

Bankruptcy Reform Law Imposes Credit Counseling Requirement

By Karen Krub

Issue 2003-2 of *Farmers' Legal Action Report* included an article giving an overview of the changes made to Chapter 12 bankruptcies by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the 2005 Bankruptcy Act). This "bankruptcy reform" law was enacted on April 20, 2005, and took effect on October 17. In addition to the farmer-specific Chapter 12 provisions of the Act, some of the general provisions will also affect farmers considering bankruptcy. This article discusses one of those provisions.

New Law Requires Credit Counseling Before Individuals May File Bankruptcy

Under the 2005 Bankruptcy Act, before an *individual* debtor can file a bankruptcy petition, the debtor must have received a briefing from an approved credit counseling agency. Since the law specifically mentions individuals, it therefore appears that entity debtors are not required to satisfy this requirement. Farmers who operate as a corporation or other business entity should consult with a bankruptcy attorney to determine whether the requirement applies to their particular circumstances.

The law requires that the debtor have received an individual or group briefing, which can be done in person, on the telephone, or over the Internet. The agency must be an approved nonprofit budget and credit counseling agency. The briefing must outline the opportunities for available credit counseling and must assist the debtor in performing a related budget analysis. This briefing must have occurred within 180 days before the date the debtor files the bankruptcy petition.

Credit Counseling Requirement Eliminates Possibility of Last-Minute Filing

There is no doubt that advance planning makes a bankruptcy more effective and less stressful for the debtor. Nonetheless, for a variety of reasons many farmer-debtors found themselves taking advantage of the ability under the prior law to file a last-minute bankruptcy petition. The last-minute filing was a tool to stop a threatened foreclosure or repossession by a creditor, at least temporarily. Indeed, the idea of the last-minute filing is likely part of many people's general understanding of what happens in a bankruptcy. The 2005 Bankruptcy Act has changed all that.

Counseling Requirement Temporarily Waived in Louisiana and Southern Mississippi Due to Hurricane Katrina

On October 4, the United States Trustee Program announced that the credit counseling requirement was temporarily waived in all of Louisiana and the Southern District of Mississippi due to the effects of Hurricane Katrina. The notice did not state how long the waiver would be in effect. The bankruptcy administrator in the Southern District of Alabama does not seem to have issued a similar waiver.

Limited Exceptions to Counseling Requirement

The 2005 Bankruptcy Act does provide for a few types of exceptions to the credit counseling requirement. First, the requirement does not apply if the debtor lives in a bankruptcy district where the United States Trustee (or bankruptcy administrator in Alabama and North Carolina) has determined that the counseling agencies approved for that district are not reasonably able to provide assistance

to the additional wave of persons needing their services as a result of the new requirement. Many counseling agencies operate nationwide by offering only telephone and Internet briefings, so it seems likely that every area of the country will have enough agencies able to meet the demand.

Another category of exception to the credit counseling requirement under the 2005 Bankruptcy Act is for debtors who are *unable* to meet the requirement. The Act limits this group to only those who are in active military duty in a combat zone and those who have an incapacity or disability that prevents them from participating in a briefing. An "incapacity," for this purpose, means debtors who have a mental illness or mental deficiency making them unable to realize and make rational decisions with respect to their financial responsibilities. A "disability" means that the debtor is so physically impaired as to be unable "after reasonable effort" to participate in an in-person, telephone, or Internet briefing.

The final exception under the 2005 Bankruptcy Act is the one likely to be of interest to most debtors. This exception allows a debtor to file a petition (and secure the protections of bankruptcy) before participating in a credit counseling session if three conditions are met. These conditions are: (1) the debtor must provide to the bankruptcy court a certification describing exigent circumstances that merit a waiver of the credit counseling requirements, (2) the debtor must have requested credit counseling services from an approved agency and been unable to obtain the services within a five-day period, and (3) the debtor's certification must be satisfactory to the court. This exception therefore still makes a last-minute filing impossible, since the debtor must wait at least five days after requesting credit counseling before filing. Even

if a debtor qualifies for this exception and is able to file a petition without first obtaining credit counseling, it appears that the debtor will still be required to participate in a credit counseling session within 30 days after filing.

What Is an “Approved” Credit Counseling Agency?

The 2005 Bankruptcy Act’s credit counseling requirement can only be satisfied by working with an “an approved nonprofit budget and credit counseling agency.” An agency can be approved by the United States Trustee (or bankruptcy administrator in Alabama and North Carolina) after that official has reviewed the agency’s qualifications and has determined that the agency satisfies the standards of the Act. These standards include: providing qualified, well-trained counselors, providing adequate safekeeping and payment of client funds, providing adequate counseling, and dealing effectively and responsibly with matters relating to its services. Agencies are also required to provide full disclosure to clients regarding the agency’s funding sources, counselor qualifications, program costs, and possible impact of the debtor’s choices on his or her credit reports.

The 2005 Bankruptcy Act requires that, if a fee is charged for the counseling services, it must be a reasonable fee. And the agency must provide services without regard to a debtor’s ability to pay the fee. The agency must have a board of directors whose majority are not employees of the agency and will not directly or indirectly receive financial benefit from the outcome of the credit counseling services provided by the agency. And the agency’s counselors may not receive commissions or bonuses based on the outcome of the counseling services provided. Finally, the agency must have adequate financial resources to provide continuing support services over the life of any repayment plan the debtor may enter into.

How to Choose a Credit Counseling Agency?

Each federal judicial district is required by the 2005 Bankruptcy Act to maintain a list of approved credit counseling agencies serving the district. For all states except Alabama and North Carolina, these lists can be found at www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm.

For Alabama, the lists can be found at www.alsba.uscourts.gov/approved.htm

(Southern District), www.almb.uscourts.gov/ (Middle District), and www.alnba.uscourts.gov/creditcounsel.html (Northern District).

For North Carolina, the lists can be found at www.nceb.uscourts.gov/documents/credit_counseling_agencies.pdf (Eastern District), www.ncmb.uscourts.gov/crediteducation.php (Middle District), and www.ncwb.uscourts.gov/reformact/ccounsel.html (Western District).

Although these agencies are “approved” to provide counseling services that satisfy the requirements of the 2005 Bankruptcy Act, the government does not vouch for the quality of their services. Debtors should carefully consider which credit counselor will be best for them. The fees agencies charge can vary widely. A bankruptcy attorney should be able to help with making this choice. In addition, a number of sources have created lists of factors that a debtor should consider when choosing a credit counseling agency. These include:

- “Fiscal Fitness: Choosing a Credit Counselor,” by the Federal Trade Commission. On the Internet at www.ftc.gov/bcp/conline/pubs/credit/fiscal.htm.
- “Tips on Choosing A Reputable Credit Counseling Agency,” by the National Consumer Law Center. On the Internet at www.nclc.org/action_agenda/seniors_initiative/information.shtml.
- “Guidelines for Selecting the Right Credit Counselor,” by the National Foundation for Credit Counseling. On the Internet at www.debtadvice.org/PersPlans/guidelines_credit-counselor.html.

Farmers are strongly encouraged to discuss these issues with their attorneys. ■

Farmers in financial distress are encouraged to discuss their situation with a bankruptcy attorney. Bankruptcy law can be very complicated when applied to specific cases. Good legal advice and careful planning are critical aspects of a successful bankruptcy reorganization.