

# **“It’s New, But Is It Improved?”**

## **What You Need to Know About the New Bankruptcy Law DC Bar Seminar, January 19, 2006**

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# Can I still file for bankruptcy?

Yes, you can always file for bankruptcy.

## The more difficult questions to answer are:

- Will you still be able to file for Chapter 7 protection?
- Will you still receive the benefit of the “automatic stay”?
- Will you still receive a discharge of a particular debt?
- Will you still be able to keep your property?
- Will you still be able to afford to make monthly payments in Chapter 13?

# Goals of the New Bankruptcy Law

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# Keep Debtors from Filing for Bankruptcy

## **Credit Counseling Prerequisite**

- §109(h): No individual may be a debtor under Title 11 unless, within 180 days prior to the filing of the petition, the debtor has received an individual or group briefing that outlines opportunities for credit counseling and assists the debtor in performing a personal budget analysis.
- Exception:
  - Certification of “exigent circumstances.”
  - Counseling services requested but not available within 5 days of the request; and
  - Either the court approves the waiver request, OR the U.S. Trustee determines such services are not adequate or available

## **Credit Counseling Certificate Must Be Filed with the Court**

- §521(b): Individual debtor must file a certificate from the budget and credit counseling agency describing the services provided to the debtor, and the debtor must file a copy of the debt repayment plan, if any.

## **Credit Counselors Must Be Approved by the U.S. Trustee**

- §111(a): The Clerk’s office will maintain a list available to the public of non-profit budget and credit counseling agencies and personal financial management courses approved by the Office of the U.S. Trustee.

# Keep Debtors from Re-Filing Bankruptcy in the Future

## **Mandatory Debtor Education Prior to Discharge**

- §727(a)(11) and §1328(g): A debtor cannot be granted a discharge if the debtor fails to complete a debtor education course concerning personal financial management.
- Exceptions:
  - Court-determined incapacity, disability, or active military service, or
  - The debtor lives in a district in which the U.S. Trustee determines that the available courses are not adequate.

## Force More Debtors into Repayment Plans under Chapter 13

### **“Means Test” and Totality of Circumstances Test for Chapter 7**

§707(b)(2) and (3): New subsections have been added to provide for dismissal of Chapter 7 cases (or conversion to Chapter 13 with the debtor’s consent) when there is a determination of “abuse” by a debtor with primarily consumer debts.

- Abuse can be found by either—
  - §707(b)(2): A presumption of abuse based upon the factors contained in that section (a.k.a. the “Means Test,” a mathematical test), or
  - §707(b)(3): A totality of the circumstances, such as bad faith, pursuant to the factors contained in that section.

# “Means Test”

- 707(b)(2): Presumption of abuse: There is a “presumption of abuse” if, after applying the “Means Test,” —
  - The debtor’s current monthly income over 60 months, after deducting certain allowed expenses, is at least \$10,000.00, or
  - The debtor’s current monthly income over 60 months, after deducting certain allowed expenses, is less than \$10,000.00, but more than \$6,000.00 and equals at least 25% of the debtor’s non-priority unsecured debts.

# “Means Test” Expressed As Monthly Income

## Net Income

## Presumption of Abuse?

- Less than \$100.00 ----- > No.
- \$100.00 to \$166.66 ----- > Yes, if pay is 25% or more of debtor’s non-priority unsecured debt (generally Schedule F) over 60 months.
- More than \$166.66 ----- > Yes.

# Calculations Under the “Means Test”

“Current Monthly Income” under §101(10A)

- “Allowed Expenses” under  
§707(b)(2)(A)(ii), (iii), and (iv)

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= Net Income for Purposes of “Means Test”

# “Current Monthly Income”

- §101(10A): “Current Monthly Income” is defined as the average monthly income from all sources paid to the debtor, or paid on behalf of the debtor or his dependents for household expenses, during the last 6 months. Among types of income excluded: benefits received under the Social Security Act.

# “Allowed Expenses”

- §707(b)(2)(A)(ii), (iii), and (iv): “Allowed expenses” are based on the National and Local Standards and Other Necessary Expenses of the IRS’ Collection Financial Standards, plus additional expenses described in these subsections:
- (1) IRS National Standards: Establish allowances for food, clothing, personal care, and entertainment, depending on the taxpayer’s family size and location. Debtors may increase amounts allowed under the National Standards up to 5% for food and clothing if the debtor can demonstrate such need.
- (2) IRS Local Standards: Establish allowances for transportation and housing by region.

# Additional “Allowed Expenses” Under the “Means Test”

- (a) Necessary health insurance, disability insurance and health savings plans;
- (b) Continuation of expenses paid for the care of an elderly, chronically ill or disabled member of the household;
- (c) If eligible for Chapter 13, the actual administrative expenses, not to exceed 10%, of projected plan payments;
- (d) Up to \$1,500.00 per year for expenses of dependent minor child to attend a private or public elementary or secondary school if properly documented and justified;
- (e) Actual expenses for utilities in excess of allowance specified in IRS Collection Financial Standards;
- (f) Payments on secured debt determined by dividing by 60 the total payments on secured debts (including payments to cure any pre-petition arrearage) to be made during the 60-month period following the date the petition is filed;
- (g) Payments on priority debt (including child support and alimony) determined by dividing by 60 the total payments on priority debt to be made during the 60-month period following the date the petition is filed by 60; and
- (h) Continued contributions to tax-exempt charities, up to 15% of gross income.

# Debtor's Disclosure of Calculations Under the "Means Test"

- §707(b)(2)(C): The debtor is required to file with the debtor's schedule of income and expenses under §521 a statement of the debtor's current monthly income and calculations that determine whether the "presumption of abuse" arises under Section 707(b)(2)(A)(i). The statement is required to show how each amount has been calculated.

# Rebutting the Presumption of Abuse

- §707(b)(2)(B): The “presumption of abuse” may be rebutted only by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.
- To establish “special circumstances,” the debtor is required to provide an itemization, documentation, and a detailed explanation of each additional expense or adjustment of income, with an attestation under oath to the accuracy of the information.
- The calculations must reduce the debtor’s net income below the amount necessary to raise the presumption of abuse.

# Totality of Circumstances Test

- §707(b)(3): If a “presumption of abuse” does not arise or is rebutted, the court may, nonetheless, dismiss a case under §707(b) if the debtor filed the petition in bad faith or the “totality of the circumstances” of the debtor’s financial situation demonstrates abuse.
- “Totality of the circumstances” includes whether the debtor seeks to reject a personal services contract and the financial need for such rejection.

# Grant Creditors (and Chapter 7 Trustee) Rights to Seek Dismissal

## **The Rules: Standing to Seek Dismissal for Abuse**

- §707(b)(1): The U.S. Trustee, the court, or any creditor can request dismissal of a Chapter 7 case for abuse.
- §707(b)(7): However, if the debtor's income is less than the State's median income, a "presumption of abuse" motion under the "Means Test," is prohibited under all circumstances. (This prohibition aggregates the debtor's and the debtor's spouse's income regardless of whether it is a joint case unless the debtor and the debtor's spouse are separated. A certification in this regard is required.)
- §707(b)(6): Furthermore, if the debtor's income is less than the debtor's State's median income, only the judge or the U.S. Trustee may file a motion under §707(b) (on other than "Means Test" presumption of abuse grounds).

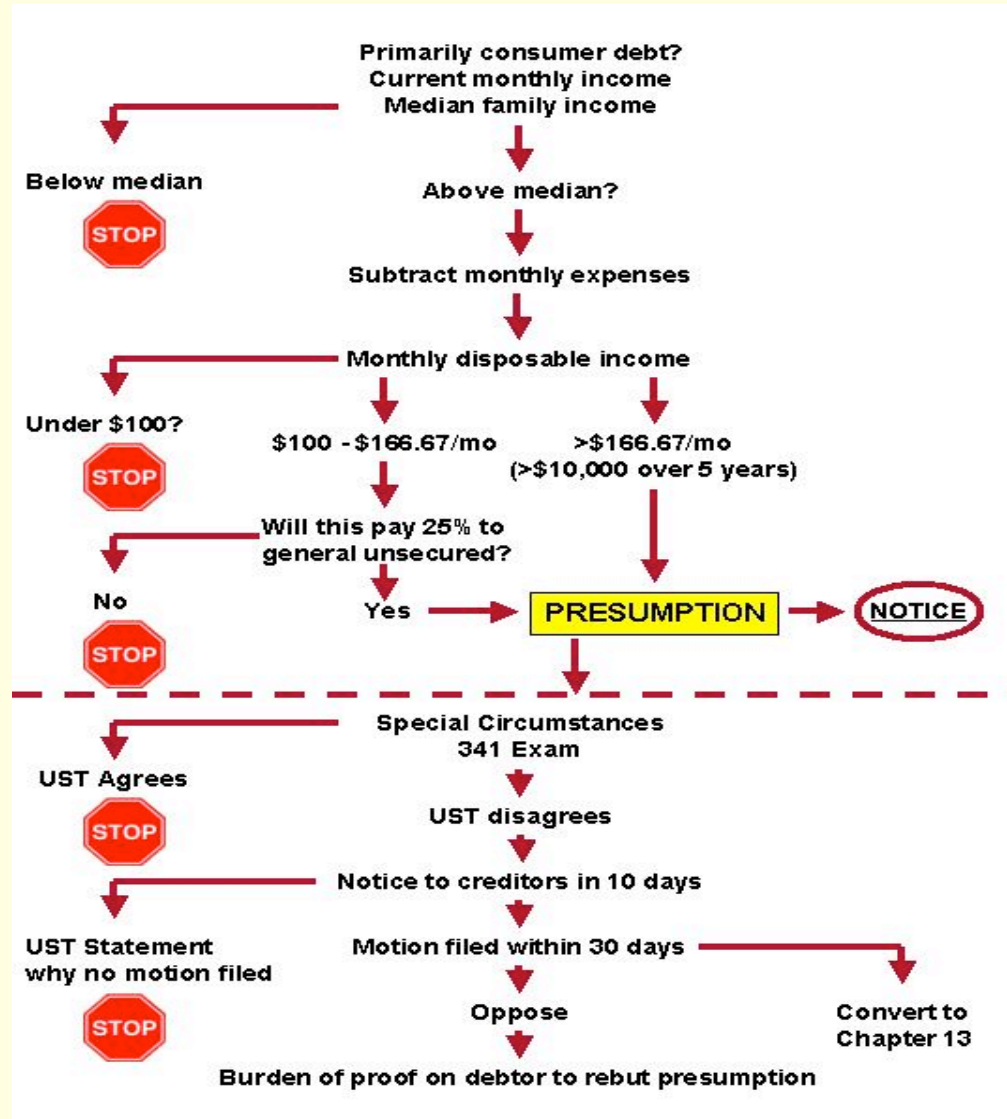
# Disabled Veterans Exception to “Means Test” Dismissal

- §707(b)(2)(D): The court may not dismiss or convert a case under the “Means Test” if the debtor is a disabled veteran and the indebtedness was incurred during active duty or while performing homeland defense activity.

## **“Safe Harbor” for Debtors with Incomes Below the State Median**

- §101(39A): “Median Family Income” is based on the Census Bureau’s reports for the most recent year. If such reporting is not available for the current year, the figures will be adjusted based on the Consumer Price Index. (The “Median Family Income” can be found at the U.S. Trustee’s website:  
<http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>.)

# Does the Debtor Qualify for Chapter 7 Under the Means Test?



Source: National Association of Consumer Bankruptcy Attorneys

# Census Bureau Median Family Income By Family Size (in 2005 inflation-adjusted dollars)

STATE	1 EARNER	2 PEOPLE	3 PEOPLE	4 PEOPLE *
DC	\$39,649.00	\$64,274.00	\$64,274.00	\$64,274.00
MD	\$48,205.00	\$60,541.00	\$72,417.00	\$88,454.00
VA	\$43,195.00	\$56,455.00	\$63,177.00	\$74,387.00

•Add \$6,300.00 for each individual in excess of 4. The expense standards can be found at the U.S. Trustee's website: (Dated: 1-19-06)

**<http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>**

# Impose Financial Documentation Requirements on Debtors

- §521(a)(1)(B): A debtor, with primarily consumer debts, is required to file with the debtor's statement of financial affairs –
  1. A certificate of an attorney or bankruptcy petition preparer that the notice required by §342(b) was provided to the debtor (or, if *pro se*, a certification of the debtor that the notice was received and read);
  2. Copies of all employer "payment advices" (pay stubs, etc.) within the 60 days prior to filing;
  3. A statement of monthly net income itemized to show how the amount was calculated; and
  4. A statement disclosing any reasonably anticipated increase in income within the 12-month period after filing.

# “Drop Dead” Penalty for Failure to Provide Documentation

- §521(i): If the debtor fails to file the requested documents listed in §521(a)(1) within 45 days of bankruptcy filing and does not request an extension, the case shall be dismissed automatically on the 46th day after the date of the filing.

## Exception:

- Trustee may request that the case not be dismissed if –
  - Debtor attempted in good faith to file all the information required, and
  - Best interest of the creditors would be served by administration of the case.

## Tax Return Documentation

- §521(e)(2): The debtor is required to provide to the trustee within 7 days prior to the meeting of creditors the most recent federal tax return filed, or at the election of the debtor, a copy of the transcript of such return.
- In addition, such return must also be provided to any creditor that has timely requested a copy.
  - Consequences:
  - If the debtor fails to comply with this requirement, the court is required to dismiss the case unless the debtor establishes that the failure to comply was caused by circumstances beyond the debtor's control.
- §521(f)(1), (2) and (3): If requested by the court, the U.S. Trustee, or any interested party, an individual debtor is required to file with the court each tax return, or tax transcript covering such tax year, filed by the debtor while the case is pending, and each tax return filed after the case was filed for any tax year ending within 3 years prior to the filing)("back years").
- §521(f)(4) and (g): In a Chapter 13 case, at the request of the court, the U.S. Trustee, or any party in interest, the debtor is required to file a statement updating the debtor's income and expenses annually not later than 45 days before the anniversary of confirmation. The statement must identify
  - the amount and sources of income
  - the identity of any person who is responsible with the debtor for the support of a dependent of the debtor, and
  - the identity of any person who contributed, and the amount contributed, to the debtor's household.

# Reduced Debtor Options to Deal with Collateral

## **No More “Ride Through” in Chapter 7**

- §521(a)(6): Under the new law, a Chapter 7 individual debtor’s only options with respect to personal property that secures purchase money financing is to either redeem or reaffirm.
  - In addition, the debtor is required to exercise either of the options not later than 45 days after the meeting of creditors, otherwise the automatic stay terminates.

## **Carry Out Statement of Intention Within 30 Days of Creditor’s Meeting**

- §521(A)(2): The debtor must perform his intentions with respect to debts secured by property of the estate within 30 days after the first date set for the meeting of creditors, unless the 30-day period is extended by the court during this period.

# Restrict Debtor Forum Shopping for Property Exemptions

- §522(b)(3)(A): The applicable state law for determining the debtor's exemptions is the state where the debtor has been domiciled for 730 days (last 2 years) prior to the filing of the petition.
- If the debtor has not been domiciled in a single state for that two-year period, the exemptions are determined by the debtor's domicile for the longest part of the 180 days that preceded the 730-day period.
- If the effect of the new domiciliary requirements is to leave the debtor with no applicable exemptions, then the debtor can elect the exemptions under §522(d) (the federal schedule).

## Restrict State Homestead Deduction in Certain Cases

- §522 (o), (p) and (q): New sections added to the Code to limit the dollar amount of a homestead exemption under §522(b)(3)(A) to \$125,000.00 in certain cases.

## Anomaly: Increase Exemption for Investments

- §522(b)(3)(C) and §522(d)(12): These new subsections permit exemption of retirement funds to the extent they are in an account exempt from tax under IRC sections 401, 403, 408, 408A, 414, 457 or 501(a). (The IRC sections deal with pension, profit-sharing, and stock bonus plans; employee annuities, IRA's (traditional and Roth); deferred compensation plans of state and local governments, and tax-exempt organizations; and certain trusts.)
  - May be claimed even if Debtor's domicile state has opted out of federal schedule; also preempts state schedule exemptions.
- §522(n): The amendment caps the total exemption at \$1 million for IRA's exempt under IRC 408 or 408A (other than a SEP account under 408(k) or simple retirement account under 408(p)).
- §541(b)(5) and (6): New exemptions for education IRA's described in IRC 530(b)(1) and tuition programs described in IRC 529(b)(1).

## Increase Time Between Re-Filings for Bankruptcy

- §727(a)(8): A Chapter 7 debtor cannot obtain a discharge if the debtor obtained a prior discharge in Chapter 7 or 11 within 8 years.
- §1328(f)(1): A Chapter 13 debtor cannot obtain a discharge if the debtor obtained a prior discharge in Chapter 7 or 11 within 4 years, or a prior discharge in Chapter 13 within 2 years.
- §1141: In Chapter 11 individual cases, a discharge is no longer granted upon confirmation. It is only granted upon completion of plan payments.

# Reduced Availability of the “Automatic Stay”

## **Debtor with One Dismissed Case In Past Year:**

- **Limited Thirty-Day Automatic Stay**
- §362(c)(3): If a single or joint case is filed by or against an individual in a case under Chapter 7, 11, or 13, and if the debtor had a single or joint case pending within the preceding 1-year period but was dismissed (other than a case refiled under a chapter other than Chapter 7 after dismissal under §707(b)), the automatic stay with respect to any action taken with respect to a debt or property securing such debt or with, respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.

## Exception:

- The court may permit the stay to continue if on the motion of a party in interest it determines that the case was filed in good faith. The hearing on the motion must be heard and completed prior to the expiration of the 30-day period.
  - The case is presumed to be filed not in good faith, but the presumption may be rebutted by clear and convincing evidence. The case is presumed to be filed not in good faith as to all creditors if-
    - Debtor had more than 1 previous case under Chapter 7, 11 and 13 pending within the preceding 1-year period.
    - A prior case under Chapter 7, 11 or 13 was dismissed within the 1 year period after the debtor: (i) failed to amend the petition or other pleading as ordered by the court (except for cases where substantial excuse exists), or (ii) failed to provide adequate protection as ordered, or (iii) failed to perform the terms of a confirmed plan, or (iv) there has been no substantial change in the financial or personal affairs of the debtor since dismissal of the last case or any other reason to conclude that the later case will be concluded with a Chapter 7 discharge or a confirmed plan.

## Debtor with More than One Dismissed Case In Past Year: No Automatic Stay

- §362(c)(4): No automatic stay goes into effect in an individual debtor's case if the individual had two or more cases that were pending in the previous year but were dismissed. On request of a party in interest the court shall promptly enter an order confirming that no stay is in effect.
- Exception: A party in interest may request the imposition of a stay if it can be shown that the new case was filed in good faith but only if the motion is filed within 30 days after the filing of the current case. If the motion is granted, the stay is not retroactive. It only takes effect as of the date of the entry of the order.
  - The case is presumed to be filed not in good faith, but the presumption may be rebutted by clear and convincing evidence. The case is presumed to be filed not in good faith as to all creditors if-
    - Debtor had more than 2 previous cases under Title 11 within, the preceding 1-year period,
    - A prior case under Title 11 was dismissed within the 1-year period after the debtor failed to complete the same acts as described in the preceding section.

# **Additional Scenarios Where the Automatic Stay Does Not Apply**

- Dissolution of a marriage, except to the extent that the proceeding seeks to determine the division of property that is property of the estate.
- A civil action or proceeding regarding domestic violence.
- The collection of a domestic support obligation from property that is not property of the estate.
- A civil action or proceeding with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or statute.

# Require Debtors to Pay More in Chapter 13

- §1325(b)(3) has been added to require that for debtors over the median income the determination of net disposable income shall be calculated using the “Means Test” of §707(b)(2).
- §1322(d) has been added to require that if a debtor’s (and spouse’s) income is greater than the applicable median income, the plan period must be for at least 5 years.
- §1325(a)(8) has been added. This section requires that a debtor demonstrate that all post-petition domestic support payments have been made before the debtor’s plan may be confirmed.
- §1325(a) has been further amended to require that the modification provisions of §1325(a)(5) that allow a debtor to pay the value (present value) of a secured claim as defined in §506 are not applicable if the secured claim is for a purchase money security interest in a motor vehicle acquired for the personal use of the debtor and that was incurred within 910 days of filing (2.5 years), or a purchase money security interest in anything of value incurred within 1 year of the filing. (“Anti-Cram Down”)

# Exclusions from “Disposable Income” in Chapter 13

- §1325(b)(2) has been amended to exclude from the definition of “disposable income” child support payments, foster care payments, disability payments for a dependent child made in accordance with applicable non-bankruptcy law, to the extent reasonably necessary to be expended for such child. Further, the net “disposable income” calculation will exclude amounts reasonably necessary for post-petition domestic support obligations.
- §1322(f) has been added to require that a plan may not alter the terms of a pension loan and the amounts required to pay such a loan are not to be construed as “disposable income.”

# Reduce Scope of the Chapter 13 “Superdischarge”

The following debts are now nondischargeable in Ch. 13:

- Withheld taxes described in §507(a)(8)(C).
- Unfiled or late-filed taxes, as provided under §523(a)(1)(B).
- Fraudulently filed taxes, as provided under §523(a)(1)(C).
- Debts incurred by fraud, as provided under §523(a)(2) and (a)(4).
- Unscheduled debts, as provided under §523(a)(3).

## Broadened Protection for “Domestic Obligations”

- §101(14A): Includes a broader definition of “domestic support obligations”
- §523(a)(5): All domestic support obligations are nondischargeable in all chapters.
- §523(a)(15): All property settlement debts owed to a spouse, former spouse, and child of the debtor are nondischargeable in Chapter 7, and the ability to pay and balancing tests are eliminated.