



MALPRACTICE ALERT!

OBLIC

Ohio Bar Liability
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BANKRUPTCY LAWYERS FACE NEW CHALLENGES

The Bankruptcy Abuse Consumer Protection Act of 2005 was passed by Congress and signed into law by President Bush earlier this year. Amendments to the U.S. Bankruptcy Code place additional responsibility on attorneys representing debtors. Attorneys who are found not to have met these responsibilities may be sanctioned for civil fines, attorney fees and other expenses. These sections of the law become effective October 17, 2005, and after that date, the playing field for attorneys representing debtors will be notably changed.

RULE 9011--SANCTIONS

Rule 9011 of the Federal Rules of Bankruptcy Procedure gives the court the power to award "sanctions" against attorneys and their law firms for filing petitions, pleadings or motions that served to harass or delay litigation, assert a position not warranted under existing law or an extension of existing law, or issues regarding factual matters. These provisions have been part of Rule 9011 for some time.

SECTION 707

New amendments to Section 707 (b) of U.S.C. Title 11 are relevant to bankruptcy counsel. This section covers dismissal of Chapter 7 cases, or conversions to Chapter 13. In the event that a Chapter 7 case is dismissed or converted by motion of the trustee, the court itself, or on motion of any interested party, can order the debtor's attorney to reimburse the trustee for reimbursable costs in moving to dismiss or convert the case. The amendments to Section 707 state that the attorney for the debtor certifies that a "reasonable investigation into the circumstances that gave rise to the petition, pleading or written motion" has been conducted, that any pleading or any motion "is well grounded in fact" and is warranted, and 707 (b) (4)

(D) states that "The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petitions is incorrect."

There is nothing apparent in the Act that defines what standard of conduct is required to have conducted an inquiry into the accuracy of the debtor's information that will be acceptable. The court will consider sanctions for any violation under Rule 9011.

SECTION 524

Section 524 of the Code discussing reaffirmation of debt has been amended to include a certification of debtor's counsel as follows:

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement."

To what extent does an attorney have to review and audit a debtor's finances in order to make this certification? The Act does not answer this critical question. Will audits have to be conducted before a lawyer certifies that reaffirmation will not pose an undue hardship?

Amendments to U.S.C. Title 18 state that investigation of abusive reaffirmations or materially false or fraudulent statements in bankruptcy schedules are to be conducted by the FBI and U.S. attorneys.

There are additional requirements for attorneys representing debtors. Such counsel will be defined as a "Debt Relief Agency," and must do certain things when giving "bankruptcy assistance" services. Included are providing a written contract explaining their fees and services within five days after first providing services,

and ads for bankruptcy services must include “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code,” see Sections 227-229 of the Act.

These provisions of the Act were opposed by the ABA, and numerous state bars, including the OSBA. None of the revisions proposed by various interested persons were accepted, however, prior to passage.

COVERAGE CONCERNS

Bankruptcy lawyers will have additional concerns regarding insurance coverage for claims brought under the amendment to the bankruptcy code. Many policies exclude coverage for claims for “sanctions” brought against a lawyer. Under Rule 9011, any award of attorney fees, costs, and other penalties is a “sanction.” These exclusions can be very broadly worded, and should be reviewed for possible coverage concerns *before* any claim is made, and coverage denied.

The OBLIC policy contains Exclusion (n) (2), which states that the policy does not apply to any claim for “restitution, fines, penalties, sanctions or any award of attorney’s fees imposed against any Insured and/or any other person or entity under any one or more of the following: Rule 11 of the Federal Rules of Civil Procedure, Rule 11 of the Ohio Rules of Civil Procedure, Ohio Revised Code Section 2323.51 (the “frivolous conduct” statute), or under any other federal, state or local statute or rules of procedure or common law designed to deter frivolous conduct by any party or attorney engaged in litigation.”

If a motion for sanctions is brought under 9011 alleging that an attorney failed to properly certify the debtor’s information provided in a petition, for example, is such a “claim” deemed to involve frivolous conduct? Without clear standards set forth regarding what is or is not required of counsel in conducting an “inquiry” into the information provided by a debtor before a Chapter 7 is filed, issues such as this will have to be clarified over time. A defense to such a claim will be provided under the OBLIC policy, pending development of further definition of what is required to adequately certify the debtor’s information.

Claims for “fraud,” or criminal or fraudulent conduct are not covered by the policy, per Exclusion (a). Any claims brought alleging fraud on the part of counsel in preparing petitions, pleadings, etc. are not covered by the policy. We suspect that most claims arising under the Act’s new provisions will involve allegations that an attorney failed to take appropriate steps to “certify” the accuracy of statements or information provided by debtors.

This “Alert!” has attempted to notify lawyers of issues contained in the Act pertaining to the conduct of counsel. The Act itself contains major reforms to the bankruptcy code that must be reviewed by all lawyers continuing to provide “bankruptcy assistance” to debtors as a “debt relief agency” (these are some of the new terms as defined in the Act). Attorneys should consider the ramifications of these provisions, and how their malpractice insurance will respond to such claims. The new amendments can be found on the OSBA Casemaker federal law website, as well as other sources on the web and elsewhere.

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