



THE SUFFOLK LAWYER

PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION

DEDICATED TO LEGAL EXCELLENCE SINCE 1908 Vol. 21 No. 13 November 2005

CONSUMER BANKRUPTCY

Consumer Bankruptcy Debtors Face New Limitations for Repeat Filings

- Reduced Relief from Automatic Stay
- Extended Periods Between Discharge

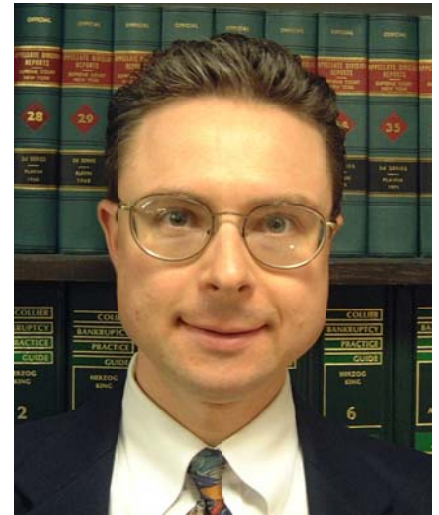
by Craig D. Robins, Esq.

New Laws Apply. On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), this country's most sweeping bankruptcy legislation in decades, became effective. The new laws have many far-reaching effects in a multitude of areas. The new laws extend the period of time an individual must wait before re-filing a new petition in which the objective is to discharge new debts. In addition, the new laws seek to stop the perceived abuse of serial filers who previously filed multiple Chapter 13 petitions in an effort to delay foreclosure sales.

The Serial Filing Debtor Seeking to Stay Foreclosure. Prior to BAPCPA, consumer bankruptcy practitioners often

experienced the following scenario: a client, whose prior Chapter 13 case was dismissed because they didn't make the necessary payments, comes in the day before a foreclosure sale saying they want to re-file another petition to stop the sale. The practitioner, searching for a clue that the debtor's financial circumstances have changed for the better so that the debtor can now afford his Chapter 13 obligations, determines that a new filing would therefore be in good faith. The practitioner immediately files a new petition, knowing without a doubt that this mere act will stay the sale and save the day. However, not any more.

New Exceptions to Automatic Stay. Consumer bankruptcy practitioners may no



CRAIG D. ROBINS, ESQ.

longer blindly rely on the features of the automatic stay. BAPCPA shortens the automatic stay for debtors who have filed for bankruptcy once during the previous 12 months, and it eliminates the stay entirely for debtors who have filed more than one bankruptcy during the previous 12 months.

Debtor Had One Case Dismissed in Past 12 Months. If a debtor had any case (Chapter 7 or 13) dismissed in the past 12 months, then the automatic stay expires thirty days after the petition is filed, unless the Court extends this time upon a showing by the debtor that the case was brought in good faith.

The new section providing for this (Code section 363(c)(3)) has the effect of shifting the burden to the debtor to maintain the stay, whereas in the past, the burden was on the creditor to lift the stay.

This provision means that in such situations, the consumer bankruptcy practitioner will now need to rush to file a motion to extend the stay within 30 days of filing and will need to demonstrate the debtor's good faith and a change in circumstances.

Debtor had Two or More Cases Dismissed in the Past 12 Months. If the debtor had two or more cases dismissed in the past 12 months, then the automatic stay does not go into effect at all. (Code section 363(c)(4)). This means that a motion or order to show cause would be necessary to impose the stay.

Practical Tip. The above provisions limiting the stay are totally new, and it is likely that the bankruptcy judges in our district will set up special chambers rules pertaining to applications extending or imposing stay relief. Accordingly, be on the lookout for this.

Filing to Discharge Debts After a Prior Bankruptcy Case. Under the old law, a debtor had to wait six years before being eligible to receive another Chapter 7 discharge after a prior Chapter 7 case. However, a debtor must now wait a longer period of time between

the prior case and the new case in order to receive a discharge in the new case. Depending on which chapter the prior case was, and which chapter the new case will be, the debtor will have to wait either two, four, six or eight years.

Note that a debtor can re-file for bankruptcy relief at any time after a previous discharge, but will not be entitled to a discharge in the new case unless the requisite period of time has passed. Also note that these waiting times do not apply if the Court did not grant a discharge in the prior case. The waiting times are as follows:

Prior Case Was Chapter 7 and New Case Will Be Chapter 7. Debtor must wait **eight** years from the date of commencement of the prior Chapter 7 case. (Code section 727(a)(8)).

Prior Case Was Chapter 13 and New Case Will Be Chapter 7. If the allowed unsecured claims in the prior Chapter 13 received more than 70% of the amount of their claims, then no waiting period applies. However, if the allowed unsecured claims received less than 70%, then the debtor must wait **six** years from the date of the prior Chapter 13 date of filing. (Code section 727(a)(9)).

Prior Case Was Chapter 7 and New Case Will Be Chapter 13. Debtor must wait **four** years from the date of the prior Chapter 7 date of filing. (Code section 1328(f)(1)).

Prior Case Was Chapter 13 and New Case Will Be Chapter 13. Debtor must wait **two** years from the date of the prior Chapter 13 date of filing. (Code section 1328(f)(2)).

Practical Tip. If your client had a prior bankruptcy filing which resulted in a discharge, and is not eligible for a discharge in a new filing, but nevertheless needs to quickly file a Chapter 13 proceeding to stop a foreclosure, then you can still file for Chapter 13 relief. The debtor will get the benefit of the stay and the use of the Chapter 13 plan to cure the mortgage arrears and pay off any unsecured debt. However, the debtor will need to provide for payment in full, including interest, to unsecured creditors to avoid those creditors pursuing the debtor after the closing of the case.

Practical Tip. The new time frames can be confusing. In addition, you will not remember if the time from the previous case runs from the date of filing or from the date of discharge. Therefore, I urge you to cut out this article and save it for future reference.

Editor's Note (revised 2008):
Craig D. Robins, Esq., a regular columnist, is a bankruptcy attorney who has represented thousands of consumer and business clients during the past twenty years. He has offices in Medford, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: CraigRobinsLaw.com.