BACK TO THE FRONT

ABA Seeks Changes in Bankruptcy Bill's Attorney Liability Provisions

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This column is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government.

PASSAGE OF LEGISLATION AIMED AT overhauling the federal bankruptcy system has appeared imminent several times in recent years, only to stall. This term, however, Congress appears poised to finally push a bankruptcy bill through.

The Senate in mid-March passed a carefully crafted bill with only minor amendments and sent it immediately to the House, whose Judiciary Committee took only a week to approve the bill without amendments.

The House was expected to pass the bill in April after Congress returns from its spring recess. President Bush would get the bill soon after.

The legislation would make it more difficult for many individuals to discharge debts by filing under Chapter 7 of the U.S. Bankruptcy Code. The bill would establish a means test to force more individuals to file under Chapter 13, which imposes repayment plans on debtors.

While the ABA has not taken a position on the overall bill, it supports provisions that would allow orders by bankruptcy courts to be appealed directly to the federal circuit courts. Under current procedures, appeals must go to either bankruptcy appellate panels or the district courts before the circuit courts will hear them.

LIABILITY CONCERNS LINGER

MEANWHILE, THE ABA, ALONG WITH 25 STATE AND LOCAL bar associations, is urging Congress to reconsider provisions in the bill that threaten to increase the liability and administrative burdens of attorneys under the Bankruptcy Code.

Those provisions would require an attorney to certify the accuracy of factual allegations in the debtor's bankruptcy schedules, certify the ability of the debtor to make future payments under a reaffirmation agreement, and identify and advertise as a "debt relief agency" subject to a host of intrusive regulations.

Those requirements would have a significant impact on attorneys, say Larry B. Feinstein and Marc S. Stern of Seattle, who co-chair the Bankruptcy Committee in the ABA's General Practice, Solo and Small Firm Section.

Describing the provisions as "an attack on the attorney-client privilege," Stern says mandating bankruptcy lawyers to identify themselves as debt relief agencies restricts their ability to represent clients as they think best.

Feinstein warns that the certification requirements would drive up attorney fees for handling bankruptcies, "leaving those most in need of a fresh start without the benefit of counsel to guide them through the process." Moreover, providers of pro bono legal services can be expected to drop bankruptcy, he says, because of the additional costs and exposure to liability, leaving still more debtors without representation.

During conference committee negotiations in 2002, the ABA persuaded congressional leaders to replace mandatory sanctions against attorneys with a discretionary standard. This spring, the association suggested additional amendments that would replace the attorney liability provisions with tough new nondischargeable sanctions against debtors who lie on their bankruptcy schedules.

Marc Stern and Larry Feinstein: Law would hurt pro bono bankruptcy services.

The ABA also proposed new language urging bankruptcy courts to more vigorously enforce existing sanctions against any party or attorney engaging in misconduct relating to bankruptcy proceedings.

Rep. Chris Cannon, R-Utah, who chairs the House subcommittee with jurisdiction over bankruptcy issues, has noted concerns over the attorney liability provisions and has indicated willingness to work with his Democratic counterpart, Melvin L. Watt, D-N.C., to revisit those issues in follow-up legislation. ■

Rhonda McMillion is editor of Washington Letter, *an ABA Governmental Affairs Office publication.*

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