

# BANKRUPTCY REFORM

*The new long and winding road out of debt*

By W. Mark Jump

After eight years, four Congresses, two Presidents and millions of dollars spent on lobbying, the credit industry finally passed a bankruptcy reform bill. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), was signed by President Bush on April 20, 2005. All provisions of the new law take effect on October 17, 2005.

How much abuse existed and how many consumers are now protected is debatable; however, it is certain to cost taxpayers more money to administer and enforce this new bankruptcy code.

The centerpiece of BAPCPA is the new codified means test under Section 707(b). The overriding legislative goal of the means test was to force more Chapter 13 repayment plans allowing unsecured creditors (i.e. credit cards) to be paid at least some percentage of the amount owed over a five-year period. Currently, the majority of consumer filings are under Chapter 7, which allows for the discharge of all unsecured dischargeable debts.

In order for this new means test even to apply, the debtor's income must be above the median income. Median income is calculated as an average of the debtor's income over the last six months, irrespective of the debtor's actual income at the time of filing. It would also include the income of a non-filing spouse. It is anticipated the median income will be some \$60,000 for a family of four in Ohio; therefore, a relatively large number of debtors will actually avoid the means test and still be eligible to file. Very few of my Chapter 7 clients will be above this threshold; however, this does not mean they escape the seemingly never ending pre and post filing requirements of this the new law.

For those above the median income, a new means test must be applied. Under this means test, a presumption of abuse will arise in the following manner: (1) if the debtor has at least \$166.67 per month available to fund a Chapter 13 plan over a five-year period or (2) if the debtor has from \$100 to \$166.66 per month to fund the plan over five years only if this will be sufficient to pay at least 25% of the general unsecured debt.

In order to complete the means test, the debtor's attorney must deduct a number of rigid expense categories. The current system of disclosing a debtor's actual income and expenses, reviewed under long standing judicial standards

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was apparently unacceptable to our lawmakers.

The new means test requires the tedious application of National IRS guideline expenses (\*food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous) as well as Local IRS guideline expenses (housing, transportation and utilities), Other Necessary Expenses (the health and welfare of the taxpayer and/or his or her family or the production of income) and actual expense defined under the new code. The Office of the United States Trustee has indicated they will post the applicable census figures on its website, [www.usdoj.gov/ust/](http://www.usdoj.gov/ust/). Unfortunately, fully describing the application of all of these variables to arrive at disposable income is beyond the scope of this article; however, the application of the means test in some Chapter 13 repayments may actually result in a 0% percent dividend to

unsecured creditors. Essentially, this interpretation of the means test in a Chapter 13 results in a de-facto Chapter 7. Seems to be a long route to the same destination.

Irrespective of the applicability of the means test, every debtor will be burdened by additional paperwork and new filing requirements.

### Pre-Petition Credit Counseling

Debtors must file a certificate of credit briefing within 180 days before filing a bankruptcy petition. The non-profit agency providing the credit counseling must be approved by the Office of the United States Trustee (UST). We are awaiting direction from the UST regarding the exact pricing and the content of the pre-petition counseling; however, it is anticipated to cost between \$35 and \$50 and be about 90 minutes in duration. BAPCPA provides that it may be completed over the telephone, internet or in a group briefing. Congress must have been convinced too many people were filing bankruptcy because they just didn't understand their options. Of course, this has never been the situation. Individuals resort to bankruptcy because there are no other options. The pre-petition counseling is a meaningless, costly and time consuming obstacle for people who need a fresh start, not fresh red tape. What has been accomplished by this pre-petition credit briefing? The creation of a new profit center for credit counseling agencies.

BAPCPA includes a number of new filing requirements, some of which are as follows:

- Filing of Tax Returns – Debtors are now required to provide copies of tax returns or transcripts before their 341 Meeting of Creditors.



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• Paycheck Stubs – Debtors will be required to file copies of paychecks or other evidence of income earned in the 60 days immediately prior to filing the case.

• Annual Budget Reviews in Chapter 13 – Debtors and their attorneys will be required to submit annual budgets and modify plans accordingly.

The legislation also takes aim at a perceived abuse by repeat filers. The new code extends time periods between filings and limits the automatic stay.

• Time Extended between Bankruptcy Filings – A debtor who filed a previous Chapter 7 and received a discharge may not receive a discharge under Chapter 7, 11, or 12 in a case filed within eight years of the filing of the pending Chapter 7 petition. A Chapter 13 debtor may not be granted a discharge if he received a discharge in a previous Chapter 7, 11 or 12, filed within four years of the filing of Chapter 13. A Chapter 13 debtor who received a discharge may not be granted a discharge if he filed within two years of the pending case.

• The Automatic Stay is Limited – The automatic stay is terminated 30 days after the case is filed under Chapter 7, 11 and 13 if a previous dismissed ( unless a Chapter 7 was dismissed for abuse under 707(b) and refiled as a Chapter 13 ) case was pending within one year. If two or more case were pending within the one year the automatic stay does not go into effect. A second bite at the apple is not a given anymore. However, debtor's counsel may motion the court for an order imposing the stay by demonstrating the refile was in good faith. Only time will tell how freely judges will grant such motions and what case law standard will evolve.

#### Additional Requirements – Liability and Disclosures for Attorneys

The extent to which our elected Congress seems concerned that financially strapped middle and lower middle class citizens

might actually seek out an attorney and perhaps discuss the remedy of bankruptcy is astonishing. There is a clear and disturbing undertone of lawyer bashing in the new attorney disclosure and liability provisions of BAPCPA. Bankruptcy attorneys are now held to the highest attorney certification standards, must refer to themselves as Debt Relief Agencies and must make sure debtors know they can prepare and file their own bankruptcy. More roadblocks, but is the end result going to be different? At the end of the obstacle course, a certain percentage of the population cannot pay their debts. They deserve a fair legal resolution, not insurmountable barriers between the problem and the legal remedy.

The more I study the specifics of BAPCPA, it appears to amount to costly and excessive administration. Congress has been talked into creating a system wherein we will push paper back and forth to prove the obvious – people filing bankruptcy cannot afford to pay their debts.

Debtors can no longer take a non-stop flight to reach their destination, they must now deal with multiple layovers. At the end of all the tax returns, w-2s, credit counseling certificates, means test schedules, over-valuation of vehicles, begging the courts for automatic stays, countless form disclosures to debtors, increased costs to all taxpayers and thousands of dollars in additional attorneys fees, it is difficult to understand what has actually been accomplished. A feel good and misguided measure for the credit industry to take comfort in additional lending? Perhaps. I suppose only time will tell, but it seems our elected officials could have done better.



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