



**Position Paper Submitted to the United States Congress
by the Commercial Law League of America and its Bankruptcy Section**

**Critical Technical Issues Regarding Public Law No. 109-8
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005**

September 7, 2005

The Commercial Law League of America (“CLLA”), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and insolvency. Its membership exceeds 3,100 individuals. The CLLA has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable and efficient administration of bankruptcy cases for all parties in interest.

The Bankruptcy Section of the CLLA is made up of approximately 1,450 bankruptcy lawyers and bankruptcy judges from virtually every state in the United States. Its members include practitioners with both small and large practices, who represent divergent interests in bankruptcy cases. The CLLA has testified on numerous occasions before Congress as experts in the bankruptcy and reorganization fields.

INTRODUCTION

On February 20, 2001, the CLLA submitted to the United States Congress its Technical Problems with S. 220 and H.R. 333, a position paper dedicated not to the substance of the bankruptcy reform legislation then pending, but to drafting issues that appeared to be in clear error, inconsistent with Congressional intent or which render certain provisions unworkable in practice.

Although the CLLA was pleased to see that a number of issues we discussed in our prior technical problems paper were addressed, as reflected in S. 256, which was enacted into law on April 20, 2005, as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") some important problems were not resolved. Moreover, since 2001, both additional amendments made to various versions of the bankruptcy reform legislation and an increasing body of academic analysis have necessitated further corrections.

Within hours of the enactment of S. 256, an example of the need for technical revision presented itself. Section 325 provided for an increase in the bankruptcy filing fees and amended the apportionment of those fees among the General Fund of the Treasury, the United States Trustee

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program and the Judiciary. The problem arose in that the fee increases were governed by the general effective date, or 180 days from enactment, while the apportionment changes were of immediate effect. Congress corrected this problem via a provision in H.R. 1268, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, which was signed into law on May 11, 2005.

Many more such problems will come to light on and after the October 17, 2005, effective date for the majority of the new Act's provisions. These problems should be afforded no less priority than was given Section 325.

The CLLA therefore urges the Congress to remedy the Act's technical defects and to do so promptly so as to avoid the confusion that will surely arise if certain of the Act's provisions are permitted to become effective without amendment. In order to better demonstrate the need for such an amendment, and to assist the Congress in this regard, the CLLA has set forth below a number of the more pressing technical problems with the Act.¹

ANALYSIS

Section 102(a)(2)(C)

Section 102(a)(2)(C) of the law creates a new § 707(b)(3) of the Bankruptcy Code ("Code"), which addresses conversion or dismissal for abuse other than under the means test. This new Code section provides:

(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider –

- (A) whether the debtor filed the petition in bad faith; or
- (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

The phrase "subparagraph (A)(i) of such paragraph" should be "subparagraph (A)(i) of paragraph (2)" because there is no "subparagraph (A)(i)" in § 707(b)(1), and the presumption to which this subparagraph refers is the means test, which is codified at § 707(b)(2).

¹ This analysis did not cover Sections 501 – 502 (municipal bankruptcies) and Sections 901 – 911 (financial contracts).



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In addition, subparagraph (B) should begin with “whether” or, alternatively, “whether” should be inserted between “consider” and the dash at the end of the paragraph (3) language and deleted from subparagraph (A).

Section 102(c) and (d)

Section 102(c) amends Code § 704 to require that the United States trustee or bankruptcy administrator “review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor’s case would be presumed to be an abuse under section 707(b).” The court is required to send this statement to creditors within five days of receipt.

Section 102(d) amends Code § 342 to require that in cases in which the presumption of abuse arises, the bankruptcy court clerk must give written notice to all creditors not later than 10 days after the petition date, that the presumption has arisen.

These two provisions, which deal with precisely the same subject matter, are obviously in conflict and not amenable to reconciliation.

The CLLA recommends that Section 102(d) be stricken to resolve the conflict because, unlike Section 102(c), it has no mechanism for determining whether the presumption of abuse has arisen and the United States trustee is much better suited to making this determination than is the clerk of the bankruptcy court.

In addition to the above, Section 102(c) incorrectly amends § 704 to impose a duty on the United States trustee. Code § 704, however, sets forth the duties of a trustee, an entity quite distinct from the United State trustee, whose duties are set forth at 28 U.S.C. § 586.

Section 104

Section 104 amends § 342(b) of the Code, is amended to read as follows:

'(b) Before the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give to such individual written notice containing--

'(1) a brief description of--

'(A) chapters 7, 11, 12, and 13 and the general purpose, benefits, and *costs of proceeding* under each of those chapters; and

The highlighted language may create confusion and uncertainty as to the actual costs of filing bankruptcy verses the filing fees for each of the different proceedings under Title 11. Although it



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is unlikely the drafters' intent, the word "costs" can have both monetary and non-monetary meaning. While costs could relate to filing fees, it could also relate to loss of credit rating or the inability to obtain favorable financing terms in the future. Costs may also relate to various taxable costs incurred in an adversary proceeding or other expense that the debtor's attorney may charge.

In order to clarify the meaning, the highlighted portion should be changed to “filing fees for proceeding”.

Although the former § 342(b) required the clerk to provide an individual debtor with disclosure information prior to filing, such an obligation is unrealistic. Except in the case of a *pro se* debtor who receives the information at the time the clerk accepts the petition for filing, the clerk will not be able to personally give each debtor a copy of the disclosure. This can be corrected by amending paragraph (b) as follows:

“(b) Before the commencement of a case under this title by an individual whose debts are primarily consumer debts, the debtor's attorney, the debtor's bankruptcy petition preparer, or the clerk if the debtor has not retained an attorney or bankruptcy petition preparer, shall give to such individual, written notice prepared by the clerk containing –”

Section 106

Section 106 amends § 362 of the Code by adding subsection (i), which reads:

If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be ***filed not in good faith***.

The highlighted language is confusing and should be changed to “filed in bad faith.”

Although neither “good faith” nor “bad faith” are defined in the Code, both terms are used throughout the Code. Alternatively, the language could read “. . . shall be presumed to be filed in good faith.” Either form of the change appears to have the same meaning and conveys the law in a less confusing manner.

Section 201

Section 201 allows the court to reduce a creditor’s claim by up to 20 percent based on the creditor’s conduct with respect to prepetition workout arrangements with the debtor. The standard used in this Section, however, is unclear because it refers to the creditor’s unreasonable refusal to negotiate with the debtor and its unreasonable refusal to consider the debtor’s proposal. Because a refusal to consider an offer is not the same as a refusal to negotiate, the statute is



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difficult to interpret and to apply. Congress should determine which behavior it intended to proscribe and use the same term throughout the statute.

In addition, if the purpose of this amendment is to encourage creditors to work with debtors and avoid a bankruptcy filing, Congress should consider conferring standing to pursue the Section's remedy on the trustee and other creditors having a claim in the case. The debtor has no real incentive to seek a reduction in the unreasonable creditor's claim and it is the other creditors, not the debtor, that are harmed when a creditor acts in the manner this Section seeks to discourage.

Sections 223 and 1209

Section 223 creates a new priority for "allowed claims for death or personal injuries resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance."

Section 1209 expands the exception to discharge for the same class of claims, but defines those debts as arising from the debtor's operation of a motor vehicle, vessel, *or aircraft*.

To the extent Congress intended that the same debts that are excepted from discharge also be entitled to priority, amendment is required.

Section 229

Section 229 adds new Code § 528, which provides that not later than 5 days after first meeting with an assisted person, a debt relief agency *shall* execute a contract with such assisted person explaining the services to be provided and the charges for such services. To the extent that following the first meeting an assisted person decides not to file bankruptcy or decides to seek assistance from a different debt relief agency and does not execute a contract with the original debt relief agency, that debt relief agency may be in violation of § 528(a)(1). The section should contain a provision excusing the debt relief agency from compliance if the assisted person decides not to use that debt relief agency's services.

Sections 304 and 305

Sections 304 and 305 both amend Code § 521 regarding the period within which the debtor must act stated as 30 days from the first date set for the Code § 341 meeting of creditors in § 521(a)(2) and 45 days in § 521(a)(6), in doing so however, they create inconsistent time periods within which a debtor must surrender or redeem collateral, or reaffirm the underlying debt, as indicated on the statement of intention.

Additionally, in order to prevent the subject property from ceasing to be property of the estate and protected by the automatic stay, the trustee must file a motion with the court before the debtor is required to perform the statement of intention. Beyond the practical problems of cost



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and potential detriment to other creditors, this requirement forces the trustee to file motions that are premature and speculative as to the necessity for relief, a position the law has historically disfavored and which may violate the case or controversy requirement of the Constitution.

A possible resolution for both of these issues is to maintain the 30 day time period for the debtor's performance of the statement of intention, with the creditor providing prompt notice to the trustee upon the debtor's failure to perform. The trustee would then have the additional 15 days to file the motion necessary to retain the subject property within the estate as well as the continued application of the automatic stay.

Section 313

Section 313 amends Code § 522(f) as it relates to a debtor's ability to avoid a non-possessory, non-purchase money security interest in certain goods to the extent the security interest impairs the debtor's exemption. Section 313, however, was not properly drafted. Code § 522(f)(1)(B) currently permits a debtor to avoid a non-possessory, non-purchase money security interest, to the extent it impairs an exemption in:

- household furnishings, **household goods**, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
- implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
- professionally prescribed health aids for the debtor or a dependent of the debtor.

Section 313 adds paragraph (4) to § 522(f), which defines "household goods" to mean clothing; furniture; appliances; 1 radio; 1 television; 1 VCR; linens; china; crockery; kitchenware; educational materials and educational equipment primarily for the use of minor dependent children of the debtor; medical equipment and supplies; furniture exclusively for the use of minor children, or elderly or disabled dependents of the debtor; personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependants of the debtor; and 1 personal computer and related equipment.

Thus, the specific list of "**household goods**" coexists with household furnishings, wearing apparel and the other items that were included in Code § 522(f) before the amendment. This not only creates duplication and some degree of ambiguity, but also frustrates the intent, which is to limit and state with specificity the items susceptible to lien avoidance.

Section 315

Section 315 (b) amends Code § 521, adding the following language to new (a)(1)(B)(iii):

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a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate –

(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or

(II) if no attorney is so indicated and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;

Code § 342(b) also requires that “Before the commencement of a case under this title by an individual whose debts are primarily consumer debts, *the clerk* shall give to such individual written notice containing –”.

The problem is that Code § 521 makes it the duty of the attorney or petition preparer to file a statement that the debtor has been provided with the statement required in § 342(b); however, § 342(b), as amended, requires the clerk to provide such statement to the debtor *before* filing a petition. There is no indication in § 342(b) as to how the clerk is to provide a represented debtor with the required statement prior to a petition that is filed electronically or why the clerk should have that responsibility, given that the attorney is already required to provide the debtor with the information.

Code §§ 342(b) and 521 should be consistent; this can be achieved by amending § 342(b) to state:

“Before the commencement of a case under this title by an individual whose debts are primarily consumer debts, the debtor's attorney or bankruptcy petition preparer, or in the event that the debtor files a petition without the assistance of an attorney or bankruptcy petition preparer, the clerk shall give to such individual written notice containing . . .”

Section 318

Section 318 adds language into § 1325(b)(1)(B) of the Code so that it reads as follows:

“the plan provides that all of the *debtor's* projected *disposable income* to be received in the *applicable commitment* period beginning on the date that the first payment is due under the plan will be applied to make payments *to unsecured creditors* under the plan.”

The highlighted language could be read to require that *all* of the *debtor's disposable income* is to be paid to unsecured creditors; this does not appear to be the intent of the revision.



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The intent of the revision could be made clearer by inserting the following language (in *italics*): “. . . will be applied to make payments to unsecured creditors *as provided for* under the plan.”

Section 322

Section 322 attempts to remediate one of the more egregious abuses under the Code, the homestead exemption, by establishing a \$125,000 cap. Interpreting the plain language of new Code § 522(p), specifically the phrase “as a result of electing under subsection (b)(3)(A) to exempt property under State or local law,” an Arizona bankruptcy court held that the homestead cap applies only in the handful of states in which a debtor may choose between the applicable state or federal exemption scheme. In other words, the “opt out” states are not subject to the cap at all. *See In re McNabb*, 2005 Bankr. LEXIS 1231 (Bankr. D. Ariz. June 23, 2005).

Under a plain language analysis, the Arizona court appears to be correct, but even the court acknowledged that this may be due to a technical “glitch” in the Act. The CLLA believes it is and should be remedied, particularly in light of the expressed desire of Congress to eliminate abusive bankruptcy filings.

Section 328

Section 328 amends Code § 365(b)(1)(A) in a manner that is extremely difficult to understand and, as such, creates a minefield for litigation and increased costs to the estate and its creditors. The amended Code section provides (with the amended language highlighted):

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default *other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;*

The amendment objective is unclear. The general exception to the cure requirement – a breach of a provision *relating to* the satisfaction of any provision *relating to* a default *arising from* any

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failure to perform – is so ill-defined as to border on nonsense. The CLLA assumes that it is the last part of the exception, that is, a failure to perform that results in a breach of the contract or lease, that is the true object of the amendment, but the enacted language renders our assumption dubious, even if correct.

The amendment's use of punctuation is improper. In addition, the placement of a comma between "real property" and "if it is impossible" without a corresponding comma after "default" throws off the entire subparagraph, everything between "such default" the first place it appears and "real property," becomes a clause unto itself. As such, the "if it is impossible" clause relates to the initial language of the subparagraph, that the trustee must cure defaults, or provide assurance of cure, before assumption. The result is obviously illogical because cure would be required only where it is impossible to do so.

The amendment language is also redundant. The "if it is impossible" clause creates further problems because of its reference to "such default" after "default" which is used three times, each of which appears to refer to a distinct default separate from the others. The vagueness thereby created, is exacerbated by the exception to the "if it is impossible" clause, which applies to nonresidential real property leases, while the first exception to the general rule of § 365(b)(1) applies to unexpired leases of real property.

Despite the problems with the language of Section 328, its purpose is a needed remedy for situations in which a prepetition default, on the part of the debtor precludes reorganization simply because cure is impossible. The CLLA observes, however, that Congress did not fully remedy this problem because the Section 328 amendment has no application to executory contracts even though the impossibility problem is identical to that arising where real property leases are concerned. If this disparity was created through oversight, the CLLA recommends an immediate correction. If intended, the CLLA suggests that Congress reconsider the distinction it has created and the negative consequences that are likely to follow.

The CLLA therefore recommends that the language added to Code § 365(b)(1) by the Act be stricken in its entirety. The exception Section 328 creates should be added at the end of Code § 365(b)(2), which deals generally with exceptions to the cure requirement of paragraph (1), and should read as follows:

(E) nonmonetary obligations if it is impossible for the trustee to cure such breach by performing nonmonetary acts at and after the time of assumption, except that if such breach arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption and pecuniary losses resulting from such breach shall be compensated in accordance with the provisions of paragraph (1).

If this suggestion is not adopted, then Section 328's amendment to Code § 1124(2)(A) should be corrected such that the second occurrence of "section 365(b)(2)" be changed to "section



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365(b)(1).” With or without the CLLA’s suggested amendment, Code § 1124(2)(D), as amended by Section 328, requires a correction in order to make it consistent with § 365(b). In its current form, the latter requires compensation for pecuniary loss resulting from the debtor’s failure to operate under a nonresidential lease, while the former states that such a claim is not impaired if a Chapter 11 plan does not provide that very compensation.

Section 404

Section 404 amends Code § 365(d)(4). In § 365(d)(4)(B)(I) the amendment states that the court may extend the 120-day period “for 90 days on the motion of the trustee or lessor for cause.” The term “lessor” should be “lessee,” as it is the lessee that has the right to seek a single 90-day extension of the 120-day period for 90 days, not the lessor.

Section 405

Section 405 amends Code § 1102(b) to require that official committees “provide access to information” to creditors not serving on the committee. Although apparently intended to enhance the dissemination of information to, and participation in the reorganization process by, all creditors, the amendment is troubling and will likely produce unintended results.

The amendment fails to appreciate important differences between creditors that are members of the committee and those that are not. Members of a committee are charged with a fiduciary duty that ordinary creditors do not have. This duty prevents committee members from engaging in self-dealing or otherwise taking action in a case for personal benefit rather than for the benefit of the estate and the committee’s creditor constituents. Creditors not serving on the committee are under no similar duty and are generally free to pursue their own interests without regard to other creditors, the estate or even the collectively beneficial goal of rehabilitating the debtor.

In addition, Section 405 will ultimately serve to decrease the amount of information available to all creditors, including the committee members, because it does not take into account the sensitivity of the information to be released, particularly in the public company context. Concerns over confidentiality could easily lead debtors to resist sharing information, even with the committee, which will not only increase costs as the parties litigate the issue of disclosure, but will decrease the likelihood of a cooperative effort between the debtor and the committee toward a plan of reorganization.

The CLLA believes that any benefit to be derived from this amendment is far outweighed by the harm that it will likely produce and it should be repealed. Should Congress disagree, the CLLA suggests, as a further amendment, a mechanism that would allow the committee to move the court for an order relieving the committee from the requirements of this Section in appropriate circumstances or conditioning compliance as necessary to protect the interests of the parties and the integrity of the process.



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Section 417

Section 417 amends Code § 366 to provide a different standard for adequate assurance of payment to utilities in Chapter 11 cases than in cases filed under any other chapter of the Code. The language used to effectuate this change, however, requires modification.

Section 417 links the required assurance of payment to the date of the petition, rather than to the date of the order for relief, as does the unamended Code § 366(b). As such, the amendment applies to involuntary cases, even where the merits of the petition are subject to dispute. Given Congressional treatment of involuntary petitions, especially those filed in bad faith, in other provisions of the Act, the CLLA believes the reference to “petition” rather than “order for relief” to be the result of oversight.

In addition, Section 417 is internally inconsistent. It amends Code § 366(c)(2) to allow a utility to terminate service if, after 30 days from the petition date, the debtor or trustee does not provide adequate assurance of payment “that is satisfactory to the utility.” This seemingly unfettered discretion, however, is difficult to reconcile with the remainder of the Section, which expressly defines “assurance of payment” as including specific forms of security or another form to which the utility and the trustee or debtor mutually agree, and, additionally, permits the court to modify the amount of the assurance of payment.

The CLLA recommends that the “is satisfactory to the utility” language be stricken from Code § 366(c)(2) and replaced with “meets the requirements of paragraph (1)” or similar language.

Section 419

The last reference to “debtor” in the final sentence of subsection (b) to Section 419 should be amended to add the word “the” prior to “debtor.”

Section 434

Section 434 creates a new Code § 308. For clarification, the references to “(A)(i)” in (b)(4)(B) should be “4(A)(i)” to insure the reader understands the subsection intended.

Subparagraphs (B) and (C) of § 308(b)(4) should be re-designated as paragraphs (5) and (6) of § 308(b) because their current designation appears to be a drafting error based on the grammar and substantive content of those provisions.



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Section 442

Section 442 amends Code § 1112 regarding conversion or dismissal of a chapter 11 case, but the amendment appears to deprive the United States trustee or bankruptcy administrator from seeking this remedy. Code § 1112(b), as amended, states that it is only upon the request “of a party in interest,” and not by the United States Trustee or a bankruptcy administrator, that conversion or dismissal may be sought. This would preclude, under the plain meaning doctrine, the right of the United States Trustee or a bankruptcy administrator to bring the motion. The CLLA believes Congress did not intend this result, particularly in light of the amendment to 28 U.S.C. § 586, which obligates the United States Trustee to move for conversion or dismissal under certain circumstances. Read together, these two provisions would impose upon the United States Trustee a statutory duty to seek conversion or dismissal, but would preclude the motion under § 1112.

Paragraphs (1) and (2) of subsection (b) both use the phrase “absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate.” This is problematic not only because it creates a redundancy, but also because presence of the phrase in paragraph (2) makes no sense, as it suggests that evidence of harm to creditors and the estate resulting from dismissal or conversion is a condition for *granting* the motion. In order to resolve the problem and lend much needed clarity to subsection (b), the CLLA suggests the “unusual circumstances” language be stricken from paragraph (2).

As now written, the lead in paragraph in Code § 1104 states that the court has the authority to appoint a trustee, but not an examiner, but the more specific subsection allows the court to appoint either a trustee or an examiner. Code § 1104(a)(3) should be amended to exclude the words “or examiner” or alternatively, the lead-in clause in § 1104(a) should include the words “or examiner” to make the provisions parallel.

Section 446

Section 446 amends Code § 521 requiring a debtor to fulfill the duties of an ERISA plan administrator if the debtor or an entity designated by the debtor, served as such administrator as of the petition date. As written, however, the new statute seems to require the debtor to assume the duties it had previously delegated. The CLLA suggests a further amendment to clarify that the debtor may continue to designate an entity to serve as plan administrator.

Section 601

Section 601 creates a new 28 U.S.C. § 159 regarding bankruptcy statistics. Subsection (c)(3)(G) should be clarified to remove the concept of “fined” from the evaluation of misconduct, as not all misconduct is subject to a “fine.” Further, this review should include not only creditor



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misconduct, but misconduct by debtors as well. Similarly, subsection (c)(3)(H) should be expanded to include not only Rule 9011 of the Federal Rules of Bankruptcy Procedure sanctions against debtors' counsel, but also against creditors' counsel.

Section 1201

Paragraph (3) of Section 1201 incorrectly inserts paragraph (23) and (35) into Code § 101 (35)(B) replacing paragraphs (21B) and (33)(A), respectively. This is incorrect. There should be no change and the references to paragraph (21B) and paragraph (33)(A) should remain.

Section 1221

Subsections (d) and (e) of Section 1221 do not amend the Code but contain general propositions for applicability and rules of construction with respect to various provisions relating to non-profit charitable corporations in bankruptcy. These additional provisions should not be placed into the Code.

Section 1224

If Congress intends to create an exception to discharge in cases under Chapter 13 for certain trustee expenses, it should make an appropriate amendment to §§ 523 and 1328 of the Code.

Section 1228

Section 1228 contains requirements for producing tax documentation in Chapter 7, 11 and 13 bankruptcy cases, but without specifically amending the Code. It is unclear where these provisions should be placed in the Code. As a possible alternative, these requirements could become part of the United States Trustee's Guidelines.

Section 1233

The provisions in Section 1233 related to direct appeal are confusing regarding how certification is achieved with respect to 28 USC § 158(d)(2)(A) and 28 USC § 158 (d)(2)(B). The proposed change below to §158(d)(2)(A) clarifies the confusion by providing for certification if all the appellants and appellees stipulate (without a court determination) to certify the matter to the court of appeal for authorization.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the



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bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or **(b)** all the appellants and appellees (if any) acting jointly, certify that –

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel –

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).



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Conclusion

The CLLA and its Bankruptcy Section appreciate your consideration of the concerns expressed herein. We would be happy to respond to any additional inquiries or concerns that you may have with respect to achieving meaningful bankruptcy reform legislation.

Respectfully submitted,

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