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December 22, 2006

The Honorable Jeff Sessions
Chairman
Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Schumer
Ranking Member
Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Correction to American Bankers Association Letter Submitted for December 6, 2006 Subcommittee Oversight Hearing on the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act (P.L. 109-8)

Dear Chairman Sessions and Ranking Member Schumer:

On behalf of the American Bar Association ("ABA") and its more than 410,000 members, I write to correct what we believe to be a mischaracterization of one of the ABA's policies that was included in a December 5, 2006 letter from the American Bankers Association and seven other creditor organizations (the "December 5 letter") to the Subcommittee in connection with its December 6 oversight hearing on the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). As explained below, the letter in question wrongly suggested that the ABA policy and related background report singled out abuse by debtor lawyers when that was not the case. For your reference, a copy of the December 5 letter is attached.

On page 2 of the December 5 letter, the American Bankers Association and the other listed entities stated that in their view, "there is a clear need to monitor continuing abuses by some consumer debtor attorneys." In support of their claim, they made the following allegations about a recent policy adopted by the ABA:

> …the Advisory Committee on Bankruptcy Rules recently agreed to study recommendations made by the American Bar Association that support new attorney discipline amendments to the Federal Rules of Bankruptcy Procedure to clarify the authority of the courts to discipline attorneys engaging in a pattern of misconduct, and to require district and bankruptcy courts to adopt and enforce local disciplinary rules and procedures. The Bar Association felt that new disciplinary powers were needed because state bar proceedings were not designed to police the obligations imposed by BAPCPA, particularly for high volume consumer bankruptcy practices.

> The Bar Association also concluded that bankruptcy courts have not generally adopted disciplinary rules and procedures, and the only systematic and effective disciplinary proceedings were found in the few bankruptcy courts that had implemented their own procedures.

The ABA "recommendations" described in the December 5 letter refer to a policy resolution adopted by the ABA House of Delegates in August 2006 and the related background report. That ABA resolution endorsed certain proposed amendments to the Federal Rules of Bankruptcy Procedure designed to clarify the authority of bankruptcy courts to discipline any attorneys—creditor or debtor—who engage in a pattern of misconduct and to provide necessary procedural certainty and due process protections for disciplinary proceedings. The proposed amendments endorsed by the ABA also would require district or bankruptcy courts to adopt and enforce local disciplinary rules and procedures with respect to both creditor and debtor attorneys practicing before bankruptcy courts. The ABA resolution further recommended that any disciplinary rules, procedures, and standards established under the proposed amendments should comply with the ABA Model Federal Rules of Disciplinary Enforcement and the ABA Standards for Imposing Lawyer Sanctions—both of which cover all types of lawyers, including creditor and debtor attorneys alike. The ABA resolution and related background report are available on our website at http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredseventeen.doc

In our view, the American Bankers Association and the other signatories to the December 5 letter mischaracterize and distort the ABA policy in question. Contrary to the claims in the December 5 letter, the abuses relating to "high volume consumer bankruptcy practices" referenced in the background report accompanying the ABA policy refers to certain high volume *creditor and debtor* practices, not just debtor practices. In addition, contrary to the inferences made by the December 5 letter, the ABA supports the adoption of the proposed attorney discipline amendments as a prophylactic measure to provide standards and procedures for dealing appropriately with possible charges against any member of the entire legal profession, including creditor and debtor lawyers, and not as a targeted response to perceived abuses by a particular segment of the profession.

The ABA has a long history of supporting strong ethical standards for *all* lawyers, as well as effective disciplinary standards and enforcement procedures for those lawyers who act improperly.[1] After Congress enacted the BAPCPA in 2005—including the new sanctions for bankruptcy lawyers who act improperly—the ABA concluded that neither state bar disciplinary entities nor federal bankruptcy courts had established sufficient disciplinary rules and procedures to police the new BAPCPA obligations or the preexisting ethical obligations that apply to all lawyers. As a result, the ABA adopted the August 2006 policy endorsing the Proposed Attorney Discipline Amendments to the Federal Rules of Bankruptcy Procedure. The American Bankers Association's

[1] For almost one hundred years, the ABA has provided leadership in the field of legal ethics by crafting professional standards that have been adopted by the vast majority of the state and federal courts that oversee the legal profession. The original Canons of Professional Ethics were adopted by the Association in 1908. The current ABA Model Rules of Professional Conduct, first adopted in 1983, are a comprehensive and uniform set of ethical standards for lawyers. In addition, the ABA first adopted model rules for enforcement of lawyer ethical standards by state and federal courts in the 1970s and has continued to update and refine those standards over time. *See* ABA Standards for Lawyer Discipline and Disability Proceedings (adopted in 1979) and ABA Standards for Imposing Lawyer Sanctions (as approved, February 1986, and as amended, February 1992). *See also* ABA Model Federal Rules of Disciplinary Enforcement (as approved, February 1978, and as amended, February 1991).

December 5 letter to the Subcommittee is misleading in that it wrongly suggests that the ABA adopted its new policy in order to help the bankruptcy courts curb abuses by "consumer debtor attorneys" when, in fact, it was designed to extend recognized professional standards for lawyer discipline to the bankruptcy court system.

We appreciate the opportunity to clarify this important point, and by copy of this letter, we are also notifying the American Bankers Association and the other signatories to the December 5 letter of the misleading nature of the statements contained in that letter. If you have any questions regarding this matter, please ask your staff to contact our senior legislative counsel for bankruptcy law issues, Larson Frisby, at 202-662-1098.

Sincerely,

Robert D. Evans

Robert D. Evans

Attachment

cc: Members of the Subcommittee
American Bankers Association
America's Community Bankers
American Financial Services Association
Consumer Bankers Association
Independent Community Bankers of America
The Financial Services Roundtable
Mortgage Bankers Association
Coalition for the Implementation of Bankruptcy Reform

ATTACHMENT

December 5, 2006

The Honorable Jeff Sessions
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on Administrative
Oversight and the Courts
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

We are writing to express our gratitude for your support over many years for commonsense bankruptcy reform and to commend you for scheduling a hearing to review the steps taken to date to implement the provisions of the "Bankruptcy Abuse Prevention and Consumer Protection Act" (BAPCPA)(Pub. L. 109-8). Although the law is still new (some of the implementing regulations have not yet been finalized), the bipartisan and balanced bankruptcy reform it put into effect is already working to benefit consumers and the economy.

While consumer bankruptcy filing rates have dropped dramatically from 2 million in previous years to about 550,000 for 2006, there is no evidence we are aware of that individual debtors in need of bankruptcy relief have been unable to obtain it. In addition, the percentage of consumers choosing Chapter 13 repayment plans over Chapter 7 is higher than under the pre-reform law. This indicates that higher income filers are voluntarily utilizing court-supervised repayment plans.

As important as the decline in filing rates, BAPCPA's requirement for pre-filing credit counseling sessions has resulted in an overall increase in credit counseling sessions compared to 2005 levels. This means that substantially more Americans are getting the benefit of high-quality credit counseling from Justice Department-approved credit counseling agencies. In fact, the Department of Justice estimates that 10 percent of consumers who receive counseling chose an option other than bankruptcy. Individual debtors also enjoy substantial new benefits, such as the ability to shelter greater amounts of retirement funds and uniform disclosures to understand fully the implications of voluntary reaffirmations of debt.

The beneficial aspects of BAPCPA go far beyond its consumer bankruptcy provisions. For instance, small businesses now have access to a faster and less expensive filing process, the financial instruments netting provisions increase the stability of the global financial system, family farmers enjoy greater protections, and the cross-border provisions respond to the reality of the global marketplace. Moreover, the consumer privacy ombudsman provisions already have been implemented in a number of major Chapter 11 cases to assure that personal data protection remains strong during corporate reorganizations.

We applaud your Subcommittee's oversight efforts. Indeed, we believe that oversight could help correct some issues that might undermine the ability of the reform law to provide meaningful economic and social benefits to our nation. For example, the Judicial Conference forms that

implement 707(g) (2) could disrupt the means-test by allowing debtors to claim deductions for phantom expenses and we feel that this should be corrected through the rulemaking process.

There is also a need to assure that adequate credit counseling resources remain available in the event that consumer filings increase substantially, and there is a clear need to monitor continuing abuses by some consumer debtor attorneys. In this regard, the Advisory Committee on Bankruptcy Rules recently agreed to study recommendations made by the American Bar Association that support new attorney discipline amendments to the Federal Rules of Bankruptcy Procedure to clarify the authority of the courts to discipline attorneys engaging in a pattern of misconduct, and to require district and bankruptcy courts to adopt and enforce local disciplinary rules and procedures. The Bar Association felt that new disciplinary powers were needed because state bar proceedings were not designed to police the obligations imposed by BAPCPA, particularly for high volume consumer bankruptcy practices. The Bar Association also concluded that bankruptcy courts have not generally adopted disciplinary rules and procedures, and the only systematic and effective disciplinary proceedings were found in the few bankruptcy courts that had implemented their own procedures.

While BAPCPA is new, its implementation so far has been relatively smooth and it is working remarkably well. In fact, many of the dark consequences predicted by opponents of the reform legislation have not materialized. Specifically, debtors are not being harmed by the new debtor counseling requirement, they are not being denied access to bankruptcy relief by the law's means testing provision, and they are not being subjected to harassment by creditors under non-dischargability or other provisions of the Act.

Therefore, we hope you agree that there is no need for further revisions to the Bankruptcy Code at this point. Instead, we urge Congress to let the reforms mature before considering further revisions. The implementation process and case law will add more context and detail to the new law, and Congress will then be in a better position to assess the long-term impact and effectiveness of bankruptcy reform, as well as determine whether clarifying or corrective amendments are justified.

We look forward to working with you and others in Congress to ensure that bankruptcy reform realizes its full potential. Thank you for considering our views.

Sincerely,

American Bankers Association
America's Community Bankers
American Financial Services Association
Consumer Bankers Association
Independent Community Bankers of America
The Financial Services Roundtable
Mortgage Bankers Association
Coalition for the Implementation of Bankruptcy Reform

Cc: Ranking Member Charles Schumer
Members of the Subcommittee