

The Senate is now considering sweeping bankruptcy reform legislation, S. 256, that would dramatically increase the liability and administrative burdens of bankruptcy attorneys. The new measure, based on last year's bankruptcy bill, H.R. 975/S. 1920, would require debtors' attorneys to: (1) certify the accuracy of the debtor's bankruptcy schedules, under penalty of court sanctions; (2) certify the debtor's ability to make payments under a reaffirmation agreement; and (3) identify and advertise themselves as "debt relief agencies" subject to new intrusive regulations. **The Senate Judiciary Committee approved S. 256 on February 17, 2005, and the bill is scheduled to come to the Senate floor for debate and amendments starting on February 28, with a final Senate vote possible as early as March 9.**

- **The ABA opposes the provisions in S. 256 that would require the debtor's attorney to certify the accuracy of the debtor's bankruptcy schedules, under penalty of court sanctions.** While existing federal rules already require all lawyers—including bankruptcy attorneys—to certify that their pleadings are supported by the facts, Section 102 of S. 256 would create a harsher standard just for debtors' bankruptcy attorneys. By holding a debtor's attorney *personally liable* for any inaccuracies in the client's schedules that lead to the dismissal of the Chapter 7 petition or its conversion to a Chapter 13, the bill would force the attorney to independently verify all of the client's factual representations and require the attorney to conduct a costly investigation and appraisal of all assets listed on the client's schedules.
- **The ABA also opposes the provisions in S. 256 that would require attorneys to certify the debtor's ability to make payments under a reaffirmation agreement.** Under current law, a debtor may choose to reaffirm certain debts—and retain liability for those debts—if the attorney certifies that the decision is voluntary and will 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) would force attorneys to conduct costly and time-consuming audits of their clients' finances.
- **The ABA also opposes the provisions in S. 256 that would require bankruptcy attorneys to identify and advertise themselves as "debt relief agencies" and then comply with a host of burdensome new regulations.** Section 227-229 would seriously interfere with the attorney-client relationship by requiring all debtors' bankruptcy attorneys—and many non-bankruptcy attorneys—to provide their clients with lengthy written disclosure statements containing government-mandated legal advice on bankruptcy law while prohibiting the attorneys from giving their clients certain proper pre-bankruptcy planning advice. These provisions would also have a chilling effect on debtors' lawyers and their firms by requiring all of their newsletters, seminars and advertising materials to include the awkward and misleading statement that "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."
- **Many state bars also oppose these provisions, including the state bars of Arizona, Illinois, Iowa, Maryland, Missouri, Minnesota, North Carolina, Ohio, Oregon, Tennessee, Utah, Virginia, Washington and Wisconsin.**
- **These three attorney liability provisions, taken together, would have a substantial negative impact on the availability of quality legal counsel in bankruptcy and would result in thousands of pro se debtors.** These provisions would discourage many attorneys from agreeing to represent debtors at all, while dramatically increasing the fees and expenses of clients who are able to obtain legal representation. In addition, these provisions would strongly discourage lawyers from providing essential *pro bono* bankruptcy services. Unless they are removed, these provisions pose a serious threat to the efficient operation of the bankruptcy system.
- **The ABA's alternative proposal would remove the harmful attorney liability provisions and replace them with appropriate new sanctions against debtors who lie to the court.** The ABA has proposed alternative amendments that would replace the current attorney liability provisions with tough new *non-dischargeable* sanctions against debtors who lie on their bankruptcy schedules and new language urging the bankruptcy courts to vigorously enforce existing Rule 9011 when misconduct by any party is shown. These reforms would reduce bankruptcy fraud and abuse without unfairly harming honest debtors or the overall bankruptcy system.