

# WHAT BANKRUPTCY ATTORNEYS NEED TO KNOW ABOUT THE NEW BANKRUPTCY RULES & FORMS

By **Teresa H. Pearson**  
Miller Nash LLP

## INTRODUCTION

**A**long with new bankruptcy code provisions come new bankruptcy rules and forms. After the adoption of BAPCPA, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States began to formulate these new rules and forms. The Judicial Conference of the United States has approved new official bankruptcy forms, which must be used (with appropriate modifications as needed). **FRBP 9009**. Under the Rules Enabling Act, 28 USC §§2071-2077, it usually takes three years formally to adopt new bankruptcy rules. Because there was insufficient time to enact new bankruptcy rules before BAPCPA went into effect, the Rules Committee has promulgated proposed interim rules, with the idea that the bankruptcy courts can adopt the interim rules by general order, and that those interim rules will apply until such time as the new rules can be officially enacted.

In **General Order 05-1**, the Oregon bankruptcy court adopted the national interim rules, and made substantial changes to its Local Bankruptcy Rules. Some of the new rules in General Order 05-1 apply to cases filed before October 17, 2005, some apply to cases filed after that date, and some apply to all cases. In addition to rule changes, the Oregon bankruptcy court made a number of changes to its Local Bankruptcy Forms to accommodate BAPCPA. General Order 05-1 and the new LBFs can be found on the Oregon bankruptcy court's website at [www.orb.uscourts.gov](http://www.orb.uscourts.gov).

The Rules Committee took a minimalist approach, making changes to the rules and forms only where absolutely necessary to comply with BAPCPA. Professor Jeffrey W. Morris, the Reporter for the Advisory Committee on Bankruptcy Rules, has written a helpful memorandum that summarizes by category the changes to the new rules. This memorandum, dated August 5, 2005, is published at [www.uscourts.gov/rules/BK\\_Reporter\\_Memo.pdf](http://www.uscourts.gov/rules/BK_Reporter_Memo.pdf). Clean and redline versions of the rules that have changed are also available at [www.uscourts.gov/rules](http://www.uscourts.gov/rules). Notwithstanding this minimalist approach, there are significant changes of which practitioners should be aware. Some highlights from the new rules follow.

## SIGNIFICANT CHANGES TO CONSUMER RULES

Under BAPCPA, it is now possible for a debtor to file a chapter 7 bankruptcy case in forma pauperis, without payment of a filing fee. **FRBP 1006** was amended to provide a procedure for obtaining fee waivers. **New Official Form 3B** is the application a debtor can use to ask to waive the filing fee.

A number of rules relate to the requirement that the debtor provide additional information under BAPCPA. **FRBP 1007** has been amended to require debtors to file certain financial records, a statement of current monthly income, and documents relating to credit counseling required by BAPCPA with the court. However, the amendments to **LBR 1007** clarify that, in Oregon, some of these documents must only be served on the US Trustee and the case trustee, and **not** filed with the court. **New Official Form 22** is the debtor's statement of current monthly income (the "means test" form), and **new Official Form 23** is the debtor's certification of completion of its postpetition credit counseling requirement. There is a new **LBF 525** that debtors in chapter 12 and 13 cases must use to certify the status of payments on their domestic support obligations. Amendments to **FRBP 4002** set forth the rules for a creditor's request for copies of tax returns from the debtor, and **General Order 05-1** contains further rules on the procedures for such requests. Amendments to **FRBP 4008** relate to the debtor's requirement to provide additional information before a reaffirmation agreement can be approved.

Several new rules implement the BAPCPA changes relating to dismissal and conversion of cases, and withholding the debtor's discharge until specific requirements have been met. **FRBP 1017** has been amended to clarify the rules for dismissal or conversion of a chapter 7 case for abuse under §707(b). **FRBP 4004** provides that the clerk cannot issue a discharge if the debtor has not filed its certificate of completion of its postpetition credit counseling requirement, or if a reaffirmation agreement presumed to be an undue hardship is pending.

Additional changes to the rules require the clerk to provide new notices. **FRBP 4006** now requires the clerk to notify parties in interest if the case is closed without entry of the discharge. **New FRBP 5008** requires the clerk to notify creditors when the presumption of abuse has arisen under §707(b), or if the debtor has failed to file information from which the presumption of abuse can be discerned within 10 days after the petition is filed. Amendments to **FRBP 2002** require the clerk to give notice about the presumption of abuse to the debtor, all creditors, and indenture trustees.

Oregon now has new form plans for chapters 12 and 13. **LBF 1200.5** and **1300.5**. One very significant change under the new form plans is that the debtor may propose treatment that is allowed only if a creditor consents, and the creditor's failure to object to the proposed plan will be deemed to be consent.

## SIGNIFICANT CHANGES TO BUSINESS RULES

BAPCPA imposes a number of new requirements on small business debtors in chapter 11, but it also allows those small business debtors to take advantage of a streamlined plan process. Amendments to **FRBP 1020** set forth the procedures for identifying the debtor as a small business debtor, and the mechanisms for resolving disputes about characterization of the debtor. **Official Form 1** (the petition) has been amended to allow the chapter 11 debtor to check a box if it designates itself a small business debtor. **FRBP 9006** has been amended to recognize BAPCPA's restriction on the bankruptcy court's ability to extend the time for a small business debtor to file its schedules and statements of affairs. The bankruptcy court may conditionally approve a disclosure statement in a small business case pursuant to amendments to **FRBP 3017.1**. **FRBP 3016** has been amended to recognize that a plan may provide adequate information to replace a disclosure statement altogether in a small business case. Amendments to **FRBP 2002**, however, require 25 days notice to parties in interest before the court can make a final determination that a small business debtor's plan does not require a separate disclosure statement.

Changes to BAPCPA make it easier for chapter 11 debtors seeking approval of prepackaged plans. Amendments to **FRBP 2003(a)** implement new **§341(e)**, pursuant to which a party in interest can ask that the **§341** meeting of creditors not occur in the case of a debtor who is seeking approval of a prepackaged bankruptcy plan.

Under BAPCPA, individual debtors in chapter 11 may modify their plans after confirmation. Amendments to **FRBP 3019** provide procedures for such modifications.

## SIGNIFICANT CHANGES TO GENERALLY APPLICABLE RULES

BAPCPA amended **§506** to require that personal property collateral be valued at replacement value. **Official Form 6** has been modified so that the schedules no longer require the debtor to list assets at market value. The schedules no longer specify what type of valuation the debtor must use in its schedules.

BAPCPA amended **§548** to allow the trustee to go back two years to recover fraudulent transfers, rather

than just one year, and to go back ten years to recover a debtor's transfers to a self-settled asset protection trust. **Official Form 7** has been modified so that question 10 on the statement of financial affairs requires debtor to disclose all transfers within 2 years before the petition date, and all transfers to a self-settled asset protection trust within 10 years before the petition date.

A number of changes to the rules are intended to protect the rights of foreign creditors. BAPCPA provides that any notice or procedure shall provide creditors with foreign addresses with such additional time as is reasonable to respond or to file a proof of claim. **§1514(d)**. Amendments to **FRBP 2002** permit the court (*sua sponte* or on motion of a party in interest) to enlarge the time for foreign creditors to respond to notices or to file claims, and/or to require notices to go by additional means (e.g., email). Amendments to **FRBP 3002** provide that if notice of the deadline to file proof of claim was mailed to a creditor at a foreign address, the creditor can move for a 60-day extension. **Official Form 9** (notice of commencement of case) has been modified to notify foreign creditors of these rights.

BAPCPA provides that a trustee can sell personally identifiable information only if it is consistent with debtor's stated privacy policy or if the trustee obtains court approval after a hearing at which a consumer privacy ombudsman can appear and be heard. **§363(b)(1)**. Amendments to **FRBP 2002(c)(1)** require notice of a sale or lease under **§363** of personally identifiable information to state whether the sale is consistent with a policy prohibiting the transfer of that information. Amendments to **FRBP 6004** require that a motion under **§362** to sell or lease personally identifiable information must include a request for a consumer privacy ombudsman, and set forth procedures for appointment of the consumer privacy ombudsman.

Direct appeals from the bankruptcy court to the circuit court of appeals are now allowed under BAPCPA. Amendments to **FRBP 8001** set forth the procedure for obtaining a certification from the bankruptcy court to allow the direct appeal. **FRBP 8003** is amended to clarify the effect of certification when leave to appeal is required under 28 USC **§158(a)** before the appeal may proceed.

## NEW RULES FOR HEALTH CARE BANKRUPTCY CASES

BAPCPA requires appointment of a patient care ombudsman to look out for the interests of patients in health care bankruptcy cases. **New FRBP 1021** sets forth procedures for identifying the debtor as a health care business, and amendments to **FRBP 2007.2** set forth procedures for appointment of the patient care ombudsman.

**Official Form 1** (the petition) now allows the debtor to check a box if it designates itself a health care business. **New FRBP 2015.1** provides rules implementing the ombudsman's duty to report on quality of patient care. **New FRBP 2015.2** provides the procedures the debtor must follow to give notice before transferring patients when closing a health care facility. **New FRBP 6011** describes the procedures a trustee must follow to give notice (by publication and mail) before disposing of patient records.

## CONCLUSION

Extensive changes to the bankruptcy code in BAPCPA have led to significant changes in both federal and local bankruptcy rules and forms. In addition to the changes described above, there are other changes that will undoubtedly affect the practice of bankruptcy law in Oregon. A careful reading of all the new rules and forms is essential!