Special Needs *(continued from page 2)*

benefit of his or her loved one with disabilities. This "Supplemental-SNT" is different from a true SNT in that several of the requirements of an SNT do not apply, including the requirement for a "pay-back" provision to the state Medicaid agency. However, in order to maintain full eligibility for governmental benefits, the Supplemental-SNT cannot permit the person with disabilities, **under any circumstances**, to demand distributions from the trust. In other words, the recipient must not be able to anticipate the benefits. To the extent distributions can be forced by the person with disabilities, they constitute an available resource and will be subject to the spend-down requirements described above, and can easily jeopardize other government benefits. Like an SNT, a Supplemental-SNT allows flexibility in providing people with disabilities with "non-necessity" items that would not otherwise be available through government benefits.

Parenting and caring for an individual with special needs as he or she travels through adult life requires unique and complex planning. This planning does not get easier as the person with disabilities gets older. If you have a special needs family member or friend, and would like more information about the issues raised here, please call John Herdzina or James Tews at (402) 392-1250.

Upcoming Seminars

Mark your calendars to attend the following seminars:

Small Businesses, Big Issues - September 13, 7:30 a.m. - 11:30 a.m., Champions Run at 13800 Eagle Run Drive. This joint seminar with Hancock & Dana, P.C. will cover Fraud, Employee Counseling & Discipline, Trends in Retirement and a panel discussion of hot issues for businesses.

Franchises - Which one is right for you? - September 16, 7:30 a.m. - 9:00 a.m. at our office. This seminar will discuss the pros and cons of owning a franchise as well as how to determine which franchise is right for you.

Health Savings Accounts - October 4 & 5, 7:30 a.m. - 9:00 a.m. at our office. Healthcare Savings Accounts and Strategies to Limit Employer Liability. A joint seminar with Marcotte Insurance Company to discuss the benefits of Healthcare Savings Accounts and basic methods to guard against employment-related liability.

Call Debbie Watson at 392-1250 or email dwatson@akclaw.com to register for a seminar. Space is limited, so call today!

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Legal
Summer/Fall 2005
Perspectives
from Abrahams Kaslow & Cassman LLP

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: What You Need To Know Before October 17, 2005

by Nicholas T. Dafney

On April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA"). The BAPCPA represents the most significant rewrite of U.S. bankruptcy law in 25 years, and while media attention has focused almost exclusively on the consumer provisions of the BAPCPA, it contains several sections that will affect creditors and businesses working with financially troubled customers.

A handful of the BAPCPA amendments became effective upon enactment; however the majority of the amendments will take effect for cases filed after October 17, 2005. The sheer volume and breadth of the BAPCPA makes it impossible to summarize all of the amendments in one article. This article, therefore, will highlight some of the major amendments implemented by the BAPCPA that we anticipate will impact AK&C's clients after October 17th.

Reclamation

Under the existing provisions of the Bankruptcy Code, a creditor wishing to reclaim goods sold to an insolvent debtor was required to demand reclamation of such goods within 10 days after the debtor received such goods, or if the 10 day period expired after the debtor filed bankruptcy, 20 days after the debtor received such goods. The BAPCPA expands these time periods by providing reclaiming creditors 45 days after debtor's receipt of goods to make a reclamation demand for goods sold on credit during that 45-day period. If the 45-day period expires after the debtor files bankruptcy, the reclaiming creditor has 20 days from the filing date to make the reclamation demand. Although a reclamation demand is still subject to being defeated by, among other things, purchasers in the ordinary course and secured creditors that have a lien on the debtor's inventory, where the secured creditor is over-secured or does not have a lien on inventory, being able to reclaim goods sold during the 45-day period before bankruptcy will be a very valuable right.

The BAPCPA provides relief for creditors who fail to make a reclamation demand by granting such creditors an administrative expense claim for the value of any goods received by the debtor within 20 days before the date of commencement of a case in which the goods have been sold to the debtor in the ordinary course of such debtor's business. An administrative expense claim has a higher bankruptcy priority in terms of payment than a general unsecured claim. This is a valuable alternative for creditors who do not want to invest the time and expense necessary to see a reclamation claim through the bankruptcy process.

Preferences

The Bankruptcy Code's formal definition of a preferential transfer is (1) any transfer of the debtor's interest in property, (2) to or for the benefit of a creditor, (3) on account of a debt owed by the debtor before the transfer was made, (4) made on or within 90 days (or one year for insiders) before the bankruptcy filing date, (5) that enables the creditor to receive more than the creditor would have received in a liquidation case if the transfer had not been made and the creditor received payment on its debt as provided by the Bankruptcy Code. Simply stated, preference law allows a debtor and/or trustee to demand repayment of amounts paid to creditors within the 90 days preceding the filing of the debtor's bankruptcy petition.

The BAPCPA will make it more difficult for trustees and debtors to pursue smaller, "nuisance" preference actions and will strengthen one of the creditor's strongest defenses to a preference lawsuit. The three most significant amendments to preference law are the following:

- For pre-bankruptcy payments of less than $10,000, a trustee or debtor can sue only in the judicial district where the defendant resides. Therefore, for example, if the bankruptcy case is pending in New York but the company that received the preferential transfer is located in Nebraska, the preference action must be filed in Nebraska if the action is for a recovery of less than $10,000.
- Before the BAPCPA, there was no monetary limit on a business debtor's ability to pursue a preference. Now, a business debtor cannot seek payment of a pre-bankruptcy transfer of less than $5,000.
- A preference defendant will now be able to establish the "ordinary course of business" defense based on either its own history of transactions with the debtor, or standards in the parties' industries. Under previous law, a defendant was required to prove both of these elements.

The bottom-line regarding preference payments is that a creditor should never return a pre-bankruptcy payment to the debtor and/or trustee without first determining whether it has one or more defenses. The Bankruptcy Code, especially after the BAPCPA amendments become effective on

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Health Care Prompt Pay Act

On April 22, 2005, the Nebraska legislature passed LB 389, adopting the Health Care Prompt Payment Act (the "Act"). The Act requires health insurers (regardless of whether they use 3rd party claims processors) to pay claims submitted by health care providers in a timely manner. The Director of Insurance has the power to promulgate rules and regulations to carry out the Act. At this time, no rules or regulations have been promulgated.

The Act provides that claims submitted on the proper claim form with all fields completed with enough information to adjudicate the claim (a "clean claim") must be paid within 30 days (if filed electronically) or 45 days (if filed other than electronically) from the date the claim is received by the insurer. If the claim requires additional information to adjudicate, the insurer must give a written explanation to the health care provider within 30 days after receiving the claim setting forth the additional information needed to adjudicate the claim. The required processing time for the insurer is tolled during the time the health care provider provides the requested information to the insurer. The health care provider must provide the requested information within 30 days. The insurer may deny the claim if the required additional information is not submitted to the insurer.

If an insurer fails to pay, deny, or settle a clean claim within the designated time period, the insurer must pay interest to the health care provider at the rate of 12% per year on the total amount ultimately allowed on the claim. Insurers can be exempted from the interest requirements of the Act for one year if the insurer files a compliance statement with the Director of Insurance certifying that the insurer paid, denied, or settled more than 90% of its clean claims in compliance with the Act for the 24-month period ending the preceding June 30.

The Act does not apply to any claim submitted before January 1, 2006, and does not apply to individual or group policies that provide coverage for a specific disease, accident-only coverage, hospital indemnity coverage, disability income coverage, Medicare supplement coverage, long-term care coverage, or other limited-benefit coverage. Unfair payment practices by insurers under the Act should be reported to the Director of Insurance. For additional information about the Health Care Prompt Payment Act and other health care related issues, please contact an attorney in our health care group.

Moratorium on Specialty Hospitals Ends

An eighteen-month moratorium on specialty hospitals imposed by the Medicare Modernization Act ended June 8th. The American Medical Association called the end of the moratorium "a victory for high quality health care." Meanwhile, Senate Finance Committee Chairman Charles Grassley (R-IA) and Ranking Member Max Baucus (D-MT) released a letter on June 8th to their colleagues urging co-sponsorship of their legislation, the Hospital Fair Competition Act of 2005, which would prohibit new specialty hospitals from qualifying for the "whole hospital" exception, thereby skirting the Stark law prohibition on physcian self-referral. The Government Accountability Office also released a report on the issue finding that the number of specialty hospitals would likely rise after the moratorium ends, but the extent of the increase is uncertain.

Providing For Persons With Disabilities or Other Special Needs

Any parent or guardian caring for a child or adult with disabilities worries what will happen when he or she is no longer able to care for this dependant. What little benefits the government may provide to an individual with disabilities, such as Supplemental Security Income, Social Security Disability Insurance, and Medicaid, can quickly dissipate if that person becomes disqualified for such benefits. In addition, under certain circumstances, the government can make a claim for reimbursement of benefits previously provided.

A person with disabilities typically has a wide range of needs, including the need for financial resources. In many cases, family and friends want to contribute financial assistance to this individual through lifetime or testamentary gifts. If it is determined the disabled person has ownership of these resources or has access to financial assistance, it could easily jeopardize his or her eligibility for government benefits. The challenge is finding a legal and ethical way in which a person with disabilities can own or have access to assets and receive assistance from friends and family without jeopardizing his or her eligibility for government benefits.

If a person with disabilities has substantial resources, he or she must generally use them for assistive care before he or she becomes eligible for government benefits. However, a Special Needs Trust (SNT) can be established to avoid this spend-down requirement. An effective SNT must meet several criteria and include several specific provisions. First, the trust must be irrevocable. Second, the trust can only be funded with assets acquired by the individual with disabilities while he or she is under age 65. An SNT will remain effective after this person reaches 65. Third, the trustee must have absolute discretion concerning the distribution of trust assets. Finally, the trust must include a provision requiring to reimburse the state's Medicaid agency upon the beneficiary's death, for an amount equal to the total benefits provided by the governmental agency for the benefit of that person during his or her lifetime. The main benefit of an SNT is the ability to expend trust assets to provide the person with disabilities with "non-necessity" items that would not otherwise be provided by government benefits, such as entertainment and travel expenses.

Friends and family members can also gift financial resources to a loved one with disabilities in a manner that allows the beneficiary to remain eligible for government benefits. Specifically, the donor can establish a trust with the donor's assets for the

(continued on last page)

New "Disposal Rule" Regulates Proper Disposal of Employee Background Check Information

Effective June 1, 2005, the Federal Trade Commission ("FTC") has promulgated regulations for the proper destruction of "consumer information" for the purpose of preventing "sensitive financial and personal information from falling into the hands of identity thieves or others who might use the information to victimize" people. Consumer information in the employment context includes background check reports obtained from a consumer reporting agency that is stored in either paper or electronic form. The regulations, therefore, apply when an employer sells, donates or otherwise transfers or disposes of computer or electronic equipment that contains consumer information.

When the employer decides to dispose of consumer information, the "Disposal Rule" sets forth safeguards for the proper disposal or destruction of such information. The Disposal Rule requires employers to take "reasonable measures" to prevent unauthorized use of, or access to, consumer information during the disposal or destruction process. Although "reasonable measures" is not specifically defined, acceptable examples include safeguarding paper documents in locked waste bins while waiting burning, pulverizing or shredding through internal or outside processes. A computer system containing consumer information must be professionally wiped clean or destroyed. Under the Disposal Rule, an employer should develop procedures for disposing of consumer information in paper or electronic form.

If an employer wishes to use a third-party disposal service, the employer should engage in due diligence before selecting or continuing to use a disposal company. "Due diligence" may include requiring a certification by a trade association that has reviewed the disposal company's security policies or obtaining references about the company from reliable sources. The employer should include compliance with the Disposal Rule by the disposal company in a written agreement with the disposal service.

Nebraska Court of Appeals Finds Non-Compete Agreement Enforceable Against Former Employee

In C & L Industries, Inc. v. Kiviranta, decided in June 2005, the Nebraska Court of Appeals ("Court") held that an employer's covenant not to compete with a former employee was enforceable. Although a victory for employers, the decision underscores the care an employer must take in drafting non-compete agreements. C & L Industries, Inc. ("C&L") provided recruiting services for companies in the Omaha area. Virginia Kiviranta worked for C&L for approximately 8 years performing recruiting services. Kiviranta signed a covenant not to compete that precluded her, during the period of employment and one year thereafter, from soliciting a client of C&L if the client was one with whom Kiviranta actually did business and had direct personal contact with during her employment. Kiviranta resigned from C&L and went to work for a direct competitor. C&L sued Kiviranta to enforce the post-employment non-compete agreement after it learned she had contacted clients she had serviced while working for C&L.

The trial court found the non-compete agreement was overly broad in that it made no distinction between current or former clients of C&L with whom Kiviranta had personal contact with and that C&L had no legitimate interest in protecting each and every client which Kiviranta had contact with over an approximate 8-year employment period. On appeal, the Court concluded the non-compete was not overly broad and overruled the trial court. In doing so, it noted the well-established Nebraska rule that a covenant not to compete in an employment contract my be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and had personal contact.

The Court rejected the trial court's construction of the term "clients" as overly broad and concluded that the plain meaning of the term "clients" is current, existing clients and that the term does not, without a modifier such as "former" or "future" encompass all clients past, present, or future. The covenant not to compete, therefore, prohibited Kiviranta from soliciting only those business entities which were current or existing clients of C&L at the termination of her employment. The Court also concluded the covenant not to compete was not unduly harsh and oppressive to Kiviranta as she had acquired her only industry knowledge through on-the-job training with C&L, she was 33 years old with no health problems, she testified there were thousands of companies she could solicit on behalf of her new employer, and her new employer would not force her to give up her job if the covenant were enforced.

Bankruptcy *(continued from page 1)*

October 17th, provides creditors with many defenses to a preference action. In the past several years AK&C has successfully defended and settled numerous preference actions on behalf of our clients.

Commercial Real Estate

The BAPCPA includes several provisions that will have an impact on owners of commercial real estate. Most significantly, the BAPCPA will force debtors to make earlier decisions on their real estate needs, before or shortly after filing bankruptcy petitions. An unexpired lease of non-residential real estate will automatically be deemed "rejected" if a debtor fails to file a motion to either assume or reject the lease within 120 days after commencing a Chapter 11 case. The Bankruptcy Court may extend the period, for no more than 90 days, upon a showing of cause; however, further extensions are permitted only if the lessor consents. This amendment will eliminate past debtor practices of keeping a lessor on the hook for one and even two years while it works through its bankruptcy.

This article has touched on only three main areas of the Bankruptcy Code that will be impacted by the BAPCPA. The BAPCPA will also have a significant impact on such areas as statutory liens, labor issues, consumer privacy, health care, utilities and contracts. Some or all of these areas will be addressed in future issues of AK&C's newsletter. Clients are encouraged to contact AK&C when they are faced with bankruptcy issues or have questions about the new rules.