Bankruptcy Law after passage of BAPCPA
All is not lost.

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The so-called bankruptcy abuse prevention and consumer protection act , effective Nov. 2005, created sweeping changes in the practice of bankruptcy law, with many of these changes occurring on the consumer side of the law. The intent was certainly to remove the option of filing chapter 7 for many people and push them into a chapter 13. This was mainly accomplished by the implementation of a "means test" which seeks to exclude individual with incomes over certain thresholds from filing chap. 7 . Initially consumer bankruptcy cases plummeted . However, more recent trends have seen consumer chap. 7 cases increase significantly. Attorneys have become more familiar with the intricacies of the law, have learned the loopholes that exist and have discovered that many people will still quality to file chap. 7 in any event.

Future articles will highlight intricacies of dealing with the means test. Other areas of greater focus in future articles may include domestic relations, individual business debtors, chap. 13 versus chap. 7 and various others. This article identifies 10 important factors for counsel to consider when performing their due diligence on a potential bankruptcy filing.

Top Ten Mistakes to Avoid Under the New Bankruptcy Law

1. Failing to receive credit counseling briefing before filing

Perhaps the biggest mistake a debtor's attorney can make is to fail to ensure that the debtor has received a credit counseling briefing before filing for bankruptcy. Under new section 109(h), an individual debtor must have received, during the 180-day period preceding the filing, an individual or group briefing from an approved nonprofit budget and credit counseling agency that "outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis." The debtor must file with the court a certificate from the agency that the debtor received the required briefing and, if a debt repayment plan was developed through the counseling, a copy of that plan. In the months since the Act's effective date, many individual debtors have seen their petitions dismissed for this reason; some courts have been particularly insistent in enforcing the requirement and in narrowly interpreting its "exigent circumstance" exception.

2. Failing to investigate prior bankruptcy filings

There are a number of new restrictions on repeat filings; a debtor's prior bankruptcy filings can affect the protection that will be afforded to the debtor in the later case. In order to ascertain whether a new filing is in the best interests of the debtor and will result in the desired bankruptcy protection, the debtor's attorney must investigate whether and when the debtor has previously filed for bankruptcy as well as the outcome of those filings.

- First, a debtor will be denied a chapter 7 discharge if the debtor received a discharge under chapter 7 or 11 in a case commenced within eight years before the

date of the filing of the petition. Previously, the time period was six years.

- Second, if the debtor received a discharge in a chapter 7, 11 or 12 case that was filed during the four years before the filing of the chapter 13 case, the debtor cannot receive a chapter 13 discharge. This provision, new section 1328(f)(2), prevents a debtor from receiving a discharge in a chapter 13 case filed soon after a chapter 7 case but does not prevent the filing of the petition itself. There may be occasions in which a debtor will find it advantageous to file a chapter 13 case even if a discharge is not available.

- Third, if the debtor has had a prior case dismissed within the preceding year, new section 362(c)(3) limits the duration of the automatic stay with respect to the debtor. Specifically, and subject to certain exceptions, if a single or joint case is filed under chapter 7, 11 or 13 and the debtor had a prior single or joint case dismissed within the preceding one-year period, the automatic stay with respect to actions taken in relation to a debt or property securing the debt shall expire on the 30th day after the filing of the later case.
- Fourth, if a case is filed by a debtor under any chapter and the debtor has had two or more prior cases dismissed within the preceding one-year period, the automatic stay will not go into affect.

3. Failing to ensure that the debtor take a financial education course

Subject to certain exceptions, most individual debtors in chapter 7 and 13 cases are now required to complete an approved financial management course before they can obtain a bankruptcy discharge. Obviously, such a course must be provided after the petition is filed and before a discharge is sought. In a chapter 7 case, the course certificate to be filed within 45 days after the meeting of creditors. In a chapter 13 case, the course could occur early or late in the case. The debtor's attorney who does not ensure theat the debtor completes an approved financial management course commits a grave error, for without a discharge, the purpose of the bankruptcy filing will have been largely negated.

4. Failing to check residency for past 2 or 2.5 years

The 2005 legislation considerably lengthened the domicile requirement that a debtor must satisfy before availing himself of a state's exemption laws. This charge is an apparent attempt to discourage certain debtors from moving to states with more generous exemption rights in contemplation of filing bankruptcy. If a debtor elects exemptions under state law, the debtor's exemptions are now determined based upon the law of the state where the debtor has been domiciled for the 730 days before the petition. Previously the period used for determining the debtor's domicile was 180 days before the petition or the longest portion of that 180 days. If the debtor has not been domiciled in the same state for 730 days, exemptions are determined based upon the state where the debtor was domiciled for the 180 days before that period or for the longest portion of that 180 days. If the effect of this provision is to render the debtor ineligible for any state's exemption, the debtor may use the federal exemptions, notwithstanding that the

state of the debtor’s domicile is an opt-out state.

The combined effect of the longer 730-day period (plus the additional 180-day period) for determining the applicable exemption law and the unchanged 180-day period for determining venue is that the law of the debtor’s domicile, for purposes of section 522, may be different from the law of the forum, as when the debtor’s place of residence or business is in one state and the domicile is in another. In such cases, the court must give effect to those exemptions allowed by the law of the state of domicile, and it makes no difference where the property is situated or where the petition is filed, so long as the property is exempt under the law of the domiciliary state.

5. Failing to obtain tax transcripts or returns

Under new section 521(f), at the request of the court, the United States trustee, or a party in interest, an individual debtor must file with the court the following:

- a copy of the federal income tax return (or transcript) for a tax year ending during the time the case is pending, at the same time it is filed with the taxing authority;
- a copy of any tax return (or transcript thereof) filed for a tax year ending in the three years before the petition, at the time it is filed with the taxing authority; and
- a copy of any amendments to such returns.

In addition, at lease seven days before the section 341 meeting, the debtor must provide to the trustee a copy of the federal income tax return required under applicable law for the most recent tax year ending immediately before the commencement of the case and for which a federal income tax return was filed, or a tax transcript of the return. The transcript or return must also be provided to any creditor that requests it at that time. If the debtor does not provide a required return or transcript to the trustee or to a creditor that timely requests it, the case must be dismissed, unless the debtor shows that failure is due to circumstances beyond the debtor’s control.

6. Failing to review debtor’s income over past six months

The most significant change made by the 2005 legislation, and the change most lawyers are aware of, is the introduction of means testing. Under amended section 707, the court can dismiss the debtor’s chapter 7 petition if the debtor is found to have sufficient means to repay creditors. However, it is crucial to note that the means test does not apply to those debtors whose “current monthly income”, multiplied by 12, is equal to or less than the state’s median income. “Current monthly income” is defined as the average of the last six months’ income received from all sources. Assuming that the debtor files a schedule of current income, the six-month period is the six months ending on the last day of the month before the petition is filed. Thus, waiting until a new month begins may affect the calculation of “current monthly income” of a debtor with irregular income. Sometimes, if a debtor has been unemployed or has otherwise lost or gained

income, waiting a month or two may radically change "current monthly income." Consequently, it will be important for the debtor's attorney to review recent fluctuations in the debtor's income and determine whether it would be advantageous to delay filing so as to arrive at a "current monthly income" that is equal to or below the state's median income.

7. Failing to determine when debtor acquired home (or made extraordinary payments toward home or improvements) if homestead cap is applicable

In response to actual and perceived abuse by some debtors of state exemption statutes that protect an unlimited amount of homestead property, Congress added new provisions to section 522 that prevent the debtor from taking full advantage of state homestead exemptions under certain circumstances. If the debtor's attorney is planning to seek exemption for the debtor's homestead property, the attorney will want to know in advance if the exemption will in fact be more limited than previously anticipated.

The first restriction - found in new subsection (o) - relates to the debtor's conversion of nonexempt property into nonexempt homestead property with fraudulent intent. Specifically, the value of the debtor's interest in certain homestead property that may be exempted will be reduced to the extent that it is attributable to any property that the debtor could not exempt and that has been disposed of within 10 years before the filing of the petition with the intent to hinder, delay or defraud a creditor.

The other restrictions - found in new subsections (p) and (q) - impose a monetary limit of $125,000 on the amount of the debtor's interest in homestead property that may be exempted to the extent that there has been an acquisition of a homestead interest within a period of 1,215 days before the commencement of the case (subsection (p)) or the commission of certain bad acts by the debtor (subsection (q)). Thus, if either provision is applicable, the debtor's exemptible interest in homestead property may not exceed $125,000.

These restrictions apply only if the debtor is invoking section 522(b) and claiming an exemption under state law or federal law other than section 522(d) and only if the homestead property falls within one of the following categories:

- real or personal property that the debtor or a dependent of the debtor uses as a residence;
- a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
- a burial plot for the debtor or a dependent of the debtor;
- or a real or personal property that the debtor or dependent of the debtor claims as a homestead.

8. Failing to provide bank statement and proof of current income at section 341

meeting

The 2005 legislation imposes numerous new document production requirements on individual debtors. In addition, Bankruptcy Rule 4002(b), requires each individual debtor to bring to the section 341 meeting of creditors the following types of documents : (1) evidence of current income, such as the most recent payment advice; and (2) statements from the debtor's depository and investment accounts that cover the period during which the petition was ruled. According to the Interim Rule, the latter would include "checking, savings, and money market accounts, mutual funds and brokerage accounts."(3) evidence of monthly expenses.

9. Failing to consider impact of past-due domestic support on chapter 13 or debtor's exemptions after bankruptcy

Numerous provisions were added to the Bankruptcy Code intended to promote the collection of "domestic support obligations", which are defined in a new subsection of section 101 to include a broader variety of debts and which are all priority debts. In chapter 13, this has the effect of increasing the types of debts that must be paid in full, with a new limited exception in section 1322(a)(4) for certain debts owed to governmental units. Further, a chapter 13 case may be dismissed, and a chapter 13 plan may not be confirmed, if the debtor is behind in post-petition support payments. In addition, a chapter 13 discharge cannot be granted unless the debtor certifies that all domestic support obligations required to be paid post-petition, including those required by the plan, have been paid.

Filing a bankruptcy case may also dramatically affect the debtor's ability to protect property from a creditor who is owed a domestic support obligation. Under prior law, courts had ruled that filing a bankruptcy case did not affect the debtor's right to exempt property after bankruptcy. An amendment to Code section 522(c)(1) provides that if the debtor files a bankruptcy case, formerly exempt property is stripped of its exemption protection with respect to domestic support obligations after bankruptcy.

10. Failing to determine whether debt relief agency provisions must be followed

The amended Code places certain restrictions on the activities of "debt relief agencies" and also requires them to make a series of disclosures to all persons that they assist. These requirements are very important, for if they are not followed, the "debt relief agency" may face monetary liability and any contract that the agency has entered into with the debtor will be void. Determining whether a particular lawyer is a "debt relief agency" is not entirely straightforward, for the issue turns on the interrelated definitions of "assisted person," "bankruptcy assistance," and "debt relief agency." However, most lawyers representing consumer lawyers may meet the definition, and it is imperative that they follow the various requirements set out in new Code sections, 525, 527, and 528.

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