

# DEFENDER

## THE NADC NEWSLETTER

### The New Act: Interpretation and Implementation

*Lawrence A. Young and Heather Heath McIntyre*



*Lawrence A. Young*

#### Sidebar

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") is the most dramatic revision of the United States Bankruptcy Code (the "Code")<sup>1</sup> in 27 years. The Act is young, and few bankruptcies have been filed under the Act. It will take some time for the cases to wind through the courts. This article looks at how courts are interpreting a few changes implemented by the Act.

#### A. Credit Counseling

The Act requires credit counseling within the 180 days before filing a bankruptcy petition.<sup>2</sup> It also requires debtors to attend a financial management course post-petition to receive a discharge under chapter 13.<sup>3</sup>

<sup>1</sup> Section references are made to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*

<sup>2</sup> 11 U.S.C. § 109(h)(1)

<sup>3</sup> *Id.* § 1328(g)(1)

Courts are dismissing cases for failure to abide by these new requirements, however loathe they may be to do so.<sup>4</sup>

Debtors may, however, obtain temporary relief from the counseling requirement under section 109(h)(3) which  
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<sup>4</sup> See *In re Sosa*, 2005 WL 3627817 (Bankr. W.D. Tex. Dec. 22, 2005) (following statute and dismissing case regardless of consequences); *In re Fuller*, 2005 WL 3454699 (Bankr. W.D. Pa. Dec. 16, 2005) (dismissing case despite certification that debtor had completed financial management course prior to filing bankruptcy because statute required credit counseling prior to filing bankruptcy and financial management course *after* filing bankruptcy to receive a discharge); *In re Miller*, 2006 WL 27217 (Bankr. W.D. Pa. Jan. 5, 2006) (finding that debtor received the credit counseling required by § 109 but that a certificate had not been obtained and allowed debtor time to obtain the actual certificate or compel the credit counseling agency to produce it)

### Second Annual Member Conference April 23 to 25, 2006



*Eugene J. Kelley, Jr.*

Register today for NADC's Second Annual Member Conference, April 23 to 25, at the Westin Chicago River North. Eugene J. Kelly, Jr., Arnstein & Lehr, LLP, Chicago, chairman of NADC's standing committee on meetings and conferences, headed the program development relying on suggestions from the membership. The conference is open only to NADC members.

Topic and speaker suggestions were made on evaluation forms from the 2005 conference and in phone calls and

e-mail messages throughout the year. The program reflects topics NADC members deal with in daily practice.

Receptions, lunches and breaks provide opportunities for members to get acquainted and to carry on informal discussions.

Conference registration and hotel reservations can be made at [www.dealercounsel.com](http://www.dealercounsel.com). Check back often for updated program information.

**continued on page 4 and 5**

## Update on Bankruptcy... from page 1

requires an individual to file a certification with the court establishing that (i) exigent circumstances merit a waiver of the requirement; (ii) the debtor requested pre-petition, but was unable to receive, counseling within five days of the request; and (iii) that court is satisfied with the certification.<sup>5</sup>

In *Davenport*, the debtor established exigent circumstances by showing that the secured creditor was actively seeking repossession of the debtor's sole means of transportation. The creditor had repossessed the debtor's other car the day before the bankruptcy filing. In addition, the debtor obtained the counseling two days after filing the bankruptcy.

However, because the debtor had not requested the counseling before filing bankruptcy, the court was compelled to dismiss the bankruptcy for failure to satisfy all elements of the statute. In addition, the court found it could not waive the request requirement in the name of equity.

### B. Cross-border Insolvency

The Act includes a new chapter, 11 U.S.C. § 1501 *et seq.*, which "is intended to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases" and "to provide for the fair and efficient administration of cross-border insolvencies . . ."<sup>6</sup>

In *United States v. J.A. Jones Construction Group, LLC*, a receiver in a Canadian bankruptcy requested a stay of the action pending in the United States in accordance with Canadian bankruptcy law.<sup>7</sup> The court determined that relief under chapter 15 of the Bankruptcy Code is available only if the foreign representative "commences an ancillary proceeding for recognition of a foreign proceeding before a bankruptcy court."<sup>8</sup> In *J.A. Jones*, an ancillary proceeding had not

been commenced, but in the interest of comity, the court stayed the action for 60 days to give the Canadian authorities an opportunity to seek the appropriate relief under chapter 15.<sup>9</sup>

### C. Homestead Exemption

Section 522(p) restricts the homestead exemption to \$125,000 for an interest in a homestead acquired within 1215 days preceding the bankruptcy petition.<sup>10</sup> In *In re Blair*, the court determined that the debtors' increased equity in their homestead acquired during the 1215 days preceding the bankruptcy petition by way of their monthly mortgage payments did not trigger section 522(p).<sup>11</sup>

The debtors purchased their home 1773 days before filing bankruptcy and scheduled equity in their homestead in the amount of \$688,606. The court found that one does not "acquire" equity in a homestead. Rather, one acquires title to a home.<sup>12</sup> Debtors acquired their "interest" as of the actual purchase before the 1215 day period. Thus, the cap did not apply.

### D. The Automatic Stay

#### 1. Substantial change in financial or personal condition

The automatic stay terminates upon the thirtieth day of a bankruptcy if the debtor(s) had a case pending within the year previous to the bankruptcy filing.<sup>13</sup> A debtor may request that the

automatic stay be extended, which the court may grant after notice and a hearing that occurs within the 30 days. The moving party must meet its burden of proof that the bankruptcy filing is in good faith as to the creditors to be stayed.<sup>14</sup>

In *In re Warneck*, the debtors had a case pending within a year of the case at hand.<sup>15</sup> The court determined that the filing was in good faith because the debtors had not triggered the presumption of bad faith under § 362(c)(3)(C). In particular, the court found that the debtors' circumstances had substantially changed in that their children could now afford to contribute to the monthly plan payments. Thus, the court extended the automatic stay indefinitely as to all creditors.

#### 2. No substantial change and no good faith

In *In re Collins*, the court found that the case was presumptively filed in bad faith due to no change having occurred in the debtor's financial affairs.<sup>16</sup> In *Collins*, two creditors objected to the debtor's motion to extend the stay – the two banks which were secured by the debtor's home and vehicle with 85,000 miles on it. The debtor filed schedules in his second bankruptcy within a year that reflected a decrease of \$479.11 in income and a \$91.00 increase in expenses.<sup>17</sup> The court determined there the debtor did not establish a substantial change in his

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9 *Id.* at 639

10 11 U.S.C. § 522(p)

11 *In re Blair*, 334 B.R. 374 (Bankr. N.D. Tex. 2005)

12 *Id.* at 376

13 11 U.S.C. § 362(c)(3)

14 See 11 U.S.C. § 362(c)(3)(B)

15 *In re Warneck*, 2006 WL 62667 (Bankr. S.D.N.Y. Jan. 4, 2006)

16 *In re Collins*, 2005 WL 3529144

17 *Id.* at \*1

5 11 U.S.C. 109(h); *In re Davenport*, 2005 WL 3292700 (Bankr. M.D. Fla. Dec. 6, 2005)

6 H.R. Rep. NO. 109-31 at 105 (2005), U.S. Code Cong. & Admin. News 2005, 88, 169

7 333 B.R. 637 (E.D.N.Y. 2005)

8 *Id.* at 638; 11 U.S.C. § 1504



## President's Message



We are on the eve of our Second Annual Conference, to be held in Chicago, and we are closing in on four hundred members. If you take a

*Jonathan P. Harvey* moment to go on our website, you will find the latest schedule for the Conference, and I am sure you will find something of interest. We have over seventy-five members signed up for the Conference and expect in excess of one hundred, judging from last year's attendance. This is a place to meet lawyers who are struggling with the same issues you fight with every day, it is a time to network in this growing field, and it has the added advantage of CLE credits. I urge you to attend and look forward to seeing you in Chicago.

There are a few housekeeping items about which I ask for comment from the members, preferably by sending me an e-mail at the address which appears at the end of my letter. I

would like your thoughts on the use of the Forum and the List Serve. Obviously the List Serve is of incalculable value to the membership, and it is clearly worth the price of admission. However, I would like to know what changes, if any, you think we should make with the Forum and what we can do to make it more active. It is not being used to the extent of the List Serve, yet I believe it is a valuable tool. Please let us have your comments on this and, of course, if you have comments on the List Serve we would be happy to have that as well. One of the other things about which I would like to hear from you is whether you think it would make sense or be appropriate to increase the cost of the membership fee for the Fellow category. Right now, the cost of a full membership is \$585.00, and the cost of a Fellow membership (subsequent member of an organization with a full member) is \$100.00. This does make it easier and less expensive for larger offices and companies to have many of their lawyers in the Association, but it has become an issue we would like

to review because of the cost of services we are providing, and the hope that we can provide more programs and services in the coming months. We would like to hear from the membership on this.

Finally, I have asked that we have a plenary session of the membership at our April Conference to vote on increasing the Board of Directors from fifteen to twenty-five in order to have sufficient people to do the traditional work of a board. Given the demographics of our membership and the Board members, it is difficult for some to attend meetings, and I believe the additional members would help alleviate that problem. If any of you have interest in serving on the Board, please give me your name to send to the Nominating Committee, and send along a curriculum vitae for reference. Thank you all for your participation and support.

*Jonathan P. Harvey of Harvey and Mumford LLP is President of the NADC and can be reached by e-mail at [jpharvey@harveyandmumford.com](mailto:jpharvey@harveyandmumford.com)*

## New Members

**NADC welcomes the following new members:**

### Full Members

#### **Neil Abbott**

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Toronto ON

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Wm. David Coffey, III and Associates  
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#### **John F. Walsh**

Automotive Management Services, Inc.  
West Palm Beach, FL

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#### **Chris Dodge**

Boardman Suhr Curry & Field  
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#### **Jami Farris**

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Charlotte, NC

#### **Maya Hill**

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Oklahoma City, OK

#### **Peter Kovacs**

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Indianapolis, IN

#### **Ellen Mastrangelo**

Greater Cleveland  
Automobile Dealers Assoc.  
Brecksville, OH

#### **Josefina M. Stamatatos**

Gadsby Hannah LLP  
Boston, MA

# Second Annual Member Conference - Preliminary Agenda

Sunday, April 23

6:00 TO 7:30 PM

RECEPTION

Monday, April 24

7:00 TO 8:00 AM

BREAKFAST

8:00 TO 8:45 AM

OPENING SESSION

- Welcoming Remarks – **Eugene J. Kelley, Jr.**, Conference Chair, Arnstein & Lehr, LLP, Chicago
- President's Opening Remarks – **Jonathan Harvey**, NADC President, Harvey and Mumford LLP, Albany
- Annual Membership Meeting – **Jonathan Harvey** and **Jack Tracey**, CAE, NADC Executive Director

8:45 TO 9:30 AM

SESSION 1: KEYNOTE ADDRESS

9:30 TO 10:40 AM

SESSION 2: DEVELOPMENTS IN BUY/SELL WORLD

Moderator: **Oren Tasini**, Haile, Shaw & Pfaffenberger, P.A., North Palm Beach, FL

Panel: **Les Stracher**, Rothstein Rosenfeldt Adler, Fort Lauderdale, FL; **Gordon E. Devens**, AutoNation, Fort Lauderdale, FL

10:40 TO 11:00 AM

BREAK

11:00 AM TO 12:15 PM

SESSION 3: FRANCHISE LITIGATION

Panel: **Eric Chase**, Bressler, Amery & Ross, PC, Florham Park, NJ; **Leonard A. Bellavia**, Bellavia Gentile & Associates LLP, Mineola, NY; and **Joe Roesner**, The Fontana Group, Inc., Tucson, AZ

- Nissan litigation
- Strong arm floorplan tactics
- Advising dealers on warranty audits
- Mass litigation by dealers against franchisors
- Latest trends in protecting dealers' rights
- Situations in which the use of an expert is appropriate
- Obtaining adequate data for analysis
- Overcoming factory objections to data requests
- Optimal scheduling
- Cross examination of opposing experts

12:15 TO 1:15 PM

LUNCH

1:20 TO 2:30 PM

SESSION 4: ARBITRATION

Panel: **Jeffrey Ingram**, Galese & Ingram, P.C., Birmingham, AL; **Lawrence W. Byrne**, Pedersen & Houpt, Chicago; and **James D. Blume**, Blume & Stoddard, Dallas; **Lew Goldfarb**, Lew Goldfarb Associates, LLC, New York, NY

- Arbitration provisions in customer agreements
- Employment arbitration issues
- Manufacturer and supplier arbitration
- Class action arbitration protections

2:30 TO 2:45 PM

BREAK

2:50 TO 4:00 PM

SESSION 5: DEVELOPMENTS IN LABOR LAW WORLD

**John Donovan**, Fisher & Phillips, LLP, Atlanta; **D. Gerald Coker**, Ford and Harrison, LLP, Atlanta

- Auditing employment practices
- Steps to take to make a dealership a "harder target"
- 10 employment law practices
- Unionization activity at dealerships
- CTW coalition and "corporate campaign" vs NLRB elections.

continued on page 3



## Conference... from page 2

4:00 TO 5:15 PM

### SESSION 6: VEHICLE STANDARDS AND CONDITIONS

**Steve Maskiewicz**, Bob Baker Auto Group, San Diego; **Ann Gambardella**, Virginia Auto Dealers Association, Richmond, VA

- Federal motor vehicle safety standards and TREAD Act
- Equipment and add-ons: warranty and liability concerns
- Tactics in protecting against lawsuits about the vehicle's condition

5:15 PM

### ADJOURNMENT – EUGENE J. KELLEY, JR

6:00 TO 7:30 PM

### RECEPTION

**Tuesday, April 25**

7:00 TO 8:00 AM

### BREAKFAST

8:00 TO 8:10 AM

### OPENING REMARKS – EUGENE J. KELLEY, JR.

8:10 TO 8:50 AM

### SESSION 7: KEYNOTE ADDRESS

**Terri S. Harris**, Motor Vehicle Technical Advisor, IRS

- Brief introduction to the IRS technical advisor program
- Motor vehicle technical advisor roles and responsibilities
- MVTA products and services
- Current activities on a few dealership issues
- Q&A

8:50 TO 10:30 AM

### SESSION 8: F&I MATTERS

**Rob Cohen**, Auto Advisory Services, Tustin, CA; **Paul D. Metrey**, National Automobile Dealers Association, McLean, VA; **Michael Charapp**, Charapp & Weiss, LLP, McLean, VA

- TILA concerns, including disclosure of negative equity
- FCRA and ECOA compliance, including adverse action notices
- FACTA, including risk based pricing
- OFAC and customer ID issues
- Establishing F&I compliance programs

10:30 TO 10:45 AM

### BREAK

10:45 AM TO 12 NOON

### SESSION 9: PRIVACY, SECURITY BREACHES AND INFORMATION SAFEGUARDS

**Patricia EM Covington**, Hudson Cook LLP, Hanover, MD; **James Chareq**, Hudson Cook LLP, Washington, DC; **William (Randy) Henrick**, DealerTrack, Lake Success, NY

12:00 NOON

### ADJOURNMENT – EUGENE J. KELLEY, JR.

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## Update on Bankruptcy... from page 2

personal or financial affairs by a preponderance of the evidence. Thus, the debtor had a burden to prove by clear and convincing evidence that the case was filed in good faith.

The court found that the debtor's testimony did not fully comport with his schedules and that based on the schedules and evidence, the debtor could not propose a feasible plan. Thus, the debtor failed to show objective good faith. The court noted that the debtor worked two jobs, supported three children without child support, and did not make luxury purchases or live an extravagant lifestyle. Nonetheless, the debtor did "not overcome the presumption that his case was not filed in good faith . . ." and the court found that the debtor failed to "establish that this case was filed in good faith as to the creditors to be stayed pursuant to the statutory requirements."<sup>18</sup> The stay terminated on the thirtieth day after the filing.

### E. Defending a Preference Action

Under 11 U.S.C. § 547, a trustee can recover certain transfers the debtor made to creditors within 90 days before a bankruptcy or, in the case of insider creditors of a business debtor, one year. These recoverable "preferences" include the creation of a security interest. A new defense to a lawsuit to void the creditor's security interest as a preference is that the security interest was perfected on or before 30 days after the

debtor received possession of the collateral.<sup>19</sup> Under the old Code, creditors only had 20 days to perfect their security interest or risk losing it. Under the new Code, the secured creditors' safety net expands an extra 10 days to 30 days.

### Conclusion

The Act has imposed dramatic changes in bankruptcy law. Courts are starting to interpret these changes, but it will take time before the full impact of the Act is known. Meanwhile, courts are handing down case law daily that further sheds light on how to navigate the Act.

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<sup>19</sup> 11 U.S.C. § 547(c)(3)(B)

*Lawrence A. Young is a partner in the law firm of HughesWattersAskanase in Houston, Texas and is chairman of both NADC's standing committee on Sections Management and the Bankruptcy and Debt Collection special interest section. He wrote or initiated several amendments to the Bankruptcy Code and wrote part of the Bankruptcy Code's legislative history. He also wrote several amendments to the Texas Finance Code.*

*Heather Heath McIntyre is an associate with HughesWattersAskanase. Her practice focuses mainly on reorganizations and workouts for corporations and individuals, representation of secured creditors in and out of bankruptcy, and representation of bankruptcy trustees.*

### ***The NADC website is a source of information for members:***

- ***Member Directory, searchable by name, firm, state, area of interest and dealership type***
- ***Forum, an online discussion of timely issues***
- ***List Archive, a collection of messages shared by those members who sign up for the List Serve***
- ***Events, conference information and downloadable materials from conferences and workshops***
- ***Banners that link to associate member websites for information on products and services***
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<sup>18</sup> *Id.* at \*5



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**NADC**  
NATIONAL ASSOCIATION  
OF DEALER COUNSEL

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