

CHAPTER 7 BANKRUPTCY

I. REVIEW DEBT RELIEF AGENCY DISCLOSURE REQUIREMENTS AND RESTRICTIONS

Title 11 *U.S.C.* §§526, 527, and 528 of the Bankruptcy Code were added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to classify certain persons as “debt relief agencies” and to impose record-keeping and disclosure requirements on those so classified. 11 *U.S.C.* §101(12A) defines a debt relief agency as “any person who provides any bankruptcy assistance to an assisted person in return for payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110” (with certain listed exceptions). An “assisted person” is a consumer debtor having nonexempt property with a value of less than \$150,000. 11 *U.S.C.* §101(3). “Bankruptcy assistance” is defined to include counsel, advice, preparation of documents, appearance in the case, attendance at the meeting of creditors, and legal representation. 11 *U.S.C.* §101(4A).

Although these revisions to the Code do not explicitly include “attorney” within their definitions, the language would lead one to believe that the attorney for the average consumer debtor qualifies as a debt relief agency under this definition and must comply with the requirements and restrictions of 11 *U.S.C.* §§526, 527, and 528. The Bankruptcy Court for the Southern District of Georgia ruled on this issue (on its own motion) in *In re Attorneys at Law and Debt Relief Agencies*, 332 BR 66 (Bankr. S.D. Ga. 2005), holding that attorneys were not debt relief agencies. However, the Executive Office of the United States Trustee has appealed this ruling, contending that attorneys must comply with the debt relief agency provisions.



Although, as noted by the court, the new provisions regarding debt relief agencies have been described as slipshod and absurd, and even though possibly unconstitutional, legal scholars have recommended that lawyers comply with the Act’s mandates. See 14 *Andrews Bankr. Litig. Rep.* 2 (Nov. 2005). Numerous challenges to the debt relief agency provisions were pending when this manual was sent to publication, so the attorney needs to carefully monitor this issue. Meanwhile, be aware that a debt relief agency’s failure to comply with 11 *U.S.C.* §§526, 527, or 528 may result in liability for damages, along with repayment of fees and costs associated with any bankruptcy assistance provided. 11 *U.S.C.* §526(c).

To ensure compliance with the Act’s provisions, attorneys advising a debtor must carefully review the requirements of 11 *U.S.C.* §526. Once a debtor has requested a consultation regarding bankruptcy, the attorney must explain to the debtor the proposed services to be provided and fees to

be charged, and must specifically disclose certain benefits and risks associated with a bankruptcy filing. The attorney must also comply with specified advertising requirements.

11 *U.S.C.* §§526 and 527 also require that the attorney, at all times, advise the debtor to completely and accurately disclose all assets and liabilities; that the attorney not counsel the debtor to make untrue or misleading statements in connection with a bankruptcy case but rather advise the debtor in writing that the petition and other information provided must be complete, accurate, and truthful; and that the information is subject to an audit. For specific fee and service disclosures, advertising requirements, and other restrictions, see 11 *U.S.C.* §§527 and 528 and Appendix A of this manual. Specific notices that must be given to the debtor or to the public are also set forth in these provisions.



The audit provisions of BAPCPA will become effective in October 2006 (18 months after enactment of the Act). See 28 *U.S.C.* §586(f).

A person who merely prepares a petition for filing is referred to as a “bankruptcy petition preparer” and is subject to both the debt relief agency provisions and increased restrictions and disclosure requirements under revised 11 *U.S.C.* §110.

II. BEFORE FILING: INITIAL CONSIDERATIONS

A. DETERMINE WHETHER CHAPTER 7 RELIEF IS AVAILABLE TO YOUR CLIENT

1. NATURE OF CHAPTER 7

Chapter 7 bankruptcy is a straight liquidation proceeding for an individual. In a “consumer” Chapter 7, the individual has debts that were incurred primarily for personal, family, or household purposes. 11 *U.S.C.* §101(8).



A corporation may file Chapter 7, but no discharge is granted. See 11 *U.S.C.* §727(a)(1). Only an orderly liquidation of assets occurs.

Under Chapter 7, the debtor receives a discharge from all dischargeable debts and turns over all nonexempt property, which the bankruptcy case trustee then converts to cash for distribution to the creditors. Most Chapter 7 bankruptcies involve no assets, or only minimal amounts of nonexempt property.



In each bankruptcy case, the United States Trustee appoints an impartial case trustee. This trustee administers the case and liquidates the debtor’s nonexempt assets to maximize the return to the debtor’s unsecured creditors. See 11 *U.S.C.* §§701, 702, 704. The U.S. Trustee retains oversight authority. 28 *U.S.C.* §586. Some of the case trustee’s and U.S. Trustee’s duties are outlined at II.B.5 on page 15.

2. THRESHOLD
STATUTORY
REQUIREMENTS

Interview the debtor to determine whether he or she qualifies as a debtor for bankruptcy relief.

a. U.S. Residence
Or Property

A Chapter 7 debtor must reside or have a domicile, a place of business, or property in the United States, or be a municipality. 11 *U.S.C.* §109(a).



A discussion of Florida domiciles, in particular, is contained at II.D.2. on page 25.

b. Previous
Chapter 7 Or
Chapter 11
Discharge

If the debtor has been granted a Chapter 7 or Chapter 11 discharge in a case commenced within the preceding eight years, a discharge under Chapter 7 is not available; thus filing will not benefit the debtor. 11 *U.S.C.* §727(a)(8).



The eight-year period runs from the commencement of the case, not the discharge date.

c. Previous
Chapter 12 Or
Chapter 13
Discharge

If the debtor has been granted a Chapter 12 or Chapter 13 discharge in a case commenced within the preceding six years, Chapter 7 relief is not available unless either 100% of the unsecured debt was paid, or 70% of the total allowed unsecured debt was paid, and the plan was proposed in good faith and represented the debtor's "best effort." 11 *U.S.C.* §727(a)(9).

d. Recent
Bankruptcy
Dismissal

If the debtor has had any bankruptcy filing dismissed by the court within the preceding 180 days and the dismissal was because the debtor willfully failed to appear or to abide by court orders, or it was dismissed at the debtor's request after a creditor attempted to lift the automatic stay, the debtor cannot file again for 180 days from the dismissal. 11 *U.S.C.* §109(g).

If the case was dismissed for other reasons, the debtor can refile before 180 days.

e. Credit
Counseling

Under BAPCPA, a Chapter 7 debtor must, within 180 days preceding the bankruptcy filing date, receive an individual or group briefing from a nonprofit budget and credit counseling agency that has been approved by the U.S. Trustee. 11 *U.S.C.* §109(h)(1). This is the "ticket in" to bankruptcy. Requirements for agency approval are set forth at 11 *U.S.C.* §111(b).

The briefing may be conducted by telephone or on the Internet. During the briefing, the debtor must be advised of the opportunities for available credit counseling as a possible alternative to bankruptcy filing, and the agency must help the debtor prepare a related budget/repayment analysis. 11 *U.S.C.* §109(h)(1).

The briefing may be waived if the debtor resides in a district where the U.S. Trustee has determined that approved agencies are not reasonably able to provide counseling services. 11 *U.S.C.* §109(h)(2)(A).



Most credit counseling services are available online, so waivers for inability to provide services have been rare. Some attorneys have facilitated the client's access to online credit counseling services by setting up computer stations for clients in their offices.

The credit counseling requirement may also be waived for 30 days postpetition if the debtor requested counseling but was unable to obtain it within five days of the filing date. 11 *U.S.C.* §109(h)(3)(A). The court may extend this time for an additional 15 days for cause. 11 *U.S.C.* §109(h)(3)(B). The required credit counseling does not apply to an incapacitated or disabled debtor, or one in active military service in a combat zone. 11 *U.S.C.* §109(h)(4).

The debtor must file a certificate of the credit counseling agency describing the services provided, and if the credit counseling agency devises a repayment plan, the debtor must submit the plan to the court. 11 *U.S.C.* §521(b).



This prepetition debt counseling is in addition to the instructional course regarding personal financial management that the debtor is required to take in order to receive a discharge of debts after the case has proceeded. See IV.E.1. on page 73 with regard to the latter. If a particular agency offers both the debt counseling service and the financial education course, the debtor may be able to negotiate a discount by agreeing to obtain both services from the same agency.

To find an approved agency or debt counselor in your area (or online), go to the U.S. Trustee's website at www.usdoj.gov/ust, and click "Credit Counseling and Debtor Education." Alternatively, you can ask the local bankruptcy clerk's office to provide a list of approved agencies in your area (or online) that meet minimum standards specified in 11 *U.S.C.* §111(c). The clerk is required by 11 *U.S.C.* §111(a) to maintain such a list.

3. DEBTOR'S SOLVENCY AND INCOME

- a. Solvency Evaluate solvency with a "balance sheet" test. That is, are the debts greater than the fair market value of the assets, exclusive of exempt property or fraudulently transferred, concealed, or removed property? 11 *U.S.C.* §101(32).



The “fair market value” as referenced here and in the remainder of this *FASTRAIN*[™] means replacement cost; that is, what it would cost to replace the item if purchased from a retail vendor, taking into account the property’s age and condition (*e.g.*, when dealing with a 20-year-old bed, the fair market value of that bed is not the price of a new bed, but rather what it would cost to replace the old bed with a comparable 20-year-old bed, in the same condition, if obtained from a resale shop).

There is no statutory requirement that a Chapter 7 debtor be insolvent, but 11 *U.S.C.* §707(b) does allow the court to dismiss a consumer case if it finds that the granting of relief would be an abuse of the bankruptcy provisions.

b. Current Monthly
Income Analysis

Newly enacted provisions of BAPCPA require that the debtor’s income be examined to see if the debtor is able to pay creditors under a Chapter 13 plan rather than liquidate and wipe out debt under a Chapter 7 bankruptcy filing. If it is determined that the debtor has sufficient disposable income to make payments under a Chapter 13 plan, filing a Chapter 7 petition may constitute an abuse of the bankruptcy provisions. In this situation, the debtor is not eligible to file under Chapter 7.

When analyzing the debtor’s income to see if the debtor is eligible to file a Chapter 7 petition, you must first determine the debtor’s “current monthly income” by averaging the debtor’s income over the past six months. See 11 *U.S.C.* §101(10A), which defines “current monthly income” as the average monthly income received by the debtor (and spouse, if filing jointly) for the preceding six months ending on the last day of the calendar month preceding the filing date or on the date the court determines the debtor’s current income.



Timing of the petition may be an issue when looking at this six-month period. For example, if the debtor received a bonus or nonrecurring overtime during the six months, this can inflate the average income and work a hardship on the debtor. Likewise, if the debtor lost a job within the past few weeks, averaging the monthly income over six months will result in a higher “current monthly income” than the debtor is actually earning presently. In either situation, if the bankruptcy filing cannot be timed to avoid the discrepancy, the debtor will be given an opportunity to explain the changed income if a presumption of abuse arises. See II.B.2.d. on page 10.

Current monthly income includes amounts regularly paid by others for the debtor’s or dependent’s household expenses, but excludes social security payments and payments received by victims of war crimes, crimes against humanity, or terrorism.



The debtor will need to provide proof of income by submitting the federal income tax return (if one was required) for the last tax year before filing the petition. 11 *U.S.C.* §521(e)(2)(A). If the debtor has not filed a required return, he or she must do so before proceeding with the bankruptcy, or must explain circumstances beyond the control of the debtor that led to the failure to file the return. 11 *U.S.C.* §521(e)(2)(B).