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SPECIAL ISSUE

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Issue II

In This Issue

Bankruptcy Law Provides New Tools to Combat Fraud and Abuse

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Executive Office for United States Trustees

The United States Trustee Program (USTP or Program) is very pleased to contribute articles to this issue devoted to the important statutory changes made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. This law provides new tools to the United States Trustees and others to combat bankruptcy fraud and abuse. With our partners in law enforcement, the USTP will endeavor to more effectively identify and take civil action against wrongdoing, as well as assist United States Attorneys in prosecuting appropriate criminal cases.

As the Justice Department component with responsibility for oversight of the bankruptcy system, the USTP carries out a wide array of litigation, regulatory, and administrative responsibilities. Although our long-standing mission has been to promote the integrity and efficiency of the bankruptcy system, over the past five years our top priority has been to implement our National Civil Enforcement Initiative. Through this Initiative, we have addressed debtor improprieties and provided greater protection to honest debtors who were defrauded or taken advantage of by attorneys, petition preparers, creditors, or others. From FY 2002-2005, the USTP took about 170,000 civil enforcement and related actions (including investigations and actions not culminating in litigation), which yielded $1.75 billion in quantifiable results, such as debts not discharged, fees disgorged, fines, and other remedies.

An integral part of our campaign against bankruptcy fraud and abuse was the establishment of a new Criminal Enforcement Unit (CREU) in 2003. The new unit is staffed largely by former prosecutors who have trained hundreds of USTP and law enforcement staff and assisted in scores of prosecutions nationwide since the unit was created. The CREU significantly strengthened the Program's ability to detect, refer, and assist in the prosecution of criminal violations. In addition to assisting in specific cases, CREU members are available to provide training to federal and local law enforcement personnel, and to assist in developing national and local bankruptcy fraud working groups for the collaborative investigation and prosecution of criminal conduct. In these working groups, CREU members and other Program staff serve as a resource for information, education and training on the bankruptcy system and specific law enforcement initiatives.

Under BAPCPA, there are three major reforms for which the USTP has special enforcement responsibility.

- Means Testing. The statute institutes new financial reporting requirements for consumer debtors, and subjects the reported information to an objective "means test" to help determine whether a debtor is eligible for chapter 7 relief. This new test will allow United States Trustees to more expeditiously identify and pursue those who defraud and abuse the bankruptcy system.
- Credit Counseling. Among the consumer protection provisions is a requirement that debtors seek credit counseling before they file for bankruptcy relief. This will help ensure that debtors know their options before taking the drastic step of filing a bankruptcy petition. Through the USTP's civil enforcement efforts, a regrettably large number of cases were discovered in which attorneys, bankruptcy petition preparers, credit repair services, or others took advantage of vulnerable debtors and placed clients in bankruptcy—sometimes even without the debtors' knowledge–despite the availability of less drastic options. Under the reform law, bankruptcy debtors now must seek counseling through agencies approved by the USTP. In the past, some credit counseling agencies have been sanctioned by federal and state authorities for inducing their clients into debt-management plans that enrich the counselors without benefitting the clients. With help from the Internal Revenue Service and the Federal Trade Commission, the Program has developed an application

procedure based on the statutory standards for pre-bankruptcy credit counselors, and is scrutinizing applicants to minimize the risk of approving an unscrupulous provider.

- Debtor Audits. BAPCPA mandates that the USTP arrange for random and targeted audits of debtors to determine the accuracy of the financial information provided in documents filed with the court. Not only will this new system help identify wrongdoers, who may be referred for criminal prosecution, but it also will help identify "red flags" for the efficient detection of possible fraud in other cases.

The new bankruptcy law includes many other provisions of vital importance to the USTP and law enforcement. Section 158 of title 18 calls for the designation of bankruptcy fraud coordinators in United States Attorneys' and FBI field offices in every district. There are new attorney disciplinary procedures to help clamp down on lawyers who fail to carry out their obligations to their clients. There are important new chapter 11 provisions to expedite a small business' passage through bankruptcy. For example, 11 U.S.C. § 1104(e) puts new obligations on the USTP to oust management in public companies and other cases in which there is accounting or other fraud.

I hope that federal prosecutors and other readers will find the articles contributed by USTP officials in this *U.S. Attorneys' Bulletin* to be of assistance in the prosecution of bankruptcy crimes. Everyone in the USTP, from the Director in the Executive Office to the staff attorneys in the field, stands ready to assist federal law enforcement in prosecuting wrongdoers who compromise the integrity of the bankruptcy system. Debtors and creditors alike rely upon the bankruptcy system to provide fair, efficient, and effective relief that is free from fraud or abuse. We look forward to continuing to work in partnership with the United States Attorneys' offices to identify and prosecute bankruptcy fraud.❖

ABOUT THE AUTHOR

❑**Clifford J. White III** is the Deputy Director of the Executive Office for United States Trustees, and is currently serving as its Acting Director. He has served in the federal government for twenty-six years, including previously as Assistant United States Trustee and Deputy Assistant Attorney General within the Department of Justice, and as Assistant General Counsel at the U.S. Office of Personnel Management. In July 2003, Mr. White was recognized with the Attorney General's Award for Distinguished Service.✠

Criminal Bankruptcy Fraud and the Role of the United States Trustee

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I. Introduction

It has been said that "[b]ehind every great fortune there is a crime." Ironically, sometimes a crime lies behind apparent debt or misfortune as well. Purportedly impoverished debtors may commit fraud by lying on their bankruptcy documents and concealing assets to avoid repaying their debts. Criminals may also attempt to forestall the collapse of their illegal schemes by fraudulently filing for bankruptcy to stop collection efforts and delay the ultimate discovery and detection of their fraud. The United States Trustee Program (USTP or Program) is committed to working with its colleagues in the United States Attorneys' and law enforcement communities to detect, investigate, and prosecute these, as well as all other fraudulent abuses of the bankruptcy system.

II. United States Trustee Program

The Program, a component of the Department of Justice (Department), serves as a "watchdog" over the bankruptcy process. H.R. Rep. No. 95-595, at 4 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5966. The USTP's mission is to promote the integrity of the bankruptcy system. Dep't. of Justice, *United States Trustee Program Strategic Plan FY 2005-2010*, at 2 (2005), *available at* http://www.usdoj.gov/ust/eo/ust_org/StrategicPlanFY2005-2010.pdf. A fundamental means of achieving that goal is to uncover and detect bankruptcy fraud and abuse, and to refer possible criminal conduct to law enforcement and the United States Attorneys' offices (USAOs). By actively identifying and referring fraud and abuse, the Program contributes to the Department's criminal enforcement efforts and helps to deter individuals seeking to use the bankruptcy system to further their criminal endeavors.

A. Department of Justice Strategic Plan

The Department's FY 2003-2008 Strategic Plan recognizes the importance of maintaining the integrity of the bankruptcy system. One of the Department's objectives is to "[p]rotect the integrity and ensure the effective operation of the Nation's bankruptcy system." Dep't. of Justice, *Strategic Plan for FY 2003-2008*, at 2.71 (2003) (discussing Objective 2.6), *available at* http://www.usdoj.gov/jmd/mps/strategic2003-2008/pdf.html. To achieve this goal, the Department has announced it will "[p]ursue violations of federal criminal laws pertaining to bankruptcy by identifying, evaluating, referring, and providing investigative and prosecutorial support of cases." *Id*. at 2.72. As the Department's *Strategic Plan* stated:

> The integrity of the bankruptcy system depends upon debtors to report honestly and accurately all their assets and liabilities when they file for bankruptcy protection. Such disclosure is necessary to resolve disputes and to distribute money and property. The U.S. Trustees have an affirmative duty to refer instances of possible criminal conduct by debtors and third parties to the U.S. Attorney and to assist in prosecutions. The bankruptcy system needs a strong impetus to encourage honest, lawful behavior. Moreover, criminal referrals from the Program show that bankruptcy crimes are often linked to other white collar crimes, such as fraud in obtaining federally guaranteed mortgage loans, money laundering, identity theft, mail fraud, and wire fraud.

Id.

B. United States Trustee Manual

The United States Trustee Manual makes clear that maintaining the integrity of the bankruptcy system through aggressive prosecution of bankruptcy fraud is "a high priority of the Department of Justice." United States Trustee Manual, Section 5-1.1 (quoting an October 10, 1995, Memorandum from former Attorney General Janet Reno). According to the Manual, this can be achieved through a team approach, with a focus on the merits of each case rather than "a blanket declination policy based solely on dollar amounts." *Id*.

C. Statutory duties to refer cases to USAOs

Congress has recognized the importance of referring, investigating, and prosecuting bankruptcy-related crimes by enacting 28 U.S.C. § 586 (2005) and 18 U.S.C. § 3057 (2005). These statutes require the USTP, as well as judges and trustees, to refer possible crimes to the USAOs.

Title 28, United States Code, Section 586(a)(3)(F) requires each United States Trustee to notify the United States Attorney of "matters which relate to the occurrence of any action which may constitute a crime" and, if requested, to assist the United States Attorney in "carrying out prosecutions based on such action." Pursuant to § 586, the USTP's duty to refer cases to the USAOs is not limited to bankruptcy crimes. Further, as the language of the statute makes clear, Congress did not intend the USTP to refer only cases that it believes will be prosecuted, that meet a certain dollar threshold, or for which there is evidence demonstrating guilt beyond a reasonable doubt. Instead, Congress has mandated that the Program refer matters to the USAOs whenever there is evidence of any action that may constitute a crime.

In addition to the USTP's duty to refer possible criminal conduct for prosecution, bankruptcy judges and trustees have statutory duties to refer cases to the USAOs. Pursuant to 18 U.S.C. § 3057, bankruptcy judges and trustees who have reasonable grounds to believe that a crime has been committed or that an investigation "should be had," must report the facts and the names of all potential witnesses to the USAO. 18 U.S.C. § 3057(a). Section 3057 requires the USAO, after receiving such a report, to "inquire" into the facts and report to the bankruptcy judge. 18 U.S.C. § 3057(b). Further, according to § 3057, if it appears "probable" that an offense has been committed, the United States Attorney must, "without delay, present the matter to the grand jury." *Id*. If, however, the United States Attorney determines that "the ends of public justice do not require investigation or prosecution," the United States Attorney "shall report the facts to the Attorney General for his direction." *Id*.

According to the United States Attorneys' Manual (USAM), the USAO's duty to report declinations of bankruptcy fraud referrals, pursuant to § 3057, is satisfied by "providing the Fraud Section, Criminal Division, with a concise summary of the facts of the case and the reasons for declining it. Concurrence with the decision to decline may be presumed if no disagreement is expressed by the Fraud Section." USAM § 9-41.010.

D. United States Trustee Program's Criminal Enforcement Unit

To assist with the USTP's mission and the Department's Strategic Plan, in 2003 the Executive Office for United States Trustees (EOUST) established a Criminal Enforcement Unit (CREU), which consists of experienced former federal prosecutors. CREU's mission includes working with Program staff to identify and refer possible criminal conduct and to assist federal law enforcement agencies and USAOs with bankruptcy-related investigations and prosecutions. A list of CREU's members and their contact information is *available at* http://ustnet/bankruptcy/criminal_enforcement/index.htm.

E. Violence Against Women Department of Justice Reauthorization Act of 2005

In January 2006, the President signed into law the Violence Against Women and Department of Justice Reauthorization Act of 2005 (the Act), Pub. L. No. 109-162, 119 Stat. 2960 (2006). Section 1175 of the Act, entitled "Bankruptcy Crimes," requires the EOUST Director to prepare an annual report for Congress detailing: "(1) the number and types of criminal referrals made by the United States Trustee Program; [and] (2) the outcomes of each criminal referral." Pub. L. No. 109-162, § 1175. Through this mandate, Congress has indicated the importance of the Program's referral of possible bankruptcy-related crimes and the USAOs' prosecution of such offenses.

The Program recognized the importance of tracking its criminal referrals even before the enactment of § 1175. In Fiscal Year 2004, the USTP created and implemented the Criminal Enforcement Tracking System (CETS), a database designed specifically to track the Program's criminal referrals, as well as the status of those referrals. Information from the CETS database is used to identify bankruptcy-fraud related trends and to provide comprehensive information to the Program regarding its criminal referrals. With the enactment of § 1175, the CETS database will play an even more important role in the referral process by facilitating the collection of information necessary to fulfill the new reporting mandate.

III. 18 U.S.C. § 158

Congress stated that the purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, which was signed into law on April 20, 2005, was to restore "personal responsibility and integrity in the bankruptcy system." H.R. Rep. No. 109-31(I), at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89. As part of BAPCPA, Congress emphasized the vital role that the Federal Bureau of Investigation (FBI) and the USAOs will play in achieving that goal. BAPCPA added § 158 to the criminal statutes contained in title 18. BAPCA § 203(b)(1). Title 18 U.S.C. § 158 requires the Attorney General to designate a point of contact within each USAO and FBI field office to address "violations of section 152 or 157 relating to materially fraudulent statements in bankruptcy schedules that are intentionally false or intentionally misleading" or that are "related to abusive reaffirmations of debt." 18 U.S.C. § 158(a)-(b). Section 158 also reiterated that the USAOs "have primary responsibility for carrying out the duties of a United States Attorney under section 3057." 18 U.S.C. § 158(c).

A. Points of contact

The USTP has compiled a list of the designated points of contact for each USTP, USAO, and FBI office nationwide. The list, entitled "Bankruptcy Fraud Points of Contact," is available from the Executive Office for U.S. Attorneys or from the CREU.

B. Working groups

To assist with bankruptcy-related investigations and prosecutions in each district, the Program recommends implementing and utilizing local bankruptcy fraud working groups. There are currently about fifty such groups nationwide. These groups meet periodically to discuss ongoing bankruptcy fraud investigations and pending criminal referrals. They also provide assistance as requested by agents and investigators. A representative of the USTP, USAO, and several federal law enforcement agencies, typically make up a working group. For further information regarding starting or re-invigorating a local bankruptcy fraud working group, please contact any member of the Program's CREU or your local USTP point of contact.

Additionally, there is a National Bankruptcy Fraud Working Group (NBFWG), which consists of a representative from the USTP, USAOs, the Department's Criminal Division, FBI, Internal Revenue Service-Criminal Investigation, Postal Inspection Service, United States Secret Service, Housing and Urban Development Office of Inspector General, Social Security Administration Office of Inspector General, Federal Trade Commission, and Executive Office for U.S. Attorneys, as well as other agencies. The NBFWG, which meets approximately once a year, helps coordinate a national response to bankruptcy fraud issues.

IV. Common bankruptcy-fraud related schemes

There are many different bankruptcy-related schemes in which perpetrators fraudulently exploit the bankruptcy system to further their criminal endeavors. Some examples include real estate fraud, identity theft, and bust-outs.

A. Real estate fraud schemes

- Financial counseling fraud. Homeowners whose properties are in foreclosure are contacted, usually through the mail, by a "financial consultant." The consultant fraudulently tells the homeowners that he/she will locate a lender to refinance the homeowner's delinquent mortgage. Homeowners are instructed to make their mortgage payments to the consultant. The perpetrator does not, and never intends to, locate a new lender. Instead, the perpetrator files bankruptcy cases in the names of the homeowners, frequently without the homeowners' knowledge or consent. This allows the perpetrator to forestall foreclosure and to continue receiving mortgage payments from the victims.
- Property title fraud. This fraud is similar to the financial counseling fraud described *supra*. The major difference is that the perpetrator convinces the victims to deed their properties to him or her for little or no consideration. After acquiring the title, the victims are fraudulently told that they will be assisted by negotiating reduced payments or short sales with the lenders or by locating other lenders to refinance the loans. The homeowners are required to pay rent to the scam artist, who does not pay the existing mortgage or seek new financing. Fractional interests of the properties are often deeded to shell companies controlled by the criminal, after he or she acquires the title to the properties. The perpetrator will then file serial bankruptcy cases in the names of the victim homeowners and/or in the names of the shell companies. This tactic complicates and delays foreclosure—sometimes for months or even years—because the lender must seek relief from the automatic stay in each bankruptcy case. The automatic stay requires all creditors, lenders, and lien holders immediately to cease

all foreclosures and collection efforts against the person or entity who has filed for bankruptcy.

- Flipping. Perpetrators purchase real estate at or below fair market value and fraudulently obtain financing to "sell" the properties to straw buyers at significantly inflated prices. Virtually all of the information provided on the mortgage applications, as well as the supporting documentation, is false. Further, mortgage brokers, lenders, and appraisers may be part of the scheme. To obtain the benefit of the automatic stay and to keep the scheme going a little longer, the perpetrators or straw buyers file fraudulent bankruptcy petitions.

B. Identity theft schemes

- Falsely obtaining credit or services. In some identity theft schemes, defendants fraudulently use a false name and identifying information or the name and identifying information of someone they know–typically, an ex-spouse, ex-partner, or minor child–to obtain credit or services. When creditors pursue the defendants for failing to pay what they owe, the defendants file fraudulent bankruptcy cases in the false names or in the names of the victims, without the victims' knowledge or consent.
- Serial filings. A debtor who has been previously barred from refiling a bankruptcy case may file a subsequent bankruptcy case using a variation of his name and/or Social Security number or the name of another person, to obtain the benefit of the automatic stay.

To reduce identity theft and serial filing schemes, Congress included provisions in BAPCPA that limit the circumstances under which persons who file bankruptcy will receive the benefit of the automatic stay. For example, the automatic stay will only be in effect for thirty days if a debtor had a previous bankruptcy case dismissed within one year. 11 U.S.C. § 362(c)(3)(A) (2005). Additionally, the automatic stay will not go into effect at all if a debtor had two or more bankruptcy cases dismissed within a year. 11 U.S.C. § 362(c)(4)(A)(i). Finally, if a bankruptcy filing is part of a scheme to "delay, hinder, and defraud" creditors, involving "transfer of all or part ownership of, or other interest in" real property or "multiple filings affecting such real property," the bankruptcy courts are authorized, after notice and a hearing, to grant relief from the automatic stay. 11 U.S.C. §§ 362(d)(4)(A), (B).

C. Bust-out schemes

Bust-outs are financial crimes that exploit credit lines and credit cards. Often, the final act in a bust-out is the filing of a fraudulent bankruptcy case to delay creditors' collection efforts and to discharge the debts incurred.

- Credit card bust-outs. Individuals incur substantial consumer credit card debt within a relatively short period of time and then file for bankruptcy protection. Purchases, cash advances, and transfers from one credit card to another typically occur within six months before the bankruptcy filing. Goods purchased are fungible and easily saleable, such as electronics, jewelry, motor oil, and baby formula. Frequently, the same individuals file bankruptcy several times using false names, aliases, or false Social Security numbers. The credit card applications typically include false information regarding the individuals' income and employment. Although the perpetrators list the credit card debt on their bankruptcy documents, they do not list the assets purchased with the fraudulently obtained credit.
- Business bust-outs. Bust-out companies establish good credit and then order hundreds of thousands of dollars of fungible goods over a short period of time, with no intent to pay. They sell the goods for cash at a significant discount and file for bankruptcy protection. Typically, bust-out companies are in business for six months or less. Initially, they often establish good credit ratings with large consumer goods manufacturers by making payments early or on time. After establishing good credit, the bust-out companies request significant increases in credit, their orders increase substantially, and they fail to pay bills as they become due. Lulling techniques are used to stall creditors. Goods are sold for cash at significantly below cost. The perpetrators typically file bankruptcy to stop collection proceedings and keep the schemes going a little longer.

V. 18 U.S.C. § 1519

In 2002, Congress reiterated the importance of protecting the integrity of the bankruptcy system when it enacted 18 U.S.C. § 1519 as part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107, § 820(a), 166 Stat. 745 (2002), also known as the Public Company Accounting Reform and Investor Protection Act. Title 18 U.S.C. § 1519 provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Although the legislative history of § 1519 is sparse, Congress stated explicitly that the statute was enacted to target "individuals who destroy evidence with the specific intent to impede or obstruct a pending or future criminal investigation, a formal administrative proceeding, or *a bankruptcy case*." S. Rep. No. 107-146, at 27 (2002), *available at* 2002 WL 863249 (emphasis added).

VI. Bankruptcy: the last act in a series of criminal schemes

Bankruptcy fraud may be the last act in a series of criminal schemes. Bankruptcy crimes have been committed at the end of numerous types of frauds, including health care, government, and tax fraud, Ponzi schemes, and money laundering. Because bankruptcy documents are signed under penalty of perjury and because debtors are required to testify under oath, relative to their financial affairs, bankruptcy filings can provide a wealth of information for other criminal investigations. If a subject or target of an investigation has filed a bankruptcy case, the USTP can provide a copy of the relevant bankruptcy documents, as well as the tape of the first meeting of creditors during which the debtor testified under oath. The documents and testimony may be useful in plea negotiations, cross-examination of witnesses, and in providing additional charging options. For assistance in obtaining any bankruptcy-related document or the tape of the first meeting of creditors, please contact the USTP office in your area. A list of the local USTP offices is available at http://www.usdoj.gov/ust/eo/ust_org/office_locator.htm.

VII. Recent bankruptcy fraud prosecutions

A. Operation SILVER SCREEN

In October 2004, the USTP, in conjunction with USAOs and federal law enforcement agencies, announced "Operation SILVER SCREEN," which highlighted the indictment of twenty-one individuals in seventeen separate prosecutions. Operation SILVER SCREEN demonstrated the breadth of enforcement actions taken by the Department in combating bankruptcy fraud and protecting the integrity of the bankruptcy system. The cases collectively involved the concealment of more than $7 million in assets, illegal conduct by an attorney and a certified public accountant, use of false Social Security numbers and false identities, submission of forged documents, false statements, and various fraudulent acts. As of this writing, the coordinated effort, dubbed "Operation SILVER SCREEN" in recognition of the USTP's enhanced screening of bankruptcy cases to identify fraud and abuse, has resulted in twelve defendants being convicted of, or pleading guilty to, bankruptcy-related crimes.

The lead case in Operation SILVER SCREEN was the conviction of Marc Edward Thompson for a wire fraud and bankruptcy fraud scheme. Thompson, who was prosecuted by a member of the Program's Criminal Enforcement Unit and an AUSA from the Northern District of Illinois, set fire to his residence, killing his ninety-year-old mother in the basement of the house. Thompson obtained insurance proceeds as a result of the fire, and then concealed these proceeds in an off-shore account in the name of a shell corporation. He filed bankruptcy and concealed the proceeds, as well as other items that were not lost in the fire. Thompson was convicted of numerous crimes, including making false statements in bankruptcy, in violation of 18 U.S.C. § 152(3), and bankruptcy fraud, in violation of 18 U.S.C. § 157. Thompson was sentenced to 190 years in prison and ordered to pay $1.4 million dollars in restitution. *United States v. Thompson*, 04 CR 944 (N.D. Ill. 2004).

B. Additional recent bankruptcy fraud prosecutions

In addition to the cases charged as part of Operation SILVER SCREEN, there have been a number of recent bankruptcy fraud prosecutions across the country. These cases highlight the diverse types of crimes committed through, or in relation to, a bankruptcy proceeding. For example, an AUSA in San Diego recently prosecuted a real estate equity skimming case against Antonio Simon, a bankruptcy petition preparer who fraudulently represented to homeowners that he could save their properties from foreclosure. Simon made numerous false representations and promises to the victims to induce them to pay a "start-up" fee and a monthly fee for his purported services. Simon falsely claimed that he would save the homeowners' properties from foreclosure, contact the lenders to renegotiate the homeowners' mortgages, assist in arranging refinancing of their homes, and use a portion of the homeowners' monthly fee to pay their lenders. Instead, Simon kept the homeowners' money and filed fraudulent bankruptcy cases in the names of the victim homeowners, as well as in the names of persons unknown to the homeowners to whom Simon had fraudulently transferred a fractional interest in the homeowners' properties. Simon was convicted of the knowing disregard of bankruptcy laws, in violation of 18 U.S.C. § 156, and bankruptcy fraud, in violation of 18 U.S.C. § 157. He was sentenced to twenty-four months in prison and ordered to pay more than $23,000 in restitution. A USTP attorney testified as a witness in the case. *United States v. Simon*, 02 CR 2245 (S.D. Cal. 2002).

The USAO in the Northern District of Ohio prosecuted a similar foreclosure fraud scheme perpetrated by Albert Thrower. Through his company, American Services, Thrower targeted homeowners facing foreclosure and promised that he could save the victims' homes by assisting them with bankruptcy filings. The bankruptcy filings failed to disclose that the documents had been prepared for a fee by Thrower and/or the company. As part of the scheme, Thrower fraudulently represented to the victims that the bankruptcy clerks would not accept the cases for filing if the homeowners disclosed his or American Services' involvement in preparing the bankruptcy documents. Among other crimes, Thrower was convicted of violating 18 U.S.C. § 1519 by falsifying records in bankruptcy cases. Thrower was sentenced to ninety months in prison and fined $188,328. A Program attorney designated as a Special Assistant United States Attorney assisted with the prosecution in this case. *United States v. Thrower*, 03 CR 341 (N.D. Ohio 2003).

The USAO in the Southern District of New York obtained convictions against Paul Boghosian and William H. Spencer for their roles in the chapter 11 reorganization case of Hawaiian Airlines, Inc. Boghosian and Spencer were convicted of conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. § 371, and Boghosian was convicted of two counts of commercial bribery in violation of 18 U.S.C. § 1952(a)(3). Boghosian fraudulently claimed to be a manager, and Spencer fraudulently claimed to be a trustee of an entity that purportedly would provide approximately $300 million in new capital to fund the Hawaiian Airlines reorganization. During the conspiracy, Boghosian bribed an FBI undercover agent, who was posing as a hedge fund manager, by offering a kickback to the agent in exchange for the hedge fund's loan of approximately $2.5 million to pay expenses purportedly related to obtaining bankruptcy court approval for the Hawaiian Airlines reorganization. Boghosian and Spencer also filed false declarations and submitted altered documents to the bankruptcy court in support of their claims. Boghosian and Spencer were sentenced in May 2006. Boghosian was sentenced to twenty-four months in prison and Spencer was sentenced to fifty-one months in prison and a $12,500 fine. A USTP attorney testified as a witness in this case. *United States v. Boghosian*, 05 CR 351 (S.D.N.Y. 2005).

The USAO in the District of Kansas recently prosecuted a number of identity theft/bankruptcy fraud cases involving defendants who, among other things, used false Social Security numbers on their bankruptcy filings. In one case, Derrick Robinson filed a bankruptcy petition in which he used a false Social Security number and failed to disclose two prior bankruptcy cases he filed in another district using his true Social Security number. Robinson used the same false Social Security number to obtain a car loan from a financial institution insured by the Federal Deposit Insurance Corporation, and he used a different false Social Security number to obtain another vehicle from a local dealership. Robinson pleaded guilty to one count of aggravated identity theft under 18 U.S.C. § 1028A, and was sentenced in January 2006 to the mandatory two-year term of imprisonment. *United States v. Robinson*, 05 CR 10054 (D. Kan. 2005).

In a second case, Vickie and Galen Beach filed a bankruptcy case pro se in which they inverted every digit in their Social Security numbers. In addition to being charged with use of false Social Security numbers, the debtors were charged with submitting a false UCC-1 Financing Statement to the Kansas Secretary of State's office fraudulently claiming they had a $500,000 "summary judgment" against the chapter 7 trustee, and submitting false and fraudulently generated "arbitration awards" of $1,500,535 and $500,720 to collect against the trustee's bond. Galen Beach, who was convicted of mail fraud and making false statements in bankruptcy in violation of 18 U.S.C. § 152(3), was sentenced in January 2006 to eighteen months imprisonment. Vickie Beach pleaded guilty to one count of making false statements in bankruptcy, in violation of 18 U.S.C. § 152(3), and was sentenced in July 2005 to three months in prison. *United States v. Beach*, 05 CR 10056 (D. Kan. 2005).

VIII. Conclusion

As is evident from the above examples, the Department's efforts to combat bankruptcy fraud remain comprehensive and vibrant. The recent bankruptcy reform legislation has reaffirmed the importance of detecting and prosecuting bankruptcy fraud. Through cooperative efforts and partnerships with the USTP, prosecutors and law enforcement agents can successfully execute their responsibilities in fighting bankruptcy fraud and abuse, and deter those inclined to use the bankruptcy process to conceal their fortunes, however great or small.❖

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Debtor Audits: Are More Criminal Referrals on the Way?

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I. Introduction

One of the lesser known sections of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat 23 (2005) (BAPCPA), may have the greatest effect on the prosecution of bankruptcy crimes. For the first time, Congress has mandated a system to audit the information that individual debtors file in their bankruptcy cases. A debtor who is chosen for audit will be required to provide specified categories of documents to auditors under contract with the United States Trustee Program (USTP or Program) to support his or her entries on the petition, schedules, and other statements filed in the bankruptcy case. The auditors will also be able to check online databases to search for undisclosed assets. They will be required to file a report with the bankruptcy court and clearly and conspicuously specify in the report any material misstatement of income, expenditures, or assets.

If a material misstatement is discovered, the U.S. Trustee is obligated to report it, if appropriate, to the United States Attorney. 28 U.S.C. § 586(f)(2)(B)(I). The information provided to, or uncovered by, the auditor may provide a solid foundation for prosecuting bankruptcy crimes, whether it be for concealment, false oath/declaration, or on other grounds. Unlike most BAPCPA provisions, which went into effect on October 17, 2005, the debtor audit provisions do not become effective until October 20, 2006. Thus, while these new provisions have provided no referrals yet, United States Attorneys should expect to see criminal referrals from the U.S. Trustees based on evidence uncovered by debtor audits in the near future.

II. The who, what, and how of debtor audits

A. Who gets audited

Section 603(a)(1) of BAPCPA provides that the Attorney General (in judicial districts served by the United States Trustee) and the Judicial Conference of the United States (in Alabama and North Carolina) are required to "establish procedures to determine the accuracy, veracity, and completeness of petitions, schedules, and other information that the debtor is required to provide under sections 521 and 1322 of title 11, United States Code, and if applicable, section 111 of such title, *in cases filed under Chapter 7 or 13 of such title in which the debtor is an individual*." (emphasis added). Thus, only individuals are subject to audit. The debtor audit requirements are also limited to chapter 7 and chapter 13 debtors. Individual debtors who file under chapter 11 and chapter 12 are excluded.

In chapter 7, trustees liquidate the debtors' non-exempt assets to pay creditors. Most chapter 7 cases are filed by debtors whose assets are either exempt under federal or state law or subject to valid liens. In these "no asset" cases, the trustee has nothing to liquidate and there is no distribution to unsecured creditors. Under chapter 13, debtors repay some or all of their debts, typically over a three-to-five-year period. Chapter 11 is the reorganization chapter that, while typically used by businesses, is occasionally used by individuals. Chapter 12 is available for family farmers and family fishermen. More than 99 percent of individual cases are filed under chapter 7 or chapter 13. *See* Press Release, Administrative Office of U.S. Courts, Bankruptcy Filings Hit New Records in Run Up to New Bankruptcy Law Implementation (Dec. 1, 2005), *available at* http://www.uscourts.gov/Press_Releases/bankruptcyfilings120105.html (providing statistics reflecting that, of the 1,782,520 bankruptcy cases filed between September 30, 2004, and September 30, 2005, 1,775,517, or approximately 99.6%, were filed under chapter 7 or chapter 13).

Although most individuals who seek bankruptcy protection will be subject to audit, only a small percentage of those debtors will be audited. Section 603(a)(2) of BAPCPA requires the Attorney General to:

> (B) establish a method of randomly selecting cases to be audited, except that not less than 1 out of every 250 cases in each Federal judicial district shall be selected for audit;
>
> (C) require audits of schedules of income and expenses that reflect greater than average variances from the statistical norm of the district in which the schedules were filed if those variances occur by reason of higher income or higher expenses than the statistical norm of the district in which the schedules were filed.

Audits under § 603(a)(2)(B) are referred to by the USTP as random audits; those under § 603(a)(2)(C) are referred to by the USTP as targeted audits. Cases will be selected for random audit from a pool of all individual chapter 7 and chapter 13 cases, but may represent as little as 0.04 percent (1 out of 250) of those cases. Cases will be selected for targeted audit from those filed by debtors whose income or expenses deviate significantly from the statistical norm of the district in which the schedules were filed. Thus, all individual chapter 7 and chapter 13 cases are subject to random audit, and cases filed by debtors with high income or expenses are also subject to targeted audit.

B. What documents are audited

The documents audited include the petition, the schedules, and other documents filed by the debtor in the bankruptcy case. *See* Pub. L. No. 109-8 § 603(a)(1), 19 Stat. 23 (2005). Importantly, before filing any of these documents, debtors sign under penalty of perjury that the information contained in the documents is true and correct.

The petition is the document that commences the bankruptcy case. It contains the debtor's name and address and whether the debtor has filed any cases within the previous eight years. The debtor also states on the petition whether the case is a business or consumer case and whether the debtor estimates that any assets will be available for unsecured creditors.

The schedules include lists of the debtor's real and personal property, a list of all debts, and a schedule of income and expenses. *See* Schedules A (real property), B (personal property), D (secured debts), E (unsecured priority debts), F (unsecured nonpriority debts), I (current income), and J (current expenditures). These schedules will likely be the source of most of the material misstatements identified by the auditors.

The other documents filed by the debtor include the Statement of Financial Affairs. In the statement, the debtor provides various information, such as how much income he or she has earned during the current year and in the previous two years. *See* Statement of Financial Affairs Questions No. 1 and 2. The debtor also explains various transfers including gifts, losses (including gambling losses), and other transfers outside the ordinary course of the debtor's financial affairs. *See, e.g.,* Statement of Financial Affairs Questions No. 3, 7, 8, and 10.

In chapter 7 cases, debtors with primarily consumer debts are also required to file the Statement of Current Monthly Income and Means Test Calculation (Official Form B22A). On this document, the debtor provides information about current monthly income, which is defined as all income received during the six calendar months prior to the filing of the bankruptcy case, except Social Security income and certain other income. 11 U.S.C. § 101(10A). In addition, if the debtor has a non-filing spouse, that individual's income is included on the form unless the debtor declares that he or she is legally separated or living apart other than for purposes of evading the means test. Debtors (or a debtor and a non-filing spouse, if applicable) whose Current Monthly Income (CMI) is greater than the applicable state median income must also complete the expense portion of the form. Some expense amounts are set by IRS Standards while others represent actual expenses in specified categories. 11 U.S.C. § 707(b)(2)(A)(ii).

In chapter 13 cases, all debtors must complete the Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income form (Official Form B22C). Unlike chapter 7, even debtors with primarily business debts must complete the form. In addition, all debtors must include their spouse's income, even if the they live apart. Like chapter 7 debtors, chapter 13 debtors (or a debtor and a non-filing spouse, if applicable) whose CMI is greater than the applicable state median income must also complete the expense portion of the forms.

C. How the audit is conducted

Section 603(a)(1) of BAPCPA provides that the audits shall be performed by independent certified public accountants or independent licensed public accountants. The U.S. Trustee for each district is authorized to contract with qualified persons to perform the audits. 28 U.S.C. § 586(f)(1). BAPCPA § 603(a)(1) also provides that the audits must be conducted in accordance with "generally accepted auditing standards" unless the Attorney General develops alternative auditing standards not later than two years after the date of enactment of the Act. Because bankruptcy documents are not prepared using Generally Accepted Accounting Principles, alternative auditing standards have been developed and will be issued before the audits commence.

A debtor must cooperate with the auditor, as necessary, to enable the auditor to perform his duties. 11 U.S.C. § 521(a)(3). This includes providing property of the estate and recorded information relating to property of the estate. Further, the debtor has the duty to "surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate whether or not immunity is granted under section 344 of this title." *Id.* 521(a)(4). Those documents may include, among others, tax returns, bank statements, credit card statements, and pay stubs. In addition, the auditors may review online databases to determine whether the debtor owns or has owned assets not listed on the schedules or statements filed in the case.

D. The audit report and its impact

The audit report shall "clearly and conspicuously" specify any "material misstatement" of income, expenditures, or assets. 28 U.S.C. § 586(f)(2)(A). A report of each audit must be filed with the court and transmitted to the U.S. Trustee. *Id.* The bankruptcy clerk shall give notice to creditors in any case in which a material misstatement is identified. *Id.*

In a case in which a material misstatement is identified, the new statute sets forth two requirements for the U.S. Trustee. 28 U.S.C. § 586(f)(2)(B). First, the U.S. Trustee shall "report the material misstatement, *if appropriate,* to the United States Attorney" pursuant to 18 U.S.C. § 3057. 28 U.S.C. § 586(f)(2)(B)(i) (emphasis added). Second, the U.S. Trustee shall "if advisable, take other appropriate action, including but not limited to commencing an adversary proceeding to revoke the debtor's discharge" pursuant to 11 U.S.C. § 727(d). 28 U.S.C. § 586(f)(2)(B)(ii). In particular, the new law provides that a debtor's discharge may be revoked for failing to explain satisfactorily a material misstatement identified in an audit or for failing to make available necessary papers or property belonging to the debtor that are requested for an audit. 11 U.S.C. § 727(d).

The U.S. Trustee, or other parties in interest, may have other civil remedies in cases where the audits uncover material misstatements, such as dismissal of the bankruptcy case or denial of discharge. 11 U.S.C. §§ 707, 727. U.S. Trustees or other creditors may find that several subsections of 11 U.S.C. § 727 apply to deny a debtor a discharge where an audit uncovers material misstatements. *See, e.g.,* 11 U.S.C. § 727(a)(2) (concealment of assets with intent to hinder or delay a creditor), and 11 U.S.C. § 727(a)(4)(A) (false oath or account). In addition, denial of discharge may be appropriate where the debtors fail to provide information to the auditors. *See, e.g.,*11 U.S.C. § 727(a)(3) (concealing, destroying, falsifying, or failing to keep books and records from which the debtor's financial condition could be ascertained); 11 U.S.C. § 727(a)(4)(D) (withholding from an officer of the estate recorded information about the debtor's property or financial affairs).

III. Possible bankruptcy crimes

As the new law provides, the U.S. Trustee may make criminal referrals of cases that have been subject to debtor audits where the auditors found material misstatements as to the debtor's income, expenses, or assets. Several subsections of 18 U.S.C. § 152, the section of the United States Code that includes bankruptcy crimes, may be implicated by findings made by the auditors. Crimes under 18 U.S.C. § 152(1), (2), and (3) regarding concealment, false oaths, and false declarations are most likely to arise.

A. False oath, account, or declaration: 18 U.S.C. § 152(2)-(3)

The most common criminal offenses that debtor audits may uncover are those of false oath or account or false declaration. 11 U.S.C. § 152(2), (3). Sections 152(2) and (3) of title 18 provide:

> A person who –
>
> (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
>
> (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;
>
> . . . shall be fined under this title, imprisoned not more than 5 years, or both.

Debtors sign all the documents that they file, and in doing so declare under penalty of perjury that the documents are true and correct. Thus, if an auditor identifies a material misstatement in one or more of the filed bankruptcy documents, and assuming the auditor's findings are accurate, the debtor has made a false declaration in a bankruptcy case. The issue would be whether the declaration was made knowingly and fraudulently. In addition, debtors are required to attend a meeting of creditors and submit to examination under oath. 11 U.S.C. §§ 341(a), 343. At the meeting of creditors, the trustee will generally ask the debtor if the information on the bankruptcy documents is true and correct. The debtor's testimony at the meeting of creditors may provide an additional false oath to prosecute.

B. Concealment of assets: 18 U.S.C. § 152(1)

Another crime that debtor audits may uncover is concealment of property of the estate of the debtor. Section 152(1) of title 18 provides:

> A person who –
>
> (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States trustee, any property belonging to the estate of a debtor;
>
> . . . shall be fined under this title, imprisoned not more than 5 years, or both.

If an auditor finds that the debtor did not list property of the bankruptcy estate on the debtor's schedules, the debtor may have committed the crime of concealment. For example, the auditor may discover that the debtor owns a boat or bank accounts that were not listed on the debtor's schedules. For concealment to occur, the debtor does not have to physically hide the property; failure to list property on schedules is sufficient to conceal it from a trustee. *Coghlan v. United States*, 147 F.2d 233, 236-237 (8th Cir. 1945).

C. Fraudulent pre-bankruptcy transfers: 18 U.S.C. § 152(7)

In reviewing documents received from the debtor or information from online databases, an auditor might uncover a pre-bankruptcy transfer made for the sole purpose of keeping an asset out of the estate and out of the reach of creditors. Section 152(7) of title 18 provides that a person commits a crime who:

> in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with the intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation[.]

Thus, if a debtor knowingly and fraudulently conceals or transfers an asset in contemplation of bankruptcy or with the intent to defeat the provisions of title 11, he or she has committed a crime. For example, a debtor might transfer a boat to a family member for no consideration in the year prior to filing for bankruptcy, so that the trustee could not sell it in the bankruptcy case. The debtor should disclose the transfer on the Statement of Financial Affairs, Question No. 10. Even if the transfer is not disclosed and the boat is not listed as an asset, database searches conducted by the auditor should reveal that the debtor recently owned a boat, and documents provided by the debtor might show payments made on the boat during the months pre-petition. This information uncovered by the auditor might lead to a criminal referral pertaining to the debtor.

D. Bankruptcy fraud schemes: 18 U.S.C. § 157

A debtor audit may reveal a bankruptcy fraud scheme, which typically involves the filing of one or more bankruptcy cases as part of a larger criminal scheme. Section 157 of title 18 provides:

> A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so –
>
> (1) files a petition under title 11;
>
> (2) files a document in a proceeding under title 11; or
>
> (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,
>
> . . . . shall be fined under this title, imprisoned not more than 5 years, or both.

E. Concealment or destruction of records: 18 U.S.C. § 152(8)

Finally, a debtor audit could uncover a debtor's attempts to avoid or thwart the audit, which, in itself, may be a bankruptcy crime. For example, 18 U.S.C. § 152(8) provides that a person commits a crime who:

> after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor[.]

Thus, a debtor who conceals, falsifies, or destroys records to avoid the auditor's review of those records would be committing a bankruptcy crime.

IV. Conclusion

With the imminent arrival of debtor audits, criminal referrals from the U.S. Trustee are likely to increase as auditors identify material misstatements that may rise to the level of criminal conduct. Moreover, the nature of the referrals may change. Referrals arising from debtor audits will not be based on testimony of an unsatisfied creditor or former spouse who may have a personal dispute with the debtor. Instead, they will be based on the work of an unbiased, disinterested auditor who will have documents to support the identified material misstatements.❖

ABOUT THE AUTHORS

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Credit Counseling and Debtor Education Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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I. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, requires each individual filing a petition under chapters 7, 11, 12, or 13 to undergo credit counseling before filing bankruptcy and to receive personal financial management instruction after filing. These new requirements for consumer debtors are found in 11 U.S.C. §§ 109, 111, 727, and 1328. Under BAPCPA, the United States Trustee Program (USTP) is responsible for approving and monitoring the entities providing counseling and educational services. The USTP has formed the Credit Counseling and Debtor Education Unit (CC/DE Unit) within the Executive Office for U.S. Trustees to review and approve applications and to establish and coordinate procedures. The CC/DE Unit's telephone numbers and e-mail addresses are posted on the Program's Internet site and are as follows: telephone, 1-202-514-4100; email, ust.cc.help@usdoj.gov; and fax, 1-202-305-8536.

II. Background

The credit counseling industry has a long history. Credit counseling services were traditionally offered by nonprofit companies as part of a charitable mission. With the growth of consumer debt and spending in recent years, the credit counseling industry experienced a similar growth, including the influx of companies that were less traditional in their approach. These new entities focused their efforts on recruiting consumers into debt management plans. These plans are out-of-court repayment arrangements wherein consumers and their creditors agree to a payment schedule without resorting to the formality of the bankruptcy process. Credit counseling agencies receive fees for setting up and administering such plans. They also receive a certain percentage from the creditors that agreed to the plans, often referred to as "fair share." Some companies concentrate their efforts on enrolling clients into debt management plans, sometimes without regard to whether the plans are feasible. These companies frequently establish for-profit affiliates that receive revenues from these operations. In recent years, a number of abusive operations were investigated and exposed by the Internal Revenue Service (IRS) and the Federal Trade Commission (FTC).

Personal financial management instruction for bankruptcy filers (debtor education) is a relatively new concept. Some chapter 13 trustees have offered post-bankruptcy filing education as part of their trustee operations, often as a means to rehabilitate a debtor's credit. Previously, there was no regulation of the debtor education industry.

III. Statutory requirements for credit counseling and debtor education

BAPCPA's credit counseling and debtor education provisions are designed to protect consumers by ensuring the following two factors.

- They have the basic understanding of their financial situation that is necessary to determine whether bankruptcy is the most appropriate option for them.

- They exit bankruptcy knowing the basic principles of personal finance that are necessary to manage their financial affairs.

These new provisions seek to empower consumers with additional knowledge they might not otherwise gain in the bankruptcy process.

The statutory requirements in 11 U.S.C. § 109(h)(1) provide that an individual is not eligible to file bankruptcy without receiving credit counseling from a nonprofit budget and credit counseling agency approved by the United States Trustee. This counseling session must occur within 180 days before the individual files a bankruptcy petition. Section 521(b) of title 11 requires that a certificate of credit counseling completion and a copy of a debt repayment plan, if any, must be filed with a debtor's initial bankruptcy petition.

The counseling requirement is subject to certain limited exceptions. The bankruptcy court may defer the credit counseling requirement for thirty days if the debtor files a "satisfactory" certification attesting that exigent circumstances exist and that the debtor attempted to obtain counseling, but could not do so within five days. The only time that the court may grant a complete waiver of the requirement is if the debtor cannot comply due to incapacity, disability, or active military duty in a combat zone. The requirement may also be waived if the U.S. Trustee determines that the approved agencies in the district cannot adequately provide services to debtors. Currently, the only districts excepted under this provision are the Southern District of Mississippi and three districts in Louisiana in the wake of Hurricanes Katrina and Rita.

In addition to complying with the pre-filing credit counseling requirements, a debtor seeking a discharge in a chapter 7 or chapter 13 case must complete an instructional course in personal financial management after filing. Title 11 U.S.C. §§ 727(a)(11) and 1328(g)(1) provide that completion of the instructional course is necessary for a debtor to receive a discharge. This requirement is also subject to the limited exceptions noted in the preceding paragraph relating to lack of adequate services in the judicial district, incapacity, disability, or active duty in a military combat zone. While there is no set curriculum for the instructional course, it must contain materials related to budget development, money management, financial record-keeping, wise use of credit, and consumer resources. The debtor education provider must also retain records to demonstrate the effectiveness of the financial management course. A debtor cannot complete the credit counseling session and the financial management course at the same time. The financial management course must be taken after the bankruptcy case is filed.

Interim Bankruptcy Rule 1007 requires an individual debtor to file a statement regarding the completion of the financial management course with the court prior to receiving a discharge. The certificate evidencing completion of the educational course must be attached to this statement. INTERIM FED. R. BANKR. 1007, *available at* Interim Rules and Official Forms Implementing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, http://www.uscourts.gov/rules/interim.html.

IV. Issuance of certificates

Initially, each approved credit counseling agency and debtor education provider created and issued its own certificate. To ensure uniformity in the certificates and to provide a tracking mechanism in the event of allegations of false or fraudulent certificates, the USTP established a Web-based certificate issuance system. All agencies and providers are required to use the Web-based system to generate certificates as of January 9, 2006. Only approved agencies and providers are allowed to furnish certificates; no other entities, including independent contractors and attorneys, may do so. Each individual debtor must be issued a certificate, even when spouses are jointly filing for bankruptcy. The certificate may not be filed with the court by the agency or provider. It must be delivered to the credit counseling client or, upon request by the client, to the client's attorney.

The Web-based system allows the USTP to track a certificate to a particular agency and counselor. Each certificate is numbered and includes the name of the agency or provider, the date of completion of the course, the judicial district, and the counselor's name and signature. The certificate of debtor education also includes the debtor's bankruptcy case number. The certificate must accurately state the name of the agency or provider as set forth in the agency's or provider's application to the U.S. Trustee. The agency or provider should not use any alias or "doing business as" name on the certificate.

An agency or provider may download the certificate as a Portable Document Format (PDF) or print a paper certificate to give to the client. To comply with privacy concerns, no other personal identification information relating to the client appears on the certificate. Certificates must have a counselor's original ink signature or an electronic signature (/s/). If the certificate is issued with an electronic signature, the agency or provider must keep an original certificate with an original signature on file.

V. Approval process

As previously noted, debtors must receive credit counseling services and debtor education from agencies and course providers approved by the U.S. Trustee. BAPCPA outlines the minimum criteria for approval in 11 U.S.C. § 111. Under this section, the U.S. Trustee must thoroughly review the qualifications of entities seeking approval to provide services and is authorized to require an agency or provider to provide information to assist in the review. The USTP began accepting applications on July 5, 2005. As of March 10, 2006, 140 credit counseling agencies and 240 financial education providers have been approved out of approximately 650 applicants.

A credit counseling agency seeking approval must be a nonprofit organization that: has a board of directors who do not benefit from the outcome of the counseling services; charges a reasonable fee; provides adequate safeguards for payment of client funds; employs qualified counselors; provides adequate counseling service; and deals responsibly with matters relating to quality, effectiveness, and financial security. The USTP has denied approval to a number of applicants for failure to meet the statutory requirements. The most frequent causes for denial have related to the applicants' failure to operate as a nonprofit agency, maintain an independent board of directors, or demonstrate that adequate counseling would be provided.

Credit counseling agencies may provide services by in-person counseling, telephone, and the Internet. To provide the "adequate counseling" required by § 111, however, Internet-based credit counseling must be supplemented by some form of person-to-person contact via telephone, e-mail, or instant messaging. The USTP requires proper verification procedures for telephonic and Internet counseling to protect the integrity of the counseling session.

Providers of debtor education courses are not required to be registered as nonprofit organizations, but must meet minimum standards such as employing qualified personnel with adequate experience, charging a reasonable fee, providing adequate facilities, and maintaining reasonable records. The preparation and retention of reasonable records permits evaluation of the effectiveness of the course. The records must be available for inspection and evaluation by the Executive Office for U.S. Trustees, the U.S. Trustee, and the chief bankruptcy judge for the district in which the course is offered.

Credit counseling agencies and debtor education providers are initially approved for up to a six-month probationary period. At the end of the probationary period, an agency or provider must reapply and demonstrate that it has met the required standards and will be able to meet the standards in the future. Each re-approval is for a one-year period. A publicly available list of U.S. Trustee-approved agencies and providers is maintained by the bankruptcy clerk for each district. The USTP also maintains a list of approved credit counselors and debtor education providers on its Web site at http://www.usdoj.gov/ust/eo/bapcpa/ccde/index.htm.

The U.S. Trustee may remove an agency or provider from the approved list at any time. Within thirty days after any final decision on an applicant's one-year renewal application, an interested party may seek judicial review in the appropriate United States District Court. In addition, under 11 U.S.C. § 111(e), the district court has the independent ability to investigate the qualifications of an approved credit counseling agency, request production of documents to ensure the integrity and effectiveness of the agency, and remove the agency from the approved list upon finding it does not meet the minimum required criteria.

VI. Complaint procedures

The USTP has established an internal complaint database to effectively administer and monitor the quality of approved credit counseling agencies and debtor education providers. When a complaint is received from an attorney, debtor, or other interested party, the agency or provider is contacted for a response and the matter is resolved as quickly as possible. The database allows the USTP to track the progress and resolution of complaints, and serves as a resource for reviewing the performance of an agency or provider during the re-application process. If a particular agency or provider receives a series of complaints, or if particularly serious allegations are made, USTP staff may conduct an on-site audit of the entity. The USTP will soon post a PDF complaint form on its Internet site that can be filed by individuals who have complaints against counseling agencies or debtor education providers.

The most common complaints to date have related to the timely or proper issuance of certificates and the waiver of fees for credit counseling. Agencies and providers may charge a reasonable fee for services, but they are obligated under BAPCPA to provide services without regard to a debtor's ability to pay. Each provider develops its own criteria on when to waive or reduce a fee, subject to the following guidance by the USTP: "Ability to pay must be determined on a case-by-case basis. One factor that must be considered is the client's personal financial situation as reflected in the budget analysis that is completed pursuant to the statute." *Available at* http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_faqs.htm#coun_issue 3. The USTP directs agencies and providers to disclose costs and the possibility of a waiver prior to providing services, and cautions agencies and providers against representing that a fee is federally mandated or required by law or the Department of Justice (Department).

Additional issues of concern include the failure to comply with licensing and other requirements in a particular state and the dissemination of legal advice during credit counseling sessions. Statutes defining the unauthorized practice of law vary from state to state. The issue of whether a credit counseling agency crosses the line into giving legal advice is of concern to both the USTP and the bankruptcy bar. The decision to file bankruptcy and a discussion of the bankruptcy filing's effect on the individual must be left to the client and his or her attorney. The USTP requires each agency and provider to attest that it is in compliance with all applicable laws of each state in which it seeks approval to provide services, and cautions agencies that providing legal advice could be deemed the unauthorized practice of law.

VII. Audit of approved providers

In view of the recent problems in the credit counseling industry, to ensure compliance with BAPCPA's requirements, the USTP will conduct reviews of the activities of approved credit counseling agencies and debtor education providers. The reviews of credit counseling agencies will include not only a financial review of how they administer debt management plans, but also an analysis of the quality of services provided. USTP staff will listen to counseling sessions, review records, and interview third parties to ensure that adequate counseling is being provided by the agencies. The USTP will also review the quality of debtor education courses by attending course sessions.

VIII. Possible fraudulent activity

One area of potential criminal fraud is the issuance of fraudulent credit counseling or debtor education certificates. Debtors may attempt to provide false certificates to their attorneys or, in the case of pro se debtors, directly to the court. The standards set by the USTP will aid in the discovery and investigation of this type of fraud. The USTP's guidelines for approved agencies and providers are very specific regarding the importance of accurate information relating to the identity of the debtor and the agency or provider. In addition, the Web-based certificate system should ensure uniformity in the certificates and be a valuable asset in tracking false certificates. To date, there has been only one instance of an allegedly false certificate. The U.S. Trustee and the U.S. Attorney's office are currently investigating this matter.

The USTP may also pursue civil remedies if a debtor files a fraudulent certificate or is improperly granted a discharge before filing a certificate confirming completion of a debtor education course. In that instance, the U.S. Trustee may file a motion to reopen the debtor's case and revoke the debtor's discharge. In general, to establish grounds for revocation of discharge, the U.S. Trustee must allege and prove fraud in receiving the discharge. In the matter mentioned in the previous paragraph, the fraud consists of filing a false certificate attesting to the completion of a financial management course.

IX. Coordination with other government agencies

The IRS reviews the tax-exempt status of nonprofit corporations, including credit counseling agencies. The IRS recently audited a number of credit counseling agencies, revoked the tax-exempt status of some agencies, and announced that it will revoke the status of a number of other agencies. The USTP met with the IRS and received helpful input from experienced IRS field auditors on the USTP's proposed audit procedures.

The FTC investigates consumer complaints, including those lodged against credit counseling agencies. The FTC maintains a database of such complaints called "Consumer Sentinel." Approximately 1,500 federal and state law enforcement agencies subscribe to this database. The subscribers issue an "alert" with respect to investigations or actions taken against companies. USTP staff received training on this database and use it in the application review and audit process. Subject to applicable privacy restrictions, the FTC has also agreed to share information with the USTP regarding public investigations of credit counseling agencies and debtor education providers.

X. Conclusion

The USTP has embraced the challenge of implementing the credit counseling and debtor education requirements of BAPCPA. The Program is committed to monitoring the quality of the provided services and assessing the impact of the statutory provisions on debtors and the bankruptcy system.❖

ABOUT THE AUTHORS

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Means Testing Under the New Bankruptcy Law

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I. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, (BAPCPA) Pub. L. No. 109-8, 119 Stat. 37, took effect on October 17, 2005, and the headlines were hard to miss. Television news stories, magazines, and newspapers expressed a full range of opinions, from bleak predictions of the end of chapter 7, to applause for increased protections that would benefit creditors. The common thread, however, is the means test of 11 U.S.C. § 707(b)(2). Despite all the press the means test has inspired, few people, including some bankruptcy practitioners, really understand what the means test is all about. This article provides a brief overview of the means test in an effort to clarify this important provision of BAPCPA.

In a nutshell, the means test seeks to answer the "very fundamental question" posed by Senator Charles Grassley, a sponsor of BAPCPA: "whether [debt] repayment is possible by an individual." 151 Cong. Rec. S1856 (Mar. 1, 2005) (statement of Sen. Charles Grassley). As Sen. Grassley explained, "[i]t is this simple: if repayment is possible, then [a debtor] will be channeled into chapter 13 of the Bankruptcy Code which requires people to repay a portion of their debt...." *Id.* The means test is thus an initial filter for an ability to pay, designed to identify, at the outset of the case, those chapter 7 debtors who are abusing the bankruptcy system, and to require those debtors to either repay a portion of their debts in chapter 13 or face dismissal of their case altogether.

II. The means test formula at work: changing the presumption

As evidenced by its title, Congress enacted BAPCPA to curb abuses of the bankruptcy system, including halting those chapter 7 debtors who seek to have their debts discharged despite having the wherewithal to repay their creditors. As part of this effort, Congress amended § 707(b) of the Bankruptcy Code to eliminate the presumption in favor of the debtor that existed prior to BAPCPA. Under the old § 707(b), courts approached a case by presuming that a debtor's chapter 7 filing was not abusive, and dismissed the case only upon a showing that granting a discharge of debts would be a "substantial abuse" of the provisions of chapter 7.

As amended, § 707(b)(2) replaces the old pro-debtor presumption with a new one: courts are to presume that a case is an "abuse" of chapter 7 (and is subject to dismissal) if a detailed mathematical formula set out in the statute yields a minimum amount of monthly disposable income. As a starting point, each chapter 7 debtor with primarily consumer debt must, as part of his or her duties under 11 U.S.C. § 521, complete the Statement of Current Monthly Income and Means Test Calculation, Official Form B22A (SCMI). *See* § 707(b)(2)(C). The SCMI form, which asks debtors to outline their income and expenses, provides information to plug into the § 707(b)(2) formula. The amount of "disposable income" that a debtor has after applying the formula determines whether the case is presumed an abuse.

III. The basic means test formula

Boiled down, the means test formula is relatively simple (see chart following this article): the debtor enters his or her current monthly income (CMI), as described in more detail below, on the SCMI. If the debtor's CMI is below the median family income for a family in the debtor's state with the same number of individuals as the debtor's household, then abuse is not presumed and the debtor does not need to fill out the remainder of the means test form. The United States Trustee Program (Program) posts the median family income data, which is published by the Census Bureau, on its Web site at www.usdoj.gov/ust under "Bankruptcy Reform"–"Means Testing Information." If the debtor's income is above the applicable state median, however, there is further inquiry.

In above-median income cases, the debtor's CMI is reduced by specific standardized and actual living expenses, and the difference is multiplied by sixty. 11 U.S.C. § 707(b)(2)(A)(I). If, after such reduction, the income available for the debtor's creditors is greater than $10,000, or $167 per month, then abuse is presumed. If the income available for the debtor's creditors is less than $6,000, or $100 per month, then abuse is not presumed. If the income available for the debtor's creditors is more than $6,000, but less than $10,000, abuse is presumed only if that income exceeds 25 percent of the debtor's non-priority unsecured debt.

If the presumption of abuse arises, the debtor may rebut it and avoid dismissal only by demonstrating special circumstances that justify additional expenses or adjustments to income. § 707(b)(2)(B). Under the prior § 707(b), the U.S. Trustee typically would argue that certain expenses were excessive and/or not reasonably necessary for the support and maintenance of the debtor and any dependents, in order to show that a case met the old "substantial abuse" standard. Now, however, each expense a debtor may deduct for purposes of calculating whether there is sufficient disposable income to presume "abuse" is specifically set forth in § 707(b)(2)(A)(ii). If an expense is not one specified in the statute, the debtor cannot claim it.

IV. Income

Under BAPCPA, the CMI that debtors are to use in filling out the SCMI is defined. "Current monthly income" means "the average monthly income from all sources that the debtor receives (or in a joint case both debtors receive) without regard to whether such income is taxable income" during the six-month period ending on the last day of the month immediately preceding the date the case commences. 11 U.S.C. § 101(10A)(A). Included in the income calculation is any amount paid by any entity other than the debtor or joint debtor, on a regular basis, for the household expenses of the debtor or the debtor's dependents. *Id*. § 101(10A)(B). The statute, however, specifically excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity, and payments to victims of terrorism, from the calculation of CMI. *Id*.

Although the debtor fills out the SCMI under penalty of perjury, neither the courts nor the U.S. Trustee simply accepts the debtor's calculation of his or her income or expenses. For example, 11 U.S.C. § 521 requires the debtor to provide pay stubs covering the sixty days prior to filing. However, because CMI, for purposes of the SCMI, is defined as the income for the six full months prior to filing, the U.S. Trustee may also require production of six months of pay stubs to verify the accuracy of the income information used in the SCMI. Other documents, including tax returns, bank statements, and documentation of spousal support payments, may also be required by the U.S. Trustee.

V. Expenses

As discussed above, once a debtor's CMI is established to be over the applicable state median family income, the debtor is required to complete the expense portion of the SCMI form. All of the debtor's allowed expenses are set forth in § 707(b)(2)(A)(ii). For the purpose of determining whether the presumption arises, the debtor may deduct only those expenses described under § 707(b)(2)(A)(ii). For example, while the debtor may list separate expenses for certain unsecured debts, student loans, pets, or 401(k) loans on other documents, such as the debtor's schedules of expenses, those expenses are not allowable in determining presumed abuse on the SCMI in a chapter 7 case.

The expenses allowable on the SCMI fall into two general categories: (1) standardized and necessary expenses promulgated by the Internal Revenue Service; and (2) some actual expenses incurred by the debtor, such as secured debt and tax obligations and expenses incurred in caring for an elderly or chronically ill member of the debtor's household.

A. Internal Revenue Service standard expenses

As set forth in § 707(b)(2)(A)(ii)(I), debtors may deduct amounts "specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the [IRS] for the area in which the debtor resides. . . ."

The National Standards published by the Internal Revenue Service (IRS) are posted on the Program's Web site at www.usdoj.gov/ust under "Bankruptcy Reform"–"Means Testing," and include expenses for food, clothing, and other items based on the size and income of the debtor's family. Local Standards for housing and utilities expenses, as well as for transportation expenses, are also published by the IRS and are posted on the Program's Web site at the same location as the IRS National Standards. These expenses are based upon the debtor's state and county of residence and, for the transportation expenses, are also contingent upon the number of vehicles for which the debtor pays operating expenses and loan or lease payments.

Although a debtor's actual expenses may be higher or lower than the IRS Standard expenses, all debtors are entitled only to the Standard expense amounts and cannot deduct their actual expenses. There is one exception, however. To the extent that a debtor's actual expenses are higher than the Standard expenses (particularly for mortgage and automobile expenses) as a result of secured debt, the debtor is entitled to take the greater of the secured debt obligation or the IRS Standard expense, but not both.

B. Other necessary expenses

In addition to the IRS Standard expenses, § 707(b)(2)(A)(ii)(I) allows debtors to deduct specified categories of actual expenses that the IRS has deemed "other expenses" not captured by the Standard expenses. Under IRS guidelines set forth in the Internal Revenue Manual's Financial Analysis Handbook, these expenses, deducted at Lines 25 to 33 of the SCMI, must be "necessary" to the "health and welfare" of the debtor and the debtor's dependents, or for the production of income. *See* Internal Revenue Service, *Internal Revenue Manual*, Financial Analysis Handbook § 5.15.1.10 (Mar. 2006), *available at* http://www.irs.gov/irm/part5/ch15s01.html#d0e175114.

These expenses may include accounting and legal fees, charitable contributions, child care, court-ordered payments, dependent care, education, health care, involuntary payroll deductions (if a requirement for employment, such as union dues), taxes, and secured debt obligations. Debtors claiming these expenses will be required to provide sufficient documentation.

At Lines 34 through 41 of the SCMI, debtors are also permitted to take specific "Additional Deductions Under §707(b)." These additional deductions include expenses for health and disability insurance; continued care for elderly, chronically ill, or disabled household members; protection against family violence; excess home energy costs; additional food and clothing costs; education expenses for minor children; and continued charitable contributions. Although these expenses are not included in the IRS Standard or necessary expenses, Congress made the express decision in § 707(b)(2) to allow debtors to deduct them from their calculation of CMI.

VI. Debtors' answer to the means test: Rebutting the presumption of abuse

Pursuant to § 707(b)(2)(B), a debtor may rebut the presumption of abuse by demonstrating "special circumstances," such as a serious medical condition or a call or order to active duty in the armed forces. Under this provision, the debtor is given an opportunity to demonstrate that special circumstances exist that support adjustments to the debtor's income and/or expenses, such that the presumption no longer arises. Even if the presumption is rebutted under this section, however, the debtor may still face dismissal under § 707(b)(3) if the case was filed in "bad faith" or the "totality of the circumstances" of the debtor's financial situation demonstrates abuse.

In cases where the debtor provides sufficient documentation to the U.S. Trustee demonstrating that the debtor could rebut the presumption of abuse, the U.S. Trustee may decline to file a motion to dismiss the debtor's case. In the months since BAPCPA was enacted, the U.S. Trustee has declined to file motions to dismiss in a number of cases, including, for example, where debtors became disabled or retired after filing the SCMI or were victims of a natural disaster. Unless the debtor provides adequate documentation to show that there are no reasonable alternatives to the adjustments to income or expenses that bring the debtor below the threshold dollar amounts giving rise to the presumption, however, the U.S. Trustee will generally move to dismiss the debtor's case.

VII. Conclusion

The means testing provisions of BAPCPA provide an objective approach for assessing a debtor's eligibility for chapter 7 relief. Although the language of §707(b)(2) can be daunting at first blush, when reduced to its component parts, the means test is relatively straightforward. Debtors who earn above-median income and have a specified amount of disposable income after deducting allowed expenses must now either repay at least some of their debts before receiving a bankruptcy discharge, or face dismissal of their cases.❖

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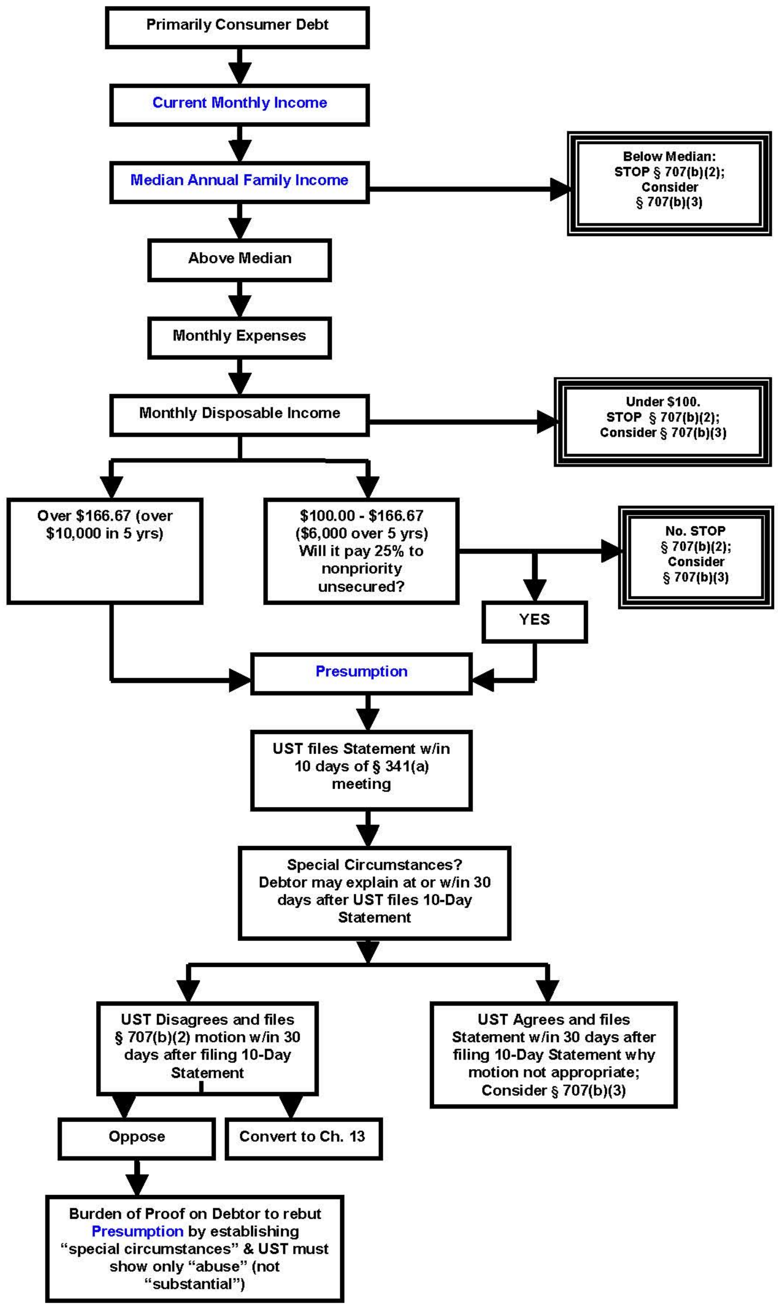
Means Test Flow Chart



New Bankruptcy Law Helps Ensure Consumer Debtors Receive Competent Bankruptcy Services

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I. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, includes several provisions designed to educate and protect debtors during their interaction with the bankruptcy system and with bankruptcy service providers. This article addresses three categories of changes that have a material impact on the rights of consumer bankruptcy debtors. First, the article discusses the creation of a category of service provider called a "debt relief agency," and the new responsibilities of those providers. Second, the article discusses important changes to the laws governing bankruptcy petition preparers. Finally, the article addresses certain enhanced remedies for violations of Rule 9011 of the Federal Rules of Bankruptcy Procedure that affect attorneys who represent debtors in bankruptcy proceedings.

II. "Debt relief agency" provisions

In BAPCPA, Congress created a category of bankruptcy service provider called a "debt relief agency." BAPCPA requires entities that qualify as debt relief agencies to comply with several new affirmative disclosure obligations, and restricts those entities from making certain representations regarding the bankruptcy process. BAPCPA defines a debt relief agency as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or anyone is a bankruptcy petition preparer. . . ." 11 U.S.C. §101(12A).

The terms "bankruptcy assistance" and "assisted person" are also newly defined. In general, bankruptcy petition preparers and attorneys who represent consumer debtors of modest means are considered to be debt relief agencies. Attorneys who provide their services *pro bono* and who do not accept any consideration in exchange for their services do not qualify as debt relief agencies and are not subject to the applicable restrictions and obligations. Certain other entities are expressly excluded from the definition, and thus do not have to comply with the applicable requirements. Exempt entities include the following.

- Any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer.
- A nonprofit organization exempt from taxation under § 510(c)(3) of the Internal Revenue Code.
- A creditor of the assisted person, to the extent the creditor is assisting the debtor to restructure a debt owed to the creditor.
- A depository institution, federal or state credit union, or subsidiary of such depository institution or credit union.
- An author, publisher, distributor, or seller of copyright-protected materials.

Entities that qualify as debt relief agencies are subject to new restrictions and affirmative obligations under three newly created sections of the Bankruptcy Code. Section 526 addresses restrictions placed on debt relief agencies; § 527 describes the necessary disclosures that debt relief agencies are required to make; and § 528 sets forth requirements, including advertising requirements, with which debt relief agencies must comply.

Most of the requirements under § 526 are not surprising or new, and competent attorneys are already routinely complying with them. For this reason, these requirements have not been the subject of much litigation. For example, § 526 prohibits a debt relief agency from failing to provide any service it promised in connection with an individual's bankruptcy case. In addition, a debt relief agency may not counsel an individual to make untrue or misleading statements in the individual's filings before a bankruptcy court.

An exception is § 526(a)(4), which prohibits debt relief agencies from advising clients to incur debt in contemplation of bankruptcy. The Department of Justice (Department) has taken the position that this provision prohibits debt relief agencies from telling clients to incur debt solely to game the system or to evade the means test. In addition, this provision prohibits a debt relief agency from telling clients to borrow money simply to pay the agency's fee. Attorneys have filed a number of lawsuits around the country to avoid having to comply with the debt relief agency requirements, particularly with § 526(a)(4). These attorneys allege either that attorneys are not debt relief agencies or that §§ 526-528 violate the First, Fifth, or Tenth Amendments of the United States Constitution. The Department has evaluated §§ 526-528, and has concluded that these provisions apply to attorneys and are consistent with the Constitution.

Under §§ 527, 528, a debt relief agency must provide an assisted person with four specific documents. Further, under § 527(d), a debt relief agency must retain a copy of the required notices for two years after the date on which the notices were given to an assisted person, which include certain notices as well as a written contract for services between the debt relief agency and the assisted person. These notices are identified according to the section in the Bankruptcy code where the purpose and content of each statement is set forth in detail. The notices include the following.

- The Section 342(b)(1) Statement.
- The Section 527(a)(2) Statement.
- The Section 527(b) Statement.
- The Section 527(c) Statement.

In general, these notices are intended to ensure that assisted persons understand the purpose and benefits of filing cases under chapters 7, 11, 12, and 13 of the Bankruptcy Code, and to put assisted persons on notice that the information they provide in any bankruptcy proceeding must be truthful and accurate. These disclosures are also intended to provide assisted persons with an understanding of the services they are entitled to receive from the debt relief agency.

Section 528 also sets forth specific requirements that govern advertising by a debt relief agency. Section 528(b)(2) mandates that an advertisement directed to the general public indicating that the debt relief agency provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt, shall disclose clearly and conspicuously that the assistance may involve bankruptcy relief, and shall include the following statement or a substantially similar one. *"We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."* These requirements have also drawn legal challenges under the First Amendment. The Department believes these requirements are fully consistent with the First Amendment.

Remedies for violations of these provisions are primarily set forth in § 526, which provides that waiver of any right under that section is not enforceable against the debtor, but may be enforced against the debt relief agency. Similarly, any contract for bankruptcy assistance that does not comply with the debt relief agency requirements shall be deemed void and unenforceable by any person other than the assisted person.

Standing to bring actions against debt relief agencies is not limited to the U.S. Trustee. Congress allows several different parties to commence enforcement actions against debt relief agencies when abuses have occurred. In addition to the U.S. Trustee, state law enforcement agencies, the court, and the debtor may act against violations, failures, or abuses by debt relief agencies.

Section 526(c) enumerates the applicable remedies, which include liability on the part of the debt relief agency for any fees or charges received, actual damages, and reasonable attorneys' fees and costs if the agency

> (A) intentionally or negligently failed to comply with any provision of this section, Section 527, or Section 528 with respect to a

case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding that is dismissed or converted to a case under another chapter of [the Bankruptcy Code] because of such agency's intentional or negligent failure to file any required document; or

(C) intentionally or negligently disregarded the material requirements of [the Bankruptcy Code] or the Federal Rules of Bankruptcy Procedure applicable to such agency.

11 U.S.C. §526(c)(2)(A)-(C). In addition, the court on its own motion, or on motion of the U.S. Trustee or the debtor, may enjoin the debt relief agency and impose an appropriate civil penalty if it finds that a person intentionally violated § 526 or engaged in a clear and consistent pattern or practice of violating this section.

III. Bankruptcy petition providers

In addition to providing restrictions upon debt relief agencies, BAPCPA sets forth new requirements for bankruptcy petition preparers. Generally speaking, a bankruptcy petition preparer is a person, other than an attorney or an attorney's employee, who receives compensation for preparing bankruptcy documents. Among the most important changes in BAPCPA's provisions relating to bankruptcy petition preparers are those addressing the unauthorized practice of law. Both the former and current versions of § 110 prohibit a bankruptcy petition preparer from executing documents on a debtor's behalf, collecting the filing fee, or using the word "legal" or similar terms in advertising. However, although the former version of the statute prohibited misleading advertising and actions where the bankruptcy petition preparer assumed responsibilities for the debtor, it did not specifically prohibit the unauthorized practice of law or render such misconduct a violation of § 110. The Bankruptcy Code ceded this prohibition to other federal and state laws.

New Section 110(e)(2)(A) specifically prohibits a bankruptcy petition preparer from offering legal advice to a potential debtor. It also requires the bankruptcy petition preparer to notify prospective debtors in writing that the bankruptcy petition preparer is not an attorney and may not practice law or give legal advice. Section 110(e)(2)(B) illustrates the type of conduct that is proscribed, through a non-exhaustive list of impermissible advice.

- Whether to file a petition for bankruptcy relief.
- Whether to file under chapter 7, 11, 12, or 13.
- What assets may be retained after filing bankruptcy.
- The tax consequences or the dischargeability of tax claims in a bankruptcy case.
- Whether to reaffirm debts.
- The characterization of debtor's interest in property or debts.
- Bankruptcy procedures and rights.

In addition, under BAPCPA, the court may triple the amount of a fine imposed in any case where it finds that a bankruptcy petition preparer did any of the following.

- Advised the debtor to exclude assets or income that should have been included on applicable schedules.
- Advised the debtor to use a false Social Security account number.
- Failed to inform the debtor that the debtor was filing for bankruptcy relief.
- Prepared a document for filing in a manner that failed to disclose the identity of the bankruptcy petition preparer.

BAPCPA also clarifies a court's authority to disallow or require fee disgorgement where a bankruptcy petition preparer is found to have violated § 110.

IV. Bankruptcy Rule 11 violations

Finally, BAPCPA also provides some important clarifications regarding the application of Rule 11 of the Federal Rules of Civil Procedure in bankruptcy proceedings. Rule 11 is made applicable in bankruptcy proceedings by Rule 9011 of the Federal Rules of Bankruptcy Procedure 9011. BAPCPA identifies areas in which an attorney may be subject to liability under Rule 9011.

For example, pursuant to § 707(b)(4)(A), debtor's counsel may be required to reimburse the trustee for all reasonable costs incurred by the trustee in successfully prosecuting a motion claiming that the debtor's case is presumptively abusive under § 707(b)(2), if the court finds debtor's counsel violated Rule 9011 of the Federal Rules of Bankruptcy Procedure. Pursuant to § 707(b)(4)(B), debtor's counsel may also be subject to assessment of a civil penalty, payable to the U.S. Trustee, if the court grants an abuse motion filed by either the U.S. Trustee or a party in interest and finds that debtor's counsel violated Rule 9011 of the Federal Rules of Bankruptcy Procedure. Finally, under § 707(b)(4)(C),

> [t]he signature of an attorney on a bankruptcy petition, pleading, or written motion shall constitute a certification that the attorney has --
>
> performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or motion; and
>
> determined that the petition, pleading, or motion--
>
> is well-grounded in fact; and
>
> is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law. . . .

In other words, any petition, pleading, or motion signed by an attorney is subject to Rule 9011 of the Federal Rules of Bankruptcy Procedure.

BAPCPA also includes a provision stating that the signature of an attorney on the bankruptcy petition constitutes a certification that the attorney "has no knowledge after an inquiry that the information in the schedules filed with . . . [the] petition is incorrect." 11 U.S.C. §707(b)(4)(D). Many attorneys have complained that this provision, and others, require far too much of debtors' counsel. Before the passage of BAPCPA, however, attorneys had a duty to counsel their clients and make due inquiry with respect to the information to be included in a debtor's bankruptcy petition.

V. Conclusion

These new provisions strengthen and clarify the rights of bankruptcy consumers by providing for additional disclosures regarding the bankruptcy process and by establishing additional remedies for debtors who have been harmed by unscrupulous bankruptcy service providers. Importantly, these provisions also present new enforcement tools that will enable the U.S. Trustee Program to continue in the mission of protecting the integrity of the bankruptcy system.

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Using Information Technology and Data-Enabled Forms to Implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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I. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 37, imposed a substantial number of new requirements on those involved with the bankruptcy system. The U.S. Trustee Program (USTP or Program) looked at ways to apply technical solutions to streamline or aid in meeting these requirements. The Program defined a new standard for filing electronic documents, which permits it to gather the new data elements required. "Smart forms" were created that are compatible with the United States Bankruptcy Courts Case Management/Electronic Case Filing System (CM/ECF) and provide the ability to "drill down" into the electronically filed documents to extract pertinent data.

A smart form is a document that is data enabled. When it is saved into the industry standard Portable Document Format (PDF), searchable data, with tags that allow the form data to be extracted by field, are available. A data-enabled standard ensures all regions use the same naming schema for the data tags.

Most of the United States Bankruptcy Courts accept electronically filed bankruptcy petitions, statements of financial affairs, and schedules through CM/ECF as PDF files. The information in these PDF files cannot be electronically extracted in this format because they are essentially "images" of the documents. If these documents were filed as smart forms, however, the data could be uniformly extracted and parsed accordingly.

II. Cooperative effort to develop data-enabled forms

For several years, the USTP has discussed the possibility of data-enabled forms with the Administrative Office of the United States Courts (AOUSC). In fiscal year (FY) 2002, the USTP worked closely with the AOUSC to update the United States Bankruptcy Court CM/ECF system. As a result, the CM/ECF system provides the USTP, from each bankruptcy court, a daily download of any new cases, new docket events, and case closures, along with the ability to download the PDFs.

In FY 2003, the USTP worked with the AOUSC to test the concept of a smart form and found that the United States Bankruptcy Courts CM/ECF system "as is" could support this new technology. The USTP subsequently asked the AOUSC to establish a joint working group to pursue a data-enabled form standard. The bankruptcy legislation raised the priority of pursuing such a standard. The concept of a data-enabled form was presented to the Advisory Bankruptcy Rules Committee, which agreed it would be beneficial to research the concept further. In addition, the Senate Appropriations Committee Report of 2005 acknowledged the efforts by the USTP and AOUSC to implement smart forms, and encouraged the continued use of information technology to leverage resources of all participants in the federal judicial system.

The USTP worked with the AOUSC to develop a draft data-enabled form standard that was compatible with the United States Bankruptcy Courts CM/ECF system and the National Archives and Records Administration archive standards, and that followed the emerging Justice XML standards. In the summer of 2005, a draft data-enabled form standard was released to the bankruptcy form software vendor community for comment, and in September 2005 a final standard was issued. The final standard applies to the following official United States Bankruptcy Court forms.

• Official Form B1	Voluntary Petition (does not apply to Exhibit A or Exhibit C)
• Official Form B6	Summary of Schedules (does not apply to Declination Concerning Debtor's Schedules)
• Official Form B6A	Real Property
• Official Form B6B	Personal Property
• Official Form B6C	Property Claimed as Exempt
• Official Form B6D	Creditors Holding Secured Claims
• Official Form B6E	Creditors Holding Unsecured Priority Claims
• Official Form B6F	Creditors Holding Unsecured Nonpriority Claims
• Official Form B6G	Executory Contracts and Unexpired Leases
• Official Form B6H	Codebtors Form 6I, Current Income of Individual Debtors(s)
• Official Form B6I	Current Income of Individual Debtor(s)
• Official Form B6J	Current Expenditures of Individual Debtor(s)
• Official Form B7	Statement of Financial Affairs
• Official Form B22A	Statement of Current Monthly Income and Means Test Calculation for use in chapter 7
• Official Form B22B	Statement of Current Monthly Income for use in chapter 11
• Official Form B22C	Statement of Current Monthly Income and Disposable Income Calculation for use in chapter 13

Unfortunately, it was subsequently determined that use of the final data-enabled forms standard would not be mandatory. Accordingly, a software vendor need not create a "smart form," but if it does so, it must use the new data-enabled form standard. Debtors may file their bankruptcy documents using either "smart forms" or forms that are not data enabled.

The new data schema for the data-enabled form standard builds upon the existing Adobe PDF/A standard (Version 1.4) currently in place for CM/ECF. Specifically, the new schema incorporates the use of the Adobe Acroform field and value (F/V) tags within the PDF document. This approach will allow the AOUSC to remain compatible with the long time archival of digital records. In addition, AOUSC and USTP research indicates that there are ample open source and commercial tool sets available to manipulate the Acroform F/V tags within the PDF document. The complete data schema, along with sample forms and frequently asked questions, is available at http://www.usdoj.gov/ust/eo/bapcpa/defs/index.htm#uscourts and http://pacer.psc.uscourts.gov/cmecf/developer/bkforms.html. Please see figure 1 for an illustration of a data enabled form.

Figure 1 depicts the underlying data tags associated with the Official Bankruptcy Court Form B1, Voluntary Petition in PDF format. The user is allowed to fill in the blanks on the computer. The data-enabled standard then applies a uniform naming convention to the PDF. A PDF, with data tags, can be created as long as the system user has a full license of Adobe Acrobat. It is that simple.

III. Use of new forms standard

A data-enabled form with data tags that are invisible to the user allows the computer system to automatically route the filings into identified categories, such as debtors with income below a specified level, debtors with special circumstances, and debtors who must undergo the full means test analysis. These automatic functions will substantially reduce the time Program employees spend reviewing forms.

The following are examples of the potential uses of data-enabled forms with data tags.

- Means test. Sort cases filed by debtors above and below the state median income, by comparing reported income/expenses under the new Current Monthly Income Form to reported income/expenses under the Petition and Schedules, and flag for further review. In addition, identify cases that might be candidates for a § 707(b)(3) motion based on bad faith or totality of circumstances. For example, data tags would allow the Program to quickly sort cases in which the debtor lists high unsecured debt, but little personal property.
- Study of Internal Revenue Service (IRS) Report Guidelines. Provide a statistical comparison of data. For example, a debtor's actual expenses compared to IRS standards, both nationally and geographically. Without data tags, it would be necessary to complete this process through manual sampling. The information from data tags allows the Program to make a more accurate assessment of the impact of the use of IRS Expense Guidelines on debtors and the courts.
- Trustee final reports. Collect chapter 13 case-closing data and chapter 7 final report data. The information from data tags allows the USTP to run national and geographic trends analyses of case closure statistics, plan payment dollars/percentages, funds distributed by estates/trustees, categories of funds distributed, and so forth. Anomalies are identified promptly using this data.
- Chapter 11 monthly operating reports. Collect chapter 11 monthly operating data, and run national and geographic trends analyses of the status of operating chapter 11 businesses, as well as their current income and cash flow/profit. The base of knowledge provided by data tags allows the Program to assess the characteristics of chapter 11 debtors that lead to successful reorganization.
- Small business debtor identification. Identify small business debtors through electronic review, rather than manual review.
- Debtor audits—targeted audits. Identify the trends/indicators to flag cases for potential selection for targeted audit, and assist with the compilation of data for the debtor audit report.
- Domestic support obligations. Aid the private trustees in their identification of cases involving domestic support obligations.
- Identify fraud and abuse. Assist the USTP and private trustees by permitting more focused and efficient identification of fraud and abuse in the bankruptcy system.
- Trustee operations. Enhance/streamline private trustee operations and management of cases. Data tags lead to more efficient and effective identification of assets to be administered.
- Court operations. Enable the courts to meet most of their new statistical reporting responsibilities in a more cost-effective manner. In the future, data tags will lead to an improved staffing formula for the bankruptcy courts and an improved weighted caseload formula for determining judgeship needs.

Since the release of the new Data-Enabled Forms Standard for Bankruptcy Petitions, Schedules, Statement of Financial Affairs and the Current Monthly Income Statement (Means Test) in September 2005, the Program has received approximately eighty data-enabled forms filed through CM/ECF. It appears only one vendor, Puritas Springs, incorporated the new standard in its software package. Some of the other vendors floated a few "test" forms through the process, but none appear to be actively integrating the new standard.

The USTP, in conjunction with the AOUSC, reached out to the software vendor community, where possible, to assist them with implementing the new standard. A vendor fair was held at the AOUSC in December 2005. About thirty individuals attended in person with another twenty connecting via teleconference. The meeting minutes of the vendor fair are posted at http://www.usdoj.gov/ust/eo/bapcpa/defs/index.htm.

The USTP also established an e-mail group to notify the software vendor community of new information posted on the Program's Web site. The Program notified this e-mail group at the end of January 2006 of the new Census and IRS means test data posted, and the vendors updated their programs to include that data. The AOUSC and the USTP held another vendor meeting in March

2006 to continue the dialogue with the software vendor community.

The Program anticipates that, once implemented, the new automated process using smart forms will eliminate thousands of hours attributed to the manual review of forms by USTP and court staff. It will also incorporate more comprehensive case data into the national repository and provide detailed national statistics on topics such as the amounts and categories of assets and liabilities in bankruptcy cases.

While the USTP made substantial progress in a relatively short period of time, it will not be able to meet all of BAPCPA's data collection requirements unless the majority of the software vendors implement the new data-enabled forms standard immediately. Specifically, without smart forms, the USTP cannot programmatically identify the cases for the targeted audits that are scheduled to begin during October 2006, or electronically access the income and expense data for the IRS Expense Guidelines Study. As a result, the USTP is reopening discussions with the AOUSC regarding implementing a mandatory data-enabled form standard as soon as possible.

In the meantime, the Program has enhanced its existing information collection systems to download the relevant PDFs (Petitions, Schedules, Statements of Financial Affairs, and the Current Monthly Income Statement) and organize them in a new nationwide application that allows Program staff to manage the means test review, view associated PDFs, record review findings, and track filing deadlines. Viewing the PDFs through the new means test review application does not incur any PACER fees, since the PDFs are stored on USTP systems.

Implementing BAPCPA's data collection requirements has provided the Program with the impetus to forge new technical solutions. It has also provided an opportunity for the USTP and the AOUSC to work collaboratively, and to form new working relationships that will have long-lasting benefits to the Program and the Department of Justice.❖

ABOUT THE AUTHOR

❏**Monique Klaus Bourque** has been the Chief Information Officer for the Program since April 2002. She is responsible for the information technology systems, and efforts to modernize the automated systems and establish nationwide information technology initiatives. Monique came to the Program from the Department of Justice's Civil Division, where she had worked since 1991, first as a Case Manager in the Office of Litigation Support and later as the Chief of the Computer Support Branch. Monique was one of the recipients of the Attorney General's Award for Excellence in Information Technology in 2001.✠

(Official Form 1) (10/05)

United States Bankruptcy Court [district name] District of [district state]	Voluntary Petition
Name of Debtor (if individual, enter Last, First, Middle): [debtor full name]	Name of Joint Debtor (Spouse) (Last, First, Middle): [joint debtor full name]
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names): [debtor aliases]	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names): [joint debtor address]
Last four digits of Soc. Sec./Complete EIN or other Tax I.D. No. (if more than one, state all): [debtor tax ID]	Last four digits of Soc. Sec./Complete EIN or other Tax I.D. No. (if more than one, state all): [joint debtor tax ID]
Street Address of Debtor (No. & Street, City, and State): [debtor address street] ZIPCODE	Street Address of Joint Debtor (No. & Street, City, and State): [joint debtor address street] ZIPCODE
County of Residence or of the Principal Place of Business: [debtor county of residence]	County of Residence or of the Principal Place of Business: [joint debtor county of residence]
Mailing Address of Debtor (if different from street address): [debtor address mailing] ZIPCODE	Mailing Address of Joint Debtor (if different from street address): [joint debtor address mailing] ZIPCODE
Location of Principal Assets of Business Debtor (if different from street address above): [joint debtor principal assets]	ZIPCODE

Figure 1

NOTES

Request for Subscription Update

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