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The newsletter of the Illinois State Bar Association's Section on Commercial, Banking & Bankruptcy Law

Environmental cleanup claims survive bankruptcy: *US v. Apex Oil Co., Inc.*

By Raymond T. Reott and Becky J. Schanz

In general, once a company files for reorganization under the federal bankruptcy laws and is reorganized, old creditors may not pursue debts arising before the reorganization. However, that outcome is not always the case in the environmental context. Courts have issued conflicting opinions on whether claims for injunctions ordering the cleanup of environmental contamination are discharged in a bankruptcy proceeding. In the recent *United States of America v. Apex Oil Company, Inc.*, No. 08-3433 (7th Cir. 2009) opinion, the Seventh Circuit held that a cleanup injunction that merely imposes a cost on the debtor was not discharged.

This ruling raises critical issues for companies seeking to reorganize after declaring bankruptcy. Because environmental problems frequently are latent, contamination claims seeking cleanup often are not brought for years after the contamination occurs. Further, if certain environmental claims are not discharged by a successful bankruptcy court reorganization, as the Seventh Circuit ruled in *Apex*, the estate needs to consider the potential costs of a future claim in the reorganization process. Further, the possibility of a large, expensive cleanup of a contaminated site may discourage companies from reorganizing.

In *Apex*, the United States Environmental Protection Agency ("EPA") brought a case in federal court seeking an injunction under the Resource Conservation and Recovery Act ("RCRA") against Apex Oil Company, Inc. ("Apex") to make Apex clean up contamination at a site in Hartford, Illinois. Apex's corporate predecessor owned an oil refinery in Hartford, Illinois from 1967 to 1981 when it merged with one of Apex's subsidiaries and continued to operate the refinery until filing

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This is the ordinary course of business? Defenses to a preference action under 547(c)(2)

By Lawrence O. Taliana

Section 547 of the Bankruptcy Code gives a bankruptcy trustee the power to ask the bankruptcy court to declare certain transfers "preferences" and to avoid transfers of the debtor made within 90 days prior to the filing of the bankruptcy. For a lot of transferees, whether or not the trustee is going to be successful depends on whether those transfers fall under 547(c)(2)—the ordinary course of business defenses to a preference action.

In turn, whether or not transfers are held to fall under that statutory defense is going to depend a great deal on the way the defense is presented. Changes in the statute under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 have made the provision more useful than ever. Still, there are aspects of it that are not at all intuitive and a successful defense may well

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for bankruptcy in 1987. Apex sold the refinery in 1988. (Apex Appellant Brief, 1/28/09, p.11). After its bankruptcy filing, Apex successfully reorganized in 1990. (Apex Appellant Brief, 1/28/09, p.13).

The District Court found Apex responsible for a hydrocarbon plume created from millions of gallons of oil spilled from the refinery and related pipelines. This plume is contaminating the groundwater and releasing fumes into the homes in the community of Hartford. *US v. Apex*, No. 08-3433, p.2 (7th Cir. 2009). To comply with the injunction, Apex would have to hire consultants to perform the cleanup at a cost of $150 million. *Id* at 3. The District Court granted the injunction and Apex appealed. *Id* at p.2.

The issue on appeal was whether the EPA's claim to an injunction was discharged in Apex's bankruptcy, which would prevent the injunction from being sought in this subsequent suit. In general, bankruptcy discharges any debt arising before the court's approval. The Seventh Circuit first reviewed the definition of a "debt," which is defined as a "liability on a claim." *Id* at p.2, citing 11 U.S.C. §101(12).

The Seventh Circuit began its analysis with the general understanding that when the holder of an equitable claim gets a money judgment instead, that equitable claim is dischargeable in the bankruptcy. *Id* at p.3. The "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured" is still a claim subject to discharge. *Id* at p.2, citing 11 U.S.C. §101(5)(B). In addition, some equitable remedies are orders to pay that normally would be discharged, but for the Bankruptcy Code's specific exceptions that prevent their discharge. *Id* at p.4. None of the exceptions applied here. (*See Eden v. Robert A. Chapski, Ltd.*, 405 F.3d 582 (7th Cir. 2005); *Bush v. Taylor*, 912 F.2d 989 (8th Cir. 1990) cited by the Seventh Circuit, p.4).

In this case, the EPA's injunction was based on RCRA and RCRA does not authorize any form of monetary relief. Thus, the EPA cannot demand payment under RCRA of the cleanup costs instead of the injunction requiring Apex to clean up the contaminated site. *Id* at p.4. Similarly, the language from that RCRA provision is identical to the language in RCRA's provision for citizen suits and courts have held that the citizen suit provision does not authorize monetary relief. *Id* at p.4. Therefore, the Seventh Circuit rejected Apex's argument that the injunction should be discharged because the cost to comply with the injunction should be deemed a monetary claim. *Id* at p.5. Thus, while an EPA claim seeking cost recovery under CERCLA may have been a discharged "debt," EPA's injunctive relief claim under RCRA was not discharged.

Apex argued that all equitable claims are dischargeable in bankruptcy. The Seventh Circuit found that argument to be inconsistent with the Bankruptcy Code's limited discharge of equitable claims. An injunction order requiring expenditures of money does not automatically make the claim dischargeable as there is almost always some cost to comply with an equitable decree. *Id* at p.6. Reviewing the case law, the Seventh Circuit distinguished *Ohio v. Kovacs*, 469 US 274 (1985), where the Supreme Court ruled that a claim based on an injunction to clean up a contaminated site was discharged. In *Kovacs*, however, the debtor failed to comply with the injunction and a receiver was appointed to take the debtor's assets to get money for the cleanup. Unlike *Apex*, where the EPA sought cleanup, in *Kovacs*, the receiver sought money from the debtor. *Id* at p.6. Thus, *Kovacs* was distinguished from this case because its equitable claim gave rise to a right of payment and that right to payment was discharged in bankruptcy.

Apex also cited *Johnson v. Home State Bank*, 501 US 78 (1991), where the Supreme Court held that a mortgage can be discharged in a Chapter 13 bankruptcy. The Seventh Circuit also distinguished that case because although the mortgage was an equitable claim, it gave the claimant the right to payment if the borrower defaults. *Id* at p.7. Therefore, similar to *Kovacs*, *Johnson* gave rise to a right of payment and was distinguished from this case.

Apex also proposed differentiating between injunctions that involve large costs versus injunctions that require small costs, or between injunctions that can be fulfilled internally versus those that required outsourcing. The Seventh Circuit rejected those distinctions as arbitrary. *Id* at p.7. Further, the Court stated that whether Apex can comply internally or has to outsource its compliance with the injunction was irrelevant to the Bankruptcy Code and RCRA. *Id* at p.8.

The Seventh Circuit stated that generally, discharges of equitable claims in bankruptcy must be limited to cases where the equitable decree cannot be performed and therefore that claim will give rise to a right to payment. Discharges of equitable claims in bankruptcy cannot be expanded to include those cases where compliance imposes a cost on the defendant because that is true in almost all cases. *Id* at p.8. The Seventh Circuit rejected Apex's argument that unless an exception in the Bankruptcy Code exists, every equitable claim is discharged. *Id* at p.7.

In addition, Apex argued that the injunction was vague and did not comply with Rule 65(d), which requires an injunction to specifically state its terms and explain its requirements in reasonable detail. *Id* at p.9. The Seventh Circuit agreed that the injunction was open-ended, but pointed out that Apex failed to offer any suggestions to correct the injunction. Further, the cleanup itself is a long-term, large project and listing too many specifications in the injunction will cause the process to be too rigid or requiring too many approvals from the district judge. *Id* at p.10. The Seventh Circuit stated that where strict compliance with Rule 65(d) is feasible, the strict compliance may be required. However, because environmental cleanup cases are complex, some ambiguity will occur and strict compliance with Rule 65(d) may not be feasible. *Id* at p.11.

Apex also argued that if the EPA injunction claim is not discharged in bankruptcy, it will create a disincentive to reorganize in bankruptcy. If companies in reorganization face the possibility of millions of dollars of future cleanup costs, then they likely will opt to liquidate instead of reorganizing, to avoid such a huge debt in the future. This ruling forces companies to reevaluate the entire reorganization process to account for potentially costly future claims.

As Apex noted in its argument, this ruling can create a disincentive to reorganize during a Chapter 11 bankruptcy. One possible solution is for companies to raise this issue during the bankruptcy and set aside

money for any potential future claims. However, if companies have to take into account a potentially large future claim during the bankruptcy, they may need to look for other solutions that do not requiring setting large funds aside, including liquidating rather than reorganizing.

Another possible solution for companies wishing to reorganize in bankruptcy without having the threat of future injunctive environmental contamination claims hanging over them is to liquidate during bankruptcy instead of reorganizing. To avoid future claims, companies may "liquidate" their assets in a Chapter 7 bankruptcy proceeding and then use the assets to create a new company. Therefore, the new company will not have owned the contaminated site and would not be liable for any future injunctive claims that may rise against the old company. Of course, if the new entity acquires the contaminated site, it also requires the liability. (See *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992).

Because the case law addressing this issue varies, Apex is likely to seek review in the United States Supreme Court. In general, the case law for injunctions holds that injunctions requiring a debtor to end a particular activity that causes pollution are not claims discharged because they do not give rise to a right of payment. These types of injunctions are prohibitory injunctions and are not discharged in bankruptcy. Some courts , such as the Second and Third Circuits, have followed this approach. (See *In re Chateaugay Corp.*, 944 F.2d 997 (2nd Cir. 1992); *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3rd Cir. 1993)). However, as mentioned above, other courts' rulings are not consistent with this holding and have discharged these types of injunctions. (See *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988)). As demonstrated in the *Apex* case, questions arise when injunctions require the debtor to clean up a contaminated site, which requires the debtor to incur costs. Until a clear consensus is reached on this issue, companies should make sure they consider potential future environmental injunction claims when reorganizing in bankruptcy. ■

Ray and Becky are environmental lawyers in Chicago. You can reach Ray at rreott@reottlaw.com or 312-332-7544. You can reach Becky at bschanz@reottlaw.com or 312-546-5148.

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Office
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

Editor
Thomas P. Sandquist
P.O. Box 219
120 W. State St.
Rockford, IL 61105-0219

Associate Editor
Hon. Michael J. Chmiel
Circuit Curt of McHenry County
2200 N. Seminary Ave.
Woodstock, IL 60098

Managing Editor/ Production
Katie Underwood
kunderwood@isba.org

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This is the ordinary course of business? Defenses to a preference action under 547(c)(2)

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depend on being familiar with the law and its interpretation from the very beginning of the case.

Text of Ordinary Course Defense

Section 547(c)(2) provides that a trustee may not avoid a transfer—

> (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was –
>
> (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
>
> (B) made according to ordinary business terms;

Purpose of Statute and Defense

The Third Circuit Court in *In Re Molded Acoustical Products, Inc* 18 F.3d 217 (1994) provided a good summary of the purpose of the preference statute and the ordinary course defense:

> On the one hand the preference rule aims to ensure that creditors are treated equitably, both by deterring the failing debtor from treating preferentially its most obstreperous or demanding creditors in an effort to stave off a hard ride into bankruptcy, and by discouraging the creditors from racing to dismember the debtor. On the other hand, the ordinary course exception to the preference rule is formulated to induce creditors to continue dealing with a distressed debtor so as to kindle its chances of survival without a costly detour through, or a humbling ending in, the sticky web of bankruptcy. 18 F.3d 217, 220.

Judge Altenberger from the Central District of Illinois cited *Collier on Bankruptcy* in *In Re Industrial & Municipal Engineering, Inc.* 127 B.R. 848 (CD IL, 1990). He noted the defense:

> … is intended to protect recurring, customary credit transactions that are incurred and paid in the ordinary course of business of the debtor and the debtor's transferee.
>
> [Its] purpose is to leave undisturbed normal financial relations, because [doing so] does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy. 127 B.R. at 849.

History

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (you remember that, it was in all the papers), the defense was worded slightly differently. It read:

> (2) to the extent that such transfer was—
>
> (A) in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (C) made according to ordinary business terms;

Under the old statute one had to prove both ordinary course of business and ordinary business terms. While under the new wording, "…the defendant need only show that the debt paid was incurred in the ordinary course of business, and *either* that the payment was made in the ordinary course of business terms between the parties *or* that the payment was made according to business terms ordinary in the industry." *In Re: Northpoint Communications Group* 361 B.R. 149, 156 (N.D. California, 2007). Under the new version of the statute, "Congress intended to make it easier for transferees to protect ordinary course payments," *In Re Montgomery Ward, LLC v. OTC International, Ltd.* 348 B.R. 662 (D.Del, 2006).

In reviewing and evaluating these types of cases, keep in mind that there is quite a difference between the pre and post BAPCPA analysis.

Burden of Proof

The party against whom recovery or avoidance is sought has the burden of proof of a defense under 547(c), (547(g)). The burden of proof is by a preponderance of the evidence, *In the Matter of Midway Airlines, Incorporated* 69 F.3d 792 (7th Cir., 1995).

Nature of Section

Subsection (B) of 547(c)(2) creates a subjective test, i.e., whether the transfers were ordinary as between the parties, and subsection (C) creates an objective test, i.e. whether the transfers were ordinary in the industry, *In Re Amarillo Mesquite Grill, Inc.* 335 B.R. 826 (D. Kansas, 2006)

Ordinary Business Terms

The inquiry into whether a particular transaction or set of transactions between a transferee and a debtor can become quite fact intensive. Sometimes charts are prepared for the court showing the history of bills and payments and the length of time between them, see e.g. *In Re Central Valley Processing* 360 B.R. 676 (E.D. California, 2007); *In Re H.L. Hansen Lumber Company of Galesburg, Inc.* 270 B.R. 273 (C.D. Ill, 2001); *In Re T.B. Home Sewing Enterprises, Inc. v. Plaid Enterprises, Inc.* 173 B.R. 790 (N.D. Georgia, 1992). "Empirical data is useful in comparing the timing, amount and manner of payment from the preference and before." *In Re Montgomery Ward LLC* 348 B.R. 662, 676. Failing to introduce such evidence may be grounds for a denial of the defense *In Re: Inland Global Medical Group, Inc.* 362 B.R. 459 (C.D. California, 2006). Despite the fact that the inquiry revolves around the particular facts of a case, some general principles have been provided to aid in the evaluation of the evidence.

There are four factors that trial courts should consider in determining whether a payment was in the ordinary course of business between the parties: 1) the length of time the parties were engaged in the transactions at issue; 2) whether the amount or form of tender differed from past practices; 3) whether the debtor or creditor engaged in any unusual collection or payment activity; and 4) whether the creditor took advantage of the debtor's deteriorating financial condition. *In Re Northpoint Communications Group, Inc.* 361 B.R. 149 (N.D. California, 2007). The goal in comparing dealings before and during the preference period is to determine

whether the transfers during the preference period resulted from unusual pressure exerted by the creditor or from the debtor's desire to prefer the transferee over the other creditors. *In Re Northpoint, supra.* In addition, there may be instances in which the objective characteristics of the transfer are so different from the prior dealings between the parties that the transfer should not be considered to be within the ordinary course of business between the parties. However, such instances should be limited to those in which the departure represents an aberration in the course of dealing between the parties, *In Re Northpoint, supra.* Late payments may still be subjectively ordinary if the parties had a history of making and accepting late payments, *In Re H.L. Hansen Lumber Company of Galesburg,* 270 B.R. 273 (C.D. Ill, 2001).

Courts generally are interested in whether or not the debt was incurred in a typical, arm-length commercial transaction that occurred in the marketplace, *In Re Johnston Industries* 357 B.R. 907 (M.D. Georgia, 2006). This prong can be established even if only one transaction of the type occurred between the parties because this showing is required merely to assure that neither the debtor nor the creditor do anything abnormal to gain an advantage over other creditors, *In Re Johnston Industries,supra.*

Although the cases focus a great deal on the timing of the payments, they also indicate that the circumstances are important. It may not be enough to say that payments were made during the same or similar time frames as other payments. It might be necessary to add that no special efforts or contacts were made to obtain the payments. Therefore, this is important evidence to include in defending under 547(c)(2)(A), if possible.

Ordinary Business Terms

Ordinary business terms are those that encompass the practices in which firms similar in some general way to the creditor in question engage, and only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection (C), *In the Matter of Tolona Pizza Products Corporation,* 3 F.3d 1029 (7th Cir., 1993). This does not mean that the creditor must establish the existence of some single, uniform set of business terms. Instead, the creditor need establish only that its own dealings with the debtors are situated within the outer limits of normal industry practice, *In the Matter of Midway Airlines, Incorporated,* 69 F.3d 792 (7th Cir., 1995). "The law should not push businessmen to agree upon a single set of billing practices; antitrust objections to one side, the relevant business and financial considerations vary widely among firms on both the buying and selling side of the market." *In the Matter of Tolona Pizza Products Corporation,* 3 F.3d 1029 (7th Cir., 1993). "The court must look to those terms employed by similarly situated debtors and creditors facing the same of similar problems, creditors are not required to prove a particular uniform set of business terms, rather, 'ordinary business terms' refers to the broad range of terms that encompasses the practices employed by those debtors and creditors, including terms that are ordinary for those under financial distress. Only a transaction that is so unusual or uncommon as to render it an aberration in the relevant industry falls outside the broad range of terms encompassed by the meaning of ordinary terms." *In Re Northpoint Communications Group,* 361 B.R. 149 (N.D. California, (2007).

The proper inquiry focuses on the creditor's competitors, *In Re Midway Airlines, Inc.* 69 F.3d 792 (7th Cir., 1995). Three types of evidence typically are used as proof:

1. Evidence produced directly from competitors, presumably the testimony of current or former employees of competitors;
2. The testimony of expert witnesses concerning industry credit practices and;
3. The testimony of the transferees own employees, if any, who have personal knowledge of the credit practices used by its competition. *In Re H.L. Hansen Lumber Company of Galesburg, Inc.* 270 B.R. 273 (C.D. Ill, 2001).

However, producing an employee who has no knowledge of the credit practices within an industry can not establish an "ordinary business terms defense." *In Re Hansen Lumber Company of Galesburg,* 270 B.R. 273 (C.D. Illinois, 2001). Relying solely on the experience of the creditor is insufficient, *In the Matter of Midway Airlines, Incorporated,* 69 F.3d 792 (1995)

Conclusion

There are more tools available to an attorney combating a preference action under 547(c)(2) than were available prior to the BAPCPA. However, a surface reading of the statute might turn out to be deceptive. Under the 547(c)(2)(A), "ordinary course of business or financial affairs" defense, one defending must remember to include evidence tending to negate any special efforts at collection. Remember, the burden is on the defendant. Asking the extra question or two from a witness who knows that no extra collection calls or threats were made might be determinative.

One needs to make sure that an "ordinary business terms" defense under 547(c)(2)(B) is appropriately proved. Since a defendant needs to prove that payments were made under ordinary terms in the industry, thought must be given as to who is going to testify to ordinary terms. Relying on an employee to testify that "everybody does it that way" might not be enough to prove that fact if the employee can not articulate a sufficient background to make the statement. If one is going to rely on this part of 547(c)(2), one should realize early on the type of proof needed. Trying to disclose a new expert witness on the eve of trial can become quite awkward. Having a witness or evidence stricken because of an insufficient foundation or disclosure is even more so.

The preference defenses under 547(c)(2) are now more useful than ever. However, a defendant needs to make sure he/she is familiar with what is necessary to prevail under them. A review of the basic cases prior to drafting a responsive pleading or a discovery response might help to insure that the defense is successful. ■

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In re kucharz: Unemployment compensation included in a debtor's "current monthly income" calculation although it is a "surprisingly difficult question"

By Brent Wilson[1]

On October 28, 2009 the Bankruptcy Court for the Central District of Illinois entered the debate on unemployment compensation and whether it should be included in the "current monthly income" calculation of debtors.[2] The Chief Judge of the Bankruptcy Court for the Central District of Illinois, Thomas L. Perkins, weighed the textual and contextual issues surrounding 11 U.S.C. § 101(10A)(B) and found that the unemployment compensation should be included in a debtor's "current monthly income."[3] This decision squares the debate with two courts holding unemployment compensation should be excluded in a debtor's "current monthly income" and two courts holding that it should be included.[4]

I. Background

Pursuant to 11 U.S.C. § 101(10A) the Bankruptcy Code broadly defines "current monthly income" drawing in every source of income the debtor has available, "[t]he term 'current monthly income'—(A) means the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the six-month period [before filing of the bankruptcy petition] . . ."[5] However, after a broad definition of "current monthly income" which taketh away, the Code starts to giveth. In 11 U.S.C. § 101(10A)(B), "[current monthly income] includes any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents . . . *but excludes benefits received under the Social Security Act . . .*."[6]

This section begs the question: what exactly does "benefits received under the Social Security Act" mean? Does this phrase mean that any funds received from the Social Security Act are excluded? Or, must a court determine what funds are "benefits" under the Act and what funds are just indirectly related to the Act and thus excluded from "current monthly income"? This issue has divided several bankruptcy courts and remains undecided in others, at least in published opinions.[7]

The answer to this question is more important than some may see at first blush. The means test of BAPCPA incorporates "current monthly income" and uses it as an initial hoop that consumer debtors must jump through. If the debtor's "current monthly income" is too high according to the median wages of individuals in the debtor's state, the debtor may not be granted access to Chapter 7 bankruptcy relief.[8]

II. Cases leading up to the decision

In 2007 the Court in the case of *In re Sorrell*, in the Southern District of Ohio, concluded that this compensation is a "benefit under the Social Security Act."[9] This Court was the first to address this issue and publish an opinion after the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") reforms.[10]

The Bankruptcy Court of Massachusetts came next in the case of *In re Munger*, and sided with the *Sorrell* Court that unemployment compensation is a "benefit received under the Social Security Act" as provided by Section 101(10A)(B).[11] This court relied much on the analysis of the *Sorrell* decision, but it added an analysis of the commentators who have addressed this issue.[12]

The Bankruptcy Court for the Middle District of Pennsylvania came after *Sorrell* and *Munger*, in 2008, and yet held that unemployment compensation is not a "benefit received under the Social Security Act;" thus this income must be included in the debtor's "current monthly income" calculation.[13]

III. The *In Re Kucharz* approach

With the Bankruptcy Courts split on the issue of whether unemployment compensation is a "benefit received under the Social Security Act," the Bankruptcy Court for the Central District of Illinois laid out its approach to this divisive issue. The Court began the analysis by noting that this issue presents a "surprisingly difficult question."[14] With the difficult task identified, the Court began its analysis by a detailed look at the Social Security Act and whether the Act creates a federal program of unemployment compensation or one that is mainly state run.[15] The Court noted that the Social Security Act created incentives for the states to enact unemployment programs, but found that the benefits paid to the unemployed citizens of the state are received under state law as opposed to the Social Security Act.[16] In this way the Court agreed with the position of Judge Eugene Wedoff of the Bankruptcy Court for the Northern District of Illinois in an article that he authored.[17]

The Court reached this conclusion by focusing on the word "under" in the phrase, "benefit received under the Social Security Act" of Section 101(10A)(B).[18] "The preposition 'under' is both the cause of and the key to unlock the mystery."[19] The Court found, by looking this word up in the dictionary, that "under" means "required by" or "in accordance with."[20] The Court reasoned that because the Social Security Act did not compel the states to enact unemployment compensation programs, the unemployment benefits that the citizens of these states received are from the states themselves not the federal government as provided by the Social Security Act.[21] Thus, the Court concluded, that the benefits received by these citizens are not received "under" the Social Security Act but rather "under" the states' unemployment programs.[22]

After making a determination based on the language of Section 101(10A)(B) the Court went on to describe the section as ambiguous and therefore proceeds to undertake a "contextual analysis" of Section 101(10A)(B).[23] In context, the Court found that BAPCPA and the means test were put in place to identify those debtors who have the ability to pay their creditors do pay their creditors.[24] The Court noted that "current monthly income" is a backward-looking test that then is projected forward to determine the debtor's income in the future.[25] The

Court found that if unemployment compensation is left out of this calculation it would not be an accurate determination of what the debtor will earn in the future because it omits the unemployment compensation received, which is the debtor's substitute wages.[26]

The Court in the case of *In re Kucharz* now squares the debate with two decisions for inclusion of unemployment compensation in a debtor's "current monthly income" calculation and two courts for exclusion of these benefits.

It will be interesting to see how other courts approach this issue and eventually decide whether unemployment is a "benefit received under the Social Security Act." ■

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1. *Juris Doctor Candidate*, January 2011, The John Marshall Law School. Available at, wilsonb@law.jmls.edu

2. *See In re Kucharz,* 2009 WL 3518163 (Bankr. C.D. Ill. Oct. 28, 2009).

3. *Id.* at *6.

4. *See In re Kucharz*, 2009 WL 3518163 (Bankr. C.D. Ill. Oct. 28, 2009) (included); *In re Baden*, 396 B.R. 617 (Bankr. M.D. Pa. 2008) (included); *In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007) (excluded); and *In re Sorrell,* 359 B.R. 167 (Bankr. S.D. Ohio 2007) (excluded).

5. The full text of this section states,

The term "current monthly income" –

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

11 U.S.C. § 101(10A)(A) (2006).

6. The full text of this section states,

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

11 U.S.C. § 101(10A)(B) (2006) (emphasis added).

7. *See, e.g.*, *In re Baden*, 396 B.R. 617 (Bankr. M.D. Pa. 2008); *In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007); and *In re Sorrell,* 359 B.R. 167 (Bankr. S.D. Ohio 2007).

8. *See* 11 U.S.C. § 707(b) (2006). Note that this is an extremely simplified discussion of the "current monthly income" prong of the means test for a general understanding of the reader only.

9. *See In re Sorrell,* 359 B.R. 167 (Bankr. S.D. Ohio 2007).

10. *Id.* at 180 ("The court is not aware of any reported decisions on the question,[of whether unemployment compensation is a "benefit received under the Social Security Act"], although the issue has been addressed by bankruptcy commentators"). This court therefore broke new ground in interpreting this section of the BAPCPA amendments.

11. *See In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007)

12. *Id.* at 23-25. The court based its determination that unemployment compensation should be excluded in "current monthly income" calculations as a "benefit received under the Social Security Act" based on its statutory interpretation and the *Sorrell* opinion. *Id.* The court found that Section 101(10A)(B) clearly states that Social Security Act benefits should be excluded from "current monthly income," and the court refused to further look at the intent of Congress in enacting this amendment to the Bankruptcy Code. *Id.*

13. *See generally In re Baden*, 369 B.R. 617 (Bankr. M.D. Penn. 2008).

14. *Id.* at *1.

15. *Id.*

16. *Id.* at *4. The Court notes that if the Social Security Act was repealed the Illinois unemployment compensation program would still be able to continue on and provide support for the unemployed citizens of Illinois. *Id.* at *3.

17.*See* Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 Am. Bankr. L.J. 231, 247 (2005) (opining that excluding unemployment compensation to from the "current monthly income" calculations of the debtors "would be a strained interpretation . . . since unemployed individuals received no benefits 'under the Social Security Act' but only under the programs adopted by the states, which may provide benefits beyond those that are federally funded).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at *5.

24. *Id.*

25. *Id.*

26. *Id.*

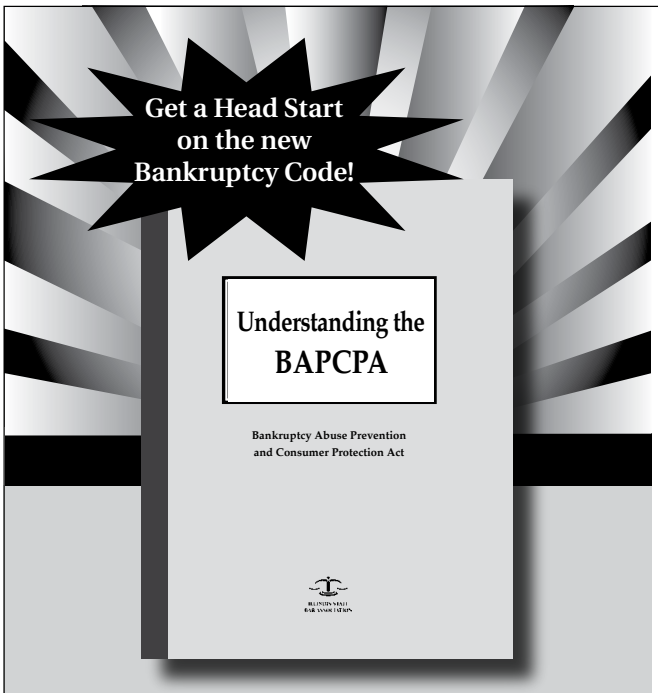
On the non-waivability of reinstatement under IMFL

By Jeffrey G. Liss, Chicago

After reading Thomas M. Lombardo's analytical article, "Commercial real estate foreclosures in Illinois —They're not always the same," in the November issue of the CB&B Law newsletter, I went back into the archives from the early days of the Illinois Mortgage Foreclosure Law, when the drafters (of which I was one) gave many presentations about various aspects of IMFL.

I found the following statement on page 1-13 of my presentation, "Selected Comments and Questions About the Illinois Mortgage Foreclosure Law," handed out as part of the materials in separate IICLE programs on "Mortgage Foreclosure Practice Under the New Act" (October 16-17, 1987) and "Mortgage Foreclosures in Illinois (May 13 and 19, 1988):

> 1601. Do the specific references to non-waivability of redemption, but not reinstatement, mean that reinstatement can be waived under certain circumstances?
>
> ANS. No. The detailed attention to redemption was intended to highlight differences between residential, agricultural and other mortgagors and to highlight the distinction between pre-foreclosure and post-foreclosure attempts at waiving redemption. **There was no intention to change the current law regarding the non-waivability of reinstatement**, and the prior statute guaranteeing the right of reinstatement to all mortgagors was carried forward substantially verbatim in Section 1602 of IMFL."
>
> [Boldfacing added for this note]. ■



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