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## *Kelo et al. v. City of New London* - Takings Law - This Land Is Your Land?

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# *Kelo et al. v. City of New London* – Takings Law - This Land Is Your Land?

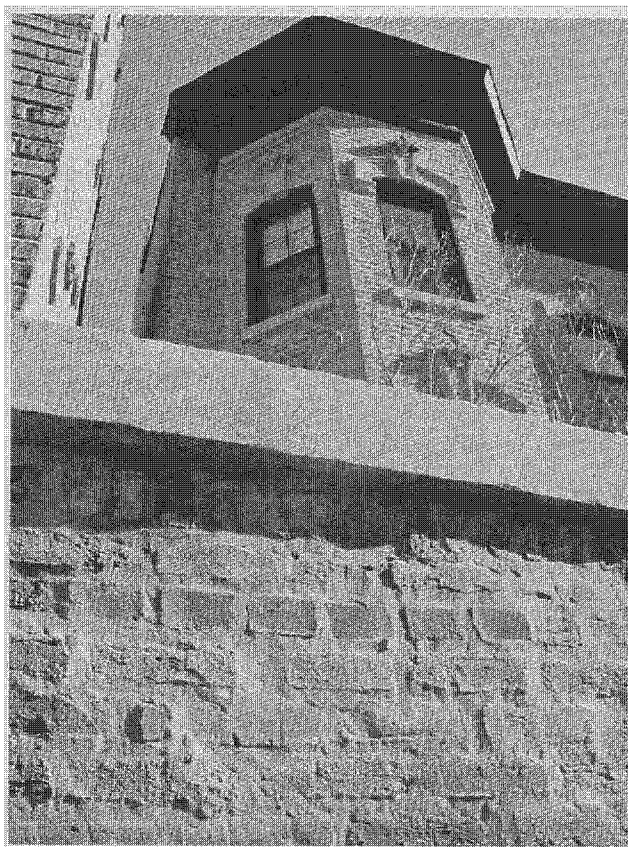
By Ronald S. Cope<sup>1</sup>

Few cases have generated such incredible debate and news media coverage as the recent opinion in *Kelo v. City of New London, CT*.<sup>2</sup> This five to four decision of the United States Supreme Court digs deep into the heart of constitutional law and reflects the very subtle balance of power on the Court. The specific issue presented for review was whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment. For private property owners, this case raises the fear that government may arbitrarily take their land for the benefit of some third party under the guise of a nebulous plan for "economic development." From a municipality's perspective, there is a need to revitalize economically distressed areas, to create jobs and to increase tax revenues. The Court, in reaching its decision, walks a delicate line which attempts to balance the interests of private property as protected by the Constitution with the ever expanding needs of communities to relieve economic stagnation and, in many areas, high unemployment.

## Basic facts

The City of New London ("the City") is located in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate

the City a "distressed municipality."<sup>3</sup> In 1998, the City's unemployment rate was double that of the state average and its population of just under 24,000 was at its lowest since 1920.<sup>4</sup> In order to alleviate these conditions, the New London Development Corporation ("NLDC"), a private non-profit entity, which had been established some years earlier to assist the City in planning economic development, was reactivated.<sup>5</sup> In January of 1998, the state authorized \$15.35 million dol-



*Kelo* may make it easier for local governments to storm your castle.

lars in bonds to support the NLDC's planning activities and towards the creation of a Fort Trumbull State Park.<sup>6</sup> The pharmaceutical company, Pfizer, Inc., announced that it would build a \$300 million research facility on a site immediately adjacent to Fort Trumbull.<sup>7</sup> After receiving approval from the City Council, the NLDC engaged in planning activities including a series of neighborhood meetings to educate the public about the planning process.<sup>8</sup> Upon obtaining state level approval, the NLDC finalized an integrated development plan that focused on 90 acres of the Fort Trumbull area.<sup>9</sup> The plan was designed to capitalize on the arrival of the Pfizer facility and the new commerce it was ex-

pected to attract, as well as to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the parks.<sup>10</sup> The City Council approved the plan in January 2000 and authorized the NLDC to purchase property or to ac-

(*Kelo*, continued on page 15)

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(Kelo, continued from page 14)

quire property by exercising eminent domain in the City's name.<sup>11</sup> The NLDC successfully negotiated the purchase of most of the real estate in the 90 acre area, but its negotiations with Mrs. Kelo and the other Petitioners failed. Consequently, the NLDC initiated condemnation proceedings in November 2000.<sup>12</sup>

One Petitioner, Suzette Kelo, had lived in the Fort Trumbull area since 1997.<sup>13</sup> She had not only made extensive improvements to her house, she prized her home for its water view.<sup>14</sup> Another Petitioner, Wilhelmina Dery, was born in her Fort Trumbull house in 1918 and had lived there her entire life. Her husband Charles (also a Petitioner) had lived in the house since they married some 60 years ago. There was no allegation that any of the properties to be taken was blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.<sup>15</sup> In December 2000, the Petitioners brought action in the New London Superior Court.<sup>16</sup> They claimed, among other things, that the taking of their properties would violate the "public use" restriction of the Fifth Amendment.<sup>17</sup>

After a seven-day bench trial, the Superior Court granted mixed relief, enjoining the taking as to certain properties and allowing it to move forward as to other properties. Both sides took appeals to the Supreme Court of Connecticut.<sup>18</sup> That court held that all of the City's proposed takings were valid.<sup>19</sup> It upheld the lower court's determination that the takings were authorized by Chapter 132, the state's Municipal Development Statute.<sup>20</sup> That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest."<sup>21</sup> The Connecticut Supreme Court, relying on cases such as *Hawaii Housing Authority v. Midkiff*,<sup>22</sup> and *Berman v. Parker*,<sup>23</sup> held that such economic development qualified as a valid public use under both the federal and state constitutions.<sup>24</sup>

### The Majority Decision-Replacing "Public Use" with "Public Purpose"

In order to reach its ultimate determination, the Supreme Court reviewed cases decided towards

the end of the 19<sup>th</sup> Century. Those cases rescinded the earlier "use by the public" test as difficult to administer and, instead, "embraced the broader interpretation of public use as 'public purpose.'"<sup>25</sup> The view, that "public use" as set forth in the Fifth Amendment has been replaced by "public purpose," is central to the Court's decision.

There are three identifiable categories of takings that comply with the "public use" requirement. First, the sovereign may transfer private property to public ownership.<sup>26</sup> This may be the taking of private property for the construction of a road or a municipally owned hospital. Second, the sovereign may transfer private property to private parties, who in turn make the property available for public use.<sup>27</sup> This may be the case with common carriers such as a railroad. Such may also be the case with a stadium open to the general public, but where its construction is financed in part by public funds.

The third category is the more controversial and involves, in certain limited circumstances and to meet certain exigencies, the taking of property to serve a "public purpose" such as the taking in *Berman v. Parker*, which was part of an overall plan to eliminate blight and generally unsafe housing conditions.<sup>28</sup> Even though Mr. Berman's department store was not itself blighted, the United States Supreme Court did not second guess Congress' decision to eliminate harm to the public emanating from a blighted neighborhood by treating the neighborhood as a whole rather than property by property.<sup>29</sup> Because such a taking "directly achieved a public benefit, it did not matter that the property was turned over to a private use."<sup>30</sup>

In the *Kelo* case, however, the City did not claim that any of the properties involved were a source of any social harm. Indeed, Mrs. Kelo's property was a well-maintained home. Here, the taking of private property is predicated upon a "prediction" that a proposed new use would generate some secondary benefit for the public, such as increased tax revenue, more jobs and maybe even aesthetic pleasure. But, as Justice O'Connor warns, "nearly any lawful use of

(Kelo, continued on page 16)

(*Kelo*, continued from page 15)

real property can be said to generate some incidental benefit to the public.”<sup>31</sup>

However, Justice Kennedy’s concurring opinion does point out that if there truly is an elicited purpose of simply taking property from A to give to B, a review of the facts would reveal this unlawful circumstance.<sup>32</sup> While the test suggested by Justice Kennedy is vague, the fact is that in *Kelo* there was a well thought out plan which the municipality was seeking to implement. Indeed, it is clear that without this plan the United States Supreme Court would not have upheld the taking. Justice Thomas’s dissent explains that the majority is saying that a taking will be upheld so long as the purpose is “legitimate” and the means “not irrational.”<sup>33</sup>

The plan in *Kelo*, however, is not without its faults, as it was predicated on the *upgrading* of properties for private and public benefit. The essential problem with this rationale is that there is always the possibility of “upgrading” property. For example, a Motel 6 might be upgraded by replacing it with a Ritz Carlton and certainly any home could be “upgraded” by a shopping mall.<sup>34</sup> Justice O’Connor, in her dissent, pointedly states:

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**Ultimately, while the court disposed of Mrs. Kelo’s arguments, it has not alleviated many people’s concerns as the opinion simply establishes a vague “federal baseline.”**

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Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded – i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public – in the process.<sup>35</sup>

Ultimately, while the Court disposed of Mrs. Kelo’s arguments, it has not alleviated many people’s concerns as the opinion simply establishes a vague “federal baseline.” The majority does state that “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”<sup>36</sup> However, Justice O’Connor points out, that this is an abdication of the United States Supreme Court’s responsibility.<sup>37</sup> It should be noted that the Michigan Supreme Court in the case of *County of Wayne v. Hathcock*,<sup>38</sup> has specifically rejected the economic takings concept, holding that under the Michigan Constitution no such taking was permitted.<sup>39</sup>

Contrary to the principles thought out by the framers of our Constitution, the replacement of the “public use” clause with a “public purpose” clause in *Kelo*, as noted by Justice Thomas, ultimately allows “the Court to hold, against all common sense, that a costly urban renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation is for a ‘public use.’”<sup>40</sup>

### Illinois Takings Law

For practitioners in Illinois, it is important to understand the case of *Southwestern Illinois Development Authority v. National City Environmental, LLC*<sup>41</sup> when studying takings law.

The Southwestern Illinois Development Authority (“SWIDA”), was created in 1987 by the Illinois General Assembly<sup>42</sup> to “promote industrial, commercial, residential, service, transportation and recreational activities and facilities, thereby reducing the evils attendant upon unemployment and enhancing the public health, safety, morals, happiness and general welfare of this State.”<sup>43</sup> The court in *SWIDA* determined whether it had properly exercised the power of eminent domain to take property owned by National City Environmental, LLC (“NCE”) and St. Louis Auto Shredding Company (“St. Louis Auto”) and to convey that property to Gateway International Motor Sports Corporation (“Gateway”).<sup>44</sup>

(*Kelo*, continued on page 17)

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*(Kelo, continued from page 16)*

In June of 1996, SWIDA issued \$21.5 million dollars in taxable sports facility revenue bonds.<sup>45</sup> The proceeds of the bonds were lent to Gateway to finance the development of a multi-purpose automotive sports and training facility in the region.<sup>46</sup> The race track was developed and has flourished.<sup>47</sup> In 1998, Gateway increased its seating capacity and desired to increase its parking capacity.<sup>48</sup> It asked SWIDA to use its quick take eminent domain powers to acquire land to the west of the race track for the purpose of expanding Gateway's parking facilities.<sup>49</sup> The adjacent 148.5 acre tract of land was owned by NCE (collectively with St. Louis Auto).<sup>50</sup> SWIDA proceeded to seek to acquire NCE's property and made a written offer to purchase of \$1 million dollars.<sup>51</sup> After NCE twice declined the million dollar offer, SWIDA instituted a condemnation action.<sup>52</sup>

At trial, testimony was introduced that "the taking was for a public purpose as there were serious public safety issues involved."<sup>53</sup> A witness from the Illinois Department of Transportation testified that the department was working with Gateway to develop a traffic plan that would move traffic in and out of the race track facility, while minimizing impact on the surrounding state and interstate highways.<sup>54</sup> According to this witness, a safety hazard was created because drivers do not normally anticipate stopped traffic on the interstate.<sup>55</sup> The trial court granted the quick take and determined the amount of compensation.<sup>56</sup> An appeal was taken to the Appellate Court which reversed the lower court's decision and an appeal was subsequently taken to the Illinois Supreme Court.<sup>57</sup>

At first, the Illinois Supreme Court reversed the judgment of the Appellate Court. However, upon the grant of a rehearing,<sup>58</sup> the court affirmed the decision of the lower court, holding that the taking violated both the Illinois Constitution (Article 1 §15) and the Fifth Amendment of the United States Constitution.<sup>59</sup> The issue presented was "whether SWIDA exceeded the boundaries of constitutional principles [not stating which Constitution] and its authority by transferring the property to a private party for a profit when the property is not put to a public use."<sup>60</sup> The Court went on to state:

It may be impossible to clearly delineate the boundary between what constitutes a legitimate public purpose and a private benefit with no sufficient, legitimate public purpose to support it. We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.<sup>61</sup>

The Court further concluded that this taking has all the trappings of simply taking property from A in order give it to B with no valid public purpose intervening.<sup>62</sup> Although the Court "recognized that economic development is an important public purpose,"<sup>63</sup> the Court gave some support to those who believe a planned project would survive the Illinois Supreme Court's scrutiny and held that:

While the activities here were undertaken in the guise of carrying out its legislative mission, SWIDA's true intentions were not clothed in an independent legitimate government decision to further a planned public use. SWIDA did not conduct or commission a thorough study of the parking situation at Gateway. Nor did it formulate any economic plan requiring additional parking at the race track. SWIDA advertised that, for a fee, it would condemn land at the request of 'private developers' for the 'private use' of developers ... Clearly, the foundation of this taking is rooted not in the economic and planning process with which SWIDA has been charged. Rather, this action was undertaken solely in response to Gateway's expansion goals and its failure to accomplish those goals through purchasing NCE's land at an acceptable negotiated price. It appears SWIDA's true intentions were to act as a default bro-

*(Kelo, continued on page 18)*

(*Kelo*, continued from page 17)

ker of land for Gateway's proposed parking plan.<sup>64</sup>

The Illinois Supreme Court, based on the particular facts in *SWIDA*, saw an effort to take the property of one legitimate business and give it to another simply because the race track sought to employ *SWIDA* to accomplish what it was not prepared to do, namely negotiate a fair price between competing businesses. The Court also saw that Gateway had an alternative, which was to build a parking garage and thereby alleviate its parking problem. Instead, it sought to employ *SWIDA* as its mercenary to accomplish what it could not do.

Viewed from this perspective, it might well be argued that the Illinois Supreme Court simply decided the case based on its facts and that the decision in *Kelo*, while taking a step beyond *Berman v. Parker*, could well describe the outer limits of the law as it might be applied by the Illinois Supreme Court. The question still remains as to whether in Illinois economic development alone would be considered a valid public purpose under the Illinois Constitution. It certainly has a much better chance of success in an area such as described in the *Kelo* case where there is high unemployment, depressed property values and where the City has taken considerable pains to formulate a plan for redevelopment.

### Conclusions

To protect property, the Fifth Amendment required that the "taking must be for public use" and "just compensation" must be paid. While the issue here is not "just compensation," it is important to remember that the Bill of Rights had, at least in terms of the Fifth Amendment, the protection of minorities who could not protect themselves in the political process against the majority's will.<sup>65</sup>

In the 18<sup>th</sup> century it would have been unthinkable that private property would be taken to benefit the common good as authorized in *Kelo*. The dissenters see the Fifth Amendment protections as those basic to the rights of a minority. It was conceived to

protect that minority, in this case, private property owners, from the will of the majority, as represented here by the City Council of the City of New London. There can be little doubt, however, that with the decision in *Berman v. Parker* and certainly the decision in *Midkiff*, which directly transferred private property to other private individuals simply because it was thought that "too much private property was in the hands of a limited number of private individuals," that there has been a broad leap across a chasm of time between the framing of our Constitution and the social revolution which has taken place during the 20<sup>th</sup> century. Private property is subject to a whole slue of limitations and regulations, including taxation and zoning. The use to which property may be put may be severely limited and still not constitute a taking.<sup>66</sup>

The court in *Kelo* wrestled mightily to find a way to remain within the boundaries of the Bill of Rights with the protections afforded the individual and still provide authority for the city to alleviate economic hardship. In a steady historical progression the property rights of the individual have given way to the felt needs of society. In *Kelo*, there can be no doubt that another step has been taken, to extend the power of the majority through the engine of economic planning. Although the United States Supreme Court refused to adopt a "bright line" rule that "economic development does not qualify as a public use," it is clear that without a showing of "community need" and a well thought out plan, it is likely that not only state courts, but even the majority in *Kelo*, would not permit the taking.

<sup>1</sup> Ronald S. Cope is a partner in the Land and Resources Practice Group of Michael Best & Friedrich LLP. He has been involved in the creation of TIF Districts, the establishment of special assessments, special service areas, the creation of business districts, redevelopment areas and condemnation of land for public use. He has represented many clients, both private and governmental, in land use matters including the creation of Planned Unit Developments, annexations, drafting new zoning ordinances, and planning and funding redevelopment projects and town centers.

<sup>2</sup> 125 S. Ct. 2655 (2005).

<sup>3</sup> *Kelo*, 125 S. Ct. at 2658.

<sup>4</sup> *Id.*

(*Kelo*, continued on page 28)

# New Challenges Following Bankruptcy Reform

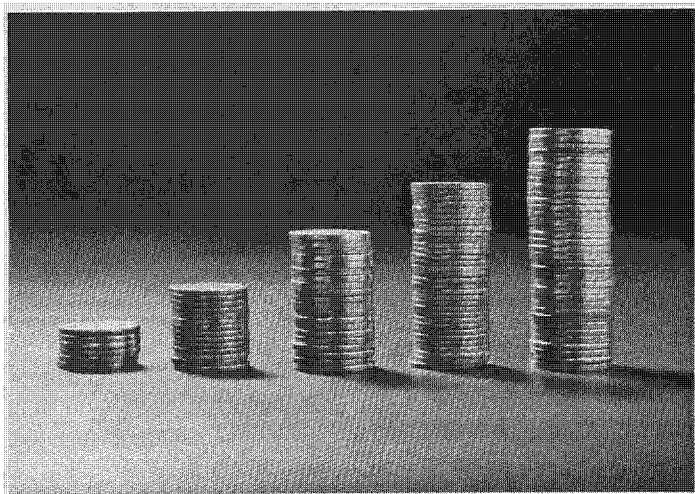
By Jeana Kim Reinbold<sup>1</sup>

Despite the concerns articulated by parties representing both debtors and creditors, and many impassioned debates in the United States Congress,<sup>1</sup> the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”)<sup>2</sup> was finally signed into law. Most of the provisions of the new law took effect on October 17, 2005, representing the most significant overhaul of the bankruptcy laws in the United States more than a quarter of a century. The enactment of the new legislation now presents significant challenges to bankruptcy practice.

## Background and Concerns with BAPCPA

In her testimony before Congress, Professor Elizabeth Warren, a leading opponent of BAPCPA for many years,<sup>3</sup> highlighted the many changes that had occurred on the American economic scene since the proposed bankruptcy reform had first been drafted eight years ago. These changes included the emergence of some of the largest corporate bankruptcy cases in American history, a list not exclusive to companies untainted by corporate scandal, which included once-vaunted names such as Enron, Worldcom and Adelphia.

Warren urged Congress to consider problems not addressed by the bill when it was first written, such as growing corporate abuses with executive compensation at the cost of benefits to ordinary employees, scandals in the non-profit credit counseling industry and the unchecked growth of payday loans, sub-prime mortgage lending and the billion-dollar credit card industries. In addition, she decried the growing problems resulting from the extension of debt to less credit-worthy customers with inadequate disclosure of the pernicious grip of fees, penalties and interest on such debt. Also, she pointed to recent studies that suggested that the majority of persons turning to bankruptcy relief only did so as a last resort, often in the aftermath of financial problems brought about by serious medical problems, job loss or divorce.<sup>4</sup>



New laws have made bankruptcy costlier and more complex.

A wide range of public interest groups similarly opposed the bankruptcy reform.<sup>5</sup> Many bankruptcy judges and academics expressed concerns with the workability of the proposed changes, and questioned the wisdom of reducing incentives to the Chapter 13 system<sup>6</sup> and limiting many of the benefits that existed under the old system. Academics questioned the efficacy of adopting a “means test” that is “unnecessary, over-inclusive, painfully inflexible and costly,” and denounced the adoption of a bill that failed to effectively target the “abuse” it purportedly set out to end.<sup>7</sup> Groups representing attorneys and many state bars expressed grave concern over the harsh new liability standards against bankruptcy attorneys incorporated in the new bill.<sup>8</sup> Consumer groups sounded the alarm in reference to the increased costs and filing burdens upon honest but unfortunate debtors, and the reduction of debtor benefits in bankruptcy while creditor remedies were yet to be expanded.<sup>9</sup>

The bill’s supporters, however, held the view that most Americans who live up to their financial responsibilities pay for those who do not.<sup>10</sup> Supporters also argued that reform was necessary to address the

**(Bankruptcy, continued on page 20)**

**(Bankruptcy, continued from page 19)**

“abuse” that had become rampant in the bankruptcy system. They argued that abuse could best be targeted by the implementation of a “means test,” a provision designed to favor more “high-income” filers with a perceived ability to repay at least some of their debt into Chapter 13 as opposed to Chapter 7. Indeed, congressional supporters believed that the “means test” was the only key change in the bill<sup>11</sup> and the data they relied on indicated that only a very small percentage of filers would be affected by the means test.<sup>12</sup>

Underlying the entire debate were, of course, differing economic opinions. While critics of the bill maintained that Americans should live up to their financial responsibilities to the extent they are able, and repay what they are able to repay, the economic view asserted that there were significant financial losses to businesses and creditors that could not be ignored. Critics of the economic view state, however, that the argument that responsible consumers pay for those who are not rests on faulty assumptions.<sup>13</sup> Indeed, their findings suggest that the events that lead to financial defaults occur regardless of bankruptcy.<sup>14</sup> Following the passage of the new bankruptcy bill, there continue to be unsettled questions regarding claims of irresponsible lending by certain creditors as a major factor in bankruptcy filings,<sup>15</sup> and the effect the legislation will have on individuals, small businesses and future economic growth.<sup>16</sup>

**Addressing Concerns Post-BAPCPA**

BAPCPA’s new means test also ushers in increased paperwork burdens on every person seeking relief under the bankruptcy system.<sup>17</sup> Consumers now filing under Chapter 7 or Chapter 13 will have to demonstrate whether they “pass” or “fail” the means test, substantially document their financial condition and complete credit counseling in order to even become eligible to file the case. Even after the case is filed, debtors will face reduced benefits and increased vulnerability to creditor and trustee actions.

Many of the enhanced requirements for filing a case under Chapter 7 or Chapter 13 are likely to prove an onerous burden for individuals attempting to get a case properly filed in the first place. Formerly, a pro-

spective client could usually just come to a bankruptcy attorney with one or two recent paycheck stubs and a list of bills or pending liabilities, and advise the attorney as to monthly expenses and assets owned to obtain an evaluation of their financial situation. However, post-BAPCPA, even setting aside the new requirement that an attorney conduct a “reasonable investigation” into a prospective client’s affairs subject to possible sanctions,<sup>18</sup> very specific documentation will be required in order to complete the analysis as to whether a person qualifies for Chapter 7 or Chapter 13. As a result, even before the client arrives at the attorney’s office, a client will want to gather at least six (6) months of paycheck stubs, evidence of other income and living expenses and bank statements to enable the attorney to begin the analysis under the means test and initial determination as to whether a bankruptcy might be in the person’s best interest.

Additionally, the client will need to provide a complete list of bills and potential liabilities, including copies of all creditor notices, billing statements received within the past three (3) months, copies of loan documents for real estate, vehicles and purchase money goods, a list of all significant property owned and copies of all insurance policies. Any tax or government debt, or child support owed or paid, also must be specified, as these are liabilities entitled to special treatment under bankruptcy law. This treatment was expanded to benefit these entities under the new law.<sup>19</sup> A recent credit report, property tax bill if applicable and current tax returns are also items likely to be helpful with verifying assets, liabilities, and income. These items will be required in order for an attorney to advise clients of their rights and liabilities properly were they to file bankruptcy. For instance, debtors in bankruptcy must provide enhanced notice to creditors, as specified in the new code, in order for the bankruptcy stay to apply to those creditors.<sup>20</sup> As other examples, vehicles purchased within 910 days of the case will be subject to a provision limiting the extent to which a Chapter 13 debtor can modify the amount owed,<sup>21</sup> and homestead property purchased within 1215 days may require that different exemptions apply in a case.<sup>22</sup> As a result, a client who is unable to provide this kind of information about his financial situation will be dis-

**(Bankruptcy, continued on page 21)**



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### The costs of bankruptcy will increase, if from nothing else, based on the sheer increase in paperwork that will be required under BAPCPA.

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advantaged from the start as he will be unable to receive proper advice from an attorney.

Assuming, however, that a person considering filing bankruptcy has determined that a bankruptcy case would be in his best interest, the person will then need to complete credit counseling in the 180-day period before starting the case. To even be eligible to file a case, an individual is now required to have "received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis."<sup>23</sup> Section 111 outlines the extensive new duties of the bankruptcy clerk and U.S. Trustee in administering and regulating such "nonprofit budget and credit counseling" programs.<sup>24</sup>

There are very limited exceptions to the credit counseling requirement. In attempting to claim an exception, the debtor must successfully present a declaration, claiming the debtor's exigent circumstances, and stating that the debtor requested credit counseling but was unable to obtain the services for five days.<sup>25</sup> This declaration must satisfy the court. Alternatively, persons who are impaired mentally or physically, rendering them unable to be able to complete the credit counseling, might be exempt from this requirement. Debtors who file their cases without completing credit counseling or proving their exception risk having their cases dismissed. Though BAPCPA is still a new law, several bankruptcy cases already have been dismissed by bankruptcy judges due to the failure of the debtor to complete credit counseling prior to the filing of the case.<sup>26</sup>

Chapter 7 and 13 cases are often filed under emergency situations, such as to prevent the foreclo-

sure of a home, a repossession of a car, the shut-off of necessary utilities, the seizure of wages and other assets and the commencement or continuation of judicial processes. As a result, the threshold credit counseling requirement may most directly impact these cases, where this requirement curtails the ability of some of the individuals facing urgent situations to get relief under Chapter 7 or 13 before additional costs have accrued or before it is too late to stop the threatening proceeding.

Low-income clients, in particular, may be more prone to waiting too long to address a serious situation due to lack of understanding or means and thus will be adversely affected by this provision. Attorneys will need to work efficiently and creatively to help their clients receive meaningful credit counseling, while still effectively assisting their time-stressed clients in getting relief in a bankruptcy case if appropriate.

After the completion of the credit counseling, a person seeking to start her case will face further documentation hurdles. The list of items required both initially and over the course of the bankruptcy proceeding has been expanded significantly under BAPCPA. First, every Chapter 7 and Chapter 13 debtor must now also complete the appropriate version of Form B22, "Statement of Current Monthly Income and Means Test Calculation," which will detail the means test analysis.<sup>27</sup> The burden of completing these forms will depend on the complexity of the case. For instance, a debtor filing Chapter 7 who has a median income below the state median for his household will typically only have to complete the first 15 of the 56 questions, in addition to the verification in question 56. On the other hand, the Chapter 7 debtor who will need to prove special circumstances to bring him below the allowed median amount will likely have to complete all 56 questions. These forms, in addition to other new and revised official forms, can be found at <http://www.uscourts.gov/rules/interim.html>.

In addition to the petition, the debtor must now file: (i) a certified statement by the attorney or debtor that the notice required under the amended Section 342(b) of the Code was received by the debtor; (ii)

(Bankruptcy, continued on page 28)

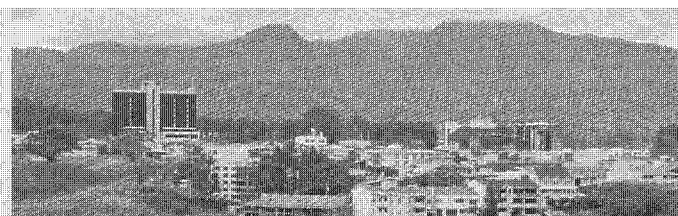
## The Central American Free Trade Agreement: Free Trade or Do Women Pay the Price?

By Andrea Hunwick

The Central American Free Trade Agreement (“CAFTA”), a proposal for free-trade between the United States and five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua) and the Dominican Republic was signed by President George Bush on August 2, 2005, and will go into effect in January of 2006.<sup>1</sup> Since 2002, President Bush has aggressively promoted this comprehensive agreement while Congress approved “fast track” provisions to speed up negotiations.<sup>2</sup> Likewise, many groups have aggressively opposed the treaty, including many who view it as a detriment to the already fragile rights of women in Central America.

CAFTA is modeled after NAFTA, and focuses in large part on the import and export of agricultural and textile goods and business. Bush considers CAFTA a vital piece in his plan for global trade, and for several years he has been promoting the reciprocal benefits he expects both sides will realize under CAFTA.<sup>3</sup> In May of 2005, Bush said in support of CAFTA:

CAFTA brings benefits to all sides. For the newly emerging democracies of Central America, CAFTA would bring new investment that means good jobs and higher labor standards for their workers. Central American consumers would have better access to more U.S. goods at better prices. And by passing this agreement, we would signal that the world’s leading trading nation was committed to a closer partnership with countries in our own backyard, countries which share our values.<sup>4</sup>



In San Jose, Costa Rica, many people do not know what to expect from CAFTA.

The biggest domestic proponents of CAFTA consist of more than 80 crop and livestock groups including the National Corn Growers Association (“NCGA”), the American Soybean Association (“ASA”), and the National Cotton Council (“NCC”). NCGA president Leon Corzine believes that CAFTA is beneficial for U.S. agriculture because U.S. agricultural products currently face high tariffs in Central America and the Dominican Republic, and CAFTA would make more than 80 percent of U.S. exports duty free immediately.<sup>5</sup> After CAFTA, Corzine states that these products will become duty free, thus, increasing U.S. agricultural profits by an estimated 1.5 billion dollars annually.<sup>6</sup>

Furthermore, Commerce Secretary Carlos Gutierrez and U.S. Trade Representative Robert Zoellick have been advocating the ratification of CAFTA to businesses. Gutierrez believes that it exemplifies “free and fair trade,” which “lifts people out of poverty, creates jobs, and creates growth.”<sup>7</sup> He describes CAFTA as a “win/win” for everyone involved, an agreement that will promote freedom and democracy.<sup>8</sup> Similarly, Zoellick believes CAFTA will improve business in both Central America and the United States. “[CAFTA] will solidify and create new opportunities to sell to the largest market in the world,” he said.<sup>9</sup>

Opponents to CAFTA, however, believe that either Central America or the United States may be on the losing end of a flawed bargain. Some claim CAFTA poses a threat to the U.S. sugar industry and will have an overall negative impact on U.S. jobs.<sup>10</sup> Additionally, others are concerned about the negative effects that CAFTA will have on impoverished Central American nations.

(CAFTA, continued on page 23)