On April 20, 2005, the President signed the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005” (the 2005 Act). The Act, 512 pages in length, made significant changes to the Bankruptcy Code and other bankruptcy statutes, and affects nearly every aspect of bankruptcy cases. The Act in general took effect on October 17, 2005. Several provisions, however, became effective upon enactment, while other provisions had individualized effective dates.

From its Orwellian title (the Act is clearly not a “Consumer Protection Act”) to the last of its 512 pages, the 2005 Act presents numerous challenges to attorneys who represent consumer debtors. How such terrible legislation could be passed by Congress is a story of money, political mean-spiritedness, and intellectual dishonesty, as detailed in a number of media and law review articles.

The changes made by the 2005 legislation are too numerous even to summarize here; they are described throughout this treatise. They affected, to some degree, most aspects of consumer bankruptcy, in almost every instance reducing consumers’ rights. Although substantial relief continues to be available to debtors, the amendments made it almost always more expensive and more cumbersome. The 2005 amendments did make chapter 12 a permanent part of the Bankruptcy Code and extended it to family fishermen. They also enacted a new chapter 15 of the Code to deal with international bankruptcies.

There is no doubt that bankruptcy relief has become more expensive for almost all debtors, less effective for many debtors, and totally inaccessible for some debtors as a result of the new law. At the same time, a minority of debtors, often the higher-income individuals whose “abuses” of bankruptcy the Act was ostensibly aimed at, have found themselves better off than before because of generous new exemptions for retirement and education savings accounts and a means test which can be turned to the debtor’s advantage, in both chapters 7 and 13, by the careful planning that only higher income debtors can afford to do.

One of the chief problems that practitioners have confronted is atrocious drafting, especially in many of the consumer provisions of the Act. In contrast to the 1978 legislation, which was crafted with extensive assistance from many of the finest minds in the bankruptcy world, the consumer provisions of the 2005 legislation were largely drafted by lobbyists with little knowledge of real-life consumer bankruptcy practice. It is perhaps a credit to the bankruptcy bar that no true expert in bankruptcy participated in drafting the consumer provisions sought by the financial services industry; apparently the industry did not trust any experienced bankruptcy attorneys, even creditor attorneys, to carry out its mission of defacing the Code. Or perhaps it is just an indication of the arrogance of the Act’s drafters, who throughout the legislative process steadfastly resisted even the smallest technical corrections to their handiwork.

The silver lining is that the Act is so poorly drafted that it did not accomplish much of what its financial backers wanted it to accomplish. It has been interesting to see courts that have been instructed to strictly follow the plain language of the statute adhere to that rule in interpreting the new provisions, leaving it to Congress to fix any mistakes. Of course, some judges who profess to follow that method of statutory interpretation seem to do so only when it brings about the result they desire.

Another redeeming fact is that the amendments are not interpreted or implemented by those who wrote them, but rather by judges, trustees, United States trustees, and attorneys for both debtors and creditors, individuals who want to see the bankruptcy system work and serve its intended purposes, not come to a grinding halt. Some provisions have been largely ignored due to their sheer silliness. Amended section 342(b)(1) of the Bankruptcy Code requires the clerk to give the debtor a notice that another provision, new section 527(a)(1), seems to require others to give to the debtor.

It is no secret that the Act’s proponents sought to limit the discretion of bankruptcy judges who, they said, are “not real judges.” However, despite such efforts, there are many areas in which judicial discretion remains. In addition, one should never underestimate the inertia of local legal culture. After all, there still remain many districts where courts “require” chapter 13 plans to pay a minimum percentage to unsecured creditors, despite statutory amendments over twenty-five years ago and numerous appellate decisions making clear that the Code contains no such requirement.

There is no question that the provisions of the Bankruptcy Code have been changed in many significant respects. There is also no question that many debtors, especially those priced out of bankruptcy relief due to increased costs, will be adversely affected by those changes. And there is no question that some debtors will have to pay more to some creditors. However, debtors and creditors alike have found that some of the supposedly pro-creditor changes in the Code can benefit some consumer debtors, that the credit industry did not accomplish all that it may have thought it did, and that practices have not changed nearly as extensively as many people anticipated. As judges, attorneys, and trustees have worked together to try to make sense out of some of the bizarre language enacted by Congress, consumer bankruptcy has remained a lifeline, albeit a bit frayed, for most of the millions of families who so desperately need it.
Footnotes


38 [38] Most of the provisions affecting consumer bankruptcies took effect on or after October 17, 2005, except for several of the exemption changes discussed in Chapter 10 [1], infra, which went into effect on April 20, 2005. Provisions concerning audits of certain debtors’ cases became effective October 20, 2006.


40 [40] See § 17.1.1.1 [2], infra.


44 [44] See BFP v. Resolution Trust Corp., 511 U.S. 531, 549, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994) (Souter, J. dissenting) (rejecting the holding of the majority opinion written by Justice Scalia that “value” means foreclosure sale price is as easy as plain language interpretation is likely to get).

45 [45] A similar provision in existing section 342(b), requiring the clerk to give a notice to debtors (who rarely appear at the clerk’s office) before the case is filed, is widely ignored.

46 [46] See § 16.8.3.1 [4], infra.

1.1.2.5 The 2005 Bankruptcy Amendments

[3] https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?article=1031&amp;context=faculty-publications
[4] https://library.nclc.org/nclc/link/Bankr.16.08.03.01