeshare Interests" is covered by section 205 of the Act. This section makes numerous changes to section 365(h) of the Code to clarify the rights of the lessee if the trustee rejects an unexpired lease of real property. Specifically, the lessee is permitted to either treat the lease or timeshare interest as terminated or to continue the present terms of the lease or timeshare interest, including provisions regarding payments and use or enjoyment of the property, etc., against damages caused by the trustee's nonperformance. The section also contains provisions permitting the lessee to offset payments, under certain circumstances.

Section 206, "Contents of Plan," amends section 1123(b) of the Code to extend the Supreme Court's Nobelman ruling against lien stripping in chapter 13 cases to chapter 11, by preventing modification of the rights of a holder of a claim secured only by a security interest in the debtor's principal residence. According to the section by section analysis, this provision is intended to apply only to home mortgages, not to commercial property, and not to any transaction in which the creditor acquired a lien on property other than real property used as the debtor's residence.

Section 207 grants "Priority for Independent Sales Representatives." Section 507(a)(3) of the Code is amended to provide a priority of up to \$4,000 for both employees and independent sales representatives for wages, salaries, or commissions earned within 90 days before the date the petition was filed or the date the business ceased operations. It is also provided that the independent sales representative must have earned at least 75% of his or her income during the previous year from the debtor firm.

The "Exclusion From the Estate of Interests in Liquid and Gaseous Hydrocarbons Transferred by the Debtor Pursuant to Product Payment Agreements" is the title of section 208. The goal of this section is to exclude from the debtor's estate production payments sold by the debtor prior to a bankruptcy filing. To do so, the bill amends the definitional section of the Code, section 101, to define "production payment" and also amends section 541 to exclude these same production payments.

A "Seller's Rights to Reclaim Goods" is extended by section 209. Specifically, section 546(c) of the Code is amended by extending the reclamation period. If the original 10 days expires after commencement of the case, then the seller can exercise the right to reclaim before 20 days after receipt of the goods by the debtor.

A new provision is section 210, "Investment of Money of the Estate." According to the section by section analysis, the amendment seeks to overrule the recent Third Circuit decision In re Columbia Gas Systems, Inc., 33 F.3d ___ (3rd Cir. 1994). The amendment affects section 345 of the Code, which requires all investments to be FDIC-insured, collateralized, or bonded, a necessary requirement, the House Judiciary Committee notes, especially with smaller debtors. The provision amends section 345 to allow the court to order slightly different investments, "for cause." The section by section analysis states that the amendment will permit more flexibility for larger, more sophisticated cases which otherwise might be "needlessly handcuff[ed]."

Yet another new section is 211, "Election of Trustee Under Chapter 11." Section 1104 of the Code is amended to provide that the selection of trustees in chapter 11 cases can now be conducted under the same procedures used to elect trustees in chapter 7 cases, e.g., the U.S. trustee shall convene a meeting of creditors at which qualified creditors can elect a trustee. The election procedure must be triggered by "the request of a party in interest" made within 30 days after the court orders the appointment of a trustee. Otherwise, the U.S. trustee will make the appointment under section 1104(c), which is redesignated as section 1104(d).

Continuing the wave of new provisions is section 212, "Rights of Partnership Trustee Against General Partners." This provision amends section 723(a) of the Code to provide that the trustee may go against a general partner only to the extent that the general partner would be liable under nonbankruptcy law instead of the present "full amount of the

deficiency." The section by section analysis states that it is not clear, without this amendment, how registered limited liability partnerships would be treated in chapter 7 cases, since they have evolved in the period following enactment of the 1978 Act.

The "Impairment of Claims and Interests" is the caption of section 213. The section deals, in part, with the voting rights in chapter 11 cases and award of postpetition interest. To resolve the issue, the bill deletes subsection (3) of section 1124 of the Code. This section of the new bill, however, contains much more. It amends section 502(b) of the Code to add late filing of a proof of claim as a ground for objecting to the allowance of a claim, thus effectively overruling In re Hausladen, 146 B.R. 557 (Bankr. D. Minn. 1992). It also extends the period for the filing of a proof of claim by a governmental unit to "before 180 days after the date of the order for relief."

Section 214 directs its attention to the "Protection of Security Interest In Post Petition Rents and Lodging Payments." The goal of this amendment is to ensure that real estate lenders are able to claim a valid security interest in postpetition rents, and to clarify the treatment of hotel revenues which have been used to secure loans to hotels and other lodging accommodations. The section by section analysis advises that with respect to hotel revenues there are two competing interests and these revenues are therefore given two different treatments—1) they are included in the category of collateral in which postpetition revenues are subject to prepetition security interests, and 2) they are included in the category of "cash collateral" as defined in section 363 of the Code. This amendment changes section 552 of the Code (post-petition effect of security interest) to provide that if the debtor entered into a security agreement before the case was filed, and, if the security interest that was created by the agreement extends to property of the debtor which was acquired before the commencement of the case and to rents or fees, charges, accounts, or other payments for the use or occupancy of rooms or other public facilities in hotels, motels, or other lodging property, then the security interest is to extend to the rents, fees, etc., acquired by the estate after the commencement of the case to the extent provided in the security agreement, except to the extent that the court, after a notice and a hearing, and based on the equities of the case, orders otherwise. As noted in the section by section analysis, the court must balance competing interests in determining "the equities" in any given case. These will include adequate protection under section 363 of the Code and operational expenses, including employee compensation and benefits, under section 506(c).

"Amendment to Definition of Swap Agreement" is the title of section 215, which seeks to make what appears to be a technical correction to the swap agreement definition. Specifically, clarifying language is added which provides that "spot foreign exchange contracts" are included in the definition of swap agreement. This change is said in the section by section analysis to conform to the market understanding of what constitutes a swap agreement. The section by section analysis states that contracts that mature in a period of time equalling 2 days or less will fall under this definition.

Section 216 is entitled "Limitation on Avoiding Powers" and clarifies section 546(a)(1) of title 11 which imposes a statute of limitations within which an appointed or elected trustee must bring an avoidance action. A two-year period commences with the entry of an order for relief or a one-year period commences after the appointment or election of the first trustee, if such appointment or election occurs before the expiration of the two-year period.

An area of considerable interest throughout this legislative process has been the subject of "Small Businesses," as now covered by section 217 of the bill. Specifically, this provision amends the definitional section of the Code, adding a new paragraph (51C) which defines "small business" as

a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed \$2,000,000.

The benefits of being defined as a small business are as follows: 1) the court may order that a committee of creditors not be appointed, per an amendment to section 1102(a); 2) only the debtor may file a plan for 100 days after the date of the order for relief (all plans to be filed within 160 days after the date of the order for relief and the court being authorized to reduce these times - "for cause" or increase them for "circumstances for which the debtor should not be held accountable;" and 3) the debtor is eligible for more liberal provisions for disclosure and solicitation of acceptances for a proposed plan under section 1125.

An interesting insertion in this "small business" section is subsection (c) "Conversion or Dismissal" which amends section 1112(b) to include bankruptcy administrators among those who may request the conversion or dismissal of a chapter 11 case.

"Single Asset Real Estate" is the subject of section 218 of the Act. This section amends section 101 of the Code to include a definition of "single asset real estate" to mean real property constituting a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent, liquidated secured debts in an amount no more than \$4,000,000.

Section 362 of the Code also is amended to provide that the stay may be lifted unless the debtor, within 90 days after the order for relief, has either filed a confirmable plan or has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien). The court, within the 90 days, can order an extension of the 90-day period "for cause."

Section 219 covers the issue of "Leases of Personal Property" and amends section 365(d) of title 11 to require the trustee to perform all of the obligations of the debtor under a lease of personal property starting 60 days after the order for relief, pending assumption or rejection of the lease. After notice and a hearing, the court may order otherwise. The section by section analysis advises that this provision also amends section 362(e) "to clarify that the lessor's interest is subject to 'adequate protection.'" That protection, the House Judiciary Committee states, prevents the lessor from being able to seek to lift the automatic stay. Additionally, section 365(b) is clarified "to provide that when sought by a debtor, a lease can be cured at a nondefault rate (i.e., it would not need to pay penalty rates)."

Lastly, the section amends section 503(a) of the Code to add a timeliness requirement for the filing of a request for payment of an administrative expense.

Small Business Investment Companies will now be prohibited from filing for bankruptcy by section 220, captioned "Exemption for Small Business Investment Companies." This is accomplished by amending section 109 of the Code. The section by section analysis states that this provision will prevent the interests of the Small Business Administration from being subordinated to those of other creditors.

The subject of the "Payment of Taxes with Borrowed Funds" is covered by section 221. It amends section 523(a) of the Code by adding a new paragraph (14) which provides that a debt incurred to pay a tax to the United States is not dischargeable. The section by section analysis advises that this provision will facilitate an individual's ability to use a credit card to pay federal taxes. (The use of credit cards for such a purpose and the nondischargeability language discussed above were both recommended in the report by the Vice President on "Reinventing Government.")

Section 222, entitled "Return of Goods," amends section 546 of the Code to permit the court, on a motion by the trustee made not later than 120 days after the date of the order for relief, and after notice and a hearing, to authorize the return of goods, with the consent of the creditor, if it is in the best interests of the estate. The purchase price of returned goods would be offset against any prepetition claim by the creditor. (Earlier versions of this provision had used the term "value" instead of "purchase price.")

"Proceeds of Money Order Agreements" is the subject of section 223. The goal of this amendment is to solve a problem that exists when a business that sells money orders files a petition under the Bankruptcy Code. When this happens, often the money for the money orders has not been transferred to the money order issuer by the money order seller, yet the money order issuer is still required to pay the outstanding money order. This bill would amend section 541(b) of title 11 to provide that the monies from the sale of money orders collected within 14 days of the filing of the petition are not property of the estate and can be forwarded to the money order issuer, if there is a prepetition agreement between the issuer and the debtor/seller that prohibits commingling of money order "proceeds" with property of the debtor, unless the issuer failed to take action, prior to the filing of the petition, to require compliance with the agreement. The section by section analysis notes that, as indicated above, to benefit from this provision, the money order issuer must have acted prior to the filing to require compliance with the prohibition against commingling.

Under section 224 of the bill, titled "Trustee Duties; Professional Fees," section 586 of title 28 would be amended to authorize the Executive Office for U.S. Trustees to promulgate procedural guidelines concerning professional fee applications and to require the U.S. trustee to review applications for compensation and reimbursement of expenses filed by trustees and professionals employed in a case in accordance with those guidelines, to file comments with respect to applications, and if appropriate, to file objections to an application.

Section 330(a) of the Code also is amended to modify the statutory standards governing the allowance of compensation to officers and professionals in a case and to state that the court may award less than the amount requested, regardless of whether any party objects.

Specifically, the court is authorized, after notice to the parties in interest and to the U.S. trustee, to award reasonable compensation for the actual and necessary services rendered by a trustee, examiner, attorney, or professional person, or para-professional, and reimbursement for actual and necessary expenses. In determining the amount of compensation, the court on its own motion or on motion of the U.S. trustee or a party in interest, may award less than the amount requested. Additionally, in considering the amount to be awarded, the court "shall" consider the nature of the services, and their extent and value, taking into account all relevant factors, including the time spent on the services, the rates charged, whether the services were necessary to the administration, or beneficial at the time rendered, in the completion of the case. The court is also required to consider whether the tasks were performed within a reasonable time commensurate with the complexity, importance, and nature of the problem or issue. The court is also to consider whether the compensation is reasonable based on the customary compensation charged by similarly skilled practitioners in non-bankruptcy cases. The court "shall not"

allow compensation for duplicate services or for services that are not reasonably likely to benefit the case or are not necessary in the administration of the case. However, an exception is made for a chapter 12 or 13 case in which the debtor is an individual, where the court may allow reasonable compensation for services by the debtor's attorney without regard to the benefit of such services to the estate.

If interim compensation was awarded, the court, in making the final award, is to consider the amount and timing of such payments. Any interim compensation that exceeds the final amount awarded by the court may be ordered to be returned to the trustee or other entity that paid such amount.

Finally, the court, when determining the amount to be awarded for the preparation of fee applications, is instructed to recognize the difference between the value of professional services and the value of services rendered in preparing fee applications. Awards for preparation of fee applications are to be reasonable and based on the level of skill required to prepare the application.

An interesting deletion from past versions is language which, in considering the amount to be awarded, allowed the court to consider the total value of the estate and the amount of funds or other property available for distribution to secured and unsecured creditors.

The final section of title II is section 225, titled "Notices to Creditors." Section 342 of title 11 is amended to add a new subsection which requires that if notice is required to be given "by the debtor" then the notice "shall" contain the name, address, and taxpayer identification number of the debtor. However, it is specially provided that the failure to include this information "shall not invalidate the legal effect of such notice." Additionally, the section by section analysis contains the comments set forth below:

The Committee anticipates that the Official Bankruptcy Forms will be amended to provide that the information required by this section will become a part of the caption on every notice given in a bankruptcy case. As with other similar requirements, the court retains the authority to waive this requirement in compelling circumstances, such as those of a domestic violence victim who must conceal her residence for her own safety.

TITLE III - CONSUMER BANKRUPTCY ISSUES

The "Period for Curing Default Relating to Principal Residence" provisions in section 301 of the bill permit the debtor to cure a default up until the completion of a foreclosure sale under state law. It is provided that a debtor may cure a default and maintain payments while the case is pending; or, in a case in which the last payment (on the original payment schedule) is due before the date on which the final payment under the plan is due, may provide for the payment of the claim pursuant to section 1325(a)(5) of the Code (which protects a secured creditor that agrees to modification of its claim or whose allowed claim the plan will pay in full).

Section 302, entitled "Nondischargeability of Fine Under Chapter 13" amends section 1328(a)(3) of the Code to provide that in addition to "restitution" not being dischargeable, neither is a criminal fine.

"Impairment of Exemptions" is the heading of section 303 which amends section 522(f) of the Code to allow debtors to avoid judicial liens on their exempt property to the extent that the lien, along with senior liens, and the exemption, exceed the value of the debtor's interest in the property (if there were no liens).

The House Judiciary Committee's analysis explains that the phrase "impair an exemption" is currently not defined in the Code. Consequently, several court decisions have reached results that, according to the analysis, were not intended by Congress. Therefore, the purpose of the present change is to clarify this intent by providing "a simple arithmetic test" to determine whether a lien impairs an exemption. The test to determine whether the exemption is impaired is if the sum of 1) the lien, 2) all other liens on the property, and 3) the amount of the exemption that the debtor could claim if there were no liens on the property exceeds the value that the debtor's interest in the property would have in the absence of any liens. However, the amendment specifies that if the property is subject to more than one lien, then any lien which has been avoided shall not be considered in the above calculation.

It is also specifically held that these provisions do not apply with respect to a judgment arising out of a mortgage foreclosure.

Section 304 is a child support and alimony provision. First, section 101 of the Bankruptcy Code is amended to define the term "debt for child support" to mean a debt for child maintenance or support within the meaning of section 523(a)(5) of the Code.

Presently, the automatic stay provided by section 362(a) of the Code does not prevent the continued collection of alimony, maintenance, or support from property that is not property of the estate. This amendment expands that provision to include paternity

actions or proceedings and the commencement of actions or proceedings to establish or modify an order for alimony, maintenance, or support from property that is not property of the estate. In order to fulfill the goals of alimony and support payments, a debt for these obligations now is afforded seventh priority under section 507(a) of the Code, and the priority section is rearranged with the present seventh priority bumped down to eighth and so on, consecutively.

The new seventh priority pertains to claims for debts to a spouse, former spouse, or child of the debtor, for alimony, maintenance or support payments for support of a spouse or child in connection with a separation agreement, divorce decree, or other court order or determination by an appropriate state or governmental body, or pursuant to a property settlement agreement. The following debts are not included: a debt that is assigned, voluntarily, by operation of law, or otherwise, to another entity or a debt that includes a liability "designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support." This language is borrowed in large part from the current section 523(a)(5) of the Code.

To further effectuate the purpose of preventing avoidance of alimony and child support payments, the bill amends section 522(f) of title 11, to provide that liens based on debts for spousal or child maintenance payments arising from a separation agreement, divorce decree or other court or governmental entity's order or determination, or from a property settlement agreement are not avoidable, except as outlined above in the discussion concerning the priority section.

Amendments also are made to section 523(a) of the Code. Specifically, a new paragraph (15) is added making a debt arising from a property settlement agreement nondischargeable. The new paragraph (15) provides that a debt not of the kind specified in paragraph (5) of section 523(a) (alimony, maintenance, child support) that is incurred by the debtor during or in connection with a divorce or separation, or in connection with a separation agreement or divorce decree or other determination made in accordance with state law by a governmental unit will not be discharged unless 1) the debtor does not have the ability to pay the debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or 2) if discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Subsection(c) of 523(a) is also amended to include a debt described in paragraph (15) among those concerning which the creditor must timely initiate a court proceeding requesting an exception to discharge. In other words, if the spouse, former spouse, or child does not prevail on a complaint to determine the dischargeability of the debt, the

obligation will discharged.

Section 547(c) is also amended to create a new paragraph (c)(7), (with the present (7) being designated as (8)), which provides that the trustee may not avoid as preferential a transfer which was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor for alimony or support payments under the same conditions, and with the same exceptions as are provided in the amendments to sections 362, 507 and 522.

Subsection (g), entitled "Appearance Before Court," provides that a "child support creditor, or its representative shall be permitted to appear and intervene without charge" in any bankruptcy proceeding in any bankruptcy or district court of the United States if such representative or creditor files a form in the court that contains information detailing the child support debt, its status, and "other characteristics." This provision has the potential to permit these claimants to litigate in the bankruptcy courts without payment of fees. The provision also permits these "creditors or their representatives" to appear without regard to "any special local court rule requirement for attorney appearances."

"Interest on Interest" is the subject of section 305. It amends the sections governing contents of a plan under chapters 11, 12, and 13 of the Code by adding new subsections providing that notwithstanding various specified sections of the Code pertaining to secured claims and holders of claims, *i.e.*, sections 506(b), 1129(a)(7), and 1129(b) 1225(a)(5), and 1325(a)(5), and if it is proposed in a plan to cure a default, the amount necessary to cure a default under a plan shall be determined by the underlying agreement and any applicable nonbankruptcy law. The section by section analysis states that the intent of this provision is effectively to overrule the decision of the Supreme Court in Rake v. Wade. This amendment applies only to agreements entered into after enactment.

Section 306, "Exception to Discharge," amends section 523(a)(2) of title 11 to extend the time during which debts incurred for "luxury goods" are not dischargeable from the present 40 days prior to filing to 60 days, increases the maximum amount not dischargeable from \$500 to \$1,000; and increases from 20 days to 60 days the time during which cash advances obtained under an open end credit plan may be nondischargeable.

Section 307 entitled "Payments Under Chapter 13," amends section 1326(a)(2) of the Code to require the standing chapter 13 trustee to distribute payments "as soon as practicable" after the plan is confirmed. The section by section analysis states that there are varied times throughout the courts when these payments begin and that this section clarifies the intent of Congress that these payments be made promptly, even prior to the bar date for filing claims, but only if the trustee can provide adequate protection against any prejudice to a later filing claimant caused by distributions prior to the bar date.

"Bankruptcy Petition Preparers" is the title of section 308. It creates a new section 110 of the Bankruptcy Code which seeks to address the "bankruptcy mills" problem (presently being felt so acutely by the Central District of California). The bill provides that bankruptcy petition preparers are not authorized to execute documents on behalf of the debtor and shall not do so. Bankruptcy petition preparers also are prohibited from using the term "legal" or similar terms in advertisements and must not advertise under any category that uses the word "legal" or similar terms.

Bankruptcy petition preparers are not permitted to collect or receive payment from or on behalf of the debtor for court fees. Within ten days after a petition has been filed, a bankruptcy petition preparer will be required to file, under penalty of perjury, a declaration which discloses any fee received from or on behalf of the debtor within the 12 months prior to the filing of the petition, and any unpaid fee charged to the debtor. It is further provided that the court shall disallow and order the immediate turnover to the trustee of any fee referred to above which the court finds to be in excess of the value of the services for the documents which were prepared. A debtor, the trustee, a creditor, or the U. S. trustee may file a motion seeking such an order. An individual debtor may exempt any funds so recovered under section 522(b) of the Code.

Each of the above-referenced provisions provides for a fine of up to \$500 for a violation.

The amendments provide a cause of action for damages arising from the negligence or disregard of the bankruptcy petition preparer and the failure of the preparer to file bankruptcy papers, specifically including the papers listed in section 521(1) of the Code. Additionally, if a bankruptcy petition preparer is found liable for damages, such preparer shall be required to pay a trustee or a creditor reasonable attorneys' fees and costs. An action for injunctive relief also can be filed by a debtor, the U.S. trustee, a creditor, or the trustee. Attorney's fees also may be awarded to a debtor, a trustee, or a creditor who is successful in obtaining an injunction. The provision also explicitly states that such an award is to be paid by the bankruptcy petition preparer.

A petition preparer is required to show the preparer's name, address, and social security number on the petition. A preparer is required to sign the document and furnish a copy of the petition to the debtor when the petition is filed. Titles 11 and 18 are amended to provide criminal penalties for willful disregard of bankruptcy rules or laws. Past versions of this amendment have permitted fees only for "typing" service. The reference to typing has been deleted and the reference is now simply to services.

Section 309, "Fairness to Condominium and Cooperative Owners," amends section 523(a) of the Code to provide that post bankruptcy condominium or cooperative housing owners' association fees, payable for a time in which the debtor occupied the unit, or

received rental payments, are not dischargeable.

Section 310 is titled "Nonavoidability of Fixing of Lien on Tools and Implements of Trade, Animals, and Crops." This amendment seeks to substantially modify the Owen v. Owen decision issued last term by the Supreme Court regarding lien avoidance. The provision would amend section 522(f) of title 11 to provide that the fixing of a lien cannot be avoided if the lien is a nonpossessory, nonpurchase money security interest in tools of the trade or farm animals or crops and state law either permits a debtor to claim exemptions without limitation in amount or prohibits avoidance of the lien. This provision affects only the value exceeding \$5,000.

"Conversion of Case Under Chapter 13" is the title of section 311 of the bill. It amends section 348 of the Code to provide that when a chapter 13 case is converted to another chapter, the property of the estate consists of property of the estate as of the date of the filing of the petition and remaining in the possession or control of the debtor, and that valuations of property and allowed secured claims will apply in the converted case, with the allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan. It is also provided that if the debtor converts a chapter 13 case in bad faith, then the property in the converted case shall consist of the property of the estate as of the date of the conversion.

Section 312 is entitled "Bankruptcy Fraud" and occupies a section of this Act instead of an entire title as in the earlier versions of the bill. This section amends chapter 9 of title 18, United States Code (the criminal code), the chapter labeled "Bankruptcy." The amendments to section 152 of title 18, entitled "Concealment of assets; false oaths and claims; bribery," are relatively minor and include listing the U.S. trustee among those from whom assets cannot be concealed. The bill also takes the present restrictions, generally, and sets them up in a numbered paragraph system.

Section 153 of title 18, pertaining to "Embezzlement" against the estate is amended to clarify and enlarge the categories and persons covered by this section. Specifically, the section applies to a person whose participation in the administration of the estate, as a trustee, custodian, marshal, attorney, or other officer or agent, employee "or other person engaged by such an officer to perform a service" affords that person access to property or documents belonging to the estate.

"Adverse interest and conduct of officers" is the title of section 154 of title 18, and the amendments to this section include establishing violations for refusing to permit the U.S. trustee to have a reasonable opportunity to inspect documents and accounts.

A new section 156 is added, titled, "Knowing disregard of bankruptcy law or rule"

which defines a "bankruptcy petition preparer" as someone other than the debtor's attorney, or an employee of the attorney, who prepares for compensation a document for filing. A "document for filing" is defined as a petition or any other document prepared for filing by a debtor in a bankruptcy court or in a district court. The amendment further provides that if a case is dismissed because of a knowing attempt by the bankruptcy petition preparer to disregard any title 11 or bankruptcy rule requirement, then the preparer "shall be fined under this title, imprisoned not more than 1 year, or both." This section does not specify the amount of the fine.

The final amendment to chapter 9 of title 18 is the addition of a new section 157 entitled "Bankruptcy fraud." Briefly, the section provides that anyone who, having devised or intending to devise a scheme or artifice to defraud, files a bankruptcy petition or any document in a bankruptcy proceeding, or makes a false or fraudulent representation or promise concerning a bankruptcy case, before or after the filing of a petition, shall be fined or imprisoned for 5 years or less, or both. Again, no specific fine amount is given. Language pertaining to "intent" which had been opposed by the Department of Justice was deleted.

Section 313, is titled "Protection Against Discriminatory Treatment of Applications for Student Loans," and amends section 525 of the Bankruptcy Code to add a new subsection prohibiting denial of a student loan, grant, guarantee, or loan insurance because the applicant is or has been a debtor or has been in bankruptcy, or has been associated with a debtor or person in bankruptcy, or was insolvent, or has not paid a debt that is dischargeable under title 11 or that was discharged "under the Bankruptcy Act."

TITLE IV - GOVERNMENTAL BANKRUPTCY ISSUES

Section 401, "Exception From Automatic Stay for Post-Petition Property Taxes," provides an exception to the automatic stay for postpetition property taxes. Specifically, the automatic stay would no longer prevent the creation or perfection of a statutory lien for such taxes by a locality.

To effect this change, this section amends section 362(b) of the Code to create a new paragraph 18. This is not correct. To create the correct paragraph number, this section needs to rectify incorrect numbering created by the Omnibus Budget Reconciliation Act of 1990, Pub. Law No. 101-508. Title III of the above-referenced Act, entitled the "Student Loan Default Prevention Initiative Act of 1990," amended section 362(b) by creating new paragraphs (14), (15), and (16), concerning swap agreements. Thus, the present bill should redesignate the paragraphs added by the Omnibus Budget Reconciliation Act of 1990 as paragraphs (15), (16), and (17), respectively, before adding the new paragraph (18). If left

as is, we will have two (14)'s, one (15), one (16), no (17), and one(18).

Section 402 is entitled "Municipal Bankruptcy," and seems to stem from the dispute that arose over the chapter 9 filing by the City of Bridgeport, Connecticut, and other proposed filings by major cities. This section amends section 109 to require a municipality to be "specifically authorized, in its capacity as a municipality or by name," as opposed to the present requirement of being "generally authorized" to be a debtor under chapter 9 of the Bankruptcy Code.

TITLE V - TECHNICAL CORRECTIONS

There are 16 pages of technical corrections which will be reviewed at a later date.

TITLE VI - BANKRUPTCY REVIEW COMMISSION

Entitled the "National Bankruptcy Review Commission Act," this title establishes a nine-member National Bankruptcy Review Commission, with a two-year mandate to 1) study and investigate issues and problems relating to the Bankruptcy Code; 2) evaluate the advisability of proposals and current arrangements regarding such issues and problems; 3) prepare and submit a report to the Congress, the Chief Justice, and the President, in accordance with the above-referenced directives; and 4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system. An interesting insertion made at the last minute is a provision which prohibits Members of Congress and officers and employees of the executive branch from serving on the Commission.

The members of the Commission are to be appointed as follows: three by the President, one to be designated by the President as the chairman; one by the President pro tempore of the Senate; one by the Minority Leader of the Senate; one by the Speaker of the House of Representatives; one by the Minority Leader of the House of Representatives; (prior versions had called for 2 appointments by the President pro tempore of the Senate, with one from each political party); and two by the Chief Justice.

The first appointments shall be made within 60 days after enactment, and the first meeting of the Commission shall be held 210 days after enactment.

The Commission is authorized to hold hearings, take testimony, and receive evidence. The Commission is also authorized to secure "directly from any Federal department, agency, or court" information it deems necessary to carry out its function. Upon the request of the chairman of the Commission, a chief judge of a federal court shall furnish information to the Commission.

The Commission's report is to be submitted not later than two years after the date of the Commission's its first meeting. The report is required to contain a detailed statement of the Commission's findings and conclusions, as well as its recommendations for legislative or administrative action. The Commission ceases to exist 30 days after submitting its report. An appropriation of \$1,500,000 is provided for the Commission.

TITLE VII - SEVERABILITY; EFFECTIVE DATE; APPLICATION OF AMENDMENTS

Section 701 is the severability section.

Section 702 is titled "Severability; Effective Date; Application of Amendments" and states that except as otherwise provided, the Act shall take effect on the date of enactment, i.e., the day the President signs the bill.

The specific exceptions to the effective date are: section 111 (supplemental, "Manville-type," injunctions) which contains a detailed effective date subsection; section 113 (sovereign immunity) and section 117 (additional trustee compensation) which are specifically stated to apply to cases commenced under title 11 "before, on, and after the date of the enactment." (NOTE: Section 117 itself explicitly provides that the \$15 increase shall NOT take effect until one year after enactment. The applicability referred to above concerns the imposition of new fees). Additionally, certain lease provisions affected by section 201 (Aircraft Equipment and Vessels; Rolling Stock Equipment) shall apply to pending cases. Finally, the provisions of section 305 (interest on interest) are held to apply only to agreements entered into after the date of enactment.

CONSUMER BANKRUPTCY ISSUES
Affected By The Bankruptcy Reform Act of 1994

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COMMERCIAL BANKRUPTCY ISSUES
Affected By The Bankruptcy Reform Act of 1994

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COMMERCIAL BANKRUPTCY ISSUES

Affected By The Bankruptcy Reform Act of 1994

**The Amendments are arranged generally by topic. Under each topic the "former law" section states the law prior to the Amendments and indicates the relevant Bankruptcy Code section. The "Amended" section states the amendment to the law under the Act of 1994 and references the relevant section of the Act in brackets. The structure of this outline is taken generally from an outline produced by the American Bankruptcy Institute.

I. AUTOMATIC STAY

A. Final Hearing

former law: must be commenced w/in 30 days after "preliminary" hearing.
[11 USC §362(e)]

Amended: must be concluded w/in 30 days after "preliminary" hearing.
[101]

B. Tax Lien for *Ad Valorem* Taxes

former law: none. [Ref. 11 USC §362]

Amended: The stay does not prevent a statutory lien for an *ad valorem* tax from being created and perfected post-petition with respect to a tax that becomes due post-petition. [401]

C. Tax Assessment

former law: The stay doesn't apply to issuing a notice of tax deficiency.
[11 USC §362(b)(9)]

Amended: The stay doesn't apply to tax audits, issuing a notice of tax deficiency, a demand for tax returns, or making an assessment.
[116]

II. CHAPTER 11

A. Creditors' Committees

1. Eligibility

former law: none. [Ref. 11 USC §1102]

Amended: Certain governmental entities (such as FDIC, PBGC, and state employee pension funds) can be appointed to serve on creditors' committees. [106]

2. Expenses

former law: none. [Ref. 11 USC §503(b)(3)]

Amended: Actual and necessary expenses (not fees) incurred by members of a creditors' committee in the performance of the duties of the committee are compensable from the estate. [110]

B. Election of Ch. 11 Trustee

former law: none. [Ref. 11 USC §1104]

Amended: Creditors in a Ch. 11 case can request the U.S. Trustee to convene a meeting of creditors for the purpose of electing a Trustee w/in 30 days after the Court has ordered the appointment of a trustee. The election shall take place in the same manner as electing Ch. 7 trustees under §702. [211]

C. Claims and Post-petition Interest

former law: Case law held that a class paid in full in cash on effective date of plan was unimpaired under §1124(3), and thus not entitled to vote or to receive post-petition interest.

Amended: §1124(3) is deleted. Thus, a class to be paid in full on the effective date is impaired and entitled to vote. As a result, in order for the plan to be "fair and equitable", unsecured creditors would be entitled to post-petition interest on their claims before the equity class could receive anything. The Amendment also clarifies that untimely claims are to be disallowed, which overrules some case law to the contrary. [213]

(II. Chapter 11 continued)

D. Treatment of Mortgage Claims

former law: none. [Ref. 11 USC §1123(b)]

Amended: Individual Chapter 11 debtors are prohibited from modifying a secured claim that is secured only by real property that is the Debtor's principal residence. This amendment makes Chapter 11 consistent w/ Ch. 13. [206]

E. Small Business Expedited Procedures

former law: none. [Ref. 11 USC §§101, 1102(a), 1112(b), 1121, 1125]

Amended: Chapter 11 Small businesses (aggregate noncontingent liquidated secured and unsecured debts totalling less than \$2,000,000 as of the date of bankruptcy) can elect these procedures. There is no creditors' committee and the exclusive period is shortened to 100 days. The debtor may solicit acceptances after a "conditionally approved" disclosure statement, and the disclosure statement hearing can be consolidated with the confirmation hearing. [217]

III. CREDITOR RIGHTS' ENHANCED

A. Perfection of Purchase Money Security Interest (PMSI)

former law: PMSI must be perfected w/in 10 days after the debtor received possession of the goods, or the PMSI could be avoided by the trustee under certain circumstances. [11 USC §547(c)(3)(B)]

Amended: 10-day period increased to 20 days to bring Bankruptcy Code in line with most states' UCC. [203]

B. Continuing Perfection

former law: Secured creditor could not file a UCC continuation statement without obtaining relief from stay. [11 USC §362(b)(3)]

Amended: Maintaining or continuing perfection are specifically excluded from the stay. Trustee's avoiding powers are limited by laws permitting such continued perfection. [204]

C. Right to Reclaim

former law: Seller of goods can reclaim goods from Trustee by making written demand w/in 10 days after debtor receives goods, if debtor files bankruptcy w/in 10 days after receipt. [11 USC §546(c)(1)]

Amended: 10-day demand period is extended to 20 days. [209]

(III. Creditor Rights' Enhanced continued)

D. Return of Goods

former law: none [Ref. 11 USC §546]

Amended: In Ch. 11, if the Court determines on motion of Trustee that return of goods is in estate's best interests, debtor can return goods shipped to debtor before commencement of case and the creditor can offset the purchase price of those goods against any pre-petition claim against debtor. Motion must be made w/in 120 days after bankruptcy filed. [222]

E. Insider Preferences

former law: A trustee could recover insider preferences against any transferee. See Levit v. Ingersoll Rand Financial Corp. (In re V.N. DePrizio Constr. Co.), 874 F.2d 1186 (7th Cir. 1989); Ray v. City Bank and Trust Co. (In re C-L Cartage Co., Inc.), 899 F.2d 1490 (6th Cir. 1990). The typical example of the DePrizio rule is where a corporation pays a debt in full that is personally guaranteed by the corporation's president (or other "insider") more than 90 days but less than a year prior to the corporation filing bankruptcy. The payment clearly benefitted the insider because it released her guaranty. DePrizio and its progeny construed 11 USC §550 to provide that the trustee could recover that preference from the insider or from the lender.

Amended: DePrizio and its progeny are overruled. Section 550 is amended to provide that the trustee cannot recover such preferences from a transferee that is not an insider. [202]

F. Appeal of Order Extending Exclusive Period

former law: An order extending or reducing debtor's exclusive period for filing a plan were interlocutory and not immediately appealable. [Ref. 28 USC §158(a)]

Amended: Such orders are now immediately appealable. [102]

G. Payment of Taxes with Borrowed Funds

former law: none [Ref. 11 USC §523(a)]

Amended: If the debtor borrows money (including credit card cash advances) to pay taxes that would have been nondischargeable, the debt to the lender is nondischargeable. [221]

IV. LEASES AND REAL ESTATE

A. Equipment Leases

former law: none. [Ref. 11 USC §365(d)]

Amended: The debtor is required to perform all obligations under an equipment lease within 60 days after filing bankruptcy, unless the Court orders otherwise upon motion by the debtor and after notice and hearing. [219]

B. Rejection of Real Estate Leases where Debtor is Lessor

former law: none. [Ref. 11 USC §365(h)]

Amended: This section clarifies rights of lessees when the Trustee rejects a lease where the debtor is lessor. Lessees have the right of use, possession, quiet enjoyment, subletting, and assignment. [205]

C. Single Asset Real Estate (SARE)

former law: none. [Ref. 11 USC §§101, 362(d)]

Amended: "Single asset real estate" is defined as single property generating substantially all of debtor's gross income on which no substantial business is being operated other than the business of the real property, and having an aggregate noncontingent, liquidated secured debts of \$4,000,000. W/in 90 days after bankruptcy is filed, the debtor must: 1) file a plan that has a "reasonable possibility" of being confirmed w/in a "reasonable time"; or, 2) commence adequate protection payments to the creditor holding a security interest in the SARE. Otherwise, the Court "shall" grant relief from the stay on request of the secured creditor. [218]

D. Post-petition Lien on Rents

former law: A real estate lender has a security interest in post-petition rents only to the extent the lender was perfected under applicable state law. [11 USC §552(b)]

Amended: Such lenders are now perfected so long as they had a security agreement before the bankruptcy case was commenced. This includes hotel revenues, and such post-petition rents now qualify as cash collateral under 11 USC §363. The Court, after notice and hearing, can order otherwise based on the equities of the case. [214]

V. MISCELLANEOUS

A. Status Conferences

former law: none. [Ref. 11 USC §105]

Amended: Upon motion of any party, or on the Court's own motion, the Court can hold a status conference. [104] As a result of such conference, in a Chapter 11 case, the Court can establish:

- deadlines for the Debtor to file a plan and disclosure statement and to solicit votes on the plan,
- deadlines for any other party to file a competing plan and disclosure statement and solicit votes on that plan,
- establish the scope and format of the notice of hearing on approval of the disclosure statement,
- provide that the hearing on approval of the disclosure statement be combined with the hearing on confirmation of the plan.

B. Bankruptcy Appellate Panels [Ref. 28 USC 158(b)]

All circuits are required to establish Bankruptcy Appellate Panels, unless the Circuit specifically determines that there are insufficient judicial resources for same. The panels replace the U.S. District Courts as the initial appellate court for appeals from bankruptcy courts. A Bankruptcy Appellate Panel is composed of bankruptcy judges from the circuit. A Panel's decision would presumably be controlling law in the Circuit.

C. Professional Fees

The U.S. Trustee is directed to provide uniform, nationwide guidelines for professional fee applications under 11 USC §330.

NOTES

NOTES

**LITIGATION AND JURY TRIALS
IN THE BANKRUPTCY COURTS**

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SECTION F



LITIGATION AND JURY TRIALS

I. INTRODUCTION - So you think you're busy now?

- A. . . . What is a jury trial all about?
1. Jury trials can be summed up in six words -- "prepare, prepare, and prepare some more."
 2. Know the facts thoroughly and as well as your witnesses.
 3. Discovery
 - (a) Be well acquainted with Federal Civil Rules 26, 33 and 34.
 - (i) required disclosures
 - (ii) discovery limitations
 - (iii) supplemental disclosures
 - (b) Depositions - CR 29
 - (i) method of recording
 - (ii) limitations
 - (c) Discovery by and through non-parties
 - (d) Discovery deadlines

II. PRE-TRIAL CONFERENCES

- A. Pre-trial Memo may be useful to enlighten judge.
- B. File pre-trial memo whether mandatory or not.
- C. Prepare jury instructions early on.
- D. Pre-trial order will establish discovery deadlines..

III. ESTABLISH PRE-TRIAL DEADLINES

- A. Double check pleadings.
 1. Amendments to pleadings.
 2. Docket all deadlines and requirements of pre-trial order met.
 3. Exchange witness lists and exhibit lists if required.
- B. Experts -- "To have or not to have?"
 1. CR26 or depose?
- C. Subpoena well in advance of trial necessary witnesses.

IV. THE TRIAL OF THE CASE

- A. Order of proof
 1. Party having burden opens first and closes last.
- B. Voir dire
 1. What is it?
 2. How do I prepare for it?
 3. Obtain jury qualification sheets

4. Analyze the type of juror you believe that favors your case.
5. Establish rapport - establish an overall theme
6. Determine if there is any juror who is unqualified to decide your case and prepare groundwork to disqualify.

V. OFFERING PROOF

- A. Direct examination
 1. Design questions to tell a story
 2. Make sure evidence offered on all elements of claim
 3. Demonstrative evidence as a story telling device
- B. Cross examination
 1. Control of witness
 2. Make your points and sit down
- C. Objections
 1. Object only when necessary and when most likely objection will be sustained
 2. Preserve record
 3. Be prepared for evidentiary issues
 4. Motions in limine
- D. Motions for directed verdict at close of evidence

VI. OPENING STATEMENT

- A. Try and make opening statement interesting while laying out your case.
- B. Tell a story.
- C. Be sure and state a claim
- D. Try and do not argue case.

VII. CLOSING ARGUMENT

- A. Argue the facts to support theory of case
- B. Be logical but brief
- C. Walk away from jury on a high note
- D. Do not attack opposing counsel

VIII. POST JUDGMENT MOTIONS

- A. Motion for new trial/Motion for judgment N.O.V.

THE BANKRUPTCY REFORM ACT OF 1994:

**An Assessment of How the Changes To The Bankruptcy Code
Affect Established Practice Derived From Caselaw**

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SECTION G

THE BANKRUPTCY REFORM ACT OF 1994:

An Assessment of How the Changes to the Bankruptcy Code Affect Established Practice Derived From Caselaw

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SECTION G

On October 22, 1994, President Clinton signed into law the Bankruptcy Reform Act of 1994 (the "'94 Amendments"). The '94 Amendments address a wide range of bankruptcy issues involving both commercial and consumer bankruptcy matters. They also include a title creating a bankruptcy commission to study the Bankruptcy Code and make suggestions with respect to changes in the Code at the conclusion of its two year life. In the meantime, however, as the Commission initiates its study of the Bankruptcy Code, a number of new provisions will first become effective during the time of the Commission's study. These materials will address the substantive changes made in the Bankruptcy Code by the '94 Amendments. These materials will follow the order set by the '94 Amendments.

Before addressing the specific provisions of the Amendments, a word about the legislative history supporting the enactment is appropriate. Congressman Brooks, the Chair of the House Judiciary Committee, had entered into the October 4, 1994 issue of the Congressional Record a section by section commentary on H.R. 5116. The Bill and commentary are reprinted at 140 Cong. Rec. H10752-01 to H10763 (Oct. 4, 1994). Limited comments were offered in the Senate. These are found at 140 Cong. Rec. S14461-01 (Oct. 6, 1994). There is also a House Report that accompanied a slightly earlier version of H.R. 5116. It is H.R. Rep. No. 103-835 (Oct. 4, 1994). As you can see, the House Report has the same date as the commentary and Bill, but it was issued before several late changes in the Bill. Nevertheless, the language of

the Report follows the language of the later commentary very closely.

TITLE I -- IMPROVED BANKRUPTCY ADMINISTRATION

SECTION 101

Expedited Hearing on Automatic Stay.

This section amends § 362(e) of the Bankruptcy Code by changing the word "commenced" to the word "concluded" in that subsection. Thus, the time within which stay hearings must be concluded is reduced to 30 days from the time the party seeking relief from the stay has initiated the action. The amendment also provides, however, that the 30 day period may be extended "with the consent of the parties in interest or for a specified time which the court finds is required by compelling circumstances." While the party seeking relief from the stay, may, in some instances, consent to an extension of the time for the conclusion of the stay litigation, it is more likely that the focus will be on the proof of "compelling circumstances" for the extension of the stay. The commentary provided in support of the '94 Amendments suggests that where the debtor is "merely seeking to delay the bankruptcy process or [has] neglected to consummate a pending contract" compelling circumstances are not presented. Instead, these comments suggest that "the bona fide illness of any party or the judge or the occurrence of an event beyond the parties' control" might constitute compelling circumstances. Even at that, the commentary cautions that the finding of

compelling circumstances still "must be balanced with the legitimate property rights at stake in each particular case."

The insertion of the "compelling circumstances prerequisite to the extension of the automatic stay might lead to a shift in emphasis in stay litigation. Rather than focusing on the value of the property or the need for the property to be retained for an effective reorganization, much of the court's time might be shifted toward the determination of compelling circumstances. Notwithstanding the limited description of either compelling or "uncompelling" circumstances in the commentary on the '94 Amendments, the possibilities of factors in support of finding of compelling circumstances for the extension of the automatic stay is unlimited. Additionally, forcing the courts to determine these issues under this particular time constraint may lead to results that creditors find unsatisfactory. That is, the courts may be inclined to deny relief from the stay within the limited time now allowed under § 362(e) given that the court's decision at that time would not preclude the creditor from seeking relief from the automatic stay later on in the proceedings. Denying relief from the stay is certainly much less "final" than granting relief from the stay. In that sense, the courts may be more likely to deny relief from the stay than they were previously.

SECTION 102

Expedited Filing of Plans Under Chapter 11.

While this amendment would appear to involve provisions under Chapter 11, in fact, it is an amendment to 28 U.S.C. § 158 (a) dealing with appeals. The amendment changes § 158(a) to grant jurisdiction to the district courts to consider appeals of interlocutory orders and decrees issued under § 1121(d) of the Bankruptcy Code. The district courts may grant leave to hear appeals of other interlocutory orders and decrees, however, appeals from rulings issued under § 1121(d) may be taken by right to the district court. The language in the new section presents one possible problem. That is, the appeals of right may be taken "from interlocutory and decrees issued under § 1121(d) of the Title 11, increasing or reducing the time period referred to in § 1121 of such title." Arguably, a bankruptcy court denial of a motion to increase or reduce the exclusivity under § 1121 would not result in an order which is appealable of right to the district court. Only when the bankruptcy court increases or reduces the time period set out in § 1121 would the appeal of right be available. The commentary to the amendment states that the appeal of right "will prevent those parties who feel they were harmed by an extension, or a failure to extend, to obtain possible recourse from the district court." Even this description of the provision does not address the rights of a party who feels harmed by a reduction, or a failure to reduce the exclusivity. If the intention of the statute was to provide

parties in interest with a right to appeal to the district court, any bankruptcy court decision rendered under § 1121(d), then the statute could simply have stated that the district court has jurisdiction to hear appeal "from interlocutory orders and decrees issued under § 1121(d) of Title 11" and should not have included any reference to the increasing or reducing of the exclusivity. Time will tell if the district courts or BAPs will interpret the amendment in this fashion.

SECTION 103

Expedited Procedure for Reaffirmation of Debts.

This section amends § 524(c) and § 524(d) of the Bankruptcy Code. It deletes the requirement that debtors attend reaffirmation hearings if they were represented by counsel in the negotiation of the reaffirmation agreement. In place of that hearing, the '94 Amendments inserts a requirement that the reaffirmation agreement contain "a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance [with] § 524(c)." The commentary to the amendments noted that courts had come to various conclusions about whether reaffirmation hearings were necessary to render the agreement enforceable. This change resolves the conflict in those cases. This conflict resolution, however, applies only to situations of which the debtor is represented by counsel. When the debtor is not represented by counsel, then the court

continues to play the role it has played in the past with respect to the approval of reaffirmation agreements.

SECTION 104

Powers of Bankruptcy Courts

This amendment is very extensive. It creates a nationwide bankruptcy appellate panel system which authorizes the hearing of appeals by a panel of bankruptcy appellate judges if "the district judges for the district in which the appeals occur, by majority vote, have authorized [the BAP] to hear and determine appeals originating in such district."

The section also, however, amends § 105 of the Bankruptcy Code to authorize the court to hold status conferences and issue a variety of orders relating to the expeditious and economical handling of cases. The commentary to the amendments indicates that "some judges have appeared reluctant to hold [status conferences] without clear and explicit statutory authorization. With the enactment of this revision, there can be no question that the bankruptcy courts have that authority."

SECTION 105

Bankruptcy Administrators

This section of the Amendments authorizes bankruptcy administrators or their designates to preside at § 341 meetings and to administer the appropriate oaths at those meetings.

SECTION 106

Governmental Units as Committee Members

This section amends Bankruptcy Code § 101(41) to provide that governmental units, including the Pension Benefit Guaranty Corporation, can serve on committees in Chapter 11 cases.

SECTION 108 Adjustment of Dollar Amounts

This section contains a number of amendments to the Code by adjusting dollar amounts in specific provisions. Most significantly, § 109(e) of the Code is amended by increasing debt limitations in Chapter 13 proceedings to \$350,000 of unsecured debt and \$750,000 of secured debt. Obviously, this will make Chapter 13 available to a much larger group of debtors. This would include especially business debtors who are conducting business as sole proprietors. Consequently, the courts may be faced with more difficult questions concerning the disposable income of a debtor engaged in business. Conceivably, the debtor and creditors may have different views on the propriety of certain expenditures for business purposes under § 1325(b). The increase in the debt limits also may have some slight impact on § 707(b) in that some debtors with significant debt would be eligible for Chapter 13 relief under the new provision. While the Sixth Circuit has indicated that ineligibility for Chapter 13 relief will not operate to prevent the application of § 707(b), In re Krohn, 886 F.2d 123, 127 (6th Cir. 1989), the availability of Chapter 13 relief certainly is a factor in favor of a

dismissal ruling under § 707(b).

The dollar adjustments also were made to a number of other Bankruptcy Code revisions. Many of them are largely irrelevant. These are the increases in the exemption amounts set out in § 522(d) which does not apply in the exemption opt-out states. The amendments do, however, include adjustments to the dollar amounts set out in § 507(a)(4), (5), and (6) relating to the claims of employee wages and retirement benefits. The wage priority set out in § 507(a)(3) is increased under § 207 of the Amendments. Additionally, the spending spree dischargeability amounts set out in § 523(a)(2)(C) also are increased in § 306 of the Amendments.

These dollar amounts are to be adjusted every three years, commencing on April 1, 1998, according to the Consumer Price Index for All Urban Consumers. The adjustments are rounded to the nearest \$25.00 amount.

SECTION 113

Sovereign Immunity.

This amendment represents an attempt to reverse the Supreme Court's decisions in Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989) and U.S. v. Nordic Village, Inc., 112 S.Ct. 1011 (1992). In response to the Supreme Court, § 106 of the Bankruptcy Code is amended to contain a specific listing of the Bankruptcy Code sections for which the assertion of sovereign immunity is waived or abrogated. The provision also indicates that the filing of a proof of claim by a governmental

unit waives sovereign immunity with respect to a claim against that governmental unit if the counterclaim "arose out of the same transaction out of which the claim of such governmental unit arose." This provision would apply in addition to the explicit abrogation of sovereign immunity set out otherwise in the section.

SECTION 114

Service on Insured Depository Institutions

This section amends Bankruptcy Rule 7004 by requiring that insured depository institutions be served by certified mail in any contested matter or adversary proceeding unless the institution has appeared in the case through an attorney or if the court orders that service may be made by first class mail. The court may so order only after service on the institution by certified mail of an application to permit service by first class mail. Of course, the institution may waive its right to service by certified mail. If service must be made by first class mail, it must be addressed to "an officer of the institution." The section does not set out any specific sanction for failing to serve in the proper manner. Presumably, the service would be ineffective.

SECTION 115

Section 341 Meetings of Creditors and Equity Security Holders

This section adds a new subsection (d) to Bankruptcy Code § 341. The new subsection requires the Chapter 7 trustee "to

orally examine the debtor to ensure that the debtor...is aware of" the consequences of seeking bankruptcy including the impact on the debtor's credit, the ability to obtain relief under other chapters of the Bankruptcy Code, the effect of the discharge, and the effect of reaffirmation of debts. It is a safe assumption that this section will not be applied to its logical extreme. Trustees likely will not be questioning debtors at length about their financial affairs and interests to determine if relief under another Chapter of the Code is more appropriate (that would mean that Chapter 7 Trustees might not receive the higher fees that § 107 of the new amendments provide!). It is more likely that individualized questions or counseling will be ignored in favor of some form of "group examination and counseling" by Chapter 7 trustees. This is the only way that the creditors' meetings can be concluded in any reasonable amount of time. Moreover, this provision contains no sanction for failure to comply with its directive.

SECTION 116

Tax Assessments

Under this provision of the Amendments, § 362(b)(9) is added to the Code to permit the taxing authorities to conduct audits of the debtor, to issue notices of tax deficiencies, to demand tax returns and to assess for taxes and issue a notice and demand for payment of the taxes. The new provision states, however, that tax liens that would attach by virtue of the assessment (see IRC

§ 6321) do not attach to property unless the tax being assessed is nondischargeable and the property or its proceeds either are transferred out of the estate or otherwise revert in the debtor.

TITLE II -- COMMERCIAL BANKRUPTCY ISSUES

SECTION 202

Insider Preferences

In this section, Congress has reversed those decisions that permitted the trustee to recover from a non-insider preferences benefitted an insider to the transaction. The commentary to the amendments notes specifically that the change in § 550 which sets out the recovery available to trustees, is intended to overrule Levit v. Ingersoll Rand Financial Corp. (In re V.N. DePrizio Construction Co.), 874 F.2d 1186 (7th Cir. 1989), and Ray v. City Bank & Trust Co. (In re C&L Cartage Co.), 899 F.2d 1490 (6th Cir. 1990). The trustee, of course, still may recover an insider preference from the insider. Generally, however, the insider is not a very attractive candidate for recovery, and trustees were more interested in seeking recovery against a much deeper pocket institutional lender. The amendment to § 550 of the Bankruptcy Code now prohibits that method of recovery.

SECTION 203

Perfection of Purchase Money Security Interests

This provision amends § 547 of the Bankruptcy Code by extending the time in which purchase money security interests

must be perfected from 10 to 20 days as set out in § 547(c)(3) (B). This change conforms the grace period for purchase money security interests perfection in the Bankruptcy Code to the prevailing grace period under the Uniform Commercial Code as it is enacted in the various states. Approximately 35 states have a 20 day grace period for the perfection of purchase money security interests under the states' enactments of UCC § 9-301(2). Kentucky grants a 20 day grace period as set out in Ky. Rev. Code § 355.9-301(2).

SECTION 204

Continued Perfection of Security Interests

This section amends Bankruptcy Code §§ 362(b)(3) and 546(b) to address the problem of security interests that are perfected at the commencement of the case but which would become unperfected due to the passage of time during a bankruptcy proceeding. For example, a filing to perfect a security interest under Article 9 of the UCC becomes ineffective five years after the date of the filing. If this lapse occurs during the pendency of a bankruptcy proceeding, the new amendments specifically authorize the creditor first to take action to maintain or continue the perfection of the security interest without violating the automatic stay, and second recognize that the continuation of perfection of that interest to be effective against entities that acquire rights in the property prior to the continuation of the perfection.

SECTION 205

Rejection of Unexpired Leases of Real Property or Time Share Interests

This amendment to the Code is intended to clarify that the rejection of a lease by a debtor/lessor will not extinguish the nondebtor lessee's rights under the lease agreement. Thus, the lessee's ability to sublet the property or otherwise enforce restrictive covenants under the lease would be retained by the lessee notwithstanding the rejection of the lease. The House commentary on the Bill thus identifies several cases as being changed by the new rules. See, In re Carlton Restaurant, Inc., 151 B.R. 353 (Bankr. E.D. Pa. 1993); Home Express, Inc. v. Arden Associates, Ltd. (In re Arden & Howe Associates, Ltd.), 152 B.R. 971 (Bankr. E.D. Cal. 1993); In re Harborview Development 1986 Ltd. Partnership, 152 B.R. 897 (D.S.C. 1993). This amendment to § 365 also removes the reference currently set out in § 365(h)(1) that requires that a nondebtor/lessee or time share interest purchaser be in possession of the leasehold or time share interest in order to elect to remain in possession of the property. Instead, under the new § 365(h)(1)(A)(ii), the triggering mechanism for a lessee to retain rights in the property is that the term of the underlying lease have commenced rather than the nondebtor/lessee be in possession of the property. Similarly, if the nondebtor is a time share interest holder, then if the term of the time share interest has

commenced, the time share interest purchaser may retain rights to the property. The current statutory language relating to these nondebtors "remaining in possession" is thus removed from § 365(h).

SECTION 206

Contents of Chapter 11 Plans

This section imports into Chapter 11 the provision already included in Chapter 13 in § 1322(b)(2). Thus, individual debtors cannot circumvent the Supreme Court's decision in Nobelman v. American Savings Bank, 113 S.Ct. 2106 (1993). Thus, cases such as In re Dever, 164 B.R. 132 (Bankr. C.D. Cal. 1994) would no longer arise.

Importantly, the commentary to the Bill favorably cites In re Hammond, 27 F.3d 52 (3rd Cir. 1994) which explicitly recognized that a security interest in a debtor's appliances, machinery, furniture, and equipment (whether fixtures or not) took the mortgage claim out of the protection of § 1322(b)(2).

SECTION 207

Priority for Independent Sales Representatives

This section specifically adds to the category of priority wage claimants persons who are owed sales commissions if during the twelve months preceding the date of the filing of the petition or cessation of the debtor's business "at least 75% of the amount [of commissions] earned by acting as an independent

contractor in the sales of goods or services was earned from the debtor." The amendment also increases the amount of the priority from \$2000 to \$4000. This is consistent with the adjustment of dollar amounts set out in § 108 of the Amendments.

SECTION 208

Exclusion From the Estate of Production Payment Agreements

This provision is intended to remove from the bankruptcy estate any interest that the debtor has transferred under a written conveyance of a production payment to entities who do not participate in the operation of the property from which the production payment is transferred. These payments involve only payments resulting from the production of liquid or gaseous hydrocarbons. This was a matter of some significant interest to several members of the Senate, and their comments on these matters are set out in the Congressional Record dated October 6, 1994. See 140 Cong. Rec. S14461-01.

SECTION 209

Seller's Right to Reclaim Goods

This provision includes a slight adjustment in the recognition of sellers' rights under § 2-702 of the UCC. Under that section, sellers who deliver goods on credit to a purchaser who is insolvent may claim the goods in certain circumstances. Section 546 has recognized this reclamation right, but it requires that the seller take action to demand reclamation of the

goods "for ten days after receipt of such goods by the debtor." The amendment retains the general ten day rule unless the bankruptcy case is commenced before the expiration of the ten days. In that instance, the seller would have a total of twenty days after receipt of the goods by the debtor within which to demand reclamation rights. The House commentary to the Bill simply states that the amendment "gives trade creditors up to 10 extra days to utilize reclamation rights after the commencement of a bankruptcy case." Not surprisingly, the commentary offers no reason for extending that time. I can't think of any.

SECTION 210

Election of Trustees Under Chapter 11

This amendment changes the practice in Chapter 11 to allow for the election of trustees in those cases. Given that trustees may be elected, they no longer need to be appointed by the U.S. Trustee when an election takes place. This opens up the trustee position to persons who are not on the panel of private trustees.

SECTION 212

Limited Liability Partnerships

Section 723 of the Bankruptcy Code provides that the trustee of a partnership has claim against the general partners for any deficiency that exists over the assets of the partnership to pay the claims against the partnership. Several states have enacted new partnership forms generally referred to as Limited Liability

Partnerships. This amendment to § 723 is intended to ensure that those partnership forms are included in the treatment of partnerships under § 723. Its inclusion, however, is to operate comparably to the treatment that the entity would receive under the applicable state law. Ohio is one of several states that have enacted a limited liability partnership statute.

SECTION 213

Impairment of Claims and Interests

This section of the Amendments addresses two distinct problems. First, it amends §§ 502(b) and 726(a) to state explicitly that tardily filed claims may be disallowed. This overrules the decision in In re Hausladen, 146 B.R. 557 (Bankr. D. Minn. 1992). Similarly, § 503(a) is amended to insert into the provision the requirement that requests for the allowance of administrative expenses must be made in a timely fashion unless the court otherwise orders for cause.

This provision of the amendments also contains a significant change in § 1124 of the Bankruptcy Code. The amendments delete subparagraph (3) of that section. That portion of the section provided, inter alia, that claims were impaired unless the holder of the claim receives on the effective date of the plan the allowed amount of the claim. Interests were impaired unless the interest holder received as of the effective date of the plan the greater of either the fixed liquidation preference to which the terms of any security representing such interest entitled the

holder, or the fixed price at which the debtor under the terms of the security may redeem the security. The impact of the claim impairment provision was that unsecured creditors were considered not to be impaired if the plan provided for the payment of the creditors' claims without postpetition interest even if the debtor was insolvent. See In re New Valley Corp., 168 B.R. 73 (Bankr. D.N.J. 1994). The amendment is intended to make clear that these claims are impaired unless they are paid postpetition interest. The provision does not indicate the rate of interest that must be paid. The contract rate of interest would seem a likely candidate, and the plan proponent could argue that this payment amount would leave the claim holders' legal, equitable, and contractual rights unaltered. See § 1124(1).

Section 214

Postpetition Rents and Lodging Payments

This provision of the amendments changes § 552(b) and 363(a) of the Bankruptcy Code. In § 552, the existing portion of §552(b) is reconstituted as (b)(1), and a new subsection (2) is added. The new subsection provides that a creditor's prepetition agreement with the debtor remains effective with respect to a claim of a security interest in the rents and related fees and charges for the use or occupancy of rooms in a hotel or motel. Sensibly, this extension of a security interest to the proceeds is assertable only to the extent that the prepetition security interest would reach those assets. Even if the security interest

reaches those assets, the court may cut off the security interest based on the equities of the case. This is consistent with the postpetition effect of security interests generally under § 552(b).

The amendment also changes § 363(a) to list specifically in the definition of cash collateral the fees, charges, accounts or other payments for the use or occupancy of a hotel or motel. Since this definition of cash collateral is bankruptcy specific, it would override any conflicting state law that would define these assets as something other than cash proceeds.

SECTION 216

Limitation on Avoiding Powers

Bankruptcy Code § 546(a)(1) is amended to set a new statute of limitations for the commencement of actions under §§ 544, 545, 547, 548 or 553. Those actions must be commenced before the later of two years after the entry of the order for relief in the case, or one year after the appointment or election of a trustee in the case, if the election or appointment of the trustee occurs prior to two years after the entry of the order for relief. This change resolves the conflict in the courts relating to the proper application of § 546(a)(1) when a trustee was appointed either in a Chapter 11 case or in a case converted to Chapter 7 from Chapter 11 when the debtor in possession had failed to recover property. In that situation under the new provision, the trustee will be precluded from bringing those actions if the conversion

or appointment/election of trustee took place more than two years after the entry of the order for relief. Another situation in which this limitation will be significant is in cases converted from Chapter 13 to Chapter 7. Since a trustee is appointed at the beginning of every Chapter 13 case, if the conversion of the case occurs more than two years after the commencement of the case, no actions can be taken under the sections set out in § 546(a)(1). Given the generally low priority of recovering preferences and other transfers in most Chapter 13 cases, this limitation could shelter a number of transfers that otherwise might have been recovered.

The impact of this provision is already being felt. In In re John Hicks Oldsmobile-GMC Truck, Inc., 1994 WL 621531 (Bankr. E.D. Tenn., Nov. 2, 1994), the court held that the limitations period for the commencement of avoiding actions is not extended by the appointment of another trustee in a case. Instead, the court held that the new amendment demonstrates that the proper analysis of the previous version of § 546 should lead to the same result as would occur under the amended section.

SECTION 217

Small Businesses

This section is a response to the move to create a new Chapter 10 or some other form of expedited business reorganization relief. A small business is defined generally as a person engaged in commercial activities (other than real

estate) whose noncontingent, liquidated debts do not exceed \$2,000,000. More importantly, however, the "streamlined" procedures applicable to small businesses are applicable only if the debtor elects to be treated as a small business. The "benefits" available to the small business are a shortened plan exclusivity period under § 1121 (from 120 days to file a plan down to 100 days) and the possibility of obtaining conditional approval of a disclosure statement which can be used to secure acceptances of the plan. The hearing to approve the disclosure statement thereafter can be held in conjunction with the confirmation hearing. The other "benefit" available to the small business debtor is the possibility that the court can order that a creditors' committee not be appointed in the case. These "benefits" hardly seem worth it. The exclusivity period for filing the plan is actually shortened for the debtor. Why the debtor would seek this benefit is not explained in the commentary accompanying H.R. 5116.

SECTION 218

Single Asset Real Estate Cases

This section first defines single asset real estate as real property that is a single property or project which generates all or substantially all of the debtor's gross income and on which no other substantial business is being conducted. The noncontingent, liquidated secured debt limit for single asset real estate cases is \$4,000,000. Cases decided under Chapter 13

may be particularly instructive in resolving whether particular projects are single asset real estate projects. It would seem that § 506(a) would be used to determine the extent of a secured claim, so that real estate worth more than \$4,000,000 would not be eligible for treatment as single asset real estate. This could lead to the assertion by secured creditors of a lower valuation of the property than the valuation asserted by the debtor. This is often contrary to the positions taken by the debtor and creditor during the case.

Assuming that the debtor is a "single asset real estate debtor", then with respect to an act against the real estate by the secured party, the automatic stay of § 362 will be terminated, modified, annulled, or conditioned unless within 90 days after the commencement of the case the debtor files a reorganization plan that has a reasonable prospect of being confirmed in a reasonable time or the debtor begins paying the creditor monthly payments "in an amount equal to interest at a current fair market rate on the market value of the creditor's interest in the real estate." Thus, the debtor either must pay interest to the creditor or must file a "viable" plan in the first 90 days after the commencement of the case. This effectively shortens the plan exclusivity period for debtors that is otherwise available under § 1121. The notion behind the amendment is that these debtors have a single asset with which to be concerned, and there is little need for an extended period of time to elapse while the secured creditor is going unpaid. The

bankruptcy system should not be used to hold off secured creditors simply to roll the dice on the real estate market for the sole benefit of the debtor.

SECTION 219

Leases of Personal Property

This provision of the amendments includes changes in both §§ 365 and 363 to alter the treatment of personal property leases. Specifically, § 365(d)(10) is added to require debtors in possession and trustees to perform the obligations under the contract (other than the obligations relating to default payment rates and the like as set out in § 365(b)(2)) from 60 days after the commencement of the case until the lease either is assumed or rejected. This new treatment for personal property lessors may cause greater scrutiny to be given to those agreements to determine whether they are true leases or disguised security agreements. Certainly, it would seem that this provision would encourage lenders to structure more transactions in the form of leases rather than as secured transactions. Even if the agreement is a true lease, however, the court may, for cause, permit the debtor to use the property without paying the full amount called for under the terms of the lease agreement.

If the debtor is making the payments called for under this section, the lessor may not obtain relief from the stay.

SECTION 221

Payment of Taxes with Borrowed Funds

This amendment ostensibly protects credit card issuers whose cards are used by debtors to pay their income taxes. It provides that the debts incurred in that fashion are nondischargeable as to the credit card issuer to the extent that the tax being paid would have been nondischargeable under § 523(a)(1). The language of the statute, however, is not so limited. Instead, it simply provides that any debt incurred for the purpose of paying a tax that would be nondischargeable under § 523(a)(1) is nondischargeable under the new § 523(a)(14). It would seem to permit a lender who has made a general operating loan to the debtor to at least assert that the debt was incurred to pay a tax to the United States. There is no indication as to the extent to which the creditor will have to trace the loan proceeds. Until the courts rule on the specifics of the tracing necessary to fall under this new exception to discharge, a number of lenders may seek refuge in this section. Moreover, in those instances where the debtor actually uses a credit card to pay an income tax liability, payments by the debtor thereafter to the creditor and additional charges on the account will make tracing very difficult, especially in the absence of any contractual or statutory provision setting out a tracing mechanism or mechanism for allocating payments on the account.

SECTION 222

Return of Goods

Under this provision, the debtor may return goods to the seller that the debtor had received prior to the commencement of the case if the creditor consents to the return. The creditor then may offset the purchase price of the goods against any claim that the creditor held against the debtor as of the commencement of the case. Any motion to permit this return of goods must be made not later than 120 days after the commencement of the case. Moreover, this treatment of a claim is available only in a Chapter 11 proceeding. This provision would be of benefit to the estate where the value of the goods in the hands of the debtor is less than the purchase price, but the value of the goods in the hands of the seller is greater than it is in the debtor's possession.

SECTION 223

Proceeds of Money Orders

This section amends § 541 to exclude from the estate cash or cash equivalents received by the debtor in exchange for money orders that were purchased in the last two weeks prior to the case and which were purchased under an agreement that prohibits the commingling of those funds with other funds of the debtor. However, if the money order issuer has not taken action during the 14 day period to segregate the funds as required by the agreement, then the cash or its equivalent would become part of

the estate.

SECTION 224

Trustee's Review of Professional Fees

This section adds a requirement in 28 U.S.C. § 586(a)(3)(A) that the U.S. Trustee review and comment on applications for compensation filed under § 330 of the Bankruptcy Code. The amendment also sets out the guidelines to be applied in determining the proper level of compensation. New § 330(a)(3) directs the court to consider the nature, extent and value of the services, paying particular attention to the time spent, rates charged, necessity for and benefits obtained through the services, and the "efficiency" of the services in light of the rates charged and the complexity of the matters addressed. Section 330(a)(4) then lists matters that do not warrant an award of fees, including duplicative services and services that were not reasonably likely to benefit the estate and were not necessary for the administration of the case. These "limitations" on professional fees could be viewed as a directive from Congress to the courts to exercise 20/20 hindsight over the actions of the professionals in the case. The limited commentary on the section indicates that Congress is seeking greater uniformity in the application of standards for the awarding of professional fees; however, it does not seem likely that any greater degree of uniformity will result from the enactment of this provision.

The amendment also adds a subsection explicitly permitting the payment of fees to an individual debtor's attorney in Chapter 12 and 13 cases for representing the interests of the debtor in connection with the bankruptcy case. The services are compensable based on the factors set out in the earlier provisions of the section, but they focus on the necessity for the services and the benefit to the debtor rather than to the estate. Thus, the debtor's attorney could be compensated out of the estate for the representation of the debtor in dischargeability litigation in the Chapter 12 or 13 case.

Finally, the amendment provides that compensation may be awarded for the preparation of fee applications. Again, the compensation is based on the "level and skill reasonably required to prepare the application." Given that the U.S. Trustee is directed to scrutinize the fee applications ever more closely, one wonders whether the "fee application process" will require higher skill levels and more time to complete thereby increasing the fees paid by the estate rather than decreasing fees as Congress no doubt hopes will happen under the new system.

SECTION 225

Notices to Creditors

This amendment provides a classic example of legislation that serves little purpose other than to fill up a page. It amends § 342 to provide that any notice that the debtor must give to a creditor shall contain the debtor's name, address, and

taxpayer identification number. Significantly, the section concludes by noting that "the failure of such notice to contain such information shall not invalidate the legal effect of such notice." Presumably, the court could impose sanctions against a debtor who wilfully failed to include the information. This sanction could even rise to the level of the dismissal of the case. Then, the debtor would be barred from filing for bankruptcy relief for another 180 days under § 109(g)(1). I would be very surprised to see such a case.

TITLE III -- CONSUMER BANKRUPTCY ISSUES

SECTION 301

Curing Defaults Relating to the Debtor's Principal Residence

Section 1322 is reconfigured to move former subsection (c) (three or five year maximum plan periods) to new subsection (d), and adding a new subsection (c). The new subsection sets out a federal rule for determining the last point at which a debtor may cure a default under a home mortgage pursuant to a Chapter 13 plan. Currently, a variety of deadlines have been applied throughout the country. These various deadlines generally are the result of different laws applicable in the particular states regarding the foreclosure of residential mortgages. This amendment preempts those laws and provides that mortgage defaults may be cured "until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law." The concluding reference to "applicable nonbankruptcy law"

may lead some courts back to the thicket of state foreclosure law to arrive at the last point in time at which cure is possible. This may be before or after the actual foreclosure sale. For example, the nonbankruptcy law may cut off the debtor's right to cure upon the entry of a judgment of foreclosure, or it may allow cure up to the judicial confirmation of the foreclosure sale. Both of these times are different from the actual foreclosure sale. Nevertheless, it seems clear from the language of the amendment that Congress is seeking to establish the foreclosure as the cutoff date. The commentary submitted to the Congressional Record suggests, however, that the final "cure date" could extend beyond the foreclosure sale if the applicable state law so provides.

The amendment also provides some relief for homeowners whose mortgages come finally due and payable during the life of the debtor's plan. For example, the mortgage may have a balloon payment that comes due two years into the plan. Under Bankruptcy Code § 1322(b)(2), extension of that payment date was considered an impermissible modification of the mortgage. The new amendment permits the payment of the mortgage over the life of the plan. Thus, a debtor with a mortgage that balloons in two years might seek to stretch the payments to five years. The extended payment plan still must meet the requirements for the treatment of secured claims under § 1325(a)(5). It seems possible, nonetheless, that the new treatment of the claim under § 1325(a)(5) could include periodic payments followed by a balloon payment

at the conclusion of the plan. The court also would have to determine that the plan is feasible.

SECTION 302

Nondischargeability of Criminal Fines in Chapter 13

This brief amendment inserts into § 1328(a)(3) of the Code the words "or a criminal fine" to add this category of claims to the list of debts that are nondischargeable in Chapter 13. As with nondischargeable restitution awards under § 1328(a)(3), the criminal fines must be "included in a sentence on the debtor's condition of a crime." Thus, an argument exists that the reach of this exception to discharge is significantly less than the reach of the exception to discharge for fines, penalties and forfeitures set out in § 523(a)(7). For example, debts for parking tickets and the like may not fall under the new version of § 1328(a)(3).

SECTION 303

Impairment of Exemptions

If the recent history of § 522(f) is any guide, this section may be among the more litigated provisions of the 1994 Amendments. It provides a mechanism for the determination of whether a particular lien impairs an exemption for purposes of § 522(f). The new provision directs the court to total the amount of all unvoided liens on the property and to add to that amount the amount of the exemption that the debtor could claim if there

were no liens on the property. If that entire amount "exceeds the value that the debtor's interest in the property would have on the absence of any liens," then the lien impairs the exemption. The legislative commentary on this provision is quite extensive. It suggests that decisions reached by the courts under four scenarios that would be overruled by the new definition of impairment. The first is the situation in which the consensual mortgage(s) on the property equals or exceeds the fair market value of the property and the debtor is seeking to avoid a junior judicial lien. Notwithstanding the absence of "equity" in the property, the debtor would be able to avoid the judicial lien. The second case scenario identified as being overruled by the amendment is the situation in which the consensual mortgage(s) with priority over the judicial lien do not exhaust the value of the property. The commentary uses the example of a \$50,000 house subject to a \$40,000 mortgage. The debtor's \$10,000 "equity" is subject to a \$20,000 judicial lien. The commentary then identifies In re Chabot, 992 F.2d 891 (9th Cir. 1992), as holding that in that situation, the debtor would be able to avoid only \$10,000 of the judicial lien, while the remaining \$10,000 of the lien would somehow remain alive. The commentary then notes that permitting the lien to continue "in life" in this fashion would result in a right for the judicial lienholder to assert a claim against the debtor's postpetition earnings contrary to all notions of a fresh start. The commentary then states that the arithmetic formula set out in the

amendment would not permit this result.

The commentary then continues on to state that the amendment overrules the Sixth Circuit's decision in In re Dixon, 885 F.2d 327 (6th Cir. 1989). In Dixon, the Sixth Circuit held that the debtor's homestead exemption was not impaired in the absence of a pending sale of the property by the judicial lienholder. While the Supreme Court's decision in Owen v. Owen, 111 S.Ct. 1833 (1991) seemed to overrule Dixon, the Sixth Circuit held otherwise in In re Moreland, 21 F.3d 102 (6th Cir. 1994), and the Supreme Court denied cert. in that case on October 17, 1994. This amendment is stated to overrule the Sixth Circuit, but only time will tell. More importantly, Dixon has been limited to application to the Ohio exemption. In re Powell, 1994 WL 570864 (Bankr. E.D. Ky., Nov. 18, 1994) (Howard, J.). Finally, the commentary notes that the Third Circuit's decision in In re Simonson, 758 F.2d 103 (3d Cir. 1985) is overruled by the amendment. Simonson involved the application of § 522(f)(1) to a case in which the judicial lien intervened between two consensual mortgages. The Third Circuit held that the lien could not be avoided because the amount of the mortgages exceeded the value of the property. The commentary states the position of the dissent in the case is adopted by the amendment.

The success of this amendment in resolving the proper application of § 522(f)(1) can only be measured after the courts of appeal have had their chance to "interpret" its language. The commentary sets out the goals of the section with some

particularity. The current emphasis on the "plain meaning" of the statute, however, offers ample opportunity for the courts to analyze the section in a manner that does not necessarily comport with the commentary that accompanied the legislation. Moreover, the legacy of Dewsnup v. Timm, 112 S.Ct. 773 (1992), also may limit the effectiveness of this amendment to § 522(f).

SECTION 304

Protection of Child Support and Alimony

Section 304 of the amendments is lengthy and significant. Among other things, it creates a new exception to the automatic stay for actions to establish or modify an order for the payment of alimony, maintenance, or support. Arguably, this change is somewhat limited in its significance in that prior to this amendment, the nondebtor spouse likely could obtain relief from the stay without too much difficulty to pursue those matters. More significantly, the amendments create a new category of priority claims under § 507(a)(7) for alimony, maintenance, and support claims. This priority is immediately before the priority for taxes which is moved down to § 507(a)(8). Given that these claims now are priority claims, they generally must be paid in full in chapter proceedings in order to obtain confirmation of the plan. See, e.g., §§ 1129(a)(9)(B) & (C), 1222(a)(2), 1322(a)(2). The amendment also protects the liens that creditors holding these alimony and support claims have against attack pursuant to §522(f)(1). Section 547(c) is amended to create

another category of protected transfers, but the protection applies only to "payments" of alimony, support, or maintenance, and it does not extend to a protection of the lien that a creditor of this type might obtain. Presumably, the creation of many of these liens would be contemporaneous with the creation of the debt, or the debts would not accrue until a later time so that no antecedent debt issue existed as required by § 547(b)(2).

There is another, and potentially very significant, change wrought by the amendments with respect to claims arising out of domestic relations. Section 523 is amended to include a new category of nondischargeable debts (new subsection (a)(15)) for debts arising out of a divorce decree or separation agreement that are not covered by § 523(a)(5). This relates basically to property settlement debts. It excepts these debts from the discharge unless the debtor cannot afford to pay this amount out of his or her disposable income or if discharging the debt "would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor." Actions to determine the dischargeability of these debts must be brought in the bankruptcy court under the same time restrictions as apply to nondischargeability actions under § 523(a)(2), (4), and (6).

Finally, the amendment provides that child support creditors and their representatives may appear in bankruptcy cases without any charges being levied against them for the appearance.

SECTION 305

Interest on Interest

This section "prospectively" overrules the Supreme Court's decision in Rake v. Wade, 113 S. Ct. 2187 (1993). The Court in that case held that an undersecured mortgage holder with an arrearage being cured under a plan has a right to receive interest on that arrearage even in the absence of a contractual right to interest on that amount. This section provides that interest on these amounts is recoverable only in accordance with the terms of the underlying agreement and applicable nonbankruptcy law. The amendments add appropriate subsections to §§ 1129, 1225 and 1325 to accomplish this result.

Significantly, § 305 of the Amendments is governed by a separate effective date provision. Under § 702(b)(2)(D) of the Amendments, the changes set out in § 305 of the amendments applies only to **agreements** entered into after October 22, 1994. Thus, the impact of this change will not be felt for some time.

SECTION 306

Exception to Discharge

Section 306 of the Amendments changes some of the "numbers" contained in Bankruptcy Code § 523(a)(2)(C). The new language provides that luxury goods purchases made within 60 days before the order for relief (rather than 40 days) and aggregating more than \$1,000 (rather than \$500) create presumptively nondischargeable debts. Similarly, cash advances totalling more

than \$1,000 (this amount is unchanged) and obtained during the last 60 days before the order for relief (rather than 20 days) are also presumptively nondischargeable. This has the effect of increasing the reach back period for nondischargeability as well as to increasing the minimum purchase amount of luxury goods. The amounts of debt set out in the section are now equal, and they are to be adjusted according to the provisions of § 108 of the Amendments. In a sense, however, the adjustment of the dollar amount of luxury goods purchases was not "fully adjusted" since the reach back period for scrutinizing those purchases was extended by 50%.

SECTION 308

Bankruptcy Petition Preparers

This sections contains a relatively elaborate system for the regulation of persons other than attorneys who for compensation prepare documents for filing in connection with a bankruptcy case. The amendments require the preparers to identify themselves by name and address as well as by an identifying number. It also places limits on the preparer's advertising, and it lists a variety of sanctions for violations of its requirements and limitations. Included among the sanctions are fines, actual damages, injunctive relief, and attorney fees for the party seeking the relief against the preparer. This section will have its greatest impact in California and other areas where these services seem to have proliferated.

SECTION 309

Fairness to Condominium and Cooperative Owners

As a general rule, I take particular caution when considering any legislation that has the word "Fairness" in its title. This provision is no exception. It provides that debts for condominium or cooperative fees that become due and payable to a condominium or cooperative association are excepted from the discharge under new § 523(a)(16) for any period that the debtor either occupied the dwelling or received rent from a tenant for that postbankruptcy period. The amendment cautions, however, that this new category of nondischargeable debts does not include any similar debt that arose before the entry of the order for relief. Although this is an amendment to the dischargeability section, it might be more properly placed in the definition of a claim. Since it is included in § 523, however, it would appear that Congress believes that these apparently postpetition debts are claims for purposes of the Bankruptcy Code. This legislative understanding of claims may have some impact on other areas.

SECTION 310

Lien Avoidance and Tools of the Trade

Section 303 of the Amendments sought to clarify and expand a debtor's ability to avoid liens that impair their exemptions. Section 310, on the other hand, explicitly limits those avoiding

powers when the property the debtor seeks to exempt is tools of the trade or the like. Under this new provision, the avoiding power of § 522(f) (2) is limited to the extent that the value of the property to which the nonpossessory, nonpurchase money security interest attaches exceeds \$5,000. The provision applies only when the applicable state exemption law either permits the debtor to claim an unlimited value of tools of the trade except to the extent of any consensual lien, or the state law prohibits the avoidance of liens on otherwise exempt property. In that event, the debtor may avoid the lien, but only to the extent of \$5,000. The statute may leave open the problem of a state exemption statute that sets aside an amount of tools of the trade in excess of \$5,000, but that is not unlimited in value. That is, what impact would a \$10,000 tool of the trade exemption have on this new § 522(f)(3)?

SECTION 311

Conversion of Chapter 13 Cases

Many Chapter 13 debtors fail to make all of the payments called for by their confirmed plans. Many others fail even to get plans confirmed. While many of these "failures" are dismissed, many other cases are converted to Chapter 7 proceedings. This section offers a solution to a pair of problems that arise when this occurs. First, the section clarifies Bankruptcy Code § 348 by providing that the property of the estate in the converted case consists of the property of the

estate as of the date of the filing of the petition that remains in the possession or control of the debtor on the date of the conversion. The section further provides that the valuations of property made during the case as well as the allowance of secured claims continue to apply in the converted case. Secured claims also are deemed to be reduced to the extent that the debtor has made payments on the secured claim during the Chapter 13 proceeding. This treatment of the payments removes the disincentive for debtors to make Chapter 13 payments to partially secured creditors who would thereafter assert a fully secured claim upon conversion of the case. Some courts have held that the secured creditor could assert its entire indebtedness against the collateral after the conversion of the case even though their secured claim had been set at a lower amount in the Chapter 13 case. The commentary offers some insight into the operation of the amendment by "adopting the reasoning" of the Third Circuit in In re Bobroff, 766 F.2d 797 (3d Cir. 1985), and by rejecting the decision of the Seventh Circuit in In re Lybrook, 951 F.2d 136 (7th Cir. 1991). The new provision also contains a "safety valve" to protect against what Judge Posner referred to in Lybrook as "strategic behavior by debtors." That is, if a court finds that the debtor is converting the case "in bad faith, the property in the converted case shall consist of the property of the estate as of the date of the conversion." This "safety valve", however, could operate to retain the rule of Lybrook in many cases.

SECTION 312

Bankruptcy Fraud

This section amends several of the bankruptcy crimes provisions in Title 18 of the U.S. Code by making some stylistic changes in §§ 152, 153, and 154, and by adding another category of criminal activity in § 154. The new "criminal" act is the knowing refusal "to permit a reasonable opportunity for the inspection by the United States Trustee of the documents and accounts relating to the affairs of an estate in the person's charge." This addition recognizes the position of the United States Trustee as being responsible for the oversight of trustees in bankruptcy proceedings.

The section also adds two new sections to the bankruptcy crimes provisions of the federal criminal laws. First, if a bankruptcy case or related proceeding is dismissed because of a bankruptcy petitioner's knowing disregard of a requirement of the Bankruptcy Code, then the preparer can be imprisoned for up to one year and/or fined. Secondly, a new § 157 is enacted which is patterned after the mail and wire fraud statutes of the federal criminal code. There is a potential five year imprisonment and/or fine awaiting any person who "having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so [either} files a [bankruptcy] petition; files a document in a [bankruptcy] proceeding; or makes a false

representation, claim or promise [regarding a pending or future bankruptcy], or in relation to a proceeding falsely asserted to be pending." A letter from an Assistant United States Attorney is reprinted in the Senate Floor Remarks of the Congressional Record noting that this provision is based on the wire and mail fraud statutes and indicating that "an essential element of the ... statute requires proof beyond a reasonable doubt of a specific intent to defraud." The letter also states that "most courses of action under the Bankruptcy Code and allowed by the bankruptcy courts are unlikely to be prosecutable under this new law or any other statute." I would not expect that this letter is grounds for the dismissal of any criminal action. A careful review of the language of the letter allows the somewhat remarkable interpretation that some actions allowed by the bankruptcy courts could be prosecuted under the new statute. One would be wise to keep a close eye on the conversion of nonexempt to exempt property cases for situations where the U.S. Attorney may become active.

SECTION 313

Discrimination Against Student Loan Borrowers

Section 525 of the Bankruptcy Code is amended to add a new subsection (c) to prohibit discrimination against a current or former debtor in connection with a grant, loan, loan guarantee, or loan insurance. It is difficult to determine the practical effect of this change. The commentary states that it is intended

to overrule the Second Circuit's decision in In re Goldrich, 771 F.2d 28 (2d Cir. 1985), which held that the credit guarantee of a student loan is not even similar to the licenses, permits and charters enumerated in § 525 of the Bankruptcy Code. Thus, discriminatory treatment in the offering of the credit guarantee was not barred by that section. The Second Circuit specifically noted that Congress did not intend to prohibit lenders from considering the financial history of a potential borrower when deciding whether to make a new loan. It is not clear what the extent of the "overruling" of Goldrich might be. The amendment would seem at the least to anticipate that lenders and guarantors will not treat loan applicants who have obtained bankruptcy relief any differently from the borrowers with otherwise similar backgrounds who have not previously filed for bankruptcy. Thus, litigation under this section might be based on a disparity in the loan approval rates of the lenders and guarantors for persons in these two categories.

TITLE IV -- GOVERNMENTAL BANKRUPTCY ISSUES

SECTION 401

Exception from Automatic Stay for Post-Petition Property Taxes

This amendment adds another exception to the automatic stay. It excludes from the operation of the stay the creation or perfection of statutory liens of the District of Columbia and the political subdivisions of states for ad valorem property taxes that come due after the filing of the bankruptcy petition. This

is consistent with the notion that debtors may not otherwise avoid the application of laws and regulations that govern the behavior and transactions of nondebtors. See, e.g., 28 U.S.C. § 929.

SECTION 402

Municipal Bankruptcy

This section changes the eligibility for Chapter 9 relief set out in Bankruptcy Code § 109(c)(2). It now provides that municipalities are eligible for Chapter 9 relief if, inter alia, the municipality is "specially authorized, in its capacity as a municipality or by name, to be a debtor under Chapter 9" This amendment is intended to resolve the conflict among the decisions as to whether specific authorization to commence a Chapter 9 case is required. The change answers the question in the affirmative.

TITLE V -- TECHNICAL CORRECTIONS

This Title of the Act contains numerous technical corrections to the Bankruptcy Code. If the Sunday New York Times Crossword Puzzle is insufficiently challenging for you, take a shot at this Title and try to determine whether any of the "corrections" are incorrect. If you are still game, go back through the Bankruptcy Code and determine if there are other instances where technical corrections might be appropriate. If you are still willing to consider these matters, send your resume

to the Office of the Legislative Counsel, and you can do that sort of work every day!

TITLE VI -- BANKRUPTCY REVIEW COMMISSION

This Title of the Amendments Act has been described by many people as the most important part of the Act. It establishes a Commission and requires that the **first** (cf. §101 of the Amendments Act requiring that the hearing on relief from the stay be **concluded** within 30 days) appointments to the Commission be made not later than 60 days from the enactment. This time period expires on December 21, 1994. The Commission must hold its first meeting not later than 210 days after the enactment. Thus, the first Commission meeting must be held by approximately the middle of May 1995. The Committee is directed to investigate and study problems and issues relating to bankruptcy, and to evaluate proposals to resolve those matters. The Commission is directed to solicit divergent views of parties concerned with the operation of the bankruptcy system, and the Commission is to submit its report not later than two years after the date of the first meeting.

The most interesting provision of this Title, in my opinion, is § 607(f). That section provides, "The Commission may accept, use, and dispose of gifts or donations of services or property." The cynics among you may be particularly troubled by this provision. And if you're not at least a little skeptical of this provision....

TITLE VII -- SEVERABILITY AND EFFECTIVE DATE

SECTION 701

Severability

This is the standard form provision indicating that the finding that one or more provisions of the Act is unconstitutional will not affect any other provision of the Act.

SECTION 702

Effective Date

This section provides generally that the amendments are effective upon enactment. President Clinton signed the Bill on October 22, 1994. Thus, the amendments are generally effective as to cases filed after that date. However, there are several exceptions to the rule.

First, § 305 dealing with interest on arrearages applies only with respect to mortgages entered into after October 22, 1994. Second, the elaborate provisions relating to "Manville" type reorganization plans as set out in § 111 of the Amendments applies to existing cases. Thirdly, the changes made in § 201 of the Amendments apply in connection with leases of aircraft equipment and vessels entered into in connection with a settlement of any proceeding pending under the Bankruptcy Code on October 22. Finally, the amendments made with respect to sovereign immunity (§ 113 of the Amendments), and additional trustee compensation (§ 117 of the Amendments), apply to all bankruptcy cases, regardless of when the cases were commenced.

The additional trustee compensation payable pursuant to § 117 of the Amendments, however, is by the terms of that section postponed for one year.

THE BANKRUPTCY REFORM ACT OF 1994

VIEWS FROM THE BENCH

Changes In Bankruptcy Practice And Procedure As Viewed By The Judiciary

**Hon. Henry H. Dickinson
United States Bankruptcy Judge
Western District of Kentucky**

**Hon. William S. Howard
United States Bankruptcy Judge
Eastern District of Kentucky**

**Hon. Joe Lee
Chief United States Bankruptcy Judge
Eastern District of Kentucky**

**Hon. J. Wendell Roberts
Chief United States Bankruptcy Judge
Western District of Kentucky**

**Hon. David T. Stosberg
United States Bankruptcy Judge
Western District of Kentucky**

SECTION H

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