

The Impact of the New Bankruptcy Law on the Small Business Debtor

Among the groups that will be most affected by the sweeping changes of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), are small business debtors. Perhaps the most striking change is that the small business debtor designation is no longer optional. Under the BAPCPA, a debtor meeting the \$2 million debt threshold is, by default, a small business debtor if the U.S. Trustee has not appointed an unsecured creditors' committee, or if the court determines that the unsecured creditors' committee is not sufficiently active and representative to provide effective oversight of the debtor. See 11 U.S.C. § 101(51D) (A). Further, the BAPCPA excludes debts to affiliates and insiders from the \$2 million debt threshold, and provides that a debtor that has less than \$2 million in debt but that is part of a group of affiliated debtors with more than \$2 million in debt will not be considered a small business debtor. See 11 U.S.C. § 101(51D) (B).

Default designation as a small business debtor has significant ramifications where, among other things, the BAPCPA subjects small business debtors to increased oversight by the U.S. Trustee's Office and an expedited timetable for confirmation of a plan of reorganization. Under the BAPCPA, the U.S. Trustee has expanded powers to evaluate the viability of small business debtors through, among other things, a mandatory interview of the debtor at the beginning of the case [28 U.S.C. § 586(a)(7)(A) and 11 U.S.C. § 1116(2)], inspections of the debtors' business premises [28 U.S.C. § 586(a)(7)(B) and 11 U.S.C. § 1116(7)], and review and monitoring of the debtors' activities to determine whether the debtor will be unable to confirm a plan [28 U.S.C. § 586(a)(7)(A)]. Small business debtors are now required to file their plan and disclosure statement within 300 days after the order for relief [11 U.S.C. § 1121(e)(2)] and, once filed, the plan must be confirmed within 45 days [11 U.S.C. § 1129(e)]. And under the BAPCPA, an extension of these deadlines will only be granted where the debtor can show a high likelihood that it will confirm a plan within a reasonable period of time. See 11 U.S.C. § 1121(e)(3).

But the BAPCPA does contain mechanisms that should make the process for small business debtors simpler and less expensive. For example, if the court finds that a small business debtor's reorganization plan provides the required "adequate information," the debtor may be exempted from the requirement to file a separate disclosure statement. See 11

U.S.C. § 1125(f)(1). The small business debtor may now file a standard form of disclosure statement approved by the court [11 U.S.C. § 1125(f)(2)], and may seek to have a combined hearing on the plan and disclosure statement [11 U.S.C. § 1125(f)(3)(C)]. And the court in a small business case can actually order that a committee of creditors not be appointed. See 11 U.S.C. § 1102(a)(3).

Ultimately, like most new provisions contained in BAPCPA determination of the benefits of the small debtor provisions will need to be played out in real life situations. The goals of accelerating the process and, thereby, reducing professional fees, which will make it more likely for a debtor to successfully emerge from bankruptcy is a laudable goal.

Like most new provisions of BAPCPA, the small debtor provisions have been the subject of much debate. Their goal is to accelerate the reorganization process and reduce the typical layers of professional and administrative expenses associated with the reorganization process so that the small business debtor has a greater likelihood of successfully emerging from bankruptcy. Although a laudable goal, practitioners and courts will still need to feel their way through the new process and, hopefully, avoid protracted litigation over potential ambiguities.

Tabas, Freedman, Soloff & Miller, P.A.
Gary M. Freedman and Zana M. Scarlett