

# Bar Bulletin

The Debtor/Creditor Issue

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## The Bankruptcy Reform Act:

### What It Means for Lawyers

#### By **Merrilee A. MacLean**

The main provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA", aka the Bankruptcy Reform Act) went into effect on October 17. But its impacts were felt earlier.

Anticipating the new law and perceived restrictions on debtors, there was an unprecedented flurry of bankruptcy filings, primarily by consumer debtors, in the weeks leading up to October 17. In the Western District of Washington alone, 10,967 bankruptcy cases were filed between October 1 and October 16. By comparison, 1,103 cases were filed in the same period in 2004. Once the BAPCPA went into effect, only 136 cases were filed between October 17 and November 10.

So, what's the big deal and why were

This month's issue of the Bar Bulletin

presents - as space allows - a comprehensive look at the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Additional articles regarding this important piece of legislation and its effects appear at pages 4, 5 and 7.

people so eager to avoid the effects of the new law? While there have been numbers of articles and presentations on the impact of the new bankruptcy law on debtors, there has been less reporting on the impact of the new law on lawyers. For those either representing debtors, particularly consumer debtors, or those who have just a peripheral relationship with bankruptcy, it is crucial to understand that things have changed. It's not "business as usual."

One of the theories underlying the BAPCPA is a new "presumption of abuse" that those seeking bankruptcy protection are not poor-but-honest debtors needing a fresh start, but instead are people seeking to avoid their obligations. There appears also to be a distrust of the attorneys representing those debtors. Thus, the BAPCPA has created a number of new hurdles, potentials for liability and inherent conflicts that make debtor representation much more challenging than in the past.

#### **Consumer Bankruptcy Lawyers as Debt Relief Agencies**

The BAPCPA states that those providing advice to "assisted persons"

**BANKRUPTCY REFORM**  
*continued on page 12*

## KCBA Seeks Officer, Award Nominees

The King County Bar Association Nominating Committee begins this month to identify candidates for the Board of Trustees and officers, with three-year terms to begin July 1, 2006.

Open officer positions are second vice president, who will advance to first vice president in 2007 and president in 2008, and secretary/trustee, succeeding J. Mark Weiss. Three other new trustees will be elected to replace outgoing Central District Trustees Joe Bringman, Carolyn Cairns and Gary Strauss.

Regular attendance is expected at semi-monthly board meetings. Other expectations are detailed on the web site, [www.kcba.org](http://www.kcba.org), at "About KCBA." Information about a prospective nominee and why he or she would be a valuable addition to the KCBA board is appreciated.

For further information, please contact Alice Paine at 206-267-7015 or [alicep@kcba.org](mailto:alicep@kcba.org) or Nominating Committee Chair John Cary.

KCBA also is seeking nominations for

## BANKRUPTCY REFORM

continued from page 1

(essentially low-net-worth consumer debtors) must identify themselves to the public at large as "Debt Relief Agencies." A Debt Relief Agency is required to provide a number of written notices, including a notice that the debtor does not need the assistance of a lawyer.

Failure to comply with these requirements is a violation of the Bankruptcy Code. It has been suggested that if the failure is found to be either negligent or intentional, a law firm may be liable to the client for the amount of any fees or charges in connection with the case, in addition to actual damages and attorneys' fees and costs incurred.<sup>1</sup> Also, if any promise in an advertisement is unmet, it can be considered a misrepresentation, constituting a violation of section 526(a)(3) of the Bankruptcy Code, also creating liability.

One Georgia bankruptcy court entered a ruling immediately after the law took effect that attorneys do not have to comply with these requirements; however, no other courts are reported to have joined in that opinion.

### "Trust But Verify": Attorney Certification of Debtor's Schedules

The BAPCPA requires attorneys representing consumer debtors to conduct a "reasonable inquiry" to verify that the information being submitted by the debtor is well grounded in fact. Moreover, the attorney's signature constitutes a certification that the attorney has no knowledge after an inquiry that the information supplied is incorrect. If the information is subsequently found to be inaccurate, the firm may be construed to be assisting the client in misrepresenting his or her financial condition.

Unfortunately, many of the important terms are not defined and there is a significant concern that these certifications go well beyond the requirements of Rule 11. The ABA Business Law Section recently issued a report on this issue, recommending a set of guidelines that can assist attorneys venturing into these waters.

Also, attorneys are expected to check PACER to ensure that their clients have not previously sought bankruptcy protection, regardless of what their client says. An Alabama bankruptcy court recently held that it was a violation of Rule 11 for an attorney to file a case without checking for prior bankruptcy filings.<sup>2</sup>

Section 707(b)(4) of the BAPCPA

also states that, if it is determined under the new rules that a case was improperly filed as a Chapter 7, the debtor's attorney, not the debtor, can be held responsible for all costs incurred by the trustee in seeking the dismissal. The court may also assess a civil penalty for violating Rule 11.

### Restrictions on Advice

Under the "means test" created by the BAPCPA, clients that otherwise would not qualify for Chapter 7 might qualify if the amount of their secured debt is increased, since the means test deducts secured debt from the income calculation. However, Debt Relief Agencies are prevented under section 526 of the BAPCPA from encouraging clients to incur additional debt. Thus, an attorney deemed a Debt Relief Agency is apparently barred from advising his or her client on this issue and potentially even advising on how the means test is calculated, since a review of that test could lead a client to the conclusion that he or she should incur debt.

### Getting Paid

The Congressional Budget Office anticipated that the cost for a debtor's attorney would likely increase by \$150 to \$500 per case. An informal survey of local bankruptcy debtors' attorneys confirms that their base fees have indeed increased. Thus, it is now more expensive for troubled debtors to seek bankruptcy relief.

Attorneys representing Chapter 7 debtors must be paid in advance of the

filing; however, an attorney taking a credit-card payment for fees likely runs afoul of section 526 referenced above.

Chapter 13 debtors' counsel are often paid through the course of the case. In the past, the fees of debtors' counsel were paid as a first priority and usually paid within one year of filing. The BAPCPA now subordinates the fees of counsel to domestic support obligations and it is expected that fees may now take up to 60 months to be paid, assuming the debtor remains in Chapter 13.

So, what to do? First, be sure to become very familiar with the BAPCPA before taking on any new cases. The law is truly different and the penalties can be severe for not understanding those changes fully.

Second, be aware of the pitfalls and potential liability. The ABA has recently published an e-book, "Nine Traps and One Slap — Attorney Liability Under the New Bankruptcy Law," which is advertised as containing in-depth information on liability problems for consumer-debtor attorneys, as well as all other lawyers who get involved with any bankruptcy proceedings. ■

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1 § 526(c)(2)(A).

2 *In re Oliver*, 323 B.R. 769 (M.D. Alabama 2005).