Public Interest Law Reporter

Volume 10
Issue 3 *Winter 2005*

Article 11

2005

New Challenges Following Bankruptcy Reform

Jeana Kim Reinbold

New Challenges Following Bankruptcy Reform

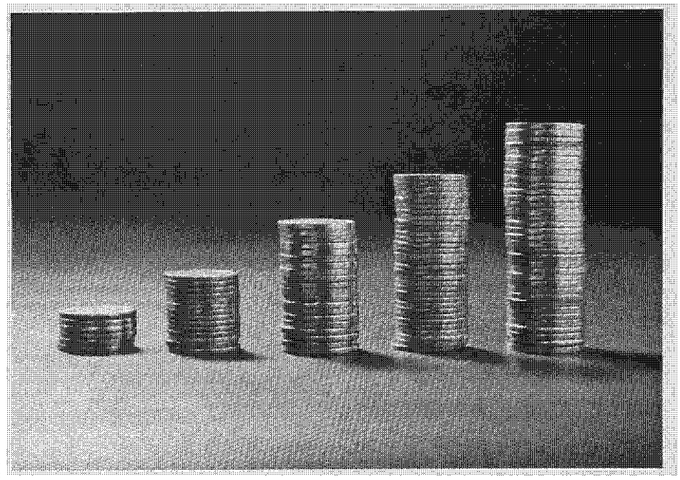
By Jeana Kim Reinbold[1]

Despite the concerns articulated by parties representing both debtors and creditors, and many impassioned debates in the United States Congress,[1] the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA")[2] 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,[3] 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 creditworthy 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.[4]



New laws have made bankruptcy costlier and more complex.

A wide range of public interest groups similarly opposed the bankruptcy reform.[5] 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[6] 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.[7] Groups representing attorneys and many state bars expressed grave concern over the harsh new liability standards against bankruptcy attorneys incorporated in the new bill.[8] 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.[9]

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

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(**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[11] and the data they relied on indicated that only a very small percentage of filers would be affected by the means test.[12]

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.[13] Indeed, their findings suggest that the events that lead to financial defaults occur regardless of bankruptcy.[14] 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,[15] and the effect the legislation will have on individuals, small businesses and future economic growth.[16]

Addressing Concerns Post-BAPCPA

BAPCPA's new means test also ushers in increased paperwork burdens on every person seeking relief under the bankruptcy system.[17] 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 prospective 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,[18] 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.[19] 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.[20] 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,[21] and homestead property purchased within 1215 days may require that different exemptions apply in a case.[22] As a result, a client who is unable to provide this kind of information about his financial situation will be dis-

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

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

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."[23] 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.[24]

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.[25] This declaration must satisdfy 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 a 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.[26]

Chapter 7 and 13 cases are often filed under emergency situations, such as to prevent the foreclosure 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.[27] 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*)

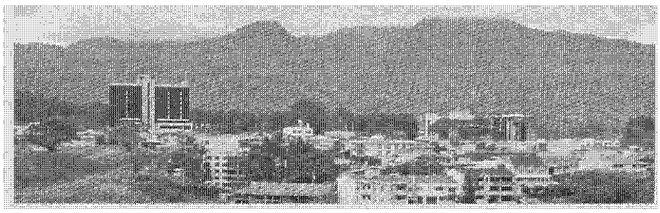
The Central American Free Trade Agreement: Free Trade or Do Women Pay the Price?

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.[1] Since 2002, President Bush has aggressively promoted this comprehensive agreement while Congress approved "fast track" provisions to speed up negotiations.[2] 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.[3] 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.[4]



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.[5] 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.[6]

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."[7] He describes CAFTA as a "win/win" for everyone involved, an agreement that will promote freedom and democracy.[8] 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.[9]

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.[10] Additionally, others are concerned about the negative effects that CAFTA will have on impoverished Central American nations.

(**CAFTA**, *continued on page 23*)

(**CAFTA**, *continued from page 22*)

Indeed, CAFTA's controversial nature is exemplified by the congressional vote, which was very close with a final vote of 217 to 215 in favor of ratifying CAFTA.[11] Minority House Leader Nancy Pelosi (D-Calif.), an opponent to CAFTA, described the voting floor during the ratification of CAFTA as very similar to a "Let's Make a Deal set."[12] When the initial fifteen minute voting period expired, legislators actually defeated CAFTA by a vote of 180-175. However, the vote was held open for an extra forty-seven minutes until, as challengers to CAFTA claim, Republicans could "wrestle" the necessary votes.[13]

Lori Wallach of Public Citizen's Global Trade Watch considers CAFTA "the cancer on democracy."[14] Wallach argues that proponents of CAFTA fail to acknowledge the devastating effect it might have for people in Central America and the Dominican Republic. She says:

> The provisions [of CAFTA] are very clear: People with HIV and AIDS who need medicine, who use generics will die now, because they will not get generic drugs because this agreement takes away the ability to produce generic drugs. People in Central America who rely on essential public services, their drinking water, electricity, education, or for instance in Costa Rica, the whole tele-communications system, has to be privatized and deregulated under this agreement.[15]

In an official statement against CAFTA, the Women's Edge Coalition ("WEC") stated "[w]e support trade agreements that are fair and help reduce poverty, that's why we OPPOSE CAFTA."[16] Both the WEC and Representative Marcy Kaptur (D-Ohio) believe that CAFTA will have disproportionately negative effects on Central American women.[17]

There are several reasons why groups focus on Central American women. First, women head eight to ten million rural households throughout Central America and largely depend on small family farms.[18] Opponents believe CAFTA will crush the agricultural sector in Central America and force thousands of people into the urban marketplace.[19] CAFTA promotes cash crop for export rather than local consumption, which will likely harm women farmers who will be unable to compete locally with imported U.S. subsidized foods and will ultimately be pushed out of the agricultural market.[20]

Such will be the case for women farmers at ANDAR, a Costa Rican sustainable living community that adamantly opposes CAFTA. ANDAR is a community-run organization that gives impoverished women their own sections of farmland and teaches them how to cultivate in hopes that they may lead more self-sufficient lives.[21] ANDAR has had great success in educating women farmers; however, ANDAR relies on the sale of its excess crop in order to continue farm operation and believes that U.S. subsidized products will drive them out of business.[22]

Citing CAFTA's resemblance to NAFTA, the WEC notes that following the implementation of NAFTA, poverty increased by 50 percent for female-headed rural households who fell behind in the transition process brought on by NAFTA. The WEC and other adversaries expect the consequences of CAFTA to be at least as detrimental to women of Central America, if not more.[23]

In addition to uprooting rural agricultural communities, CAFTA also threatens the livelihoods of many indigenous women, who make up roughly 70 percent of artisans and craftspeople throughout Central America. According to the WEC, the "intellectual property rights" section of CAFTA permits corporations to patent indigenous designs used on ceramics, woven items and other crafts without compensating the indigenous communities.[24] Furthermore, it allows pharmaceutical companies to patent medicinal plants that indigenous women have been harvesting for centuries.[25]

Opponents believe that CAFTA will force many women into the cities, where they will likely have to take jobs in sweatshops, working long hours for minimal pay. Under NAFTA, over a million and a half peasants were forced off their land and forced to migrate to the cities.[26] Further complicating these women's futures is the fact that Central American laws afford urban workers very few rights, and the few laws that are enforced provide minimal protection. For

(**CAFTA**, *continued on page 31*)

Federal and State Laws Improve Sex Offender Registry

By **Andrea Binion**

On September 14, 2005, the U.S. House of Representatives passed the Children's Safety Act of 2005[1] in an effort to protect more children from the psychological and physical damage that associated with being a victim of sexual assault.[2] The Act is expected to easily pass in the Senate, since few issues garner as much widespread support as those involving the safety and protection of children.[3]

Congress acted in response to concern over the amount of exposure sex offenders have to children. According to the U.S. Department of Justice, 67 percent of the victims of sexual assault are younger than 18 years old and 34 percent of victims are younger than 12 years old.[4] The National Center for Missing & Exploited Children ("NCMEC"), an organization advocating improved child protection laws, proclaims sexual assault to be a desperate issue for children because these offenses are associated with a great risk of long-term psychological harm for the victim.[5]

State and federal officials hope their recent efforts will protect more children from the disturbing and damaging effects of sexual assault by improving the sex registry systems that work to keep track of these offenders after they leave prison.[6]

The NCMEC has identified some of the major loopholes in the present child sex offender registry laws. Studies have shown that there are increasing numbers of "lost" sex offenders - those who fail to comply with registration duties and remain undetected due to law enforcement's inability to track their whereabouts.[7] Of the 550,000 registered sex offenders nationwide, at least 100,000 of those offenders are now lost or unaccounted for.[8] Among the reasons for losing sex offenders: general mobility of society, stereotypical personality type of sex offenders as loners, and the specific efforts of convicted sex offenders to "forum shop," or research which states have lenient laws, and choose those communities where it is easier to live in relative anonymity.[9] Because states are free to create their own registration and notification procedures, the requirements in each state are quite different.[10]

Child advocates, including the NCMEC, have recommended changes to the registry system that would enable easier coordination among the people charged with protecting children.[11] Advocates have called for federal funding to assist states in maintaining and improving the sex offender registration and notification programs with the desired result being more consistency and uniformity among the state programs.[12]

The NCMEC is also in favor of new technology that would be developed for tracking offenders and improving communication between and among various agencies (law enforcement, corrections, courts and probation).[13] The Children's Safety Act of 2005 attempts to close some of the loopholes cited by the NCMEC and other child advocates with multiple new registry requirements and increased criminal penalties.[14] The Act proposes a comprehensive, national system for sex offender registration that would eliminate the inconsistencies that come with having so many separate state systems.[15] The national Web site will contain information about all sex offenders in all states and any changes in registry information will be immediately communicated and electronically transmitted to all states.[16] The Act will expand the amount of information required on the national registry to include license plate and vehicle information, along with information about each offender's DNA.[17]

The Children's Safety Act of 2005 was introduced by Rep. Jim Sensenbrenner (R-Wis.) with one of its main provisions mirroring a Wisconsin state law, where juveniles who commit sex crimes against children are placed on sexual offender registries along with other convicted sex offenders.[18]

Persons convicted in foreign countries for crimes against children also will have to register, as will persons convicted of possession of child pornography.[19] All offenders with felony convictions will be forced to comply with lifetime registration.[20]

Under the Child Safety Act, offenders must complete initial registration before they are released from prison as opposed to after being released, which is the current procedure.[21] Offenders must then verify registry information in person every six months and must notify law enforcement within five days of any

(**Sex Offender Registry**, *continued on page 25*)

(**Sex Offender Registry**, *continued from page 24*)

change.[22] Offenders will also face increased penalties (a state or federal felony) for failing to register or verify their information.[23] An interesting addition to the sex offender laws is a three-year pilot program in 10 states that will integrate electronic monitoring into the registry program.[24]

These new requirements are being hailed as great improvements to the system, but it will take time to implement these changes assuming quick passage of the Children's Safety Act of 2005 in the Senate. Fortunately, there are other efforts being made to improve the abilities of law enforcement to protect the safety of children. U.S. Attorney General Alberto Gonzales announced on September 26, 2005 that awards of $26 million will be allocated to state agencies to help the agencies link to national criminal record systems maintained by the FBI.[25] Better integration of the federal criminal databases will allow law enforcement to more effectively organize their child protection efforts.[26]

The federal government first addressed concerns regarding sex offenders in 1994 with the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Act ("Wetterling Act").[27] The Wettlerling Act mandated that every state have a sex offender registry or forfeit 10 percent of federal funds for state and local law enforcement under the Byrne Grant Program.[28] Before this law took effect only five states required convicted sex offenders to register their addresses with local law enforcement; today, all 50 states have sex offender registries.[29] While the registries provided law enforcement officials knowledge of the whereabouts of convicted sex offenders, the public was not provided with this information until federal law mandated state community notification programs. In 1996, the Wetterling Act was amended to include Megan's Law, which required all states to create Internet sites containing state sex offender information.[30] This initiative advanced child protection goals, but some child advocates criticized Megan's Law, because, apart from the required Internet site, it did not set out specific methods of communication between law enforcement.[31] The states also were given broad discretion in creating their own policies.[32] Communities are at a great disadvantage if the whereabouts of convicted sex offenders are not known because, of all criminals, sex offenders represent the highest risk of repeat offenses.[33]

States are also doing their part to protect children from sex offenders. Illinois provides a good example of the national trend of states providing for increased child protection from sex offenders.[34] The Illinois Attorney General's Office led an effort to create the Illinois Sex Offender Registration Team (I-SORT), which was established in December 2003.[35] I-SORT has recently improved Illinois' sex offender registry by including a Spanish translation and a new label clearly identifying offenders as "sexual predators," those sex offenders who are judged to be the most dangerous to the community and are required to register for life.[36] I-SORT also has enhanced the Web site by including information on the criminal history of registered offenders, as well as information on whether the offenders are compliant with the registry laws.[37]

Sharon Hurwitz, Executive Director of Court Appointed Special Advocates ("CASA") for Children in Illinois, expressed approval for the recent Illinois initiatives aimed at protecting children.[38] "Any program that provides for greater protection of children is desperately needed and appreciated because the Illinois Department of Children and Family Services estimates that more than 8,000 children are sexually abused every year in Illinois," Hurwitz said.[39]

In response to these disheartening statistics, Illinois Gov. Blagojevich signed a bill in the summer of 2005 that created lifetime supervised parole for sex offenders.[40] The state has also launched an aggressive sex offender management plan that will include more parole agents and support staff to expand the monitoring of sex offenders.[41] The Illinois Department of Corrections will also implement a Global Positioning System and use satellite technology to track movement of parolees.[42]

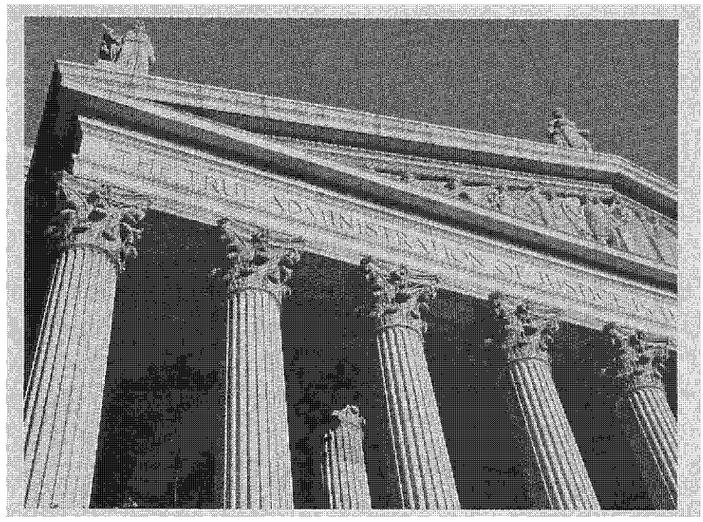
Along with improving the sex offender registry and sex offender management plan, Illinois recently has launched the nationally recognized Child Lures Prevention Initiative, which teaches parents and children to recognize potential danger signs and make smart decisions to avoid child predators.[43] The programwill help protect children against predatory crime.[44]

(**Sex Offender Registry**, *continued on page 32*)

Supreme Court Says no Federal Guarantee of Protection

By **Shauna Coleman**

In a landmark decision, the Supreme Court held in *Town of Castle Rock v. Gonzales*[1] that federal law provides no guarantee of a specific police response to domestic violence complaints, even when a restraining order has been issued against a potential perpetrator. The decision stemmed from allegations by a woman in Colorado that the police failed to make a serious effort to enforce a restraining order against her estranged husband, who then killed their three daughters before being fatally shot by the police.[2] The U.S. Supreme Court ruling protected the city of Castle Rock from a potential $30 million lawsuit resulting from the police officers' failure to enforce the restraining order.[3]



The Supreme Court's ruling in *Gonzales* may have serious consequences for those seeking protection.

Jessica Gonzales, the respondent in *Gonzalez* had obtained a domestic abuse restraining order against her husband.[4] Several weeks after Gonzales obtained the order, Gonzales' husband took her three daughters, in violation of the protective order, while they were playing outside their home.[5] Gonzales called the Castle Rock Police Department four times requesting that the restraining order be enforced. She was told to wait for an officer to arrive, but when no one came, she went to the police station and submitted an incident report.[6] Later that night, Gonzales' husband arrived at the police station and opened fire using a semiautomatic handgun he had purchased earlier that evening.[7] Police returned fire and killed him.[8] After the gunfire, the officers inspected the cab of his pickup truck, found the bodies of all three of Gonzales' daughters and discovered that Gonzales' husband had murdered them.[9]

Gonzales then brought a civil rights action under 42 U.S.C. § 1983, claiming that Castle Rock had violated the Due Process Clause because its police department had "an official policy or custom of failing to respond properly to complaints of restraining order violations" and "tolerate[d] the non-enforcement of restraining orders by its police officers."[10] Before answering the complaint, Castle Rock filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[11] The District Court granted the town's motion, concluding that, whether construed as making a substantive due process or procedural due process claim, respondent's complaint failed to state a claim upon which relief could be granted.[12]

A panel of the Court of Appeals affirmed the rejection of a substantive due process claim, but found that respondent had alleged a cognizable procedural due process claim.[13] On rehearing *en banc*, a divided court reached the same disposition, concluding that respondent had a "protected property interest in the enforcement of the terms of her restraining order" and that the town had deprived her of due process because "the police never 'heard' nor seriously entertained her request to enforce and protect her interests in the restraining order."[14]

The Supreme Court overruled the 10th Circuit Court of Appeals' decision, and held that for purposes of the Due Process Clause, Gonzales did not have a property interest in police enforcement of the restraining order against her husband, even though the police officers had probable cause to believe it had been violated.[15] The Supreme Court reasoned that the Due Process Clause's procedural component does not protect everything that might be described as a government benefit.[16] Rather, the Court maintained,

(**Federal Guarantee**, *continued on page 27*)

(**Federal Guarantee**, *continued from page 26*)

to have a property interest in a benefit, a person must have a legitimate claim of entitlement to it.[17] A benefit is not a protected entitlement if officials have discretion to grant or deny it.[18] Justice Scalia resolved that, in this case, state law did not truly mandate that such enforcement was mandatory, and, as such, Gonzales did not have a claim of entitlement.[19]

Further, the Colorado statute did not require officers to arrest the perpetrator, but only to seek a warrant.[20] This, however, would give Gonzales an entitlement to nothing but procedure, which cannot be the basis for a property interest.[21]

Many local governments see this decision as a victory for cities and states. According to Michael T. Jurusik, a local government attorney with Klein, Thorp and Jenkins, Ltd., "the Supreme Court's decision in Gonzales, while unfortunate, ultimately preserves the principle of law enforcement discretion." He maintains that,

> A decision that upheld the Tenth Circuit's ruling would have put the police in an impractical and virtually impossible situation. Police officers are regularly called upon to make judgment calls, and if Gonzales had succeeded, police officers would be second-guessed each and every time they did not enforce an order the way someone wanted.[22]

Similarly, Attorney Thomas S. Rice, of Senter Goldfarb & Rice, LLC, counsel for Castle Rock in *Gonzales* doubts this decision will lead to increased violence. Further, Rice doubts "that [the decision in *Gonzales*] will result in any decrease in persons seeking these types of orders. In fact, the police provide excellent services with respect to these orders and they continue to be sought in great numbers."[23]

In contrast, the National Network to End Domestic Violence and the American Civil Liberties Union ("ACLU"), both of whom filed *amicus* briefs in this case, were disappointed by the U.S Supreme Court's decision.[24] The ACLU views the Supreme Court's ruling as undermining the protection that victims of domestic violence seek from protection orders.[25] The ACLU strongly believes that police departments must be held accountable for complying with mandatory arrest laws and enforcing orders of protection.[26] Lenora Lapidus, Director of the ACLU Women's Rights Project, said that "without systems of accountability in place, women and children are subjected to the whims of local police departments and may suffer grievous harm."[27]

This decision also affects other cases where restraining orders are vital, such as in elder abuse cases. The American Association of Retired Persons ("AARP") filed a brief[28] in *Gonzales* stressing the need for enforcement of protective orders in elder abuse cases involving instances of physical harm.[29]

AARP stated that the decision not to enforce a protective order can have a profound effect on elder abuse and the life of an older person.[30] Repeated violence, physical harm and possibly death can occur as a result of elder abuse as many older people are unable to take measures to prevent physical abuse.[31]

Despite the fact that this ruling does not strengthen the position of those that need restraining orders, the ACLU believes that the Supreme Court's decision does not alter or weaken existing state laws regarding mandatory or presumptive arrest, pointing to Justice Scalia's own words in the majority opinion.[32] Justice Scalia explicitly states that the ruling "does not mean states are powerless to provide victims with personally enforceable remedies ... the people of Colorado are free to craft such a system under state law."[33] The ACLU hopes that this ruling will push state legislatures to pass laws that will hold police accountable for taking protection orders seriously.[34] The ACLU Women's Rights Project now strongly urges state legislatures to act immediately to protect women and their families from harm.[35]

Domestic violence laws in Montana and Tennessee are considered good examples of how states can create legal mechanisms that protect victims and ensure that police departments are accountable for enforcing the law. The Montana Supreme Court has

(**Federal Guarantee**, *continued on page 33*)

(**Kelo**, *continued from page 18*)

[5] *Id.* at 2659.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 2659-60.
[12] *Id.* at 2660.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Conn. Gen. Stat. §8-186 *et seq.* (2005).
[21] 268 Conn. at 18-28, 843 A.2d at 515-21.
[22] 467 U.S. 229 (1984).
[23] 348 U.S. 26 (1954).
[24] 268 Conn. at 40, 843 A.2d at 527.
[25] *See Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 112, 158-64 (1896); *Strickley v. Highland Boy Gold Min. Co.*, 200 U.S. 527, 531 (1906).
[26] *Kelo*, 125 S. Ct. at 2673. (O'Connor, J., dissenting.)
[27] *Id.* at 2673. (O'Connor, J., dissenting.)
[28] *Id.; Berman,* 348 U.S. at 34.
[29] *Kelo*, 125 S. Ct. at 2673. (O'Connor, J., dissenting.)
[30] *Id.* at 2674. (O'Connor, J., dissenting.)
[31] *Id.* at 2675. (O'Connor, J., dissenting.)
[32] *Id.* at 2669-70. (Kennedy, J., concurring.)
[33] *Id.* at 2677. (Thomas, J., dissenting.)
[34] *Id.* at 2676. (O'Connor, J., dissenting.)
[35] *Id.* at 2671. (O'Connor, J. dissenting.)
[36] Id. at 2668.
[37] *Id.* at 2677. (O'Connor, J. dissenting.)
[38] 471 Mich. 455, 684 N.W.2d 765 (2004).
[39] *See also* D. Berliner, Public Power Private Gain: A Five Year, State by State Report Examining the abuse of Eminent Domain, Institute for Justice (Apr. 2003), http://www.castlecoalition.org/pdf/report/ed_report.pdf.
[40] *Kelo*, 125 S. Ct. at 2677-78. (Thomas, J., dissenting.)
[41] 768 N.E.2d 1, 199 Ill.2d 225, 263 Ill. Dec. 241 (Apr. 4, 2002) (hereinafter "*SWIDA*").
[42] 70 ILCS 520/1 et seq. (Stat. 1998).
[43] 70 ILCS 520/2(g) (Stat. 1998); *SWIDA*, 199 Ill.2d at 227.
[44] *SWIDA*, 199 Ill.2d at 227.
[45] *Id.* at 228.
[46] *Id.*
[47] *Id.* at 229.
[48] *Id.*

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copies of all payment advices or other evidence of payment received within the 60 days prior to the filing date of the petition;[28] (iii) a statement of the amount of monthly net income, showing how the amount is calculated and (iv) a statement disclosing any reasonably anticipated increases in income or expenditures over the 12-month period following the filing of the petition.[29] The penalty for not filing these items is dismissal, unless an extension is requested and granted within 45 days.[30] Also, the following additional items are required to be filed with the court: a certificate from the nonprofit budget and credit counseling agency that provided the debtor with the services required under Section 109(h) prior to the filing of the case and a copy of any debt repayment plan developed through the agency.[31]

Significantly, BAPCPA now requires the provision and/or completion of tax returns during both Chapter 7 and Chapter 13 proceedings. In either a Chapter 7 or Chapter 13 case, a tax return or transcript for the most recent tax year must be provided to the trustee, and to any creditor who requests it, by seven days before the date first set for the meeting of creditors required under Section 341(a).[32] The new code provides that court shall dismiss the case if this is not done.[33] Further, a party in interest or the court can request copies of tax returns or amendments that come due or are completed while a case is proceeding,[34] and also specifically allows for a taxing authority to request an order converting or dismissing the case if tax returns that come due are not filed.[35]

The tax burdens upon a Chapter 13 debtor are significantly expanded. Chapter 13 debtors will need to file with all appropriate tax authorities any unfiled tax returns due for taxable periods over the four-year period ending on the date the petition is filed by the day before the first date of the Section 341(a) meeting of creditors.[36] While the trustee can hold the meeting period open for a reasonable period up to 120 days to allow the debtor to get the returns required filed,[37] it seems that the pressure will be on the Chapter 13 debtor to get this done, as a new Section 1325(a)(9) also specifies that all returns required

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under this section must be filed in order for a Chapter 13 plan to be approved by the court. Further pressure also could be found from a party in interest or the U.S. Trustee, who could ask the court to dismiss or convert a case to Chapter 7 if any of the specified returns are not filed.[38] Chapter 13 debtors will also be subjected to increased ongoing scrutiny and will need to file annual statements of the income and expenditures.[39]

As should be apparent, the costs of filing bankruptcy will increase, if from nothing else, based on the sheer increase in paperwork that will now be required under BAPCPA. Financially stressed or low-income persons who have endured divorce, illness or natural disaster-or any other situation in which they may not have kept complete records still will be subject to these requirements. It will be no small challenge to assist persons with bad or missing records to gain relief under the new law, which is no longer discretionary and not easily waived. It will be incumbent upon attorneys who intend to continue to represent consumers in bankruptcy to familiarize themselves with the changes and explore technology and new creative ways of assisting and motivating potential clients.

While the costs of filing for both types of bankruptcy have increased, the costs under Chapter 13 have been most significantly impacted. It will be more difficult and costly for individuals filing under Chapter 13 to properly get the case filed, get a plan confirmed or be relieved of certain debts. This is a curious and unfortunate result, particularly if the goal of Congress was to encourage more persons to try Chapter 13,[40] which is a voluntary repayment plan through the court.

Some of the major changes in the Chapter 13 scheme include: changes to the mandatory length of plan, depending upon the amount of "disposable income" a person has available as defined by the new code;[41] greater amounts required to be paid for secured collateral desired to be retained[42] and the reduced scope of debts which can be discharged in a Chapter 13 case.[43] In a Chapter 13 case, persons above the applicable median income will now also arguably be required to propose a five-year plan.[44] This will be a problem for persons who have recently lost a job or a source of income, yet find themselves ensnared in a higher median income category that may disqualify them from the means test. The terms "current monthly income" and "disposable income" do not any longer have the commonly understood meaning. Rather, current monthly income now means the total sum of the past six months income from all sources, divided by six.[45] On the other hand, if that person elects to file Chapter 13, the person will still be looking at long term plan.

Another change involved in Chapter 13 will be greater amounts to be paid for secured collateral desired to be retained. Formerly, a Chapter 13 debtor could take a debt, such as that for a car loan, and propose to pay through the plan a differing amount due, typically less, than that due under the car contract. This right has been restricted. Under new confirmation requirements, it is now required that, unless otherwise agreed, the plan allow the lienholder to retain the lien to the vehicle until the amount due under the contract is paid or the case is completed,[46] provide special payments of "adequate protection" to the lienholder[47] and propose to pay at least "replacement value," an amount costlier than the actual "fair market value" of an item, plus interest.[48] A new paragraph after section 1325(a)(9) further restricts "cramdown" of claims for vehicles purchased within the 910-day period prior to the filing of the case or purchase money goods purchased within one year.[49]

Finally, the value of the discharge in Chapter 13 cases has been scaled back and been made less effective.[50] For certain debtors, this may reduce the incentive for completing or filing a Chapter 13 case. Previously, the one of the great incentives for completing a Chapter 13 was found in the broader discharge of debts granted under Section 1328(a), compared to the more limited discharge of debts under Chapter 7, Chapter 11, Chapter 12 or in a hardship situation in Chapter 13. The categories of debts now discharged under the amended Section 1328(a) has been significantly expanded to exclude many other debts from discharge, making a Chapter 13 discharge much more similar to the discharge received in Chapter 7. Persons who may have debts excepted from discharge will want to investigate the new Section 1328(a) carefully prior to filing their cases.

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(**Bankruptcy**, *continued from page 29*)

Costly Changes, But New Opportunity

While the changes are costly, the silver lining in BAPCPA is that the changes will likely cause attorneys to take a good hard look at their practices. It was difficult before, but with the passage of BAPCPA it has become nearly impossible to navigate all the complex new provisions of the bankruptcy code without an attorney. Post-BAPCPA, attorneys have become more important than ever and must become willing to rise to the challenges.

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[1] Jeana Kim Reinbold worked as a private attorney specializing in bankruptcy cases with the law firm of Joseph Wrobel, Ltd. in Chicago, Illinois before relocating to Boston, Massachusetts. She will work as a law clerk for a judge with the U.S. Bankruptcy Court for the District of Massachusetts in Boston from 2006-2007.

[2] A discussion of the legislative history behind bankruptcy reform can be found in Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L. J. 485 (2005).

[3] Pub. L. No. 109-8, 119 Stat. 23 (to be codified in 11 U.S.C. (2005)). Citations to the Act will be to 11 U.S.C. § (2005).

[4] Elizabeth Warren, Testimony Before United States Senate Committee on the Judiciary, Bankruptcy Reform (Feb. 10, 2005), http://judiciary.senate.gov/testimony.cfm?id=1381&wit_id=3996.

[5] *Id.*

[6] *See, e.g.*, Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L. J. 169, 175 n. 41 (2005) (citing examples of criticism of bill by academics and bankruptcy professionals).

[7] *See, e.g.*, Hon. A. Thomas Small & Hon. Eugene R. Wedoff, *A Proposal for More Effective Bankruptcy Reform*, www.abiworld.org/pdfs/LegisProposal256.pdf (recommending that the proposed legislation maintain incentives for debtors to choose repayment of debts through Chapter 13).

[8] Letter from Professors of Bankruptcy and Commercial Law regarding BAPCPA (S.256) to Senators Specter and Leahy (Feb. 17, 2005), http://bankruptcymedia.com/bkfinder/article%20folder/LawProfessorLetterfinal.pdf.

[9] American Bar Association Fact Sheet, *Senate Considers Imposing Harsh New Liability Standards Against Bankruptcy Attorneys* (Dec. 2004), http://www.abanet.org/poladv/priorities/brattyliabilityfactsheet_december2004_.pdf.

[10] John Rao, National Consumer Law Center, Inc., *What's Wrong with S.256, Let Us Count the Ways ...*, http://www.consumerlaw.org/initiatives/bankruptcy/content/KeyProblemswithS256.pdf.

[11] Todd J. Zywicki, *Testimony Before United States Senate Committee on the Judiciary, Bankruptcy reform*, (Feb. 10, 2005), http://judiciary.senate.gov/testimony.cfm?id=1381&wit_id=3997.

[12] *See* Jacoby, *supra* note 6 at 171-75.

[13] *See* Zywicki, *supra* note 11.

[14] *See, e.g.*, Elizabeth Warren, *The Phantom $400*, 13 J. BANKR. L. & PRAC. 77 (2004).

[15] *Id.* at 82; *see also* Mary Rouleau & Travis Plunkett, *The Truth About Bankruptcy*, (Jan. 2003), available at http://www.nacba.org.

[16] Historically, the economic data has indicated that the ratio of bankruptcy filings to the number of amount lent has remained consistent. *But compare* Todd J.Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463 (2005) (arguing that an aggregate set of economic variables over time do not match the observed increase in bankruptcy).

[17] CNN televised report, *Assault on the Middle Class*, (Oct. 31, 2005) (discussing possible effect of bankruptcy reform on small businesses).

[18] Jacoby, *supra* note 6, at 171-73.

[19] 11 U.S.C. § 707(b)(4) (2005).

[20] Persons owing outstanding "domestic support obligations," a new term defined in the Code, will find that they are increasingly out of luck, as such claims under the new Code have earned enhanced claim treatment and priority status, and are largely excepted from discharge and collection. *See, e.g.*, 11 U.S.C. § 101(14A) (expanded definition of domestic support obligation); 507(a)(1) (elevated priority of domestic support obligations); 1325(a)(8) (required payment of all domestic support obligations since start of case in chapter 13 case, in order for the case to be able to be confirmed); 523(a)(5) and 1328(a) (discharge exceptions); 362(b)(2) (automatic stay exceptions). Categories of tax debt excepted from discharge have also been expanded. *See, e.g.* 11 U.S.C. § 523(a)(1).

[21] 11 U.S.C. § 342(c).

[22] 11 U.S.C. § 1325(a)(9).

[23] 11 U.S.C. § 522(p)(1).

[24] 11 U.S.C. § 109(h)(1).

[25] 11 U.S.C. § 111. A list of preliminarily approved credit counselors can be found on the U.S. Trustee's website at http://www.usdoj.gov/ust/bapcpa/ccde/cc_approved.htm.

[26] 11 U.S.C. § 109(h)(3).

[27] *See, e.g., In Re Gee*, No. 05-71886 (Bankr. W.D. Mo. Oct. 26, 2005) (case dismissed for debtor's failure to obtain credit counseling prepetition or qualify for exception).

(**Bankruptcy**, *continued on page 34*)