

Written Testimony

of

Edward C. Boltz, Esq.

On behalf of

National Association of Consumer Bankruptcy Attorneys

Before the

United States House of Representatives

The Subcommittee on Commercial and Administrative Law

H.R. 4044, the 2005 Bankruptcy Act and active duty military

April 1, 2008

Chairman Sánchez, Ranking Member Cannon and Members of the Subcommittee, thank you for the opportunity to testify before you regarding the need to enact H.R. 4044, which would exclude debtors currently serving on active duty in the military from the Means Test under the bankruptcy code.

I am a consumer bankruptcy attorney in private practice in North Carolina, where my bankruptcy practice includes the representation of military personnel and their families stationed primarily at Fort Bragg, as well as members of the military, reserves and National Guard residing elsewhere in North Carolina. I am a certified specialist in consumer bankruptcy law by the North Carolina State Bar Board of Legal Specialization and the American Board of Certification and I serve on the Board of Directors of the National Association of Consumer Bankruptcy Attorneys (NACBA). I received my J.D. from the George Washington Law School and my B.A. from Washington University. At the 2007 Convention of the National Association of Consumer Bankruptcy Attorneys I moderated the panel discussion, entitled “Military Members Deep in Debt,” which addressed the unique issues facing military service members who are in debt and in need of the bankruptcy safety net.

In 2005, Congress passed, and President Bush signed into law, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). BAPCPA, among other substantial changes, required consumer debtors to pass a rigorous “Means Test” in order to obtain a discharge in a Chapter 7 proceeding or to determine the amount to be repaid to creditors in a Chapter 13 case. The purpose of the Means Test was to create a standardized, almost mechanical, review of a debtor’s income and expenses. The first step in the application of the Means Test is a calculation of a debtor’s “Current Monthly Income,” based on the income received by the debtor in the six (6) months preceding the filing of the bankruptcy petition. As “Current Monthly Income” is an historical average of a debtor’s income, rather than a reflection of his or her actual income at the time the case is filed, it has been frequently remarked that “‘Current Monthly Income’ may be neither current, monthly, nor income.”

It is from the starting point of the “Current Monthly Income” that a debtor’s permissible standardized expenses are deducted, determining whether a debtor qualifies for a discharge in a Chapter 7 case or the amount that must be repaid to creditors in a Chapter 13 case. When there is a discrepancy between a debtor’s actual income and “Current Monthly Income,” a debtor may be denied a discharge or required to pay income that is no longer actually received.

This discrepancy, between a debtor’s actual income and his “Current Monthly Income” may result from a change in employment, medical distress, etc. Of particular relevance to consideration of H.R.4044, such a discrepancy between actual income and “Current Monthly Income” can often arise for members of the military, particularly when they return from combat duty overseas. While serving in an “imminent danger pay zone,” most notably including Iraq and Afghanistan, a service member is entitled to an additional \$225.00 per month for “Hostile Fire and Imminent Danger Pay.” In addition to combat pay, service members in combat zones generally are not required to pay

income taxes. While serving in a combat zone, members of the military who are separated from their spouse or children, also are entitled to an additional \$250.00 a month. And upon conclusion of their tour of duty in a combat zone, a service member also receives \$3.50 per day for compensation for incidental expenses. With a 15-month tour of duty, this would result in income of \$1,575.00. When a service member returns from such combat duty, these additional compensations terminate.

It is, however, precisely after returning from overseas, that a service member may face the greatest need of seeking bankruptcy protection. Upon return, the service member also may have to bear many of his own living expenses, such as food, clothing, housing, etc., which were covered by the military while overseas. Furthermore, the stresses and rigors of long deployments overseas all too often leave service members facing additional pressures once they return home, including personal, marital and psychological difficulties, which often result in additional expenses and financial problems. It is these issues that often press those military members into filing bankruptcy following their return from combat duty.

By looking back at a debtor's income over a period of six (6) months, however, service members may find themselves on the horns of a dilemma - their "Current Monthly Income" will include not only the combat pay, but also a *per diem*, family separation allowance, and the lack of taxes, but their actual income will not include any of these additional amounts. They may be ineligible for a bankruptcy discharge or forced to file a Chapter 13 bankruptcy, which requires them to pay their creditors "disposable income" which they do not actually have. The result of this discrepancy is that service members must often wait up to six (6) months to seek bankruptcy protection, as their "Current Monthly Income" comes back into line with their actual income.

In some cases, this may result in a debtor having to just grit his teeth and live through the harassment of creditors for several months. When facing foreclosure, garnishment or repossession of an automobile, however, waiting may simply not be possible, since any delay may result in the loss of a debtor's home, car or income.

This is compounded by a gap between the protections of the Bankruptcy Code and the Servicemembers' Civil Relief Act ("SCRA"), found at 50 U.S.C. §§501-596. The SCRA will generally provide service members with a stay against all legal proceedings, including foreclosures, for up to 90 days following termination of active duty, if such duty impedes the service member from appearing at such proceeding. This leaves a gap of three (3) months between when the protections of the SCRA terminate and those of the Bankruptcy Code become fully available, during which the service member may be subject to substantial risk.

Additionally, service members face a risk from their creditors that civilians generally do not. Article 134 of the Uniform Code of Military Justice makes it a crime for a service member to dishonorably fail to pay a debt. (In most instances, filing bankruptcy is not considered a dishonorable failure to pay debts, as is it allowed by federal law.) The threat of facing a court martial, whether overt or implied, will often override any delay required by the oddities of the Means Test.

Admittedly, some bankruptcy courts that have faced this quandary have found ways to provide relief to service members. Primary among these has been to find that the reduction of the service member's income constituted a "special circumstance" that rebutted any presumption of abuse in a Chapter 7 or excused the payment of nonexistent income in a Chapter 13. The difficulty with this solution, however, is that it is both unpredictable and, because the finding of "special circumstance" requires extensive evidentiary hearings, also involves increased cost to the already bankrupt service member, in terms of both attorneys fees and time by the service member, time that distracts the service member from his responsibilities defending the Nation.

Accordingly, H.R. 4044 is an appropriate, modest and narrowly tailored response to this problem. This provision would not be radical departure from the Means Test as enacted under BAPCPA, as it would be substantially similar to those in 11 U.S.C. § 707 (b)(2)(C), which excuses disabled veterans, with some qualifications, from application of the Means Test.

H.R. 4044 also would exempt only service members on active duty and for a period of 180 days thereafter from the Means Test. Once their "Current Monthly Income" is no longer artificially inflated with combat pay, service members who are not on active duty to the Mean Test, would again be subject to the Means Test. Further, even those service members excluded by H.R. 4044 from being subjected to the Means Test, would still be subject to scrutiny by the bankruptcy court under §707 (b)(3) as to whether their bankruptcy demonstrates an abuse and under the good faith requirements of Chapter 13.

Lastly, at a time of war, H.R. 4044 would further the laudable and important goals of the Servicemembers Civil Relief Act of strengthening and expediting the national defense by enabling service members to devote their entire energy to the defense needs of the Nation, by providing temporary suspension of the Means Test, as the application of the Means Test may adversely affect the bankruptcies of service members during their military service.