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Tom Enneking, Editor

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Bankruptcy Revisions Affecting Business Creditors

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http://www.kmklaw.com/articles_detail.aspx?id=102
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Much has been written about the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the Act) that will take effect on October 17, 2005. Most of the publicity surrounding the Act has related to the significant changes to the Bankruptcy Code that are designed to force individual debtors with consumer debt to file under Chapter 13 rather than Chapter 7.

However, the Act also makes many changes to the Bankruptcy Code that will affect business bankruptcies. These amendments include changes that will have an impact on vendors, landlords, and other creditors. The changes that may have the most significant impact on business creditors are summarized below.

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The Cincinnati Law Library Association

Hamilton County Courthouse
1000 Main Street, Room 601
Cincinnati, OH 45202

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Fax: (513) 946-5252
Reference: (513) 946-5303
reference@cms.hamilton-co.org

Hours: Monday-Friday 7:30-4:30

<http://www.hamilton-co.org/cinlawlib/>

Ohio Legal Gateway: A Compilation of Ohio Legal Resources

Tom Enneking
Assistant Law Librarian

Imagine you're conducting some legal research from your office. You need to access the following Ohio information: cases; court rules from several different jurisdictions; statutes; and information on environmental law (which is outside of your practice area). You could do a number of Google searches and spend valuable time looking for your needs, and even if you know where you can find some of this information online, you still need to enter web addresses and then hunt for specific databases. As an alternative, you could simply visit the Ohio Legal Gateway and easily locate that information.

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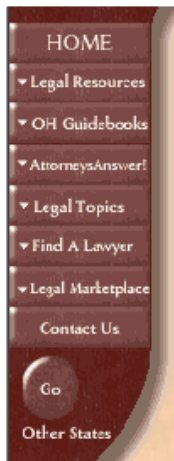
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Gateway, cont'd from page 1

The Ohio Legal Gateway (<http://oh.legalgateway.com/default.asp>) is a compilation of online Ohio Legal recourses that is designed not only for attorneys, but for anyone who needs information on Ohio law. It offers a wealth of legal information, everything from cases to codes to guidebooks covering a variety of legal topics. From this single website, you can begin your legal research.

Perhaps the best place to begin is with the menu located on the left side of the screen. There are eight buttons that when accessed, will take you to a variety of databases.



The first of these buttons, “Legal Resources,” contains drop-down menu from which you may choose the Statutes option. This contains links to the *Anderson’s Ohio Revised Code*, a searchable version of Ohio’s Constitution, and links to other legislative information. Under the Rules option, you will also find links to all of Ohio’s courts and their rules. You will also find, under separate tabs, information covering the Ohio’s Executive and Judicial branches, and related legal information, such as law libraries, legal organizations, professional development, and the University of Akron’s guide to Ohio legal research.

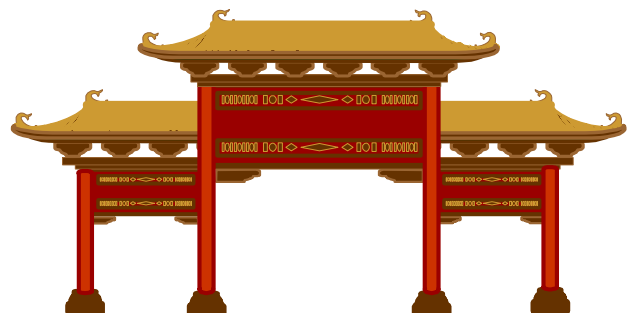
In addition to the above information, the second button, “OH Guidebooks,” provides introductory materials on a number of legal topics. If you are new a certain area, these guidebooks are a valuable introduction. The Ohio Legal Gateway offers twenty-one guidebooks, some of which treat multiple subtopics. For example, in the Personal

Injury guidebook, you can access information on Medical and Professional Malpractice and on Professional Malpractice Defense. Other topics of note include bankruptcy, contracts, family and real estate. These guidebooks would be more useful, however, if they were annotated with a few cases and code sections.

Two buttons, “AttorneysAnswer!” and “Find A Lawyer,” are clearly designed for non-attorneys. On the AttorneysAnswer! page, you may post a question for an Ohio attorney to answer. This webpage is broken down into subject areas so that you can ask attorneys specific questions on specific topics. The Find A Lawyer page is a searchable directory from which you can search nearly 10,000 attorneys, by practice area, firm, and city.

Another button, “Legal Topics,” acts as a table of contents for the website. From this button, you can access information on thirty-five different legal topics, from advertising and media law to workers’ compensation. You can even browse attorney listings for practitioners and search relevant guidebooks.

Several more resources exist in addition to those outlined above. A button marked “Legal Marketplace” will one day lead you to a bookstore, but as of this writing, the page is still under construction. Kentucky and Indiana practitioners shouldn’t feel left out, as you can access all 50 states plus the District of Columbia – simply click the “Go Other States” button. You also have the option to customize your services by clicking the “My Legal Gateway.” Registration is free and requires that you be an active member in good standing with the state bar of Ohio. Whether you are a practitioner or layman, the Ohio Legal Gateway functions as your one-stop resource for Ohio law.



Bankruptcy Revisions, cont'd from page 1

New Protections for Preference Defendants

As many business owners have discovered after a customer has filed bankruptcy, payments that you receive from your customer within 90 days before the bankruptcy may be voidable “preferences” and recoverable by a bankruptcy trustee. The Act provides two notable changes to enhance the defenses available to defeat an action by the trustee to recover a preference.

1. *The Act limits the trustee’s ability to avoid and recover small preferences.* Under the Act, a trustee now cannot recover a payment where the aggregate amount of payments to a creditor during the 90-day period prior to the filing of a debtor’s bankruptcy petition is less than \$5,000. Prior to the Act, there was no minimum threshold, and creditors were routinely required to defend preference actions where the amount in controversy was less than \$5,000. Most creditors found that defending these small preference actions was cost prohibitive.

2. *Preference actions involving less than \$10,000 may only be commenced in the jurisdiction where that creditor is located.* Prior to this amendment, only actions involving less than \$1,000 had to be brought in the defendant’s jurisdiction. This change will discourage a trustee from pursuing preferences involving less than \$10,000 and will allow preference defendants to defend preference actions more easily and efficiently.

In addition to making it more difficult for a trustee to avoid small preferences, the Act also broadens the ordinary course of business defense available to a creditor that has been sued to recover a preference. Under the Bankruptcy Code, a trustee may not avoid a payment made to a creditor if it was incurred and paid in the ordinary course of business. Under the current Bankruptcy Code, to utilize this defense, a creditor must establish:

1. that debt was incurred by the debtor in its ordinary business or financial affairs;
2. that the payment was made within the established payment relationship between the debtor and the creditor; and
3. that the payment was made according to the ordinary payment terms of the relevant industry.

The Act has modified these provisions by requiring a creditor to establish only the first prong and either the second or third prong. This should make the ordinary course of business defense more readily available to creditors because creditors will no longer have to prove that a payment fell within the objective industry standards for the payment to qualify as ordinary if the payment fell within the established relationship between the parties.

New Protections for Landlords

Under the current Bankruptcy Code, a Chapter 11 debtor-in-possession is deemed to reject a commercial lease if it has not assumed it within 60 days. The Bankruptcy Code, however, provides that the debtor may seek extension of this period for “cause,” and Courts routinely have permitted debtors numerous extensions. The Act amends section 365(d)(4) to provide that a debtor must assume or reject an unexpired lease of nonresidential real property by the earlier of:

- 120 days from the commencement of the bankruptcy case; or
- the date of confirmation of a plan.

A court may extend these deadlines for up to one additional 90-day period upon a motion of the debtor or lessor for cause shown. The court may only grant subsequent extensions upon the prior written consent of the lessor for each extension. The debtor’s failure to assume or reject a lease prior to the applicable deadline will result in the lease being deemed rejected.

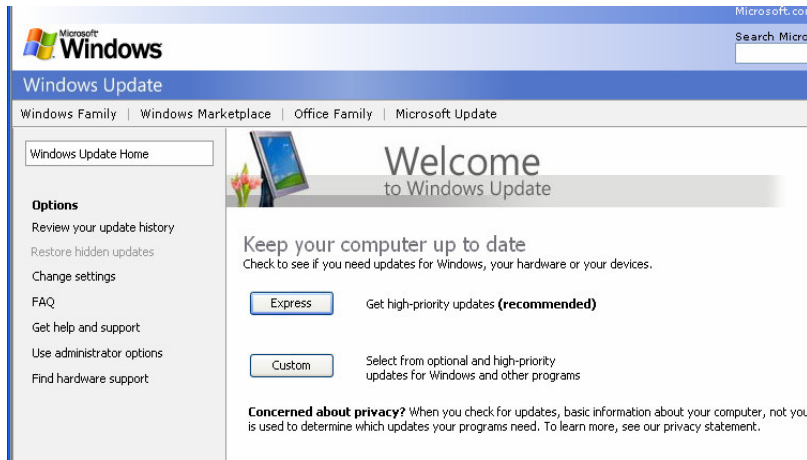
In a related revision, the Act provides a new section 503(b)(7) that applies to a situation where a debtor-in-possession has assumed a nonresidential real property lease but then subsequent to the assumption rejects the lease. Under this new section, the lessor will be entitled to an administrative expense in an amount equal to rent for the two-year period following the later of the rejection date or the date of the actual turnover of the premises, less any mitigation by the lessor. Prior to this revision, there were opposing theories as to the treatment of damages for the subsequent rejection of a previously assumed nonresidential real property

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Keep Windows Updated at No Cost

Julie Koehne
Assistant Law Librarian

Microsoft provides updates once a month to address known issues and help protect against known security threats.



Getting to the Microsoft website may be achieved several different ways. One way would be to click on the Start button and choose Windows Updates. This will take you to the website to update your computers operating system. Another way to get to the website is to open Internet Explorer, select the Tools drop menu and choose Windows Updates. You may also type in the URL, <http://update.microsoft.com/windowsupdate>.

When you visit the Web site, Windows Update scans your computer and tells you which updates apply to your software and hardware. You choose the updates that you want to install and how to install them.

Did You Know Our Members Receive:

- ❖ Free Lexis Access in the Library
- ❖ Free Internet Access in the Library
- ❖ Free Remote Access to HeinOnline, FastCase, and CCH Newsletters
- ❖ Free Reference Assistance, in person, by phone, or via e-mail
- ❖ Extensive Ohio and Federal primary law collection in print and electronic formats
- ❖ Practice materials, including:
 - handbooks
 - rules
 - treatises
 - jury verdicts
- ❖ Borrowing privileges to nearly all materials in the Library's collection, including CLE materials.

New Titles at the Law Library

- Peter A. Lowy. *U.S. Federal Tax Research*. Tax Management Inc., 2005.
- Pamela Everett Nollkamper. *Bankruptcy Courts and Procedures*. James Publishing, 2005.
- Randy Herz. *Federal Habeas Corpus Practice and Procedure*. LexisNexis/Matthew Bender, 2005.
- Marcia Stewart. *Leases and Rental Agreements*. Nolo, 2005.
- James Edward Maule. *Income Tax Basics: Overview and Conceptual Aspects*. Tax Management Inc., 2005.
- Karen B. Brown. *Innocent Spouse Relief*. Tax Management Inc., 2005.
- *Baldwin's Kentucky Lawyers Handbook: with Forms*. Thomson West, 2005.
- Michael Cioffi. *Anderson's Ohio Pretrial Litigation Manual*. LexisNexis/Matthew Bender, 2005.

Bankruptcy Revisions, cont'd from page 4

lease. This amendment provides a clean measure of the landlord's administrative claim.

New Protections for Sellers of Goods

Under the current Bankruptcy Code, a vendor that has delivered goods to a debtor prior to the filing of the debtor's bankruptcy petition has the right to make a claim to reclaim those goods. The vendor's right however, is subject to several limitations, *e.g.*, the goods must have been delivered within 10 days of the bankruptcy filing, and the vendor must make its written reclamation demand within 20 days of the petition.

Revised section 546(c)(1) broadens the rights of reclamation creditors. It now provides that a seller of goods has a right to demand the return of goods sold to an insolvent debtor within 45 days prior to the commencement of a bankruptcy case. The demand must be made in writing within 45 days of delivery or, if the goods are sold less than 45 days before the commencement of a bankruptcy case, within 20 days after the petition date.

Additionally, under revised section 546(c)(2), even if a creditor fails to make a timely written reclamation demand, the creditor still is entitled to an administrative expense claim for the value of any goods received by the debtor in the ordinary course of the debtor's business within 20 days of the commencement of the petition date.

These changes will enhance the rights of creditors that continue to ship goods to debtors in the time immediately prior to their bankruptcy.

Changes for Chapter 11 Cases*Exclusivity*

Under the current Bankruptcy Code, a debtor has the exclusive right to file a plan of reorganization for 120 days after the commencement of the bankruptcy case. Courts, however, have had broad discretion to provide an unlimited number of extensions to this exclusive period upon the request of the debtor. This has led in some cases to multi-year extensions during which the debtor enjoyed the exclusive right to file a plan. This unilateral control of the case can provide the debtor with significant bargaining leverage when negotiating with its creditors. Under the revised Act, the exclusive period may not be extended beyond a date that is 18 months after the petition date. The court has no discretion to further extend these periods. No longer

will the debtor be able to hold creditors hostage for years in a Chapter 11 case.

Dismissal or Conversion

The Act also made changes to the Code designed to make it easier for creditors to have a Chapter 11 case dismissed or converted to Chapter 7. Under the current Bankruptcy Code the judge has broad discretion whether to convert or dismiss a case even if a creditor has demonstrated the existence of one of the statutory standards for conversion or dismissal. Under the revisions to the Act, the bankruptcy court generally is required to convert or dismiss a Chapter 11 case "absent unusual circumstances," which must be specified by the court. Additionally, the revisions have expanded the non-exhaustive list of factors that will constitute "cause" for conversion or dismissal.

Prior to these amendments, a creditor seeking conversion or dismissal carried a heavy burden; now once the creditor establishes cause the burden shifts to the debtor to show that there is a reasonable likelihood that the debtor will be able to get a plan confirmed within a reasonable period of time or that the grounds justifying conversion or dismissal will be cured within a reasonable time period fixed by the court. These changes provide a moderate shift in leverage from the debtor to the creditor on issues of conversion and dismissal.

Changes for Small Business Bankruptcies

Congress has recognized that the complexity and expense of a typical Chapter 11 case can be too much for a small business to bear, making it impossible for small businesses to reorganize. The Act contains changes that are designed to make Chapter 11 a more uniform, streamlined and efficient process for small businesses.

Duties and Filings in Small Business Cases

Under newly created section 1116, a debtor in a small business case (*i.e.*, those involving debts of not more than \$2.0 million) is required to perform seven additional duties upon the filing of a Chapter 11 petition that are intended to assist all parties to quickly and efficiently obtain important information about the debtor's business. These duties include: attaching the most recent balance sheet, statement of operation, cash-flow statement, and federal income tax return for the debtor to the

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debtor's petition; timely filing all schedules and statements of financial affairs within a period that may not be extended more than 30 days absent extraordinary and compelling circumstances; maintaining insurance customary and appropriate to the debtor's industry; and allowing the United States trustee to inspect the debtor's business premises, books, and records at reasonable times.

Additionally, newly-created section 308 requires a debtor in a small business case to file periodic financial and other reports containing information regarding the debtor's profitability, reasonable approximations of the debtor's projected cash receipts and cash disbursements over a reasonable period, and comparisons of actual cash receipts and disbursements with projections in prior reports.

Disclosure Statement and Plan

Under the revised Bankruptcy Code, the exclusive period for a small business debtor to file a plan and disclosure statement is extended from 160 days to 180 days, and a plan and disclosure statement must be filed not later than 300 days after the petition date, unless these periods are extended. The passage of the 300-day deadline to file a plan would be grounds for conversion of the debtor's case to one under Chapter 7 or dismissal.

The revisions to Bankruptcy Code also streamline the procedures for disclosure statements and plans by permitting the bankruptcy court to remove the requirement of a disclosure statement if the court determines that the plan itself provides adequate information and that a separate disclosure statement is not necessary. Additionally, the court may combine the hearing on the disclosure statement with the hearing on confirmation of the plan.

These changes and the development of forms by the Judicial Conference of the United States will allow for a more uniform process when dealing with small business debtors.

Conclusion

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 provides numerous new rights and enhances existing rights for business creditors. The amendments to the Bankruptcy Code discussed in this legal update do not include all of the possible amendments that will affect creditor's rights in business bankruptcies.

Editor's note: This article is intended to inform about legal matters of interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

Finances from the Past: Locating Historical Stock Prices

In the course of settling an estate, attorneys sometime need to calculate the value of a decedent's assets. More often than not, stock is part of those assets. The value of the stock must be calculated to the date of the decedent's death. For example, if a decedent died on March 8, the fact that the stock split and doubled in value on March 10 is irrelevant. How do you calculate the past value of stock?

There are, in fact, several different methods. A first stop is Yahoo's finance page (<http://finance.yahoo.com/>). At the Get Quotes bar, enter a stock symbol and you can examine the most current information for your stock. On

the left side of the screen is a list of options, one of which is Historical Prices. By clicking that link, you can access historical stock prices from January 2, 1970 to the present. Other web pages, such as New York Times (<http://www.nytimes.com>) and BigCharts (<http://bigcharts.marketwatch.com/>) function similarly.

For prices that predate 1970, you will likely have to consult older newspapers. The Public Library of Cincinnati and Hamilton County has full runs of the New York Times and the Wall Street Journal on microfilm. Consult the finance sections and you'll have your historical prices.

TWO CLE OPPORTUNITIES!

High Octane Internet Legal Research

Location: Cincinnati Law Library Association, 1000 Main Street, Room 601

Date: Friday, March 10

Time: 8:00-noon (registration begins at 7:45)

Speaker: David Whelan, Law Librarian

Find out about cost-effective legal research with freely available cases, statutes, and regulations. Learn how to do better business research, to identify potential new clients, stay up to date on current clients, or get details on your opposition. This 3.5 hour seminar will help you hone your searching skills, introduce you to a wealth of useful Internet research tools, and give you tips on making your research as efficient as possible.

The seminar is \$35 for members, \$90 for non-members. It is approved by the Ohio Supreme Court Commission on CLE for 3.5 general credit hours.

Traffic Law Update

Location: Cincinnati Law Library Association, 1000 Main Street, Room 601

Date: Tuesday, April 18

Time: 1pm-2pm

Speaker: David Diroll, Executive Director, Ohio Criminal Sentencing Commission

Mr. Diroll will provide an update on legislative developments relating to traffic law in Ohio. We are currently seeking approval from the Ohio Supreme Court Commission on CLE for one credit hour of general credit.

To reserve your spot in either seminar, please call Madonna @ 946-5301 or register online at:

<http://www.hamilton-co.org/cinlawlib/cle/signup.html>

**Cincinnati Law Library Association
Hamilton County Courthouse
1000 Main Street, Room 601
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ADDRESS CORRECTION REQUESTED

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