BAPCPA Turns Three

By Stephen B. Selbst

So far, neither overwhelmingly pro-creditor nor fatal to debtors.

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) became effective in October 2005. At its enactment, most of the business press focused on changes in the Bankruptcy Code regarding consumer bankruptcies, even though BAPCPA also made significant changes to the provisions of the Bankruptcy Code affecting business cases. BAPCPA was passed in the wake of the publicity that surrounded such prominent cases as *Enron, WorldCom* and *Adelphia,* all of which were tainted by allegations of pervasive fraud. The BAPCPA amendments were intended to make Chapter 11 reorganizations faster and cheaper and to counter the perception that crooked managements were abusing the bankruptcy process to enrich themselves at the expense of their creditors. Critics of the new amendments noted their pro-creditor provisions, and some predicted BAPCPA would make Chapter 11 more expensive and would cripple debtors' ability to reorganize.[1]

But the predictions that BAPCPA would fundamentally alter the Chapter 11 dynamic appear premature at best: There has been no sea change in Chapter 11 practice. This may be because the number of cases filed in 2006 and 2007 were low by historical standards (Exhibit 1); therefore, there are few reported BAPCPA decisions. In addition, some attorneys have persuaded courts to mitigate the results that might result if BAPCPA were applied as written. Part of their success has come from exploiting ambiguities in BAPCPA; one point that debtors' and creditors' lawyers agree on is that the BAPCPA amendments were poorly drafted and did not integrate well with the existing Bankruptcy Code. This article surveys the major developments in the law regarding the BAPCPA amendments and, subject to the caveat that it is dangerous to extrapolate from the small sample of new cases, interprets them from the perspective of institutional lenders.

Exhibit 1. Chapter 11 Filings: Low by Historical Standards

Year	Filings
1Q 2008	2,012
2007	6,353
2006	5,163
2005	6,800
2004	10,132
2003	9,404
2002	11,270
2001	11,424
2000	9.884
1999	9,315
1998	8,386

Source: //www.uscourts.gov/bnkrpctystats/statistics.htm#june.

Exclusivity

Under the Bankruptcy Code, at the commencement of a Chapter 11 case the debtor has the exclusive right to file a plan of reorganization. Prior to BAPCPA, the debtor had 120 days to file a plan and 180 days to have that plan accepted by creditors. The debtor had the right to ask the bankruptcy court for unlimited extensions of exclusivity if it could demonstrate a good reason for each extension. Before BAPCPA, courts had complete discretion in evaluating extensions and typically granted them long beyond the initial 180 days. In large bankruptcies, multiple extensions were often necessary to develop the consensus required for a plan, and plan confirmation

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could take several years. United Airlines took three years to confirm its plan in 2005; Adelphia took more than four years.

Under BAPCPA, the debtor's 120-day exclusive period to file a plan may not be extended beyond 18 months from the petition date and acceptance is capped at 20 months. For small business cases (involving total debts of less than $2 million), the exclusivity period is 180 days unless extended by the court for cause, with a limit of 300 days.

There has been no sea change in Chapter 11 practice.

The change was aimed at curbing the perceived abuse of debtors spending too long in Chapter 11 and using exclusivity to coerce concessions from creditors. Many bankruptcy professionals believed that BAPCPA would fundamentally alter the debtor/creditor balance of power. Despite these dire predictions, the new rule appears to have had little apparent impact, because there does not appear to be a single reported decision applying the new exclusivity provisions in a non–small business case.[2] In a case involving a small business debtor, *Florida Coastal,* the court determined that the 300-day limit for proposing and obtaining acceptances of a plan applied solely to the debtor, and that creditors may file competing plans immediately after the debtor's exclusive period expires.[3] The debtor argued that because it filed its plan within the exclusive period, it should retain exclusivity, a position the court rejected. It is unwise to read too much into a single case; nevertheless, lenders can be comforted by the court's decision not to accept a debtor's invitation to stretch exclusivity beyond its statutory limit. On the other hand, some had read the 300-day limit as applying to both debtors and creditors. To the extent that *Florida Coastal* means a small business case will not be dismissed or converted after 300 days, it may represent an example of a court evading the intent of BAPCPA.

Executive Compensation

One criticism of Chapter 11 that had arisen in the notorious megacases was that debtor managements were getting rich in Chapter 11 through so-called key employee retention (KERP) plans that provided senior executives with generous compensation, in addition to their regular salaries, to induce them to stay employed with the debtor. These plans, which had become widespread and increasingly rich, had attracted attention in the business press and Congress.[4] In the *Enron* case, the potential KERP payment pool was $130 million; in *WorldCom,* it was $25 million.[5] Prior to BAPCPA, to obtain approval of KERP plans, debtors only had to establish that payment of this compensation was a valid exercise of their "business judgment," a relatively easy matter to prove, and in practice, most KERP plans were approved as proposed. One of BAPCPA's goals was to sharply limit such plans by creating a substantially more rigorous and formulaic test that debtors had to pass before courts could approve KERP plans.[6]

The evidence from the cases decided under BAPCPA shows, however, that debtors have found success in drafting around the limitations in the new statute. BAPCPA does not appear to have been successful in stopping the adoption of KERPs: Instead, their form has simply changed. Mindful of the new requirements, debtors structured their post-BAPCPA plans as "incentive plans" instead of retention plans, again seeking approval under the more lenient business judgment rule and seeking to avoid application of the stricter standards of Section 503(c)(1).

Nobex Corporation was one of the first cases to deal with a post-BAPCPA retention program. In *Nobex*, the debtor presented an "incentive plan," under which it sought to provide bonuses for its chairman and its vice president. The *Nobex* debtor intended to sell its business in an auction and claimed that those executives were essential to completing the sale. The plan only provided incentive compensation if the ultimate sale price exceeded the initial bid price. The court analyzed the incentive plan under Section 363 of the Bankruptcy Code, rather than Section 503(c)(1), because it found that the payments were not meant as an inducement to stay employed by the debtor, but rather an inducement to increase the sale price and generate more money for creditors, and approved the plan.[7]

Similarly, in *In re Pliant Corporation,* the Bankruptcy Court for the District of Delaware approved the debtors' adoption of a management incentive plan

(MIP) that had been in place prior to the bankruptcy.[8] The debtor argued that it was only seeking to pay the amounts it would have paid outside Chapter 11 and that the MIP should be approved as an exercise of its business judgment. Despite creditor objections that the plan should be reviewed as a retention plan under Section 503(c)(1), the court approved the plan under the business judgment test.

But not every court has been so tolerant. In *In re Dana,* relying on amended Section 503(c)(1), the court declined to approve an executive compensation plan.[9] In *Dana,* the debtors sought to pay annual incentive plan bonuses and "target completion bonuses" to six executives. The annual bonuses were to be paid without regard to the achievement of any specific business performance goal. The second part of the bonus structure was based on the total enterprise value of the debtors six months after the effective date of the plan. Several objectors argued that the completion bonuses were based on "artificially low threshold[s]," which guaranteed that the bonuses would be paid under any circumstances, making them akin to retention bonuses. The court agreed and ruled that the incentive plans were disguised retention plans, stating, "[u]sing a familiar fowl analogy, this compensation scheme walks, talks and is a retention bonus" and in a footnote added, "if it walks like a duck (KERP) and quacks like a duck (KERP), it's a duck (KERP)." The court held that the large incentive bonus, tied only to emergence from Chapter 11, could not be considered a form of incentive bonus and denied the debtors' motion.

If the debtor proposes a postpetition compensation plan, creditors should insist that any compensation payable be tied to performance targets that are set at realistic levels.

Significantly, the *Dana* debtors did not have the approval of several key creditor groups and the U.S. trustee. As the court stated, "[a] significant aspect of these cases in the context of the Compensation Motion, are the issues raised in the strong objections filed by several parties in interest, including the Creditors' Committee, Equity Committee and United States Trustee and therefore, the Compensation Motion cannot fairly be compared to other compensation motions brought before this Court or other courts." After the initial *Dana* plan was disapproved by the court, however, the debtors refashioned a less generous plan tied to realistic performance targets, which was then supported by many of the previously objecting creditor groups, and which was subsequently approved.

BAPCPA does not appear to have been successful in eliminating pure "retention" or "stay" bonuses for senior management in Chapter 11. But as these cases show, KERP plans tied to performance have not disappeared. The lesson for creditors is clear: If the debtor proposes a postpetition compensation plan, creditors should insist that any compensation payable be tied to performance targets that are set at realistic levels, that is, not ones that guarantee that management will earn the top tier of compensation. But if the debtor persists in pursuing a plan that does not meet those criteria, creditors should object and adopt Judge Burton Lifland's "walks like a duck" and "talks like a duck" analysis.

Single Asset Real Estate Cases

In 1994, Congress amended the Bankruptcy Code to provide a definition of a "single asset real estate" debtor and amended Section 362(d)(3) to specify when foreclosure would be permitted in such cases.[10] The intent was to make it easier for mortgagees to foreclose when the owner had no realistic prospect of reorganization. In practice, courts interpreted the definition of single asset real estate debtor narrowly and lender expectations for streamlining these cases were not met. The $4 million cap in the definition meant that larger projects were outside of the definition; courts also ruled that the operation of any meaningful business outside of passive real estate ownership took a project outside the definition. For example, in *CBJ Development,* a debtor that operated a hotel was deemed not to be operating a single asset real estate business, a decision that attracted criticism.[11] In BAPCPA, the $4 million debt limitation was eliminated and Congress revisited the language of Section 101(51B) to clarify that operation of an incidental business did not exclude a project from the definition, a change that was aimed at reversing *CBJ Development.* Congress also amended Section 362(d)(3) to provide that foreclosure would be permitted if the debtor failed to file a reorganization plan within 90 days following the petition date.[12]

Whether Congress was successful in plugging the loopholes for single asset real estate cases remains an open question. In *Kara Homes,* a group of affiliated debtors that developed single family homes and condominiums took the position that they were not single asset real estate debtors on the basis that their business of land acquisition, project design, construction and marketing and sale of residential units was broader than the statutory definition.[13] The court disagreed, holding that the debtors' operations were "intrinsic to owning and developing the real estate and not one where the debtor generates income" from other sources.[14] In *Heather Apartments,* a debtor admitted that it was a single asset real estate debtor and stated that it intended to sell its asset in its Chapter 11 case. It then sought to stay foreclosure until a sale could be completed, arguing that its sale efforts were "cause" to deny foreclosure. The court rejected the debtor's request, finding that cause meant something extraordinary and that to stay foreclosure while a sale was attempted would be to frustrate the intent of Congress.[15]

On the other hand, relying on the criticized *CBJ Development* case, a court recently held that a debtor that operated a hotel was not a single asset real estate case.[16] Similarly, again relying on pre-BAPCPA law, a court recently held that a golf club was not a single asset real estate debtor because, in its analysis, the success of the venture required active efforts of the club's owners and employees and was not a classic passive ownership business such as owning an apartment building.[17] As these cases illustrate, some courts remain reluctant to apply the revised definition of single asset real estate, so lenders continue to face uncertainty in knowing whether they will be successful in obtaining foreclosure relief if real estate borrowers file for bankruptcy.

Reclamation and Administrative Claims

BAPCPA attempted to give stronger rights to trade creditors by revising the Bankruptcy Code to create a federal right of reclamation.[18] Prior to BAPCPA, trade creditors had relied on the Uniform Commercial Code, which recognized a right of reclamation only for goods shipped within 10 days of an insolvency. Under BAPCPA, the time period in which sellers could reclaim goods sold to an insolvent buyer was increased to 45 days, and a new provision was added that allows sellers to assert an administrative claim for goods delivered to the debtor within 20 days before the bankruptcy filing. Under BAPCPA, a reclaiming seller must have sold the goods to the debtor in the "ordinary course" of its business, and the debtor must have received the goods while insolvent. The reclamation demand must be in writing and made within 45 days of the receipt of the goods by the customer (now the debtor in bankruptcy). If the 45-day period expires after the bankruptcy case is filed, the vendor must make the reclamation demand within 20 days after the bankruptcy filing.

The concern for lenders was that the new right of reclamation might be senior to existing liens on inventory, in the case of reclamation, and that payment of the new administrative claims might deplete debtors' cash reserves. To the great relief of lenders, however, cases decided under BAPCPA have found new Section 546(c) did not change the prior law: The rights of a reclamation claimant remain subordinate to a prior lien on inventory. In *Advanced Marketing Services,* the Bankruptcy Court for the District of Delaware refused to issue a temporary restraining order in favor of a reclamation claimant who sought to prevent the sale of goods it was trying to reclaim.[19] Similarly, in *Dana Corporation,* the Bankruptcy Court for the Southern District of New York applied the "prior lien defense" in favor of a secured creditor by valuing all reclamation claims in the *Dana Corporation* case at zero.[20]

The other protection aimed at trade creditors was the adoption of Section 503(b)(9), which provides an administrative priority claim for goods received by the debtor within 20 days before the date a bankruptcy petition was filed.[21] In most cases, administrative claims are paid in full, rather than pennies on the dollar for general unsecured claims. In effect, the amendment puts qualifying trade creditors on a par with vendors selling goods *after* the bankruptcy filing. As with other BAPCPA provisions, however, there were numerous questions about its scope. One issue was whether a Section 503(b)(9) claimant could compel immediate payment of its claim. The cases decided under Section 503(b)(9) have held, however, that the timing of payment of an administrative claim remains in the discretion of the bankruptcy court and that no immediate right to payment exists.[22]

Health Care Amendments; Appointment of Patient Ombudsman

Among BAPCPA's major changes were a series of amendments designed to address health care bankruptcy issues. BAPCPA added new provisions dealing with the appointment of a patient care ombudsman, transfers of patients, preservation of patient records, sales of assets by not-for-profit debtors and debtor eligibility to participate in government programs such as Medicare and Medicaid. Because of the scope of the health care amendments, commentators expressed concern that the new laws would add to the expense and complexity of health care cases without any corresponding benefit to creditors.

As with other BAPCPA provisions, the experience has been different from what its drafters intended. The issue that has arisen most frequently has been whether to appoint a patient care ombudsman under Section 333(a) of the Bankruptcy Code, where, in a surprisingly large number of cases, courts have declined to make such an appointment.[23] According to a recent study, ombudsmen have only been appointed in 64 percent of the skilled nursing facility cases, 62 percent of the hospital cases and only 7.4 percent of the health care cases not involving a hospital or skilled nursing facility.[24]

The Section 333(a) cases have focused on whether the debtor is operating a "health care business" and whether the appointment of a patient care ombudsman is necessary.[25] The courts have adopted a four-part test to determine whether a debtor is operating a health care business: (1) The debtor must be a public or private entity; (2) the debtor must be engaged in offering facilities and services to the general public; (3) the facilities and services must be for the diagnosis or treatment of injury, deformation or disease; and (4) the facility must be for surgical care, drug treatment, psychiatric care or obstetric care.[26] Debtors seeking to avoid having their operations treated as health care businesses have argued that they were not generally providing facilities or services to the public or that the patient care ombudsman provision was intended to apply only to facilities offering in-patient services.

On the alternate prong of whether the appointment of a patient care ombudsman is necessary, courts have adopted a totality-of-the-circumstances test articulated in *the Alternate Family Care* case, weighing these factors:[27]

- The cause of the bankruptcy
- The presence and role of licensing or supervising entities
- The debtor's past history of patient care
- The ability of patients to protect their rights
- The level of dependency of patients of the facility
- The likelihood of tension between the interests of the patients and debtor
- The potential injury to the patients if the debtor drastically reduced its level of patient care
- The presence and sufficiency of internal safeguards to ensure the appropriate level of care
- The impact of the cost of an ombudsman on the likelihood of a successful reorganization

Debtors have been successful in opposing the appointment of a patient care ombudsman when they demonstrated that bankruptcy resulted from tax or other legal problems, and not patient care issues, and when the debtor's principals had well-established reputations for providing excellent patient care.[28] Similarly, a debtor, with the support of its creditors committee, persuaded a court that a patient care ombudsman was unnecessary when the debtor's prepetition management had been replaced by a well-regarded turnaround management firm.[29] While no reported decision focuses exclusively on the cost of a patient care ombudsman as the sole reason to deny appointment, the inclusion of cost as a factor in the *Alternate Family Care* test illustrates that courts are sensitive to that issue. More broadly, the cases show that creditors who want to oppose the appointment of a patient care ombudsman can make arguments that have been accepted by courts: (1) The debtor is not operating a health care business; (2) the debtor's bankruptcy is caused by reasons unrelated to patient care, and the debtor has an excellent patient care record; and (3) the debtor has in place skilled turnaround professionals who will be sensitive to patient care issues.

Chapter 15

As part of the BAPCPA amendments, Chapter 15 was added to the Bankruptcy Code to deal with transnational insolvency proceedings. Chapter 15 adopted the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law. One of its premises is that the bankrupt's principal insolvency proceeding will be in a jurisdiction where it has its "center of main interests" (COMI). Although COMI is not defined in Chapter 15, the statute creates a rebuttable presumption that the jurisdiction of a debtor's organization is its COMI. Chapter 15 provides that if a non-U.S. insolvency is recognized as a "foreign main proceeding," the debtor will be eligible for the benefit of the Bankruptcy Code's automatic stay provisions with respect to U.S. assets and may be eligible for other relief at the discretion of the court.

In a recent case, however, the U.S. District Court for the Southern District of New York affirmed a bankruptcy court ruling that two hedge funds, which were organized in the Cayman Islands, and sought insolvency relief there, would not have their Cayman Islands proceedings recognized as "foreign main proceedings" because the evidence showed that the two funds had no assets, employees or operations in that jurisdiction and were run and managed from New York.[30] The decision involved hedge funds sponsored by Bear Stearns that had suffered trading losses in the summer of 2007 as a result of exposure to the subprime mortgage industry. Both funds had invested in mortgage-backed securities and had borrowed money to enhance their returns. When conditions deteriorated in 2007, their creditors began to make margin calls, which the funds were unable to meet. In July, the funds sought to be liquidated in the Cayman Islands and filed Chapter 15 petitions with the Bankruptcy Court for the Southern District of New York.

The funds alleged that the Cayman Islands was their COMI and sought recognition of the Cayman Islands proceedings as foreign main proceedings. No creditor opposed the relief, but the bankruptcy court determined that the Cayman Islands were not the funds' COMI because there were no employees or managers of the funds in the Cayman Islands and that the funds' assets, books and records and administrator were all in New York. The funds argued that, by alleging that they were organized in the Cayman Islands, they had satisfied their obligation to prove that their COMI was there. Rejecting that argument, the district court held that, even in the absence of creditor opposition, the court must make an independent determination of whether the debtor has met its burden to establish that its COMI was in a foreign jurisdiction. The lesson for lenders is that businesses organized offshore for tax or regulatory purposes, but which are managed from the United States and have their assets here, will be subject to the Bankruptcy Code and are not likely to be eligible for Chapter 15.

Conclusion

Three years after its enactment, BAPCPA must still be considered a work in progress in terms of its effect on business bankruptcy cases. Its impact on exclusivity has been minimal. While it has changed the types of KERP plans being proposed by debtors, it has not eliminated them. Perhaps the biggest surprise so far has been the willingness of courts to forgo the appointment of patient care ombudsmen in health care cases. At least to date, it has been neither as pro-creditor as some of its supporters had hoped nor as fatal to debtors as its detractors predicted. But with the U.S. economy weakening and the pace of Chapter 11 filings on the increase this year, the next few years are likely to see more cases that will continue to interpret the BAPCPA amendments.

Endnotes

1 *See, e.g.*, Richard Levin and Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)*, 79 Am. Banker L. J. 603.

2 It is likely, of course, that the BAPCPA change is having an effect on exclusivity negotiations in pending cases, even if those negotiations have not led to reported decisions.

3 *In re Florida Coastal Airlines, Inc.*, 361 B.R. 286 (Bankr. S.D. Fla. 2007).

4 *See, e.g.*, 151 Cong. Rec. S2306 (Mar. 9, 2005) (statement of Senator Hatch explaining Senator Kennedy's proposed amendment), new law was intended to "prevent unfair and unnecessary retention bonuses to insiders in Chapter 11

companies."

5 John Moragham and Diane Rallis, *BAPCPA's Treatment of KERPs: A Prime Example of Why Leaving It to the Courts Would Have Been the Right Idea, available at www.hklaw.com/id24660/PublicationId1611/ReturnId31/contentid47494/.*

6 Section 503(c)(1) of the Bankruptcy Code, dealing with employee retention to "insiders" provides:

> (c) Notwithstanding subsection (b), there 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
>
> (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 obligation is incurred; or
>
> (ii) if no such similar transfers were made to, or obligations 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[.]

7 *In re Nobex*, 2006 Bankr. LEXIS 417 (Bankr. D. Del. 2006).

8 *In re Plant Corp.*, Case No. 06-1001 (Bankr. D. Del 2006).

9 *In re Dana Corp.*, 2006 WL 2563458 (Bankr. S.D.N.Y. 2006).

10 Section 101(51B) of the Bankruptcy Code formerly provided:

> (51B) The term "single asset real estate" means real property constituting a single property or project, other than residential property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate, noncontingent, liquidated secured debts in an amount no more than $4,000,000.

11 *In re CBJ Dev., Inc.*, 202 B.R. 467 (Bankr. App. Panel 9th Cir. 1996).

12 Section 362(d)(3) of the Bankruptcy Code provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay— …
>
> (3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—
>
> (A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
>
> (B) the debtor has commenced monthly payments that—
>
> (i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and
>
> (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or…

13 In re *Kara Homes*, *Inc.*, 363 B.R. 399 (Bankr. D.N.J. 2007).

14 *Kara Homes*, 363 B.R., at 406.

15 *In re Heather Apartments Limited Partnership*, 2007 WL 926299 (Bankr. D. Minn. 2007).

16 *In re Whispering Pines Estate*, *Inc.*, 341 B.R. 134 (Bankr. D. N.H. 2006).

17 *In re Golf Club Partners, L.P.*, 2007 WL 1176010 (Bankr. E.D. Tex. 2007).

18 Section 546(c) provides:

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

[19] *In re Advanced Marketing Systems Inc.*, 360 B.R. 421 (Bankr. Del. 2007).

[20] *In re Dana Corporation*, 367 B.R. 409 (Bankr. S.D.N.Y. 2007).

[21] Section 503(b)(9) provides:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

[22] *In re Global Home Products, LLC*, 2006 WL 3791955 (Bankr. D. Del. 2006); *In re Bookbinders' Restaurant, Inc.*, 2006 WL 3858020 (Bankr. E.D.Pa. 2006).

[23] Section 333(a) of the Bankruptcy Code provides:

(a)

(1) If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case.

(2)

(A) If the court orders the appointment of an ombudsman under paragraph (1), the United States trustee shall appoint disinterested person (other than the United States trustee) to serve as such ombudsman.

(B) If the debtor is a health care business that provides long-term care, then the United States trustee may appoint the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the case is pending to serve as the ombudsman required by paragraph (1).

(C) If the United States trustee does not appoint a State Long-Term Care Ombudsman under subparagraph (B), the court shall notify the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the case is pending, of the name and address of the person who is appointed under subparagraph (A).

[24] Harold Kaplan and Samuel Maizel, *Evolving Standards for Appointment of a Patient Care Ombudsman: Section 333 in "Operation,"* 27 ABI J. 2 (Mar. 2008), at 40.

[25] Section 101(27A) of the Bankruptcy Code provides:

(27A) The term "health care business"—

(A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for—

(i) the diagnosis or treatment of injury, deformity, or disease; and

(ii) surgical, drug treatment, psychiatric, or obstetric care; and

(B) includes—

(i) any—

(I) general or specialized hospital;
(II) ancillary ambulatory, emergency, or surgical treatment facility;
(III) hospice;
(IV) home health agency; and
(V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and

(ii) any long-term care facility, including any—

(I) skilled nursing facility;
(II) intermediate care facility;
(III) assisted living facility;
(IV) home for the aged;
(V) domiciliary care facility; and
(VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

[26] *In re Medical Associates of Pinellas LLC*, 360 B.R. 356 (Bankr. M.D. Fla 2007); *In re Alternate Family Care*, 377 B.R. 754 (S.D. Fla 2007); *In re William Saber, M.D., P.C.*, 369 B.R. 631 (Bankr. D. Colo 2007); *see also In re 7-Hills Radiology, LLC*, 350 B.R. 902 (Bankr. D. Nev. 2006).

[27] *In re Alternate Family Care, id.*

[28] *In re Alternate Family Care*; *id.*; *In re Saber, id.*; *In re Total Woman Healthcare, P.C.*, 2006 WL 370816 (Bankr. M.D. Ga. 2006).

[29] *In re Pleasant Care Corporation et al.*, Chapter 11 Case No. LA 07-122312-EC (C.D. Cal. 2007).

[30] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 2008 WL 2198272 (S.D.N.Y. 2008).