PRELIMINARY BANKRUPTCY ISSUES

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3. 28 USC § 152 Appointment of bankruptcy judges

a) Bankruptcy judges shall serve as judicial officers of the US district court established under Article III of the US constitution

II. The Bankruptcy Code 11 USC § 101 et seq. (New BAPCPA sections underlined).

A. Chapter 1 – General Provisions

1. 101 – Definitions

a) Debt Relief Agency – who is a debt relief agent?

Under the Bankruptcy Abuse prevention and Consumer Protection Act of 2005, Congress determined (among other things) that it should specifically define and hold accountable persons that assist potential debtors in counseling and filing bankruptcy. Unfortunately, this exercise created more uncertainty as to the meaning and scope of an attorney's responsibilities as concerns persons that are considering filing bankruptcy. It also raises the issue of whether a non-bankruptcy attorney falls within the definition of "debt relief agency" during the course of representation of the client that may not even be initially considering bankruptcy relief.

One may ask what the ramifications are in being labeled a "Debt Relief Agency?" The Code has three brand-new sections, 11 USC § 526, 527, and 528 entitled "Restrictions on Debt Relief Agencies", "Disclosures" and "Requirements for Debt Relief Agencies" respectively. I include the complete text of these sections as an exhibit to this manuscript. There are numerous do's and don't's for persons and firms labeled "debt relief agencies," including restrictions on advertising. The Act goes so far as to require DRA's to include

specific language in any advertisement (which would include yellow page advertising) concerning credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or the inability to pay and consumer debt. The Code, in section 528(b)(2), reads:

> *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-*
>
> *(A) disclose clearly and conspicuously in such advertisement that the assistance may involve bankruptcy relief under this title; and*
>
> *(B) include the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." or a substantially similar statement.*

This subsection is just a small part of DRA requirements for notice to the public, as well as interaction with the public. Refer to the exhibits attached for the entire statute as codified.

Now that we completely understand what a DRA is, let's dissect whether you, a non-bankruptcy practitioner, are a Debt Relief Agency. 11 USC § 101(12A) reads:

The term "Debt Relief Agency" means 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 but does not include-

(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) *a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;*

(C) *a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;*

(D) *a depository institution (as defined in section 3 of the FDIA), or any Federal credit union or State credit union, or any affiliate or subsidiary of such depository institution or credit union; or*

(E) *an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity*

Before making a final decision as to whether you are covered by this section, you should look at a few more definitions. The first clause of this section has three different phrases and words that are also defined in the Code. A "*person*" includes an individual, partnership, and corporation, but does not include a governmental unit except in certain circumstances more specifically set forth in § 101(41). Next, the phrase "*bankruptcy assistance*" is defined as follows:

§ 101(4A) *The term "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.* (emphasis added)

And just when you thought we were finished, we must look at the definition of "assisted person", especially since it is used not only in the definition of a "debt relief agency," but also in the definition of "bankruptcy assistance." An "assisted person" is defined as:

§ 101(3) *The term "assisted person" means any person whose debts consist of primarily consumer debts and the value of whose nonexempt property is less than $150,000.00.*

Arguably, this definition includes practically all consumers living in the US that have financial problems and that are eligible for consumer debt relief under the Code (the eligibility requirements for filing are covered later in this seminar). Interestingly, this definition even covers persons who may not be looking for bankruptcy relief, but may have domestic issues, workers' compensation or personal injury cases, lender liability claims, among other types of non-bankruptcy claims and issues.

Just imagine a consultation with a prospective domestic client regarding a potential equitable distribution claim. One of the first inquiries as a domestic attorney is to decide whether an ED claim is viable. Second, you must analyze the assets and liabilities of the parties, then advise that client of all the options that are available concerning the assets and liabilities. Some of that advice may not be sufficient or complete without some discussion of whether insolvency relief is appropriate. The same can be said for any area of the law that involves a client's (assisted person) financial situation since most claims brought in most areas of the law involve money damages, payment of money or receipt of money. Therefore, it could be argued that you, the non-bankruptcy attorney are subject to the provisions of the Code that concern providing advice or assistance to a client, whether or not his/her purpose in consulting with you initially involves bankruptcy at all.

To the non-bankruptcy practitioner, the amended definitions in the Code certainly cast a wide net over attorneys, arguably including those that have no intention of ever filing a petition for bankruptcy relief. In fact, these "consumer protection" provisions could have a chilling effect on attorneys giving advice to clients.

b) You Choose – Zealous Representation or Obey the Code?

There are several motions/adversary proceedings being filed across the country asking the courts to interpret these provisions, with some asking that attorneys be excluded from the definition of "Debt Relief Agency," mainly because the definitions can be construed to prohibit attorneys from zealously representing their clients. Attorneys are stuck between the proverbial "rock and a

hard place" if one construes the definitions literally, for there are parts of sections 526-528 that prohibit attorneys from providing adequate and accurate advice. For example, 11 USC § 526(a)(4) prohibits a debt relief agency from advising an "assisted person" or "prospective assisted person"[which, by the way, is not defined in the Code] to "incur more debt in contemplation of such person filing a case under this title. . ."

If you assume that a non-bankruptcy attorney could be defined as a DRA, and if you advise that domestic client to refinance or consolidate some of their debt, which may be the best advice for their situation, you could run afoul of the Code, subjecting you to action by the consumer protection division of the state attorney general's office [see 11 USC § 526(c)(3)] as well as other state civil remedies.

Where does this leave the non-bankruptcy practitioner? It is unclear whether the state attorney general's office would actually bring such a case against a DRA, however, until a case is ripe for determination, that is, a DRA gave certain advice that may run afoul of this section, this will be an academic exercise. The alternative to this is possibly not adequately or zealously representing your client by providing adequate or accurate advice, subjecting the attorney to discipline by the State Bar. Not much of a choice, is it?

2. 102 – Rules of Construction

3. 109 – Who may be a debtor

4. 111 – Nonprofit budget and credit counseling agencies; financial management instructional courses

5. 112 – Prohibition on disclosure of name of minor children

B. Chapter 3 – Case Administration

1. Subchapter I Commencement of a Case

a) 301 – *Voluntary Cases* –

> *(1) A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.*
>
> *(2) The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.*

(*Please see the exhibits attached to this manuscript for an explanation of the petition and required schedules necessary to commence and maintain a voluntary case.*)

b) 303 – Involuntary Cases – (see exhibit attached for a complete reading of this section)

An involuntary case is rare, however, it can be a valuable tool for creditors to force a debtor into fair and equitable treatment of said debtor's obligations. Simply stated, the code allows an involuntary case only in chapters 7 and 11, and it also requires there to be three or more entities that are holders of a noncontingent claims if the noncontingent undisputed claims aggregate at least $12,300 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims. If there are fewer that 12 such holders, (subject to specific exclusions found in the statute), then one holder of a claim as defined above may file an involuntary petition.

An involuntary petition may be an effective tool for creditors in situations where a corporation is being mismanaged or a partnership has division among its partners as to the operation of the partnership. It can also be effective simply as a threat to a debtor in negotiations with creditors. The existence of an involuntary filing can tip the scales for a potential debtor to seek bankruptcy relief or to offer a workout outside bankruptcy.

Some of the difficulties in amassing three or more holders involve any one creditor's knowledge of the existence of another holder, the amount of the holder's claim, whether the holder's claim is contingent, and whether the value of the debtor's property provides sufficient value to qualify under this section.

C. Chapter 5 – Creditors, Debtors and the Estate

1. Subchapter I Creditors and Claims

a) 501 – Filing Proofs of Claims or Interests

11 USC § 501 provides, in part, that a creditor may file a proof of claim, and if a creditor does not timely file a claim, and entity liable to such creditor may file one. The statute also provides that a debtor or trustee may file a claim.

A claim is defined simply as a right to payment, whether the right has been reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured or even the right to an equitable remedy under certain conditions found in 11 USC § 101(5).

Filing a proof of claim identifies a creditor's right to payment in a particular case. This filing is the creditor's opportunity to establish its position relative to the debtor, and it also provides the court and trustee (if applicable) with

information to establish that creditor's position relative to the debtor. Because of this, it is crucial that the creditor's proof of claim be filed on time and be accurate regarding the debt. A creditor with a secured claim must attach any and all proof of said security, including any note, security agreement, and evidence of security such as a deed of trust or title. The bankruptcy courts look to state law regarding the existence of a valid security instrument, whether it exists under UCC or other state law. Unsecured claimants must also provide proof that there is a debt, such as an invoice, contract, note, account statement sufficient to show the court that there is a debt owing.

Currently, in Chapter 13 cases, all proofs of claim are filed with the office of the chapter 13 trustee for each case. The clerk of court does not docket chapter 13 claims on the claims register. Creditors must file a claim on time with the appropriate trustee's office with all the appropriate documentation to ensure payment on their claim. Otherwise, the creditor is subject to objection by the trustee or the debtor if the information provided is inaccurate or insufficient to receive treatment according to the filed claim.

Chapter 7 cases are treated differently than Chapter 13. In chapter 7 cases, a creditor should not file a claim until it receives notice from the court that assets have been located and that the Chapter 7 trustee intends to reduce the asset to money and pay unsecured creditors. Once that notice has been sent to creditors, they have a certain time frame within which a claim must be filed. The same rules apply to the claim filing in that a creditor must substantiate its claim sufficiently to avoid an objection by the trustee or the debtor. Unlike Chapter 13 cases, the clerk's office is the appropriate venue for filing a chapter 7 claim.

Claims in Chapter 11 cases are likewise filed with the clerk of court and made a part of the claims register, accessible on the court's website.

Within the next year (and most likely by the end of this year) all bankruptcy courts will require electronic filing of proofs of claim in all chapters. Some bankruptcy courts require electronic filing already. Current information about these requirements can be found at each district's website. This is crucial for creditors that do not have electronic filing access, as well as attorney that represent creditors.

b) 502 – Allowance of Claims or Interests

c) 506 – Determination of Secured Status

d) 507 – Priorities

2. Subchapter II Debtor's Duties and Benefits

a) 521 – Debtor's Duties

b) 522 – Exemptions

c) 523 – Exceptions to Discharge (main goal of debtor – to get the discharge – creditor tries to except their debt – last resort for most creditors)

d) 526 – Restrictions on Debt Relief Agencies

e) 527 – Disclosures

f) 528 – Requirements for Debt Relief Agencies

The purpose of this manuscript is provide the non-bankruptcy practitioner with a thumbnail sketch of some of the more general issues that confront non-bankruptcy practitioners. Obviously, there are several sections of the code not covered that may apply to your client, and the best advice that can be offered is to refer your prospective creditor or debtor client to a competent bankruptcy attorney to fully protect and preserve

your client's rights in bankruptcy court. There may be instances where your client has no chance of recovery on their claim, however, more often than not, there are protections that the code affords a creditor, and following procedure set forth in the code and rules is crucial in preserving your client's rights. Before your client gives up on his/her claim in a specific case, a complete and thorough review of your client's situation by a bankruptcy attorney gives that client the best chance for recovery.