KING'S FUNDAMENTALS OF CONSUMER BANKRUPTCY PRACTICE 2008 Release #1

ERRATA & CORRECTIONS TO THE TEXT Corrections or amendments to 43 pages

Page 10

Table of Contents; ¶ 10.12 page number should be 491

Page 17 bottom paragraph:

Correct language: A debtor may file a chapter 7 once every 8 years, from date of first filing to date of second filing. 11 U.S.C. § 727(a)(8).

Page 25 second paragraph from the top commencing "The petition typically consists of …" The second-to-last sentence of that paragraph commencing "These documents are filed at the bankruptcy courthouse …' This sentence should read "These documents must be filed electronically with the bankruptcy court having the proper venue for the location of the debtor or his business. The filing fee is paid electronically ("e-filing") with the attorney's credit card that is on file with the court clerk. See this book ¶ 3.2." The last sentence commencing "The debtor is in bankruptcy …" is correct.

A footnote to his paragraph should indicate that as of the printing date of this book the filing fee for a Chapter 7 case is $299.

Page 27

¶ 1.6 The Bankruptcy System
¶ 1.6(o) Exceptions to discharge

Add an introductory paragraph:

"A discharge can be denied as to *certain particular debts*, or *denied in its entirety*. For example, in a case where the debtor commits fraud against the bankruptcy court itself, the entire discharge may be denied.[1] Or, in a case in which the debtor committed fraud against a particular creditor, the court may except that debt from being discharged, while granting a general discharge in the case.[2] The Bankruptcy Code does not contain a list, *per se*, of debts that are dischargeable in chapter 7 or chapter 13 bankruptcy. Rather, it contains within its overall structure an assumption that all debts are dischargeable, but then lists certain categories of debts that are not dischargeable (i.e., exceptions to discharge). For chapter 7 cases the Code[3] provides that " … a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief" (i.e., the filing of the petition), but then provides that those debts described in 11 U.S.C. § 523 are not dischargeable in chapter 7.

[1] 11 U.S.T. § 727(a)(4). See this book ¶ 3.34 Denial of Discharge.
[2] 11 U.S.T. § 727(b). See this book ¶ 3.32 Exceptions to Discharge.
[3] 11 U.S.C. § 727(b).

"The Code does the same thing for chapter 13 cases by providing that " … the court shall grant the debtor a discharge of all debts provided for by the plan …" but then goes on to list debts that are excepted from discharge in chapter 13.[4]

"Some debts that are not dischargeable in chapter 7 may, or may not be, dischargeable in chapter 13, depending on circumstances. The fact that some debts not dischargeable in chapter 7 are, or may be, discharged in a chapter 13 is referred to as the *super-discharge*."[5]

Page 32

The text of this page (¶1.7(c)) discusses "ipso facto clauses."

Add a cross-reference: See ¶ 3.19(d) Options for handling secured claims

Add a box:

NOTE: The validity of an *ipso facto* clause in a purchase-money-security-interest" is largely governed by state law. If the debtor in chapter 7 elects to continue paying on the contract and retain the item, rather than redeem it or surrender it, the automatic stay no longer protects the property. The debtors and creditors are left to their legal rights under their respective state laws. 11 U.S.C. § 362(h)(1), § 521(d).

Page 37

Flow chart, "8 Steps to A Fresh Start." Step 3 should have added to it, "Conduct Means Test if applicable."

Page 51

Just above the bold text stating "8 years between chapter 7 cases," should appear this text:

"The time periods below are measured from date of filing the previous case to date of filing the new case."

Page 52

Part "e" add sentence: "The chapter 7 debtor must file a certificate, within 45 days of the first date set for the meeting of creditors, that the financial management course has been completed. This of course means the debtor's attorney needs to calendar a reminder and see to it that the certificate is timely filed." Rule 1007(b)(7), (c).

Page 58

The "Practice Tip" in the box states an incorrect filing fee for chapter 7. The filing fee in effect as of date of this book (2008) is $ 299.00. www.canb.uscourts.gov/bankruptcy-court-fee-schedule.

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[4] 11 U.S.C. § 1328(a).

[5] While BAPCPA narrowed the scope of the super-discharge, it did not entirely eliminate in for several categories of debts. See This book, ¶ 4.6, *Treatment of Claims in Chapter 13*; ¶ 4.6(b)(3), *Super-discharged preserved*.

Page 59

Section 3.5(b) The filing fee

"Under current bankruptcy rules the filing fee, like the petition and other documents required to be filed at the commencement of the case, must be paid electronically. Contact the local bankruptcy court clerk for instructions and training in electronic filing and payment."

Page 64

Section 3.6(c) Termination of the stay.

Add:

"Under certain circumstances, primarily in the case of repeat or serial filers, the automatic stay may not arise at all, or may arise but terminate 30 days after filing. See discussion, this book, ¶ 11.3. And, failure to give proper notice could result in loss of right to seek damages for violation of the stay. See this book, ¶ 3.8(d) Damages, ¶ 6.13(53) Creditor addresses, ¶ 5.5 Secure list of creditors, ¶ 9.2 BAPCPA Changes, I, New Notice Provisions."

Page 70

¶ 3.8(b) Motion for damages, fees etc.

Add:

2. No damages if incorrect notice

"Under BAPCPA failure to use the addresses lodged with the court by creditors results in the creditor not being subject to monetary sanctions for violation of the automatic stay. See ¶ 3.8(d), ¶ 9.2(n)."

Page 74

¶ 3.8(d) Damages

Add:

"Be forewarned that under BAPCPA, failure to provide the creditor's correct address for note of filing of bankruptcy may result in forfeiture of the right to seek damages against a creditor who violates the automatic stay. 11 U.S.C. §342(g)(2). See this book ¶ 9.2(n)."

Page 75

In the list of debtor's principal duties,

Correction**:**

b. The chapter 7 filing fee as of 2008 is $299.

add:

"i. Complete, prior to filing the petition, a credit counseling briefing pursuant to 109(h)(1). See this book, Part 7 – The Credit Briefing."

Page 93

18. Pensions, retirement plans and retirement annuities

Add:

The Reform Act of 2005 made some changes to exemptions of pensions and retirement plans. Chief among these are:

Regular IRAs are exempt

"Code § 522(n) provides that funds in individual retirement accounts are exempt to the limit of $1,000,000, 'except that such amount may be increased if the interests of justice so require.'"

Exclusions[6] from the estate:

1. Educational IRAs are excluded from estate

"Section 225 of the Act amends Code § 541(b)(5) to provide that funds in educational individual retirement accounts are excluded if deposited before 365 days prior to filing the bankruptcy. For funds placed in such an account more than 365 days before filing, but not more than 720 days before filing, the exemption is limited to $5,000. Funds placed in such an account before 720 days prior to filing appear to have no exemption limit."

2. ERISA-qualified retirement plans

"Section 225 of the Act adds § 541(b)(7) to exclude contributions to ERISA qualified retirement plans, deferred compensation plans, tax-deferred annuities, and health insurance plans are excluded from the estate."

Page 99

1. Not property of the estate

Add:

Also excluded from the estate by BAPCPA:

1. Educational IRAs are excluded from estate

"Section 225 of the Act amends Code § 541(b)(5) to provide that funds in educational individual retirement accounts are excluded if deposited before 365 days prior to filing the bankruptcy. For funds placed in such an account more than 365 days before filing, but not more than 720 days before filing, the exemption is limited to $5,000. Funds placed in such an account before 720 days prior to filing appear to have no exemption limit."

2. ERISA-qualified retirement plans

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[6] An asset may be owned by the debtor but not be part of his/her bankruptcy estate (e.g., *excluded* from the estate), or included in the estate but *exempt* from seizure by the trustee. See ¶ 3.10(c).

"Section 225 of the Act adds § 541(b)(7) to exclude contributions to ERISA qualified retirement plans, deferred compensation plans, tax-deferred annuities, and health insurance plans are excluded from the estate."

Page 110

3. Avoiding fraudulent transfers

Correct:

Reference to Guide ¶ 2.24 should be deleted and replaced with This book ¶ 3.25.
Reference to Guide ¶ 2.23 should be deleted and replaced with This book ¶ 3.24.

Page 120

3.14 Exemptions

Add:

"Before discussing exemptions from the estate, attention should be drawn to the subtle difference between debtor's property that is property of the estate but may be exempt from the estate, and debtor's property that is not part of the estate to begin with, or in other words is excluded from the estate.

"In order for an asset to be exempt from the estate it must first be property of the estate. Property that is not property of the estate cannot be exempt per se. It simply is not property of the estate and is unaffected by the bankruptcy.

"This distinction is typically unimportant. However, in some situations the distinction may have substantial consequences. For example, whether or not to treat a debt in chapter 13 as secured or unsecured is often very important; as a secured debt the plan will have to provide for full payment of the debt up to the value of the asset, with any balance of the debt over and above the value of the collateral is lumped in with the unsecured debts. If, however, the asset is not property of the estate, it no part of the debt can be treated as secured in the plan.

"For example, certain retirement programs referred to as "ERISA" qualified retirement plans are excluded from the estate. 11 U.S.C. § 541(b)(7). Hence, a tax lien may attach to the ERISA plan, but the tax claim is treated as unsecured in the chapter 13 plan."

Page 155

Add:

v. Redemption must be paid in lump sum

Prior to the Reform Act of 2005 the courts were not in agreement on whether the debtor could redeem an asset, such as a motor vehicle, that was security for the debt, in several payments or a series of payments, or rather had to pay the creditor the full value of the asset at one time. Creditors typically objected to having to wait through a series of payments where the debtor chose redemption rather than surrender or reaffirmation.

BAPCPA amended the Code to provide that upon redemption the entire amount of the redemption must be paid in full at time of redemption, thus eliminating broken payments or series of payments.

Page 159

5. Continue paying without reaffirming

The general thrust of this language suggests that if the debtor is current on an installment payment, such as a car, he/she has the option of continuing the payments and retaining the car, even though he/she does not sign a reaffirmation agreement. The underlying principle is that *ipso facto* clauses[7] found in many installment contracts were unenforceable under bankruptcy law. Thus the debtor could *ride-through* the bankruptcy and keep the vehicle.

While this may have been true before the Reform Act, BAPCPA eliminated the Bankruptcy Code prohibition against ipso facto clauses.[8] Thus, if the debtor fails to elect one of the two permitted choices, surrender the vehicle, or keep the vehicle and reaffirm the contract, the automatic stay protecting the vehicle terminates as to that property, and the debtor and creditor are left to whatever their respective rights are under state law. In some states ipso facto clauses are not necessarily automatically enforceable. And, in some cases, if the debtor is current on payments the creditor would rather just let things be, usually preferring cash to a used car. See this book ¶ 1.7(c).

Page 187

3.24(h) Preferential liens or other security interests

For most purposes the preference period described in the first paragraph is 90 days pursuant to § 547(b)(4)(A). The preference period for recording of a lien for a purchase-money-security interest 30 days after debtor receives possession of the property (extended from 20 days by BAPCPA). § 547(c)(3)(B).

Page 190

¶ 3.25 Fraudulent transfers

¶ 3.25(a) In general

The text of this section incorrectly explains the lookback period for fraudulent transfer is 12 months. BAPCPA extended this period to two years.

Page 191

¶ 3.25(b)

Same error as on page 90; the correct lookback period for fraudulent transfer has been extended to 2 years by the Bankruptcy Reform Act of 2005 (BAPCPA).

Page 195

3.25(h) The look-back period.

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[7] An *ipso facto* clause is a condition in many installment agreements that filing bankruptcy is automatically deemed a violation of the contract which permits repossession of the vehicle even if the payments are current. This is referred to as *a ride-through*. See this book, ¶ 1.7(c).

[8] See 11 U.S.C. § 365(e)(1), § 521(d).

Same error as appears on pages 190 and 191: the period in which the trustee can avoid a fraudulent transfer is 2 years, not one year.

Page 198

¶ 3.29 Conversion of case

3.29(a)

Change the title of ¶ 3.29(a) to The Presumption of Abuse, and re-number the following sections accordingly (3.29(a) becomes 3.29(b) etc.).

Add:

"A significant change brought about by the Reform Act is the new requirement that some chapter 7 debtors submit to a "means test" to calculate whether or not the debtor has sufficient disposable income to pay a certain amount of his/her unsecured debt, fixed by the means test formula prescribed at § 707(b)(2)(A). If the disposable income is over the bright line as calculated by the means test, a "presumption of abuse" arises in the case which is supposed to trigger the trustee's motion to dismiss the case, or convert it to a chapter 13 with the debtor's permission. See this book, ¶ 8.6 The Means Test; 8.6(e).

"The "presumption" is rebuttable. The debtor may rebut the presumption by demonstrating *special circumstances*. See further discussion at this book, ¶ 8.6(f) The Presumption is Rebuttable."

Page 203

Above the subtitle 1. "False or incorrect information on filed papers" insert the following, referenced as ¶ 3.30(a)(1) Presumption of abuse. Renumber (1) to be (2), and (2) to be (3), etc.

Add:

"A significant change brought about by the Reform Act is the new requirement that some chapter 7 debtors submit to a "means test" to calculate whether or not the debtor has sufficient disposable income to pay a certain amount of his/her unsecured debt, fixed by the means test formula prescribed at § 707(b)(2)(A). If the disposable income is over the bright line as calculated by the means test, a "presumption of abuse" arises in the case which is supposed to trigger the trustee's motion to dismiss the case, or convert it to a chapter 13 with the debtor's permission. See this book, ¶ 8.6 The Means Test; 8.6(e).

"The "presumption" is rebuttable. The debtor may rebut the presumption by demonstrating *special circumstances*. See further discussion at this book, ¶ 8.6(f) The Presumption is Rebuttable."

Page 214

¶ 3.31 The Final Discharge

Immediately below the boxed "RULE" the "note" says a discharge in chapter 7 may be granted every 6 years. BAPCPA has changed this rule so that under current law a discharge may be granted in a subsequent chapter 7 discharge only where the subsequent chapter 7 has been filed 8 years since the filing of the previous case in which a discharge was granted. 11 U.S.C. § 727(a)(8).

Page 215

In the next to last paragraph above ¶ 3.31(b) the text explains that "Congress has created a laundry list of debts … "

Add a footnote:

*The list of debts not dischargeable in chapter 7 is found at § 523. The list of debts not dischargeable in chapter 13 is found at § 1328(a); the chapter 13 list includes a number of debt categories also listed at ¶ 523.

Page 219

The paragraph appearing immediately under "The 'means' test does not apply in tax discharge cases," "Guide ¶ 6.5" commencing with "Section 102 of the Act …" and ending with "Taxes have been held not to be …" is misplaced in this part of the book. This entire paragraph should be deleted here and moved to page 413, ¶ 8.2(a) Is the Means Test Required?

The subtitle should state "The 'means' test does not apply in tax discharge cases.

Page 229

iii. Previous bankruptcy filing

This sentence beginning with "If the client was in …" incorrectly states the running of the time period is tolled ("… the clock stops") and does not resume ticking until the bankruptcy is concluded …"

Delete the words "bankruptcy is concluded …" and insert instead the words "the automatic stay expires or is terminated…"

Page 250

¶ 3.32 Exceptions to discharge

¶ 3.32(o) Family debts in connection with divorce or separation [§523(a)(15)]

This subsection included in the discussion of exceptions to discharge, incorrectly states pre-BAPCPA law that a spouse could under certain circumstances, based on a balancing test of respective burdens and benefits of the spouses, have a marital property decree or agreement deemed discharged.

This is incorrect. Under the Reform Act of 2005 (BAPCPA) all marital-dissolution related debts are nondischargeable in chapter 7. However, such debts are not excepted from discharge in chapter 13, so the super-discharge still functions with respect to such debts. In re Lam, 364 B.R. 379 fn3 (Bkrtcy.N.D.Cal. 2007). Tchaikovsky, Bankruptcy Judge.

Page 261

¶ 3.34 Denial of discharge

Add a new ¶ 3.34(a) entitled "Failure to complete the financial education course."

Add text:

"One of the important changes made by the Reform Act is the provision that a discharge may be denied if the debtor fails to complete " … an instructional course concerning personal financial management described in section 111 …" See ¶ 11.18 The Financial Management course."

Re-designate the former ¶ 3.34(a) In General to (b), former (b) Procedure, to (c), and etc.

Page 271

¶ 7. Prior discharge within six years. [§ 727(a)(9)]

Change this sub-heading to say

"Discharge in prior case filed within 8 years. [§727(a)(8)]"

"The debtor has been granted a discharge under this section . . . in a case commenced within 8 years before the filing of the petition." 11 U.S.C. § 727(a)(8)

Page 285

Fn1484 should state: "The limits under § 109(e) were raised effective Feb. 14 2007 by the Judicial Conference Of The United States. Federal Register Online [wais.access.gpo.gov] (Volume 72, Number 30)]. Dollar amounts are adjusted every 3 years, as prescribed by the Bankruptcy Reform Act of 1994."

Fn1485 should state: "The limits under § 109(e) were raised effective Feb. 14 2007 by the Judicial Conference Of The United States. Federal Register Online [wais.access.gpo.gov] (Volume 72, Number 30)]. Dollar amounts are adjusted every 3 years, as prescribed by the Bankruptcy Reform Act of 1994."

Page 314

Subsection "O"

Title should be changed to read:

"Cases unsettled whether actual surplus income is counted"

Add:

"For purposes of the plan payment, although the Code as amended by BAPCPA only requires an amount as calculated under § 1325(b)(1)(B) and (b)(2) to be dedicated by paying unsecured claims, the cases are split on this question.[9] Some jurisdictions hold that the plan payment is calculated strictly according to the formula inserted in the Code by BAPCPA, others holding that the actual surplus income determined by the schedules ("I" Income, "J" Expenses) must be taken into consideration.

"The reasons typically cited for using only the strict codified formula is that in passing the Reform legislation in 2005 Congress clearly communicated a desire to limit or eliminate the court's discretion in setting the plan payment, and that the language of the Code as written does not provide for actual income and expenses to be considered, but only the 6-

[9] To obtain a compilation of typical case opinions on this issue order *King's Digest of BAPCPA Cases* at BankruptcyBooks.com.

month average as incorporated by the codified formula, and courts should follow the exact wording of the code unless it leads to an absurd result.

"Reasons typically posited in opinions that include actual income and expenses include, to do otherwise is contrary to common sense, and that the phrase "projected disposable income" means to include actual future income and expenses."

Page 327

¶ 5 The Filing Fee

The figure given as the chapter 13 filing fee ($195) is incorrect. As of the publication of this book (Sept. 2008) the filing fee is $274, effective April 9, 2006.

Add:

"Under rules of practice in the federal bankruptcy courts, the filing fee must be paid electronically. Call your local bankruptcy court clerk for local rules and instructions on filing and paying electronically."

Page 374

¶ 7 Explain the requirement of a financial management plan

This text cites "Official Rule 10-07." This is a typo. It should be Rule 1007.

And add:

"In chapter 13, the certificate of completion of the financial management training course must be filed before the final payment in the plan."

Page 415

¶ 8.2(c) Non-consumer debt cases are not subject to the means/median income tests.

This statement is incorrect.

Replace the title with:

"The median income test may determine the length of a chapter 13 plan"

Replace the first two paragraphs with the following:

"While it is correct that the *means* test is only required of debtors whose debts are primarily consumer debts[10] the *median income* test is required in any case for which chapter 13 is the intended filing; the median income test determines the "applicable commitment period" in chapter 13 cases, which is used in calculating the disposable income,[11] but in many jurisdictions is also used to determine the length of the plan (i.e., can it be a 36-month plan, or a must it be a 60-month plan?")

[10] 11 U.S.C. § 707(b)(2).
[11] 11 U.S.C. §§ 1325(b)(1), 1325(b)(3) and (4).

Page 438

¶ 8.6 Doing the means test
¶ 8.8(b) The formula in a nutshell again

Replace "The formula in a nutshell again" with "The presumption of abuse."

Add a cross reference, "See ¶ 8.1 In a Nutshell"

Page 474

¶ 9.4 Filing the petition

Add a cross reference: "See Checklist No. 4 in Appendix"

Page 475

The section beginning on page 474, ¶ 9.5 Mandatory e-filing

Add a subsection

"b. Filing fee paid online with a credit card"

Add:

In most bankruptcy jurisdictions the filing fee is required to be paid at the time of filing the petition,[12] unless the debtor can demonstrate that he/she can only pay in several installments. This is in conformity with the rules in most districts that all bankruptcy documents must be filed electronically.[13]

Page 479

¶ 12 45 Days after MOC to complete the financial management course

In the second paragraph right above ¶ 13, amend the beginning of the sentence to say "For chapter 7 cases Interim Rule 1007(c) provides that …"

Add a second sentence to that paragraph stating:

"For chapter 13 cases the rule requires the course to be completed and the statement/certificate to be file prior to the final payment in the plan. See 11 U.S.C. § 1328(g)(1).

Page 484

Following paragraph "27" add another paragraph "28" as follows:

"28. For chapter 13 the financial management course and the statement certifying completion of the courts must be filed prior to the last payment in the plan."

Change existing paragraph "28" to "29"

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[12] Bankruptcy Rule 1006. Filing Fee
[13] See comments on US Courts web site in Folder 10, Miscellaneous, on the CD accompanying this book.

Page 525

Add a cross reference; See ¶ 3.31 and ¶ 10.9.

In the first sentence under "a. In general" change the cross reference from Code § 707(a)(11) to § 727(a)(11).

Page 537

¶ 11.36 Posting deposit with utility company

Add footnote*

*11 U.S.C. § 366.

Page 580

Above the checkbox item "Deadlines established by local rules" add another checkbox:

"Chapter 13 debtors must complete the financial management training no later than the final payment of the chapter 13 plan.[14]"

[14] 11 U.S.C., § 1328(g).