



Bankruptcy Attorney Liability Reform

ABA Seeks Repeal of Harmful Provisions in BAPCPA

In 2005, President Bush signed into law sweeping bankruptcy legislation, the “Bankruptcy Abuse Prevention and Consumer Protection Act” (BAPCPA), P.L. 109-8, containing provisions that unfairly increased the liability and administrative burdens of bankruptcy attorneys while denying effective legal representation to many Americans. These provisions require debtors’ attorneys to: (1) certify the accuracy of the debtor’s bankruptcy schedules, under penalty of harsh court sanctions; (2) certify the debtor’s ability to make future payments under reaffirmation agreements; and (3) identify and advertise themselves as “debt relief agencies” subject to new intrusive regulations. These provisions have had a substantial negative impact on bankruptcy attorneys, debtors, and the bankruptcy system. **Accordingly, the ABA has prepared draft legislation known as the “Effective Bankruptcy Attorney Discipline Act” that would reverse these provisions in BAPCPA, and it urges Congress to enact the bill as soon as possible for the following reasons:**

- **The proposed legislation would reverse the harmful provisions in BAPCPA that require the debtor’s attorney to certify the accuracy of the debtor’s schedules, under penalty of harsh court sanctions.** While existing federal rules already required all lawyers to certify that their pleadings are supported by the facts, Section 102 of BAPCPA created a harsher standard just for debtors’ bankruptcy attorneys. By holding these attorneys *personally liable* for the accuracy of their clients’ schedules, Section 102 could force many attorneys to hire private investigators and appraisers to verify this information, potentially adding thousands of dollars to the cost of representing a debtor in bankruptcy. Any attorney who fails to take these costly steps—including *pro bono* attorneys—could face harsh sanctions if the client’s stated financial information proves to be inaccurate. Because of this provision, bankruptcy representation has become unaffordable for many debtors and many firms have stopped providing *pro bono* bankruptcy services altogether, resulting in many more *pro se* debtors overburdening the court system.
- **The proposed legislation also would reverse the unjust provisions in BAPCPA that require attorneys to certify the debtor’s ability to make future payments under reaffirmation agreements.** Under previous law, a debtor could choose to reaffirm certain debts—and retain liability for those debts—if the attorney certified that the decision was voluntary and would not create undue hardship for the debtor. By requiring the attorney to also certify the debtor’s ability to pay the reaffirmed debt, Section 203(a) of BAPCPA has forced many attorneys to conduct costly audits of their clients’ finances—or to simply not represent debtors in this aspect of the bankruptcy case.
- **The proposed legislation also would reverse the harmful provisions in BAPCPA that require bankruptcy attorneys to identify and advertise themselves as “debt relief agencies” and comply with intrusive new regulations that interfere with the confidential attorney-client relationship.** Sections 227-229 of BAPCPA interfere with the attorney-client relationship by prohibiting debtors’ bankruptcy attorneys—and many non-bankruptcy attorneys—from giving clients proper pre-bankruptcy planning advice. These provisions also have had a severe chilling effect on the willingness of many attorneys to represent debtors by requiring their advertising materials to include awkward and misleading statements identifying them as “debt relief agencies.”
- **The key remedial provisions in the proposed legislation are strongly supported by legal groups throughout the country.** These reforms have been endorsed by many statewide bar associations including those in Arizona, Arkansas, Illinois, Iowa, Maryland, Missouri, Minnesota, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Virginia, Washington and Wisconsin.
- **The proposed legislation would correct the problems created by the bankruptcy attorney liability provisions in BAPCPA in a fair and equitable manner.** Instead of unfairly punishing attorneys who provide legal services to debtors in bankruptcy, the proposed legislation would replace the attorney liability provisions in BAPCPA with new language clarifying bankruptcy courts’ authority to discipline attorneys and instructing them to vigorously exercise that authority when misconduct by any attorney or party in a case is shown. The proposed bill would reduce fraud and abuse in a far more effective and equitable manner while eliminating the harmful effects caused by the attorney liability provisions of BAPCPA.