

A REVIEW OF THE NEW BANKRUPTCY LAW

Wednesday, 15 February 2006

I. One of the main purposes of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is to prohibit granting relief under Chapter 7 if the debtor's current monthly income, less expenses, multiplied by 60, is not less than the lesser of of the debtor's unsecured debt, or \$6,000, whichever is greater; or 10,000.00

A. "Current monthly income" is the income received by the debtor(s) within the last 6 months from all sources, including, but not limited to, employment, interest income, rental income and contributions to household expenses by family members residing with the debtor.

1. Social Security benefits, SSI, unemployment compensation and DPW payments are excluded.

II. Means Test Formula

A. Begins with calculation of current monthly income and deducts expenses allowed by the IRS in collecting taxes.

B. A presumption of abuse exists if the debtor's annual income exceeds the "median family income" calculated by the Bureau of the Census for the most recent year. Figures are published each August.

1. If the presumption exists, debtor may deduct amount allowed by the IRS' National Standards for food, clothing, household supplies, personal care and miscellaneous.
2. Deductions also allowed under local standards for the following:
 - i. housing and utilities; non-mortgage expense
 - ii. housing and utilities; mortgage/rental expense
 - iii. transportation; vehicle operation/public transportation expense
 - iv. transportation; ownership/lease expense for two vehicles only.
3. Debtor may deduct "necessary expenses" actually incurred for:
 - i. taxes
 - ii. mandatory payroll deductions
 - iii. life insurance
 - iv. court-ordered payments
 - v. education for employment or for a physically or mentally challenged child
 - vi. child care (note: does NOT include payments for education)
 - vii. health care (note: does NOT include health insurance premiums or expenses reimbursed by insurance)

viii. telecommunications services (cell phones, pagers, caller ID, call waiting, internet services necessary for the health and welfare of debtor or dependents.

4. Additional expense deductions are permitted for:
 - i. average monthly expenses actually incurred for health insurance, disability insurance and health savings accounts
 - ii. continued contributions to care of elderly, disabled, or chronically ill member of debtor's household or immediate family who is unable to pay such expenses.
 - iii. continued charitable contributions.
5. Debtors may also deduct expenses for:
 - i. home energy costs that exceed the IRS Local Standards, provided he supplies documentation showing the expense is reasonable and necessary.
 - ii. Education expenses for dependents under age 18, not to exceed \$125.00 per child. Documentation as in i., above, is required.
 - iii. Additional food and clothing expenses, provided these do not exceed the IRS National Standards by more than 5%. Documentation as in i., above, is necessary.

III. Section 521 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requires the filing of additional documents with the bankruptcy court. Please note that it is wise to file with the petition; failure to file within 45 days after the petition is filed will result in dismissal!)

- A. Certification of completion of a briefing by an approved credit counseling agency that outlines opportunities for credit counseling and assists the debtor in performing a related budget analysis within 180 days of filing the petition.
 1. The credit counseling agency must be approved by the US Trustee (a list of such agencies is available from the bankruptcy clerk's office)
 2. Counseling shall be available regardless of debtor's ability to pay.
 3. The maximum fee to be charged for counseling shall not exceed \$50.00.
- B. Copies of "payment advices" (pay stubs) received by debtor from his employer within 60 days of filing the petition.
(Note: pay stubs usually have debtor's Social Security number; redact before filing!)
- C. Copies of income tax returns for two years prior to filing.

D. Means test calculation form

E. In Chapter 13 cases, debtors must file annual statements of income and expenses in the preceding tax year, showing how these amounts are calculated.

1. Statements must be filed beginning one year after the case is filed, or 90 days after the end of “such tax year”, whichever is later. Subsequent annual statements must be filed after the plan is confirmed at least 45 days before the anniversary of confirmation.

2. Statements must disclose:

- i. all amounts and sources of income
- ii. the identity of anyone who shares with the debtor the responsibility for support of a dependent of the debtor
- iii. the identity of any person who contributes to the debtor’s household and the amounts contributed

2. Statements must be available to:

- i. US Trustee
- ii. Trustee
- iii. any party in interest

F. To receive a discharge in either a Chapter 7 or Chapter 13 case, debtors must provide proof of completion of credit education (budgeting) course.

1. Courses are available through approved credit counseling agencies, teleconferences or internet.

2. Courses must be given regardless of ability to pay.

3. Maximum allowable fee is \$50.00.

4. Courses must be approved by US Trustee.

IV. Changes in Exemptions

A. Retirement funds

1. Includes funds under I.R.C. sections 401, 403, 408, 408A, 414, 457 or 501(a) (pension, profit-sharing and stock bonus plans; employee annuities; IRAs (including Roth IRAs); deferred compensation plans of state, local government and tax-exempt organizations; certain trusts.

i. This is important to consider as the new exemption category covers exemptions under both state and federal non-bankruptcy law. Therefore, 11 U.S.C. section 522(b) (3) (c) should control over any state law that does not exempt retirement funds or offers less protection.

ii. There is a \$1,000,000.00 cap on aggregate interest in IRAs established under IRC section 408 or 408A; however, the cap does not apply to SEP or SIMPLE IRAs, rollover contributions or earnings thereon.

V. Changes in Automatic Stay

A. Limits on individual chapter 7, 13, or 11 cases if the individual debtor's case was dismissed within one year prior to the new filing

EXCEPTION: this limit does not apply if the initial filing was dismissed under section 707(b), and the new filing is not a chapter 7 case.

1. The stay expires within 30 days after filing unless extended by the court on motion and hearing before the 30 days expires. The stay may be extended to some or all creditors.

2. Extension likely to be granted if the case was filed in good faith.

3. Presumption of bad faith filing exists if:

i. More than one case involving the debtor was pending in the year before filing; or

ii. The reason a case was dismissed within the preceding year was failure to file required documents without substantial excuse; (NOTE: negligence on part of an attorney may be substantial excuse!) or

iii. Debtor failed to provide court-ordered adequate protection

iv. Debtor failed to comply with terms of a confirmed plan; or

v. There has been no substantial change in circumstances; or

vi. If the request for relief by a creditor in a prior case was still pending when the case was dismissed.

B. Filings after prior discharge

1. Debtors may file a chapter 7 case once every eight (8) years, as opposed to once every six (6) years.

2. No corresponding amendment with respect to chapter 13 cases.

C. Discharge in Chapter 13 cases

1. May not be entered if a debtor received a discharge in a chapter 7, 11, or 13 case that was filed within four (4) years prior to the order granting relief in the chapter 13 case.

2. May not be entered if the debtor received a discharge in prior chapter 13 case that was filed within two (2) years prior to the chapter 13 order for relief.

V. Family Law Provisions

A. "Domestic support obligation" is still "in the nature of alimony, maintenance or support", but has been broadened to include

1. both pre-petition and post-petition obligations, as well as any interest that has accrued on the debt under any applicable non-bankruptcy law.

2. obligations owed to a spouse, former spouse or child of debtor, the child's parent or legal guardian or responsible relative.

3. obligations owed to governmental units.

4. obligations assigned to nongovernmental units if voluntarily assigned for purposes of collection.

B. Priority of domestic support obligations

1. ALL obligations are first priority under section 507(a)

2. First among first-priority debts are those listed in A1-A4, above

3. Second among first-priority debts are those assigned to a governmental unit (other than for purposes of collection) or owed directly to a governmental unit under applicable non-bankruptcy law.

4. The trustee's administrative expenses for administering the assets for such claims have "super-first" priority; that is higher priority than the obligations in A1-A4.

C. Automatic stay changes

1. Does not apply to commencement or continuation of proceedings with respect to withholding income from the property of the estate or property of a debtor for a domestic support obligation.

2. Does not apply to interception of tax refunds to pay a domestic support obligation.
3. Does not apply to permit reporting a domestic support obligation to a credit reporting agency in order to collect the obligation.
4. Does not apply to actions to enforce medical support.

D. Dischargeability changes

1. All domestic support obligations are non-dischargeable in all chapters.
2. All property settlement debts are non-dischargeable in chapter 7 cases.
3. Property settlement debts are dischargeable in chapter 13 cases.

E. Exemption changes

1. Domestic support creditors are now entitled to proceed against exempt property, including property exempt under state law. As a result, a debtor who files bankruptcy will subject property exempted by state law to possible execution.
2. If a domestic support obligation creates a lien against exempt property, such lien can no longer be avoided under 11 U.S.C. section 522(f).

F. Preference change

1. Bona fide payments of domestic support obligations are NOT considered preferences.