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CONSUMER BANKRUPTCY

The New Bankruptcy Laws: Some Pieces are Falling Into Place

by Craig D. Robins, Esq.

There is virtually unanimous opinion by consumer bankruptcy attorneys that the new bankruptcy laws contain many unusual and ambiguous provisions which the consumer bankruptcy bar has had uncertainty in addressing. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), aside from being rather intimidating, is so relatively new, that there has been hardly any case law to assist counsel in interpreting it. Previously, some judges have even expressed a "wait and see" attitude, actually announcing that they preferred to see how the newly-filed cases panned out before rendering any substantive decisions clarifying the new laws.

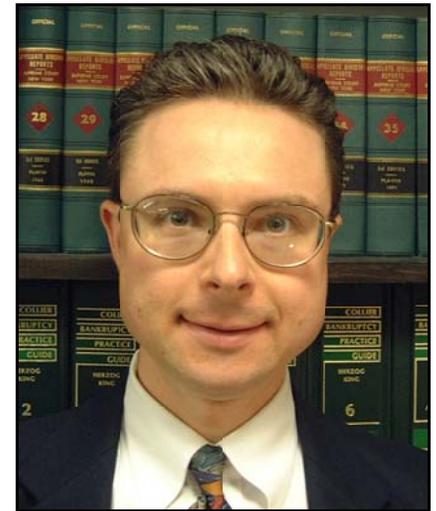
Consequently, for the first six months under the new laws, the consumer bankruptcy bar has been exceptionally conservative by playing it safe and not filing any cases that test BAPCPA's boundaries. This is probably due to several factors. BAPCPA contains many new and intimidating provisions that enable the Court to sanction attorneys for a variety of reasons. Many attorneys have initially decided to turn away potential clients whose facts did not squarely fit within their existing understanding of how the Court, the trustee and the United States Trustee would handle them. In addition,

there was a paucity of filings after the new laws went into effect, although the numbers are slowly starting to rise.

Several prominent bankruptcy attorneys and judges recently spoke at a panel discussion at the Nassau County Bar Association entitled, "Looking Back . . . Looking Forward . . . Perspectives Under the Bankruptcy Act of 2005." The presentation was particularly insightful because it provided some of the speakers' perceptions on interpreting ambiguous aspects of the new bankruptcy laws. Perhaps most importantly, Therese Cavanaugh, Assistant U.S. Trustee in the Office of the U.S. Trustee for the Eastern District of New York, which is the agency that reviews the propriety of all petitions filed in our district, gave her take on how the Office of the United States Trustee was interpreting some of the new requirements. I will use this column to highlight some of the most interesting points that were raised.

Can You Overcome Unrealistic Means Test Results?

What do you do if you feel that the results of the Means Test do not accurately indicate that the debtor is filing in good faith? It is quite possible that the Means Test will indicate that



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there is a presumption of abuse; yet, the debtors cannot afford to make any payments in a Chapter 13 scenario based on their true disposable income as set forth in the budget schedules (Schedules "I" and "J"). The means test is based on a calculation of income received over the past six months. However, that is not necessarily a fair indicator of future income. In such cases, the U.S. Trustee recognizes that financial circumstances change. If your client fails the Chapter 7 means test but you honestly feel that the debtor cannot afford payments in a Chapter 13 case, then consider filing Chapter 7 and immediately providing the U.S. Trustee (and Chapter 7 Trustee) with financial documentation and support to demonstrate your position. In a worse case situation, you will have a hearing before a judge who will decide the issue.

Old Rules of Good Faith Still Apply.

The mere fact that an individual passes the means test does not automatically mean that they are filing in good faith. The U.S. Trustee's office reviews every petition and takes a good look at the budget schedules to make sure that even if there is no presumption of abuse, there is no actual disposable income. The U.S. Trustee's office still considers a "totality of circumstances" in deciding whether to bring any motions to dismiss for abuse under Code section 707(b). In a reported case from the West Coast, the U.S. Trustee successfully sought dismissal of a case because the debtors, even though they passed the means test, obtained new jobs with substantial income increases after filing.

In addition, the U.S. Trustee continues to review expenses to ascertain if they are reasonable. For example, the U.S. Trustee can argue that a single debtor with three vehicles has an unreasonably excessive expense. If you feel that your client could be put on the defensive because of expenses that appear excessive, consider immediately communicating with the U.S. Trustee and Chapter 7 trustee to persuade them that no genuine issues of fact exist.

Dealing With Pesky Requirement of Producing 60 Days of Pay Stubs.

BAPCPA requires counsel to file the debtor's pay stubs or "payment advices" to show what the debtor earned in the sixty-day pre-petition period. For those debtors who receive regular weekly pay stubs, this is no problem. However, many employers simply do not provide any kind of regular pay stub. The U.S. Trustee recognizes the inconsistent manner that some employers pay their employees and will analyze these documents on a case-by-case basis. To date, the U.S. Trustee in this district has not brought any proceeding challenging the sufficiency of the pay stubs that a debtor has filed. If your client cannot produce sufficient pay stubs there are several ways of handling this. One is to have your client obtain a letter from the employer indicating the information. Another way is to have the client's human resources department issue a summary or duplicate pay stubs. If all else fails, you can always bring a motion requesting that the Court waive compliance based on a showing of good cause.

Will Court Automatically Dismiss a Case for Failure to File Documents?

Certain provisions of the 2005 Act provide for automatic dismissal if the debtor does not file certain documents. Pursuant to Code section 521(i)(1), failure to file requisite documents within 45 days of the petition filing date results in "automatic dismissal" of the case. However, what we are actually seeing is that the court clerk is issuing a "Notice of Deficiency" which is served on the debtor and counsel. This gives the debtor the opportunity to file the necessary documents within a certain stated period of time. If the debtor does not, then the "Notice" acts as actual notice that the case will be dismissed, and the clerk will then dismiss the case without an order or hearing. As of last month, 76 out of about 3,000 cases filed in this district since October 2005 were dismissed this way.

One exception is payment advices and pay stubs. The clerk will not make a decision on these. Instead, when there are questions as to the sufficiency of the payment advices, the clerk will send the matter to chambers for a judge to review.

Failure to file a tax return with the trustee usually will not automatically result in dismissal of the case as most trustees are willing to hold the meeting of creditors open to provide debtors with the opportunity to cure.

Generally, if there is cause to dismiss, the Court will only seek dismissal if there is substantial non-compliance. The Court will often give debtors the opportunity to demonstrate that the difficulty in providing documents is due to factors beyond their control. In our jurisdiction at least, it appears that the judges are not seeking to strictly construe the new statutory provisions regarding dismissal of cases, and will not, *sua sponte*, dismiss all cases that fail to comply.

Dealing With Non-Traditional Living Arrangements in Means Test.

Both the means test and the budget schedules require the debtor to list all family income. However, that is not always so easy considering that there are so many more living arrangements than the traditional family. The United States Trustee has acknowledged that many cases present

unique circumstances, such as those involving extended families, domestic partnerships, roommates, etc. In these situations the best counsel can do is to use good faith to present a reasonable financial picture of the debtor and in return, the U.S. Trustee will try to reasonably evaluate the situation. If the U.S. Trustee feels that certain expenses are not accurately stated, then they will usually request counsel to produce the necessary information and file an amendment unless the omission appears to have been done in bad faith.

Income is Not Always Income for Means Test.

The means test is pretty clear that Social Security income is not to be treated as income for the means test. What is not so clear is that you do not include tax refunds. You do include unemployment income.

Conclusion. Slowly but surely, learning how to deal with some of the uncertainties of the 2005 Act are falling into place. For now, that includes the notion that the presumption of abuse can be rebutted. The U.S. Trustee will utilize a totality of circumstances approach to addressing that issue. The best way to handle cases involving questionable good faith is to immediately communicate with the U.S. Trustee and the Chapter 7 trustee. As long as you seek to provide the requisite documents, the Court will not dismiss your case provided that there is substantial compliance.

Editor's Note (revised 2008):

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