

More on the New Bankruptcy Law: Myth and Reality

By Sheryl Sisk Schelin

By now you've undoubtedly heard something about sweeping new bankruptcy laws that were enacted and signed into law by President Bush in 2005. While it's true that the state of bankruptcy is very different now than it was prior to these amendments, there is a lot of misinformation floating around about the new law. Take a moment to familiarize yourself with the reality behind the myths.

Myth #1: Bankruptcy was repealed.

Reality: Bankruptcy was most definitely not repealed. The laws governing bankruptcy cases and procedure were amended, in some respects drastically. Many of these amendments have a disadvantageous effect on consumer debtors, while a few of the new provisions have a beneficial effect on those debtors.

Because of the new requirements and the unfortunate poor quality of the drafting, much more work on the part of debtor's attorneys is required. This in turn makes bankruptcy more expensive for consumers. Bankruptcy protection, however, absolutely does exist and is available for those who need it.

Myth #2: Chapter 7 is, for all practical intents and purposes, no longer available.

Reality: Chapter 7 is still available, but it is true that it's harder to qualify for its protections. In order to qualify for Chapter 7, a consumer debtor's Current Monthly Income (a figure loosely defined as the average of all income from most sources, with some exceptions and deductions, over the six months prior to filing) must not exceed the state median income level for a household of the same size. If

the CMI exceeds the median, what's called "a presumption of abuse" arises in the debtor's case. The presumption can be rebutted by successful passing of the "means test" - a new calculation based on national and local IRS standards for various categories of expenses. If the means test is "failed," then the debtor has the option of arguing that special circumstances exist which reduce the debtor's CMI to an extent that he or she actually passes the means test. Failing a successful argument of special circumstances, the debtor will be forced into Chapter 13, if he still wishes to file for bankruptcy.

Myth #3: Bankruptcy is too complex, expensive, and/or cumbersome now to be of any practical use.

Reality: Because of the new law and its new requirements, bankruptcy costs have, indeed, gone up. In addition, filing fees have been raised by the Judicial Conference to \$299 for Chapter 7 and \$274 for Chapter 13. Also, there are new hurdles the debtor must negotiate - credit counseling course and debtor financial education course - that will also cost money.

However, the value received is still significant to the debtor who truly needs a "fresh start." In addition, many attorneys will accept payment plans through a Chapter 13. *(NB: I am one of them - SSS.)*

The new documentation requirement is significant. However, most debtors find that the process of collecting records and filling out the financial questions that most attorneys pose to collect the data necessary for the petition and schedules actually has a comforting aspect to it. Many debtors who find themselves in financial distress fall behind in recordkeeping. Many also are overwhelmed by the sheer amount of debt they face, and so avoid coming to grips with it. This causes in most people a great deal of stress. Gathering the information and documentation required by the new law helps debtors feel more in control of their finances.

Additionally, filing for bankruptcy can be the single most positive affirmative step they've taken to improve their financial condition in quite some time. Thus, there is definitely a practical advantage that results from these new requirements - peace of mind and more personal power.

Myth #4: All the bankruptcy attorneys stopped practicing because of fears of personal liability or the complexity of the new law.

Reality: Many attorneys who dabbled in bankruptcy practice, or who had a mixed practice including several practice areas, did indeed drop those practices. However, many attorneys who have practiced primarily in the consumer bankruptcy area for years were actually galvanized by the new law. What was seen as an assault on their profession's integrity gave them new purpose and new passion for their work.

In addition, the new law actually motivated many attorneys into bankruptcy practice – attorneys like me. Realizing the "brand new ballgame" that had been created by the new law, we studied the new law and the resulting process and procedure very carefully by attending seminars, reading authoritative treatises on the subject, and engaging mentors. You will find most bankruptcy attorneys who represent consumer debtors primarily to be compassionate and passionate about consumer protection - tireless advocates who fight for your rights.

Myth #5: You can save money by doing it yourself, or hiring bankruptcy petition preparers.

Reality: You may save a little money up front by either doing it yourself (with the aid of form books or Internet information) or by hiring a storefront bankruptcy petition preparer to fill out your petition and schedules. However, you will lose the advantage of a qualified attorney's advice.

Preparers are, by law, prohibited from giving you legal advice on any issue related to bankruptcy (which they are unqualified to do in any event). Preparers may only place the information you give them in the appropriate blank spaces on the forms. They cannot:

- Give you advice on planning and claiming your exemptions;
- Advise you which chapter to file;
- Help you determine which debts to reaffirm;
- Represent you in the meeting of creditors or at a Rule 2004 deposition;
- Litigate any claims you may have against harassing collectors;

- Argue on your behalf for special circumstances to qualify you for Chapter 7; or
- Provide any legal assistance whatsoever.

As a result, you **could therefore lose the benefit of legally-sound documents (costing you more money** in the long run in the form of undischarged debts, fees and penalties that could have been reduced or eliminated, property being listed as nonexempt when it could have been exempted with the assistance of a competent attorney, etc.).

Given the uncertainties surrounding the new law - the new requirements, the poorly drafted statutes, the inevitable court challenges and interpretative struggles over the wording of the new law - it is in your best interests to retain competent, qualified legal counsel to help you in your bankruptcy case.

Whatever you do, **do not delay in selecting an attorney to assist you**; there are many deadlines and tasks that must precede filing for bankruptcy protection which will benefit from the involvement of an attorney who is familiar with the new law and with consumer bankruptcies.

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