Business Reorganizations After One Year of BAPCPA

By Michael P. Richman and Lori V. Vaughan

Key employee payments and preference actions are affected by the new law.

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)[1] became effective on October 17, 2005. Directed in the main at perceived abuses of bankruptcy law by consumers seeking relief, BAPCPA also contained significant (and less well publicized) changes to provisions affecting Chapter 11 business reorganizations. Concerns about the potential impact of the new law caused a record spike in consumer filings just before the law's effective date.[2] The pattern of business filings appears in the main to have remained unchanged, however. Instead, it appears that in the business arena, judging by the few published decisions in BAPCPA's first year and anecdotal evidence, the parties and courts have learned to adapt, accommodate and otherwise work around the changes in law without any significant changes in the manner in which Chapter 11 business reorganizations are administered.

We review below a variety of the changes enacted by BAPCPA to the business reorganization provisions of the Bankruptcy Code and discuss how they have functioned (or not) in BAPCPA's first year. We caution that this is just a snapshot. It is too early to determine how a number of important provisions will work (for example, limitations on exclusivity, which do not begin to affect cases until 18 months from filing) as decisions are few and experiences around the country vary. In addition, apart from the few published decisions, our observations are based on our personal experiences and nonscientific discussions with lawyers and judges. Thus, it is best to view this as an opinion piece on a work in progress.

Conversion or Dismissal of Chapter 11 Reorganizations

BAPCPA's changes to 11 USC §1112, which governs the conversion or dismissal of Chapter 11 reorganizations, was the subject of much pre-effective-date commentary and speculation. Previously, §1112 provided that the bankruptcy court may dismiss or convert a case to Chapter 7, whichever result was in the best interests of creditors, for cause, which included a nonexclusive list of 10 different factors. This generally gave the court discretion in determining whether it was appropriate to convert or dismiss a Chapter 11 case (and gave parties in interest flexibility in determining whether to seek such relief). BAPCPA's amendment to §1112 appears to limit judicial discretion and party flexibility, and the pre–effective-date speculation by many was that this would lead to additional litigation (and expense). The law now creates a presumption of dismissal or conversion (with the burden on the debtor to attempt to overcome such presumption) if a movant can show that "cause" exists.[3] According to the new language, "absent unusual circumstances specifically identified by the court that establish that

Michael P. Richman is Chair of the National Business Reorganizations Practice Group of Foley & Lardner LLP, based in the firm's New York office. He is also chair of the American Bankruptcy Institute and its former president (2004–05). Contact him at mrichman@foley.com.

Lori V. Vaughan is Senior Counsel in Foley's Business Reorganizations Practice Group, also based in its New York office. Contact her at lvaughan@foley.com.

the request for conversion or dismissal is not in the best interests of creditors and the estate, the court *shall* convert … or dismiss a case … if the movant establishes cause."[4] Cause is now specifically defined in §1112(b)(4) with reference to a list of 16 different facts or offenses.[5]

But is it still a list of nonexclusive factors, or is it a list of 16 required findings? Absurd as this sounds, just this issue was presented in *In re TCR of Denver, LLC.*[6] The court struggled with the use of the word "and" between the last two items under the definition of cause in §1114(b)(4) that, if read literally, appears to require a movant to show each of the 16 factors in order to demonstrate cause for dismissal of a Chapter 11 reorganization. "This is a case where the language of BAPCPA passed by Congress tends to defy logic and clash common sense."[7] In *TCR of Denver,* the debtor, only seven days after filing its voluntary petition for relief, filed a motion for voluntary dismissal.[8] A creditor challenged the dismissal as did the U.S. trustee, who argued that the case may only be dismissed if all 16 of the cause factors are established, even in the case of a voluntary dismissal. The *TCR of Denver* court noted that the term "and" was inserted into the statute in place of "or" when describing the list of factors demonstrating cause and noted that this was clearly a deliberate change giving weight to the US trustee's argument.[9] Recognizing the absurdity of such a literal reading and noting its conflict with the use of the term "including" at the beginning of the list, as well as the legislative history,[10] the court interpreted the law to make the factors alternatives rather than requirements. If §1112 "truly requires, as the United States Trustee coined, the 'perfect storm' of all the elements constituting cause, it would render [the statute] a nullity and the statute cannot be read that way."[11] The court also noted Congress's frequent interchanging of the terms "and" and "or."[12] Accordingly, the *TCR of Denver* court took the first step in clearing up this confusion by ruling that a movant need not establish each of the §1112(b)(4) factors to show cause for conversion or dismissal of a Chapter 11 case.[13] The court further held that a debtor may voluntarily dismiss its own case without showing all the factors and that the court may dismiss a Chapter 11 case for reasons other than those specified in §1112(b) as long as those reasons satisfy cause.[14] This interpretation of §1112 has more recently been followed in *In re 3RAM, Inc.*, where the court likewise ruled that the §1112(b)(4) list of cause factors was nonexhaustive.[15]

We believe the interesting conclusion to be drawn from these two early cases under BAPCPA is that bankruptcy courts are loath to relinquish discretion, which is in many ways the *sine qua non* of the judicial process. "Despite Congress's attempt to remove any discretion of the Bankruptcy Court, it appears that 11 U.S.C. §1112(b) may still give the Court some limited discretion to dismiss, convert, or otherwise deal with the disposition of Chapter 11 cases as appropriate."[16]

Key Employee Retention Plans

BAPCPA changed the rules for executive bonuses in Chapter 11 cases, in clear reaction to well-publicized large bonuses paid to executives in a number of bankruptcy cases. These bonuses are typically paid (and justified) as part of what is known as a Key Employee Retention Plan (KERP). (In other words, as the argument typically goes, "to retain these key employees in the Chapter 11 environment, we have to pay them large bonuses." Creditors are often struck by the counterintuitive nature of this argument. Many consider it offensive to pay bonuses to the persons who oversaw the company's decline and fall into bankruptcy.) Senator Edward Kennedy proposed a last-minute amendment to BAPCPA's language to amend 11 USC §503, noting the "glaring abuses of the bankruptcy system by the executives of giant companies like Enron Corp. and WorldCom Inc. and Polaroid Corporation, who lined their own pockets, but left thousands of employees and retirees out in the cold."[17] One court aptly described the issue. "All too often [KERPs] have been widely used to lavishly reward—at the expense of the creditor body—the very executives whose bad decisions or lack of foresight were responsible for the debtor's financial plight."[18]

In BAPCPA's amendments to §503, Congress attempted to curtail such abuses by heightening the threshold requirement for paying retention bonuses to insiders. The term "insider" is defined in the Bankruptcy Code to generally refer to officers and entities in control of the debtor.[19] Under the new §503(c)(1), no administrative expense may be incurred for the benefit of an insider "for the purpose of inducing such person to remain with the debtor's business" without a finding by the court (based on evidence in the record) that the transfer is needed to retain the person because he or she has a *bona fide* job offer for the same or greater compensation, or the person's services are essential to the survival of the business and the amount is either not more than 10 times greater than the mean amount paid to nonmanagement employees or more than 25 percent of what was paid to the person in prior years.[20]

BAPCPA's language marked a significant change in the law. Previously, there was no specific provision in the Bankruptcy Code governing KERPs. The courts deferred to a debtor's business judgment.[21] KERP motions were very common, especially in large Chapter 11 reorganizations. The amendments are badly flawed, however, in the sense that it cannot possibly be in the interests of the debtor or the creditors to encourage senior management to go looking for alternative employment in order to justify KERP payments. If they find such *bona fide* offers, why wouldn't they simply take the new less risky positions? Not surprisingly, there does not so far appear to be any attempt in reported decisions for KERPs to be justified on the basis of such alternative *bona fide* offers. Instead, the few cases and anecdotal evidence suggest that bankruptcy lawyers and senior management are engaged in efforts to work around the amendments. The emerging trend appears to be to construct such programs as bonus/incentive programs that provide "success fee" structures, rather than retention payments that benefit the employees for simply agreeing to stay in employment regardless of their performance.

The best and most recent example of this is the *Dana Corp.* case.[22] In *Dana Corp.*, Judge Burton Lifland held that incentive programs were not always governed by the restrictions and evidentiary requirements of §503(c)(1). The court noted that "merely because a plan has some retentive effect does not mean that the plan, overall, is retentive rather than incentivizing."[23] In the *Dana Corp.* case, the debtor was making a second attempt to have the court approve certain executive compensation packages. The first attempt failed because the court found that the debtor's plan was "retentive" and subject to §503(c)(1) and that the debtors could not meet the §503(c)(1) standards. But Judge Lifland left the door open to reconsideration by noting that because an incentive plan has some retention effect did not necessarily implicate §503(c)(1).[24] This knowledge in hand, the debtor went back to the drawing board and came up with a different plan in an attempt to get around the §503(c)(1) requirements.

On the second time around, the debtor presented a bonus program for senior executives that was based upon performance and not merely on staying employed. The court ruled that §503(c)(1) did not apply but that §503(c)(3), which was also created by BAPCPA and which embodies a lesser threshold for payments to insiders, did apply. Under §503(c)(3), if such payments are outside of the ordinary course of business, they must be justified "by the circumstances of the case."[25] The court held that this standard was similar to the standard required for any administrative expense (requiring actual and necessary costs or expenses). The court held that "section 503(c)(3) gives the court discretion as to bonus and incentive plans, which are not primarily motivated by retention or in the nature of severance."[26] Judge Lifland approved the debtor's short-term incentive plan as being within the ordinary course of business on the basis of evidence that such a plan had been used for the past 50 years. The court also approved Dana's revised long-term incentive plan, the part of the compensation plan to which the court had previously objected. The debtor's second attempt at executive compensation succeeded because the long-term incentive plan required the company to reach certain benchmarks for earnings before interest, taxes, depreciation, amortization and rent (EBITDAR) before the executives would be eligible for payment. Under the prior, failed plan, executives were paid a completion bonus, which would have been awarded on emergence from Chapter 11 regardless of the company's financial performance, and a separate bonus based on the total enterprise value of the company upon emergence. In other words, under the prior plan, the executives could obtain a bonus even if the total enterprise value of the company declined by the time the company emerged.[27] On the second effort, with the plan modified, the key to the court's determination that the plan was not a KERP was the testimony of the debtor's chief restructuring officer that the EBITDAR levels now required by the plan would actually take a good effort to reach and were not "lay-ups."[28]

A similar distinction between mere retention and incentive/bonus programs was made by Judge

Mary Walrath in the *In re Nobex Corporation* case. Judge Walrath held that the debtor's incentive plan to reward executives based on the price garnered by a postpetition sale of the debtor's business was not subject to §503(c)(1) because it was an incentive plan and not a retention plan.[29] In *Nobex,* the debtor's incentive plan provided for bonuses based on the amount received by the debtor in a sale of its assets.[30]

If this trend continues, it may fairly be said that BAPCPA's changes may do little to curb bonuses paid to executives of bankrupt corporations. By creating "success fee" programs, debtors appear to be able to avoid the alternative *bona fide* offer requirements of the statute or any need to show that their services are essential to the survival of the business. By creating incentive plans, debtors can receive approval showing nothing more than a fair and reasonableness exercise of business judgment. Whatever you call these bonuses, they are all aimed at the same goal: keeping current management. Perhaps tying the bonus to certain goals will keep the bonuses within a reasonable range, but so far this appears not to be the case.[31] The result is not likely to satisfy critics and creditors who would question the payment of bonuses to those in control of a bankrupt company.

Preferences Defenses

Another significant change under BAPCPA was the alteration of the ordinary course of business defense to a preference action. Under 11 USC §547, a debtor or trustee may recover funds for the bankruptcy estate by avoiding certain transfers made to creditors within the 90 days before the bankruptcy filing.[32] One of the most common defenses to a preference action is what is referred to as the ordinary course of business defense found in §547(c)(2). BAPCPA amended §547(c)(2) to effectively remove what was generally perceived as a hurdle in presenting the ordinary course of business defense.

Under the former, pre-BAPCPA version of §547(c)(2), in order to avail itself of the ordinary course of business defense, a defendant had to show that the transfers (1) were in payment of a debt incurred by the debtor in the ordinary course of business between the debtor and the transferee; (2) were themselves made in the ordinary course of business between the debtor and the transferee (sometimes referred to as the objective element); and (3) were made according to ordinary business terms (sometimes referred to as the subjective element).[33] Many courts interpreted §547(c)(2) to mean that even if the payments were consistent with the historical relationship between the parties, the payments were still avoidable if they were not consistent with standard billing practices within the transferee's industry.[34] Expert testimony made the use of the ordinary course of business defense a difficult and expensive proposition.[35]

BAPCPA's amendment to §547(c)(2) removed "ordinary business terms" as the third element of the defense and instead made it an alternative to the second element of "ordinary course of business." According to the revised language, a defendant must either show that such transfer was made in the ordinary course of business between the debtor and the transferee *or* that it was made according to ordinary business terms.[36] (In either case, a defendant must establish the first element: that the transfer was made in payment of a debt incurred by the debtor in the ordinary course of business between the debtor and the transferee. This element is typically not difficult to establish.)

Many commentators predicted that BAPCPA's change would reduce the difficulty and expense of defending preference cases—perhaps even make the playing field between creditors and the debtor or trustee more level. Some early experience under the amendments shows, however, that this may not always be the case. The bankruptcy court in *Hutson v. Branch Banking & Trust (In re National Gas Dist., LLC)*[37] has interpreted the new statute to create a seemingly unintended consequence of making "ordinary business terms" an alternative element of the §547(c)(2) preference defense. BAPCPA's change was accomplished by simply changing "and" to "or," but, according to this court, the defense changed dramatically.[38]

In *National Gas Distributors,* the trustee sought to avoid the debtor's payments to its lender in satisfaction of a line of credit and a working capital loan. The lender asserted the §547(c)(2) preference defense but did not argue that the payments were made in the ordinary course of business between it and the debtor.[39] Instead, the lender argued that the payments were made according to the alternative element of ordinary business terms under §547(c)(2)(B).[40] In considering the defense, the court held that after BAPCPA, the ordinary business terms element means something more than it did previously and that parties may not rely on the interpretations found in pre-BAPCPA decisions.[41]

The court explained its decision by reviewing the history of the §547(c)(2) defense and the ordinary business terms element. Citing the Fourth Circuit's opinion in *Advo-System, Inc. v. Maxway Corp.*, the court explained that, when it was the third element of the defense, "ordinary business terms" was considered a subsidiary to the "ordinary course of business" element and that its weight depended on the length of the parties' relationship.[42] "Only in the absence of an established history between the creditor and debtor did the industry norm become 'crucial,' because only then was there 'no baseline against which to compare the pre-petition transfers at issue to confirm the parties would have reached the same terms absent the looming bankruptcy.'"[43] But, according to the bankruptcy court, when "the prior history existed, the industry norm was relevant, but less significant."[44]

The court concluded that because ordinary business terms is now an independent basis for the defense, it is more complex and should be considered more carefully. This careful scrutiny requires one significant change from pre-BAPCPA interpretation. According to *National Gas Distributors,* instead of evaluating only the standards of the transferee's industry, courts must now consider the industry standards of both the creditor and the debtor, as well as general business standards.[45] Further, the court held that these standards must be applied "to the factual circumstances of the transfer."[46] Applying this standard, the court held that the lender did not establish the §547(c)(2)(B) defense because its affidavit was too generic and did not establish industry standards.[47] The court further held that the payment of the debtor's loans in full may have been a normal practice for the lender but that it was not normal from the debtor's perspective, or from a general business practice standard, when the debtor paid off its working capital debt and had not arranged for any other financing.[48]

Whether BAPCPA successfully separated the subjective ordinary course of business element from the objective ordinary business terms element still remains to be seen. The *National Gas Distributors* decision creates some doubt. By evaluating whether payments were standard for the debtor's industry, considering the debtor's particular situation, the court appears to have inserted a subjective aspect into what was considered an objective element of the defense. Still, *National Gas Distributors* only dealt with the ordinary business terms element and not ordinary course of business. The new language would appear plain on its face to not require evidence of industry standards to establish that payments were made in the ordinary course of business between the debtor and the transferee. Yet, keep in mind that the *National Gas Distributors* court redefined what is required for ordinary business terms because BAPCPA made it an alternative defense. Will ordinary course of business likewise be redefined? We must wait for consideration of the BAPCPA's change in the context of the ordinary course of business element to determine whether the amended language will live up to expectations and whether there will be further unintended consequences to BAPCPA's change.

Chapter 15 Cross-Border Insolvency

One of the most significant changes to the Bankruptcy Code provided by BAPCPA was the creation of Chapter 15—an entirely new chapter of the Bankruptcy Code. Before BAPCPA, ancillary proceedings were governed under only one section, 11 USC §304. Congress has since repealed §304 and replaced it with Chapter 15.[49]

Chapter 15 was designed "to provide effective mechanisms for dealing with cases of cross-border insolvency."[50] Essentially, Chapter 15 allows for a foreign representative to petition the bankruptcy court for recognition of a foreign proceeding. If the court enters an order recognizing the foreign proceeding, the benefits and protections of Chapter 15 are activated. The debtor's assets will be subject to the automatic stay and the foreign representative is given the authority to operate the debtor's business and to use, sell or lease its assets.[51] While we still await the development of law under Chapter 15, a couple of opinions have recently been published discussing the new chapter. In one case, the receiver in a Canadian bankruptcy asked a federal judge in New York to stay proceedings against its US affiliate. The court held that such "relief under Chapter 15 is available only after a foreign representative commences an ancillary proceeding for recognition of a foreign proceeding before a bankruptcy court."[52] The judge allowed the defendant corporation a short stay to permit the receiver to bring such an action in the United States. The court held that in the absence of recognition under Chapter 15, it had no authority to consider the requested relief.[53]

Another case from California recently discussed provisions of Chapter 15 but used them only as a guide because the case was filed before October 17, 2005.[54] The court in *In re Artimm,* a case ancillary to an Italian insolvency, described the major changes to ancillary proceedings under Chapter 15. "The consequences of an order recognizing a foreign main proceeding are substantial. Most dramatically, the US automatic stay, in all its details, applies immediately with respect to the debtor and property of the debtor that is located within the territorial jurisdiction of the United States."[55] "This is a major change from the law under §304, which required a court order for the imposition of the stay on domestic creditor collection action."[56] Another major change provided by Chapter 15 is the requirement that the US Bankruptcy Court cooperate to the maximum extent possible with a foreign court or representative.[57] Chapter 15 is still very fresh and untested. Only time will tell how exactly it will be used and interpreted and how effective its provisions will be in handling cross-border insolvencies.

Deadlines for the Assumption or Rejection of Unexpired Leases

BAPCPA made several changes to 11 USC §365, including changes to important deadlines[58] and changes allowing debtors to assume executory contracts where incurable nonmonetary defaults occurred prepetition. To date, there is little reported experience about assumption in the context of nonmonetary defaults on which to draw conclusions.[59] However, the new limitations on the time for assumption and rejection of unexpired commercial leases under §365(d)(4) have been the subject of recent discussion.

BAPCPA's changes to time limits under §365(d)(4) represent a great departure from pre–BAPCPA law and practice. Before the enactment of BAPCPA, Chapter 11 debtors sought, and often received, numerous extensions of the 60-day deadline to assume or reject unexpired leases of nonresidential real property. In fact, in many courts, it was common to receive an extension through confirmation of a plan of reorganization—the same amount of time applicable to all other executory contracts and unexpired leases in Chapter 11. BAPCPA's changes extended the initial 60-day deadline to 120 days but now provide that the court may only grant one 90-day extension of this deadline, unless the lessor gives its prior written consent.[60] Accordingly, if the lessor does not consent, the debtor has at most 210 days to assume or reject unexpired leases of nonresidential real property. If the unexpired lease is not assumed or rejected by this deadline, it "shall be deemed rejected."[61] This language is likewise a departure from the previous statute, which provided that failure to meet the deadline meant the lease "*is* deemed rejected."[62]

The question raised by this change in language is whether the deadline creates a self-executing rejection (as in prior law) or one that now requires judicial action. To date, one court has held that the new language does not change the result and that §364(d)(4) is still self-executing.[63] The court in *In re Tubular Technologies, LLC* noted that the new statute appears to continue to be self-executing, but the issue in that case was whether the debtor could receive an extension after the deadline had expired. The answer was held to be no, as was the prevailing law under the unamended code.[64] *Collier on Bankruptcy* has likewise raised the issue, noting that in the pre-BAPCPA case of *Stumpf v. McGee (In re O'Connor)* the Fifth Circuit Court of Appeals interpreted similar language in a plan of reorganization to create a meaningful difference.[65] Under the *O'Connor* analysis, some further action would be required to effect the rejection, but the statute does not make clear what action this might be.[66] Further, the idea that additional action would be required seems inconsistent with the language "and the trustee shall immediately surrender," which was unchanged by BAPCPA and appears directly after the new language.[67] Essentially, the issue is still up for interpretation, and we will have to wait for further guidance to determine if this is a distinction without difference.

Conclusion

While it is too early to draw definitive conclusions, it does seem that in certain important respects, as discussed above, BAPCPA's changes to business reorganizations practice have not, so far, worked out quite the way Congress planned. This next year should reveal how the new exclusivity time limits, perhaps the most significant changes of BAPCPA, affect Chapter 11 cases, as well as continue to construe and apply the changes discussed herein. Stay tuned.

Endnotes

1 The Bankruptcy Abuse Prevention and Consumer Protection Act (P.L. 109-8).

2 According to the federal judiciary's Web site, filings during the last three months of 2005 were at a historic high as were filings in 2005 generally. During the three months, a total of 667,431 petitions were filed. Of this amount, 630,497 were filed in October.

3 11 USC §1112((b)(1) (2006).

4 Emphasis added. 11 USC §1112(b)(1).

5 11 USC §1112(b)(4).

6 *In re TCR of Denver, LLC,* 338 BR 494, 499 (Bankr. D. Col. 2006).

7 *Id.*, at 495–96.

8 *Id.*, at 496.

9 *Id.*, at 499.

10 *Id.*, at 500.

11 *Id.*, at 499.

12 *Id.*

13 *Id.*, at 500.

14 *Id.*

15 *In re 3RAM, Inc.*, 343 BR 113, 117 (Bankr. E.D Pa. 2006).

16 *TCR of Denver,* 338 BR, at 499–501.

17 *See In re Dana Corp.,* 2006 WL 3479406, *5 (Bankr. S.D.N.Y. Nov. 30, 2006) quoting Statement of Edward Kennedy on the Bankruptcy Bill (March 1, 2005).

18 *In re US Airways, Inc.*, 329 BR 793, 797 (Bankr. E.D. 2005).

19 *See* 11 USC §101(31)(2006).

20 11 USC §503(c)(1)(2006).

21 *See, e.g., In re Montgomery Ward Holding Co.,* 242 BR 147 (D. Del. 1999).

22 2006 WL 3479406 (Bankr. S.D.N.Y. Nov. 30, 2006).

23 *Id.*, at *2.

24 *Id.*

25 11 USC §503(c)(3)(2006).

26 *Id.*, at *6.

27 *Id.*, *10.

28 *Id.*, at *11.

29 2006 Bankr.LEXIS 417 (Bankr. D. Del. Jan. 19, 2006); *see also In re Airway Industries, Inc.*, 2006 WL 3056764, at *6 (Bankr. W.D. Pa. Oct. 3, 2006) (noting that its retention plan would not be subject to §503(c) in part because it was negotiated pre-petition and before BAPCPA took effect).

30 2006 Bankr.LEXIS 417, at *9 (Bankr. D. Del. Jan. 19, 2006).

31 In *Dana Corp.,* the long-term incentive program could have resulted in the CEO receiving 200 percent of his salary in 2007, but Judge Lifland did rule that the plan required a cap. In *Nobex,* Judge Walrath approved a bonus program that would pay the CEO a bonus out of a range starting at 100 percent of his salary.

32 11 USC §547 (2006).

33 11 USC §547(c)(2) (2005).

34 *See, e.g., Forklift Liquidating Trustee v. Custom Tool and Mfg. (In re Forklift Corporation),* 340 BR 735, 739 (D. Del. 2006) (noting that a creditor cannot maintain a defense to a preference action unless it can prove that the transfers were made "in harmony with the range of terms prevailing as some relevant industry norms") (citing *In re Molded Acoustical Products, Inc.*, 18 F3d 217, 219 (3d Cir. 1994); *Advo-System, Inc. v. Maxway Corp.,* 37 F3d 1044, 1048 (4th Cir. 1994).

35 *See G.H. Leidenheimer Banking Co. v. Sharp (In re SGSM Acquisition Co., LLC),* 439 F3d 233, 240–41 (5th Cir. 2006).

36 Apparently, the National Bankruptcy Review Commission recommended that the defense be revised to make the standard more objective, but what it had in mind was to require that all defendants demonstrate that payments were made according to the ordinary course of business between the parties, but if the history was insufficient to establish a course of business, the parties could instead rely on the ordinary business terms. The language of §547(c)(2) does not reflect this approach.

37 346 BR 394 (Bankr. E.D. N.C. 2006).

38 *Id.*, at 400 (quoting Charles J. Tabb, *The Brave New World of Bankruptcy Preferences,* 13 Am. Bankr. Inst. L. Rev. 425, 428 (2005).

39 *Id.*, at 398. This is presumably because there was no payment history to rely upon.

40 The plaintiff did not dispute that the transfers were made in payment of debts incurred by the debtor in the ordinary course of business under §547(c)(2).

41 *Id.*, 403.

42 *Id.*

43 *Id.*

44 *Id.*

45 *National Gas Distributors,* 346 BR, at 404.

[46] *Id.*, at 405.

[47] *Id.*

[48] *Id.*

[49] Chapter 15 incorporates the Model Law on Cross-Border Insolvency, U.N. GAD., 52d Sass., Supp. No. 17 (A/52/17).

[50] 11 USC §1502.

[51] 11 USC §1520.

[52] *United States v. JAG. Jones Constructions Group, LLC,* 333 BR 637, 638 (E.D.N.Y. 2005).

[53] *Id.*, at 639.

[54] *In re Artimm, S.r.L.,* 335 BR 149, 159 (Bankr. C.D. Cal. 2005) (noting that since §304 was repealed and replaced with Chapter 15, the new chapter should be consulted for guidance even though it was not yet effective).

[55] *Id.*, at 159.

[56] *Id.*

[57] 11 USC §1525(a).

[58] 11 USC §365(d)(4).

[59] *See* 11 USC §365(b)(1)(A).

[60] 11 USC §365(d)(4).

[61] *Id.*

[62] *Id.*

[63] *In re Tubular Technologies, LLC,* 2006 WL 2405711, *2 (Bankr. D.S.C. 2006).

[64] *Id.*

[65] 258 F.3d 392 (5th Cir. 2001).

[66] *See* King, 5 COLLIER ON BANKRUPTCY, at ¶365.04[4].

[67] 11 USC §362(d)(4).