

## Standing Trustee's Guide to BAPCPA

Following is a brief summary of BAPCPA's impact on Trustees, debtors and their attorneys.

This is intended to be a practical guide to making BAPCPA work in Chapter 13 and highlights what is required to get the case started, get through the 341 meeting, get through confirmation and touches on a few common post confirmation issues.

### Credit Counseling

The debtor must file a certificate of completion of a credit counseling briefing to be eligible to file Bankruptcy. The code requires that the briefing occur during the 180 day period preceding the date of filing. This appears to require the briefing occur at least one day pre petition. I am not inclined to raise the issue of eligibility for debtors whose certificate is dated the same day the case is filed. If the certificate cannot be filed with the petition it must be filed as soon as possible thereafter. The United States Trustee Program maintains a list of approved providers on their web site at [http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc\\_approved.htm](http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm)

### Automatic Stay

There are now limitations on the automatic stay for repeat filers.

Pursuant to § 362(c)(3) if the debtor has had one case dismissed [other than a Chapter 7 dismissed under § 707(b)] within the one year prior to filing, the automatic stay terminates after 30 days. The court may extend the stay pursuant to § 362(c)(3)(B) after notice and with a hearing completed within 30 days of filing. The debtor must demonstrate that the new case was filed in good faith as to the creditors to be stayed.

Pursuant to § 362(c)(4) if the debtor has had two or more cases dismissed [other than a Chapter 7 dismissed under § 707(b)] within the one year prior to filing the stay under § 362(a) shall not go into effect. The court may impose the stay pursuant to § 362(c)(4)(B) after notice and with a hearing completed within 30 days of filing. The debtor must demonstrate that the case was filed in good faith as to the creditors to be stayed.

The prudent debtor attorney will be sure that every flaw in the prior case(s) is corrected in the new filing and that the first mortgage and plan payments are presented with the motion. File the motion on Day One. Remember, you only have 30 days to have the hearing concluded.

There are other limitations to the automatic stay; the stay does not apply to commencement or continuation of civil action or proceeding

- a) to establish paternity;
- b) to establish or modify an order for DSOs;
- c) concerning child custody or visitation;
- d) for dissolution EXCEPT to determine division of property that is property of the estate;
- e) collection of a DSO from non-estate property;
- f) interception of tax refunds. 362(b)(2) (A-F)

The stay does not apply to withholding of income for maintenance/support for amounts accrued before and after the filing of petition if from judicial or administrative order or statute 362(b)(2)(C)

**Domestic Support Obligations (DSO)** § 1302(d) requires the Trustee to provide certain notices to DSO claim holders; therefore the debtor must list DSO claim holders on Schedule E even if they are current with their payments.

**Payments**

Pursuant to § 1326(a)(1) the debtor’s first plan payment is due within 30 days unless otherwise ordered; pre BAPCPA the debtor had 30 days after filing their Plan to make a payment.

Pre confirmation adequate protection payments required under § 1326(a)(1)(C) will be paid by the Trustee pursuant to a Standing Order. Adequate protection payments will be made regardless of whether a claim is on file so it is imperative that the debtor provide complete account numbers on Schedule D.

**Changes to the Chapter 13 model plan resulting from BAPCPA**

There are no material changes to Sections A and D 1. Debtor’s plan payment still equals net income on Schedule I less total expenses listed on Schedule J.

There are substantial changes in Section E, Disbursements by the Trustee, and Section F, Priority.

	<b><u>Old Section E</u></b>	<b><u>New Section E</u></b>
1	Trustee Fee	Trustee Fee
2	Debtor Attorney Fee	Current Mortgage Payments
3	Current Mortgage Payments	Other Secured Creditors
4	Mortgage Arrears	Debtor Attorney Fee
5	Other Secured Creditors	Mortgage Arrears
6	Priority	Priority
7	Special Class	Special Class
8	General Unsecured	General Unsecured
	<b><u>Old Section F</u></b>	<b><u>New Section F</u></b>
1	Trustee Fee	Trustee Fee
2	Debtor Attorney Fee	Current Mortgage Payments
3	Secured Claims with fixed payments	Secured Claims in Section E 3
4	Secured Claims without fixed payments	Debtor Attorney Fee
5	Priority	Mortgage Arrears
6	Special Class	Priority
7	General Unsecured	Special Class
8	N/A	General Unsecured

All creditors with claims secured by personal property must receive fixed monthly payments under BAPCPA. These payments must be sufficient to provide the creditor with adequate protection. Section E 3 no longer includes an election for pro rata payments. See § 1325(a)(5)(B)(iii)(I) & (II).

Section B 3 is eliminated. No early release of a lien on personal property § 1325(a)(5)(B)(i)(I)

### **Pay Advices and Tax Returns**

Pursuant to a Standing Order, payment advices required by § 521(a)(1)(B)(iv) and a Federal income tax return required by § 521(e)(2)(A)(i) shall be filed with the Trustee a minimum of seven days before the 341 meeting. This requires the debtor to provide every pay stub and/or record of every other payment of any kind received by the debtor(s) for the 60 days pre petition.

Pursuant to § 1308 (a) & (b) we can't conclude a 341 meeting unless the debtor provides proof of filing of tax returns for the four years pre petition.

### **Automatic Dismissal**

Pursuant to § 521(i), a debtor's case *shall be automatically dismissed effective on the 46<sup>th</sup> day* if they fail to file everything required by § 521 (a)(1) within 45 days of the petition date. In the NDIL there is no truly automatic dismissal; a motion is required but the only defense is having actually complied with § 521(a)(1) or having the court order that the debtor is not required to comply.

### **Contents of Plan and Confirmation of Plan (not covered above)**

There is no change to the good faith requirement of § 1325(a)(3) regardless of income level.

§ 1322(b)(10) allows a debtor to pay interest on unsecured claims that are nondischargeable under 1328(a) if the debtor's plan pays all GUC's in full.

If the debtor's (and spouse's if any) income is above the median the term of the plan must be sixty months, § 1322(d) and § 1325(b)(4)(A)(ii).

New requirements for confirmation include § 1325(a)(7) the petition must be filed in good faith, § 1325(a)(8) the debtor must have made all post petition DSO payments, § 1325(a)(9) the debtor must have filed all tax returns required under section 1308.

The famous hanging paragraph after §1325(a)(9) severely restricts the debtor's ability to bifurcate the claim of a creditor secured by a vehicle purchased within 910 days pre petition, acquired for the personal use of the debtor; the Supreme Court's decision in re Till still controls as to interest.

Means test doesn't appear to apply to debtors below the median income, § 1325(b)(3).

Debtors over the applicable median income are committed to a sixty month plan, §1325(b)(4) .

### **Discharge**

There are eight new exceptions to discharge in § 523(a).

Time period between discharges has been lengthened (filing date to filing date), § 1328(f).

Eight years between chapter 7 discharges. Two years between chapter 13 discharges.

Four years between a chapter 7 discharge and a chapter 13 discharge.

The Trustee's office no longer "Requests Discharge", we file a "Notice of Completion of Plan Payments" on the PACER docket.

For cases filed prior to October 17, 2005 the discharge order should be entered promptly.

For cases filed on or after October 17, 2005 every debtor is required to file a DSO Declaration and a Certification Regarding Financial Management (Official Form 23) to be eligible for a discharge.

After the Trustee files the Notice of Completion of Plan Payments, the Clerk will send a reminder notice to the debtor's attorney or pro se debtor advising them of the requirement to file these forms. Once the DSO Declaration and Form 23 have been filed, the discharge will be issued.

If no DSO Declaration or Form 23 is filed the case will be closed without a discharge.

### **Debtor Education**

Debtors are required by § 1328(g)(1) to provide proof that they have completed an instructional course concerning personal financial management described in § 111 to be eligible for a discharge. The certificate of completion of the course should be filed prior to payment of the final payment under the plan. United States Trustee Program maintains a list of approved providers on their web site at [http://www.usdoj.gov/ust/eo/bapcpa/ccde/de\\_approved.htm](http://www.usdoj.gov/ust/eo/bapcpa/ccde/de_approved.htm)

### **Other**

“Bowie Kuhn rule” - if the debtor has not lived in the same one state for the 730 days prior to filing then domicile is based on the place in which the debtor was domiciled for the 180 days (or majority of the 180) prior to such 730 day period. 522(b)(3)(A)

401(k) loans are not dischargeable 523(a)(18). 401(k) loans are not debts 362(b)(19)

### **Case Audits**

Commencing with cases filed after October 20, 2006 the UST (via independent CPA's) is auditing bankruptcy cases to determine the accuracy, veracity and completeness of petitions, schedules and other information required to be filed or provided in a bankruptcy case.

Cases will be selected for audit within 10 days of filing and completed within 63 days.

They will randomly audit 1 in 250 cases. There will be targeted audits as well.

For more information visit the United States Trustee Program's website at [http://www.usdoj.gov/ust/eo/public\\_affairs/press/docs/pr20061019.htm](http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20061019.htm)

### **Case Filings**

The FLOOD of filings leading up to BAPCPA's effective date of October 17, 2005 immediately slowed to a drip, then a trickle. Chapter 13 filings have been steadily increasing since July of 2006.

For the month of January, Chapter 13 filings in the Eastern Division of the Northern District of Illinois were 83% of the average filings for the first six months of 2005 (before the panic set in).

Chapter 7 filings have actually been declining the last four months and are down to 27% of early 2005 levels. Before BAPCPA 80% of filings in the ED of NDIL were Chapter 7 and 20% were Chapter 13. In January the ratio was down to 56% Chapter 7 and 44% Chapter 13.