

MISCELLANEOUS PROVISIONS OF THE 2005 ACT

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CHANGES TO CHAPTER 9

Chapter 9 has been modified to (i) clarify that if the filing of a chapter 9 petition is objected to and the objection fails the order for relief must be entered upon the dismissal of the objection (11 U.S.C. § 921(d)), and (ii) add sections 555, 556, 559, 560, 561 and 562 (dealing with securities, commodities and forward contracts and repurchase, swap and master netting agreements) and section 1123(d) (cure of defaults) to the list of sections from other chapters applicable in a chapter 9 case (11 U.S.C. § 901(a)). The modifications take effect on October 17, 2005, and apply to cases filed on and after April 20, 2005.

BANKRUPTCY STATISTICS

Title 28 of the United States Code is amended by adding new § 159 to provide for the collection by the clerk of the district court (or the bankruptcy court if a clerk is certified) of bankruptcy statistics regarding individual debtors under chapters 7, 11 and 13 of the Bankruptcy Code. The statistics to be compiled include total assets and liabilities, monthly income and expenses, amount of debt discharged, and the average period of time between petition filing dates and the closing of the cases for cases closed during a reporting period. Under the 2005 Act, and 28 U.S.C. § 586, as modified thereby, in districts where there are United States trustees, the Attorney General (or the Judicial Conference of the United States in districts served by bankruptcy administrators) (i) must establish audit procedures to determine the accuracy, veracity and completeness of information furnished by individual debtors, and (ii) must establish a method of selecting qualified auditors. The amendments take effect on October 17, 2005, and apply to cases filed on and after April 20, 2005.

CHAPTER 12

Chapter 12 has been permanently reenacted, effective July 1, 2005. The changes below take effect on October 17, 2005 and apply to cases filed on and after April 20, 2005.

A new category of persons protected by chapter 12, family fishermen (11 U.S.C. § 109(f)), includes an individual (or individual and spouse) engaged in catching or harvesting various forms of marine life whose debts are less than \$1.5 million, of which at least 80% (excluding home mortgage debt not incurred in the commercial fishing operation) arose from a commercial fishing operation owned or operated by such individual (and spouse, if applicable), or a non-public corporation or partnership 50% or more of the equity of which is held by the family that conducts the fishing operation, 50% or more of the value of the assets of which relate to the operation, and the debts of which (exclusive of home mortgage debt not incurred in the fishing operation) are \$1.5 million or less. 11 U.S.C. §§ 101(7)(A), 19(A). The property of a commercial fishing operation (including a commercial fishing vessel) may be sold free and clear of any interest in such property of an entity other than the estate (with the proceeds being subject to the divested interest). 11 U.S.C. § 1206.

The aggregate debt limit for family farmers has been increased to \$3.237 million, and the amount of debt (exclusive of home mortgage debt not incurred in farming operations) which must arise from farming operations has been lowered from 80% to 50%. 11 U.S.C. § 101(18). Family farmers must receive 50% of their income from farming operations in either the year preceding the year in which their cases are filed, or the second and third years preceding the year of filing. 11 U.S.C. § 101(18)(A).

Claims of governmental units arising from sale or transfer of any farm asset which had been entitled to § 507 priority are to be treated as nonpriority unsecured claims if the debtor receives a discharge. 11 U.S.C. § 1222(a)(2) (effective on April 20, 2005 as to cases filed on or after that date). Further, a plan may provide for less than full payment of § 507(a)(1)(B) claims if the plan proposes that all of the debtor's projected disposable income for a five-year period starting with the first payment date will be used to make plan payments. 11 U.S.C. § 1222(a)(4).

A chapter 12 debtor's plan may not be confirmed if an unsecured claimant or the trustee objects unless the claimant receives the amount of its claim or, in the alternative, all the debtor's projected disposable income during the plan period will be applied to payments under the plan, or (as added by the 2005 Act) the value of the property to be distributed during the plan period is not less than the debtor's projected disposable income during that period. 11 U.S.C. § 1225(b)(1)(c).

Certain chapter 12 plan modifications by anyone other than the debtor are prohibited. 11 U.S.C. § 1229(d).

Provisions protecting the beneficiaries of a chapter 12 debtor's domestic support obligations have been added to chapter 12, particularly with regard to the chapter 12 trustee's duties to inform the beneficiaries of various facts (11 U.S.C. § 1202(b) (6)), payment of interest on such obligations (11 U.S.C. § 1222(b)(1)), confirmation of a plan (11 U.S.C. § 1225(a)(7)), and discharge (11 U.S.C. § 1228(a)).

A discharge may not be granted to a chapter 12 debtor if the court finds that (i) the debtor cannot exempt property because he or she was convicted of a certain type of felony, or (ii) there is pending a proceeding in which the debtor could be convicted of a certain type of felony or is liable for a debt arising from a violation of securities laws, fraud or deceit in a fiduciary capacity or in connection with the purchase or sale of securities, or from certain other facts. 11 U.S.C. § 1228(f).

Section 1231 has been amended (effective on April 20, 2005 and applicable only to cases filed on and after that date) to delete former subsections (a) and (b) and provide that the court may authorize a plan proponent to request a determination of a question of law by any governmental unit (previously such authorization related only to state or local governmental units) responsible for collection or determination of income, of the tax effects of a plan.

USE, SALE OR LEASE OF PROPERTY

Section 363(b)(1) of the Code has been amended to require that a debtor which, in offering a product or service, disclosed to an individual a policy prohibiting the transfer of personally identifiable information (defined in new § 101(41A)) about individuals to persons not

affiliated with the debtor, and the policy is in effect on the date the debtor's case was commenced, may not sell or lease personally identifiable information to any person unless the transfer is consistent with the policy, or, after appointment of a consumer privacy ombudsman pursuant to new Code § 332, and after notice and a hearing, the court approves the transfer giving due consideration to the facts, circumstances and conditions of the transfer, and finding that no showing was made that the transfer would violate applicable nonbankruptcy law. The restriction on sale or lease of personally identifiable information also applies to a debtor's trustee.

New Code § 101(41A) defines "personally identifiable information" as an individual's first name (or initial) and last name, geographical residential address, electronic (e-mail) address, social security number, or credit card number, and, if identified with any of the foregoing, a birth date, birthplace or birth or adoption certificate number, or any other information concerning the identified individual that, if disclosed, would result in the individual being contacted or identified. The information must have been provided by an individual to the debtor in connection with obtaining a product or service from the debtor primarily for personal, family or household purposes.

New Code § 332 provides that if a hearing is required by § 363(b)(1)(B) (described above), the court must order the United States trustee to appoint, not later than five days before the commencement of the hearing, a disinterested person (other than the United States trustee) to serve as the consumer privacy ombudsman, and the court must require that notice of the hearing be timely given to the ombudsman. The ombudsman may appear and be heard at the hearing, and must provide the court with information to assist the court in its consideration of the facts, circumstances and conditions of the proposed transfer of personally identifiable information. The ombudsman may present to the court the debtor's privacy policy, potential losses or gains of privacy to the consumer, and potential costs or benefits to consumers if the transfer is approved, and potential alternatives that would mitigate potential privacy losses or potential costs to consumers. The ombudsman must not disclose any personally identifiable information obtained in performing the role. An ombudsman will be compensated pursuant to § 330(a)(1).

HEALTH CARE BUSINESS AMENDMENTS

Various sections of the Code have been amended (effective October 17, 2005, and applicable to cases filed on and after April 20, 2005) to deal with the financial difficulties of a health care business, defined as an entity (public or private, non-profit or profit) engaged in offering to the general public diagnosis or treatment of injury, deformity or disease, surgical, drug treatment, psychiatric or obstetric care, and including any general or specialized hospital, ancillary ambulatory, emergency or surgical treatment facility, hospice, home health agency, or similar health care institution, and any long term care facility including a skilled nursing, intermediate care, assisted living or domiciliary care facility, home for the aged, or any institution related to such facilities which offers room, board, laundry or personal assistance with daily living activities. 11 U.S.C. § 101(27A).

The first operative change to the Code in respect of health care businesses deals with patient records (defined in new § 101 (40B) as any written document relating to a patient (defined in new § 101 (40A) as an individual served by a health care business) or a record recorded on an electronic medium). New § 351 requires, in the event a health care business

commences a chapter 7, 9 or 11 case and the trustee or debtor does not have sufficient funds to pay for mandated storage of patient records, that the trustee or debtor will (i) provide published newspaper notice that the patient records will be destroyed if not claimed within 365 days of the notification date, and (ii) attempt to notify directly each patient who is the subject of the records and the appropriate insurance carrier regarding the claiming or disposing of patient records. If the records are not claimed within 365 days, the trustee or debtor must request in writing that each appropriate Federal agency accept a deposit of patient records, although the agency is not required to accept the records. If after the 365 day period, and after providing notice to the appropriate Federal agency, the records are not claimed by a patient or insurance provider, or accepted by a Federal agency, the trustee or debtor must destroy the records. Section 503(b)(8) provides administrative expense priority for the actual, necessary expenses of closing a health care business incurred by a trustee, debtor, Federal agency or a department or agency of a state or political subdivision thereof, including the cost of disposing of patient records and of transferring patients from the closing business to another health care business.

Section 704(a)(12) of the Code (as amended by the 2005 Act) adds to the trustee's duties the obligation to use all reasonable and best efforts to transfer patients from a closing health care business to a health care business in the vicinity which provides substantially similar services and maintains a reasonable quality of care.

New Code subsection 362(b)(28) excepts from the operation of the automatic stay the exclusion of the debtor by the Secretary of Health and Human Services from participation in the Medicare program or another Federal health care program.

New Code section 333 provides for the court-ordered appointment of an ombudsman in a chapter 7, 9 or 11 health care business case, who must monitor the quality of patient care and represent the interests of the health care business patients unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the facts of the case. The United States trustee, if ordered, must appoint an ombudsman. The appointed ombudsman must monitor the quality of patient care, provide a report to the court every 60 days regarding such quality, and if the ombudsman determines that patient care is declining significantly or is otherwise being materially compromised, a motion or written report must immediately be filed with notice given to parties in interest. The ombudsman must maintain confidentiality of information related to patients (including patient records) and may not review confidential patient records unless authorized by the court with any restrictions necessary to protect confidentiality, or unless the ombudsman has access to patient records pursuant to the Older Americans Act of 1965 and under non-Federal laws governing the state Long-Term Care Ombudsman Program. Subsection 330(a)(1) of the Code has been amended to provide for an ombudsman's compensation.

COMPENSATION

Section 328(a) has been amended (effective on October 17, 2005, and applicable to cases filed on and after April 20, 2005) to add to professionals' fee methods charges on a fixed or percentage basis. Section 1326 has been amended to provide for monthly payments of compensation owed to a chapter 7 trustee in a case converted to chapter 13.

PREFERENCES

Section 547(c)(2) (the ordinary course of business preference exception) has been amended to provide that an excluded transfer can either be made (i) in the ordinary course of business or financial affairs of the debtor and transferee, or (ii) according to ordinary business terms.

Section 547(c)(7) has been amended to exclude from preference treatment bona fide payments of debts for a debtor's domestic support obligations.

Section 547(c)(9) has been added to exclude from preference treatment transfers of less than \$5,000 by debtors whose debts are not primarily consumer debts.

Under § 547(e)(2), prior to its modification by the 2005 Act, a transfer involving a security interest was deemed made for preference time measurement purposes as of the transfer date if perfected at or within 10 days after the transfer (and under § 547(c)(3)(B) (the new value exception), within 20 days after the debtor received the collateral). The time periods have been extended to 30 days.

Section 547(h) has been added to protect from preference treatment transfers made as a part of an alternative repayment schedule between the debtor and any of debtor's creditors which schedule was created by an approved nonprofit budget and credit counseling agency.

Section 547 has been amended to provide (in sub-section 547(i)) that if a transfer to a non-insider for the benefit of a creditor that is an insider made between 90 days and one year before the petition filing date is avoided, it is avoided only with respect to the insider.

The foregoing changes will take effect on October 17, 2005, and apply to any case pending or commenced on and after April 20, 2005.

BANKRUPTCY JUDGESHIPS

New bankruptcy judgeships are provided in a supplement to 28 U.S. C. § 152 (effective on April 20, 2005) as follows:

District	Number of Judges
Eastern District of California	1
Central District of California	3
Delaware	4
Southern District of Florida	2
Southern District of Georgia	1
Maryland	3
Eastern District of Michigan	1
Southern District of Mississippi	1
Nevada	1
New Jersey	1
Eastern District of New York	1

District	Number of Judges
Northern District of New York	1
Southern District of New York	1
Eastern District of North Carolina	1
Eastern District of Pennsylvania	1
Middle District of Pennsylvania	1
Puerto Rico	1
South Carolina	1
Northern District of Tennessee	1
Eastern District of Virginia	1

Vacancies in the above judgeships in districts where one judge is added occurring 5 years or more after appointment and resulting from the death, retirement, resignation or removal of the judge will not be filled. In the Central District of California, the Southern District of Florida, and the Districts of Delaware and Maryland, the following vacancies in the above judgeships which occur five years or more after appointment and resulting from death, retirement, resignation or removal shall not be filled:

District	Vacancy
Central District of California	1st, 2nd and 3rd
Delaware	1st, 2nd, 3rd and 4th
Southern District of Florida	1st and 2nd
Maryland	1st, 2nd and 3rd

The temporary offices of bankruptcy judges authorized by the Bankruptcy Judgeships Act of 1992 (28 U.S.C. § 152 note) for the Northern District of Alabama, Delaware, Puerto Rico and the Eastern District of Tennessee are extended until the first vacancy occurring in the office of a bankruptcy judge in the applicable district resulting from the death, retirement, resignation or removal of a bankruptcy judge and occurring five years or more after the enactment of the 2005 Act.

The 2005 Act further amends 28 U.S.C. § 152(a)(2) by adding one judge to the Middle District of Georgia and deleting the one judge from the Middle/Southern Districts of Georgia.

The 2005 Act provides that the Director of the Federal Judicial Center, in consultation with the Director of the Executive Office for United States Trustees, shall develop materials and conduct training which may be useful in implementing the 2005 Act.

PROPERTY OF THE ESTATE

As amended, § 541(b)(5) now excludes any interest of a debtor in tangible personalty pledged or sold as collateral for a loan or advance given by a licensed lender where: the property is in the possession of the pledgee/transferee; the debtor has no obligation to repay the money, redeem the collateral or buy back the property at an agreed price; and neither the debtor nor the trustee has exercised any right to redeem the property in a timely manner under state law, as

extended by § 108(b). The amendment is effective on October 17, 2005, and applicable to cases filed on and after April 20, 2005.

APPEALS

Section 158 of title 28 has been amended to provide that a court of appeals has jurisdiction over an appeal if the bankruptcy court, district court or bankruptcy appellate panel involved, acting on its own motion, or on the request of a party to the judgment, order or decree over which the district court has jurisdiction pursuant to the first sentence of 28 U.S.C. § 158(a), or all the appellants and appellees acting jointly, certify that (i) the judgment, order or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the United States Supreme Court, or involves a matter of public importance; (ii) the judgment, order or decree involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order or decree may materially advance the progress of the case or proceeding in which the appeal is taken, and if the court of appeals authorizes the direct appeal. The lower or intermediate court can make the certification if, on its own motion or on the request of a party, it determines that a circumstance specified in (i), (ii) or (iii) exists, or if a request is made to the court by a majority of the appellants and a majority of the appellees (if any) to make a certification. There is no stay of such an appeal unless the bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay pending the appeal. The request for certification must be made within 60 days after the entry of the judgment, order or decree. Procedural rules are contained in the 2005 Act section amending 28 U.S.C. § 158(d)(2), including an admonition that a bankruptcy court, a district court or a bankruptcy appellate panel can only make a certification with respect to matters pending in that court. The amendments are effective on October 17, 2005, and apply to cases filed on and after April 20, 2005.

FRAUDULENT TRANSFERS

Section 548 of the Code has been amended to extend the lookback period for transfers by the debtor from one year to two years before the petition filing date (effective only as to cases commenced more than one year after April 20, 2005).

Sub-section 548(a) has been amended to make clear that transfers to an insider pursuant to an employment contract can be fraudulent transfers and can serve as a basis for the insolvency test for a constructively fraudulent transfer if made outside the ordinary course of business, whether or not the debtor was insolvent or was rendered insolvent by the transfer.

A new sub-section (e) was added to § 548 giving a fraudulent transfer plaintiff the ability to set aside a transfer made by the debtor within ten years before the petition filing date to a self settled trust or similar device, if the debtor is a beneficiary of the trust, and the debtor made the transfer with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the transfer date, indebted. The transfer includes one made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by, any violation of securities laws, or fraud, deceit or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security

registered under sections 12 or 15(d) of the Securities Exchange Act of 1934 or section 6 of the Securities Act of 1933.

Other than the lookback period changes, modifications to § 548 were effective on April 20, 2005, and apply to cases commenced on or after April 20, 2005.