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ANALYSIS OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 (BAPCPA)

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was signed into law on April 20, 2005. The new legislation is the largest overhaul of the bankruptcy system since its enactment in 1978. One main purpose of the new legislation is to prevent fraudulent bankruptcy filings as the new law makes filing chapter 7 bankruptcies more difficult. This analysis looks at the major amendments made to the bankruptcy system and the effects on the bankruptcy courts in the United States. A literature review was conducted and found that the new legislation is viewed as being creditor friendly. Many effects of the new legislation can be seen upon enactment of the bankruptcy reform act. However, it is too early to determine the effects of the new legislation on society as a whole until more research is conducted after the October 17, 2005 effective date of the act.

INTRODUCTION

When an individual or corporation falls into debt and is unable to pay these obligations, many turn to the bankruptcy system for assistance. Under the bankruptcy law, some individuals and corporations are able pay off their debt based on a plan and in some cases are able to “write-off” portions of their debt. Under the bankruptcy system, these individuals and corporations are known as debtors. Filing bankruptcy can provide relief to debtors in that they no longer have to worry about collection agencies calling and reminding them they owe creditors money. Many see the bankruptcy laws as a necessary service offered by the federal government to aid those who have faced unfortunate times, such as illness or unemployment. This is exactly why the government established the bankruptcy code: to help those who have fallen on hard times. According to some the bankruptcy legal system has done just this. However, there are others who would argue that the bankruptcy system is being abused by people who do

not need assistance. Some say that people file bankruptcy just as a way to cancel the debt they incurred and feel the bankruptcy system is too lenient and is being abused.

To end this abuse, Congress introduced a bill that would stop debtors from filing bankruptcies fraudulently. On April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). There are many changes that have been made to the United States Bankruptcy Code. This new bill amends Title 11 of the United States Code, which deals with bankruptcy, and is said to be the most significant change to bankruptcy law since its establishment in 1978. Some fear that this new legislation will punish those who really need the assistance, while others argue that the purpose of the bill is to stop those who are filing bankruptcies on false pretenses.

The purpose of this paper is to give a basic overview of the new bankruptcy act in relation to individual bankruptcies. To begin, a review of bankruptcy law in the United States will be given followed by some background information on the new bankruptcy law passed this year. Next a discussion on the major changes of the bill that apply to individual bankruptcies will be listed as well as the impact of the legislation on bankruptcy courts. There will be a review on what the literature says about the new bankruptcy code followed by some concluding thoughts.

BRIEF HISTORY OF UNITED STATES BANKRUPTCY LAW

The history of the United States' bankruptcy law can be traced back to the English bankruptcy system. The United States was able to learn from the strengths and weaknesses of English law. During the Federal Convention of 1787, bankruptcy law was not discussed. However, individuals, such as John Rutledge of South Carolina, suggested that Congress be given the power to create laws that dealt with bankruptcies (Frimet, 1991, p. 164). On September 3, 1787, power was given to congress to establish bankruptcy law. During the 1790s, congressmen realized that there was a need for bankruptcy law (Frimet, 1991, p. 166). Much of this need was due to land speculation where people were buying up land for investment but were unable to pay their obligations. People were sent to bankruptcy jail, but the debt they owed was still not being paid. In 1778, Robert Harper of South Carolina introduced the first bankruptcy bill to Congress. The bankruptcy bill was supported by other representatives like James Bayard of Delaware who said that the bankruptcy legislation would prevent fraud and assist those who fell onto hard times financially (Frimet, 1991, p. 167-168). On February 21, 1800, Congress passed the first bankruptcy law, however, the same legislation was repealed in 1803.

The great panic of 1837 led to the next bankruptcy legislation bill. The panic has been attributed to land speculation, relaxed credit policies, debts held

by state governments, crop failures and failure of banks; all of these factors lead to a harsh depression (Frimet, 1991, p. 175). In reaction to this depression, a new bankruptcy bill was introduced by Daniel Webster in 1840. After numerous discussions by Congress along with many amendments, the legislation was adopted as the new Bankruptcy Act of 1841. However, three years later the act was repealed in 1843. Similar to the panic of 1837, the United States suffered the panic of 1857 which once again lead to the introduction of another bankruptcy law. The economy of the United States was grim due to the Civil War. As a result, Congress passed the Bankruptcy Act of 1867 in hopes that the country would rebound from its financial disparity. Both debtors and creditors were not happy with the Bankruptcy Act of 1867. Debtors believed the legislation made them victims while creditors felt the legislation gave room for debtors to abuse the law (Frimet, 1991, p. 186). In 1878, the Bankruptcy Act of 1867 was repealed by Congress.

Improvements in technology, transportation and communication gave way to a more prosperous economy during the later part of the 1800s. Skeel contributes the significant number of commercial organizations established in the late 1800s, as the reason for the next bankruptcy legislation passed by congress (as cited by Zywicki, 2002, p. 5). Creditors were advocating the adoption of guidelines for paying debts owed to creditors. In 1889, Jay Torrey of Missouri introduced a bill, also known as the “Torrey Bill”, which was drafted with the intent of improving bankruptcy administration while keeping down expenses (Frimet, 1991, p. 188). The new act also gave companies protection from creditors. This bill was seen by many as debtor friendly (Zywicki, 2002, p. 5). Unlike the previous three bankruptcy acts, the Bankruptcy Act of 1898 was not repealed. It was amended numerous times and in 1978, was replaced by the Bankruptcy Act of 1978.

The bankruptcy legislation established in 1978 was created to replace the outdated legislation that was in place. The new legislation changed many aspects of the bankruptcy law and established the bankruptcy code. Two major highlights of the new code include more power given to bankruptcy judges and the creation of chapters 11 and 13, which made it easier for businesses to reorganize and individuals to file bankruptcy. Many believed the Bankruptcy Act of 1978 made bankruptcy filing easier leading to a significant increase in bankruptcy filings as well as bankruptcy rates (Nelson, 2000, p. 181). Once again, bankruptcy law was seen to favor debtors. Zywicki states that corporations used bankruptcy as a means of business instead of a last resort to fixing financial problems (2000, p. 6). The Bankruptcy Act of 1978 has been amended over the years. In 1994, the Bankruptcy Reform Act of 1994 was established in an effort to accelerate bankruptcy processes. The act also created the National Bankruptcy Review Commission whose task was to make recommended revisions of the bankruptcy code to Congress. The next major

change to the bankruptcy code occurred in 2005, which will be discussed in more detail next.

ENACTMENT OF BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT (BAPCPA)

As previously mentioned, this paper will focus on the policies that regulate individual bankruptcies. A brief description explaining individual bankruptcy will be given before discussing the bankruptcy reform act of 2005. Individuals who file for bankruptcy qualify for either a chapter 7 bankruptcy or chapter 13 bankruptcy. A Chapter 7 allows debtors to start over without having to worry about being pursued by creditors. Any property that is non-exempt is turned into cash and dispersed to creditors who file claims. A claim is filed by creditors who state that a debtor owes them money. Upon filing of a new chapter 7 bankruptcy, a Chapter 7 trustee is assigned to the case to determine whether or not there are sufficient assets belonging to the debtor. If there are assets, the trustee liquidates the property and returns certain monies to creditors based on priority. For example, if the debtor owed money for taxes, the government would be first on the list to get paid. In situations where there are no assets, no money is distributed to creditors (there are exceptions to this if government creditors are involved). If eligible, a debtor who files a chapter 7 bankruptcy can have certain debts discharged meaning that creditors can no longer collect on debt owed to them. In order for a debt to be discharged, the debtor must have listed the obligation on their bankruptcy schedules, which must be submitted at the beginning of filing.

A Chapter 13 bankruptcy gives debtors the opportunity to pay back their debt based on a payment plan. Here debtors are able to keep some of their assets. Chapter 13 plans give debtors between three to five years to repay creditors. All payments are distributed to creditors by a trustee. As with asset chapter 7 bankruptcy cases, creditors must file a proof of claim in order to be entitled to any type of repayment. Once the chapter 13 plan is completed, some debts are discharged.

The passing of the bankruptcy act is not the first attempt by Congress to amend the United States Bankruptcy Code in an effort to prevent fraudulent bankruptcy filings. An example of this occurred in the year 2001. On January 31, 2001, Representative George Gekas introduced a similar proposal to amend title 11 of the United States Code. The bill was passed by the house after being amended March 1, 2001. The proposal was also amended and passed by the Senate on July 7, 2001 and is as far as it got as President Bush did not sign the bill for reasons that the bill was not equitable. It was not until the year 2005 when a bill to amend the bankruptcy code was successful. On February 1, 2005 Senator Charles Grassley introduced the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to the 109th Congress, first session. The bill

was amended and passed by the Senate on February 17, 2005 and March 10, 2005. On April 14, 2005 the proposal was passed by the House without any amendments and then on April 20, 2005 the legislation was presented to President Bush who signed the bill into public law.

One of the main purposes of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) is to steer individuals towards filing chapter 13 bankruptcy cases instead of chapter 7 bankruptcy cases. The legislation was established to prevent consumers from abusing the bankruptcy system and to encourage payment of debts so the rest of society does not have to pay the debts instead (Bush, 2005). Congressmen from both major political parties favored the bill. Democratic Representative James Davis supports the new legislation because it preserves the bankruptcy laws for people who truly need the help and at the same time makes certain that those who can make payments towards their debt are held responsible (2005). Republican Representative John Hostettler of Indiana supports the bill because it will crack down on fraud and abuse found in bankruptcy filings, and will make both fraud and abuse tougher (2005). These two representatives were not alone in passing the new act. 302 representatives voted in favor of the bill while 126 voted against the bill.

Some portions of the new legislation went into effect as of April 20, 2005. The majority of the bill did not become effective until 180 days of enactment, October 17, 2005. The changes that will be discussed later in this paper became effective as of October 17, 2005. There was some confusion as to which portions of the bill were effective immediately and which aspects were not effective until October. In fact, a memo was distributed to all the Bankruptcy Courts prior to the signing of the bill regarding the uncertainty as to whether or not new filing fees were to be implemented on the date of the bill's signing or later in October (Schafer, 2005). Then in May another memorandum was sent to the courts by the Director of the Administrative Office for the courts clarifying when changes were to go into effect. In the case of the new filing fees, the effective date would be October 17, 2005 (Mecham, 2005).

In anticipation of the effects of the new legislation, the Administrative Office of the United States Courts formed three "working groups" to help with the implementation of the new law into the court system. One group was in charge of making changes to the Case Management/Electronic Case Filing (CM/ECF) system that the courts use. The group produced an updated version of the electronic filing system which was released in September. Standard changes were made to the system, such as filing fee amounts, and then each bankruptcy court was able to make the changes they needed for their particular districts.

A second group created is the Bankruptcy Reform Legislation Working Group. This committee has been reviewing the new law to determine the new

tasks that court operations will need to perform. Once the working group established the additional duties that courts must take on, they submitted in writing suggestions as to how courts may need to address the changes operationally. The last group formed is the Rules Committee.

The Rules Committee was charged with creating interim rules and forms regarding the bankruptcy act. The normal time frame for creating bankruptcy rules is approximately three years. However, since the bill went into effect 180 days from enactment, the group had to create interim rules until the final rules can be completed. The Rules Committee released a draft of the interim rules in September and each bankruptcy court had about a month to review and decide as to whether or not they would adopt the interim rules. The committee will continue to work on the rules until they are fully implemented into the coming years. These three working groups are designed to help inform, interpret and implement the many changes of the new bankruptcy legislation.

MAJOR CHANGES MADE TO THE BANKRUPTCY CODE

This section will look at some major changes that have been made to the bankruptcy code due to the new act. The discussion will consist of a summarization of some changes that apply mainly to individual bankruptcy filings.

Means Testing

As previously mentioned, one of the main reasons for the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is to cut down on the abuse of the bankruptcy system by steering more debtors towards filing a chapter 13 bankruptcy versus a chapter 7 bankruptcy. The determining factor as to whether or not an individual may file a chapter 7 bankruptcy will be the means test. Starting on October 17, 2005, any individual considering filing a bankruptcy, must complete a means test. The means test looks to see if the individual is eligible to file a chapter 7 case. The test measures whether or not the individual will be able to repay a scheduled amount or percentage of debt owed to unsecured creditors, such as credit card companies (Brown & Ahern, 2005, p. 25). If the debtor's income exceeds the median income of their state, they will not qualify to file under a chapter 7. Those individuals, who can pay approximately \$6,000 to \$10,000 over the course of three to five years, will not pass the means test and will have to file a chapter 13 bankruptcy.

The means test gives bankruptcy administrators, trustees and creditors the right to file a motion to dismiss or convert an individual's chapter 7 bankruptcy to a chapter 13. However, only bankruptcy administrators and trustees can file motions to dismiss cases based on abuse of the bankruptcy laws. If the debtor claims they have passed the means test, when in fact they did not, there is a presumption of abuse. A presumption of abuse can take place "...if

the debtor's income minus expenses multiplied by 60 is greater than the lesser of: 1) 25% of the debtor's unsecured claims or \$6,000, whichever is greater, or 2) \$10,000" (Palman, 2005). The debtor has the right to show that the calculations are valid under special circumstances or convert the case to a chapter 13 bankruptcy.

Brown & Ahern point out there are still some unanswered questions pertaining to the means test (2005, p. 25). There is no clear indication as to whether or not the income of an individual's spouse can be taken into consideration in the determination of abuse unless it is a joint filing (Brown & Ahern, 2005, p. 25). Another question posed is what if the debtor does not have any income in the past six months to use as part of their average income (Brown & Ahern, 2005, p. 26). There are still other questions regarding this means test as well as the rest of the bankruptcy act. Some of these questions will be answered in the interim rules while others will have to be decided by way of case law and the interpretation of bankruptcy judges.

Credit Counseling and Financial Management Course

Under the new legislation, debtors are required to attend a credit counseling session within 180 days prior to bankruptcy case filing. Individuals will not be considered a debtor until certification of credit counseling is filed with the bankruptcy court. Proof of credit counseling attendance must be submitted upon filing of a case. In the event that a debtor is unable to acquire credit counseling prior to filing bankruptcy, they must file a waiver explaining the special circumstances. This may occur if there are no approved credit counselors in the state the debtor resides in. In this case, the debtor must submit a certificate of exigent circumstances explaining why credit counseling was not obtained prior to filing bankruptcy. If the credit counseling waiver is approved, the debtor can file their case with the court and then must obtain credit counseling within 30 days after case filing. The new legislation does provide that credit counseling does not apply if a debtor is unable to meet the requirement due to incapacity, disability or active military duty in a combat zone.

In order for debtors to receive a discharge on either a chapter 7 or chapter 13 bankruptcy case, they must first attend a financial management course. As with the credit counseling, proof of a financial management course must be filed on record with the court.

The United States Trustees Office was charged with approving agencies as credit counselors and financial management educators. In order for an agency to qualify as a credit counselor or financial educator for purposes of the bankruptcy code, the parties must be not for profit United States Trustee, (2005). Currently the United States Trustees Office has determined that an agency can charge debtors for credit counseling. At this time the agency has

determined a “reasonable” fee is \$50, however, some organizations offer free credit counseling and education services. All courts are then required to post a list of those parties that have been approved as a resource for debtors. Some of the approved credit counseling organizations will offer counseling and education services via the internet, telephone or both. One interesting aspect that the courts see with this requirement is that attorneys, who represent debtors, are able to submit credit counselor and financial management educator applications. The question for some courts is whether or not this is ethical.

In Forma Pauperis

The process of in forma pauperis is considered a big change to the bankruptcy system. In forma pauperis is defined as a time when an individual is not liable for court fees if they are considered poor (Random House Webster’s College Dictionary, 1992). Currently debtors are required to pay their filing fees upon bankruptcy filing whether they pay the full amount or file an application to pay the filing fee in installments. If the fee is not paid in full or an application to pay in installments is not filed, the case may be dismissed. In forma pauperis will allow debtors to file cases without paying the initial filing fee. In order for individuals to qualify for in forma pauperis, they must prove that their income is less than 150% of the official poverty line as determined by the Office of Management and Budget agency (Palman, 2005).

Automatic Stay

When a debtor files bankruptcy, they automatically receive a stay on debts owed. Creditors are not able to actively pursue debtors to repay their obligations. There are occasions where creditors will file a motion to lift the automatic stay. Sometimes the debtor will agree and file a stipulation with the creditor to lift the stay. One major change for automatic stays applies to leases. Once a trustee is assigned to a case, a first meeting of creditors is scheduled. This first meeting is generally sent to all creditors listed on the debtor’s schedules, which are filed when the case is initially opened. This is how creditors are informed of the bankruptcy and must stop any advances towards collecting on debt owed to them by the debtor. These provisions will still apply after October 17, 2005. However, the new legislation has some exceptions when it comes to debts involving leases.

If a debtor is involved in a lease for which they still have an obligation, the automatic stay still applies, however, there are two exceptions where the stay will be treated differently starting in October. The first exception pertains to situations when a debtor is a tenant and the lessor has been awarded a judgment to possess leasehold before the debtor filed bankruptcy. The second exception applies to a pending eviction, where the debtor was found using illegal drugs on the property or was found to endanger the property. The first exception to the stay will apply after 30 days of bankruptcy case filing unless the following

occurs: 1) the debtor submits a certification, which must be served upon the creditor, that they will pay the full amount which is in default that led to the judgment for possession of the property, 2) the debtor files, rent which will be due within 30 days after case filing, with the court and 3) the debtor files certification with the court and the lessor that they paid off the amount in default (Palman, 2005).

Tax Returns

Under the new bankruptcy legislation, debtors are required to file copies of their tax returns or tax transcripts with their trustee at least seven days prior to the scheduling of their first meeting of creditors. Creditors may file a request to obtain a copy of these tax returns or transcripts within fifteen days prior to the meeting of creditors. Debtors who file a chapter 7 bankruptcy must submit their income taxes for the past year at least seven days before the first meeting of creditors. Individuals filing a chapter 13 bankruptcy also have to file tax returns before the first meeting of creditors, however, debtors have to submit their tax returns for the past four years prior to filing bankruptcy. If tax returns are not submitted as required, the case may be dismissed. During the course of a debtor's case, any interested party, which includes the court, trustee, United States Trustee and creditors, may request the debtor file a tax return or transcript for the current year. Creditors can then motion to obtain a copy of the tax return once it has been filed with the court as the court is required to retain the copies.

Appeals

If an appeal occurs for any type of issue relating to a bankruptcy ruling, the appeals process begins at the bankruptcy court. In many bankruptcy districts, bankruptcy appeals are heard by a judge in a United States District Court. Under the new legislation bankruptcy courts may change the appeals process starting in October. Appeals can now bypass the District Court and go directly to the court of appeals that has jurisdiction over the district. These appeals will then be heard by a panel of bankruptcy judges.

Although the above listed changes are only a few of the numerous changes, the changes discussed are probably the most talked about when it comes to individual bankruptcy filings. The next section will look at how the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 affect the bankruptcy courts.

IMPACT ON THE BANKRUPTCY COURTS

Over the past five months, bankruptcy courts across the nation have been gearing up for the biggest bankruptcy reform since its enactment. As previously mentioned, working groups were created to help the courts become familiar with the new legislation and with its implementation. Courts have other

resources they can tap into to help implement the new legislation. For example, a lot of information is posted on the J-Net. The J-Net is an internal web site that contains information regarding every topic that judicial employees could imagine. The three working groups have posted their status reports on the J-Net for all courts to view. There have been live video conferences where courts could tune into panel discussions on the legislation as well as many telephone conferences that included all bankruptcy courts nationwide. There was a bankruptcy conference in Chicago this past July and a seminar in Washington D.C. in late August all in effort to help bankruptcy courts implement the new bankruptcy code changes. Although there are a lot of useful resources available to the courts, many questions have to be answered by individual courts as to how they will conduct local court operations relating to the new code. This will be the basis for the next discussion.

When courts first heard about the means test, there was a lot of concern how the court was going to go about making the calculations. After the Rules Committee studied the legislation, it was found that the courts will not be responsible for determining whether or not debtors are completing the means test correctly. According to Mary Fritshce, the means test will not be a burden to the court (2005). The United States Trustee will be reviewing the means tests for accuracy. If there is a presumption of abuse, the court must send notice of abuse within 10 days after the bankruptcy case is filed.

In regards to credit counseling and financial management education, courts are required to maintain a list of all parties that have been approved by the United States Trustee as credit counselors and financial educators. Many courts have decided to post these approved organizations on each court's respective web sites. Bankruptcy courts will also have to keep a record of the certificates that indicate an individual completed the courses. Some courts have their electronic filing systems programmed so that based on certain criteria, cases are automatically discharge when appropriate. These courts will have to insert in their programs that automatic discharges cannot take place until the court receives financial management certification from debtors.

The new provision regarding automatic stays and lease payments has an interesting impact on the court. If a debtor owes rent payments to a lessor, they must submit the payment that is due for the next thirty days at the time of bankruptcy filing to the court. Each court has had to decide what procedures they will follow upon receipt of a rent payment. There have been some recommendations by the Administrative Office regarding this matter. One option is to accept a debtor's rent payment in the form of a money order or cashiers check and then forward the payment to the lessor. Another option is to accept the rent payment in the aforementioned formats, cash the check and then cut a check to the lessor. Each court has the authority to make these determinations as to what best fits their district. Courts also had to establish the

proper accounting procedures and financial depository for these rent payments. This is a new task for the courts.

The new tax return requirements will also be a challenge to the court. Most of the courts have completely converted to the Case Management/Electronic Case Filing (CM/ECF) system where courts are receiving little if any paper at all. Not too long ago a privacy act went into effect that required bankruptcy courts to no longer make social security numbers on debtor documentation available to the public. Any document created by the court can not contain a debtor's social security number and if documents do, the number has to be redacted so that only the last four digits appear. Documents filed on the record by attorneys, trustees or other parties are to follow suit as well. The CM/ECF system allows attorneys, trustees and creditors to electronically submit their documents. These external filers should not include social security numbers on their documents and in the cases they do, the number is to be redacted. The challenge boils down to the privacy of a debtor's social security number on tax returns.

If tax returns are electronically filed, the likelihood of an individual's social security number being on these returns is great. Courts across the nation have made decisions as to whether or not tax returns should be filed electronically. One suggestion made by the Administrative Office is for courts to allow returns to be electronically filed after first advising all electronic filers that it is the filer's responsibility to redact the social security number. If the number is not redacted, then the filer is held responsible, not the court. Some courts have decided to allow tax returns to be filed conventionally. This may seem like an easy answer, however, many courts have mandated electronic filing, so if they permit paper filing of tax returns, an administrative order would have to be drafted allowing the paper. If courts allow tax returns to be filed conventionally, the next issue is storage of the returns. The Bankruptcy Court for the Western District of Michigan will probably allow filers to submit returns electronically. There is a way to create an electronic event that will make the image of the return "private". This means anytime someone views the electronic docket, they will see an entry that states the returns have been filed, but the image will not be accessible. The only problem with this is when a creditor requests to see the returns as in certain circumstances, they will have the right to that view.

The new legislation also impacts the electronic system for the court both internally and externally. The electronic filing system was originally created out of Washington D.C. The system is a standard program that each court can modify to fit their needs and local rules. The filing system has been upgraded by the CM/ECF working group. In September, once the new version of the electronic filing system was released, each bankruptcy court had just under a month to make the modifications necessary. The system can be

complicated and very detailed when it comes to making the changes needed. Modifying the system is very time consuming as not only are changes made, but the system had to first be tested as thoroughly as possible before the mandatory implementation date of October 17, 2005.

Another impact on the court is the collection of statistics. The bankruptcy code already requires courts to collect and submit statistics to the Administrative Office in Washington D.C. The bankruptcy act is requiring more information to be submitted to Washington. The CM/ECF system aids courts with the collection of statistics and will do so under the new legislation. However, a lot more information is now required. The new version of CM/ECF that will be issued in September will not fully be ready for the statistics requirement. Another version will be issued in 2006 to help courts collect the statistical information required in the new bankruptcy act.

Once the Rules Committee released the interim rules for the new bankruptcy legislation, each bankruptcy court has to decide as to whether or not they would adopt the new rules. Some courts have submitted an administrative order adopting the rules, while others have decided to draft their own local rules in accordance to the new code. Some courts will rewrite their own current local rules and incorporate the interim rules. Many new official bankruptcy forms were released in September. Courts have to ensure these forms are available to the public. They also have to make modifications to the forms, such as adding the name and mailing address of the court, before they post the forms to their web sites and place in their public areas.

A lot of work is still ahead for the courts. Although the legislation went into effect October 17, 2005, courts are still making decisions such as what to do with certain issues as parts of the new bankruptcy code are ambiguous and unclear. Some of the uncertainty will have to be determined by case law in the court room. There have been a lot of opportunities for courts to interact with other courts to share information on how to deal with the changes. Courts have been busy not only trying to interpret how the bankruptcy reform act will affect daily operations, but have also had to concentrate on training staff members. Much of the preparation was interrupted by the overwhelming number of bankruptcies that were filed in anticipation of the new legislation. As of October 16, 2005, the eve of the new legislation, the United States Bankruptcy Court for the Western District of Michigan received 23,077 bankruptcy filings. For the entire year of 2004, the same court only received 16,877 total bankruptcy cases. Many courts have already begun training staff members and their respective attorney bar, but much more training will still be needed over the next months to come.

WHAT DOES THE LITERATURE SAY?

Much of the literature available has a common theme regarding the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: the new legislation is a raw deal for consumers. Some argue that the law will make bankruptcy filing more difficult for debtors while others see that those who really need relief will still get it despite the new bankruptcy act. There are critics of the new legislation stating it will make it a lot harder for honest people to file chapter 7 bankruptcies due to the new means test. According to Harvard law professor Elizabeth Warren, almost half of individuals who file for bankruptcy do so because they are plagued with medical bills while two thirds of those who file bankruptcy are unemployed (as cited by Khulmann, 2005, p. 2).

James Waldron, a bankruptcy clerk in the State of New Jersey, believes the means test will be a complicated and tough calculation for pro se filers, those who are not represented by counsel (as cited by Gallagher, 2005, p. 2). Many believe the means test will force people to file chapter 13 cases when they really need the relief of a chapter 7. Under a chapter 7 bankruptcy, debtors are able to sell their house to help pay debt whereas chapter 13 cases individuals tend to keep their houses. The new legislation in this case may appear to be going against what it was originally intended for, to give aid to those who have fallen on hard times.

Mark Sargent feels the government is going backwards with the new bankruptcy legislation by assuming and implying that honest people are fraudulently filing chapter 7 bankruptcies (2005, p. 9). He wrote,

“Remember “welfare queens”? That absurd image of black, inner-city, unwed mothers-purposely popping out illegitimate babies so that they could dine on filet mignon purchased with food stamps-strongly influenced the welfare "reform" debate and its pernicious outcome. The welfare-queen image was never an accurate description of the women who actually depended on welfare support, but it embodied precisely the type of simple-minded morality tale that too often drives social policy in this country. And it is happening again” (Sargent, 2005, p. 9).

Many feel the same way as Sargent in that the bankruptcy law is making it seem like people constantly abuse the bankruptcy system to get out of paying debts. Senator Edward Kennedy of Massachusetts states that “Millions

of...Americans...have filed for bankruptcy only after exhausting all other options” (Gordon, 2005, p. 2).

On the other side of the coin, supporters of the bill say that those who truly need relief will get it. Those who are able to pay off at least a portion of their debt should. Senator Charles Grassley of Iowa was quoted saying “...our bankruptcy system will be focused as it should be on helping those with real need, and less vulnerable to abuse by consumers who have the ability to repay their debts” (Gordon, 2005, p. 2). To proponents, the bankruptcy act will be stopping individuals, who can afford to make payments, from abusing the bankruptcy system to write-off their debts. Many supporters believe the legislation will help make credit more accessible and affordable which will be an advantage in the long run to all consumers if bankruptcy abuse is prevented (Gallagher, 2005, p. 2).

There was a study conducted by Best Case, a software company that creates bankruptcy documents for attorneys who represent debtors. They wanted to find out if the bankruptcy act will really affect the number of people eligible for chapter 7 bankruptcies. The company’s study compared each state’s income to the income of debtor’s who filed between the dates of June 15 and 28 of this year. They reviewed a total of 5,964 bankruptcy cases. They used the Census Bureau Statistics adjusted with the Consumer Price Index to 2004 numbers and took the debtor’s household size into account according to the new requirements of the law for the means test. They found that more than 85% of chapter 7 debtors had incomes that fell below their respective state’s income median (Best Case, 2005). The study also showed the 73.7% of chapter 13 debtors had incomes that were below their respective state’s median (Best Case, 2005). How accurate is this study? Only time will tell. Best Case states that their software is used for more than 40% of the bankruptcies filed in the nation (Best Case, 2005). One could say this study is just a marketing tool so they do not lose those attorney customers who are thinking about leaving the chapter 7 bankruptcy field.

There are critics who argue that it is not the debtors that should be penalized, but the creditors who continuously give out credit. Arkadi Kuhlmann does not think it is the debtors that government should be concerned about but instead it should be the creditors who constantly attempt to place their credit cards in every American’s wallet (2005, p. 2). Sargent states that the reason why the bill supports creditors is because they are the ones who have political influence on government (2005, p. 11). Gordon writes that the bankruptcy courts will become like collection outfits for credit card companies (2005, p. 2). To summarize, opponents feel the new act is taking away the safety net for those who work hard, but find themselves in tough times and unable to keep up with their debts.

One of the new requirements of the bankruptcy act is for attorneys to provide evidence that what their clients state in the means test and on their

documents is true and correct. This is placing pressure on attorneys who represent debtors in chapter 7 bankruptcies. Many speculate that it will take more resources and time for attorneys to represent chapter 7 debtors, which may increase attorney fees. On average for chapter 7 clients, attorneys charge approximately \$700 to \$1100; with the new added responsibilities to the attorney and the debtors who have to go through the means test, attorneys may add an additional \$1000 to the fee (Carter, 2005, p. 12). If attorneys raise their fees, the obvious question is how will debtors be able to afford attorneys when they are already having financial difficulties?

Another reason why attorney fees may rise is because attorneys may feel the need to increase their malpractice insurance as there are new risks with the new legislation (Carter, 2005, p. 13). If attorneys are found to have said they verified debtor information that is not true and correct, they could be sanctioned. The new bankruptcy act may also squeeze out many attorneys out of the chapter 7 bankruptcy profession as it will be too burdensome. Attorney Robert Todd believes the new law is written to favor creditors (2005, Winslow, p. 2). Todd is not the only attorney upset over the bankruptcy act. Attorney William Wolfson suggests that attorneys should pay back the credit card industry, "all bankruptcy lawyers, as a form of protest, should pay off their credit card balances and keep them paid off" (Carter, 2005, p. 12).

There are many opinions about the new legislation as well as speculations as to what will happen once the majority of the act goes into effect in October. As with any new law, it will take some time for all those affected to get used to new procedures.

CONCLUSION

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 signed into law on April 20, 2005 by President Bush is the largest overhaul of the bankruptcy code since its enactment in 1978. The main goal of the law is to prevent debtors from abusing the bankruptcy system by ensuring debtors who are able to make payments on their debts do so through a chapter 13 bankruptcy. To determine whether or not an individual will be able to file under a chapter 7 bankruptcy, which allows debtors to write off their debts, the bankruptcy act requires debtors to adhere to a means test. The means test is one of the many major changes made to the bankruptcy code.

Other changes to the code include requiring debtors to attend credit counseling before they can file bankruptcy and then attendance of a financial management course before any debts are discharged. Another major change to the code is the provision under automatic stays where leases may be exempt from the stay once a bankruptcy case is filed with the court. Individual debtors will have to submit tax returns under both a chapter 7 bankruptcy and a chapter

13 bankruptcy case. Under certain circumstances, creditors will be allowed to view these tax returns. These are only some of the many changes to the bankruptcy code. A large portion of these changes will affect the way things are done at the bankruptcy courts.

A lot of literature can be found regarding the bankruptcy legislation. There are differing opinions on whether or not the act will impede individuals from filing chapter 7 bankruptcy cases. The most common opinion is that hard working individuals who have fallen on hard times will have a much more difficult time finding relief from the government as the legislation will force debtors into a chapter 13 bankruptcy. There is also speculation that many attorneys will get out of the business of representing chapter 7 clients as the business will be much more risky. Attorneys will be held responsible for verifying that information submitted by debtors is accurate. Those attorneys that do stay in the business may have to increase their fees.

There are many questions regarding the new bankruptcy legislation that will be left unanswered until the law has been in effect for some time. One of these questions is the impact of the new act on courts financially. Will this new legislation cost more, less or have no affect financially? Bankruptcy filing fees have been increased for chapter 7 bankruptcies, but decreased for chapter 13 bankruptcies. Initial training and implementation of the new legislation requires more resources, however, if the number of bankruptcy filings decrease, then the financial future of bankruptcy courts may not be affected.

Another question that will take time to answer is the impact of the new legislation on society and the economy as a whole. Will the legislation help enforce better finance practices for individuals as it will be harder to write off debts via a chapter 7 bankruptcy. Or, will the legislation only cause a larger problem in the future as those who need financial help from the government may be turned away. For example, individuals who would like to start their own business may decide the risks are not worth the attempts as they will have a harder time seeking financial refuge from the government via bankruptcy.

Lastly, another question of interest is if the new legislation does impede fraud that was possible under the old bankruptcy code. Will there be a noticeable savings to those who do not file bankruptcy as creditors will now have more protection under the new bankruptcy act?

It is hard to determine what the true affects the new bankruptcy law will have on the bankruptcy courts, creditors, debtors and society as a whole. One could say that this paper is premature and that a lot of unknown issues will not be settled until years after October 17, 2005. It is recommended that more research be conducted on the effects of the new bankruptcy reform act of 2005 including a comparison of the effects of the bankruptcy system before and after the bankruptcy act was enacted on October 17, 2005.

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