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BAPCPA and Commercial Credit: Who (SIC) Do You Trust

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BAPCPA AND COMMERCIAL CREDIT: WHO (SIC) DO YOU TRUST?[1]

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Trying to understand and apply the many different provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) has caused people to yearn for the "good old days." At the National Conference of Bankruptcy Judges' (NCBJ) Annual Meeting in San Antonio in October 2005, there was a lot of talk about the "good old days"[3] and some singing "'bout the good old days" at the NCBJ "Final Night Dinner" by a larger than life (at least as large as Sally Struthers), Wynonna Judd.[4]

And this has caused me to remember a daytime television show from my good old days: "Who Do You Trust?"[5] BAPCPA is like this

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1. This article was prepared in November 2005 originally and exclusively for presentation to the 2006 North Carolina Banking Institute and publication in the North Carolina Banking Institute Journal. Feel free to use the stuff in this article however you wish, with the understanding that everything written in the article and said in my presentation is, at best, my best guess as to what the law is, or should be.

2. I teach at the Dedman School of Law of Southern Methodist University, in Dallas, Texas and continue to have a relationship with the law firm of King & Spalding. I am grateful for the opportunities to work with the students at SMU and the lawyers at King & Spalding. I am grateful for the many other professional opportunities I have had; I am especially grateful to the University of North Carolina School of Law, which gave me my first opportunity to teach.

3. Particularly from the "alter knockers," such as Leonard Gilbert and Bill Sullivan.

4. *See* Wynonna: Official Worldwide Website, http://www.wynonna.com/ (Lyrics are available under "Music" then "Greatest Hits").

5. "Who Do You Trust?" was a daytime television series from 1957-62, starring Johnny Carson. *See generally* RONALD L. SMITH, JOHNNY CARSON – AN UNAUTHORIZED BIOGRAPHY (1987). I was a teenager then: watching television in the afternoon, "discovering" girls, and . . . Definitely good old days. I understand (as do the law review editors) that this footnoted statement is a sentence fragment. One of the best teachers from my "good old days," my 10th grade English teacher Miss Lindemann, told me that I could use sentence fragments after I had a book published.

comedy/quiz show in (1) the poor choice of words in the title,[6] and (2) the focus on whom is to be trusted[7] to answer questions.

The title "Who Do You Trust" is obviously grammatically incorrect. It is equally obvious that whatever BAPCPA is, it is not, as the title states, a "consumer protection act."

Each afternoon on Who Do You Trust?, two contestants who did not necessarily know each other would decide which of the two would be trusted to answer a particular question.[8] In BAPCPA, Congress has repeatedly decided that it does not trust anyone to answer bankruptcy questions.

I. CONGRESS'S LACK OF TRUST OF DEBTORS

Congress's lack of trust in consumer debtors has already been documented and debated by others.[9] New provisions requiring consumer education, documentation, and income and expense calculations are the most obvious examples.[10] BAPCPA is also rich in obvious examples of Congress's lack of trust of business debtors, large and small.

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6. "Who Do You Trust?" is, of course, grammatically incorrect. *See* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON STYLE § 10.3 (2002). Perhaps, the show's producer, Don Fedderson, had an English teacher who told him that he did not need to follow accepted rules of grammar if he ever had a network game show.

7. This article uses the word "trust" in the same way that Professor Frank Cross uses the word in his new article that focuses on trust in economic transactions between private parties. Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1461 (2005) ("(T)he voluntary ceding of control over something valuable [or important] to another person or entity, based upon one's faith in the ability and willingness of that person or entity to care for the valuable thing.").

8. The more interesting part of the show was Johnny Carson's pre-quiz conversations with the contestants. For example, "(a) body builder who was a contestant once cautioned Carson to respect his own body "the only house he'd ever have.' 'My house is pretty messy,' Carson retorted, 'but I have a woman come in once a week to clean it out.'" PAUL CORKERY, CARSON: THE UNAUTHORIZED BIOGRAPHY 77 (1987).

9. *See generally* Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191 (2005).

10. *See generally* Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24 AM. BANKR. INST. L.J. 67, 68-9 (2005).

A. Making the right decisions regarding management

BAPCPA shows that Congress does not trust business debtors to make the "right" decisions regarding management. Or that Congress does not understand how decisions regarding management of a debtor in the "zone of insolvency" are made.[11]

1. Trustee

New § 1104(e) requires the United States Trustee to move for the appointment of a trustee in a Chapter 11 case when there are grounds to believe that there may be fraud or criminal conduct among the governing body of the debtor or among the executives whom chose the governing body in financial reporting.[12]

This provision does not change the standards the bankruptcy court is to apply in determining whether to appoint a trustee. The general "cause" standard in § 1104(a) remains unchanged.

Section 1104(e) does not even change the standards for a private party's filing a motion for the appointment of a trustee. Before and after BAPCPA, any party in interest *may* move for the appointment of a trustee in a Chapter 11 case because of "actual fraud."

What has been changed is that now the United States Trustee *must* so move. Note the word "shall" in § 1104(e).[13]

Note also the phrase "reasonable grounds to suspect." Section 1104(e) is the only Bankruptcy Code provision to use that phrase. Other Bankruptcy Code sections use the phrase "reasonable cause to believe."[14] Obviously, "reasonable grounds to suspect" is a lower standard.

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11. Officers and directors of corporations that are in the "zone of insolvency" now generally understand that they have expanded fiduciary duties that include the creditors. Helen Shaw, *Fiduciary Duty in the Zone of Insolvency*, CFO MAG., Aug. 25, 2005, at 1. And creditors of the corporation are generally included in major decisions regarding management. *Id.*

12. 11 U.S.C. § 1104(e) (2005). ("The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.").

13. *Id.*

14. 11 U.S.C. § 727(a)(12) (2005); § 1141(d)(5)(C) (2005).

While § 1104(e) should not change a court's ruling on a motion to appoint a trustee, one could easily speculate that new § 1104(e) will result in the United States Trustee filing more motions for the appointment of a trustee, and will result in additional time-consuming, costly litigation. Other "ones" (but not me) have also speculated that § 1104(e) could result in "increased pressure to act prepetition to remove CEOs and CFOs."[15]

2. KERPs (Key Employee Retention Plans)

Kmart is the "poster child" for reform of key employee retention plans.[16] Kmart filed for bankruptcy on January 22, 2002, and its CEO, Chuck Conaway, left the company less than two months later and was granted $4 million in severance.[17] After BAPCPA, no more Chuck Conaways as § 503(c) addresses company programs for post-petition payments to key executives.[18] It provides:

> [T]here shall neither be allowed, nor paid—
> (1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that—
> (A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;
> (B) the services provided by the person are essential to the survival of the business; and

15. Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J 603, 620 (2005).

16. *See generally* Allison K. Verderber Herriott, *Toward an Understanding of the Dialetical Tensions Inherent in CEO and Key Employee Retention Plans During Bankruptcy*, 98 NW. U. L. REV. 579 (2004).

17. Nelson D. Schwartz, *Greed-mart; Attention, Kmart Investors. The Company May Be Bankrupt, but Its Top Brass Have Been Raking It In*, FORTUNE, Oct. 14, 2002, at 139.

18. A recent New York Times article on the Delphi Corporation bankruptcy "addressed" Delphi's KERP as "[t]ruly a Marie Antoinette moment." Gretchen Morgenson, *Oohs and Ahs at Delphi's Circus*, N.Y. TIMES, Nov. 13, 2005 (Late Edition), § 3, at 1.

(C) either—
(i)the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or
(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;
(2) a severance payment to an insider of the debtor, unless—
(A) the payment is part of a program that is generally applicable to all full-time employees; and
(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or
(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.[19]

Note that the provision distinguishes among retention payments, covered in subsection (1); and severance payments, restricted in subsection (2); and other payments such as incentive bonus plans, regulated in subsection (3).

19. 11 U.S.C. § 503(c) (2005).

Don't feel guilty if you skimmed over or even skipped over most of the statutory provision. In dealing with retention payment programs, you can probably stop with the phrase "bona fide job offer from another business at the same or greater rate of compensation" in § 503(c)(1)(A).[20] A failing company cannot have its key executives out looking for another job. And, a failing company might not want to keep a key executive who is offered another position at the "same or greater rate of compensation" with a company that is not failing and who is not smart enough to take that other job.

In dealing with severance pay proposals, the key phrase in § 503(c)(2) is "generally applicable to all full-time employees." No business can afford to pay all of its employees the kind of severance pay that its top management asks for. While a severance payment plan limited to employees with qualifying time tenure may qualify, a severance plan limited to employees with qualifying rank is likely to be disqualified.

The new deal for key executives may well be "performance" incentive bonus plans, with the lowest possible qualifying thresholds. Such plans will be subject to the "justified by the facts and circumstances of the case" standard of § 503(c)(3), the easiest of the three § 503(c) standards to meet.

B. Making timely decisions

Congress not only does not trust business debtors to make the right decisions about management, but also does not trust business debtors to make timely decisions. BAPCPA imposes new deadlines.

1. Exclusivity

Amended § 1121(d) limits the time for decisions on Chapter 11 plans. More specifically, the limitation on exclusivity is now eighteen months. At most, this will impact only the largest, most contentious cases.[21]

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20. § 503(c)(1)(a).

21. David A. Skeel, Jr., *Déjà vu All Over Again in American Corporate Bankruptcy?*, 79 ANNUAL MEETING OF THE NAT. CONF. OF BANKR. JUDGES, 12-7, 12-16 (2005) ("The new restrictions on exclusivity are puzzling in two respects. First, they seem to be responding to

2. Commercial real estate lease decisions[22]

Until BAPCPA, a debtor had sixty days after the order for relief to decide whether to assume or reject a lease of commercial, i.e., "nonresidential," real estate. And, the prevailing practice was for extensions to be granted until the confirmation of a Chapter 11 plan.

BAPCPA extends this initial period from sixty days to 120 days.[23] More important, BAPCPA caps nonconsensual extension of the 120-day period to ninety more days, a 210-day cap. This cap will affect more cases than the new cap on exclusivity.

Consider the impact of this deadline on a retailer like Kmart that leases hundreds of stores.[24] Is the first 210 days of a bankruptcy case enough time to make these business decisions?

And consider the impact of this deadline on a debtor like United Airlines, Inc. that is using essential facilities under very complicated transactions that are structured as leases, but that may or may not be

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a by-gone problem . . . Second, the best recent evidence suggests that in relatively small cases at least, judges have made remarkably good decisions about when to turn off the spigot."). *But see* Alan M. Christenfeld & Shephard W. Melzer, *2005 Bankruptcy Amendments: A Secured Creditor's Perspective*, N.Y.L.J. August 4, 2005, at 5.

> The elimination of judicial discretion to grant extensions of exclusivity is likely to put increased pressure on debtors by inducing them to propose reorganization plans, and by transferring bargaining leverage to creditors and other parties in interest, at an earlier stage in the proceedings than previously. It conceivably might prove fatal to debtors that could reorganize given more time, especially in complex cases or where vulture investors are circling the debtor. Secured creditors that are at odds with a debtor may exploit the shortening of exclusivity to file a plan of reorganization themselves, or to encourage another party in interest to do so, despite opposition from the debtor. Different outcomes may occur, however, where debtors and their secured creditors are not in conflict and are cooperating to formulate a reorganization plan. The curtailment of debtor exclusivity could then pose unforeseen obstacles for the secured creditors by leaving them with weakened debtors and potentially involving them in confirmation and other battles with competing parties that might have been less emboldened or potent under current law.

Id.

22. *See generally* Jordan Kirby, Note, *Unexpired Leases Under the New Bankruptcy Act: A Win-Win for Landlords and Lenders?* 10 N.C. BANKING INST. 377 (2006).

23. 11 U.S.C. § 365 (d)(4)(A). More precisely, the initial time period is now the earlier of 120 days after the order for relief or the date of an entry of an order confirming the plan. *Id.*

24. *See generally* Brent Snavely & Jennette Smith, *Slow Auction Leads Kmart to Give Up Sale of Most Leases*, CRAIN'S DETRIOT BUS., June 24, 2002, at 3.

"true leases."[25] Is the first 210 days of a bankruptcy case enough time to resolve these difficult legal issues?

BAPCPA somewhat limits the effect of this cap on the time for deciding whether to assume or reject by also imposing a cap on the burden to the estate from a "bad" assumption decision. New § 503(b)(7) does three things: first, it recognizes the possibility that an assumed lease can be rejected later in the case, second, it provides that the damages from such later rejection will be a second priority administrative expense claim, but third, it caps any such priority to two years of future lease obligations.[26]

Note that § 365(d)(4) only limits the time for deciding whether to assume or reject commercial leases. There is no deadline for assignment decisions. Some debtors may be able to limit somewhat the effect of § 365(d)(4) by obtaining an assumption order confirming that any decision as to whether to assign leases that have been timely assumed can be made later.

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25. *Cf.* United Airlines, Inc. v. HSBC Bank USA, N.A., 416 F.3d 609, 617 (7th Cir. 2005) ("The transaction between United and the CSCDA is not a 'true lease' under California law. . . . We do not doubt that many financing devices are 'true leases.'").

26. 11 U.S.C. § 503(b)(7). New § 503(b)(7) also provides that the claim for any remaining amount due for the balance of the lease will be a claim subject to the cap in section 502(b)(6). *Id.*

II. CONGRESS'S LACK OF TRUST OF BANKRUPTCY JUDGES[27]

The BAPCPA provisions considered in § 1 which reflect Congress's lack of trust of debtors also reflects Congress's lack of trust of bankruptcy judges.[28] As Judge Keith Lundin, a bankruptcy judge for more than twenty years, wrote:

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27. Congress's lack of trust to make bankruptcy decisions is not limited to bankruptcy court judges. At the very least, this lack of trust extends to the judges who are involved in the formulation and approval of the Bankruptcy Rules. This lack of trust can be seen in the Rules Enabling Act. Professor Alan Resnick, who has served as a Reporter and as a member of the Advisory Committee on Bankruptcy of the Judicial Conference of the United States, explains:

> Section 2072 of Title 28 governs rulemaking relating to the Federal Rules of Civil Procedure, Criminal Procedure, and Appellate Procedure, and the Federal Rules of Evidence. Although these rules may not modify substantive rights, § 2072(b) provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." This provision, commonly called the "supersession clause," gives the Supreme Court flexibility in devising and amending procedural rules that will supersede any current statute that may be in conflict with them-so long as substantive rights are not affected. The advisory committees for these bodies of rules are not constrained by existing procedural statutory provisions in recommending changes to improve efficiency in case administration and judicial procedure. . . .The promulgation and amendment of the Federal Rules of Bankruptcy Procedure are governed by § 2075, rather than § 2072. In contrast to § 2072, § 2075 does not contain a supersession clause. Therefore, the Bankruptcy Rules are the only federal rules that may not conflict with a procedural statutory provision.

The Bankruptcy Code and the bankruptcy-related sections of Title 28 of the United States Code contain many provisions that are procedural in nature. Alan N. Resnick, *The Bankruptcy Rulemaking Process*, 70 AM. BANKR. L.J. 245, 262 (1996).

28. An important question that can be asked but not answered in November 2005, one month after the effective date of most BAPCPA provisions, is whether the perception of bankruptcy judges that BAPCPA reflects Congress's lack of trust of bankruptcy judges will affect bankruptcy court application and interpretation of BAPCPA provisions. In *In re* McNabb, Judge Haines held that the language "as a result of electing under subsection (b)(3)(A) to exempt property under state or local law" only applies to debtors in those relatively few states that allow debtors to elect between § 522(b) and state exemptions. Judge Haines looked to the "plain meaning" of the language only even though his plain meaning meant that the provision limited debtors only in the states of Minnesota and Texas. He did not consider legislative history or Congressional intent. 326 B.R. 785, 791 (Bankr. D. Ariz. 2005). However, in *In re* Kaplan, Judge Mark found that more than one plausible reading of Congress's words exists, looking to legislative history for Congress's intent. He also criticized the decision in *McNabb*: "[t]o arrive at this [the conclusion that the cap is limited to the states of Minnesota and Texas] based on a strained and convoluted use of statutory interpretation in the face of this unambiguous legislative intent is simply wrong.") 331 B.R. 483, 487-88 (Bankr. S.D. Fla. 2005).

> BAPCPA arrived on a wave of anti-bankruptcy judge rhetoric. As if blaming the court system for too many people with debt trouble, BAPCPA is packed with provisions intended to "reduce the discretion" of bankruptcy judges. . . .
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> . . . .
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> You can bet the lobbyists who delivered BAPCPA will be the first to claim it is the bankruptcy (non)judges who are impeding and distorting all their good work.[29]

If Judge Lundin had written this article after his semester teaching at the University of New Mexico School of Law,[30] he might have made the same point using the mud/crystal language[31] now in vogue in the academy.[32] For example, Professor A. Mechele Dickerson, an outstanding young[33] bankruptcy professor at the University of Texas Law School, has opined

> Legislators, and some academic commentators, seem highly distrustful of bankruptcy judges' ability to properly exercise judicial discretion. . . . Congress and other bankruptcy critics seem to prefer clear, inflexible "crystalline" rules that severely limit a court's ability to

29. Lundin, *supra* note 10, at 69; *see also* Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 561 (2001). This distrust of judges is evident in the recent bankruptcy reform efforts and in recent bankruptcy scholarship of the "Law and Economics" stripe. These legislators and scholars use the supposed incompetence of bankruptcy judges as a principal basis for arguments in favor of limiting the goals of bankruptcy law and curbing the discretion of bankruptcy judges. Indeed, some recent bankruptcy scholarship carries this disenchantment with bankruptcy judges even further, seeking to make bankruptcy law irrelevant by reducing it to a set of contractual default rules. Lundin, *supra* note 10, at 69.

30. Professor Lundin will be teaching at the University of New Mexico Law School during the first half of 2006. *See* http://lawschool.unm.edu/faculty/lundin/index.php (last visited Dec. 20, 2005).

31. Most of the law review articles that use this terminology refer to Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 604-05 (1988) (developing mud/crystal terminology to describe rules of property law).

32. The phrase "in the academy" is also in vogue in the academy. *E.g.*, Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 152 (2005); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1794 (2005).

33. I.e., younger than me.

> make fact-based decisions over flexible "muddy" rules that give courts considerably more discretion.[34]

While the examples that Professor Dickerson and Judge Lundin use to illustrate Congress's lack of trust of bankruptcy judges are the obvious Chapter 7/Chapter 13 provisions affecting consumer debtors, there are also important examples of BAPCPA adding "crystalline rules" or replacing "standards" with "rules"[35] that affect business cases in Chapters 3, 5, and 11.

A. A New (And Very "Muddy" Rule) for Goods Delivered Within Twenty Days Before Bankruptcy

New § 503(b)(9) creates a new administrative priority for goods received by the debtor within twenty days prior to the petition date. It is necessary to see what § 503(b)(9) says (and does not say) in order to see how "muddy" this "crystalline" rule is:

> (b) After notice and a hearing, there shall be allowed administrative expenses, . . . , including—
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> . . . .
>
> (9) the value of any goods received by the debtor within 20 days before the date of commencement of a case

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34. A. Mechele Dickerson, *Approving Employee Retention and Severance Progams: Judicial Discretion Run Amuck?*, 11 AM. BANKR. INST. REV. 93, 104-05 (2003); *see also* Janger, *supra* note 29, at 623.

> Muddy rules that confer discretion on judges in contexts where abusive or inefficient non-cooperative behavior raise the cost of opting out of the bankruptcy case. This dynamic operates even where we have no confidence that bankruptcy judges are capable of identifying abuse. Even where judges have limited capacity, the costs of litigation associated with the open-textured rule will operate as an incentive to cooperate. Moreover, this is not just true in the cases where the parties actually litigate. It will also be true any time a party considers unilateral action. Thus, when legislators and law reformers speak of eliminating statutory ambiguity or of limiting judicial discretion, they should recognize that increased statutory specificity may reduce the extent to which broad statutory policies are incorporated into the behavior and thinking of the parties subject to statutory regulation.

Id.

35. *See generally* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381-83 (1985) (exploring of the differences between "standards" and "rules").

> under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.[36]

The most obvious questions are created by what is not said about "value."[37] For example, is value measured as of the time of the delivery, the time of the petition, or the time of the payment? Value to whom: the seller or the debtor? Replacement value or resale value?[38]

Note also what is not said in § 503(b)(9) about the "prior rights of a holder of a security interest in such goods." The new § 546(c) provision on reclamation, discussed more fully in § III (B)(4), contains this limiting phrase.[39] Section 503(b)(9) does not.

Accordingly, it seems that the seller has an administrative priority in the value of the delivered goods even though another creditor has a security interest that reaches the delivered goods. In essence, the estate could be paying twice for goods delivered to the debtor within twenty days of bankruptcy: (1) to the lender with a floating lien on all of the debtor's inventory, and (2) to the seller who now has an administrative priority.

And consider the relationship of new § 503(b)(9) with § 546(c) and other Bankruptcy Code concepts and provisions. A vendor who delivers goods within twenty days of bankruptcy can satisfy the requirements of both §§ 503(b)(9) and 546(c). There is nothing in either §§ 503(b)(9) or 546(c) that indicates that a vendor who meets the requirements of both § 503(b)(9) and 546(c) is limited to reclamation or an administrative priority.

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36. 11 U.S.C. § 503(b)(9) (2005).

37. Other possible litigable issues under new section 503(b)(9) include what are "goods" and what is in the "ordinary course."

38. Elsewhere, BAPCPA is more "crystalline" about value. *See* 11 U.S.C. § 506(a)(2).

> [V]alue . . . shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. 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 value is determined. *Id.*

39. 11 U.S.C. § 546(c) (2005). Section 546(c) contains other limiting language that does not appear in § 503(b)(9). Section 546(c) expressly requires that the debtor "received such goods while insolvent." *Id.*

Finally, consider what is not said in § 503(b)(9) about the time of payment. A basic concept of Chapter 11 is that payment of claims, including administrative priorities, are not paid until confirmation of the plan. There is nothing in § 503(b)(9) that indicates an earlier payment is necessary or permissible.[40]

If § 503(b)(9) payments are treated like other payments for administrative obligations and deferred, it would seem that "critical vendors" will still be persuading debtors to persuade judges to enter a first day order authorizing their payment.[41] Will this new statutory priority make it more difficult to persuade bankruptcy judges to enter orders authorizing immediate payment to "critical vendors?"

If so, consider the relationship of § 503(b)(9) with §§ 1129(a)(9) and 547. Section 1129(a)(9) requires that a Chapter 11 plan pay administrative priorities in full in cash on the effective date of the plan. Does that mean that a pre-bankruptcy payment to a vendor will not be a § 547(b) preference because it merely enabled the creditor to be paid sooner, and not to "receive more" as required by § 547(b)(5)?[42]

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40. *Compare* 11 U.S.C. § 365(b)(1)(B) *with* 11 U.S.C. § 503(b)(9). Note the word "promptly" in the former but not the latter. *See also* § 365(d)(2) and (5) (setting a time for the payment with the word "timely").

41. Victor A. Vilaplana & Seltzer Caplan McMahon Vitek, *The Rebellion Continues: Practicalities Override Precedent in Critical Vendor Motions*, 877 PLI/COMM. 439, 445 ("Notwithstanding *In re* Kmart, 359 F.3d 866 (7th Cir. 2004), debtors' counsel continue to ask for and bankruptcy courts' [sic] continue to approve first day motions to pay prepetition unsecured claims prior to plan confirmation, including so-called critical vendors.").

42. *See generally* Bruce H. White & William L. Medford, *Zenith Industrial and the Critical-Vendor Preference Defense*, 24 AM. BANKR. INST. J. 32 (2005); *cf. In re* Hayes Lemmerz Int'l , Inc., 313 B.R. 189, 193 (Bankr. D. Del. 2004) ("[t]he payments at issue here were *not* made under the Critical Vendor Order; rather, they were made *before* the Critical Vendor Motion was filed and *before* the Critical Vendor Order was entered. Therefore, the payments at issue are not protected by the Order.").

Even more generally, these questions suggest that I used the wrong adjective in titling this section of the article. Perhaps I should have used the word "fuzzy" instead of "muddy." *See* Jack F. Wiliams, *The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guaranties: Fraudulent Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403, 1406 (1994)

> Fuzzy logic permits us to expand our metaphorical thinking about the law. Experience teaches that there are many degrees of "correctness" or "trueness." Oftentimes, the quality of "correctness" or "trueness" depends on one's perspective. . . . Fuzzy logic permits us to escape the shackles of a confining metaphor steeped in formal logic, to rethink legal issues with a greater array of answers with their own degrees of acceptability. The foundation of fuzzy logic is fuzzy set theory. Aristotelian or formal logic recognizes statements as only true or false. In contrast, fuzzy set theory recognizes partial membership in one or more sets at the same time. Fuzzy set theory abolishes the law of the

B. *A Crystalline New Rule for Assuming Leases and Other Contracts Notwithstanding a Historic Nonmonetary Default*

A business's leases and other contracts can be a major part of the collateral for the credit and thus a major factor in a decision whether to extend credit. Accordingly, the question of whether a debtor can retain (i.e., "assume") or sell (i.e., "assign") its unexpired leases or unperformed (i.e., "executory") contracts notwithstanding bankruptcy is an important question to commercial bankers.

It is clear from § 365(b) that a debtor must "cure" defaults in order to assume or assign.[43] What was not "crystalline" clear until BAPCPA[44] is whether a debtor could assume a lease or executory contract even though there had been a "nonmonetary default," such as "going dark,"[45] that could not be cured. Section 365(b)(1)(A) now expressly deals with nonmonetary defaults:[46]

> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may

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excluded middle in formal set theory. Whereas formal set theory insists that a variable be either in or out of the set, fuzzy set theory permits a variable to be in and out of the set simultaneously, usually by reducing the quality of a variable to a qualitative relation. For example, the fuzzy set of blue swans admits any swan that is less than totally blue, because blue becomes a qualitative property—a matter of degree. The pale blue swan is therefore both in and out of the set.

Id.

43. *See* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 613 (Foundation Press 1997).

44. For a review of the law prior to BAPCPA, *see generally* William P. Weintraub, *Historical Defaults and Cross-Defaults: Here a Default, There a Default, Everywhere a Default, Default, Default*, 26 CAL. BANKR. J. 286 (2003).

45. *Cf. In re* The Ground Round, Inc., No. 04-11235-WCH , 2004 WL 1732207, at *7 (Bankr. D. Mass. 2004) ("[A]ny continuous operations provision or 'going-dark' clause, or similar clause prohibiting the cessation of operations at the leased premises is unenforceable against the assignee thereof under Section 365(f)(1) of the Bankruptcy Code and, with respect to a New Restaurant Location real estate lease, is not a valid restriction on use as contemplated under Section 365(b)(3)(C) of the Bankruptcy Code for a period of one hundred eighty (180) days following the Closing.").

46. The Bankruptcy Code now uses, but does not define, the phrase "nonmonetary obligations." Risa Lynn Wolf-Smith, a bankruptcy partner in the Denver office of Holland & Hart, suggests the following examples of what might constitute a monetary default: "[b]reaches such as the failure to maintain certifications or licenses, to maintain specified quality or qualification standards, to provide information and to operate continuously without closure." Risa Lynn Wolf-Smith, *Bankruptcy Reform and Nonmonetary Defaults – What Have They Done Now?*, 24 AM. BANKR. INST. J. 6, 6 (2005).

> not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee —
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph.[47]

As Judge Richard Posner wrote in *In re Handy Andy Home Improvement Centers, Inc.*, "[s]tatutory language like other language should be read in context. The context consists not merely of other sentences but also of the real-world situations to which the language pertains . . . . When context is disregarded, silliness results."[48] How would you use the statutory provision set out above to answer the following questions about a "real-world situation to which" § 365(b) pertains?[49]

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47. 11 U.S.C. 365(b)(1)(A) (2005). Language was also added to section 1124.(2)(A), (D). Alan N. Resnick & Henry J Sommer, *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: A Section-by-Section Analysis*, 2005 SUPPLEMENT COLLIER PORTABLE PAMPHLET XLIII (2005) ("Similar kinds of provisions on the obligation to cure nonmonetary defaults are added to section 1124(2) with respect to the impairment of a class of claims."). For a review of the legislative process that led to section 365(b)(1)(A), *see generally* David G. Epstein & Lisa Normand, *"Real World" and Academic Questions About "Non-monetary Obligations Under the 2005 Version of 365(b)"*, ___ AMER. BANKR. INST. L. REV. ___ (2006). The next paragraph in the text is the only paragraph of text that I "borrowed" from the ABI article. And it is one of the ABI article paragraphs that I wrote.

48. Matter of Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125, 1128 (7th Cir. 1998) (citations omitted).

49. I have been looking for an opportunity to use "pertain" in a law review article. Since 1971 (the year I started my teaching career as a "baby professor' at the University of

Debtors operated a General Motors (GM) automobile dealership in a building leased from Landlord. On November 7, 2005, Debtors ceased operating their automobile dealership. The bankruptcy cases were not filed until November 20, 2005. The GM Dealer Agreement and the lease with Landlord each provided that the failure to operate the business for seven consecutive business days was an event of default. Debtors' failure to operate the dealership for two weeks preceding the bankruptcy filing constituted a nonmonetary default – "a 'historical fact' [that], by definition, cannot be cured."[50]

Notwithstanding the noncurable default under the lease, Debtors can, at least "in theory," assume Landlord's lease because "an unexpired lease of real property" comes within the "other than" language that BAPCPA added to § 365(c)(1)(A). Debtors cannot however assume the GM franchise agreement. Only "an unexpired lease of real property" comes within the "other than" language.

In the preceding paragraph, I used the "weasel words,"[51] "in theory" with respect to Debtors' assumption of the lease with Landlord because the "other than" language requires "performance at and after the time of assumption."[52] How can Debtors' continue to operate their

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North Carolina School of Law), the word "pertain" has appeared in the Harvard Law Review 152 times (isn't Westlaw wonderful) and my words have yet to appear in the Harvard Law Review.

50. *In re* Claremont Acquisition Corp., 113 F.3d 1029, 1033-35 (9th Cir. 1997) (holding that debtors could not assume the franchise agreement because they were required but unable to cure the nonmonetary default). The First Circuit reached a different decision in *In re* Bankvest Capital Corp., 360 F.3d 291, 301 (1st Cir. 2004), holding that a debtor is not required to cure a nonmonetary default. *But cf.* Ralph Brubaker, *Cure of Nonmonetary Defaults as a Prerequisite to Assumption of Executory Contracts and Unexpired Leases: A Lesson in the Nature and Function of the Cure Requirement*, 24 BANKRUPTCY LAW LETTER NO. 12 p. 1 (December 2004) (making a persuasive argument based on contract law principles and stating that "[t]he notion that most (if not all) nonmonetary defaults are incurable is therefore misguided"); *see also* James I. Stang, *Assumption of Contracts and Leases: The Obstacle of the Historical Default*, 24 CAL. BANKR. J. 39 (1998).

51. A weasel word is a word that avoids forming a clear position on an issue. Theodore Roosevelt once said in a speech:

> One of our defects as a nation is a tendency to use what have been called weasel words. When a weasel sucks eggs, it sucks the meat out of the egg and leaves it an empty shell. If you use a weasel word after another there is nothing left of the other.

BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE (Oxford University Press 2003).

52. The "other than" language in § 365(b)(1)(A) also requires payment for "pecuniary losses resulting from such default." 11 U.S.C. § 365(b)(1)(A). Note that § 365(b)(1)(B) contains almost identical language. I "noticed" that for almost a paragraph in David G. Epstein & Lisa Normand, *"Real World" and "Academic Questions About "Nonmonetary*

business on Landlord's premises as required by the lease agreement with Landlord if Debtors' business is a GM franchise and Debtor cannot assume its franchise agreement without curing a historical fault that is "impossible" to cure? Another way of asking the same question is how can a lender make an asset-based loan to a business debtor whose assets are based on a franchise agreement?

And the same questions can arise in connection with an equipment lease. What if an equipment lease requires that the lessee maintain insurance and there was a brief period of time, prior to the lessee's bankruptcy filing, in which the insurance lapsed? In new § 365(b)(1)(A), Congress treats equipment leases like executory contracts not like real estate leases.

A different question that debtors in historical default on important equipment leases or franchise agreements might raise is whether the default is sufficiently "material" to preclude assumption. The word "material" is not a part of the BAPCPA § 365(b)(1)(A); was not a part of the pre-BAPCPA § 365(b)(1)(A). Nonetheless, there is some pre-BAPCPA authority for requiring cure under section 365(b)(1)(A) only if the default is material.[53]

A recent law review article by two bankruptcy partners in the New York office of Skadden, Arps, Slate, Meagher & Flom suggests a still different strategy for debtors with equipment lease or franchise agreement problems under BAPCPA. "Rather, the debtor may choose neither to assume nor to reject, leaving open the possibility of post-emergence litigation over whether the nondebtor party may terminate the contract or lease under applicable nonbankruptcy laws."[54]

There is some support for this strategy. Under § 365(d), a Chapter 11 debtor does not have to assume or reject an executory

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Obligations" Under the 2005 Version of 365(b), __AMER. BANKR. INST. L. J. __ (2006).

53. *E.g.*, *In re* Whitsett, 163 B.R. 752, 754 (Bankr. E.D. Pa. 1994) ("[I]t is clear that a bankruptcy court has 'some latitude' in determining whether provisions in a debtor-tenant's lease may be deemed waived and their compliance be deemed insignificant in the assumption process. The determining factor appears to be the 'materiality' of the default in issue.") (citation omitted); *In re* Windmill Farms, Inc., 841 F.2d 1467, 1473 (9th Cir. 1988) ("[T]he bankruptcy court found the alleged nonmonetary defaults were not of sufficient substance to preclude assumption of the lease. This finding is not clearly erroneous."); Brubaker, *supra* note 50, at 1 ("the concept of the 'cure' of defaults, by its very nature, is a material breach concept").

54. Levin & Ranney-Marinelli, *supra* note 15, at 626.

contract or equipment lease until confirmation of the plan.[55] And, a recent law review article indicates, there is case law that an unassumed executory contract can "ride through" a bankruptcy case.[56]

C. *New Muddy Rules for Small Business Cases*

For years,[57] law professors and real lawyers believed that the "S" in small business cases should be capitalized because of the pioneering work of North Carolina's Judge Thomas Small.[58] There

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55. 11 U.S.C. § 365(d)(2) (2005).

56. Levin & Ranney-Marinelli, *supra* note 15, at 626 (citing In re Hernandez, 287 B.R. 795 (Bankr. D. Ariz. 2002)). *See generally* Mette H. Kurth & Joel Ohlgren, *Ride Through Revisited (Again): The Strategic Use of the Ride-through Doctrine in the Post-Catapult Era*, 24-5 AM. BANKR. INST. J. 16, 60-61 (2005).

57. *See generally* Josef Athanas, *Expediting the Administration of the Estate in Chapter 11*. 8 J. BANKR. L. & PRACT. 103, 115 (January/February 1999). From 1978 until 1994, there were no special provisions for small business debtors in the Bankruptcy Code, only special procedures in some bankruptcy courts. The 1994 amendments, Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994), gave chapter 11 debtors who had $2,000,000 or less in liquidated debts the option of dispensing with creditors' committees, and opting for a fast-track to confirmation through the ability to combine a disclosure statement hearing with a hearing on plan confirmation. *Id.* "In 1994, partly in response to the positive results achieved by Judge Small and other judges in speeding the administration of the estate in smaller cases by combining the disclosure statement approval and plan of reorganization confirmation hearings, Congress amended sections 105 and 1125 of the Bankruptcy Code." *Id.*

58. *See* Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 190 n.86 (2000).

> By now, most bankruptcy professionals are familiar with the 'fast-track' procedures pioneered by Judge A. Thomas Small, Jr. in the Eastern District of North Carolina to streamline and expedite the process for small businesses. Judge Small did lobby Congress to codify a special reorganization chapter, but the failure of Congress to respond has not impeded the efforts of Judge Small to adapt the present statute to the needs of particular types of cases and Judge Small's model has been followed across the country.

Id.

See also George W. Hay, *Lawyers Overwhelmingly Endorse Judge Small's "Fast Track"* 11's, TURNAROUND AND WORKOUTS, July 15, 1989, at 1; *See generally* Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483, 533.

> In self-organizing systems, norms emerge through a complex process of selection. Sometimes norms emerge when actors imitate a particular innovation known for its excellence at resolving a problem. An example of this sort of norm emergence is the spread of "fast-track" procedures for small business bankruptcies that were developed in the Eastern District of North Carolina. This particular form has spread to many other jurisdictions.

were Small (as in Judge Small) business bankruptcy cases - cases that Judge Small made work through flexible procedures. The new BAPCPA rules for small business debtors, at best, simply make for more work - more work that must be done more quickly.

There are five sections of BAPCPA that require enhanced reporting by "small business debtors."[59] And BAPCPA has amended two other sections to require that small business debtors reorganize more quickly.

Section 1121 requires that small business debtors file the plan and disclosure statement not later than 300 days after the order for relief.[60] And, under § 1129, the plan must be confirmed within forty-five days after it is filed.[61] A bankruptcy judge can extend these deadlines only if the debtor "(A) . . . demonstrates by a 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 time is signed before the existing deadline has expired."[62]

Under BAPCPA, neither a bankruptcy judge like Judge Small nor the debtor will be able to decide whether the debtor would benefit

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Id.

59. *See* Bruce A. Markell, *Small Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, SL068 ALI-ABA 263, 268 (2005).

> One theme of the small business amendments is that creditors deserve more and better information, presented in understandable and recognizable formats. Many sections of the small business amendments were framed with this goal in mind. In particular, there are five sections that require enhanced reporting in some way by small business debtors:
>
> (1)Section 419, regarding increased reporting of the assets and operations of any entity, including a closely-held corporation, in which the debtor holds a substantial or controlling interest;
>
> (2)Section 433, which directs the national Bankruptcy Rules Committee to prepare standard forms of disclosure statements and plans of reorganization for small business debtors;
>
> (3) Section 434, which would add section 308 to the Bankruptcy Code regarding periodic reporting of financial operations by small business debtors;
>
> (4) Section 435, which specifically directs the National Bankruptcy Rules Committee to develop forms to implement new section 308; and
>
> (5)Section 436, which would add section 1116 to the Bankruptcy Code regarding enhanced filing and other duties of small business debtors.

60. 11 U.S.C. § 1121(e)(2) (2005).

61. § 1129(e).

62. § 1121(e)(3); § 1129(e) (2005).

from these new expedited procedures. Congress has already made that decision. Sort of.

The small business provisions are no longer elective. All Chapter 11 debtors that meet the new § 101 definition of "small business debtor"[63] must comply the BAPCPA small business debtor requirements.

The new definition of "small business debtor" contains two separate requirements: (1) a debt requirement and (2) a creditors' committee requirement. Looking first at the debt requirement, if the debt is no more than $2 million[64] at the time of the filing of the petition, then look at whether there is a creditors' committee and whether the creditors' committee is active.[65] The debt requirement can be finally resolved at the time of the petition.

The creditors' committee requirement can be more troublesome. As Judge Bruce Markell has observed,

> [A]ll chapter 11 debtors who are within the applicable debt limits will commence their cases as small business cases. They may lose that status, however, if a committee is formed, but may regain it if that committee isn't doing its job. The chameleon-like character of the definition takes on heightened importance, given the different duties, obligations, and burdens the small business debtor faces.[66]

III. CONGRESS'S LACK OF TRUST OF CONGRESS

Before adjourning for 2005, Congress had time to "clear" professional baseball player Rafael Palmeiro of perjury.[67] Congress did not, however, have time to "clear up" BAPCPA. Congress's failure to

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63. § 101(51D).

64. *Id.* In applying the "not more than $2,000,000" requirement look only at "liquidated" debt. § 101(51D)(A).

65. § 101(51D)(A). The statutory language is,"[A] case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor." *Id.*

66. *See* Markell, *supra* note 59, at 268.

67. Richard Sandomir, *Report: No Evidence of Perjury by Palmeiro*, N.Y. TIMES, Nov. 11, 2005, at D1.

correct "typos" and confusing language during the 2005 legislative process and since the enactment of BAPCPA suggests that Congress no longer trusts Congress to make decisions about bankruptcy.

A. Proofing problems

As the editors of the North Carolina Banking Institute Journal can attest, I cannot find the proofing problems in my own manuscript. Nonetheless, even I can find examples of proofing problems in BAPCPA.

1. New ground for relief from stay

For example, § 362(d)(4) uses a new phrase to create a new basis for relief with respect to real property collateral - "filing of the petition was part of a scheme to delay, hinder *and* defraud." Elsewhere in the Bankruptcy Code[68] and other federal statutes,[69] Congress uses the phrase "hinder, delay, or defraud." Do you think that Congress could have intended to create a new, higher standard? Of more immediate importance, do you think that a bankruptcy judge could look solely at the "plain meaning" of what Congress said and not consider what Congress must have intended?

2. Utility service

Your turn. What is the time deadline for providing adequate assurance to utilities under newly revised § 366 set out in pertinent part below? Section 366:

> b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. . . .
> c) . . .

68. 11 U.S.C. § 101(32A) (2005); § 522(o); § 548(a)(1)(A) § 727(a)(2).
69. *See e.g.*, 12 U.S.C. § 1828 (2005); 28 U.S.C. 3302 (2005).

> (2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.[70]

If a utility receives a cash deposit more than twenty days but less than thirty days after the debtor files its Chapter 11 petition, can the utility discontinue service? Is the right number twenty or is it thirty? Does the phrase "a case filed under chapter 11" which appears in BAPCPA added § 366(c)(2), but not § 366(b)(1) mean that the thirty is the right number for chapter 11 cases and twenty is the right number for cases under other chapters? What is the number of cases under other chapters in which there will be an issue of utility service under § 366?

Read the provisions more carefully. Section 366(b) measures the twenty days from the "order for relief" while § 366(c) refers to a thirty-day period beginning on the date of the "filing of the petition."[71] In involuntary cases, there is a difference between "order for relief" and "filing of the petition."

And, read even more carefully. How important is it that the phrase "satisfactory to the utility" appears only in § 366(c)(2)?[72]

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70. 11 U.S.C. 366(b) & (c) (2005).

71. *Id.*

72. *See In re* Lucre, Inc., 333 B.R. 151 (Bankr. W.D. Mich. 2005).

> Debtor requests that I continue the subsection (a) injunction with respect to Consumers Energy, Sprint and IXC notwithstanding subsection (c) because of their failure to respond to its offers of adequate assurance. However, subsection (c) does not give me that discretion, for it clearly requires as a condition to continuing the injunction either the utility's acceptance of the adequate assurance offered by the Chapter 11 trustee or debtor in possession or the Chapter 11 trustee's or debtor in possession's acceptance of the adequate assurance offered by the utility. Granted, subsection (c)(3) does give the trustee or debtor in possession the right to have the adequate assurance payment modified by the court. However, that right arises only after the adequate assurance payment has been agreed upon by the parties. In other words, the trustee or debtor in possession has no recourse to modify the adequate assurance payment the utility is demanding until the trustee or debtor in possession actually accepts what the utility proposes.

Regardless of how carefully you read § 366 - you can read it so carefully that you are willing to discuss it in an article in the American Bankruptcy Law Journal - you are still going to conclude that "[i]t is unclear how soon the debtor-in-possession must furnish adequate assurance of payment to the utility under BAPCPA."[73]

B. Placement Problems

1. Credit counseling and involuntary petitions

Section 109, as its title indicates, deals with the question of "who may be a debtor." Prior to BAPCPA, nothing in the § 101 definition of "debtor" or in § 109 distinguished between debtors in voluntary cases and debtors in involuntary cases.

BAPCPA adds a requirement of budget and credit counseling for individuals.[74] New subsection (h) to § 109 now provides - "an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received . . ."

It can be argued that the above language means that Congress has created a new defense to involuntary petitions against individuals such that creditors cannot file an involuntary petition against an individual unless and until she has completed the required counseling. This argument is consistent with the notion that all of the rest of § 109 applies to both voluntary and involuntary cases - *noscitur a sociis*.[75]

Id.

This opinion also distinguished between the word "service" in § 366(b) and the phrase "utility service" in § 366(c)(2). *Id.*

73. Levin & Ranney-Marinelli, *supra* note 15, at 608. *But see* Marcia Goldstein & Victoria Vron, *Current Issues in Debtor in Possession Financing*, ALI-ABA CHAPTER 11 BUSINESS REORGANIZATIONS, June 9-11, SKO92 ALI-ABA 115, 151 (2005).

> Currently, section 366 of the Bankruptcy Code provides that a utility company may alter, refuse, or discontinue service to the DIP if the DIP does not provide adequate assurance of payment within 20 days after the date of the order for relief, in the form of a deposit or other security. Although section 417 of the 2005 Act extends the time within which the DIP has to provide adequate assurance of payment to 30 days . . . .

Id.

74. John D. Hurst, Note, *Consumer Protection Issues: Protecting Consumers from Consumer Credit Counseling*, 9 N.C. BANKING INST. 159, 170 (2005).

75. State v. Merino, 81 Haw. 198, 915 P.2d 672, 691 (1996) ("[T]he canon of construction denominated noscitur a sociis . . . may be freely translated as 'words of a

A different argument can be made by focusing on the phrase "by such individual" § 109(h) applies only to petitions filed by the debtor.[76] This argument is consistent with the notion that courts should give meaning to all words in a statute.[77]

Isn't this an unnecessary issue to argue? Is there a better place for the credit counseling requirement for individuals filing voluntary petitions than § 109?

2. Asset sales by unprofitable for-profit corporations and the law of non-profits

And isn't there a better place for the phrase "not a moneyed, business or commercial corporation or trust" than at the end of § 363(d)(1). After BAPCPA, that section reads:

> (d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only —
> (1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust;

As written and set out above, it can be argued that § 363(d)(1) requires all sales in bankruptcy – even sales by for profit debtors such as GM – must comply with the non-bankruptcy law regulating non-profit corporations and trusts. Again, there is a counter-argument: nonbankruptcy law governing non-profits is not "applicable" law as that word is used in § 363(d)(1) when the debtor is GM or some other ostensibly for profit business entity. Again, enacting "technical amendments" could eliminate an unnecessary argument caused by where BAPCPA language has been placed.

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feather flock together,' that is, the meaning of a word is to be judged by the company it keeps.").

76. *See* Bruce C. Scalambrino, *Bankruptcy Reform for Non-Bankruptcy Lawyers*, 93 ILL. B. J. 518, 522-23 (2005).

77. Negonsott v. Samniels, 507 U.S. 99 (1993).

3. Small business debtor reporting

Section 308 details the filing requirements for a "small business debtor." Under § 103, Chapter 3 provisions are applicable in Chapter 7, 11 and 13 cases.

Note also that the requirements are directed to a "small business debtor" not "small business case." Section 308(b) begins "A small business debtor shall . . ."

The § 101(51)(C) definition of "small business case" includes the limiting language "filed under Chapter 11." The § 101(51)(D) definition of "small business debtor" is not so expressly limited.

It can be argued that since § 101(51)(D) refers to § 1102 that a "small business debtor" can only be a Chapter 11 debtor and that § 308 can only apply in Chapter 11 cases. And, it can be argued that placing the reporting requirements in Chapter 3 and using the term "small business debtor" means that the reporting requirements can apply in Chapter 7 cases and Chapter 13 cases in which the debtor is "engaged in commercial or business activities" and has debts of "no more than $2 million." And, yet again, it would seem that a technical amendment moving the reporting requirements to Chapter 11 could easily eliminate the arguments.[78]

4. Reclamation

Finally, consider the BAPCPA provisions on reclamation placed in § 546(c). Section 546 is surrounded by avoiding powers, which have the effect of increasing what is available to the estate by decreasing the rights of a particular creditor.[79] And, § 546 is entitled "Limitations on avoiding powers."

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78. 11 U.S.C. § 308 (2005). If filing requirements for a small business debtor were changed to requirements for a "small business case" and were moved from § 308 to Chapter 11 then the number "308" could be used for what is now § 1514. 11 U.S.C. § 1514 (2005). That section sets out the procedure for giving a "foreign creditor" notice in a "case under this title." *Id.* In other words, section 1514 applies in Chapter 7, 11 and 13 cases. *Id.* In fairness, section 103(k)(1) so provides, but is it fair to expect attorneys to catch that the first time around? 11 U.S.C. § 103(k)(1) (2005).

79. *See generally* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 613 (Foundation Press 1997) (1997).

Until BAPCPA, that was the right place for the Bankruptcy Code provision on reclamation because that provision simply acknowledged "any common law or statutory right of reclamation" and limited the use of the Bankruptcy Code avoiding powers on such non-bankruptcy reclamation rights. In structure and effect, § 546, before BAPCPA, was similar to § 553 which acknowledges a nonbankruptcy right of setoff and limits the use of avoiding powers on such nonbankruptcy rights.[80]

The *"old"* and BAPCPA versions of § 546(c) are set out below:

> (c) Except as provided in subsection (d) of this section the rights and powers of a trustee under section 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but
> (1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—
> (A) before 10 days after receipt of such goods by the debtor, or
> (B) if such 10 day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor, and
> (2) the court may deny reclamation to a selle with such a right of reclamation that has made such a demand only if the court—
> (A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title, or
> (B) secures such claim by a lien.[81]

The *"new"* § 546(c) of BAPCPA reads:

> (c)(1) Except as provided in subsection (d) of this

80. *Id.* at 406-12.

81. 11 U.S.C. § 546(c) (1998) *amended by* 11 U.S.C. 546(c) (2005).

> section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods—
> (A) not later than 45 days after the date of receipt of such goods by the debtor; or
> (B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.
> (2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).[82]

First, the reference to "statutory or common law" has been eliminated.[83] Recall that until BAPCPA, the right of reclamation that existed in bankruptcy was derivative of state law - more specifically of the Uniform Commercial Code § 2-702 which generally imposed a ten-day limit on reclamation.[84] By eliminating the reference to "statutory or common law" and by stating that the seller has forty-five days in which to act, Congress seems to have created a new bankruptcy right of reclamation that is greater than any right of reclamation under non-bankruptcy law.

Of course, there is nothing in § 546 or the legislative history that expressly indicates that Congress intended to create a new, independent

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82. 11 U.S.C. § 546(c) (2005).

83. *See supra* notes 81 & 82 and accompanying text. There is a new reference to an exception in § 507(c). § 507(c). That is probably another proofing error. That section deals with the priority of claims of governmental units. The exception should probably refer to § 507(b) which concerns failed adequate protection rights. *Id.*

84. *See generally* Craig M. Geno & Meade W. Mitchell, *Basic Principles of Bankruptcy and State Reclamation*, 18 MISS. C.L.REV. 443 (1998).

right of reclamation. And, of course, there is again the *noscitur a sociis* (or "what is a nice girl like you doing in a place like this") argument.

The rest of § 546, like the title suggests, simply limits the use of avoiding powers with respect to claims, rights, and interests that exist outside of bankruptcy. And, the rest of the sections surrounding § 546 reduce the rights of a particular party to increase the rights of the estate instead of creating new independent rights in sellers.

If § 546(c) creates a new, non-derivative right of reclamation, what are the limits on that right? More specifically, can the seller reclaim the goods not only from its customers but also from its customers' customers?

The answer to this question under prior law was "no." Under the Uniform Commercial Code, the major piece of nonbankruptcy legislation governing reclamation, "The seller's right to claim . . . is subject to the rights of a buyer in ordinary course or other good faith purchaser under this article (§ 2-403)".[85]

The answer under BAPCPA § 546(c) is not "no" but instead, once again, "I don't know." If BAPCPA creates an independent right of setoff, then the UCC's limits on reclamation are irrelevant. BAPCPA § 546(c) expressly recognizes that a seller's reclamation rights are subordinate to the rights of a holder of security interest in the same goods but does not mention the rights of a buyer of the goods. Under the doctrine of *expresio unius exclusio alterius*, ...[86]

My resort to Latin maxims is probably attributable to watching re-runs of HBO's Rome.[87] I would have been better served by re-reading (reading?) Shakespeare's Julius Casear:

> Cassius: Did Cicero say any thing?
> Casca: Ay, he spoke Greek.
> Cassius: To what effect?

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85. U.C.C. § 2-702(3) (2005).

86. State v. Williams, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000) ("The maxim *expresio unius est exclusion alterius* is often employed in the construction of statutes. In general, it means that a statute's inclusion of a specific limitation excludes all other limitations of that type"); *see also* Mich. Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C. Cir. 1989) ("For example, if Congress banned the importation of apples, oranges, and bananas from a particular country, the canon of *expresio unius est exclusion alterius* might well indicate that Congress *did not* intend to ban the importation of grapefruits.").

87. Rome, http://www.hbo.com/rome, (*last visited* December 19, 2005).

> Casca: Nay, an I tell you that, I'll ne'er look you i' the face again; but those that understood him smiled at one another and shook their heads; but, for mine own part, it was Greek to me.[88]

Congress spoke "Greek" in BAPCPA. Technical amendments would help. And commercial lenders need this help in making the "whom do you trust" decisions they regularly make.

IV. AND WHOM DO COMMERCIAL LENDERS TRUST

The question of whom Congress trusts is a question asked and answered by academics.[89] The question of whom lenders to businesses trust is a question asked and answered daily by commercial bankers in deciding whether and how to do new credit transactions and what if anything to do about existing, troubled credit transactions. And, the possible effect of bankruptcy and the bankruptcy laws is a part - not the most important part, but a part - of answering that question.

BAPCPA affects how commercial creditors answer that question. BAPCPA can be seen as a double "win" for consumer creditors. First, BAPCPA makes it more difficult for consumer debtors to file for bankruptcy. Second, BAPCPA makes it more difficult for consumer debtors with meaningful income or assets to leave bankruptcy with as much of that income or assets.

It is harder to see how BAPCPA will be a win for secured lenders.[90] BAPCPA does not make it harder for business debtors -

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88. WILLIAM SHAKESPEARE, JULIUS CAESAR, act 1, sc. 2.

89. Professor Elizabeth Warren of the Harvard Law School might answer that question "Citibank, MNBA and their lobbyists." Elizabeth Warren, *Show Me the Money*, N.Y. TIMES, October 24, 2005 at A21 ("Is there celebration in the halls of Citibank this week. Is MNBA uncorking the Champagne . . . Last Monday, the law they lobbied for went into effect."); Professor David A. Skeel, Jr. of the University of Pennsylvania Law School might answer that question "Wall Street" and "investment bankers." *See* David A. Skeel, Jr., *Déjà vu All Over Again in American Corporate Bankruptcy?*, 79 ANNUAL MEETING OF THE NAT. CONF. OF BANKR. JUDGES 12-7, 12-11, 12-17 (2005).

90. *Contra* Alan M. Christenfeld & Shepherd W. Melzer, *2005 Bankruptcy Amendments. A Secured Creditor's Perspective,* N.Y.L.J. August 4, 2005 ("The overall tenor of the Act is to make bankruptcy, including Chapter 11, less hospitable to debtors and to reduce a debtor's powers while it is in bankruptcy. This would appear at first blush to help secured creditors.") Professor Melissa B. Jacoby of the University of North Carolina School of Law is, appropriately enough, more professional in her assessment:

> Legal and sociological research suggests that the bill's impact will be

individuals or business entities - to file for bankruptcy. Instead, BAPCPA arguably makes it harder for business debtors to reorganize in Chapter 11, and BAPCPA provides new recoveries and rights for employees, landlords, utilities, and vendors that will inevitably reduce what is available to secured lenders.

As Wynonna should have sung at the NBCJ "Final Night Dinner" in San Antonio:

> Tom Dunn,[91] / tell me bout the good old days /
> Sometimes it feels just like / Congress has gone crazy /
> Tom Dunn, / take me back before BAP C_P)_A /
> When how an 11 would turn out /
> Didn't seem so hazy
> Did debtors ever simply stay
> In leases after the two-ten day? /
> Were confidences something committees kept /
> Not something they must say? /
> Did key executives never really go away /
> Because of the KERPS 11 debtors pay? /
> Oh, Tom Dunn, / tell me about the good old days. /

> filtered through the influence of day-to-day actors in the bankruptcy system. As in the past, this filtering may mute or magnify certain statutory changes and may produce variation around the country. Assessments of the impact of formal changes are incomplete without taking this filtering into account.

Melissa B. Jacoby, *Ripple or Revolution? The Indeterminancy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L. J. 169, 170 (2005).

91. "Tom Dunn" is, of course, J. Thomas Dunn, Jr., the prominent North Carolina attorney who, along with the prominent Florida attorney Leonard Gilbert, invited me to speak at the Banking Institute. I understand that Wynonna's version of the song uses the word 'Grandpa' instead of "Tom Dunn." I also understand that people in North Carolina generally think "Grandpa" when they see Tom. And, I know that you understand that the reasons that I used "Tom Dunn" in the song instead of "Leonard Gilbert" are that (1) "Tom Dunn" works better in the rhyme scheme than "Leonard Gilbert" and (2) Tom is a lot older than Leonard and (3) Leonard's firm has referred more business than Tom's firm.