

BANKRUPTCY REFORM ACT OF 2005

Issue: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) made numerous changes to the commercial section of the Bankruptcy Code. The intent of these changes was to help offer protections to unsecured trade creditors as they worked with distressed and insolvent debtors through the Chapter 11 process toward rehabilitation. Although a good start, the changes in some areas fall short of achieving their intended purpose, namely the effort to restore the balance between debtor and creditor rights. Now, three years into the new code, there are specific areas that need to be refined or enhanced to better meet the intentions of the original changes. This includes the treatment of preferences (Section 547), treatment of claims for goods shipped within 20 days of the date of the filing (Section 503 (b)(9)), executory contracts (Section 365) and venue (28 U.S.C. Section 1409).

Background: Representing a large sector of unsecured trade creditors, the IHA is vitally concerned about the effects that bankruptcy law and practices have on the U.S. economy. For many years, the IHA has fought for bankruptcy reform laws that accurately reflect the needed balance between creditors and debtors. IHA was very supportive of the efforts of the National Bankruptcy Review Commission (NBRC) because, like other unsecured trade creditor groups, it believed that bankruptcy reform must be conducted in a thoughtful, deliberative environment. IHA has worked closely with the NBRC, policymakers in Congress, and a broad-based coalition of trade creditors, including the National Association of Credit Managers (NACM), to highlight problems and offer specific recommendations to address these inequities. Listed below are some of the major concerns identified by the NACM, IHA and other unsecured trade creditor organizations. A detailed summary of the issues, as well as suggested changes to the Bankruptcy Code, is attached to this cover sheet (see attached Bankruptcy White Paper developed by the NACM).

- **Section 547 – Preferences** - Modify the Code to end the abuse that continue to plague creditors who receive legitimate payment from debtors for goods and services sold to the debtor.
- **28 U.S.C. §1409(b) – Venue and Preferences** - The trade creditor community recommends changing Section 1409(b) to make it clear that it applies to small preference claims up to the amount of \$16,425.
- **Section 503(b)(9) – Administrative Priority Claims** – Changes in the Code in 2005 appeared to give trade creditors who supported the debtor in the 20-day period before the filing date a leg up in recovering the value of their shipments by making the claim an administrative priority. But the process for payment of such claims was never defined, resulting in an interpretation that payment can be delayed until confirmation of a reorganization plan. For reasons outlined in the

attached paper, the wording of Section 503(b)(9) should be changed to require immediate payment for goods delivered within 20 days prior to the filing in order to encourage creditors to continue extending credit while the company is in financial distress prior to the bankruptcy filing.

- **Section 546(c)(1) – Reclamation** - In addition to the administrative priority claim offered by Section 503(b)(9), the Bankruptcy Code also provides trade creditors a remedy under Section 546(c)(1) on reclamation. This right was expanded under BAPCPA to include goods shipped within 45 days prior to the commencement of a bankruptcy proceeding, rather than the previous version of the Code’s 10-day reclamation period. However, cases decided since the 2005 enactment of the BAPCPA have often come down against trade creditor rights and, very frequently, reclamation claims in Chapter 11 cases provide trade creditors little to no protection from preference claims, even if those goods were shipped within the statutory 45-day period. Section 546(c)(1) on reclamation should remain unchanged as long as a trade creditor’s right to an administrative priority claim under Section 503(b)(9) is preserved. Should Section 503(b)(9) be eliminated, the trade creditor community would require a second look at the current language of Section 546(c)(1) in order to see what changes could be made to ensure that the provision works as it was originally intended and provides adequate remedy to unsecured trade creditors.
- **Section 365 - Executory Contracts** - The debtor is allowed time to review each executory contract and either reject the contract or accept it and pay any cure amount, the amount of prepetition debt owed on the contract. This can often take several months and, in the interim, the trade creditor is compelled to support the debtor’s reorganization and rehabilitation by supplying more goods and services needed in the normal operation of its business. No creditor shall be obligated to continue to extend trade credit to a debtor subsequent to the commencement of a case under any chapter of this title.
- **Section 366 – Utility Service** - There should be no change to this section.
- **28 U.S.C. § 1408 – Filing Venue** – Where a case is filed can have significant impact on the outcome. The debtor should not be able to venue shop, looking for the court that will be most sympathetic to their case. Rather, they should file in the jurisdiction of their headquarters or primary operations.

Status: Discussions have begun with the House Judiciary Committee to better determine what the intentions are, or might be, to amend the commercial bankruptcy code.

IHA Position: IHA is working with groups and organizations representing unsecured trade creditors to assess the possibility of suggesting changes to the Code that would strengthen bankruptcy protections for these trade creditors.