

New Provisions effecting Secured Creditors under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005:

- I. This outline discusses provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“Act”) which alter in some way the rights of secured creditors. Among those provisions, of which you should be aware are:
 - A. Automatic Stay.
 1. Elimination or automatic expiration of automatic stay in case of repeat filing **§362 (c)(3), (4)**.
 2. Termination of the automatic stay for failure to file statement or to perform intention with respect to secured property. **§362 (h), §521 (a)(6)**.
 3. Exception for enforcement of liens against property as to which in rem orders were entered in prior case. **§362(b)(20), (d)(4)**.
 4. Exceptions for acts against real property in cases in which the debtor was not eligible to be a debtor or filed in violation of a previous court order. **§362(b)(21)**.
 5. Exception for continuation of eviction proceedings where a landlord obtained judgment of possession prior to filing. **§362(b)(22), (1)**.
 - B. Chapter 13.
 1. Elimination of write-down on claims incurred within 910 days (2.5 years) of filing and secured by motor vehicles acquired for personal use or on debts secured by other property if incurred during the one year period prior to filing. **§1325(a)(5)**.
 2. Lien retention until full payment of debt or discharge under §1328. **§1325(a)(5) (B)**.
 3. Direct payments to lessors and secured creditors for adequate protection commencing within 30 days of filing, **§1326(a)(1)**.
 4. Requirement that payments be periodic and in an amount sufficient to provide adequate protection. **§1325(a)(5)(B)(iii)**.

II. Secured Creditors

A. Valuation.

1. General Rule - New § 506(a)(2) provides a standard of valuation for determining the allowed secured claim of a creditor secured by personal property of the debtor in an individual case under Chapter 7 or 13.
 - a. The value shall be determined based upon replacement value of the property.
 - b. Valuation is to be done as of the date of the filing of the petition.
 - c. The value is not reduced for cost of sale or marketing.
2. As to property acquired for personal, family or household use, replacement value is specifically defined to mean the price a retail merchant would charge for property of that kind considering its age and condition “at the time that value is determined.”

QUERIES: Is the “replacement value” for property acquired for personal, family or household purposes different from the replacement value for property acquired for other purposes? Does this standard alter the current rule applied to motor vehicles in Chapter 13 cases pursuant to the *prior* decisions?

3. On conversion.
 - a. Valuations of property secured claims in Chapter 13 do not apply in cases converted to Chapter 7. §348(f)(1)(B).
 - b. In cases converted from Chapter 13 to Chapter 7, the claim continued to be secured by the property unless the full amount of the claim determined by applicable non-bankruptcy law has been paid as of conversion. §348(f)(1)(C)(i).
 - c. If pre-bankruptcy default has not been fully cured under the plan at conversion, the default shall have whatever effect given it by applicable non-bankruptcy law. §348(f)(1)(C)(ii).

- d. The effect of this provision is to prohibit redemption of property in Chapter 7 by paying the balance of the stripped down value.

B. Redemption.

1. § 722 has been amended to make clear what has been the majority rule that redemption must be accomplished in one lump sum payment rather than in installments.
2. The new valuation standard contained in § 506(a)(2) likely changes the prevailing rule in the Western District of Missouri regarding redemption of motor vehicles set forth in *In rePodnar*, 307 B.R. 667 (Bankr. W.D. Mo. 2003) to mandate the payment of retail value rather than liquidation value. It is not clear whether it changes the holding in *Podnar* with respect to the appropriate date of valuation.

C. Reaffirmation - § 524.

1. An extensive new set of disclosures, set forth in Subsection (k) must be given to the debtor at or before the time a reaffirmation agreement is signed. § 524(c)(2). These requirements are satisfied if the disclosures are made in good faith. § 524(1)(3).
2. Those disclosures must be accompanied by a form of agreement and the statement, declaration, motion, and order described in detail in paragraphs (4) through (8) of Subsection (k). § 524(k)(1).
3. Debtor must submit a statement in support of the reaffirmation agreement attesting to his or her ability to make the payments on the reaffirmed debt and identifying current income and monthly expenses, payments required on the reaffirmed debt and payments due under any other reaffirmation agreements. § 524(k)(6)(A). Proposed Interim Rule 4008 would provide that the statement in support be accompanied by a statement of total income and total expense amounts stated on Schedules I and J and that if a difference exists between the scheduled amounts and the amounts included in the statement, the statement in support must also include an explanation of any difference.
4. For a period of 60 days after the agreement is filed with the court, a presumption of undue hardship arises if the debtor's monthly income minus monthly expenses shown in the statement in support of the agreement is less than the payments required by the

reaffirmation agreement. This presumption must be reviewed by the court. It may be rebutted by the debtor in writing with a statement that includes an explanation that identified additional sources of income with which to make the payments. The court may not disapprove the agreement without notice and hearing. The hearing must be conducted before entry of the debtor's discharge. **§ 524 (m)(1)**. These provisions do not apply to a reaffirmation agreement on which the creditor is a credit union. **§ 524(m)(2)**.

5. Proposed Interim Rule 4004 (c)(1)(J) provides for a delay in the entry of an order of discharge if the presumption of undue hardship has arisen based on a filed reaffirmation agreement.
6. A creditor may accept payments from a debtor before filing of the agreement and may accept payments from a debtor under an agreement that it believes in good faith to be effective. **§ 524(l)**.
7. **§ 524(a)(2)**, which enjoins acts to collect or recover a debt as a personal liability of the debtor, does not prevent a creditor holding a claim secured by real property that is the debtor's principal residence from seeking or obtaining periodic payments "in lieu of pursuit of in rem relief to enforce the lien" if that act is in the ordinary course of business between the creditor and the debtor. **§ 524(j)**. This provision is apparently designed to permit residential lien creditors to ascertain a debtor's desire post-discharge to retain property by continuing to make payments.

D. Lien Avoidance - § 522(f) now contains a specific definition of and limitations on the phrase "household goods" for purposes of lien avoidance. **§ 522(f)(4)**.

E. Preferences.

1. The perfection period for immunization of purchase money security interests from preference challenge contained in **§ 547(c)(3)(B)** is expanded from 20 to 30 days.
2. A Similar change is made in the provision specifying the date on which a transfer is deemed made for purposes for preference analysis. The time periods contained in § 547(e)(2) for perfection are expanded from 10 to 30 days after the transfer takes effect. **§ 547(e)(2)(A), (B), (C)**.

III. Lessors.

A. Nonresidential real property - time to assume or reject - **§ 365(d)(4)**.

1. The period of time after which an unexpired lease of nonresidential real property is deemed rejected is extended to 120 days after the date of the order for relief (rather than 60 days) or the date of the entry of a confirmation order, whichever is earlier.
2. Under prior law, the court had the power to extend that deadline, and often did so, particularly in complex cases, until the entry of an order of confirmation, with lease assumption and rejection decisions being embodied in the confirmed plan. Pursuant to **§ 365(d)(4)(B)**, the court may now extend the period for an additional 90 days for cause, if that extension is made prior to the expiration of the 120 day period. The court may not grant further extensions of the deadline without prior written consent of the lessor.

B. Personal property leases - **§ 365(p)**.

1. Deemed rejection.
 - a. If a personal property lease is either rejected or not timely assumed (under subsection (d)(1)), the leased property is no longer property of the estate and the stay is automatically terminated with respect to such property. **§ 365(p)(1)**.
 - b. A lease of personal property in which the debtor is the lessee in a Chapter 11 individual case or a Chapter 13 case is deemed rejected as of the conclusion of the hearing on confirmation if not assumed in the plan. The stay, as well as the co-debtor stay of § 1301 terminates with respect to such property. **§ 365(p)(3)**.
2. Assumption by Chapter 7 debtors - **§ 365(p)(2)**.
 - a. In an individual Chapter 7 case the debtor may notify a lessor in writing that he or she desires to assume the lease upon receipt of which the creditor may notify the debtor of its willingness to have the lease assumed and condition assumption on cure of any outstanding defaults. No time limits are specified for the giving of these notices.
 - b. If the debtor, within 30 days after providing the notice described above, notifies the lessor that the lease is

assumed, the liability under the lease is assumed, but by the debtor and not by the estate. The effect is that there would be no administrative expense claim on breach or subsequent rejection.

- c. Neither the automatic stay nor the discharge injunction is violated by the creditor's notification of the debtor of conditions on assumption and negotiation of terms of cure.

C. Assumption requirements - non-monetary defaults.

1. Under prior law, a split had developed among the courts as to whether § 365(b)(2)(D) required a debtor to cure non-monetary defaults as a condition to assuming a contract. The split was created by ambiguous language in that provision. See *In re Claremont Acquisition Corp., Inc.*, 113 F.3d 1029 (9th Cir. 1997) (non-monetary defaults required to be cured); *In re BankVest Corp.*, 360 F.3d 391 (1st Cir. 2004) (debtor need not cure non-monetary defaults).
2. § 365(b)(2)(D) has now been amended to except from the cure requirement “any penalty rate or *penalty* provision relating to a default arising from any failure by the debtor to perform non-monetary obligations.” (Italicized language added.) The addition was intended to make clear that non-monetary defaults must be cured unless they require a payment of some type of penalty, thus adopting the rationale of the *Claremont* court.
3. In order to ameliorate somewhat the otherwise potentially harsh effects of this change, however, Congress also amended **§ 365(b)(1)(A)** which would, in the case of unexpired leases of real property, exempt the debtor from being required to cure defaults arising from failure to perform non-monetary obligations if it is impossible for the trustee to cure that default by performing non-monetary acts at or after the time of assumption. If the default in question arises from failure to operate in accordance with the lease, then the default may be cured by performance at and after the time of assumption.

D. Limits on rejection claims - **§ 503(b)(7)**.

1. Under current law, damages arising from rejection of a lease or other contract previously assumed by the debtor, are entitled to treatment as an expense of administration.

2. Under the Act, perhaps in recognition of the likelihood that debtors will subsequently reject leases of non-residential real property they may now be required to resume before thorough evaluation, such administrative expense claims of non-residential real property are subject to a limitation. Claims are limited in amount to a sum equal to all monetary obligations due (excluding those arising from or relating to a failure to operate or a penalty provision) for two years following the later of rejection or the date of turnover of the premises. The claim is not reduced and may not be set off except for sums actually received or to be received from an entity other than the debtor, such as a guarantor. The claim for the balance of the sums due for the term of the lease is an unsecured nonpriority claim subject to the limitations imposed by § 502(b)(6).