

# CREDITORS' RIGHTS UPDATE

Recent Developments in Creditors' Rights & Bankruptcy from the SandersBaker Financial Institutions Practice Group\*

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Amarillo, Texas

September, 2005

## BANKRUPTCY REFORM STILL ON TRACK

### Effective Date October 17

As you know, Congress has passed significant amendments to the Bankruptcy Code, most of which take effect October 17. While many experts still fear unintended consequences, bankruptcy reform moves ahead. While most amendments are perceived to be creditor friendly, there are traps for the unwary, some of which are highlighted below.

### Relief for Auto Lenders—Chapter 13

First, the good news for auto lenders:

Purchase money security interests in vehicles purchased within 910 days (about 2 1/2 years) before bankruptcy may not be modified by a Chapter 13 plan. Thus, most vehicle lenders who provide purchase money financing should not have to worry about being "crammed down" for at least the first two and a half years that the debtor owns the vehicle.

Even in "cram down" situations, Congress has clarified that the proper valuation to be used is the full replacement cost of the vehicle.

Crafty debtor's counsel are already developing strategies for minimizing the impact of these requirements. Those strategies, however, can be met head on provided that lenders or their counsel pay close attention to proposed treatment in Chapter 13 plans before they are confirmed.

### Chapter 13 Confirmation

Until now, Chapter 13 plan confirmation has not occurred in the Northern District of Texas until well after the claims bar date. Under the new act, that practice will change, because confirmation must occur within 45 days after the creditors' meeting. Thus, lenders would be wise to file claims as early as possible, and proposed plans will need to be checked for compliance with the requirements for treatment of secured claims. Additionally, some trustees may have mechanisms in place to try to resolve claim treatment at the creditors' meeting.

This should also shorten the time for interim "adequate protection payments" or "pre-confirmation disbursements." In fact, the new act specifically addresses interim payments. There is some localized debate regarding whether the first required payments will pass through the Chapter 13 trustee or be paid directly to creditors. In any event, the so-called pre-confirmation disbursement issue should be minimized.

Early confirmation has long been the practice in many other districts, so this is not entirely new. To reiterate, though, secured lenders need to pay attention early in the case.

### Beware Reaffirmation Agreements—Chapter 7

Changes affecting reaffirmation agreements cut both ways.

First, individual debtors are required to make a decision regarding property securing loans. They must elect (in writing) to reaffirm, surrender, or redeem collateral within a set period after filing, and then perform under that election. Failure to do so will result in the automatic stay being lifted without any act by the creditor. That would leave the parties governed by state law, and in the event of a default, the creditor could act without bankruptcy court approval.

On the other hand, Congress has imposed detailed requirements for creditor disclosure in reaffirmation agreements. Lenders who ignore these new requirements do so at their peril. Once standardized forms and disclosures become routine, risks should be minimized, but the first few months after the effective date could provide minefields for ill-informed creditors.

### Bragging Rights

Sanders Baker welcomes JOHN ATKINS to the firm. John obtained his BBA in finance from the University of Texas, and he is an honors graduate of Texas Tech Law School. After receiving his bar exam results, John anticipates practicing in the firm's Commercial Practice Group, and he also hopes to handle employment law issues and related litigation.

ROGER COX will be speaking at the 24th Annual University of Texas Bankruptcy Conference in Austin, November 10-11. Cox has also completed his Creditors' Rights & Bankruptcy article in the SMU Law Review's Annual Survey of Texas Law—his eleventh year to be featured.

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This newsletter is for general information only, and it is not intended as legal advice, nor is it intended as a statement of a specific position in any pending litigation, bankruptcy, or transactional matter. We urge our readers to consult with their own legal counsel regarding the issues discussed above.

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Roger S. Cox - Financial Institutions Practice Group  
[rcox@sandersbaker.com](mailto:rcox@sandersbaker.com)

P.O. Box 2667  
Amarillo, TX 79105-2667  
(806) 372-2020; FAX (806) 342-5679  
[www.sandersbaker.com](http://www.sandersbaker.com)