

**VBA BANKRUPTCY COMMITTEE**  
**BENCH-BAR BROWN BAG LUNCH MEETING**  
with  
**THE HONORABLE COLLEEN A. BROWN**

**Tuesday, February 14, 2006**  
**12:30 pm – 2:00 pm**

Burlington Federal Courthouse  
2<sup>nd</sup> Floor Courtroom

The topics for this informal discussion will include:

1. New § 521 eligibility language on ch 12 and ch 13 notices of commencement of cases.
2. Current Filing Numbers: From 10/17/05 through 2/13/06 there were 34 ch 7 cases and 18 ch 13 cases filed: a total of 53; by contrast, prior to BAPCPA filings came in on the average of 144/mo.
3. Sales of Estate Assets – Should notices of Vt bankruptcy estate sales be noted on this Court's website? Trustees currently post notices of sale on NABT website. If it were feasible and practicable to do so, would it be of benefit to creditors, potential purchasers, local bar and estates to list sale info on Court's website too?
4. New Rule 11 Sanctions Proposed / Bill Pending in Congress – see attached. The **Lawsuit Abuse Reduction Act of 2005** has been referred to the Senate Judiciary Committee after being received from the House (H.R. 420 RFS). In addition to making sanctions under Rule 11 mandatory, it also has a mandatory suspension provision for any attorney who has had sanctions levied against them three times during his/her career, creates a presumption of a Rule 11 violation for repeatedly relitigating the same issue and mandates that courts shall make any Rule 11 violation findings public. For the full text of the Lawsuit Abuse Reduction Act of 2005, see [www.thomas.loc.gov](http://www.thomas.loc.gov).
5. Payment Advices Cover Sheet and Standing Order – form to be effective March 1<sup>st</sup> (attached)
6. Open Discussion / Q & A: any concerns, questions or points of interest raised.

***These Bench-Bar Lunches are coordinated by the  
Bankruptcy Court Clerk's Office.***

***Questions: Call Thomas J. Hart at 802-776-2002***

***No fee, no pre-registration required.***

***Soft drinks and bottled water will be provided.***

# Mandatory Sanctions for Violations of Civil Rule 11

The Lawsuit Abuse Reduction Act would amend Federal Rule of Civil Procedure 11(c), which currently gives the district court discretion to impose sanctions against attorneys or litigants that violate, or are responsible for violations of, Rule 11(b)'s certification duties for pleadings, motions, and other papers presented to a federal district court. Under Rule 11(b), an attorney or unrepresented

party who presents a pleading, motion, or other paper to a federal district court (by signing, filing, submitting, or later advocating it) certifies (1) that it is not being presented for an improper purpose; (2) that its legal contentions are warranted by existing law or by a nonfrivolous argument to change existing law or establish new law; (3) that its factual contentions have, or, if specifically so identified, likely will have, evidentiary support; and (4) that its denials of factual contentions are warranted by the evidence or are reasonably based on a lack of information or belief.

The Act's amendment of the first sentence of Rule 11(c) would make the imposition of sanctions *mandatory* "[i]f a pleading, motion, or other paper is signed in violation of this rule" [H.R. 420, 109th Cong. (2005), § 2(1)]. In addition, by requiring sanctions for a "violation of this rule" [H.R. 420, 109th Cong. (2005), § 2(1)], rather than just for a violation of Rule 11(b), the amendment would expand the kinds of conduct that could result in sanctions. For example, under the terms of the amendment, a violation of Rule 11(a) would become sanctionable. Rule 11(a) specifies formal requirements for signatures on pleadings, written motions, and other papers. The mandatory imposition of sanctions and the expansion of sanctionable conduct would effectively restore pre-1993 provisions of Rule 11.

In an apparent drafting error, the amendment to the first sentence of subdivision (c) of the Rule states that mandatory sanctions would be imposed against "the attorney, law firm, or parties that have violated *this subdivision* or are responsible for the violation" [H.R. 420, 109th Cong. (2005), § 2(1) (emphasis added)]. Since subdivision (c) is not itself the source of any of the Rule's signing requirements or certification duties, it appears that this passage was intended to require the imposition of sanctions against those who have violated "this rule" rather than "this subdivision."

The Act's amendment of Rule 11(c) does not affect the Rule's current provisions allowing sanctions to be initiated either (1) by an adverse party's motion; or (2) on the court's own initiative, by the entry of an order to show cause why sanctions should not be imposed for an apparent violation of the Rule [see Fed. R. Civ. P. 11(c)(1); H.R. 420, 109th Cong. (2005), § 2(1)].

## Elimination of 21-Day "Safe Harbor" Under Rule 11

Currently, Civil Rule 11(c)(1)(A) provides that a motion for sanctions under Rule 11(c) may "not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention,

allegation, or denial is not withdrawn or appropriately corrected."

The Lawsuit Abuse Reduction Act would eliminate this "safe harbor" provision [H.R. 420, 109th Cong. (2005), § 2(2)(A)]. Thus, under the amendment, an attorney or party who submits a pleading, motion, or paper in violation of Rule 11's requirements would no longer be entitled to advance notice and an opportunity to correct the violation before a motion for sanctions is filed.

## Costs and Fees Incurred on Motion for Rule 11 Sanctions

Civil Rule 11(c) currently provides that when a party moves for sanctions under the Rule, "[i]f warranted, the court *may* award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion" [Fed. R. Civ. P. 11(c)(1)(A) (emphasis added)].

The Lawsuit Abuse Reduction Act would replace “may” with “shall” [H.R. 420, 109th Cong. (2005), § 2(2)(B)]. Thus, it appears that the intent is to mandate an award of costs and fees to the prevailing party on a motion for Rule 11 sanctions. However, the amendment leaves unchanged the current Rule’s “[i]f warranted” language, and it is unclear whether that language would provide the court with any discretion to deny costs and fees to the prevailing party on the motion.

### Nature of Rule 11 Sanctions

The Lawsuit Abuse Reduction Act would delete Civil Rule 11(c)’s current provisions regarding the nature of, and limitations on, sanctions [Fed. R. Civ. P. 11(c)(2)], replacing them with the following language:

“A sanction imposed for a violation of this rule shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney’s fee” [H.R. 420, 109th Cong. (2005), § 2(3)].

The Act would eliminate the current Rule’s prohibitions on (1) monetary sanctions against a represented party whose attorney presents a paper in violation of the implicit certification that the paper’s legal contentions are warranted by existing law or by a nonfrivolous argument to change existing law or establish new law [*see* Fed. R. Civ. P. 11(b)(2), (c)(2)(A)], and (2) monetary sanctions on the court’s own initiative when the party to be sanctioned voluntarily dismissed or settled its claims before the court issued a show-cause order [*see* Fed. R. Civ. P. 11(c)(2)(B)].

The Act would also eliminate the express authorization of nonmonetary sanctions and orders to pay penalties into court [*see* Fed. R. Civ. P. 11(c)(2)]. However, the Act would replace language that the sanctions “shall be *limited to what is sufficient*” [*see* Fed. R. Civ. P. 11(c)(2) (emphasis added)] with language that the sanctions “shall be sufficient to” deter repetition of the violation and to compensate the injured parties [H.R. 420, 109th Cong. (2005), § 2(3)]. Accordingly, it appears that the court would continue to have inherent power to order nonmonetary sanctions and penalties payable into court in addition to whatever sanction is sufficient to accomplish the amended Rule’s deterrence and compensation goals.

### Application of Civil Rule 11 in State Court

The Lawsuit Abuse Reduction Act would make Rule 11 applicable in certain civil actions in state court. Under

the Act, in any civil action in state court, any party could move the court for a determination whether the action substantially affects interstate commerce. The court would be required to make the determination within 30 days, based on an assessment of the costs to the interstate economy, including the loss of jobs, if the relief requested is granted. If the court determines that the action substantially affects interstate commerce, the provisions of Federal Rule of Civil Procedure Rule 11 would apply in that action [H.R. 420, 109th Cong. (2005), § 3].

### “Three-Strikes” Rule for Attorneys Who Violate Civil Rule 11

The Lawsuit Abuse Reduction Act would make suspension mandatory for certain attorneys who repeatedly violate Federal Rule of Civil Procedure 11. Specifically, whenever a federal district court determines that an attorney has violated Rule 11, the court would be required to determine the number of times the attorney has violated that rule in that district court during the attorney’s career. If the court determines that the number is three or more, (1) the court would be required to suspend the attorney from the practice of law in that district court for one year, and (2) the court would be authorized to suspend the attorney from the practice of law in that district court for any additional period that the court considers appropriate [H.R. 420, 109th Cong. (2005), § 6(a)].

An attorney would have the right to appeal a suspension under this provision, and the suspension would have to be stayed while that appeal is pending [H.R. 420, 109th Cong. (2005), § 6(b)].

To be reinstated to the practice of law in the district court after completion of a suspension under this provision, an attorney would be required first to petition the court for reinstatement under procedures and conditions prescribed by the court [H.R. 420, 109th Cong. (2005), § 6(c)].

### Repeated Relitigation of Issue Is Presumed Violation of Civil Rule 11

The Lawsuit Abuse Reduction Act would create a rebuttable presumption that the presentation of a pleading, written motion, or other paper to a federal court is in violation of Rule 11 if (1) the paper includes a claim or defense that the party has already litigated and lost on the merits in any forum in final decisions not subject to appeal on three consecutive occasions, and (2) the claim or defense involves the same plaintiff and the same defendant [H.R. 420, 109th Cong. (2005), § 7].

### Enhanced Sanctions for Destruction of Litigation Documents

The Lawsuit Abuse Reduction Act would provide penalties for willfully and intentionally influencing, obstructing, or impeding (or attempting to influence, obstruct, or impede) a pending federal-court proceeding through the willful and intentional destruction of documents sought pursuant to the rules of that proceeding and highly relevant to that proceeding. Any person engaging in such conduct would be (1) punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under Federal Rule of Civil Procedure 11, in addition to any other civil sanctions that otherwise apply; and (2) held in contempt of court and, if an attorney, referred to one or more appropriate state bar associations for disciplinary proceedings [H.R. 420, 109th Cong. (2005), § 8].

### Disclosure of Unlawful Conduct

The Lawsuit Abuse Reduction Act would place limits on courts' ability to seal records of proceedings under Federal Rule of Civil Procedure 11. Generally, in any proceeding under Rule 11, a court would not be able to order that a court record not be disclosed, unless the court makes a finding of fact that identifies the interest that justifies the order and determines that that interest outweighs any interest in the public health and safety that the court determines would be served by disclosing the court record [H.R. 420, 109th Cong. (2005), § 9(a)]. This general rule would not apply, however, to any records subject to (1) the attorney-client privilege or any other privilege recognized under federal or state law that grants the right to prevent disclosure of certain information unless the privilege has been waived; or (2) state or federal laws that protect the confidentiality of crime victims, including victims of sexual abuse [H.R. 420, 109th Cong. (2005), § 9(b)].

### Prevention of Forum-Shopping for Personal-Injury Claims

The Lawsuit Abuse Reduction Act would add the following provisions designed to prevent forum-shopping in personal-injury cases filed on or after the effective date of the Act [*see* H.R. 420, 109th Cong. (2005), § 4(d)].

In general, a personal-injury claim filed in state or federal court could be filed only in the state and within that state, in the county (or if there is no state court in the county, the nearest county in which a court of general jurisdiction is located) or federal district in which [H.R. 420, 109th Cong. (2005), § 4(a)]:

- The person bringing the claim (including a decedent's estate, and a parent or guardian in the case of a minor or incompetent) resides at the time of filing, or resided at the time of the alleged injury;

- The alleged injury or circumstances giving rise to the personal-injury claim allegedly occurred;
- The defendant's principal place of business is located, if the defendant is a corporation; or
- The defendant resides, if the defendant is an individual.

If a person alleges that the injury or circumstances giving rise to the personal-injury claim occurred in more than one county (or federal district), the trial court would be required to determine which state and county (or federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court would be required to dismiss the claim. Any otherwise applicable statute of limitations would be tolled beginning on the date the claim was filed and ending on the date the claim is dismissed under this provision [H.R. 420, 109th Cong. (2005), § 4(b)].

For purposes of the foregoing rules, the following definitions would apply. A "personal-injury claim" would mean a civil action brought under state law by any person to recover for a personal injury, illness, disease, death, mental or emotional injury, risk of disease, or other injury, or the costs of medical monitoring or surveillance (to the extent such claims are recognized under state law); this would include any derivative action brought on behalf of any person on whose injury or risk of injury the action is based by any representative party, including a spouse, parent, child, or other relative of such person, a guardian, or an estate. "Personal-injury claim" would not include a claim brought as a class action, and it would not include a personal-injury tort or wrongful-death claim against a debtor in a case pending under the Bankruptcy Code [H.R. 420, 109th Cong. (2005), § 4(c)(1); *see* 28 U.S.C. § 157(b)(5)]. The term "state" would encompass the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and any other territory or possession of the United States [H.R. 420, 109th Cong. (2005), § 4(c)(3)].

◆ **References.** 17 Moore's Federal Practice (3d Ed.) § 110.01.

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT**

**In re:**

**Cover Sheet for Filing of Payment Advices  
under 11 U.S.C. § 521(a)(1)(B)(iv)  
in Cases Filed On or After March 1, 2006**

**Standing Order # 06-01**

WHEREAS, on April 20, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) was enacted into law, and on October 17, 2005, BAPCPA became fully effective; and

WHEREAS 11 U.S.C. §521(a)(1)(B), as amended by BAPCPA, requires a debtor to file certain information, including but not limited to payment advices or other evidence of payment received within 60 days prior to the date of the filing of a petition by the debtor from any employer of the debtor; and

WHEREAS when, for example, the debtor has not been employed during the 60 day period prior to the date of the filing of a petition or does not have all the required payment advices available, there is presently no mechanism through which the debtor can include that information in the record.

AFTER DUE CONSIDERATION of the forms created by BAPCPA, the Court’s obligation to implement BAPCPA, and the need to ensure that the record is clear and complete in each case,

IT IS HEREBY ORDERED that each debtor who files a bankruptcy petition on or after March 1, 2006, shall file the Local Form titled “Payment Advices Cover Sheet” (copy attached), attested to under penalties of perjury stating that (1) all existing payment advices are attached, and identifying the number of payment advices, the period those advices cover and the number of employers who issued those payment advices; (2) no payment advices are attached because the debtor has not received income from any employer within 60 days prior to the date of the filing of the petition; or (3) some or all of the payment advices are not attached, and explaining why.

**SO ORDERED.**

February 14, 2006  
Rutland, Vermont



Colleen A. Brown  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT

**PAYMENT ADVICES COVER SHEET**  
in Accordance With 11 U.S.C. Sec. 521(a)(1)(B)(iv)

**In re:** \_\_\_\_\_

**Case No.** \_\_\_\_\_

**Chapter** \_\_\_\_\_

**Debtor(s)**  
\_\_\_\_\_

*Please Check the Appropriate Box.*

**For Debtor:**

\_\_\_\_\_ Payment Advices are Attached.

Number of Payment Advices Attached: \_\_\_\_\_

Period Covered: \_\_\_\_\_

Number of Employers From Whom Debtor Received Payment Advices During the 60 Days Prior to Filing the Bankruptcy Petition: \_\_\_\_\_

\_\_\_\_\_ No Payment Advices are Attached (the debtor had no income from any employer during the 60 days prior to filing the bankruptcy petition).

\_\_\_\_\_ No Payment Advices Attached for other Reason, or Some Payment Advices Missing (please explain). \_\_\_\_\_

**For Joint Debtor, if applicable:**

\_\_\_\_\_ Payment Advices are Attached.

Number of Payment Advices Attached: \_\_\_\_\_

Period Covered: \_\_\_\_\_

Number of Employers From Whom Joint Debtor Received Payment Advices During the 60 Days Prior to Filing the Bankruptcy Petition: \_\_\_\_\_

\_\_\_\_\_ No Payment Advices are Attached - the debtor had no income from any employer during the 60 days prior to filing the bankruptcy petition.

\_\_\_\_\_ No Payment Advices Attached for other reason, or Some Payment Advices Missing (please explain). \_\_\_\_\_

I declare under penalty of perjury that I have read this Payment Advices Cover Sheet and the attached payment advices, consisting of \_\_\_ sheets, numbered 1 through \_\_\_, and that they are true and correct to the best of my knowledge, information and belief.

Signature of Debtor: \_\_\_\_\_

Date: \_\_\_\_\_

Signature of Joint Debtor: \_\_\_\_\_

Date: \_\_\_\_\_