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Rubin & Levin Lawyers Named 2006 Super Lawyers

Nominated by their peers and thereafter selected by committee, three of our Rubin & Levin partners have been named to the 2006 Super Lawyers in Indiana. This prestigious designation recognizes George A. Rubin, Elliott D. Levin and Sue Figert Meyer for their years of experience and professional accomplishments in their fields of practice. Other Partners in the firm include Christine Hayes Hickey, John C. Hoard, R. Brock Jordan and James E. Rossow, Jr.

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Dramatic Changes for Creditors, Debtors and Insolvency Attorneys Under New Bankruptcy Law

(This is the first part of a three part series of an article prepared by Elliott D. Levin & John M. Rogers, Rubin & Levin, P.C., that reviews the changes under the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") which became effective October 17, 2005.)

PART I. ISSUES GIVING RISE TO THE NEW LAW

Those of us who regularly practice insolvency law were not surprised by a massive increase in consumer bankruptcy filings last year. Throughout 2005, bankruptcy filings jumped in anticipation of the October 17, 2005 effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), signed into law by President Bush in April. By the end of 2005, consumer bankruptcy filings were up 32% nationally, to a record 2.04 million, according to a study cited by the National Association of Consumer Bankruptcy Attorneys.

The rise in filings is not surprising, because the changes in the law are substantial and with few exceptions make it more difficult and less beneficial for debtors to obtain bankruptcy relief. Less commonly known is that the changes will drastically affect business as well as consumer debtors (and the relief available to creditors of either) and will broadly change the day-to-day practices and risks for attorneys who practice in the area.

This article highlights some of the key changes imposed by BAPCPA.

Many of the modifications are most easily understood with reference to the perceived issues which gave rise to changes. There appear to be three major grounds for the reform:

- bankruptcy "abuse;"
- a surge in the number of filings and apparent decline in associated bankruptcy stigma; and
- disparate results in individual cases, caused by differing state exemption laws and variations in judicial interpretation of the Code.

The general consensus is that the relatively high volume of consumer bankruptcy filings during the 1990s was the key factor in creating a climate for reform. Anecdotal evidence also suggests that to the dismay of creditors, in recent years there has also been a weakening of the "stigma" traditionally associated with bankruptcy relief.

Inequalities within the old system require a bit more explanation. Under the Bankruptcy Code as it has existed for many years, consumer debtors would typically file under either Chapter 7, which involves liquidation by a trustee of the debtor's non-exempt assets (if any) and distribution of proceeds to creditors; or under Chapter 13, in which debtors with regular income such as wages pay their "disposable" income to creditors for three or five years under a simple reorganization plan, following a more streamlined procedure for reorganization than the elaborate reorganization plans and voting procedures typically used by businesses under Chapter 11.

Although the Bankruptcy Code governed all filings through the country, the results in individual cases under the 1978 Code were by no means uniform. Disparities arose because of flexibility inherent in the Bankruptcy Code, with regard to the assets included or excluded from the bankruptcy "estate," and by virtue of a complex interplay between the Bankruptcy Code and state law "exemptions," provisions designed to exempt from the bankruptcy estate the property deemed necessary to provide debtors with a "fresh start" after their bankruptcy discharge.

Although the 1970 Bankruptcy Commission had urged adoption of a uniform set of federal bankruptcy exemptions, in 1978 Congress opted instead to allow an election between state and federal exemption law which produces extremely different results depending upon a debtor's state of residence, due to wide variations in the exemption laws of individual states. Additional disparities arose because under pre-BAPCPA law governing Chapter 13 "wage earner" plans, the disposable income payable to creditors by debtors would fluctuate considerably from debtor to debtor, depending upon the individual's financial circumstances at the time of filing.

In recent years, proponents of reform legislation contended that reform was needed not only to stem the tide of abusive bankruptcies, by reviving the social stigma of filing, and to prevent alleged "convenience" bankruptcies, but also to provide more uniform and rigorous tests to insure that those who file pay what they are able to pay to creditors. The result, it has been argued, would not only reduce abusive filings and maximize distribution to secured and unsecured creditors, but would broadly benefit society by, for example, lowering consumer interest rates.

Opponents of bankruptcy reform responded that the alleged "abuses" are overstated, and that the vast majority of filings arise involuntarily from job loss, medical bills and divorce, a conclusion borne out by a number of studies. It was further argued, unsuccessfully, that the proposed means tests would unfairly impact less sophisticated debtors, and would ultimately burden the system without clear evidence that there would even be a meaningful benefit to creditors.

Regardless of one's view on these debates, it is undeniable that the sweeping changes of BAPCPA will radically alter all bankruptcy practice, in both business and consumer cases.

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Did you know...

PREFERENCES

For bankruptcy cases filed after October 17, 2005, the trustee may not avoid as a preference a transfer if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $ 600; and in the case of a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $ 5,000.

Also, under 28 U.S.C. 1409(b), an action to recover a consumer debt worth less than $15,000 or a non-consumer debt worth less than $10,000 (including preferences in commercial cases), must be brought in the district where the defendant resides.

UNIFORM COMMERCIAL CODE

PRIORITY:
Revised Article 9 of the Uniform Commercial Code, Section 9-324(a) gives you priority with regard to all goods except livestock and inventory, if you are perfected when debtor takes possession or within 20 days thereafter. For inventory, you must be perfected when the debtor receives the goods, you have to send notice to the other secured creditors with previously recorded liens, and the notice must be sent within the five years prior to the debtor receiving the inventory. 9-324(b).

CONSIGNED GOODS:
Revised Article 9 of the Uniform Commercial Code requires the filing of a financing statement for consigned goods. When a supplier consigns goods to another for purposes of resale, but the supplier remains the "owner" of the goods, Revised Article 9 of the U.C.C. treats the transaction as creating a purchase money security interest in the consigned goods. Therefore, the supplier who "owns" the goods must still comply with the filing and perfection requirements of Revised Article 9 in the same manner as any other secured creditor. The supplier's security interest will take priority over other security interests in the same collateral if it is perfected when the debtor receives the goods, and within the five years prior to the debtor's receipt of the goods, the supplier has sent the notice described in U.C.C. 9-324(b) to other secured creditors with previously recorded liens.

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The Top Ten Helpful Tips to Increase Collections

Regardless of whether you are a seasoned collector, or new to the area of credit and collections, there are tried and true methods to increasing the amount you may recover on an overdue account. While we realize it is not always practical to achieve results on all ten suggestions below, your success in recovering receivables begins with the work you do before credit is ever extended. Please look for articles on each of the collection tips below in future issues of our newsletter.

1. Obtain a signed credit application (We can provide a form)
2. Obtain a personal guaranty
3. Reduce a payment agreement to a promissory note
4. Keep copies of debtor's checks for banking information
5. Do not wait too long to collect
6. Send monthly statements
7. Multiple broken promises should be acted upon
8. Reduce phone conversations to writing
9. Know the entity with which you are dealing
10. Create a file on each debtor with the following information: name of principal; phone; fax; address; itemized statement; contract(s)

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Indiana Court of Appeals Declares Transfers of Assets Fraudulent

On January 13, 2006 the Indiana Court of Appeals issued a significant ruling for creditors in Commercial Credit Counseling Services, Inc. v. W.W. Grainger, Inc., 840 N.E.2d 843 (Ind. Ct.

App. 2006), wherein the Appellate Court affirmed two rulings from separate trial courts declaring transfers made by debtors to Commercial Credit Counseling Services, Inc.(CCCS) fraudulent as to the specific creditors (Creditors) represented by Rubin & Levin, P.C.

CCCS had entered into debt restructuring agreements with the debtors against whom the Creditors held judgments. The CCCS agreement required the debtors to submit their funds to CCCS in installments, purportedly to be used by CCCS to settle all debts with the general creditors. As part of the agreement, CCCS sought to retain a security interest in virtually all of the debtors' assets. The blanket security interest in the debtors' assets was then utilized by CCCS as leverage against the general creditors to force their acceptance of settlement on terms favorable to the debtors, with uncooperating creditors (i.e., those creditors which pursued execution upon debtors' assets) having to engage in a priority dispute with CCCS.

Through post-judgment proceedings, the Creditors attempted to attach funds held by CCCS. In response, CCCS maintained that it held a superior interest in the transferred assets, despite the fact that of the approximately $36,000 paid to CCCS by the debtors, less than $1,200 was actually paid out in satisfaction of creditors' claims, with the remainder being retained by CCCS as its fee. CCCS additionally maintained that the transfers did not violate Indiana's Uniform Fraudulent Transfer Act ("UFTA") because there was no evidence of actual intent to defraud creditors.

In separate consolidated opinions, the trial courts held the transfers of funds to CCCS were null and void as fraudulent, concluding the transfers violated the UFTA as being made for the express purpose of hindering and delaying the efforts of creditors from realizing upon the property of the debtor in satisfaction of claims. Notably, the trial courts determined the arrangement between CCCS and the debtors was "taken too far... when the agent becomes a straw man of his principal for purposes of shielding assets from creditors."

The Court of Appeals, in affirming the trial courts' rulings, held the security interest purportedly provided to CCCS failed to attach to the debtors' assets because CCCS did not present evidence showing the extent to which value was given by it for the transference of the security interest. Specifically, the Appellate Court ruled that CCCS, at the time of the transfers, promised only to contact creditors to arrange for debt restructuring. However, it had not contacted any creditors at the time it received the alleged security interest. Accordingly, its unfulfilled promise of future performance could not serve as the requisite value which must be given for a transfer to avoid running afoul of the UFTA.

The Court of Appeals further held there was sufficient evidence of actual intent to defraud the Creditors. With respect to this issue, the Court noted the transfers were "intended to prevent some creditors from obtaining remuneration to which they were legally and equitably entitled." The Appellate Court additionally determined the "trial courts' conclusion that CCCS utilized its purported security interests as a shield to protect the assets of [the debtors] from [the Creditors] by concealing them in plain sight is supported by the record."

The Opinion issued by the Court of Appeals should serve as a useful tool in stemming the increasing practice of for-profit debt counselors, which routinely attempt to obtain blanket security interests to coerce unsecured creditors into settling their claims, often on a take-it-or-leave-it basis. The Court of Appeals correctly recognized that an avoidable transfer of property can include the granting of a security interest under these circumstances, where no debtor-creditor relationship exists in its traditional sense. Not only will this ruling allow creditors to avoid such transfers and reach otherwise unencumbered property, it should discourage debtors and debt counselors from using security interests as a mechanism for fraud.

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Court of Appeals Clarifies Time Limits for Filing Claims Against Payment Bonds for State Projects

One of the practice areas of Rubin & Levin, P.C. is assisting clients in filing Mechanic's Liens on private and public construction projects. Mechanic's Liens can be filed on private construction projects; however, for public property held for public use, other statutory remedies are provided for material suppliers and subcontractors to claim against payment bonds. Rubin & Levin recently prevailed on behalf of Siemens Building Technologies, Inc. in their claim against a payment bond on a State of Indiana, Title 4, public project.

The Indiana Court of Appeals recently issued its opinion in the matter of Electrical Specialties, Inc. v. Siemens Building Technologies, Inc., holding that the time-limit for filing a claim against the payment bond on a state project expires sixty (60) days from the final date that any party

provides labor or materials to the project. The Court's holding in this landmark case clarifies what had been a murky area of the law regarding the time limit for the filing of claims by subcontractors against payment bonds issued on state-owned projects. The project at issue in the Siemens case was renovations and additions to a state hospital located in Richmond, Indiana. Siemens had been hired by the electrical subcontractor to install the fire alarm, intercom, and music systems, but the subcontractor that hired Siemens failed to pay for the work and materials provided. Siemens filed its verified claim against the bond on June 9, 2003, which was nine months after Siemens last worked on the project, but was less than sixty days from the date that the last work was performed on the project by any party.

Because claimants cannot file mechanic's liens against publicly owned projects, the general contractor on the project was required to post a bond for the protection of all persons providing materials or labor to the project. This bonding requirement exists for all state projects over $150,000.00 (also know as 'Title 4 Projects'), and similar schemes exist for county or local government-owned projects ('Title 36'), Department of Transportation contracts ('Title 8'), and state university building contracts ('Title 5'). Each of these statutory schemes contains different deadlines and timing requirements for filing claims against the payment bonds. At issue in the Siemens case was language contained in the Title 4 statutes which required claims to be filed "within sixty (60) days from the last labor performed, last material furnished, or last service rendered."

The Court in Siemens found that by leaving out reference to the dates that work was performed or materials supplied by the individual contractor/claimant in the Title 4 scheme, the legislature intended for the time limitation to extend to sixty days from the last date that any party provided labor or materials. In so holding, the Court re-emphasized that the payment bond statutory schemes were created for the benefit of and to ensure payment to the subcontractors, laborers, and material-men on public works projects and are to be broadly applied to serve that purpose.

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Nothing in this publication is intended as legal, tax or accounting advice. The information set forth herein is subject to constant change and should serve merely as a guide. We encourage consultation with our office on case-specific issues.

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