

GOVERNMENTAL AFFAIRS
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

DIRECTOR

Robert D. Evans
(202) 662-1765
rdevans@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL

Denise A. Cardman
(202) 662-1761
cardmand@staff.abanet.org

Kevin J. Driscoll
(202) 662-1766
driscollk@staff.abanet.org

Lillian B. Gaskin
(202) 662-1768
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL

R. Larson Frisby
(202) 662-1098
frisbyr@staff.abanet.org

Kristi Gaines
(202) 662-1763
gainesk@staff.abanet.org

Kenneth J. Goldsmith
(202) 662-1789
goldsmithk@staff.abanet.org

Ellen McBarnette
(202) 662-1767
mcbarnee@staff.abanet.org

E. Bruce Nicholson
(202) 662-1769
nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS
OPERATIONS/LEGISLATIVE COUNSEL

Julie M. Strandlie
(202) 662-1764
strandlj@staff.abanet.org

INTELLECTUAL PROPERTY
LAW CONSULTANT

Hayden Gregory
(202) 662-1772
gregoryh@staff.abanet.org

STATE LEGISLATIVE COUNSEL

Rita C. Aguilar
(202) 662-1780
aguilarr@staff.abanet.org

EXECUTIVE ASSISTANT

Julie Pasatiempo
(202) 662-1776
jpasatiempo@staff.abanet.org

STAFF DIRECTOR FOR
INFORMATION SERVICES

Sharon Greene
(202) 662-1014
greenes@staff.abanet.org

EDITOR WASHINGTON LETTER

Rhonda J. McMillion
(202) 662-1017
mcmillionr@staff.abanet.org

September 16, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Bankruptcy Attorney Liability Provisions in P.L. 109-8, the
“Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”

Dear Chairman Specter and Ranking Member Leahy:

As your committee continues its work on technical corrections legislation relating to the recently-enacted “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005” (P.L. 109-8; S. 256) prior to the Act’s October 17, 2005 effective date, the American Bar Association (ABA) respectfully urges you to reconsider and modify several provisions in the new Act that unfairly increase the liability and administrative burdens of bankruptcy attorneys under the Bankruptcy Code. Unless they are promptly remedied, we are concerned that these provisions will have serious adverse effects on the nation’s bankruptcy system in general, as well as on the availability of *pro bono* legal representation for the many victims of Hurricane Katrina.

Although the ABA did not take a position on P.L. 109-8 in its entirety, the ABA and many state and local bars throughout the country continue to strongly oppose those provisions in the Act that would require debtor bankruptcy attorneys to: (1) certify the accuracy of the debtor’s bankruptcy schedules, under penalty of harsh court sanctions [*see* Section 102]; (2) certify the ability of the debtor to make future payments under reaffirmation agreements [*see* Section 203(a)]; and (3) identify and advertise themselves as “debt relief agencies” subject to a host of new intrusive regulations that will interfere with the confidential attorney-client relationship [*see* Sections 227-229]. For the ABA’s detailed analysis of the problems with these three provisions, please see our February 8, 2005 letter to the Senate Judiciary Committee, which is available online at <http://www.abanet.org/poladv/bankruptcymaterials.html>.

In our view, these bankruptcy attorney liability provisions will be highly detrimental to the nation’s bankruptcy system for many reasons:

- **These provisions will make legal representation unaffordable for many debtors.** By holding a debtor’s attorney personally liable for the accuracy of the client’s schedules, Section 102 of P.L. 109-8 will force the attorney to hire private investigators

and appraisers to independently verify the existence and value of all the client's assets—and the extent of the client's debts—thereby adding up to several thousand dollars to the cost of representing a debtor in bankruptcy. Most individual debtors will not be able to afford these new expenses, resulting in many thousands of *pro se* debtors throughout the nation, which could overwhelm the court system.

•**These provisions will discourage many attorneys from agreeing to represent debtors in bankruptcy at all.** Section 102 will create a harsh new liability standard for debtors' attorneys who do not conduct a lengthy investigation and appraisal of the client's assets. If these costly steps are not taken and the Chapter 7 petition is dismissed or converted to a Chapter 13, the court could then impose harsh sanctions and civil penalties on the attorney personally. Because most malpractice carriers are expected to exclude this new liability from coverage under their policies, the attorney's exposure will be even greater. These provisions in Section 102, combined with the reaffirmation agreement certification language contained in Section 203(a) and the "debt relief agency" liability and regulations in Sections 227-229, will drive many debtors' bankruptcy attorneys from the practice altogether, leaving many thousands of debtors without any legal representation at all.

•**These provisions unfairly establish separate legal standards for one particular type of attorney.** While current Bankruptcy Rule 9011 holds all bankruptcy attorneys to the same standards, Section 102 of P.L. 109-8 unfairly discriminates between debtor and creditor attorneys by requiring the debtor attorney to personally certify the accuracy of the underlying factual information supplied by the client and by holding the attorney *personally liable* if even innocent errors are discovered later. In addition, Sections 227-229 impose special advertising and gag rules and other regulatory burdens on attorneys representing individual debtors in bankruptcy. In contrast, attorneys representing creditors will not be required to certify the accuracy of their clients' factual information and will not be made subject to any comparable new sanctions or regulatory burdens under the new law.

The unfairness—and unworkability—of imposing different legal standards on different types of lawyers was perhaps best expressed in the February 28, 2005 correspondence from prominent business bankruptcy attorney Michael Reed, the then-President of the Pennsylvania Bar Association, to Senate Judiciary Committee Chairman Arlen Specter, in which he wrote:

“It is as unfair and inappropriate to require an attorney to certify the accuracy of a client's bankruptcy filings as it would be to require an attorney representing a corporation to certify the accuracy of all of the company's statements in its public filings. Indeed, the situation is worse since private bankruptcy counsel often have had limited prior experience with the debtor whereas a company's regular outside corporate counsel often will have had a long relationship with the company.”

•**These provisions will greatly reduce the availability of *pro bono* bankruptcy representation for victims of Hurricane Katrina and for many other poor Americans.** In addition to causing widespread death and destruction throughout the Gulf Coast region, Hurricane Katrina also destroyed the homes and the livelihoods of literally hundreds of thousands of people, many of whom ultimately will be forced to seek bankruptcy protection. Although the “debt relief agency”

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provisions in Sections 227-229 of P.L. 109-8 referenced above only apply to attorneys who receive payment for their services, the new certification requirements of Sections 102 and 203(a) apply to *all* debtor bankruptcy attorneys, whether or not they charge a fee. As a result, these provisions will strongly discourage attorneys and law firms from providing essential *pro bono* bankruptcy services to the victims of Hurricane Katrina and to many other poor Americans who are in dire need of legal assistance.

To avoid these problems, the ABA has crafted proposed amendments that would replace the current attorney liability provisions in P.L. 109-8 with tough new *non-dischargeable* sanctions against debtors who lie on their bankruptcy schedules and new language urging the bankruptcy courts to enforce more vigorously existing Rule 9011 of the Federal Bankruptcy Rules when misconduct by any party is shown. These reforms will reduce bankruptcy fraud and abuse without unfairly harming honest debtors or the overall bankruptcy system—and without reducing the availability of essential *pro bono* bankruptcy assistance. Accordingly, we urge you to include these or similar amendments in the technical corrections bill—or in any other appropriate legislative vehicle—that your committee considers prior to the Act's effective date on October 17, 2005. The text of these proposed amendments is available on our web site at the following address:
<http://www.abanet.org/poladv/bankruptcymaterials.html>.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA's positions on these issues, your staff may contact our senior legislative counsel for bankruptcy law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

cc: All Members of the Senate Judiciary Committee