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CONSUMER BANKRUPTCY

Bankruptcy Judges Convene to Discuss New Bankruptcy Laws on their One Year Anniversary

by Craig D. Robins, Esq.

Members of the bankruptcy bar had a rare opportunity to hear comments from six of the seven bankruptcy judges sitting in the Eastern District of New York at a symposium on October 23, 2006. The occasion was to discuss views from the bench on the one year anniversary of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The panel also contained members of the United States Trustee's office, a Chapter 7 trustee, and two bankruptcy practitioners. The symposium was held at the Nassau County Bar Association.

As everyone knows by now, the new laws were most controversial and not welcomed by the bankruptcy bar and most judges. Practitioners and judges alike previously described them as everything from tricky and cumbersome to inane and unjust. The one year anniversary of the new laws (they became effective October 17, 2005) provided an ideal time for the judges to assess their impact.

The judges who appeared were Chief Judge Melanie Cyganowski, Judge Stan Bernstein, Judge Carla Craig, Judge Dorothy Eisenberg, Judge Jerome Feller, and Judge Elizabeth Stong. Judge Dennis Milton had planned to appear but could not make it. The following topics were discussed:

Volume Way Down.

Andrew Thaler, a panelist who is a Chapter 7 trustee, discussed some recent filing statistics. The number of cases currently being filed is similar to the number we saw over two decades ago in 1985. Right now the amount of new cases being filed is about one-third of the number we would have expected had there been no new laws. In the Eastern District, that translates to about 31 cases a day instead of 110. Chief Judge Cyganowski pointed out that the dearth of cases is resulting in a staffing issue as there is not enough work to keep all of the employees in the clerk's office busy and there is pressure to terminate some positions.

Pro Se Filings.

Chief Judge Cyganowski stated that 25 to 30% of all filings were by *pro se* debtors, a relatively high percentage. She introduced Mary Fox, a new law clerk whose job will strictly be to assist *pro se* filers. The judge pointed out that an extremely large number of *pro se* cases are dismissed because the debtors do not know how to follow the new BAPCPA rules.

Effect on Panel Trustees.

Andrew Thaler discussed some of the ways BAPCPA has



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impacted his work as a Chapter 7 trustee. He indicated that he must now spend a good amount of time reviewing tax returns and chasing debtors and attorneys who do not provide them. [BAPCPA requires that you provide the trustee with a copy of the debtor's last filed tax return at least seven days before the meeting of creditors.] He also stated that he thoroughly reviews the budget schedules ("I" and "J") and refers potential cases of abuse to the United States Trustee. He is also kept busy ascertaining whether there are domestic support obligations as trustees must now notify the creditor-spouse and the New York State Support Unit. Finally, he mentioned that even though his meeting of creditors calendar is significantly smaller than before, it takes just as long because of all of the additional issues to cover.

Automatic Dismissal.

Judge Cyganowski began what led to a heated discussion about the controversial practice of automatically dismissing a case on the 46th day after filing if the debtor does not adhere to certain new obligations imposed by Code section 521(i)(1). In particular, pursuant to that section, a debtor must file the means test and copies of pay stubs with the Court within 45 days of the date the petition is filed. If the debtor neglects to do so, then the clerk's office administratively handles this issue without referring the matter to a judge. The clerk has been instructed to automatically dismiss the case without a hearing and to serve a notice of dismissal on all interested parties. Some expressed concern as to whether this provided sufficient notice to the debtor and the trustee.

Judicial Commentary on Working With the New Laws.

Judge Feller said that Congress was dissatisfied with the way the bankruptcy laws had previously been administered. He felt that too many attorneys and judges were complaining about perceived problems with the new laws. "If we do not do the darndest to make it work, then it will not work" he said. "We've made an attempt to make this work. There are ways that we can make these provisions work. We can't sit back and complain." However, I was not convinced that all of the judicial panelists shared the same sentiment.

New Local Rules.

Chief Judge Cyganowski mentioned that it became necessary to revise the existing local rules to work in conjunction with the new BAPCPA provisions. She said that a draft copy of the proposed new local rules will be circulated in the near future for comment.

New Decision Interpreting BAPCPA Provision.

Judge Bernstein, who, a year ago, said that he had no intention of being one of the first judges to issue a decision interpreting the new laws, volunteered that he was about to release a decision which he intimated would be rather controversial. He said that the issue concerned Bankruptcy Code section 109(h) and the impact of the BAPCPA credit counseling requirement on the debtor's eligibility to file.

Issue of Sanctions for Attorney's Slip-up.

One of the major concerns when BAPCPA went into effect last year was the number of provisions imposing burdens on bankruptcy counsel and liability for negligent non-compliance. Judge Bernstein discussed one particular case in which counsel filed a petition despite the fact that the debtor's credit counseling certificate was obsolete. (The counseling session must be obtained within six months of filing. Here, the attorney filed the case seven months after the session.) Judge Bernstein commented that he easily could have sanctioned, humiliated and embarrassed the attorney, but instead sought to "make no noise" about it and to give the debtor's attorney "a pass." He implied that his rationale for doing so was because the "sage" attorney ordinarily demonstrated responsibility with his cases.

Judge Bernstein, who also spends a significant amount of time teaching law students as an adjunct faculty professor at Hofstra and Touro Law Schools, is apparently quite familiar with the concept of permitting a pass in class under appropriate circumstances. Incidentally, while the other judges appeared most judicial in attire, Judge Bernstein looked most professorial and relaxed in a sweater and collared shirt.

Audits.

In my September 2006 column, I discussed the new U.S. Trustee program of random and targeted audits of consumer debtors. Assistant United States Trustee Terry Cavanagh and United States Trustee Attorney, Linda Rifkin, provided more information. The Office of the United States Trustee will have no relationship with the auditors. The audits will be completed totally independently so that there is no influence or bias. Audits will not involve face-to-face interaction as many had feared. Instead, the auditors will request documents and review them to look for material misstatements.

The main office of the United States Trustee in Washington hired two auditors (accounting firms) for this district and they are both located upstate, well out of this district, to minimize the possibilities of conflicts of interest. The auditor will file a final

report with the Court when the audit is completed.

A heated discussion on the audit reports themselves began with Judge Bernstein questioning their usefulness and considering their impact on the court system by asking, "What are we going to do with them?"

Linda Rifkin replied that depending on what is found (i.e. material misstatements) the United States Trustee will take action. It will be up to the United States Trustee's office to decide whether to take a position, although technically, creditors will have standing also. At the end of that discussion, Judge Bernstein commented, "I'm just trying to understand what additional burdens I have to look forward to," which brought a round of chuckles from the room.

Judge Bernstein also questioned whether debtors would have difficulty responding to the audits if their attorneys previously restricted their involvement with limited engagement retainer letters, a practice which is becoming more and more prevalent.

Impact of BAPCPA on the Judiciary.

Judge Bernstein stated that the biggest impact of the new laws on the judiciary is "not very much impact at all." This was in harsh contrast to his statements a year ago in which he opined that the new laws spelled gloom and doom. He also mentioned that there are many traps for inexperienced counsel and many trip wires.

Judge Eisenberg commented that she thought dealing with credit counseling issues was an unnecessary burden. Clearly frustrated, she said, "This is all a waste of judicial time and lawyer time."

Chief Judge Cyganowski commented that while some bankruptcy courts are more activist to try to fix perceived problems with the new laws, some are more constrained. She said, "Our Court is more constrained. We're waiting to see. . . In the meantime, we are doing our best to apply construction of the new laws."

Editor's Note: Craig D. Robins, Esq., a regular columnist, is a bankruptcy attorney who has represented thousands of consumer and business clients during the past twenty years. His office is in Westbury (516) 228-9800. He can also be reached by e-mail at CraigRobinsLaw@aol.com.