SURVIVING THE BANKRUPTCY REFORM ACT OF 2005

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THIS OUTLINE IS INTENDED FOR GENERAL, INFORMATIONAL PURPOSES ONLY AND SHOULD NOT BE CONSIDERED ALL-INCLUSIVE OR RELIED ON AS LEGAL ADVICE!

MAJOR NEW CHANGES IN THE U.S. BANKRUPTCY LAWS WENT INTO FULL EFFECT ON OCTOBER 17, 2005.

The new legislation that took full effect on October 17 of 2005 makes it somewhat harder than before for debtors to obtain financial relief by filing Chapter 7 bankruptcy. The solution to rising middle-class personal bankruptcy rates resorted to by Congress was to invite special-interest groups to propose what has now become the new bankruptcy laws. The new laws are specifically designed to limit individual access to U.S. bankruptcy courts, including: (1) new bans on Chapter 7, (2) increased Chapter 13 payments, (3) new presumptions against debtors with increased penalties, and (4) the reduction of judicial discretion to balance competing interests. These proposed new bankruptcy laws narrowly missed passage each of the three years preceding the passage of the 2005 Bankruptcy Reform Act.

A FEW GOOD RESOURCES FOR GETTING UP TO SPEED WITH RECENT BANKRUPTCY REFORM:

King's Guide to Practice Under the Bankruptcy Reform Act of 2005 (see www.bankruptcybooks.com for more information or to order).

The National Consumer Law Center's Special Guide to the 2005 Act (visit www.consumerlaw.org for more information or email publications@nclc.org. The list price is $80, including all shipping and handling).

The District of Idaho has compiled and posted a Impact Statement of the Bankruptcy Reform Act that details the effects of the new law on attorneys, clerks, and judges (copy provided for this seminar, and available on line at: http://www.id.uscourts.gov/BK_Reform/ImpactClerks-Judges-Debtor-Trustee.pdf).

IT IS FORMALLY ENTITLED "THE BANKRUPTCY ABUSE PREVENTION & CONSUMER PROTECTION ACT OF 2005," AND IT HAS PEOPLE IN THE BANKRUPTCY-SERVICES INDUSTRY SCARED FOR NO REASON AT ALL!

There has been much speculation in the bankruptcy-services industry that, because of the new complications and risks imposed on debtors seeking to file, consumers' access to the bankruptcy system will be greatly reduced. In the consumer financial-services industry, the thinking (and *hope*) was that the bankruptcy rate may go down due to the new legislation. But there are several macro-economic factors indicating that the bankruptcy rate will be high for years to come. Consider the following:

- Energy and gasoline costs are rising quickly.

- Interest rates are rising.

- Uninsured medical costs continue to rise, a factor that contributes to many bankruptcies.

- The horrendous consequences of Hurricane Katrina meant that many people had no homes or jobs for a long period of time afterwards. Furthermore, prices of oil and oil-related products have risen across the country, as well as certain agricultural items from the Gulf Coast area that are transported up the Mississippi River.

- Bankruptcy has lost much of its stigma, and some of its harshest consequences, as debtors are able to re-establish credit shortly after filing.

- Minimum payments on major credit cards, which typically used to average 2% of the balance, increased to about 4% in January of 2006, effectively doubling some consumers' payments. Why? The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and Office of Thrift Supervision proposed that credit card companies establish reasonable periods for paying back balances of about 7-10 years (see www.bankrate.com/brm/news/debt/20050503a1.asp for details).

Proprietary research by Best Case Solutions indicates that the vast majority of 2005 Chapter 7 debtors (86%), and even most Chapter 13 debtors (73%), would still be able to file Chapter 7 without presumption of abuse after bankruptcy reform went into effect.

THOUGH MOST OF THE PROVISIONS OF THE OLD BANKRUPTCY CODE STILL REMAIN IN PLACE, CONGRESS HAS GRAFTED MANY COMPLICATED, NEW PROVISIONS ON TO THE FORMER LAW:

Only one discharge in Ch. 7 allowed every EIGHT years (used to be only 6 years under the old Bankruptcy Code).

Prospective filers must now obtain a mandatory briefing from an approved non-profit credit-counseling agency within 180 days before filing, unless they live in an area where the U.S. Trustee has determined such services are not available (this requirement can also be waived under exigent circumstances or debtor incapacity). This can be done through e-mail or by telephone. The U.S. Trustee's office has requirements posted for Credit Counseling and Debtor Education Providers at www.usdoj.gov/ust/bapcpa/ccde.htm. They also have some general information posted on their main Bankruptcy Reform page. In addition to this preliminary briefing which is required before filing, there is also a post-filing financial-management course requirement that must be satisfied in order to obtain a discharge.

The new Voluntary Petition is three pages long, and includes new checkboxes asking whether credit counseling has been received and whether there are pre-petition judgments on residential property where debtor resides as a tenant. Only the last four digits of the debtor's Social Security number may be published in the petition paperwork – a separate statement of Social Security number must be filed. A new option appears for the debtor to request a waiver of the filing fee, among other changes.

Audits are now required for at least 1 out of every 250 bankruptcies filed - a finding that a debtor made material misrepresentations of fact in his or her petition and schedules regarding his or her debts, property, etc., could bring harsh sanctions, including the revocation of his or her discharge!

A new form was added incorporating the Statement of Monthly Income and the Means Test Calculation. This is a chapter-specific form available on the Internet at www.uscourts.gov/rules/CPA2005.html.

Notices to creditors must be sent to the address a creditor designates for receiving correspondences. If a creditor has established reasonable means for providing notice to a debtor at least twice in the 90 days preceding the commencement of a case of a specific address to which correspondences should be sent, then that is the address to list in the debtor's matrix or notice of the filing will be deemed ineffective as to each such creditor.

The value of secured property must now be determined by its "replacement value":

> "With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined."

11 USC § 506

THE MEANS TEST – NOTHING TO FEAR

The Means Test requires an average of the debtor's income over the last six months to be listed, including wages, salary, tips, gross income from operation of a business, interest and royalties, rents, pension and retirement income, contributions to the household expenses including child or spousal support, unemployment compensation, and any other income, excluding benefits under the Social Security Act and certain payments received as compensation for being a victim of a crime.

If the debtor is a disabled veteran whose debt was incurred while on duty in the military or for activities related to homeland security services, or if the debtor's income is below the state median for the debtor's household size, the debtor falls under the "safe harbor" provision: the debtor may file under Chapter 7 and does not need to complete the rest of the Means Test form (copy of interim form provided for this seminar). Again, proprietary research by Best Case Solutions indicates that more than 85% of Chapter 7 filers have income that will fall below their state medians.

If the debtor's average monthly income is above the state median, the means-test portion of the form must be continued to determine what the debtor's disposable income is.

To arrive at disposable income, the following are subtracted:

- National IRS Standards for food, clothing, household supplies, personal care, and miscellaneous (not the debtor's actual expenses).

- Local IRS Standards for housing and utilities (again, not actual expenses and excluding secured debts).

- Local standards for transportation, vehicle operation or public transportation, and vehicle ownership (again excluding secured payments).

- Certain taxes, mandatory payroll deductions, insurance, court-ordered payments, childcare, health care, and business expenses.

- Continued contributions to care for elderly, ill or disabled family members.

- Payments to maintain safety of family under Family Violence Act.

- Home energy in excess of allowance if reasonable and necessary (documented).

- Educational expenses for children <18, also reasonable and necessary and up to $125 per child per month.

- Additional food and clothing, up to 5% of allowance, if reasonable and necessary.

- Continued charitable contributions.

- Secured payments that become due in the next 60 months; arrears on secured claims.

- The total of all priority claims, divided by 60.

- Chapter 13 administrative expenses.

If the debtor's monthly disposable income is below $100, he or she may file Chapter 7. If it is between 100 and 166.67, and a 13 plan would result in unsecured, non-priority creditors receiving at least 25% of their claims, he or she must file Chapter 13. (If these creditors would receive less than 25%, he or she could file Chapter 7.) If disposable income is at least 166.67, he or she must file Chapter 13 regardless of the percentage that unsecured non-priority creditors would receive.

Other changes to forms include:

- A Certificate of Credit Counseling must be filed, identifying the counseling agency as a valid agency, and containing a budget analysis and any management plan produced.

- The Notice to Individual Consumer Debtors required by §342(b) includes new language detailing each chapter, as well as describing types and services of credit counselors. A certification must also be filed, signed by the attorney, indicating that the attorney provided this Notice to the debtor.

- Copies of payment advices (pay stubs) from the past 60 days must be filed with the court along with the petition, unless the Court orders otherwise.

- Tax returns or tax transcripts must be provided to the trustee before the 341 meeting and within 120 days of filing the petition. Some attorneys may prefer to submit transcripts instead of returns as there is less information on the transcript that the attorney may want to keep confidential.

- The new *in forma pauperis* provision states that the filing fee can be waived if the debtor's income is below 150% of the poverty line and the debtor cannot pay in installments, subject to a judicial decision.

The Reaffirmation Agreement has specific new language - there are several new disclosures by the attorney required under §527.

There are many changes to Chapter 13 practice: how claims are classified and treated, how plan length is determined, and how secured claims are valued.

There are many different income calculations that will need to be made: current monthly income, disposable income, current income, etc.

Changes to the CM/ECF system were expected in the fall of 2005 – check the local rules.

Though the filing fee for a Ch. 13 has gone down, the cost of filing Ch. 7 went up to $274 (from $209)!

EXEMPTIONS
(Married couples double the amount of the following exemptions.)

FEDERAL - Title 11 U.S.C. §522

- Homestead / Real property, including co-op or mobile home, to $18,450; unused portion of homestead to $9,250 may be applied to any property.

- Life insurance payments for person you depended on, needed for support.

- Life insurance policy with loan value, in accrued dividends or interest to $9,850.

- Unmatured life insurance contract, except credit insurance policy.

- Alimony, child support needed for support.

- Pensions and Retirement Benefits / ERISA - qualified benefits needed for support.

- $475 per item in any household goods up to a total of $9,850.

  - Note that a nonpossessory, nonpurchase-money security interest in household goods may now only be avoided on clothing; furniture; appliances; 1 radio; 1 television; 1 VCR; linens; china; crockery; kitchenware; educational materials and equipment for minor dependents; medical equipment and supplies; furniture for children and elderly or disabled dependents; personal effects (including toys and hobby equipment of dependent children and wedding rings) of the debtor and the dependents of the debtor; and 1 personal computer and related equipment. “Household goods” for these purposes does not include most works of art; most electronic entertainment equipment; antiques with aggregate fair market value of more than $500; jewelry with an aggregate fair market value of more than $500 (except wedding rings); and a computer, motor vehicle, boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.' § 522(f)(4).

- Health Aids;

- Jewelry to $1,225.

- Lost earnings payments.

- Motor vehicle to $2,950.

- Personal injury compensation payments to $18,450.

- Wrongful death payments.

- Crime victims' compensation.

- Public assistance.

- Social Security.

- Unemployment compensation.

- Veterans' benefits.

- Tools of trade - books and equipment to $1,850.

- Wild Card - $925 of any property plus up to $9,250 of any amount of unused homestead exemption.

OCTOBER 17, 2005 IMPACT ON EXEMPTIONS

Homesteads:

- The exemption for a homestead is limited to $125,000 if the property was acquired within the previous 1,215 days (3.3 years). The cap is not applicable to any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1,215-day period).

- The value of the state homestead exemption is reduced by any addition to the value brought about on account of a disposition of nonexempt property made by the debtor (made with the intent to hinder, delay, or defraud creditors) during the 10 years prior to the bankruptcy filing.

- An absolute $125,000 homestead cap applies if either:

  - the court determines that the debtor has been convicted of a felony demonstrating that the filing of the case was a abuse of the provision of the Bankruptcy Code; or

  - the debtor owes a debt arising from a violation of federal or state securities laws, fiduciary fraud, racketeering, or crimes or intentional torts that caused serious bodily injury or death in the preceding 5 years. NOTE: This limitation is inapplicable if the homestead property is "reasonably necessary for the support of the debtor and any dependent of the debtor."

For purposes of the new law, the state used for a debtor's exemptions is the state he or she lived in for the 730 days (2 years) before filing or, if he or she did not live in a single state in the previous two years, then use the state where he or she lived the majority of the 180-day period preceding the 2-year period; or, if the preceding renders him or her ineligible for any exemptions, then the debtor is only allowed to choose the federal exemptions.

Tricky Example: If the debtor moved to Wisconsin and bought a home and filed, after having just moved from Tennessee where the debtor lived for the last three years, then Tennessee's homestead exemption is the one to apply to the debtor's home, even though it is located in Wisconsin. However, because controlling case law in Tennessee permits that state's exemption to be used only for those who live in Tennessee, then the federal exemption must be applied. But let's say the debtor just moved from living more than

two years in California and bought a home in Wisconsin before filing. Because California's laws say that California's $75,000 homestead exemption may be applied by those who live outside that state, then the debtor can enjoy a huge advantage over both Wisconsin's $40,000 homestead exemption and the measly federal homestead exemption!

Pension Plans exempt from seizure:

- Employee contributions to ERISA qualified retirement plans, deferred compensation plans, tax-deferred annuities, and health insurance plans.

- Education Funds exempt from seizure:

    - Funds placed in an educational retirement account or qualified State tuition programs at least 365 days prior to a bankruptcy filing, within the limits established by the Internal Revenue Code, and for the benefit of a child or grandchild of the debtor, are excluded from the debtor's estate, with a $5,000 limit on funds contributed between one and two years before the filing.

WISCONSIN STATE EXEMPTIONS:

Under the laws of Wisconsin, a homestead consists of the dwelling, including a building, condominium, mobile home, house trailer or cooperative, and so much of the land surrounding it as is reasonably necessary for use as a home, but not less than 0.25 acres, if available, and not exceeding 40 acres, within the limitation as to value under §815.20, except as to lien attaching or rights of devisees or heirs of person dying before the effective date of any increase of that limitation as to value. §990.01(14). As stated above, the statutory homestead exemption allowed under §815.20 is $40,000.00 per household, except mortgages, laborers', mechanics' and purchase money liens and taxes. §815.20.

Personal property exempt from execution, attachment, and garnishment may include:

- Provisions for burial.

- Tools of trade, business and farm property not to exceed $7,500.00.

- Consumer goods not to exceed $5,000.00.

- Household furnishings, $5,000.

- Federal disability insurance benefits, fire and casualty insurance, unmatured life insurance on the life of the debtor or his dependent with an aggregate interest not to exceed $4,000.00 in value.

- Motor vehicles not to exceed $1,200.00 in aggregate value, plus unused amount of household furnishings.

- Life insurance claims.

- Personal injury recovery not to exceed $25,000.00.

- Retirement benefits, and deposit accounts in the aggregate value of $1,000.00.

§815.18.

TIMELINES & GENERAL SUMMARY

Personal bankruptcy under Chapter 7 eliminates debt through discharge. Chapter 13 bankruptcy (sometimes called "wage earner plans") reorganizes debts for either full or partial repayment over three or more years. Chapter 11 offers more complex reorganization of debts for businesses, while Chapter 12 applies only to family farmers. Of all bankruptcy types, Chapter 7 & 13 are chosen by most individual filers because these chapters are cost effective.

In a nut shell, the process for filing a straight liquidation (Ch. 7) used to start under the law before October 17 of 2005 with the filing of the voluntary petition with numerous schedules detailing the debtor's information – now the process starts with the debtor obtaining a credit-counseling briefing. A husband and wife may file one petition together and commence a joint case. 11 U.S.C. §§301, 302, 101(42). Except for criminal, family-support and certain other actions (to include most evictions), the filing also puts a stay under 11 U.S.C. §362 into effect prohibiting all collection actions until the earlier of the case closing, dismissal or the time of discharge or denial of a discharge. Creditors may file a motion to seek to have the stay lifted, however. Under the new law, the stay terminates 60 days after the request of a party in interest, unless extended by the court after a hearing. If a debtor had a case pending and then dismissed within one year preceding the filing, then the stay is terminated after 30 days, but may be extended on motion for cause made before the expiration of the 30 days. And “serial” filers now get no stay at all without first filing a motion with the court!

If the debtor fails to file schedules listing his or her assets and liabilities, his or her current income and expenditures, executory contracts and unexpired leases, and a statement of his or her financial affairs, among other things, with the voluntary petition, it must be done within 15 days after filing. Bankruptcy Rule 1007(c); see also 11 U.S.C.

§521. In Chapter 13, the Plan must also be filed within 15 days after the Bankruptcy was filed. The plan provides for submission of future income and the treatment of the debtor's creditors, specifying when and how much each kind of creditor will receive. Bankruptcy Rule 3015(b).

Approximately 14 days after a case is commenced, the court mails a Notice of Commencement of Case to the debtor and to the creditors he or she has included in his or her mailing list (the "matrix"). The notice contains a date for a meeting with the assigned case trustee pursuant to §341 of the Code, deadlines for objections to discharge and for filing Proofs of Claims. The debtor and his or her attorney must be present at the §341 meeting so that the assigned case trustee can review the information submitted in the debtor's petition paperwork with him or her and give any creditors who want to appear an opportunity to cross-examine the debtor.

- A debtor filing Chapter 7 or Chapter 13 bankruptcy, must provide to the trustee, at least seven days prior to the 341 meeting, a copy of a tax return or transcript of a tax return, for the period for which the return was most recently due, or the case will be automatically dismissed!

Within 20 to 30 days after the 341 meeting, the trustee will sell any nonexempt assets available for the benefit of the creditors. The trustee has the authority to:

- pursue causes of action (lawsuits) belonging to the debtor; set aside preferential transfers made to creditors within 90 days before the petition;

- undo security interests and other pre-petition transfers of property that were not properly perfected.

In Chapter 7, within 45 days after the Statement of Intention is filed, the debtor is to perform as he or she indicated. In that statement, he or she is required to declare whether he or she will be surrendering or keeping property secured by consumer debt. If he or she wants to keep secured property, he or she has to indicate whether he or she intends to: (1) reaffirm the debt and continue to make the payments remaining obligated for the balance of the debt, or (2) redeem the property by immediately paying the value of the property and receiving a discharge for the balance of the debt. 11 U.S.C. §521(2)(B). If the debtor fails to perform as indicated within the time allowed, the automatic stay is terminated for the secured property.

Creditors and the trustee have until 30 days after the conclusion of the creditor's meeting under §341 to object to the property the debtor has claimed as exempt in Schedule C. While most §341 meetings are concluded on the same day they are set (most typically last only around 5 minutes), it is not unheard of for a meeting to be continued to a subsequent date, which will extend the time that creditors have to object. Bankruptcy Rule 4003.

Creditors have until 60 days after the first date set for creditor's meeting under §341 to file a complaint under §523(c) to commence an "Adversary Proceeding." §523(c) allows creditors to object to the discharge of debts which were obtained by false pretenses, a false representation, or actual fraud; debt from fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny; debt for willful and malicious injury; and debt incurred in a divorce or separation (other than child support and spousal maintenance which are not discharged even without an objection to discharge). The most common objection to discharge of a debt is based on §523(a)(2). This section presumes that certain charges to one creditor within a certain number days before the case is commenced are not discharged, if they are for luxury goods or services, or cash advances, as later explained. This section also denies a discharge to debt extended because the creditor relied upon a credit application which was materially false. Bankruptcy Rule 4007(c); see also 11 USC §523.

Chapter 7: Debtors must obtain and file the *certificate of financial management course* within 45 days after the §341 meeting. Creditors have until 60 days after the first date set for creditor's meeting under §341 to file a complaint under §727(a) which allows objection to the discharge of all debts because of misconduct including transfer, destruction or concealment of property; concealment, destruction, falsification or failure to keep financial records; making false statements; withholding information; failing to explain losses; failure to respond to material questions; having received a discharge in a prior case filed within the last 8 years. Bankruptcy Rule 4004(a); see also 11 USC §727(a).

Court rules require that the discharge be entered "forthwith" after the expiration of the time for objecting to discharge or moving to dismiss the case. The time for those objections expires 60 days after the first date set for creditor's meeting. But the discharge in a Chapter 7 or Chapter 13 is contingent upon the debtor's completion of an approved instructional course concerning personal financial management, and is not absolute or final. The trustee can ask that the discharge be set aside if the debtor does not turn over non-exempt property, and for other violations of the debtor's duties. Bankruptcy Rules 4004(c)(1), 4004(a), 1017(e).

The maximum length of a Chapter 13 plan is five years beginning on the date that the first payment is due under the plan. After the third year of the plan, the plan no longer needs to provide that all of the disposable income be committed to the plan. 11 U.S.C. §§1325(b)(1), 1322(d). Discharge entered in Chapter 13 upon completion of plan payments. 11 U.S.C. §1328. However, debtors must obtain and file the *certificate of financial management course* no later than the last payment made by the debtor as required by the plan or the filing of a motion for entry of a discharge. Discharge in chapter 13 is denied to any debtor who has received a discharge: (1) in a chapter 7, 11, or 12 case within the preceding four years; or (2) in another Chapter 13 case within the preceding two years.

Debts that are *per se* non-dischargeable:

- *All* student loans.*
- Certain taxes.
- Debts incurred for injuries caused by drunk driving.
- Nearly every type of court-ordered, family-support obligation, like child support, maintenance and alimony, now referred to as “Domestic Support Obligations” (a/k/a “DSO”).
- Debt of more than an aggregate of $750 for cash advances incurred within 70 days before the Bankruptcy is filed - applies to Chapter 7 cases, and to hardship discharge in Chapter 13. 11 U.S.C. §§523(a)(2), 1328(b).
- Debt of more than an aggregate of $500 for "luxury goods or services" incurred within 90 days before the Bankruptcy is filed - applies to Chapter 7 cases, and to hardship discharge in Chapter 13. 11 U.S.C. §§523(a)(2), 1328(b).

* Before the reform went into full effect on October 17 of 2005, only student loans that were funded by any federal money were non-dischargeable. Now, all student loans are deemed non-dischargeable. However, a debtor may still seek to have some or all of his or her student loans discharged by commencing an Adversary Action to obtain a determination of hardship by the court.

The court may deny discharge of all debt if the debtor attempted to hinder, delay or defraud a creditor when he or she transferred, removed, destroyed, mutilated, or concealed property within one year prior to the filing of your Chapter 7 petition. The trustee may recover the property from the person to whom you transferred it. 11 U.S.C. §§727(a)(2), 548(a)(1).

A total of $600 or more in money or property which is paid to a creditor that is a relative or "insider" (certain business associates) within a year prior to filing is a "preference." The Trustee may recover preferences and divide the money between all creditors. In Chapter 13, one may be able to prevent the trustee from going after the relative by increasing the amount paid into the plan. 11 U.S.C. §§547(b)(4)(B), 547(c)(8), 101(31).

A debtor may not file any bankruptcy if he or she filed a previous bankruptcy which was dismissed in the preceding 180 days either (1) on the court's order because of his or her willful failure to obey orders of the court or to appear in court when required; or (2) at his or her request after the filing of a request for relief from the automatic stay. 11 U.S.C. §109(g).

The debtor must be a resident in the state in which he or she is filing for the last 180 days. If he or she has not resided in the state that long, he or she can only file in the state where he or she has resided, or which has been his or her principal place of business or which

has been the location of his or her principal assets for the majority of the last 180 days. 28 USC §1408.

A total of $600 or more in money or property which is paid to a creditor within 90 days prior to filing is a "preference." The Trustee may recover preferences and divide the money between all creditors. In Chapter 13, a debtor may be able to prevent the trustee from going after the creditor by increasing the amount paid into his or her plan. 11 U.S.C. §§547(b)(4)(B), 547(c)(8), 101(31).

ADDED HEADACHES FOR LEGAL-SERVICES PROVIDERS: CERTAIN LAW FIRMS MAY NOW HAVE TO COMPLY WITH NEW NOTIFICATION AND OTHER LEGAL REQUIREMENTS IMPOSED BY THE REFORM LAW ON "DEBT RELIEF AGENCIES"

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 places extensive requirements on "debt relief agencies" and subjects those who do not comply to substantial penalties.

What is a "debt relief agency"?

A "debt relief agency" is a person who, for compensation, provides bankruptcy assistance to a person who owes debt incurred primarily for personal, family, or household purposes, and has less than $150,000 in non-exempt assets. The non-attorney bankruptcy petition preparer is specifically included in the definition of a debt relief agency without regard to the nature or amount of the debt; the debtor's attorney is not specifically included, but would be included by the definition, subject to the requirements for nature of debt and amount of non-exempt assets. 11 USC §101(3), (8), (12A). There are now a few federal lawsuits challenging the constitutionality of applying this provision to attorneys. There has already been one decision and order issued October 17, 2005 by the U.S. Bankruptcy Court for the Southern District of Georgia (Davis, L.) holding that this provision does not apply to attorneys licensed to practice law in that district.

Restrictions on debt relief agencies. 11 USC §526(a), prohibits debt relief agencies from taking certain actions:

- Failing to perform services. An agency may not fail to perform any service which it informed the debtor that it would provide in connection with a Bankruptcy case. 11 USC §526(a)(1).

- Making an untrue and misleading statement. An agency may not make any untrue and misleading statement in a document filed in a Bankruptcy, or make a statement which, upon the exercise of reasonable care, should have been known by the agency to be untrue or misleading. 11 USC §526(a)(2).

- Counseling or advising the debtor to make untrue and misleading statements. An agency may not counsel or advise the debtor to make any untrue and misleading statement in a document filed in a Bankruptcy. 11 USC §526(a)(2).

- Misrepresent services, benefits or results. An agency may not directly or indirectly, affirmatively or by material omission make a misrepresentation with respect to the services that the agency will provide, or the benefits and risks that may result in filing Bankruptcy. 11 USC § 526(a)(3).

- Advising to incur debt. An agency may not advise a person contemplating the filing of a Bankruptcy to incur more debt in contemplation of filing bankruptcy, or to pay an attorney or bankruptcy petition preparer fee or charge for Bankruptcy services. (The statute is less than clear regarding the fees for Bankruptcy services. The restriction could be interpreted as only restricting an agency from advising that debt be incurred to pay for bankruptcy services--or it could be interpreted more broadly as prohibiting the agency from advising the debtor to pay for bankruptcy services.) 11 USC §526(a)(4).

Notices and disclosures - A debt relief agency must give the following notices and disclosures:

- Bankruptcy court clerk notice. The agency must provide the debtor with the written notice of the clerk of the court which contains brief descriptions of:

  - chapters 7, 11, 12, and 13 and the general purpose, benefits, and costs of proceeding under each of those chapters;

  - the types of services available from credit counseling agencies. 11 USC §§527(a)(1), 342(b)(1).

The agency must retain this notice for 2 years from the date that the notice is given. 11 USC §527(d).

The court clerk is required to give this notice "before the commencement of a case" under 342(b)(1), but no date is given in 527(a)(1) for a debt relief agency to provide that same notice, and it is difficult locating any other section specifying when the agency must give the notice.

Additional written notice - An agency must provide the following information to the debtor, to the extent that the Bankruptcy court clerk's notice does not provide it:

- All information is required to be complete, accurate, and truthful; 11 USC §527(a)(2)(A).

- All assets and all liabilities are required to be completely and accurately disclosed; 11 USC § 527(a)(2)(B).

- The replacement value of each secured asset must be stated where requested after reasonable inquiry to establish that value; 11 USC §§527(a)(2)(B), 506.

- The debtor must disclose, after reasonable inquiry, his or her current monthly income, and the amounts specified to determine whether a case satisfies the means test under 11 USC §707(b)(2), Those amounts include:

  - debtor's nonpriority unsecured claims;

  - debtor's monthly expenses;

  - actual expenses paid by the debtor for care and support of an elderly, chronically ill, or -disabled household member or member of the debtor's immediate family;

  - expenses of administering a chapter 13 plan;

  - expenses to attend a private or public elementary or secondary school for each dependent child less than 18 years of age;

  - housing and utilities expenses if in excess of IRS Local Standards;

  - average monthly payments on account of secured debts; and

  - expenses for payment of all priority claims (including priority child support and alimony claims).

- In a case under chapter 13 of this title, the debtor must disclose after reasonable inquiry, his or her disposable income (determined in accordance with section 707(b)(2)), which are required to be stated after reasonable inquiry; and 11 USC §527(a)(2)(C).

- Information may be audited, and failure to provide information may result in dismissal of the case or other sanction including a criminal sanction. 11 USC §527(a)(2)(D).

The agency is required to provide this notice within 3 business days after the first date that the debt relief agency first offers to provide any bankruptcy assistance services. 11 USC §527(a)(2). The agency must retain this notice for 2 years from the date that the notice is given. 11 USC §527(d).

Specific written statement. A debt relief agency must provide the written statement titled "IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER" which is set forth in 11 USC §527(b) (copy provided for this seminar). The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices which the agency provides. 11 USC §527(b).

§527(b) requires that the agency give this notice at the same time that is required to give the Bankruptcy Court Clerk Notice (described above), but gives no time at which that notice must be given.

Document preparation information. The debt relief agency must give the debtor "reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide" for the documents required by 11 USC § 521, which include the list of creditors, schedule of assets and liabilities, schedule of current income and current expenditures, and statement of the debtor's financial affairs. That information must include:

- How to value assets at replacement value, determine current monthly income, the amounts specified for the means test in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

- How to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

- How to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

§527(c) requires that the agency give this notice at the same time that is required to give the Bankruptcy Court Clerk Notice (described above), but as far as we can determine, gives no time at which that notice must be given.

11 USC §527(c).

Written contract for services. A debt relief agency must execute a written contract with the debtor:

Contents. The contract must clearly and conspicuously explain:

- The services such agency will provide;

- The fees or charges for such services; and

- The terms of payment.

When provided. The contract must be executed not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, and prior to the filing of the bankruptcy petition.

Copy. The debt relief agency must provide the assisted person with a copy of the fully executed and completed contract.

11 USC §528(a).

Advertising requirements.

Disclosure that services are for bankruptcy. A debt relief agency must clearly and conspicuously disclose in any advertisement directed to the general public that the services or the benefits offered are with respect to bankruptcy relief. Advertising requiring the disclosure includes:

- Advertisements in general media, seminars or specific mailings, telephonic or electronic messages, or otherwise; 11 USC §528(a)(3).

- Descriptions of bankruptcy assistance in connection with a chapter 13 plan whether or not chapter 13 is specifically mentioned in such advertisement; and 11 USC §528(b)(1)(A).

- Statements such as "federally supervised repayment plan" or "Federal debt restructuring help" or other similar statements that could lead a reasonable consumer to believe that debt counseling was being offered when in fact the services were directed to providing bankruptcy assistance with a chapter 13 plan or other form of bankruptcy relief. 11 USC §528(b)(1)(B).

Debt relief agency statement. A debt relief agency must clearly and conspicuously include in advertisements the following statement (or a substantially similar statement):

"We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."

11 USC §528(a)(3) & (4), 528(b).

SANCTIONS

Unenforceable contract. If a contract for bankruptcy assistance between a debt relief agency and an assisted person does not comply with the material requirements of this, it is void. It cannot be enforced by or on behalf of the debt relief agency. It can, however, be enforced by the assisted person. 11 USC §526(c)(1).

Liability for fees received, actual damages, attorneys' fees. A debt relief agency is liable to the assisted person for:

- The amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received;
- Actual damages; and
- Reasonable attorneys' fees and costs.

The penalties are to be imposed if, after notice and hearing, the court finds that the debt relief agency has:

- Intentionally or negligently failed to comply with any provision of sections 526, 527, or 528 (described above) with respect to the assisted person's bankruptcy case;
- Intentionally or negligently failed to file any required document (including those specified in section 521), which resulted in the dismissal of the case or its conversion to a case under another chapter; or
- Intentionally or negligently disregarded the material requirements of the Bankruptcy Act or the Federal Rules of Bankruptcy Procedure applicable to such agency.

11 USC §526(c)(2).

Actions by State law enforcement. In addition to any state law remedies, the Act specifically authorizes state agencies to:

- Bring actions to enjoin violations;
- Bring actions on behalf of its residents to recover the actual damages; and

- Recover the attorneys' fees and costs of successful actions.

11 USC §526(c)(3).

Actions by the court, United States Trustee, or the debtor. Where a debt relief agency intentionally violates section 526 or engages in a clear and consistent pattern or practice of violating the section, the court may, on its own motion or on the motion of the United States Trustee or the debtor:

- Enjoin the violation of such section; or

- Impose an appropriate civil penalty against such person.

11 USC §526(c)(5).

CONCLUSION

Though creditor advocacy has now resulted in an attempt by Congress to rein in debtors seeking to abuse the bankruptcy system, mandating many more complicated steps and risks in the filing process for debtors and their attorneys to have to endure, it will not result in the drastic reduction of filings that the consumer financial-services industry had hoped for. Congress did not hand them everything that they wanted on a silver platter, and the bankruptcy option will continue to be readily available for most people in need of debt relief. Attorneys and other legal-services providers who have been helping people to file bankruptcy up to the time of the full enactment of the 2005 Bankruptcy Reform Act should not be afraid or intimidated by all the new requirements to continue doing so.

Through on-going education about the new laws, by obtaining the latest bankruptcy software and implementing some simple, new practice procedures, such as visiting a client’s home and/or business to actually observe and inventory the debtor’s property, ordering and analyzing the debtor’s credit report(s) and doing a check through various resources for judgments, legal-services providers should easily be able to fully comply with all new requirements at additional, hourly costs to the clients which, experience dictates, clients should be able to pay with little or no difficulty.