

# AMERICAN BANKRUPTCY INSTITUTE JOURNAL

Issues and Information for Today's Busy Insolvency Professional

## Lightning Strikes Thrice: Emerging Issues in Bankruptcy Credit Counseling

### Contributing Editor:

Leslie E. Linfield  
Institute for Financial Literacy  
Portland, Maine  
llinfield@financiallit.org

**A**llegations of the unauthorized practice of law, wrongfully withholding counseling certificates, failure to provide *pro bono* services, generally poor customer service: These are just a few of the issues that the mandatory credit counseling provisions of BAPCPA have given rise to around the country since Oct. 17. An industry already under the microscope of public opinion has proven a lightning rod for the bar, bench, U.S. Trustee Program (USTP) and the bankruptcy administrators (BAs).

### Strike One: Unauthorized Practice of Law

The bankruptcy bar's earliest, ongoing and most frequent complaints emerging from mandatory pre-filing bankruptcy credit counseling sessions revolve around



Leslie E. Linfield

the dispensing of legal advice by credit counselors. These instances of "inappropriate comments on bankruptcy law" are one of several types of complaints being registered with the USTP according to their spokesperson, **Jane Limprecht**. BAPCPA authorizes the USTP to approve such credit counseling providers according to criteria set forth in the law.

When defining the "unauthorized practice of law" (UPL), you would think that one should first look to the definition of the "practice of law." In its most general sense, the practice of law is:

### About the Author

Leslie Linfield is the executive director of the Institute for Financial Literacy (IFL), an approved credit counseling provider with the USTP and Bankruptcy Administrators.

the professional work of a duly licensed lawyer, encompassing a broad range of services such as conducting cases in court, preparing papers necessary to bring about various transactions from conveying land to effecting corporate mergers, preparing legal opinions on various points of law, drafting wills and other estate-

a model definition, a recommendation should be made to the individual state bars that they consider adopting their own definition of the practice of law. At this time, the ABA is monitoring the issue of UPL, and at least one section has held a symposium on the topic.

John Orcutt, a debtor's attorney from Raleigh, N.C., has encountered first-hand the quandary of the UPL issue and credit counseling. "People coming to [credit counselors] are thinking about filing bankruptcy. They have questions and fears. The clients are going to ask legal questions and it's going to be hard for MMI (Money Management International) and the like not to answer those legal questions." Orcutt goes on to say what many others in the legal profession have also expressed:

## Feature

planning documents, and advising clients on countless types of legal questions.<sup>1</sup>

However, the water quickly becomes murky when accounting for 49 state statutes that provide different definitions (only Arizona does not currently attempt to define and regulate UPL). One can't help but think of Justice Potter Stewart's famous quote regarding pornography: "I know it when I see it."<sup>2</sup>

Even the American Bar Association (ABA) has struggled with the issue. The ABA created a Task Force on the Model Definition of the Practice of Law to study and recommend to the full House of Delegates on what said definition would be. After much work and discussion, the Task Force issued a recommendation to the House of Delegates stating that, rather than have the ABA attempt to promulgate

"Credit counselors have a tradition of answering these questions with no idea that they are in effect giving legal advice."

A review of some approved credit counseling agency Web sites also calls into question whether or not these organizations are crossing the line of UPL. Consumer Credit Counseling of Springfield, Mo., has the following information posted on their bankruptcy general information page: "Also you aren't always relieved of all your debts. Some obligations—like federal taxes, student loans, child support and alimony—aren't discharged even if you declare bankruptcy."<sup>3</sup> Consumer Credit Counselors of Kern County, another approved credit counseling provider, has posted a detailed list of some of the changes under BAPCPA including "debts owed to a single creditor totaling more than \$500 for luxury goods incurred

<sup>1</sup> *Black's Law Dictionary* 955 (7th ed. 2000).

<sup>2</sup> *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

<sup>3</sup> [www.cccs-swmo.com/bankruptcy.php](http://www.cccs-swmo.com/bankruptcy.php) (1/2/06).

within 90 days of filing are presumed nondischargeable” and “domestic child and spousal support obligations now have the first priority in distribution over governmental owed obligations.”<sup>4</sup> Whether or not these pages can be construed as “legal advice” may be left to the individual states that control their individual enforcement of UPL statutes. However, the USTP and BAs do include language in their counseling applications that may allow them to hold individual agencies accountable. Each applicant agency attests that it is “in compliance with all applicable laws and regulations of each state, commonwealth, district or territory of the United States in which the (credit counseling) agency seeks approval....”<sup>5</sup>

Orcutt further believes that he and other attorneys have an obligation to monitor what is occurring during the credit counseling sessions due to the possibility of UPL. “North Carolina is a state that allows for one-party consent tape recording. Attorneys will start recording what is being said, and when the credit counselors begin saying things like ‘we don’t think bankruptcy is a good idea,’ we will then have the proof that they have gone over the line.”

Are attorneys justified in this approach? Perhaps, as the ABA Model Rules of Professional Conduct state, “a lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction or *assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law* (emphasis added).”<sup>6</sup> What remains to be seen is whether referring a client to a credit counseling agency that then conducts UPL constitutes “assistance” under the Model Rules.

### Strike Two: Pro Bono Credit Counseling Vagueries

Another issue arising with the credit counseling provisions is that of fee waivers and *pro bono* credit counseling services. BAPCPA includes language requiring that “if a fee is charged for counseling services, counselors charge a reasonable fee and provide services without regard to ability to pay the fee.”<sup>7</sup>

<sup>4</sup> [www.californiaaccs.org/bankruptcy](http://www.californiaaccs.org/bankruptcy) (1/2/06).

<sup>5</sup> *Acknowledgments, Agreements, and Declarations in Support of Application for Approval as a Nonprofit Budget and Credit Counseling Agency, Appendix A*, #1 (June 2005).

<sup>6</sup> Model Rules of Professional Conduct Rule 5.5 (a) (2004).

<sup>7</sup> 11 U.S.C. §(c)(2)(B)

Limprecht says that the USTP has “discussed a number of issues with the credit counseling industry, including... disclosure issues regarding the potential for fee waiver.” The USTP Web site does include some information regarding what “ability to pay” means. According to the most recent FAQ post on the USTP Web site, the “ability to pay must be determined on a case-by-case basis. One factor that must be considered is the client’s personal financial situation as reflected in the budget analysis that is completed pursuant to the statute.”<sup>8</sup>

Some approved credit counseling providers have published their fee-waiver policy, including Consumer Credit Counseling Service of Greater Atlanta (CCCS Atlanta). CCCS Atlanta states on their Web site that “If you are receiving your legal services *pro bono*, or if your sole source of income is disability, this fee may be waived.”<sup>9</sup> Other organizations are more ambiguous. GreenPath Inc. states on their Web site that it “has established criteria for determining if a consumer qualifies for free services. During the counseling session, the counselor will ask the consumer questions to gather the information necessary to determine if they meet the criteria.”<sup>10</sup> It is worth noting that the actual criteria is not published, and the counseling sessions start only after a client has provided either an attorney’s billing code, a debit card number or permission to do a check-by-phone transaction.

Other organizations have taken a slightly different approach. Springboard Nonprofit Consumer Credit Management will first have the client complete the credit counseling session, then determine if the client meets their fee-waiver policy. If a client doesn’t meet the Springboard guidelines but can’t afford the fee, they will not receive their counseling certificates.

**David Yen**, an attorney with Legal Assistance Foundation of Metropolitan Chicago, has some concerns over how the fee waivers will work. Clients working with Yen are typically at 150 percent of poverty and are often dealing with rental arrearages and threat of utility shut-offs.

One such client completed the credit counseling session, but when they asked for their certificate the client was informed that they would have to pay a fee. When the client explained that they

<sup>8</sup> [www.usdoj.gov/ust/eo/bapcpa/ccde/cc\\_faqs.htm](http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_faqs.htm) (1/2/06).

<sup>9</sup> [www.cccsatl.org](http://www.cccsatl.org) (1/2/06).

<sup>10</sup> [www.greenpathbk.com/faq\\_attorney.htm](http://www.greenpathbk.com/faq_attorney.htm) (1/2/06).

were working with a *pro bono* provider and could not afford the counseling fee, the credit counselor began negotiating with the client for a reduced fee. It was only after their attorney spoke with the agency directly that the fee was waived and the certificate released. Yen says, “I’m concerned about people who aren’t our clients and don’t know about the fee waivers. We tell people you are entitled to a waiver.”

### Strike Three: Quality of Service

Other complaints that have come to the surface include not receiving counseling certificates in a timely manner. One such instance led to a unique motion being filed in the District of Rhode Island requesting an extension of time to file the actual physical certificate.

In the motion filed by Attorney **Christopher Lefebvre**, he states: “For some unknown, bizarre and extremely frustrating reason, the certificate of completion has yet to be forwarded to the undersigned.”<sup>11</sup> Lefebvre explains that the client was faced with an imminent foreclosure of his home. Understanding that this alone would not warrant an exigent circumstance waiver of the credit counseling, he advised the client to seek and receive credit counseling immediately. “The Internet wasn’t an option, because he didn’t have high-speed access, and more importantly, he was emotionally a wreck.” Lefebvre says that in-person counseling wasn’t available immediately either, leaving only the choice of telephone counseling.

The client went home that day and completed a telephone session with Springboard Nonprofit Consumer Credit Management. He called Lefebvre to inform him that he completed the required counseling, but explained that due to his lack of a debit card he could not receive his certificate. Lefebvre then contacted Springboard directly using his own credit card to pay for the certificate and asked that it be faxed immediately, explaining that he needed to file the petition immediately to save the client’s home from the pending foreclosure.

Lefebvre goes on to explain that they did not receive the certificate, even after given assurances by Springboard staff that it would be faxed over within the hour. The next day both he and his staff made repeated phone calls and were assured that it was coming shortly.

<sup>11</sup> Motion to Extend Time to File Counseling Certificate, *In re Robert K. Posta* (BK NO: 05-15734).

Assuming that it was, Lefebvre electronically filed the chapter 13 petition, checking the box that indicated that the credit counseling had "been completed." After several days had passed and no certificate was received, Lefebvre filed his motion.

Did the certificate ever arrive? "Yes, a week after completed. It just arrived on the fax without a cover letter. I wasted time [and] energy, and the counseling was a colossal waste of time for the client. The mortgage delinquency was due to illness because the client was out of work for several months. This wasn't due to mismanagement of their funds." The court never ruled on the motion, as Lefebvre withdrew it once he filed the actual certificate with the bankruptcy clerk.

### **Industry Boom or Bust?**

Brad Botes, the executive director of the National Association of Consumer Bankruptcy Attorneys (NACBA), has heard many stories of abuse regarding the credit counseling provisions from his members. "NACBA is in the process of putting together a list of complaints to present to the UST(P)." He goes on to say that "there are many instances of [counselors] poorly prepared to give advice, and often the advice is contrary to the advice the attorneys have given." Botes is also concerned that what he and many attorneys feared about the credit counseling provision may be coming to pass. "It is proving to be what we thought it would because everyone has to go through it. A debtor who files bankruptcy because their child fell ill is treated the same as a consumer who ran up their credit cards."

Another common complaint being registered by attorneys are long hold times on the phone, or appointments being scheduled weeks in advance for in-person credit counseling. Botes is also concerned that because of the now-mandatory bankruptcy credit counseling requirement, "those who really need the credit counseling may not actually be getting it."

Susan Keating, president and CEO of the National Foundation for Credit Counseling (NFCC), recently stated that "[t]he volume is significantly higher than their original projections. We originally expected our client volume of 1 million to double in 2006 (because of the new requirement). Now we're thinking we may be looking at even more."<sup>12</sup> NFCC-

affiliated agencies currently represent almost 80 percent of the approved credit counseling providers. Could this mean an industry boom?

Mark Guimond, executive director of the American Association of Debt Management Organizations (AADMO), might disagree. AADMO is the largest trade association for the credit counseling industry, yet only half of its members have sought approval to provide the bankruptcy credit counseling, unlike its NFCC counterpart. Guimond explains that "the volume of pre-filing counseling sessions is consistent with our projections, and the number of debtors actually entering debt-management programs is so small as to be almost nonexistent and may show that this provision of bankruptcy reform has no significant impact on filings."

Guimond goes on to express concern that several agencies approved by the USTP to provide the pre-filing credit counseling have been questioned in several states about their legal authority to act as credit counselors. Limprecht has indicated that this issue has been raised at the USTP as well, and that they are looking into the "state licensing and registration issues" of several approved providers.

Asked if the additional scrutiny of the USTP process contributed to the industry's concern, Guimond replied that "while the majority of licensed and authorized credit counseling agencies in the United States are AADMO members, they are holding back and waiting to see what happens with the credit counseling application and approval process."

### **Growing Pains; Warning Signs**

Though one can expect that credit counseling agencies might need to make a certain amount of adjustment during the first few months after the enactment of BAPCPA, they should quickly settle into a smooth and efficient delivery of services. The allegations of UPL should most certainly raise alarm. The bar and bench have yet to come to terms with the many complications and intricacies of this new law; consumers can only be harmed if the untrained are allowed to freely cross the line and impart their interpretation of the Code. It will be crucial that the bar and the bench work cooperatively with the USTP and bankruptcy attorneys to give them feedback about the credit counseling requirements and approved providers.

Although the validity and necessity of

credit counseling have been called into question by many in the bankruptcy community, proper budget counseling can be an effective tool for the clients it serves. Clients who may not reach the debtor-education program may still benefit from the budget counseling as it can help them identify areas of their personal finances that need additional attention. For these clients, the lightning will only strike once, and woe to the approved credit counseling providers who misses this opportunity to truly help them. ■

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<sup>12</sup> Weston, Liz Pulliam, "Bankruptcy Law Backfires on Credit Card Issuers," *MSN Money Online* (Dec. 8, 2005).