

ABI ONE-YEAR ANNIVERSARY PROGRAM ON BAPCPA

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MAKING BANKRUPTCY REFORM WORK

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- A. Overall, the systems established to implement and enforce the reform law are proving workable for all stakeholders – debtors, creditors, and the general public.
- B. The number and patterns of bankruptcy filings changed significantly after enactment of the BAPCPA. *(Numbers exclude judicial districts in North Carolina and Alabama which are outside the jurisdiction of the USTP).*
 - 1. In FY 2006 (i.e., October 1, 2005, through September 30, 2006), total filings are expected to be slightly less than 1.1 million.
 - a. Approximately 600,000 cases were filed during the two weeks prior to the October 17, 2005, general effective date of the BAPCPA.
 - b. In the latter part of FY 2006, filing rates were approximately 40 percent of the pre-BAPCPA rates.
 - c. The number of cases filed per week is gradually rising.
 - 2. Chapter 13 filings represent a higher proportion of total consumer filings.
 - a. In the latter part of FY 2006, chapter 13 filing rates have been well above 60 percent of the pre-BAPCPA rates.
 - b. In the latter part of FY 2006, chapter 13 cases have represented 40 percent of total filings compared to a historic average of 27.4 percent.
 - 3. Chapter 11 filings have decreased post-BAPCPA by nearly 25 percent compared to FY 2005.
- C. Means testing – the cornerstone of reform.
 - 1. 11 U.S.C. § 707(b) and other provisions provide a more objective formula to determine whether a case is “presumed abusive.”

2. Preliminary conclusions are that the means test is workable.
 - a. IRS and Census Bureau information is readily available to assist in making required calculations.
 - b. New Official Forms are helpful, although continuing education of debtors' counsel is needed to improve quality.
 - c. True test will come when filings return to historical levels.
 - d. "Smart forms" with "data tags" need to be mandated by the court to automate procedures.
 3. The means test is a promising approach to identifying abuse.
 - a. Of the individual debtors who filed from October 17, 2005, through June 30, 2006, 95 percent were below the median income.
 - b. Of those above the median, the United States Trustees determined that slightly less than 10 percent were "presumed abusive."
 - c. Of the presumed abuse cases that did not voluntarily dismiss or convert, United States Trustees filed motions to dismiss in about three-quarters of the cases and declined to file in about one-quarter of the cases.
 - d. These data suggest that the statute provides the United States Trustees with sufficient discretion so that decisions on filing motions to dismiss can be made on a case-by-case basis and not solely based upon the statutory formula.
- D. Financial education – credit counseling and debtor education.
1. Important consumer protection feature designed to ensure that debtors enter bankruptcy knowing what their options are and exit bankruptcy with the tools to avoid future financial catastrophe.
 2. Entirely new responsibility for the United States Trustee Program.
 - a. First priority of the Program was to screen out those who might seek to defraud debtors.
 - b. Approval and monitoring criteria were developed with enormous assistance from the Internal Revenue Service and the Federal Trade Commission.
 - c. Post-approval, on-site reviews of agencies have commenced.

3. There are currently 153 approved credit counseling agencies and 275 approved debtor education providers.
 - a. As of the end of August, over 1,000 applications and re-applications from credit counselors and debtor educators had been received.
 - (1) About two-thirds of the applications were approved; and
 - (2) About one-third of the applications were denied, voluntarily withdrawn, or were still under review.
4. Available data suggests that approximately 10 percent of those receiving credit counseling certificates do not file for bankruptcy relief.
5. United States Trustees play a significant role in enforcing the credit counseling requirements.
 - a. United States Trustees have exercised sound discretion in deciding when to bring actions or to urge dismissal pursuant to court Orders to Show Cause.
 - b. Debtors, their counsel, and enforcers of the credit counseling requirement will be aided by the recent action of the Judicial Conference to issue Exhibit D to Official Form 1.
 - (1) The new Official Form is effective on October 1, 2006.
 - (2) The new Official Form puts debtors and their counsel on notice of the credit counseling requirements and requires them to check one of five boxes demonstrating compliance.

E. Debtor audits.

1. By law, the United States Trustee Program must commence a series of debtor audits designed to verify the accuracy of schedules filed by individual chapters 7 and 13 debtors.
2. This regimen of audits will help to identify cases of fraud and abuse, enhance deterrence, and provide baseline data to gauge the magnitude of fraud, abuse, and errors in the bankruptcy system.
3. In FY 2007, contractors will be utilized to conduct approximately 7,000 audits, including 6,000 random audits and 1,000 targeted audits of cases in which debtors have unusually high income or expenses.

4. Debtors selected for audit (or their counsel) will receive a notification of audit and request for documents.
 - a. Most audits can be completed within 70 days after a debtor's schedules are filed.
 - b. Reports will be filed with the court by the auditors.
 - c. Extensions of time to object to discharge will be sought only in unusual circumstances.
 5. The statute provides that a discharge may be revoked if the auditor finds a material misstatement not adequately explained or if the debtor does not adequately explain a failure to provide information to the auditor.
- F. Chapter 11 and other responsibilities.
1. United States Trustees carry out numerous other responsibilities under BAPCPA.
 - a. In the area of chapter 11 small business case administration, new duties include such matters as initial debtor interviews, streamlined financial reporting requirements, and policing new deadlines.
 - b. Studies on debtor education, the use of IRS standards in means testing, and the impact of the new statutory definition of household goods are being conducted.
 2. United States Trustees also help enforce new provisions designed to enhance management accountability in large business reorganization cases.
 - a. United States Trustees have opposed executive compensation programs under 11 U.S.C. § 503(c) to curtail excessively generous severance packages, key employee retention plans, success bonuses, and similar arrangements for the benefit of senior executives and insiders.
 - b. United States Trustees have brought actions to replace management under the lower threshold requirement of 11 U.S.C. § 1104(e) and take other enforcement actions in chapter 11 cases.
- G. On the one year anniversary of the BAPCPA, it is important for all bankruptcy professionals to elevate the public discussion about the law and to work together to make the system more effective.