THE OCTOBER SURPRISE: THE BANKRUPTCY REFORM ACT OF 1994 — AN ANALYSIS OF TITLE II — THE COMMERCIAL ISSUES

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I. INTRODUCTION

The Bankruptcy Code1 ("Code") was signed into law in 1978 by President Jimmy Carter. During virtually every congressional session and administration since then, there have been rumors of major amendments. Notwithstanding some major technical amendments in 1980, none of the various interest groups trumpeting their respective wishful thinking agendas ever succeeded in obtaining major "reforms" to the Code.

It was at the end of President Carter's administration that the words "October surprise" entered America's lexicon. President Reagan's campaign team feared that the Carter administration would accomplish something spectacular, such as freeing the hostages held in Iran, on the eve of the November 1980 election. There was no October surprise that year nor at any time during the next thirteen years.

The year of 1994 ushered in the first October in living memory where there was no baseball world series, but by October this was certainly no surprise to anyone. The real surprise in the legal community was that the Bankruptcy Reform Act of 1994 ("Act") was passed by a House/Senate conference committee and signed into law by President Clinton on October 22, 1994.2 For the most part, the provisions be-

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came effective immediately. A few exceptions were allowed on pending cases.\(^3\)

This legislation had been expected for years.\(^4\) The legislation had an unusual history in the political process.\(^5\) There had been much commentary and speculation in the trade journals and on the seminar circuit about various aspects of the two congressional versions of the legislation, such as the tentative Chapter 10 and the jurisdictional limit of one million dollars for Chapter 13 filing irrespective of secured or unsecured status.\(^6\) The bill generated so much controversy that it was rumored that the legislation was once again doomed to layover for another year — a delay that would have surprised no one. Then came the October surprise. Some commentators called the Act the most sweeping change to the Bankruptcy Code in the last sixteen years.\(^7\)

The Act had its political origins in a 1991 bill sponsored by Senators Howell Heflin (D. Ala.) and Charles Grassley (R. Iowa). These Senators submitted Senate bill S. 1985 in 1991. The initial and modest goal of S. 1985 was to create a bankruptcy commission to review the bankruptcy system and make recommendations for improvements.\(^8\) This proposal did not generate enough support or interest so its sponsors broadened its scope to incorporate alleged consensus reforms. However, there was more controversy than consensus that included a great deal of publicity and media speculation. During the 102nd Congress, the bill finally passed both the House of Representatives and the Senate in two different versions, but died in conference committee. Political insiders were not surprised.\(^9\)

The 103rd Congress reintroduced the bill. During the course of the legislative process, controversial provisions were omitted under heavy pressure from major lobbying interests. For example, the proposed Chapter 10 was deleted in the midst of intense opposition by the American Bankers Association. Finally, both the House and Senate

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5. Flaccus, 47 Ark. L. Rev. at 821.


8. Interview with Sam Gerdano, Executive Director of the American Bankruptcy Institute (Aug. 21, 1995).

9. *Id.*
again passed their respective versions of the Act — Senate bill S. 540 and House bill H.R. 5116.10 Usually, whichever body is the driving force behind particular legislation gets to label the finished product. With bankruptcy legislation, the Senate is almost always the driving force. This was also true with the Act, but the House negotiated to have the honor of labeling the final product as a House bill.11

This time there was no formal conference committee at the end of the process. Instead, as often happens near the end of a session, an unofficial group, primarily through staff, came together to complete this bill. Major players, both personally and through their respective staffs, were Senators Heflin and Grassley (still taking the lead from more than three years earlier) and Representatives Brooks (the then Committee Chair) and Mike Synar (who now heads the Bankruptcy Review Commission, which finally came into existence as part of the Act).12

II. OVERVIEW

In its final form, the Bankruptcy Reform Act of 1994 ("Act") contained seven separate titles. Title I deals with "Improved Bankruptcy Administration"; Title II addresses "Commercial Bankruptcy Issues"; Title III amends "Consumer Bankruptcy Issues"; Title IV deals with "Governmental Bankruptcy Issues"; Title V addresses "Technical Corrections"; Title VI provides for the creation of a "Bankruptcy Review Commission"; and Title VII provides for "Severability, Effective Date and Application of Amendments."13

This Article is limited in scope to the discussion of the provisions of Title II and its amendments dealing with commercial bankruptcy issues as well as other related provisions of the Act. Title II of the Act is comprised of Sections 201 through 225, inclusive, of the Act, which will be inserted at various relevant sections throughout the Code. As of this writing, not many cases pertaining to Title II and filed subsequent to the effective date of the Act have been decided. Those that have been decided are generally discussed at the appropriate sections of this Article.

11. Interview with Sam Gerdano, Executive Director of the American Bankruptcy Institute (Aug. 21, 1994). Thus, the Bankruptcy Reform Act is labelled H.R. 5116.
12. Interview with Sam Gerdano, Executive Director of the American Bankruptcy Institute (Aug. 21, 1995).
III. SECTION 201: AIRCRAFT EQUIPMENT AND VESSELS; ROLLING STOCK EQUIPMENT

Like many sections ultimately becoming part of the Bankruptcy Reform Act of 1994 ("Act"), prior versions of this amendment were deleted. A number of important changes occurred as a result of section 201. Bankruptcy Code Sections 1110 (Aircraft Equipment and Vessels) and 1168 (Rolling Stock Equipment) are affected. All debt and lease financing agreements that provide for the granting of a security interest are protected as to equipment placed in service after the enactment date. This new protection is an expansion of prior protection that applied only to "purchase money equipment," but this expansion is limited in its application of those protections to the post-enactment date. "A safe harbor provision for equipment placed in service prior to the enactment date is available if it is a lease that is to be treated as such for federal income tax purposes, and is a purchase-money security interest." Accordingly, once section 201 is completely phased in, no relevant distinction will exist between leases and loans. A careful review of this new definition of equipment is crucial because covered equipment is immune to debtor "cram down" tactics.

IV. SECTION 202: LIMITATION ON LIABILITY OF NON-INSIDER TRANSFEREE FOR AVOIDED TRANSFER

Section 202 of the Act amends section 550 of the Bankruptcy Code. Section 202 of the Act amends section 550 by limiting the preference recovery period applicable to non-insider transferees to the ninety day look-back period, thereby overruling the Deprizio line of cases. "Deprizio" is the generic term given to the doctrine first enunciated in Levit v. Ingersoll Rand Financial Corporation. Deprizio "stunned the lending community" with its literal interpretation of "preferential transfers" set forth in Title 11 U.S.C. § 547(b) and transferee liability provisions in Title 11 U.S.C. § 550. The United States Court of Appeals for the Seventh Circuit held that repayments made by a debtor, even though made more than ninety days prior to filing for bankruptcy relief, were recoverable from the transferee lender when within the one year insider look-back period.

14. S. 540 originally would have granted an administrative expense priority. Both prior S. 540 and H.R. 5116 contained restrictions on rights of debtors-in-possession to reject or assume airport gate leases. None of these provisions became law.
15. Whelan, 2 AM. BANKR. INST. L. REV. at 409 (emphasis added).
17. 874 F.2d 1186 (7th Cir. 1989).
because the lender had taken a personal guarantee from an insider.\textsuperscript{19} Subsequent to the Seventh Circuit's decision in \textit{Deprizio}, five other United States courts of appeals addressed this issue and concurred in the result.\textsuperscript{20}

Accordingly, six circuits agreed that insider-guarantors are creditors of the debtor because insider-guarantors hold contingent claims against the debtor that become fixed if and when they pay the outsider-creditor whose claims are being guaranteed.\textsuperscript{21} In light of this startling trend, Congress apparently felt compelled to act.

The legislative history of the Act indicates that the amendment "clarifies" that Congress never intended the result of the \textit{Deprizio} holding.\textsuperscript{22} The Senate Judiciary Committee, while debating S. 540 which ultimately led to the passage of H.R. 5116 as amended, also expressed the belief that \textit{Deprizio} and its progeny were wrongly decided.\textsuperscript{23}

The \textit{Deprizio} decision is now history because section 202 of the Act "directly prohibits a preference recovery under [11 U.S.C.] section 547(b) from a non-insider transferee when the transfer was made for the benefit of an insider creditor."\textsuperscript{24} Because section 202 is not retroactive, section 202 only specifically applies to cases filed after October 22, 1994.\textsuperscript{25} Accordingly, an interesting issue arises concerning whether lenders, transferors, or guarantors in pending, pre-Act cases will be able to persuade courts to reject \textit{Deprizio} type outcomes on the grounds that the original congressional intent, made clear by the Act, would be undermined.\textsuperscript{26}

As of the writing of this Article, there are three reported cases where this tactic has been utilized. The tactic succeeded once in a circuit that had not previously ruled in a \textit{Deprizio} situation and was unsuccessful twice — once in a jurisdiction where the circuit had previously followed \textit{Deprizio} and also in a circuit that had not yet ruled in a \textit{Deprizio} situation.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{19} Effross, \textit{Am. Bankr. L.J.} at 22.
\item \textsuperscript{20} See \textit{In re Wesley Indus., Inc.}, 30 F.3d 1438 (11th Cir. 1994); \textit{In re Southmark Corp.}, 993 F.2d 117 (5th Cir. 1993); \textit{In re Sufolla, Inc.}, 2 F.3d 977 (9th Cir. 1993); \textit{In re C-L Cartage Co., Inc.}, 899 F.2d 1490 (6th Cir. 1990); \textit{In re Robinson Brothers Drilling, Inc.}, 97 B.R. 77 (W.D. Okla. 1988) \textit{aff'd}, 892 F.2d 850 (10th Cir. 1989).
\item \textsuperscript{21} See Wesley, 30 F.3d at 1441.
\item \textsuperscript{22} H.R. 5116, 103rd Cong., 2nd Sess. (Oct. 4, 1994) (submission of Rep. Brooks).
\item \textsuperscript{24} S. 540, 103rd Cong., 2d Sess. (1994).
\item \textsuperscript{25} Section 702 of the Bankruptcy Reform Act of 1994 specifies which amendments are prospective and which are retroactive. Section 202 specifically applies only to cases after the October 22, 1994, effective date. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 202, 108 Stat. 4106 (codified as amended at 11 U.S.C. § 550 (1994)).
\item \textsuperscript{26} See supra notes 17-24 and accompanying text.
\item \textsuperscript{27} See infra notes 28-37 and accompanying text.
\end{itemize}
In Artha Management, Inc. v. Lehigh Savings Bank,28 a Chapter 11 trustee filed an adversary proceeding seeking to recover preferential transfers made by debtors to the mortgagee. The transfer was within the controversial time frame of more than ninety days but less than one year before filing bankruptcy. The mortgagee was not an insider, but insiders with contingent liabilities based upon their personal guarantees had benefited from the transfers. Judge Burton B. Lifland, before announcing his decision, indicated his awareness of four facts relevant to the context of his decision: (1) the Act rejected the Deprizio Doctrine; (2) the Act did not apply in this case because the case was brought prior to the effective date of the Act; (3) the Court of Appeals in his circuit had not had an opportunity to construe the Deprizio holding prior to the Reform Act Amendments; and (4) “the majority of the lower court holdings in this circuit refuse to apply a recovery period beyond [ninety] days to non-insider transferees” based on policy grounds.29 Ultimately, the court agreed with the reasoning behind the Act and, accordingly, refused to apply Deprizio to this pre-Act case.

The first case to uphold a Deprizio result in a pending case after the passage of the Act was Air Forwarding Systems, Inc. v. Air Forwarding Systems, Inc.30 Air Forwarding Systems, Inc. was an involuntary Chapter 7 case, originating in 1993.31 The trustee sought to recover preferential payments made to a non-insider lender, First Union National Bank of Florida (“First Union”), more than ninety days but less than one year prior to filing bankruptcy. First Union’s loan was secured by an insider-guarantor. The trustee sought recovery from transferee First Union. In response, First Union filed a Motion to Dismiss for Failure to State a Claim based on section 202 of the Bankruptcy Reform Act of 1994 and the relevant legislative history.32 The court denied First Union’s motion, stating that it was bound by the United States Court of Appeals for the Eleventh Circuit’s statutory interpretation of Title 11 U.S.C. § 547(b)(4)(B) as that section af

32. Air-Forwarding Systems, Inc., 176 B.R. at 638; F.R. Civ. P. 12(b)(6), is applicable in adversary proceedings in Bankruptcy Court according to BANKR. R. 7012(b).
The court observed that Congress had specifically designated section 202 only as a prospective amendment.\textsuperscript{33} The court stated that this “new legislation is welcome,” but the court did not apply it to the Chapter 7 case commenced before the Act’s effective date.\textsuperscript{34}

The third attempt to reject the reasoning of \textit{Deprizio} occurred in the case of \textit{Northeastern Contracting Company, Inc. v. John Deere Industrial Equipment Company, Inc.}\textsuperscript{35} \textit{Northeastern Contracting Company, Inc.} involved a non-insider creditor who had received payments that benefited guarantors by relieving them of their contingent personal liability within the one year look-back period and who was defending a preference avoidance action brought by the Chapter 7 trustee.\textsuperscript{36} On cross motions for summary judgment, the court stated that “[t]he sole issue defined in the motions is whether this court should follow the \textit{Deprizio} doctrine since the Court of Appeals for the Second Circuit has not yet addressed the matter.”\textsuperscript{37} The court, while explicitly recognizing the change implemented by the Act, concluded that it should follow the \textit{Deprizio} doctrine, because the “Code provisions, in effect at the time of the transfer in this proceeding, admits [sic] no other conclusion than that reached by \textit{Deprizio}, and that the court of appeals of this circuit would so hold.”\textsuperscript{38}

V. SECTION 203: PERFECTION OF PURCHASE MONEY SECURITIES INTEREST AND SECTION 204: CONTINUED PERFECTION

Sections 203 and 204 of the Bankruptcy Reform Act of 1994 are included in Title II, the “Commercial Bankruptcy Issues” section, but may have been more appropriately included in Title V, the “Technical Corrections” section. Section 203 was inserted to instill consistency between the Bankruptcy Code and the Uniform Commercial Code (“UCC”). Section 203 amends sections 547(c)(3)(B) and 547(e)(2)(A) which had previously provided a ten day window for secured creditors to perfect their security interests. This was different than the UCC provisions of most states that established a period of twenty days. Section 203 conformed the Code to the UCC by also providing for a twenty day perfection period. The practical effect in a bankruptcy pro-

\textsuperscript{33} Air Forwarding Systems, Inc., 176 B.R. at 639.
\textsuperscript{34} Id.
\textsuperscript{35} 182 B.R. 673 (Bankr. D. Conn. 1995).
\textsuperscript{37} Northeastern Contracting Company, Inc., 182 B.R. at 674.
\textsuperscript{38} Id.
ceeding is that the time period for a creditor to perfect a security interest in property acquired by the debtor, while remaining immune from the trustee's avoiding powers, is increased by ten days.\textsuperscript{39} The House Judiciary Committee noted that this change "conforms bankruptcy law practices to most States' practice."\textsuperscript{40}

In \textit{W.T. Vick Lumber Company, Inc. v. Chadwick},\textsuperscript{41} the Chapter 11 debtor-in-possession filed adversary proceedings against the three incorporating shareholders in order to avoid as preferences the transfer of security interests in equipment belonging to the debtor.\textsuperscript{42} The shareholders asserted the "contemporaneous exchange for new value" defense.\textsuperscript{43} This case was a pre-Act case; the actions taken to perfect prior transactions occurred beyond the twenty day time period and so were not considered to be substantially contemporaneous for purposes of the asserted defense.

Section 204 clarifies that actions taken by secured creditors to maintain their secured position and status which are consistent with the UCC will not constitute violations of the Bankruptcy Code's automatic stay provisions.\textsuperscript{44} In essence, then, secured creditors can be comfortable in filing continuation statements or financing statements, knowing that these acts alone will not expose them to liability for violating the injunctive provisions of 11 U.S.C. § 362. The policy reasoning behind this section is that ordinary and necessary steps taken by a secured creditor to ensure the continued perfection of its security interest does not enhance that position to the detriment of other creditors, but merely maintains the status quo. Section 204 also attempts to clarify that these changes are not meant to alter the relationship between bankruptcy trustee and secured creditor, as provided in section 546 of the Bankruptcy Code.

VI. SECTION 205: REJECTION OF UNEXPIRED LEASES OF REAL PROPERTY OR TIMESHARE INTERESTS

Section 365 of the Code concerns executory contracts and unexpired leases and gives bankruptcy debtors and/or trustees certain

\begin{footnotesize}
\begin{enumerate}
\item[40.] Effross, \textit{Am. Bankr. L.J.} at 23 (citing United States Bankruptcy Code Title 11 U.S.C. §§ 203, 547(c)(3) (1994)).
\item[41.] 179 B.R. 283 (Bankr. N.D. Ala. 1995).
\end{enumerate}
\end{footnotesize}
options to accept or reject certain leases and executory contracts. Section 365(h) provides for those instances wherein a trustee rejects an unexpired lease of real property when the debtor is the lessor. Section 205 of the Bankruptcy Reform Act of 1994 amends section 365(h) of the Code, attempting to clarify certain rights of the parties in this context. Specifically, section 365(h) provides that a tenant's right of possession includes the rights of quiet enjoyment, subletting, assignment, or hypothecation as well as timing and amounts or rental payments. Pre-Act cases providing to the contrary have been legislatively overruled. Lessees clearly no longer suffer an acute abridgement of their rights in those instances when a bankrupt lessor elects to reject its lease obligation.

VII. SECTION 206: CONTENTS OF PLAN

Section 206 is an interesting amendment for two reasons. First, section 206 adopts the principle and its exception established in case law, and, second, because this section amends section 1123(b) of the Bankruptcy Code by adopting the language of section 1322(b)(2) of the Code. This is a reverse of the historical pattern. When Chapter 13 was created, it borrowed much from the concepts of Chapter 11. Particularly, these sections deal with what a plan "must" and "may" provide and the classification of claims. In this instance, Chapter 13 language developed Chapter 11.

Section 206 adopted the holding of Nobelman v. American Savings Bank. Nobelman held that debtors could not bifurcate a secured claim that was a mortgage lien on their principal residence into secured and unsecured portions. In effect, home mortgage claims were exempted from cramdown. Following Nobelman, Chapter 13 debtors

45. 11 U.S.C. § 365 (1994). "Executory contracts" were most famously defined by Vern Countryman in his article. Vern Countryman, Executory Contracts In Bankruptcy (Part I), 57 Minn. L. Rev. 439 (1973). Vern Countryman defined "executory contracts" as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, 57 Minn. L. Rev. at 460.


47. For a discussion of classification of claims in Chapter 13 plans and its development and expansion from prior Chapter 11 concepts, see Oliver B. Pollak and David G. Hicks, Student Loans, Ch. 13, Classification of Debt, Unfair Discrimination and the Fresh Start After the Student Loan Default Prevention Initiative Act of 1990, 4 Det. C.L. Rev. 1617, 1625-30 (1993).

could not cramdown home mortgages, even on second or third mortgages, to the fair market value of that lien on petition day — at least if any portion of the claim was secured. Nobelman did not address these restrictions outside of Chapter 13.

Moreover, since the United States Supreme Court held in Toibb v. Radloff\(^4\) that individual debtors (not just corporations) could avail themselves of the relief afforded by Chapter 11 of the Bankruptcy Code, an unresolved question remained as to whether the cramdown option of home mortgage liens still existed in Chapter 11. While other impediments or disincentives might discourage individuals from filing for relief under this Chapter, this loophole may have created an opportunity which debtors with homes that are undersecured might be unable to resist. However, assuming that this loophole existed, Congress has obviated this anomaly by the provisions of section 206 of the Bankruptcy Reform Act of 1994. The Nobelman holding is now incorporated into bankruptcy law and is specifically included in Chapter 11 by the amendment of section 1123(b) of the Code.

VIII. SECTION 207: PRIORITY STATUS FOR INDEPENDENT SALES REPRESENTATIVES

As the result of lobbying, section 207 does nothing more nor less than increase the earned wages priority of Code section 507(a)(3) from $2,000.00 to $4,000.00 and clarifies that this protection extends to certain independent sales representatives. Other provisions of the Bankruptcy Reform Act of 1994 that provided for adjustment of dollar amounts were located in Title I of the Act. It is not clear why the decision was made to put this section into the “Commercial Issues” title of the Act.

This amendment codifies In re Wang Laboratories, Inc.\(^5\) Clearly, any claims by an independent sales representative of a bankrupt debtor against the bankrupt debtor are now on an equal basis with the claims of employees of the bankrupt debtor, as long as the independent sales representative earns 75% of his or her income in this capacity from the bankrupt debtor.\(^6\)

IX. SECTION 208: EXCLUSION FROM THE ESTATE OF INTERESTS IN LIQUID AND GASEOUS HYDROCARBONS TRANSFERRED BY THE DEBTOR PURSUANT TO PRODUCTION PAYMENT AGREEMENTS

Section 208 of the Bankruptcy Reform Act of 1994 defines the term “production payment” and then excludes production payments from property of the bankruptcy estate. Different states treated oil and gas leases differently, and uniformity was desired in the bankruptcy arena. Bankruptcy Code sections 101(42A) and 541(b)(4) were amended accordingly.\(^{52}\)

X. SECTION 209: SELLERS' RIGHTS TO RECLAIM GOODS

Section 209 is another provision that overlaps the Uniform Commercial Code (“UCC”). This section amends Bankruptcy Code section 546(c)(1) which had provided that certain trustee's rights and powers are subject to any statutory or common law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but (1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor. . . .\(^{53}\)

Section 209 provides that when the ten day period relating to the receipt of goods by the debtor expires postpetition, the creditor shall have twenty days after the debtor's receipt of such goods to effectuate the reclamation rights.\(^{54}\)

XI. SECTION 210: INVESTMENT OF ESTATE MONEY

Section 210 is another section motivated by congressional desire to statutorily overrule the result of a court decision. In 1994, the United States Court of Appeals for the Third Circuit interpreted section 345 of the Code to mean that a trustee could only invest or deposit money from a bankruptcy estate into government backed securities.\(^{55}\) Now, bankruptcy courts are permitted discretion as to what constitutes authorized investments in bankruptcy estates. It is expected that this power will be utilized primarily in the cases of larger, more sophisticated debtors.

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XII. SECTION 211: ELECTION OF TRUSTEE UNDER CHAPTER 11

The amendment in section 211 is intended to conform the trustee selection process of Chapter 11 to the trustee selection process of Chapter 7. Section 211 amends Code section 1104 by implementing the Chapter 11 trustee election process. An unintended consequence may be that the United States Trustee will be prohibited from considering otherwise qualified candidates. As pointed out by the Honorable Judge Roger M. Whelan, circumstances may arise in large, complex Chapter 11 cases where individuals with highly specialized qualifications are needed but may be precluded from consideration by the specific terms of section 1104 as amended by section 211.56 On the other hand, proponents of this section, who lobbied heavily for its inclusion in the Bankruptcy Reform Act of 1994, claim that private turnaround companies with people qualified to serve as trustee were being shut out of the process by the United States Trustee.57 With the new amendment, these companies now have an equal opportunity to compete for votes of creditors to serve as private trustee.58

XIII. SECTION 212: RIGHTS OF PARTNERSHIP TRUSTEE AGAINST GENERAL PARTNERS

Section 212 amends section 723(a) of the Bankruptcy Code which formerly read:

[If there is a deficiency of property of the estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner for the full amount of the deficiency.59

As amended, the final seven words “for the full amount of the deficiency” were deleted and replaced with the phrase “to the extent that under applicable nonbankruptcy law such general partner is personally liable for such deficiency.”60 The change in the language clarified the liability of a general partner under limited liability partnership statutes which have been enacted by many jurisdictions during the interval between the enactment of the Code and the passage of the Bankruptcy Reform Act of 1994.61

57. Interview with Sam Gerdano, Executive Director of the American Bankruptcy Institute (August 21, 1995).
58. Id.
XIV. SECTION 213: IMPAIRMENT OF CLAIMS AND INTERESTS

Section 213 is ambitious in scope and extensive in consequence. Section 213 amends several sections of the Bankruptcy Code dealing with the troublesome issues of tardy claims and the impairment of claims. This section was specifically intended to overrule In Re Hausladen\(^62\) and its progeny.

The Minnesota Bankruptcy Court handed down the decision in In Re Hausladen\(^63\) in 1992 and wreaked havoc in Chapter 13 cases and some Chapter 7 cases. The court decided that the Code and Bankruptcy Rules were complicated with respect to dealing with late or tardily filed claims.

In Hausladen, Judge Robert J. Kressel was faced with three consolidated Chapter 13 cases in which the trustee had objected to late filed claims. In two cases, the claims were filed by creditors who had not received proper notice of the case or its deadlines. In the third case, two creditors were filing after their Rule 3002 time period had expired, and the debtors were filing two claims on behalf of creditors after their extended Rule 3004 time period had expired. In a thorough and thoughtful analysis, it became evident that tardy claims could indeed survive objection, and the plan would govern their treatment. Sections 501 and 502, Rule 3002, and the Official Bankruptcy Forms were reviewed, and the court held that lateness was not a ground for disallowance of a claim under Title 11 U.S.C. § 502. Therefore, the court allowed the claims.

Section 213 in part clarifies how the court should deal with issues of tardy claims. For example, section 502(b) was amended by the addition of a specific objection on the grounds that the claim was not timely. As a result, a late filed claim can now clearly face objection and disallowance for the reason of its lateness.

The United States Court of Appeals for the Ninth Circuit decision in Pacific Atlantic Trading Company v. Towers\(^64\) gave new life to tardy claims by holding that Bankruptcy Rule 3002(c) violated the Code's definition of allowed claims. The result of the Ninth Circuit's decision was that the restrictive time provisions of Rule 3002(c) were not enforceable and certain late claims were allowed. Congress has now placed new restrictions on late claims by amending section

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64. 33 F.3d 1064 (9th Cir. 1994).
502(b). Essentially, late filed claims will be disallowed unless all other timely filed claims can be paid first.\footnote{65}

Additionally, section 503(a) as amended grants bankruptcy courts authority to establish a bar date for administrative priority claims and also provides authority to allow a late claim "for cause." These changes are not intended to detract from the ability of the court to extend the bar date for claims when authorized to do so under the Federal Rules of Bankruptcy Procedure.\footnote{66} For example, Title 11 U.S.C. § 503 as amended provides that a request for payment of an administrative expense may be filed tardily, if such request is permitted by the court for cause.

Judge David F. Snow in the Northern District of Ohio was influenced by the passage of the Bankruptcy Reform Act of 1994 when deciding \textit{In re Monroe Distributing, Inc.}\footnote{67} Judge Snow allowed a tardily filed state priority tax claim, making reference to the fact that the claim was filed prior to any distribution by the trustee and prior to the passage of the Act.

This section continues by addressing impairment of claims in Chapter 11 cases. A recent decision in New Jersey, \textit{In re New Valley Corporation},\footnote{68} caused some consternation to creditors, because the court ruled that an unsecured creditor with an allowed claim was not in a Chapter 11 case entitled to receive postpetition interest on its claim against the solvent debtor. That ruling motivated the recent amendment to section 1124, which now provides that such a proposed treatment constitutes that class of claims being classified as impaired. In other words, the alternative treatment previously permitted by section 1124(3) no longer exists. Specifically, a class of unsecured claims that are proposed to be paid in full but with no interest can be deemed an impaired class which triggers the right of such creditors to vote on the debtor's proposed plan. To obviate such a result in future cases, the amendment deleted former section 1124(3) from the Code.

As noted by the court in \textit{In re Rocha},\footnote{69} the Act did not specifically apply, because this case was filed prior to the Act's effective date. However, the court stated that its decision was influenced by portions

\footnote{66. See N.A.C.B.A. COMMENTS, Legislative Reports regarding H.R. 5116, October 14, 1994. Section 503(a) overrules prior case decision and prior statutory language, both within the purview and responsibility of Congress. This approach is consistent with the Rules Enabling Act, unlike Section 114 of the Bankruptcy Reform Act which utilizes the statutory process to contradict and undermine existing and valid rules. Section 114 is the product of Senator Jesse Helms.}
\footnote{67. 176 B.R. 458 (Bankr. N.D. Ohio 1995).}
\footnote{68. 168 B.R. 73 (Bankr. D. N.J. 1994).}
\footnote{69. 179 B.R. 305 (Bankr. M.D. Fla. 1995).}
of the Act. The court concluded that there is a "new value exception" to the "absolute priority rule," but that it is not applicable in individual Chapter 11 cases, only to business cases. The court also concluded that the proposed plan in this case was not confirmable due to the "absolute priority rule." Looking to the provisions of the Act, the court noted that to satisfy the new "fair and equitable" test of "cram down," a solvent debtor would be required to pay postpetition and preconfirmation interest on a claim to have that class of claims considered unimpaired.

XV. SECTION 214: PROTECTION OF SECURITY INTERESTS IN POSTPETITION RENTS AND LODGING PAYMENTS

Section 214 amends present Bankruptcy Code section 552(b). The term "rents" is more broadly defined as "fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities and hotels, motels, or other lodging properties..." A secured creditor with a valid security agreement can enforce its security interest against "rents" and "realize the protections of the Code applicable to cash collateral." This amendment was intended to include hotel rents in the category of assets constituting "cash collateral" and to extend the same protection to hotel rents as realty rents and profits by preserving that interest postpetition. That interest is intended to be preserved even when it has not been fully perfected under applicable state law, such as by failing to deliver demand notices to tenants.

In In Re Brandywine River Hotel, Inc., the hotel management closely held corporation became a Chapter 11 debtor. The only shareholders, officers, and directors were a husband and wife. A partnership, consisting of this same husband and wife team as the general partners, owned the hotel. Debtor Brandywine operated the hotel...

71. Rocha, 179 B.R. at 306-07. The "fair and equitable" requirements of 11 U.S.C. § 1129(b)(2)(B) include the "absolute priority rule." 11 U.S.C. § 1129(b)(2)(B) (1994). In its simplest terms, this rule requires that all creditors receive payment of their respective claims in their established order of priority under bankruptcy law and that they receive payment in full before lesser interests, such as those of debtors-in-possession or their officers and directors, may share in the assets of the reorganized entity. Id.
72. Rocha, 179 B.R. at 307. See 11 U.S.C. § 1124(3) (1994). Section 1124(3) provided that a class of creditors not receiving interest on their claims could nevertheless be considered as unimpaired. Section 1124(3) has been deleted in its entirety.
pursuant to the terms of a written lease agreement with the partnership. Suburban Federal Bank ("Bank") held a first mortgage against the real estate and its improvements (collectively, "Hotel Property"). Brandywine filed a motion seeking a determination that the Bank had no legal interest in the revenues and/or rents generated from the hotel operations, or alternatively, for permission to use the revenues and/or rents as cash collateral.\(^7\)

The Bank asserted an interest in the cash collateral based essentially on two theories. First, there was a lease between the partnership owners and the corporate debtor management company. The partnership owners gave a mortgage interest to the Bank which had the usual assignment of rents and profits language. The Bank argued that this language gave it a cash collateral interest. Second, as an alternative, the Bank argued that there was a community of ownership between the partnership and the corporation that should be sufficient for the court to invoke the "mere instrumentality" doctrine to pierce the corporate veil, giving the cash collateral effect to the assignment of rents language.\(^7\)

As to the first argument, the court did not view the assignment of rents clause in the Bank's mortgage agreement from the partnership owner as permitting the Bank to look beyond the partnership's lease with its tenant (i.e. the corporate management debtor) and cause the assignment to attach to the operating revenues of the owner's tenant.\(^8\) The court stated that it did not believe such a result would occur if the tenant in question operated a retail store or service business, and, therefore, the result should not be different in this case just because the tenant was in the hotel business.\(^8\) As to the second argument, the court found no egregious disregard of corporate formality and no evidence of facade or sham and accordingly held that the Bank had no interest in the revenues and/or rents generated by the debtor's operations.\(^8\) The court stated that the cash collateral issue was thus moot.

Essentially, with the issue before the court having been decided, the court did not need to reach the additional issue raised by the parties under section 214 of the Bankruptcy Reform Act of 1994. However, Judge Stephen Raslavich decided that addressing this issue was appropriate.\(^8\) Apparently, because this was a case of first impression, because of the newness of the Act, and because of the aggressive,
competing points of view as to the meaning of section 214, the court in
dicta provided guidance to future litigants.

As to the effect of the Act, debtor Brandywine urged the court to
reject the Bank's claim to cash collateral even if the corporate veil
were to be pierced, because the pertinent language of its rent assign-
ment clause did not encompass the hotel revenues that were the sub-
ject of the dispute. Section 214 of the Act defines cash collateral "as
used in 11 U.S.C. § 363, to include the 'fees, charges, accounts or other
payments for the use of occupancy of rooms and other public facilities
in hotels, motels or other lodging properties." Debtor Brandywine
urged that without the specific references to "fees, charges, accounts
or other payments for the use of occupancy of rooms..." in the assign-
ment, the creditor had no cash collateral interest.

Pursuant to Brandywine's logic, the language created the inter-
est. If the proper language was in the assignment, then the security
interest was valid. Therefore, the effect of the amendment is merely
to permit a lender with a valid but possibly less than fully perfected
pre-petition security interest in hotel revenues to assert both that the
interest was preserved postpetition and that the security interest con-
stituted cash collateral. Brandywine insisted that the court, be-
cause this assignment had the old, pre-amendment language, should
follow its own precedent of In re West Chestnut Realty of Haverford,
Inc., which was consistent with a majority of courts nationwide.
This case held that hotel room charges were neither rentals nor profits
of real estate as that phrase is commonly understood in real estate
terminology, but were instead an interest of a different sort, perhaps
subject to U.C.C. Article 9 perfection procedures. Brandywine urged
that section 214 of the Act did not alter this fact by expanding the
definition of the term "rents."

Conversely, the Bank insisted that the amendment of Code sec-
tions 363 and 552(b) by the Act was specifically designed to deal with
the circumstances found in this case. The Bank urged that section
214 of the Act eliminated any distinction between "rents" and "hotel
revenues," such that an existing security instrument which made ref-
ence to one asset was now deemed to automatically include the
other. In response, Judge Raslavich stated that "[t]he legislative his-
tory of [s]ection 214 does not support this conclusion... and given the

84. Id.
85. Id.
86. Id.
89. Id.
recent passage of the ... Act there is apparently yet no case law on the question."90

XVI. SECTION 215: AMENDMENT TO DEFINITION OF SWAP AGREEMENTS

Section 215 modifies an existing definition in a seldomly used provision of the Bankruptcy Code. This section was the result of special interest lobbying and merely adds “spot foreign exchange agreements” to the definition of “swap agreements” in section 101(55)(A) of the Code. Parties active in the foreign exchange market generally understand that “spot” foreign exchange contacts are included as a subset of the broader term “swap agreements.” The Code is now consistent with that particular industry custom or understanding.

XVII. SECTION 216: LIMITATION ON AVOIDING POWERS

Section 216 clarifies trustees’ rights to bring postpetition avoiding power causes of action by amending existing section 546(a)(1) of the Bankruptcy Code. The pre-amendment confusion arose in the context of a trustee succeeding a debtor-in-possession after the two-year period. Now, the ambiguity is resolved by the fact that the trustee can exercise avoiding powers up to one year from the date of assuming trustee duties, if he or she became the trustee during this two year period or by stipulation of the parties.

This issue has to date generated a great deal of controversy and litigation. Four recently published cases discuss the section 216 amendment. All of the cases were decided prior to the effective date of the Bankruptcy Reform Act of 1994, but are also guided or influenced by the Act. Chronologically, the first case, John Hicks Oldsmobile-GMC Truck, Inc. v. Nationbank of Tennessee,91 is a pre-Act case that is instructive concerning the respective positions and the ensuing confusion which the Act was designed to resolve. In Hicks, a Chapter 7 trustee attempted to exercise his avoiding powers by suing the bank to recover alleged preferential payments made by the debtor. The bank moved to dismiss, claiming that the time periods provided as statutes of limitation in Title 11 U.S.C. § 546(a)(1) barred the action.

Originally commenced as a Chapter 11 proceeding on November 11, 1991, a Chapter 11 trustee was appointed on March 18, 1992. The case was subsequently converted to a Chapter 7 on July 14, 1992, and the same trustee was appointed to serve as the Chapter 7 trustee, ef-

90. Id.
effect on the date of conversion. The trustee brought the adversary proceeding on June 16, 1994, which was within two years of the date of his appointment as Chapter 7 trustee, but beyond two years from the date of his appointment as the Chapter 11 trustee. The issue was whether the statute of limitations started anew upon conversion of the case and appointment as trustee under Chapter 11.

The court cited a variety of cases that stood for the respective positions and discussed the policy underlining each viewpoint. The archetypical case in support of the bank's position that the statutes of limitation policy was to protect litigants from stale claims was *Luria Steel and Trading Corp. v. Denbo Iron and Metal, Inc.* 92 The opposing viewpoint, that the different roles and objectives of trustees under different chapters required the statute to be interpreted in such a way as to allow each trustee the full opportunity for action, was exemplified in *M&L Business Machine Co., Inc., Jobin v. Boryla* 93 and *M&L Business Machine Co Inc., Amazing Enterprises v. Jobin.* 94

The court did not have to choose between these philosophies; Congress made the choice. Referring to the Bankruptcy Reform Act of 1994, the court stated that "[w]hatever the merits of these two opposing viewpoints, the choice between them is facilitated by very recent legislation amending [s]ection 546(a)(1)." 95 So while technically not bound by congressional action, the court was influenced and followed congressional intent.

The court stated, "That section 216 of the Bankruptcy Reform Act of 1994 was intended by Congress to settle the controversy over the correct interpretations of [s]ection 546(a)(1) seems clear." 96 This amendment was intended not only to clarify existing law, but also to create a definite limitation of time for creditors who are at risk of avoidance actions at the expense of the trustee's freedom of action. 97 In its amended form, Title 11 U.S.C. § 546 clearly does not permit a second trustee to avail himself or herself of a second limitations period. Rather in some instances, the limitation period available to the first trustee is shortened to one year from the date of appointment. 98

In *Peterson Distributing, Inc. v. Conoco,* 99 the court was faced with a pre-Act situation wherein a Chapter 7 trustee brought a prefer-

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96. *Id.*
ence avoidance action subsequent to a conversion from Chapter 11 and after serving as interim trustee. This debtor filed a Chapter 11 petition on June 28, 1991. More than one year later, on July 14, 1992, the case was converted to a proceeding under Chapter 7. Two days later, on July 16, 1992, the trustee was appointed as interim trustee. On July 26, 1992, an order was issued authorizing the qualified interim Chapter 7 trustee to hire counsel to pursue avoidance actions and other matters. On August 17, 1992, the trustee was finally appointed as the permanent Chapter 7 trustee. Precisely two years from that date, on August 16, 1994, the trustee filed her avoidance action.\(^{100}\)

Judge Judith D. Boulden permitted the suit to go forward, interpreting section 546 to mean that the two year period of repose commenced with the date of the trustee's permanent appointment. Reviewing the Act with "interest from an academic viewpoint," Judge Boulden recognized that Congress had attempted to clarify the statute by fixing a limitation period where no trustee is appointed and an additional limitation period when a permanent trustee is appointed.\(^{101}\)

"The Bankruptcy Reform Act of 1994 also clarifies that the limitations period does not run from the appointment of an interim trustee."\(^{102}\)

Judge Boulden stated that the only modification applicable to this case was the creation of the one year statute from the date of the appointment of the trustee, if that appointment occurred within the two year window from the date of filing the case. Therefore, in this case, the trustee was appointed permanent trustee on August 17, 1992, which was within two years from the filing of the original petition. Therefore, the trustee would have had to bring this action by August 16, 1993; the extra year would not have been available. Because that limitation was not in effect, the court applied the statute in effect at that time, and the defendant creditor's motion to dismiss was denied.\(^{103}\)

In \textit{Miller's Cove Energy Co., Inc. v. Audus},\(^{104}\) an official unsecured creditors committee brought the avoidance action in an involuntary Chapter 7, which was by subsequent agreement voluntarily converted to a Chapter 11 case.\(^{105}\) The adversary proceeding was commenced more than two years after the filing of the case, and no trustee was

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102. \textit{Id.}
103. \textit{Id.} at 591-92.
ever appointed. Rather, the debtor-in-possession operated the business and obtained a confirmed plan. The proceeding was dismissed as out of time. The Act would not have changed the result.106

XVIII. SECTION 217: SMALL BUSINESS

Section 217 was born of a series of compromises between the House and Senate versions of the Act. The result is a “fast-track” Chapter 11 option for “small businesses.” While some streamlining of the reorganization process was provided, it seems doubtful that many small business debtors would wish to avail themselves of this option. For instance, the far less cumbersome Chapter 13 is now more broadly available for proprietorships. Therefore, the benefits of the fast track may not outweigh the element of time on the side of the debtor in many small business reorganizations. However, with interest now required on postpetition/pre-confirmation unsecured claims to avoid impairment, coupled with the fees to the United States Trustee, there may be an additional incentive for a small business debtor to avail itself of the money saving fast-track.

Small businesses that do not fit under Chapter 13 may find some relief in this provision.107 The time spent in Chapter 11, which may or may not be helpful depending on the business, will be reduced in a variety of ways. For example, the exclusive period for the debtor to file a plan, which may or may not be helpful, is reduced to 100 days. All plans must be filed within 160 days.108 The court may increase or decrease these time limits for cause. To increase the time limits for cause, the debtor must not be at fault. Additionally, the court can dispense with a creditor committee “for cause.”109 The disclosure statement need only to be mailed ten days prior to the date of the confirmation hearing, and any hearing on its effectiveness can be held simultaneously with the confirmation hearing.110 Acceptances and rejections can be solicited on a conditional basis.

Any qualifying small business may elect to participate in this option.111 It appears that a business could meet the qualifications and

107. Flaccus, 47 Ark. L. Rev. at 822-23.
111. Section 217 of the Bankruptcy Reform Act of 1994 amends Bankruptcy Code Section 101 by adding new subsection (51)(C) which defines a qualifying small business as “a business, other than a real estate business, with noncontingent liquidated debts that do not exceed $2,000,000.” 11 U.S.C. § 101 (1996). A qualifying small business
not elect to proceed in this manner, opting instead for the traditional
Chapter 11 reorganization procedure.

XIX. SECTION 218: SINGLE ASSET REAL ESTATE

Limited to cases in which the debtor has "non-contingent, liqui-
dated secured debts" of less than four million dollars, section 218 will
likely not have a significant impact on the majority of single asset real
estate cases. The significance of this section may primarily be the
recognition of the term "single asset real estate case" which was
widely used but has never before appeared in the Bankruptcy Code.
This section defines "single asset real estate" as meaning real property
that constitutes a single property or project (other than residential
property with fewer than four units) which generates substantially all
of the gross income of the debtor and has aggregate noncontingent,
liquidated secured debts in an amount up to $4 million.

Propelled by substantial support from commercial mortgage
bankers, life insurers and related industries that hold long term paper
on these projects, it amends the automatic stay provision of section
362 to provide special circumstances under which creditors of a single
asset real estate debtor may have the stay lifted if the debtor has not
filed a 'feasible' reorganization plan within 90 days of filing, or has not
commenced monthly payments to secured creditors.

The case of In re Kkemko, Inc. was a post-Act case addressing
the single asset real estate issue. In this case, the mortgagee creditor
asserted that the debtor was a single asset real estate, and, because
the debtor had failed to file a plan within ninety days of filing its case,
the case should be dismissed. The court determined that the debtor's
docks were not appurtenant to the debtor's real estate and therefore
did not meet the amendment's definition which included the criterion
of "single property or project," and, as such, was not a single asset real
estate case. Accordingly, the court stated that the ninety day dead-

must also elect to be a small business under the new United States Bankruptcy Code,
112. Whelan, 2 AM. BANxR. INST. L. REV. at 414.
stated in this case, "Single asset bankruptcy cases are not new. They first blossomed
under Chapter XII of the Bankruptcy Act of 1898, which was enacted as a part of the
114. Interview with Sam Gerdano, Executive Director of the American Bankruptcy
Institute (Aug. 21, 1995).
115. N.A.C.B.A. COMMENTS, Legislative Report Regarding H.R. 5116, October 14,
1994.
The line for filing a plan was not applicable and denied the motion to dismiss.\textsuperscript{118}

The United States Bankruptcy Court for the Eastern District of Pennsylvania in \textit{In re Philmont Development Company}\textsuperscript{119} reached an opposite conclusion under a similar fact pattern. A creditor sought relief based on the fact that a plan had not been filed within ninety days of the order for relief, and the debtor was allegedly a single asset real estate. Analyzing whether or not this was such a case, the court declared that four statutory criteria existed to make the determination. First, the real property must constitute a single property or project, other than residential real property with fewer than four residential units; second, the property must generate substantially all of the debtor's income; third, the debtor must not be involved in any other substantial business activities; and, fourth, the debtor's aggregate noncontingent, liquidated secured debt must be less than four million dollars.\textsuperscript{120} The court decided in this case that a series of semi-detached houses constituted a single project and therefore was a single asset real estate. Because more than ninety days had passed with no plan having been filed, the creditors were granted relief from the automatic stay.\textsuperscript{121}

\section{XX. SECTION 219: LEASES OF PERSONAL PROPERTY}

Section 219 amends Code sections 365(b)(2) and 365(d) by providing that debtors are now required to perform personal property lease obligations only after the expiration of a sixty day period subsequent to the entry of the order for relief, unless, based on the equities of the case, the court orders otherwise.\textsuperscript{122} Moreover, the amendments clarify that debtors may exercise their election to assume or reject the debt without being subjected to default rates or other contract penalty provisions. Section 219 also extends the adequate protection provisions of Title 11 U.S.C. section 363(e) to holders of unexpired personal property leases, but emphasizes that the automatic stay provisions of Title 11 U.S.C. section 362 do not control these leases.

Intended to balance competing concerns that have arisen under existing law, the burden is now shifted to the debtor to bring a motion. However, the section provides some protections and enough of a postpetition breathing spell to permit sober reflection and, thus, a more informed decision.

\begin{itemize}
\item \textsuperscript{118} Kkenko, Inc., 181 B.R. at 51.
\item \textsuperscript{119} 181 B.R. 220 (Bankr. E.D. Pa. 1995).
\item \textsuperscript{120} \textit{In re Philmont Development Co.}, 181 B.R. 220, 223 (Bankr. E.D. Pa. 1995).
\item \textsuperscript{121} \textit{Philmont Development Co.}, 181 B.R. at 22.
\item \textsuperscript{122} Whelan, 2 Am. Bankr. Inst. L. Rev. at 415.
\end{itemize}
XXI. SECTION 220: EXEMPTION FOR SMALL BUSINESS COMPANIES

“Small Business Investment Corporations” are added to those entities that are precluded from any relief afforded under Title 11 by adding them to section 109(b)(2) of the Bankruptcy Code. Therefore, small business investment companies will be ineligible to file for bankruptcy. This preclusion benefits the Small Business Administration (“SBA”) by preventing small business investment companies from subordinating SBA interests to those of other creditors.\(^\text{123}\)

XXII. SECTION 221: PAYMENT OF TAXES WITH BORROWED FUNDS

A tax obligation that was otherwise nondischargeable pursuant to section 523(a)(1) of the Bankruptcy Code will, if paid off with funds from another source, render that source vicariously nondischargeable. This apparently anticipates the forthcoming Internal Revenue Service policy of accepting payment of tax obligations by credit card. Such a means of tax liability payment originated with the current administration as part of its ambitious “reinventing government” agenda.\(^\text{124}\) To preclude unintended consequences that might arise in a variety of bankruptcy litigation contexts, this section was added to the Bankruptcy Reform Act of 1994. Section 221 eliminates all debate about unintentional consequences by rendering all such indebtedness nondischargeable. It is not readily apparent why this section was included within the commercial issues section of the amendments.

XXIII. SECTION 222: RETURN OF GOODS

Section 222 is another overlap area between the Uniform Commercial Code (“UCC”) and the Bankruptcy Code. Prior to the amendment, section 546 of the Code prohibited a debtor from returning goods, postpetition, to a seller of those goods as an impermissible payment of a pre-petition claim, except in those instances when the vendor had the right of reclamation. Under the new law, if the court, after notice and a hearing and with the vendor's consent, determines that the return of the goods is consistent with the best interest of the estate, then the trustee or the debtor-in-possession may return goods shipped pre-petition and the creditor may offset the purchase price of the goods against the vendor’s pre-petition claim. The motion seeking such authorization must be filed not later than 120 days after the or-

\(^{123}\) Am. Bankr. Inst., Section Analysis of Bankruptcy Reform Act at 32.

\(^{124}\) Interview with Sam Gerdano, Executive Director of the American Bankruptcy Institute (Aug. 21, 1995).
der for relief. The amendment does not address how the return of goods under this section will affect the rights of pre-petition and/or postpetition lenders with security interests in the debtor's inventory.

This section amends Code section 546(g). The new section 546(g) provides that debtors may, with court approval after appropriate notice and hearing, return goods to trade creditors that were shipped by those creditors prior to the commencement of the bankruptcy case. This provision apparently applies whether or not such goods were subject to valid reclamation rights. The pre-petition claims of such creditors are offset by the purchase price. The debtor or trustee must make such a motion within 120 days of the commencement of the case, and, after a hearing, the court will determine whether or not such reclamation will occur in any given case.

This expansion of the rights of trade creditors, while obviously welcomed by some, is expected to produce significant litigation by disgruntled creditors having valid security interests in inventories that are being returned to shippers. This clash of competing interests between unsecured trade creditors having ordinary reclamation rights and secured creditors with valid and perfected liens in inventory is not new.

Under pre-Act cases, virtually all courts sided with the secured creditors, protecting their lien rights as superior to reclamation rights of unsecured creditors. This amendment expands the reclamation rights of unsecured creditors and makes it possible for the unsecured creditors to recover inventory during the first 120 days of the case, even if they do not have or exercise reclamation rights. It seems that Congress overlooked the potential competing rights of certain secured creditors. Perhaps Congress was convinced that the courts would, through the notice and hearing mechanism, continue to interpret the return of goods provisions and balance the interests substantially as in the past. However, there is no assurance that in some cases or in some jurisdictions significant collateral value will not be transferred from secured creditors to a new preferred sub-class of unsecured creditors, if courts now interpret the new Title 11 U.S.C. § 545(g) as providing return of inventory rights which are superior to secured creditor lien rights in and to the same collateral.

126. Id.
Another concern involves what will occur if the goods in question are determined to be, or even suspected of being, hazardous goods. Congress did not address this concern.\textsuperscript{128}

XXIV. SECTION 223: PROCEEDS OF MONEY ORDER AGREEMENTS

This amendment provides that proceeds from money orders sold by the debtor within fourteen days of filing bankruptcy are not included as property of the estate. Accordingly, section 223 amends Bankruptcy Code section 541(b). There are two exceptions to the application of this section, in which event these proceeds would be property of the estate. First, this section will not apply when the agreement between the debtor and the issuer of the money orders does not prohibit commingling of the sale proceeds and, second, when the issuer has not taken steps to require or enforce the commingling provisions prior to the debtor filing bankruptcy.

This section resulted largely from an organized lobbying campaign by representatives of the money order industry. These representatives cleverly postured money order providers as bank substitutes for citizens of poor neighborhoods.\textsuperscript{129}

XXV. SECTION 224: PROFESSIONAL FEES

Section 244 is another section that seems misplaced in the Bankruptcy Reform Act of 1994. Regardless of its placement, however, section 224 is destined to generate a great amount of controversy. Retired United States Senator Howard Metzenbaum frequently expressed concern about the size of attorney fees in the mega cases under Chapter 11. Senator Metzenbaum's initial concerns ultimately led to the inclusion of this section. The intention of section 224 is to ensure some degree of uniformity in fee application and award processes by requiring the United States Trustee to draft uniform procedural guidelines for fee applications and by requiring the United States Trustee to comment on certain fee applications.\textsuperscript{130}

XXVI. SECTION 225: NOTICE TO CREDITORS

Section 225 is a "paper tiger" amendment that purports to mandate certain conduct, but permits the conduct to occur without pen-\textsuperscript{128} See generally A.B.I. On-Line, "Return of Goods" Amendments in New Bankruptcy Law Discussed On-Line, 1994 A.B.I. JNL. LEXIS 2795.
\textsuperscript{129} Interview with Sam Gerdano, Executive Director of the American Bankruptcy Institute (Aug. 21, 1995).
\textsuperscript{130} Id.
alty. As with certain other sections, it is not clear why this provision was included with Title II — Commercial Issues. Amending the current Bankruptcy Code, this section requires debtors to include within all of their bankruptcy notices the debtor's name, address, and taxpayer identification number. Virtually every bankruptcy notice contains the debtor's name; very few include the address and taxpayer identification number, except the original petition commencing the case. Then, as if to prove that the left hand taketh away what the right hand giveth and perhaps in deference to most existing bankruptcy software programs, the amendment proceeds to explain that failure to include this information will not invalidate the legal effect of such notice. Additionally, this section grants bankruptcy courts the discretion to waive any of these requirements, including the provision of the address on the initial petition in appropriate instances, such as when victims of domestic violence need to keep their whereabouts undisclosed.

XVII. CONCLUSION

The Bankruptcy Reform Act of 1994 emerged as a last minute legislative surprise from the 103rd Congress and will undoubtedly have ramifications and consequences not yet envisioned. As more bankruptcy cases filed after October 22, 1994, involve disputes over these issues, the ensuing litigation will result in published decisions. History tells us that these decisions will both provide guidance and create confusion. Resolution of any confusion and reversal of any disagreeable guidance will be left to another Congress, not yet elected, to provide further surprises.