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Article of the week from *Lawyers Weekly USA:*

New bankruptcy law raises liability risks for lawyers

By Correy E. Stephenson Staff writer

Marc Stern, a solo practitioner in Seattle, Wash., recently had to give a client the debt relief agency disclosures required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

While the disclosures are a common requirement under the new Act, Stern wasn't talking to a debtor.

"My client is a creditor whose significant other is in bankruptcy, but they own a piece a property together," he explained.

Under the new definitions in the Act, the client was an "assisted person" seeking "bankruptcy assistance" - making Stern a "debt relief agency" and requiring him to give her certain information.

"She was so confused," he said. "She read [the materials] and said, 'You realize I am not the one filing bankruptcy?' That's when it hit me how absolutely irrational this really is."

Stern isn't alone.

Just six months since the passage of bankruptcy reform, attorneys across the country are decrying the confusing, overbroad drafting of the statute that they claim has created an increased potential for liability.

Attorneys also report increased paperwork and time spent on each case, resulting in an increased cost for clients.

Some attorneys are limiting their bankruptcy practice; others are foregoing it altogether, said Philadelphia attorney and president of National Association of Consumer Bankruptcy Attorneys Henry Sommer.

"There is a lot of fear of the unknown, and attorneys are being cautious," he told Lawyers USA. "There are lawyers and firms who are restricting their practice and refusing to get involved in anything bankruptcy-related - even creditor's work - in order to avoid becoming a debt relief agency."

Liability concerns

Attorneys are concerned about two main areas of potential liability, each of which can lead to sanctions for failing to comply:

- Debt Relief Agencies.

One of the most controversial provisions in the new Act establishes the concept of "debt relief agency," defined as "any person who provides 'bankruptcy assistance' to an 'assisted person' in return for the payment of money or other valuable consideration." This definition is so broad it encompasses even non-bankruptcy attorneys. And any entity that qualifies as a debt relief agency must identify and advertise itself as such, as well as provide clients with notice and disclose its status.

- Certification.

Bankruptcy attorneys must perform a "reasonable investigation" into the circumstances that gave rise to their client's petitions. In addition, by signing off on the schedules and assets of a petition, an attorney certifies that he or she has "no knowledge after an inquiry that the information in the schedules is incorrect." For re-affirmations, in addition to verifying that it would not be an undue hardship to re-affirm an existing debt, bankruptcy attorneys must also certify that the client can afford to pay the debt back.

Corinne Cooper, professor emerita of law at the University of Missouri-Kansas School of Law, said most of the problems result from poor drafting in the key definitions.

An "assisted person" is defined as any person whose debts consist primarily of consumer debts, and whose non-exempt assets have a value less than $150,000 - which includes creditors as well as debtors. And "bankruptcy assistance" includes any information, advice, counsel, document preparation or filing for an assisted person.

The result is that even lawyers who never handle a bankruptcy matter are implicated.

"Family lawyers are tremendously at risk," with the potential for both parties' attorneys to run afoul of the new law, said Cooper, co-author with Catherine E. Vance of a new book, "Attorney Liability in Bankruptcy."

"Every time you get involved in a divorce, there are questions about debt and who is obligated to pay it," she noted.

Required disclosures

Dallas solo Howard Spector said he provides his clients with the required disclosures despite his objections to the Act, although he personalized them a bit.

"I have a big bold section at the beginning that explains to clients that they need to read these disclosures and understand that they were written by creditors to scare people out of filing," he said.

Spector has filed a lawsuit challenging the constitutionality of the Act [see accompanying story], focusing on the required debt relief agency disclosures, some of which he claims are inaccurate and misleading.

For example, "one of the required disclosures is that the debtor must pay a filing fee to the court, but you are not required to disclose the fact that the debtor can defer that fee," he said. Other disclosures include telling clients that a Chapter 13 filing requires them to pay

whatever they can afford over the next 3-5 years.

"That's just not true," Spector said. "It doesn't have to be three to five years. Sometimes it is, but not always."

In addition to the required disclosures, lawyers must update all of their advertising under what Cooper calls the "scarlet letter provision," identifying themselves as debt relief agencies.

Some, like Stern - who admits that he hasn't updated his website or yellow pages listing - aren't concerned about repercussions.

But Jeffrey Freedman, who runs a 15-office firm in New York andadvertises in print, on TV and the Internet, said updating all of the firm's information was just "part of doing business."

Bankruptcy more expensive

The increased work required to satisfy the certification requirements and limit lawyers' liability has increased their rates - and made bankruptcy even more expensive.

Freedman said that while his firm tries to have compassion for their debtor clients, the increased paperwork and time required for each filing has forced them to raise rates, from $850 for a Chapter 7 to $1,000.

Spector said he had also increased his rates.

"Everything requires more time," he said. "Now we have to file tax returns and wage statements, compile all of this information and perform the means test, which is just more calculation and more paperwork that raises the price for debtors."

Sommer downplayed concerns about the certification requirements, noting that even prior to the new law attorneys could be sanctioned under federal Rule 11 for filing inaccurate schedules and petitions.

But other lawyers aren't taking any chances.

"I think that if you want to satisfy the requirement and certify a client's petition, you have to do quite a bit more background work to make sure the petition is correct," said Mark Laudisio, who practices at the law offices of Jeffrey Freedman in Buffalo.

And lawyers have a good reason to be concerned - under the Act, approximately one in 250 petitions will face an audit beginning in April 2007, 18 months after enactment.

Questions or comments can be directed to the writer at: correy.stephensonr@lawyersweekly.com

Bankruptcy lawyers fight back

While most attorneys report they are complying with the new regulations under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 - causing an increase in paperwork, time and fees - several lawsuits have already been filed challenging the statute.

Howard Spector, a solo attorney in Dallas, just filed his response to a government motion to dismiss in U.S. District Court in the Northern District of Texas.

"The best case scenario: the court finds the entire Act unconstitutionally broad because it

interferes with the administration of an independent bar," Spector told Lawyers USA. Spector's suit focuses on two areas of the statute: Sect. 526(a)(4) and Sect. 527, which relate to lawyers as debt relief agencies.

Section 526(a)(4) changes how attorneys can counsel their clients, Spector said, creating what is essentially a First Amendment violation of bankruptcy lawyers' rights.

For example, "I cannot tell clients they are allowed to borrow money prior to filing," he said. "I am prohibited from telling them to take out equity in their home that might be included in their homestead exemption in order to pay child support."

Spector said all attorneys should be concerned about legislation that limits their ability to advise their clients.

"We are the only ones who can't advise our clients - they can ask their brother, their shoe salesman and the drunk on the street. They just can't ask their lawyer," he said.

Henry Sommer, President of the National Association of Consumer Bankruptcy Attorneys and a bankruptcy attorney in Philadelphia, said his organization, in conjunction with the Connecticut Bar Association, will also be filing a lawsuit.

"There is a lot of confusion about the new Act," Sommer said. "This legislation was horribly drafted, and people who are cautious have been chilled in how they practice."

Sommer said one unfortunate side effect of the confusion is a decrease in attorneys volunteering to help debtors because of liability concerns.

But "you don't become a debt relief agency by taking a pro bono case," he emphasized, because by definition bankruptcy assistance must be performed for payment.

"It's important that lawyers realize they can continue to take pro bono bankruptcy cases and not have to worry about these idiotic provisions," Sommer said.

- Correy E. Stephenson

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