

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and Bankruptcy Selected Topics

Presented by

**David A. Garland
Edgar W. Duskin, Jr.**

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 AND BANKRUPTCY SELECTED TOPICS

- I. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.
 - B. The Act has passed in both the House and the Senate and signed by President Bush on April 20, 2005. (See President=s remarks at end of section)
 - C. Effective Date: October 17, 2005, 180 days from enactment for most provisions.
 - D. General Provisions.
 1. Credit Counseling.
 - (a) Current Law - No requirement for Credit Counseling.
 - (b) 2005 Reform Act.
 - (i) An individual will not qualify to file a Petition for bankruptcy under any Chapter unless the individual receives credit counseling through a service approved by the United States Trustee or the Bankruptcy Administrator within one hundred eighty (180) days prior to the filing of the bankruptcy.

- (ii) The briefing may be individually or in a group briefing, including a briefing conducted by telephone or on the internet.
 - (iii) The briefing must outline the opportunities for available credit counseling and assist the individual in performing a related budget analysis.
 - (iv) The only exceptions are: (1) Debtor resides in a district in which adequate services are not available, (2) Debtor submits to the Court a certification that describes Aexigent circumstances@ that merit a waiver of the counseling requirements and that states the Debtor requested credit counseling services but was unable to obtain the services during the five day period after requesting the counseling, and (3) the Debtor completes counseling within thirty (30) days after filing his bankruptcy.
- (c) The Act also requires Chapter 7 and 13 Debtors to receive pre discharge instructional course in personal financial management.

2. Changes to the Automatic Stay Related to Multiple Filings.

- (a) Current Law.
 - (i) Currently, the dismissal of an earlier case does not affect the automatic stay in a subsequent case.
 - (ii) An individual or family farmer may not file a subsequent case within one hundred eighty (180) days if the Debtor voluntarily dismisses his case following the filing of a request for relief from the automatic stay.
 - (iii) Adequate protection and stay relief orders do not survive a refiling.
- (b) 2005 Reform Act.
 - (v) If a case is filed under Chapter 7, Chapter 11, or Chapter 13 within one year of the dismissal of an earlier case:

- (A) As to all creditors the automatic stay will terminate in the subsequent case within thirty (30) days after the filing, unless a party in interest demonstrates that the second case was filed in good faith with respect to the creditor sought to be stayed.
- (B) The Act further provides that the stay terminates as to any creditor that commenced a stay relief action in a previous case in which the individual Debtor, if as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to the actions of such creditor. It is our understanding that this provision will, in essence, allow adequate protection and stay relief orders from prior cases to remain valid in future cases.
 - (i) The sole exception is if the Chapter 11 or Chapter 13 case is filed after a Section 707(b) Dismissal.
 - (ii) A presumption of Bad Faith arises (which must be rebutted by clear and convincing evidence to the contrary) and no automatic stay exists if:
 - (A) As to All Creditors:
 - (1) Two or more filings of Chapter 7, 11, 13 in preceding year.
 - (2) Previous case dismissed within one year after Debtor failed to:
 - (a) File or amend Petition or other documents as required by code or by the Court;
 - (b) Provide adequate protection as ordered;
 - (c) Perform the terms of a confirmed Plan 1; or
 - (3) No substantial change in financial or

personal affairs.

- (B) As to any creditor who had a pending motion for relief from the automatic stay, when the previous case was dismissed or if a prior motion for relief had been resolved by terminating, conditioning, or limiting the stay as to that creditor.

3. Notices to Creditors In Chapter 7 and Chapter 13 Cases.

(a) Current Law.

- (i) Notice must be given as Ais appropriate@.
- (ii) There is no specific requirements concerning notice to creditors.

(b) 2005 Reform Act.

- (i) If within the ninety (90) days prior to the date of the filing of bankruptcy, the creditor supplies the Debtor in at least two communications with the current account number of the Debtor and the address which the creditor wishes to receive correspondence, the Debtor must send any notices required by the Bankruptcy Code to the address provided by the creditor, and the notices must include the account number.
- (ii) In the event the creditor would be in violation of applicable non-bankruptcy law by sending any such communication within the ninety (90) day period and if the creditor supplies the Debtor in the last two communications with the current account number of the Debtor and the address which the creditor wishes to receive correspondence, the Debtor must send any notice required under the Bankruptcy Code to the address provided by the creditor, and the notice must include the account number.
- (iii) Notice given to a creditor other than as provided above will not be effective notice until the notice has been brought to the attention of the creditor. If the creditor designates a person or department to be

responsible for receiving notices concerning bankruptcy cases and establishes reasonable procedures so that the bankruptcy notices received by the creditor are to be delivered to such department or person, notice shall not be considered to be have been brought to the attention of the creditor until received by the designated person or the designated department.

4. Successive Discharges.

(a) Current Law.

(i) Cases Filed Under Chapter 7.

(A) The Debtor may not be granted a discharge under Chapter 7 if the Debtor has been granted a discharge under Chapter 7 or under Chapter 11 in a case commenced within six (6) years before the date of the filing of the current Chapter 7 case.

(B) A Debtor may not obtain a discharge under Chapter 7 if the Debtor has been granted a discharge under Chapter 12 or Chapter 13 in a case commenced within six years before the date of the filing of the Petition unless:

(1) The payments under the Plan in the case totaled at least 100% of the allowed unsecured claims in the case, or

(2) The payments under the Plan totaled at least 70% of such allowed unsecured claims, and the Plan was proposed by the Debtor in good faith and was the Debtor=s Abest effort@.

(ii) Cases Filed Under Chapter 13 - No Prohibition Against Successive Discharges.

(iii) Cases Filed Under Chapter 12 - No Prohibition Against Successive Discharges.

(iv) Cases Filed Under Chapter 11.

- (A) The Debtor may not be granted a discharge under Chapter 11 if the Debtor has been granted a discharge under Chapter 7 or under Chapter 11 in a case commenced within six years before the date of the filing of the current Chapter 11 case.
- (B) A Debtor may not obtain a discharge under Chapter 11 if the Debtor has been granted a discharge under Chapter 12 or Chapter 13 in a case commenced six years before the date of the filing of the petition unless:
 - (1) The payments under the Plan in the case totaled at least 100% of the allowed unsecured claims in the case; or
 - (2) The payments under the Plan totaled at least 70% of such allowed unsecured claims, and the Plan was proposed by the Debtor in good faith and was the Debtor's best effort.

(b) 2005 Reform Act.

- (i) Cases Filed Under Chapter 7.
 - (A) A Chapter 7 Debtor may not obtain a successive discharge if the Debtor received a discharge in a Chapter 7 or Chapter 11 case filed within eight (8) years of the filing of the current case.
 - (B) A Debtor may not obtain a discharge under Chapter 7 if the Debtor has been granted a discharge under Chapter 12 or Chapter 13 in a case commenced within six years before the date of the filing of the petition unless:
 - (1) The payments under the Plan in the case totaled at least 100% of the allowed unsecured claims in the case, or

(2) The payments under the Plan totaled at least 70% of such allowed unsecured claims, and the Plan was proposed by the Debtor in good faith and was the Debtor's best effort.

(ii) Cases Filed Under Chapter 13.

(A) A Chapter 13 Debtor can not receive a discharge in a successive case if the Chapter 13 Debtor received a discharge in a case under Chapter 7, 11 or 12 within four (4) years of the current case; or

(B) A discharge in a prior Chapter 13 case filed within two (2) years of the current case.

(C) However, if extreme hardship can be shown by a Chapter 13 Debtor, the Chapter 13 Debtor may receive a discharge notwithstanding the fact that the Debtor had received a Chapter 13 discharge within two (2) years of the current case.

(iii) Cases Filed Under Chapter 12.

No Change.

(iv) Cases Filed Under Chapter 11.

A Chapter 11 Debtor may not obtain a successive discharge if the Debtor received a discharge in a Chapter 7 or Chapter 11 case filed within eight years of the filing of the current case.

5. Information To Be Provided By Debtors.

(a) Current Law.

(i) The Code does not require an individual Debtor to produce his tax returns

(ii) Debtor must provide list of creditors, schedules of debts and liabilities and a statement of income and expense.

(b) 2005 Reform.

- (i) The Debtor is required to provide a tax return or a transcript, at the election of the Debtor, for the latest period prior to filing, no later than seven days before the first date set for the Meeting of Creditors, or the case will be dismissed, unless the failure to file a return as required is due to Acircumstances beyond the control of the Debtor@.
- (ii) If a creditor has requested a tax return or transcript, the Debtor must provide the tax return or transcript to the requesting creditor at the time the Debtor provides a tax return or transcript to the Trustee, or the case will be dismissed, unless the Debtor demonstrates he is unable to provide such information due to Acircumstances beyond his control@.
- (iii) A Debtor is required to file any tax returns past due for the four years proceeding the bankruptcy filing on or before the date on which the Section 341 Meeting of Creditors is first scheduled.
- (iv) Debtor must now provide the following or the case will be dismissed.
 - (A) Certificate of credit counseling;
 - (B) Evidence of payment from employers, if any, received 60 days before filing;
 - (C) Statement of monthly net income and any anticipated increase in income of expenses after filing;
 - (D) Tax returns or transcripts for the most recent tax year;
 - (E) Tax returns filed during the case including tax return for prior years that had not been filed when the cases began; and
 - (F) A photo ID, among other items.
- (v) Debtor=s attorney must make reasonable efforts to verify that schedule information is well grounded in

fact.

D. Changes to Cases Filed Pursuant to Chapter 7.

1. Dismissal for Abuse - Means Testing.

(a) Current Law.

- (i) Currently, a Court by its own motion or by a motion of the U.S. Trustee may dismiss a case filed by an individual Debtor under Chapter 7 whose debts are primarily consumer debts if it finds that the granting of relief under Chapter 7 would be a substantial abuse of the provisions of Chapter 7.
- (ii) There is a presumption that the Debtor did not abuse the provisions of Chapter 7.
- (iii) There must be a showing that the petition was filed in bad faith or that the totality of the Debtor's financial circumstances indicates an abuse.

(b) 2005 Reform Act.

- (i) Under the Reform Act an abuse can be shown in two ways: (1) based on a means test, or (2) based upon facts which indicate that the Debtor filed the petition in bad faith or that the totality of Debtor's circumstances indicates an abuse.
- (ii) Any party in interest may bring a motion to dismiss.
- (iii) Means Test:
 - (A) The means test is designed to determine the extent of the Debtor's ability to pay general unsecured claims. The Court will presume an abuse exists if the Debtor does not pass the means test.
 - (B) The means test first compares the Debtor's annual income with the state median income as determined by census calculations. If the Debtor's annual income is less than the state median income, there is

no presumption of abuse. If the Debtor=s annual income is greater than the state median a determination is made as to whether there is net monthly income in excess of allowed expenses (explained later). If the net monthly income is less than \$100 there is likewise no presumption of abuse and the Debtor passes the test.

- (C) ACurrent monthly income@ means the average monthly income from all sources from which the Debtor, or in a joint case, the Debtor and the Debtor=s spouse, received without regard to whether the income is taxable, derived during the six month period preceding the termination and includes any amounts paid by any entity other than the Debtor on a regular basis to the household expenses of the Debtor and the Debtor=s dependents, but excludes benefits received under the Social Security Act and payments to the victims of war crimes against humanity on account of their status as victims of such crimes.
- (D) The allowable deductions consist of: (1) standardized expenses derived from the Internal Revenue Code for certain categories, (2) actual expenses of the Debtor in categories recognized by the IRS but which are not specific allowances, (3) necessary expenses incurred to maintain safety of the Debtor and Debtor=s family from family violence, (4) a percentage of secured debt and priority debt, (5) expenses paid for care and support of elderly, chronically ill or disabled household member or members of Debtor=s immediate family, and (6) expenses not to exceed \$1,500.00 per child per year to attend private or public school.
- (E) The trigger points where abuse is presumed is when the monthly income net of deduction is greater than the lesser of: (1) 25 percent (25%) of the Debtor=s non-priority

unsecured claims in the case or \$6,000.00, whichever is greater, or (2) \$10,000.00.

- (F) To rebut the presumption, the Debtor must document under oath Aspecial circumstances@ that would decrease the income or increase expenses so as to bring Debtor=s income after expenses below the trigger points.
- (G) If a Trustee brings a Motion to Dismiss and is successful with the motion, and if the Court finds that the Debtor=s attorney failed to reasonably investigate the facts related to the case, the Court must award cost and fees to the Trustee. Additionally, the Court is authorized to award civil penalties against the attorney payable to the Trustee, U.S. Trustee or Bankruptcy Administrator.
- (H) The signature of the Debtor=s attorney on the petition constitutes a certification that the attorney has no knowledge, after an inquiry, that the information listed in the schedules filed with the petition is incorrect.

2. Retention of Personal Property of the Estate or Subject to an Unexpired Lease of Personal Property.

(a) Current Law.

- (i) Debtor is required to file a Statement of Intentions within thirty (30) days after the date of filing of the Chapter 7 Petition or on or before the date of the Meeting of Creditors whichever is earlier. Intention must designate whether Debtor wishes to retain the property or surrender the property and if the property is either to be redeemed or reaffirmed.
- (ii) The present Code further provides that within forty-five (45) days after the filing of such notice the Debtor should perform this intention. Debtors often file the statements but have been ignoring the requirement to perform.

(b) 2005 Reform Act.

- (i) Minor changes have been implemented regarding these provisions. The Debtor is now required to perform those intentions within thirty (30) days after the Meeting of Creditors.
 - (ii) Should the Debtor fail to perform as indicated then there is a related provision which indicates that the automatic stay will then terminate with regard to personal property or personal property subject to an unexpired lease. This does not apply to real property.
 - (iii) There are separate provisions for purchase money property discussed later.
- 3. Retention of Personal Property with a Purchase Money Security Interest In Chapter 7.
 - (a) Creditor is entitled to possession of personal property in which it maintains a purchase money security interest not later than forty-five (45) days after the first Meeting of Creditors unless the Debtor:
 - (i) Reaffirms the debt.
 - (A) Redeems the collateral.
 - (b) If Debtor fails to relinquish possession within forty-five (45) days after 341 Meeting of Creditors:
 - (i) Automatic stay terminates with respect to the property.
 - (ii) Property is no longer property of Bankruptcy estate.
 - (iii) Creditor may pursue non-bankruptcy law remedies to repossess the property.
 - (c) Chapter 7 Trustee may move to retain the personal property if it has value to the estate, but the Chapter 7 Trustee must provide adequate protection to the Creditor.
- 4. Reaffirmation Agreements.

- (a) Current Law.
 - (i) An agreement to reaffirm an otherwise dischargeable debt is enforceable if the agreement is entered into before the granting of a discharge and the agreement clearly and inconspicuously states that the Debtor may rescind the agreement at anytime prior to the discharge or within sixty days after the agreement is filed with the Court, whichever occurs later and which states that the Debtor is not required to enter into the agreement under Bankruptcy Law, Non-Bankruptcy Law or under any agreement.
- b) 2005 Reform Act.
 - (i) The new law requires an extensive set of disclosures and statements by Debtor, and the Reaffirmation Agreement is not effective if such disclosures and statements do not accompany the Reaffirmation Agreement.
 - (ii) Until sixty (60) days after a Reaffirmation Agreement is filed with the Court, it is presumed that the Reaffirmation Agreement is an undue hardship on the Debtor if the Debtor=s monthly income less the Debtor=s monthly expenses (as shown on the Debtor=s completed and signed statement in support of the Reaffirmation Agreement, required by the new statute) is less than the scheduled payments on the reaffirmed debt. The presumption will be reviewed by the Court. The presumption may be rebutted in writing by the Debtor if the statement includes an explanation which indicates additional sources of funds to make the payments as agreed upon under the terms of the Reaffirmation Agreement. If the presumption is not rebutted to the satisfaction of the Court, the Court may disapprove the Reaffirmation Agreement.
 - (iii) The above limitations do not apply where the creditor is a Credit Union.

E. Changes to Cases Filed Pursuant to Chapter 13.

- 1. Secured Creditors: Cramdown, Adequate Protection, Valuation.

- (a) Current Law.
 - (i) A Debtor=s Chapter 13 Plan may propose payments, the present value of which are equal to the value of the collateral, rather than the total amount of the claim. (Known as Acramdown@).
 - (ii) Prior to Confirmation, Plan payments in which the Debtor does not act as his own disbursing agent are paid to the Chapter 13 Trustee.
- (b) 2005 Reform Act.
 - (i) Cramdown of a secured claim to the value of the collateral is limited.
 - (A) PMSI debt incurred within two and one-half (2.5) years (910 days) prior to filing, collateralized by a motor vehicle acquired for personal use of Debtor is not subject to cramdown.
 - (B) All other debt incurred within one (1) year prior to filing, collateralized by any other thing of value is not subject to cramdown.
 - (ii) Cramdown is still allowed for PMSI personal vehicles purchased more than 910 days prior to filing and all other collateral for debt incurred greater than one year. We feel that this is the appropriate interpretation of the new Code language but it is subject to interpretation by the Court.
 - (iii) Chapter 13 Plans are required to provide for the payment of secured claims in equal installments at least sufficient to provide adequate protection. Adequate protection would involve the payment of the value of the property. If the Debtor is an individual in a case under Chapter 7 or Chapter 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of filing of a Petition. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a

retail merchant would charge for property of that kind considering the age and condition of the property at the time the value is determined.

- (iv) Lien retention until sooner of full payment of underlying debt or discharge.

2. Confirmation Delays.

(a) Current Law.

- (i) Normally Confirmation will not take place prior to the 341 Meeting of Creditors, but the Code does not specifically address this issue.

(b) 2005 Reform Act.

- (i) A Confirmation hearing may not take place until at least twenty (20) days after but no more than forty-five (45) days after the Section 341 Meeting of Creditors.
- (ii) This seems to preclude a continuation of a Confirmation hearing.

3. ABest Efforts@ Test: Disposable Income and Plan Length.

(a) Current Law.

- (i) Under current law, a Chapter 13 Plan must either pay unsecured claims in full with interest or provide that all of the Debtor=s disposal income will be contributed to the Plan for a minimum of three years.

(b) 2005 Reform Act.

- (i) The ABest Efforts Test@.

(A) Is based upon AState median@ income data reported by the Bureau of the Census and adjusted to current year. ADisposable income@ for purposes of the Abest efforts@ test is to be calculated under the Ameans test@ for the presumption of abuse (discussed above).

- (B) Those Debtors whose disposable income is greater than the AState median@ must propose a five year Plan in the absence of full payment to comply with the Abest efforts@ test.

4. Limitation of Superdischarge.

(d) Current Law.

- (i) The exception to discharge of claims is limited to:

- (A) Claims for alimony and child support.

- (B) Claims related to government guaranteed student loans.

- (C) Claims related to death or personal injury caused by an intoxicated driver of a motor vehicle.

(b) 2005 Reform Act.

- (i) In addition to the claims excepted from discharge under the current law, the type of claims excepted from discharge will be expanded to include: fraud, including credit card misuse, failure to notify creditors of the bankruptcy in time to allow an assertion of claims, embezzlement, and breach of fiduciary duties.

F. Changes to Cases Filed Pursuant to Chapter 11.

1. Small Business Cases.

(a) Current Law.

- (i) The Code currently allows a business that qualifies as a small business case to elect to be treated as a small business Chapter 11.

- (ii) Under the current Code, a small business is defined as a person engaged in commercial or business activities (but does not include a person whose primary activities 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 \$2,000,000.00.

(iii) If the debtor elects to be treated as a small business 11, the exclusivity period for filing a plan is 100 days and all plans must be filed within 160 days after the filing of the petition.

(iv) Each of these periods may be extended for cause.

(v) If the debtor elects to be treated as a small business 11:

(A) the Court may conditionally approve a disclosure statement subject to final approval after notice and a hearing,

(B) acceptance and rejection of a plan may be solicited based upon 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 must be mailed at least 10 days prior to the date of the hearing on confirmation of the plan; and

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

(b) 2005 Reform Act.

(i) The new Code provides that it is no longer an election.

(ii) A Small Business Debtor includes:

(A) a person engaged in commercial business activities, including affiliates of such person that is also a debtor in bankruptcy,

(B) who has aggregate non-contingent liquidated secured and unsecured debts as the date of

the petition of not more than \$2,000,000.00, excluding debts owed to one or more affiliates or insiders,

- (C) the case is a case in which the U.S. Trustee has not appointed a committee of unsecured creditors or where the Court has determined that the committee of unsecured creditors is not sufficiently active,

iii) a Small Business Debtor does not include:

- (A) a person whose primary activity is the business of owning or operating real property, and
- (B) any member of a group of affiliated debtors that has an aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$2,000,000.00, excluding debts owed to one or more affiliates or insiders.

(iv) The differences between a Small Business Chapter 11 case and a regular case.

- (A) A Small Business Debtor may file a simpler Disclosure Statement.
- (B) The additional duties and additional disclosure requirements for a Small Business, Chapter 11 case:
 - (1) In a voluntary case, a Small Business Chapter 11 Debtor must attach its most recent balance sheet, statement of operation, cash-flow statement and federal tax return or a statement under penalty of perjury that the documents do not exist and no tax return has been filed.
 - (2) Senior management personnel and counsel must attend meetings scheduled by the Courts or the U. S. Trustee.

- (3) The debtor must timely file all schedules and statement of financial affairs, unless the Court, after notice and hearing, grants an extension which does not extend such time period to a date later than 30 days after the filing of the petition absent extraordinary and compelling circumstances.
 - (4) File all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by Local Rules of the District Court.
 - (5) Maintain insurance customary and appropriate to the industry;
 - (6) Timely file tax returns and other required government filings and timely pay all taxes entitled to administrative expense priorities except those being contested by appropriate proceedings being diligently prosecuted.
 - (7) Allow the United States Trustee or a designated representative of the United States Trustee to inspect debtor=s business premises, books, and records at reasonable times, after reasonable prior written notice unless notice is waived by the debtor.
- (C) The maximum cap for filing a Small Business Chapter 11 Plan has changed:
- (1) The exclusivity period for filing a Plan is 180 days, but it may be extended for cause.
 - (2) The plan and disclosure statement (if any) shall not be filed later than 300 days after the filing of the case.

- (3) The plan must be confirmed within 45 days after the Plan is filed.
- (4) The above caps may be extended only if:
 - (a) The debtor demonstrates by preponderance of the evidence that it is more likely than not that the Court will confirm a plan within a reasonable period of time;
 - (b) A new deadline is imposed at the time the extension is granted; and
 - (c) The order extending the deadline is signed before the existing deadline has expired.

2. Individual Debtor.

- (a) The definition of property of the estate of the individual Debtor is expanded to include property acquired after the commencement of the case but before the case is closed and to include earnings from services performed by the Debtor after the commencement of the case but before the case is closed.
- (b) The ABest Efforts@ Test now applies to an individual in a Chapter 11, and the value of the property to be distributed to unsecured creditors under the Plan cannot be less than the Debtor=s projected disposable income to be received during the five year period beginning on the day the first payment is due under the Plan or during the term of the Plan, whichever is longer.

3. Cause For Dismissal Expanded.

- (a) Current Law.
 - (i) Under the current version of the Bankruptcy Code, a case may be dismissed for cause, including for the following the reasons:

- (A) Continuing loss to or diminution of the estate and absence of reasonable likelihood of rehabilitation;
- (B) Inability to effectuate a Plan;
- (C) Unreasonable delay by the Debtor that is prejudicial to creditors;
- (D) Failure to propose a Plan within the time fixed by the Court;
- (E) Denial of confirmation of every proposed Plan and denial of a request made for additional time for filing another Plan;
- (F) Revocation of an Order of Confirmation and denial of confirmation of another Plan or a modified Plan;
- (G) Inability to effectuate substantial consummation of a confirmed Plan;
- (H) Material default by the Debtor with respect to a confirmed Plan;
- (I) Termination of a Plan by reason of occurrence of a condition specified in the Plan; or
- (J) Nonpayment of fees and charges.

(b) 2005 Reform Act.

- (i) In addition to the above-stated causes, the 2005 Reform Act enumerates the following as additional causes for dismissal of a Chapter 11 case:
 - (A) Gross mismanagement of the estate;
 - (B) Failure to maintain appropriate insurance that poses a risk to the estate or to the public;
 - (C) Unauthorized use of cash collateral substantially harmful to one or more

creditors;

- (D) Failure to comply with an Order of the Court;
- (E) Unexcused failure to satisfy timely any filing or reporting requirements;
- (F) Failure to attend the Section 341 Meeting of Creditors or an examination ordered under Rule 2004 without good cause shown by the Debtor;
- (G) Failure to timely provide information or attend meetings reasonable requested by the United States Trustee;
- (H) Failure to timely pay taxes owed after the date Debtor files his bankruptcy case; and
- (I) Failure of the Debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the Petition.

4. Appointment Of A Trustee In A Chapter 11 Case.

- (a) Cause for appointment of a Trustee in a Chapter 11 case has been expanded by the 2005 Reform Act.
 - (i) Current Law.
 - (A) A court may appoint a Trustee in a Chapter 11 case:
 - (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the Debtor by current management either before or after the commencement of a case, or
 - (2) if the appointment is in the best interest of the creditors, equity security holders and other interests of the estate.

(ii) 2005 Reform Act.

(A) In addition to the causes stated under the current Bankruptcy Code, the 2005 Reform Act expands the grounds for appointing a Trustee to include the grounds for the dismissal or conversion of a case to a Chapter 7 if it is in the best interest of the creditors and the estate to appoint a Trustee rather than dismissing or converting the case.

5. Exclusivity Period For Non-Small Business Chapter 11 Case.

(a) Current law.

(i) Only a Debtor may file a plan of reorganization during the first 120 days of the bankruptcy case, and only the Debtor may solicit votes on its plan during the first 180 days of the bankruptcy case. However, under the current law, this exclusivity period may be expanded for cause. Traditionally, courts have been freely extended the exclusivity period.

(b) 2005 Reform Act.

(i) In a non-small business Chapter 11 case, the 120 day exclusivity period for filing its plan may not be extended beyond 18 months, and the 180 day exclusivity period for soliciting votes for a plan may not be extended beyond 20 months.

6. Discharge.

(a) Current Law.

(i) Discharge is granted upon Confirmation.

(a) 2005 Reform Act.

(i) A discharge is not effective until the completion of all payments.

(ii) At anytime after the confirmation of the Plan, the Court may grant a discharge to a Debtor that has not completed payments under the Plan only if:

- (A) for each allowed unsecured claim, the value of property actually distributed under the Plan to the creditor is greater than or equal to the amount that would have been paid to the creditor if the estate had been liquidated under Chapter 7, and
 - (B) a modification to the Plan is not practicable.
- (iii) The Court may not grant a discharge unless the Court holds a hearing within 10 days before the date of the entry of the Order discharging the debt.
- (A) The Court must find that there is no reasonable cause to believe that:
 - (1) the Debtor has committed a felony which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of the Bankruptcy Code or
 - (2) that the Debtor owes a debt
 - (a) arising from a violation of the federal securities law or state securities laws,
 - (b) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of a registered security;
 - (c) any civil remedy or violation of Civil Rights Act or
 - (d) any criminal act, intentional tort or willful or reckless misconduct that cause serious physical injury or death to another individual in the preceding 5 years, and
 - (B) The Court must also find that there is no

reasonable cause to believe that a pending proceeding exists in which the Debtor may be found guilty of a felony of the kind described above or liable for a debt of the kind described above.

G. CHAPTER 12.

1. With the exception of a few minor changes, Chapter 12 has been adopted in substantially in the same form.

(a) Permanent enactment of Chapter 12.

(b) Qualification for Family Farmer.

(i) Current law.

(A) Debt limits - \$1,500,000.00;

(B) Farm debt ratio - 80% of the aggregate noncontingent, liquidated debts, excluding a debt for the principal residence unless such debt arises out of the farming operation;

(C) Income requirements - 80% of debts must arise out of farming operation.

(D) A Family Fisherman does not qualify.

(ii) 2005 Reform Act.

(A) Debt limits - \$3,237,000.00.

(B) Farm debt ratio - 50% of aggregate, noncontingent, liquidated debts (excluding a debt for the principal residence unless such debt arises out of the farming operation,

(C) Income requirements - 50% of debt must arise out of farming operation.

(c) Includes family fisherman.

(i) Individual:

(A) Debt limits - Aggregate debts do not exceed

\$1,500,000.00.

- (B) Debt ratio - 80% of aggregate, noncontingent, liquidated debts (excluding debt for principal residence unless the debt arises out of commercial fishing operation) arise out of a commercial fishing operation owned or operated by the individual.
 - (C) Income requirements - 50% of gross income is received from commercial fishing operation.
- (ii) Corporation or Partnership.
- (A) 50% of the outstanding stock or equity is held by:
 - (1) One family that conducts the commercial fishing operation; or
 - (2) One family and relatives conduct the commercial fishing operation.
 - (B) More than 50% of the value of its assets consists of assets related to the commercial fishing operation;
 - (C) Associate debts do not exceed \$1,500,000.00 and not less than 80% of its aggregate, noncontingent, liquidated debts (excluding debt for 1 dwelling owed by the corporation or partnership unless the debt arises out of the commercial fishing operation) arises from the commercial fishing operation;
 - (D) If the corporation issues stock, the stock is not publicly traded.
- (d) Discharge under the 2005 Reform Act.
- (i) The Court may not grant a discharge unless the Court holds a hearing within 10 days before the date of the entry of the Order discharging the debt.

(A) The Court must find that there is no reasonable cause to believe that:

(1) the Debtor has committed a felony which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of the Bankruptcy Code or

(2) that the Debtor owes a debt

(a) arising from a violation of the federal securities law or state securities laws,

(b) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of a registered security;

(c) any civil remedy or violation of Civil Rights Act or

(d) any criminal act, intentional tort or willful or reckless misconduct that cause serious physical injury or death to another individual in the preceding 5 years, and

(B) The Court must also find that there is no reasonable cause to believe that a pending proceeding exists in which the Debtor may be found guilty of a felony of the kind described above or liable for a debt of the kind described above.