

# Nassau Lawyer

The Journal of the Nassau County Bar Association

November 2005

[www.nassaubar.org](http://www.nassaubar.org)

Vol.52, No. 7

## Are You Ready for the New Bankruptcy Laws?

by Craig D. Robins, Esq.

**The New Laws are Now in Effect.** The new laws that all consumer bankruptcy attorneys have dreaded for quite some time are now upon us. On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, this country's most sweeping bankruptcy legislation in decades, became effective. During the last month there was a flood of bankruptcy filings as cash-strapped consumers tried to get a jump on the new laws that will make filing much tougher for people to erase their debts.

**Learning About the New Laws.** The new laws are rather complex. Our Bar Association recently presented a three-hour C.L.E. seminar which seemed merely to provide an overview on just some of the new provisions. After attending a two day symposium and workshop in Florida sponsored by the National Association of Consumer Bankruptcy Attorneys last month, I believe that it would be difficult for a bankruptcy practitioner to effectively represent clients without such a thorough review.



**CRAIG D. ROBINS, ESQ.**

The National Association of Consumer Bankruptcy Attorneys announced that it will be offering some additional symposiums in the near future. Over 1,500 attorneys attended the one in Orlando. If you have the opportunity to attend any full-day seminars, I would urge you to do so. Just learning the intricacies of the means test can take an entire day.

**Many, Many New Laws to Learn.** Discussing the provisions of the new law could easily fill a thousand of these columns. The means test is a major component. Its ostensible purpose is to determine, after a series of calculations, whether a debtor who seeks to file for Chapter 7, would be abusing the bankruptcy laws because the debtor could afford to pay something back to their creditors.

In addition to this totally new procedure, there are new provisions for determining property of the estate and calculating exemptions. There are new procedures for valuing assets. There are new laws concerning the automatic stay, which will not be so automatic in some instances. Treatment of secured claims has changed and debtors will likely have to reaffirm secured debts, a procedure that had been mostly done away with in this jurisdiction during the past decade. Matrimonial obligations are now treated totally differently in a way designed to protect the innocent spouse. There are new exceptions to discharge. There are also greater limitations upon re-filing after a previous petition has been filed. And don't forget, debtors must receive credit

counseling as a condition to filing for bankruptcy relief, and budget counseling as a condition to receiving a discharge, and you will certainly need to assist them with this.

**The Means Test: A New Horror.** The essence of the new law is the means test, a six-page, fifty-five-line item, computational form that makes the most complicated tax return form look like a walk in the park. This form alone will intimidate the most seasoned practitioner and will likely have the effect, intended or not, of preventing many people from filing for bankruptcy for various reasons.

**Be Prepared to Do Due Diligence With Each Case or Be Sanctioned.** The number one concern that most consumer bankruptcy attorneys probably have about the new law is that it imposes a tremendous responsibility and potential liability on the attorney. The attorney must now conduct a reasonable investigation to verify the accuracy of the information provided by the client. In addition, the attorney must determine that the petition and all other information provided to the court and the trustee is well-grounded in fact. Finally, the attorney must certify that a Chapter 7 petition is not an abusive filing. The penalties for violating any of the new liability provisions can be strict and can include fee disgorgement plus actual damages including attorney's fees and costs and possible civil penalties. These new responsibilities, combined with attorney liability, will likely cause many lawyers to leave the consumer bankruptcy practice, and will result in an increase in fees charged by those who stay.

**New Mandatory Disclosures.** Debtor's attorneys are now required to make certain disclosures about the nature of legal services offered and the consequences of filing for bankruptcy. In addition, you are required to warn your clients of the penalties for failing to make less than a full and honest disclosure to the bankruptcy court. The consumer bankruptcy attorney must make these disclosures, notices and warnings no later than three days after you first offer legal services to the client. Failure to do so can mean additional sanctions.

#### **Revising Your Advertising.**

If you advertise bankruptcy legal services, even by merely mentioning that you or your firm does bankruptcy, then be advised that the new law will restrict the way that you may advertise in the future. You must now identify yourself as a "Debt Relief Agency" in any advertisement and contain a disclosure essentially stating that you help people file for bankruptcy.

#### **Revising Your Legal Fees.**

As a result of the additional amount of time that you will need to spend with each bankruptcy matter, combined with the added potential attorney liability, many attorneys are anticipating that they will end up doubling their existing fees. Legal fees of \$2,000 to \$3,000 for Chapter 7 cases and \$3,500 to \$5,000 for Chapter 13 cases may become the norm, although it is too early to determine. In addition, many bankruptcy attorneys will probably charge two separate fees: one to cover the several hours worth of work that will be involved with the means test, and another to cover the remainder of the bankruptcy filing including preparation of the petition and representation in court. After all, it will often be difficult to recommend filing Chapter 7 until the attorney devotes a substantial amount of time to reviewing all aspects of the case and then performing the means test.

#### **Manuals and Books on the New Law are Imperative.**

Getting a new copy of the Bankruptcy Code is mandatory. In addition, the leading legal publishers such as Thomson-West and LexisNexis have published versions that contain an analysis. LRP Publications has an excellent manual about understanding the new laws. LRP also publishes a regular newsletter, *Consumer Bankruptcy News*, which often contains practice oriented articles. Additionally, National Consumer Law Center will be soon coming out with a new edition of my favorite handbook, which I refer to as the bible, entitled *Consumer Bankruptcy Law and Practice*.

**Obtaining or Updating Your Software.** With the advent of the new laws, combined with the local court requirement that attorneys file petitions electronically, it is inconceivable that a

practitioner can prepare a bankruptcy petition without using a computer together with specialized and current software. If you plan to practice consumer bankruptcy, then you must make this investment. All of the leading petition preparation software publishers have rushed to prepare updated versions of their software. The software will be especially important in assisting you with the numerous calculations required by the means test. The software will also include all necessary databases regarding the IRS standardized expense tables and the state median income.

#### **Are You Ready for All of This?**

If all of the above does not sound intimidating enough, one of the judges at the recent Bar Association seminar commented that he could not imagine how the court system and United States Trustee's Office would be able to function after October 17, considering all of the major changes and obligations that they will have to address as well. To make matters more tenuous, many commentators have suggested that Congress should delay the effective date of the new law as it would be unfairly harsh to those who have been adversely affected by the recent hurricanes in the Gulf states. Finally, if you decide to continue your bankruptcy practice, be prepared to spend a substantial amount of time reviewing the new laws, attending seminars and workshops, and re-adjusting your perspective as to how bankruptcy works. It will be an evolutionary process.

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#### **Editor's Note (revised 2008):**

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