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The New Bankruptcy Laws Continue to Be Mired in Controversy

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I have devoted a substantial amount of column space in the last year to report on the numerous problems and lack of popularity besetting the new bankruptcy laws which went into effect in October 2005. Criticism and controversy continue to dog the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) as practitioners and judges alike describe it as everything from tricky and cumbersome to inane and unjust. The consensus is that BAPCPA is not working as intended. Prior to its enactment, many people predicted the problems that we are now seeing, but the law passed anyway after heavy lobbying from the banking industry. Here is a summary of the various criticisms to date.

The New Laws Weren't Needed in the First Place. Commentators have suggested that there was a perception that some debtors who filed for Chapter 7 relief were able to discharge their debts even though they had the ability to repay some or all of their debt. In response to this perceived imbalance, the credit card industry pushed for passage of tougher bankruptcy laws. However, the credit card industry has not accepted any share of the responsibility for the problem. The industry gives credit to high-risk people and then is shocked to find that people cannot make their payments. One commentator said we have a classic case of poetic injustice: Congress is bought by the

credit card companies in order to pass a bill that hammers those people who can't afford to pay their bills. Thus, Congress has listened to the banks who have complained for years that they get shortchanged by debt-crazy consumers seeking bankruptcy.

The Supposed Purpose of the New Laws is Not Being Accomplished. A major provision of the BAPCPA is to require credit counseling as a prerequisite to filing for bankruptcy. The ostensible purpose of this counseling requirement is to push the debt-ridden consumer into a non-bankruptcy debt repayment plan in lieu of bankruptcy. Most people in

debt are so far over their head that debt repayment plans are totally unrealistic. Most people go into debt for reasons beyond their control, such as loss of a job, divorce and matrimonial issues, sickness and medical expense, or death of a family member. According to a highly-publicized preliminary study by the National Association of Consumer Bankruptcy Attorneys in February, a mere three percent of those seeking credit counseling had the ability to repay any debts.

The New Laws are Poorly Written. The laws were primarily written by the lobbyists who supported the legislation, rather than by scholarly academics, judges and committees who have written most of the existing bankruptcy law. There have been a number of commentators, including judges, who have suggested that the poorly written laws are often ambiguous and will result in a number of cases needed to interpret them.

The New Laws are Cumbersome. BAPCPA makes filing a case unnecessarily complex. We now have many "obstacles" that are in the way of obtaining bankruptcy relief. These include the means test, the credit and budget counseling requirements, the requirement of producing documents and tax returns, etc. In addition, the increased burden and time on consumer bankruptcy attorneys to personally verify all information in the petition has driven up the cost of bankruptcy legal services. The commentators have been very vocal about their belief that the primary goal of the creditor community in supporting bankruptcy reform legislation was to make bankruptcy for consumers so difficult that it would cause overall bankruptcy filings to go down. The proponents of the harsher laws thought that if there are too many obstacles, then consumers will not file bankruptcy. For now, credit counseling is exactly what the opponents of the bill

predicted – a device to delay and to drive up the costs of bankruptcy for the poorest people.

Double Filing Fee Increases Compound Problem. When BAPCPA went into effect in October 2005, filing fees for Chapter 7 cases increased from \$199 to \$274. Then, on April 9, 2005, filing fees increased again. Now Chapter 7 costs \$299. This filing fee increase is surprising because it had already gone up significantly when the new laws went into effect, and now we are seeing an increase in a very short period of time. \$299 is a great deal of money for those who can barely afford to pay their bills. The quick increase is like kicking people when they're already down. Don't forget, consumers also have to shell out \$100 for the two counseling sessions, making the total cost of filing, not including attorney's fees, about \$400.

The Press Has Created the False Impression that Bankruptcy Relief is No Longer Available. There were so many news articles that painted bankruptcy after BAPCPA as gloom and doom that the public began to perceive bankruptcy as so difficult that they would not be able to utilize it any more. However, it appears that the new laws are not preventing most of those who need bankruptcy from filing; BAPCPA is just making it a little more of a nuisance. It appears that about 85% of those who could have filed for Chapter 7 relief under the old laws can still file under the new laws.

How Will We Know for Sure if BAPCPA is a Success or a Failure? The answer probably lies several years away after studies can be done to determine whether debtors are repaying a larger portion of their unsecured debts, which was the underlying objective of this legislation. In

addition, there will have to be an analysis of those consumers who did not file for bankruptcy relief and how they dealt with their debt problems. In the meantime, consumers and bankruptcy practitioners are forced to deal with a harsh, difficult and unpopular law

*Editor's Note (revised 2008):
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