

## **Implementation of the National Guard and Reservists Debt Relief Act of 2008**

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### **Introduction**

On Monday, October 20, 2008, the President signed into law S. 3197, the National Guard and Reservists Debt Relief Act of 2008. See Pub. L. No. 110-438. This new law, which amends § 707(b)(2)(D) of the Bankruptcy Code, became effective on December 19, 2008. It exempts qualifying reservists of the Armed Forces and members of the National Guard who are called to active duty for at least 90 days, or who perform homeland defense activity for at least 90 days, from all forms of means testing during the time of active duty or homeland defense activity, and for a 540-day period thereafter. The new exclusion is temporary and will apply only to cases commenced during the three-year period beginning on December 19, 2008. Interim Rule 1007-I and Official Form 22A implement this amendment to § 707(b). This article discusses important changes made by the new law as well as the changes to the Bankruptcy Rules and Official Forms designed to implement the new law.

### **BAPCPA's Changes to 11 U.S.C. § 707(b)**

In enacting the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress substantially rewrote § 707(b) of the Bankruptcy Code. See 11 U.S.C. § 707(b)(1), (2) and (3). Congress changed the standard for dismissal under all subsections of new § 707(b) from "substantial abuse" to "abuse." See 11 U.S.C. § 707(b)(1) (cases are now dismissed for "abuse"); 11 U.S.C. § 707(b)(2) (subjecting cases to dismissal for "abuse"); 11 U.S.C. § 707(b)(3) (same). In addition, Congress established a presumption of abuse when an income/expense calculation, commonly known as the "means test," yields monthly disposable income that exceeds a statutory threshold. See 11 U.S.C. § 707(b)(2). Finally, Congress enacted § 707(b)(3), which allows courts to dismiss cases based upon either a debtor's bad faith or the totality of a debtor's financial circumstances. See 11 U.S.C. § 707(b)(3)(A) and (B).

Section 707(b)(2), as originally enacted, requires debtors to calculate their monthly disposable income by deducting certain standard and actual expenses of the debtor from the debtor's current monthly income. Current monthly income (CMI) is a defined term under the Code, and is calculated based upon a historical average of the monthly income a debtor received from all sources during the six-month period prior to the month in which the debtor's case was commenced. See 11 U.S.C. § 101(10A). Debtors are required to perform this calculation and file a statement of current monthly

income and other calculations disclosing whether a presumption of abuse arises under § 707(b)(2) of the Bankruptcy Code. See 11 U.S.C. §§ 521(a)(1)(B)(ii), 707(b)(2)(C); Fed. R. Bankr. P. 1007(b)(1)(B). This statement is officially designated by the Judicial Conference of the United States as Form 22A and is entitled “Statement of Current Monthly Income and Means Test Calculation.” See Official Bankruptcy Form 22A; Fed. R. Bankr. P. 1007(b)(4). If, after completing Form 22A, a debtor’s monthly disposable income meets or exceeds a statutory threshold amount, a presumption of abuse is triggered, and the debtor’s case must be dismissed (or converted, if the debtor consents) absent an express showing of special circumstances by the debtor. See 11 U.S.C. § 707(b)(1) and (2).

### **The National Guard and Reservists Debt Relief Act of 2008**

Fluctuating income levels may present a problem for the reservist or guardsman debtor who is required to determine disposable monthly income using a CMI calculation that is a historical average of income received during the six months prior to filing. The pay received by reservist members of the Armed Forces and members of the National Guard while on active duty is frequently different than the pay a reservist or guardsman receives at his or her civilian job. This is of particular concern in those instances where a debtor is no longer on active duty and has returned to a lower paying civilian job. To address these concerns, Congress enacted The National Guard and Reservists Debt Relief Act of 2008. This new Act amends § 707(b)(2)(D) to temporarily exempt qualifying reservists and National Guard debtors who are called to active duty for at least 90 days, or who perform homeland defense activity for at least 90 days, from having to file a Form 22A during the time of their active duty or homeland defense activity, *and* for a 540-day period thereafter. See Pub. L. 110-438.

On November 18, 2008, the Judicial Conference approved technical amendments to Official Bankruptcy Form 22A and the transmission of new Interim Rule 1007-I to the district courts with a recommendation that it be adopted through local rule or standing order to implement the new Act. Copies of the new Form 22A and Interim Rule 1007-I may be obtained by accessing the U.S. Courts Web site at <http://www.uscourts.gov/bankform/index.html>.

### **Changes to the Bankruptcy Forms Designed to Implement the New Law**

In order to enable qualifying debtors to claim the new exemption permitted under the Act, the Advisory Committee on Bankruptcy Rules amended Form 22A to include a new “check box” whereby a debtor may indicate that “The presumption is temporarily inapplicable.” In addition, the Committee added new Part 1C, which is a declaration to be signed by the debtor declaring his or her eligibility to receive the exemption created by the new Act. A debtor claiming the exemption is required to identify whether he or she is on active duty and, if released from active duty, the date of his or her release. The debtor claiming the exemption need not fill out the remainder of Form 22A. However, as stated in the instructions at the top of Form 22A and in the accompanying Committee notes, joint debtors must complete separate statements, and only the

qualifying debtor is exempt from completing the entire statement.

### **Changes to the Bankruptcy Rules Designed to Implement the New Law**

In addition to modifying Official Form 22A, the Advisory Committee drafted Interim Rule 1007-I. Subparagraph (n) of the new interim rule is designed to address issues that arise when the exemption expires during the pendency of a debtor's case. As discussed previously, the exemption available under the new law is temporary and only lasts for the 540-day period after a qualifying debtor completes active duty. It is possible that a debtor's exemption may expire during the pendency of his or her case and while a timely motion to dismiss may still be brought under § 707(b)(2). Under subparagraph (n)(1), if a debtor's exemption expires before the time specified under Fed.R. Bankr. P. 1017(e) for filing a motion pursuant to § 707(b)(2), then the debtor is required, within 14 days of the expiration of the exemption, to file a completed Form 22A. In the event the debtor fails to do so, subparagraph (n)(2) requires the Clerk of Court to provide prompt notice to such debtors of the need to file a completed Form 22A. See Int. Fed. R. Bankr. P. 1007(n)(2).

### **Conclusion**

The changes created by the National Guard and Reservists Debt Relief Act of 2008 add to the evolving law under § 707(b) of the Bankruptcy Code. The United States Trustee Program is committed to implementing these new legislative changes as smoothly as possible, and we look forward to working with all participants in the bankruptcy community in our efforts to do so.

