



# THE SUFFOLK LAWYER

PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION

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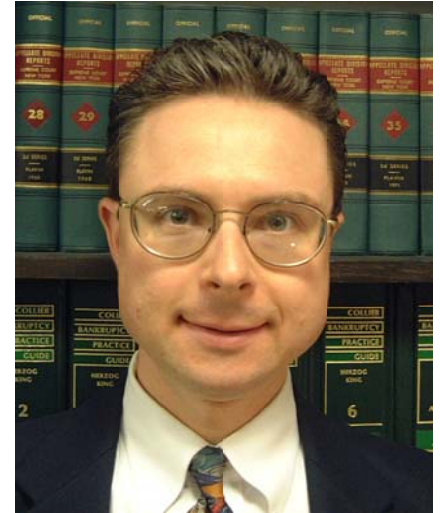
Vol. 21 No. 2

October 2005

## CONSUMER BANKRUPTCY

# Bankruptcy Practice Under the New Laws

by Craig D. Robins, Esq.



CRAIG D. ROBINS, ESQ.

**The Old Laws Are Now History.** If you have bankruptcy petitions that you have not yet filed, you are out of luck. The new laws that all consumer bankruptcy attorneys have dreaded for quite some time are now upon us. On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), this country's most sweeping bankruptcy legislation in decades, became effective. During the past month, the Bankruptcy Court saw a record number of filings by debtors trying to get in under the old laws.

**The New Laws Are Extremely Complex.** To prepare for the rough road ahead in handling BAPCPA, I recently attended a symposium and workshop in Orlando, Florida sponsored by the National Association of Consumer Bankruptcy Attorneys. BAPCPA contains so many new and complex provisions that several days of morning to evening seminars and workshops seemed to

barely skim the surface. The Nassau and Suffolk Bar Associations both offered recent one-evening C.L.E. seminars. However, they merely provided an overview of just a few of the new provisions. The CLE's were nevertheless very informative as our local judges and trustees gave their input as to how they were planning to address the changeover.

The days of the general practitioner grabbing a Blumberg bankruptcy form are over. In order to effectively represent your clients (and avoid being sanctioned), taking a thorough course on the new laws is an absolute prerequisite. The National Association of Consumer Bankruptcy Attorneys announced that it will be offering some additional symposiums in the near future. Over 1,500 attorneys attended the one in Orlando. Before that, 1,700 attorneys attended their symposium in Chicago. Various

organizations will certainly be offering full-day seminars in the near future.

**Electronic Filing and Computer Petition Preparation Are Now Mandatory.** With the advent of the new laws, combined with the local court requirement that attorneys file petitions electronically, it is inconceivable that a practitioner can prepare a bankruptcy petition without using a computer together with specialized and current bankruptcy petition preparation software. If you plan to practice consumer bankruptcy, then you must make this investment. All of the leading petition preparation software publishers have rushed to prepare updated versions of their software. The software will be especially important in assisting you with the numerous calculations required by the means test. The software should also include all necessary databases regarding the IRS standardized expense tables and the state median income.

### **The Bankruptcy Law Has Changed Considerably.**

Discussing the provisions of the new law could easily fill a thousand of these columns. The means test is a major component. Its ostensible purpose is to determine, after a series of calculations, whether a debtor who seeks to file for Chapter 7, would be abusing the bankruptcy laws if that debtor could afford to pay something back to his creditors. In addition to this totally new procedure, there are new provisions for determining property of the estate and calculating exemptions. There are new procedures for valuing assets. There are new laws concerning the automatic stay, which will not be so automatic in some instances. Treatment of secured claims has changed and debtors will likely have to reaffirm all secured debts, a procedure that had been mostly done away with in this jurisdiction during the past decade. Matrimonial obligations are now treated totally differently in a way designed to protect the innocent spouse. There are new exceptions to discharge. There are also greater limitations upon re-filing after a previous petition has been filed. And don't forget, debtors must receive credit counseling as a condition to filing for bankruptcy relief, and budget counseling as a condition to receiving a discharge, and you will certainly need to assist them with this.

### **You Must Read the New Laws.**

Let me repeat that. You must read the new laws. If you file a petition after October 17, 2005 without having a thorough understanding of the new laws, you will be inviting sanctions, embarrassment and malpractice suits. Although the new laws are several hundred pages, you must read them and you must understand them. At the bankruptcy CLE at the Suffolk Bar Association earlier this month, one of the speakers suggested that all attorneys read the new section 521, concerning debtor's duties, at least ten times.

### **The Most Significant Change is the Means Test: A Potential Nightmare.**

The essence of the new law is the means test, a six-page, fifty-five line item, computational form that makes the most complicated tax return form look like a walk in the park. This form alone will intimidate the most seasoned practitioner and will likely have the effect, intended or not, of preventing many

people from filing for bankruptcy for various reasons. If you fail to properly prepare the means test, you will be looking at sanctions. Even though your software will assist you with the computations, you must still understand the appropriate figures and definitions that the new law requires.

### **Attorneys Now Face Tough New Responsibilities and Liabilities.**

At the CLE at the Suffolk Bar Association earlier this month, speaker Sal LaMonica suggested that "as a result of this law, you have to look at each new client as a potential liability." The number one concern that most consumer bankruptcy attorneys probably have about the new law is that it imposes a tremendous responsibility and potential liability on the attorney.

The attorney must now conduct a reasonable investigation to verify the accuracy of the information provided by the client. In addition, the attorney must determine that the petition and all other information provided to the court and the trustee is well-grounded in fact. Finally, the attorney must certify that a Chapter 7 petition is not an abusive filing. At the same CLE, Judge Cyganowski suggested that a debtor's attorney will now have the obligation to examine every bill and every utility statement to ascertain the accuracy of the debtor's budget.

The penalties for violating any of the new liability provisions can be strict and can include fee disgorgement, actual damages, attorney's fees and costs, and possible civil penalties. These new responsibilities, combined with attorney liability, will likely cause many lawyers to leave the consumer bankruptcy practice, and will result in an increase in fees charged by those who stay.

### **New Mandatory Disclosures and Advertising.**

As a debtor's attorney, you are now required to make numerous disclosures about the nature of legal services offered, the consequences of filing for bankruptcy, and the obligation to provide truthful information in the petition, with such disclosures being made no later than three days after you first offer legal services to the client. Failure to do so can mean additional sanctions.

If you advertise bankruptcy legal services you must now identify yourself as a "Debt Relief Agency" in any advertisement and contain a disclosure essentially stating that you help people file for bankruptcy.

### **Revising Your Legal Fees.**

As a result of the additional amount of time that you will need to spend with each bankruptcy matter, combined with the added potential attorney liability, many attorneys are anticipating that they will end up doubling their existing fees. Legal fees of \$2,000 to \$3,000 for Chapter 7 cases and \$3,500 to \$5,000 for Chapter 13 cases may become the norm, although it is too early to determine. In addition, many bankruptcy attorneys will probably charge two separate fees: one to cover the several hours worth of work that will be involved with the means test, and another to cover the remainder of the bankruptcy including preparation of the petition and representation in court. After all, it will often be difficult to recommend filing Chapter 7 until a substantial amount of time is devoted to reviewing all aspects of the case and then performing the means test.

### **Are You Ready for All of This?**

If all of the above does not sound intimidating enough, even the most experienced attorneys, trustees and judges are experiencing high degrees of angst because no one seems to know how the new laws will pan out. Finally, if you decide to continue your bankruptcy practice, be prepared to spend a substantial amount of time reviewing the new laws, attending seminars and workshops, and re-adjusting your perspective as to how bankruptcy works. As Judge Bernstein stated, "It will be an evolutionary process for everyone."

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### **Editor's Note (revised 2008):**

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