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Congressional Intent and Judicial Response: The Consumer Credit Amendments of the 1984 Bankruptcy Act

On July 10, 1984, the Bankruptcy Amendments and Federal Judgeship Act of 1984 was signed into law by President Reagan.[1] The purpose of the Act was to establish a new bankruptcy court arrangement consistent with the United States Supreme Court's holding in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*[2] and to amend certain provisions of the 1978 Bankruptcy Act.[3] Among the amended provisions were a group that Congress and commentators alike have referred to as the "Consumer Credit Amendments."[4] This comment will focus on those amendments.

The Consumer Credit Amendments were due in large part to a concerted effort on the part of creditor lobbying groups who believed that the 1978 Act favored debtors.[5] As Senator Orrin G. Hatch stated at the time of passage of the 1984 Act:

> The number of consumer bankruptcy cases filed has risen dramatically each year since the bankruptcy code was last amended in 1978. Several witnesses before the Senate Judiciary Committee pointed to these changes in the Code as the principal cause of the increase. The 1978 amendments generally eased a debtor's access to bankruptcy to avoid excessive indebtedness.[6]

Not all members of Congress perceived the 1984 Act as a creditor-oriented bill. Representative Peter Rodino, who was instrumental in the passage of the Act, stated that the "amendments are fair to both debtors and creditors."[7] The majority of the members of Congress and legal commentators, however, agreed with Senator Hatch's view that the amendments assured that the debtor under the bankruptcy code received a "fresh start" and not a "head start."[8]

This comment will analyze the four most controversial amendments under the 1984 Act. These amendments affect the debtor's discharge, awards of attorney fees against creditors that object to discharge, reaf-

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1. Pub. L. No. 98-353, 98 Stat. 392 (1984).
2. 458 U.S. 50 (1982). The Court's holding in *Marathon* declared the 1978 Act's jurisdictional grant to the bankruptcy courts to be unconstitutional.
3. 1984 U.S. Code Cong. & Ad. News 576.
4. *See, e.g., id.*; Snider, Rochkind, Green, Stein and Welford, *The Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 Mich. B.J. 775, 778 (1984) [hereinafter cited as Snider]; Martin and Fagan, *A Guide to the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 13 Colo. Law. 1775, 1778 (1984).
5. Warren, *Reducing Bankruptcy Protection for Consumers: A Response*, 72 Geo. L.J. 1333 (1984).
6. 1984 U.S. Code Cong. & Ad. News 576, 597.
7. *Id.* at 576.
8. *See, e.g.*, Snider, *supra* note 4; Warren, *supra* note 5; Williamson, Mimms and Taylor, *Consumer Credit Changes to the Bankruptcy Laws: A Hodgepodge for Creditors and Debtors*, 58 Fla. B.J. 553 (1984); 130 Cong. Rec. H7497, H7499 (daily ed. June 29, 1984) (statements of Representatives Brooks and Anderson).

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firmation agreements, and dismissal. Judicial response to the amendments will be compared with Congress' ostensive intent, and the issues in need of resolution under the Consumer Credit Amendments will be discussed. Although the tenth circuit has yet to rule on any of the amendments discussed, other courts have interpreted and applied them. This comment will prepare the Wyoming lawyer for the issues and problems that are likely to arise in connection with the amendments.

SECTION 523(a)(2)(C): DISCHARGE

Background

Prior to the 1984 Act, a major problem was the debtor who would essentially go on a spending spree by charging up to the limits of his credit cards and then request discharge of the credit card debt in bankruptcy.[9] A number of courts have held such a debt to not be dischargeable,[10] but only if the creditor could prove the debtor's intent not to repay. This often entailed a showing of fraud on the debtor's part.[11]

New section 523(a)(2)(C) is designed to appease the credit card lobby by shifting the burden of proof.[12] The amended section declares in relevant part:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> . . .
>
> (C) for purposes of subparagraph (A) of this paragraph, *consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods and services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor;* an extension of consumer credit under an open end credit plan is to be defined for purposes of this sub-

9. Snider, *supra* note 4, at 778.
10. *Id.*
11. 11 U.S.C.A. § 523(a)(2)(A) (West 1979 & Supp. 1985).
12. Snider, *supra* note 4; Martin and Fagan, *supra* note 4; 126 BANKR. L. REPORTS (CCH) 13 (1984).

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paragraph as it is defined in the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.)[13]

Under the amendment, a discharge under sections 727, 1141 or 1328(b)[14] is *presumed* not to be available for "consumer debts owed to a single creditor aggregating more than $500 for 'luxury goods and services' " incurred within forty days of the order for discharge, or for cash advances exceeding $1,000 that are "extensions of consumer credit under an open-end credit plan obtained by an individual debtor on or within twenty days" of the order for discharge.[15] Thus, the presumption in the new section runs in favor of the creditor.

Additionally, the amendment attempts to define "luxury goods and services" by exclusion. "Goods and services reasonably acquired for the support or maintenance of the debtor" do not fall within the ambit of luxury goods and services.[16] Under section 523(a)(2)(C), if the creditor objects to discharge the debtor may attempt to show that the debt was not incurred for luxury goods and services.

A Second Circuit case, decided after the passage of the 1984 Act but before it became effective, illustrates the problem the new section is designed to solve. In *In re Senty,*[17] the debtor held Citibank, Diners Club and Carte Blanche credit cards. From July through September of 1982 the debtor vacationed in Europe and returned to the United States after incurring substantial credit card debts.[18]

In November 1982, the debtor petitioned for bankruptcy under Chapter 7 and sought discharge of the credit card debts. The three credit card companies brought suit objecting to discharge under section 523(a)(2)(A).[19] The court held that under that section a creditor need only establish a prima facie case that a debt is nondischargeable to shift the burden of proving dischargeability to the debtor.[20]

The court in *Senty* interpreted section 523(a)(2)(A) as requiring proof of the elements of fraud.[21] In holding for the creditors, the court found intent premised on the statement that "[c]ourts have generally held that

13. 11 U.S.C.A. § 523(a)(2)(C) (West Supp. 1985) (emphasis added). The emphasis added to the quoted code sections reflect the language that the author will focus on in this comment.

14. Section 727 is the standard discharge section for an individual debtor filing for liquidation under Chapter 7. Section 1141 provides that the debtor will be discharged from "any debt that arose before the date" of confirmation of the debtor's Chapter 11 reorganization plan. Section 1328(b) applies to debtors filing for a hardship discharge of their debts under a Chapter 13 payment plan. *See infra* text accompanying notes 27-30.

15. 11 U.S.C.A. § 523(a)(2)(C) (West Supp. 1985).

16. *Id.*

17. 42 Bankr. 456 (S.D.N.Y. 1984).

18. *Id.* at 458. The debtor accumulated a total debt of $62,372.06 on three different credit cards.

19. *See supra* text accompanying note 13.

20. Citibank v. Senty (*In re* Senty), 42 Bankr. 456, 458 (S.D.N.Y. 1984).

21. *Id.* at 459: "A case in fraud at common law requires proof of a material misrepresentation, knowingly made with intent to deceive, which statement is reasonably relied on by the plaintiff to its detriment."

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a debtor's intent to deceive may be inferred upon proof that the debtor knew or should have known of his insolvency and inability to repay the charges incurred."[22] The court proceeded to list a number of factors to be considered when determining the debtor's intent to deceive.[23] After evaluating the facts in *Senty* based on these factors, the court concluded that the debtor could not possibly have believed that he would be able to pay off the credit card debts and accordingly denied discharge.[24] The creditor's burden of proving fraud under 523(a)(2)(A) is removed by new section 523(a)(2)(C). When he falls within the scope of the amendment, the debtor must disprove fraud at the outset of the case.

The first case involving section 523(a)(2)(C) was *In re Smith,* a Fourth Circuit case decided June 18, 1985.[25] *Smith* was a virtual expose on the limits of the new section. The objecting creditor was a store that was attempting to block discharge of the debtor's account of $549.12.[26] The bankruptcy judge denied the creditor's objection for three reasons. First, section 523(a)(2)(C) only applies to discharge under sections 727, 1141 or 1328(b).[27] The court pointed out that section 1328(b) was only applicable to hardship discharges[28] and the debtor was not pleading hardship but was seeking discharge under 1328(a).[29] The court held that section 523(a)(2)(C) did not apply to a section 1328(a) discharge.[30]

Second, the amended section only applies to debts aggregating more than $500. The court found that the debtor opened his account on November 27, 1984 and made a purchase on that date. The debtor petitioned for bankruptcy on January 11, 1985, more than 40 days after his first purchase.[31] Although there were other purchases within forty days

22. *Id.* at 459.
23. *Id.* at 460.
24. *Id.*
25. 50 Bankr. 573 (M.D.N.C. 1985).
26. *Id.* at 574.
27. 11 U.S.C.A. § 523(a)(2)(C) (West Supp. 1985).
28. 11 U.S.C.A. § 1328(b) (West 1979):

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

29. 11 U.S.C.A. § 1328(a) (West 1979):

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5) of this title; or

(2) of the kind specified in section 523(a)(5) of this title.

30. Belk Center v. Smith (*In re* Smith), 50 Bankr. 573, 575 (M.D.N.C. 1985).
31. *Id.* at 574.

of the debtor's petition, they did not total over $500 as required by 523(a)(2)(C).[32]

Third, the court held that the debt did not fall within section 523(a)(2)(C) because it was not for "luxury goods and services."[33] The purchases made by the debtor were primarily for clothing which the court held to be "reasonably acquired for the maintenance or support of the debtor or a dependent of the debtor."[34]

Perhaps the most perplexing aspect of the *Smith* case was a portion of the opinion unrelated to the court's interpretation of the new section. After the court had determined that the case was inappropriate for section 523(a)(2)(C), it imposed sanctions on the creditor's attorney under Bankruptcy Rule 9011(a).[35] The creditor's attorney was ordered to pay the attorney fees that the debtor incurred in defending against the creditor's objection. The court's reasoning was that "the complaint was neither well grounded in fact nor warranted by existing law."[36]

Analysis

The new section 523(a)(2)(C) may raise more problems than it solves. One glaring problem with the section is the definition of "luxury goods or services." Without a more concrete definition, the question of whether a debt is for "reasonable support and maintenance" is sure to be an oft-litigated question. Once in the courts, the question of what is needed for the reasonable support and maintenance of the debtor becomes a subjective evaluation for the bankruptcy judge. The problem with such a subjective evaluation is that while the debtor may view expenditures on recreation and church contributions as vital to his well-being, the bankruptcy judge may view the same expenditures as frivolous or unnecessary.

32. *Id.*
33. *Id.* at 575.
34. *Id.*
35. Bankruptcy Rule 9011(a):
(a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, statement of financial affairs, statement of executory contracts, Chapter 13 Statement, or amendments thereto, shall be signed by at least one attorney of record in his individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state his address and telephone number. The signature of an attorney or a party constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, any appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.
36. Belk Center v. Smith (*In re* Smith), 50 Bankr. 573, 576 (M.D.N.C. 1985).

Second, the burden placed on the debtor to overcome the presumption of nondischargeability needs to be ascertained. Creditors who object to discharge of credit card debts under section 523(a)(2)(C) are relieved of the burden of proof they carried under section 523(a)(2)(A). Under the old section, however, the creditor only had to establish a prima facie case to shift the burden of proof to the debtor.[37] Unless the burden of nondischargeability in 523(a)(2)(C) is relatively substantial, the amendment will be of only slight consequence. That Congress intended the burden of overcoming the presumption to be formidable is indicated by the fact that section 523(a)(2)(C) is specifically applied to hardship discharges.[38] A debtor should have a difficult time pleading good faith failure to meet a chapter 13 repayment plan and discharge of debts for luxury goods at the same time.

Third, there are problems with the new section's time requirements. Debts for luxury goods and services incurred within forty days of relief, and debts under open-end credit plans incurred within twenty days of relief, are not dischargeable.[39] By simple manipulation of the time requirements a debtor can avoid section 523(a)(2)(C).[40] Thus, a case like *Senty*[41] could still have been decided under section 523(a)(2)(A) even though the abuse of credit card privileges in that case is a prime example of what section 523(a)(2)(C) is designed to stop. The debtor in *Senty* returned from Europe in September 1982, and filed for bankruptcy on November 3, 1982.[42] The opinion does not state the specific day on which the debtor incurred his last credit card charge. If it was prior to September 24, 1982, however, the debtor would not come under section 523(a)(2)(C) and the burden of proof would rest with the creditor.

Fourth, the *Smith* case also raises problems with the dollar requirements of section 523(a)(2)(C). The *Smith* court held that part of the debtor's obligations were incurred prior to the forty-day period. Thus, the debtor's "aggregate"[43] debt was under $500 and did not fall within 523(a)(2)(C).[44] The problem with the *Smith* court's analysis lies in its definition of "aggregate." The new section makes no attempt to define the time period of the aggregate of the debt.[45] Certainly, a creditor does not keep a different file for each purchase by the debtor; he keeps a running balance or "aggregate" irrespective of any forty-day requirements. Under the *Smith* court's approach, a clever debtor could charge up to $500 within the forty-day period in addition to debts previously incurred to the same creditor and avoid the 523(a)(2)(C) presumption. It would make more sense to interpret the new section to mean "reaching an aggregate of more than

37. Citibank v. Senty (*In re* Senty), 42 Bankr. 456, 458 (S.D.N.Y. 1984).
38. *See supra* text accompanying notes 27-30.
39. 11 U.S.C.A. § 523(a)(2)(C) (West Supp. 1985).
40. Martin and Fagan, *supra* note 4, at 1782.
41. 42 Bankr. 456 (S.D.N.Y. 1984).
42. *Id.* at 457.
43. 11 U.S.C.A. 523(a)(2)(C) (West Supp. 1985).
44. Belk Center v. Smith (*In re* Smith), 50 Bankr. 573, 575 (M.D.N.C. 1985).
45. 11 U.S.C.A. § 523(a)(2)(C) (West Supp. 1985).

$500"[46] after the forty-day period has started to run. Then when the debtor incurs additional debts to a single creditor within the forty-day period, creating a single debt in excess of $500, the burden of proof would lie with the debtor. This would lessen the impact of the forty-day limit as an instrument of abuse because the debtor could only charge up to $500 within the forty-day period rather than adding $500 to his already existing debt.

Fifth, the finding in *Smith* that a debt of $549.12 for clothing was not a debt for "luxury goods and services" also may bode ill for creditors.[47] The court did not discuss the size of the Smith family but simply classified clothing as necessary for support and maintenance. Of course, the problem is that unless the Smiths were the benefactors of a large family, $500 worth of clothing within forty days of a petition for bankruptcy is a rather substantial sum. The court should have explained the circumstances surrounding its holding.

Finally, the court's imposition of sanctions in *Smith* is disturbing. Granted, the creditor's attorney did not show up for the discharge hearing, but then, neither did the debtor's attorney.[48] The creditor's attorney was found at fault for requesting that the debt not be discharged after the court found that discharge was appropriate. The court's motive in levying sanctions appears to have been to punish the creditor's attorney for testing the waters of a relatively vague and complex new section in the bankruptcy code. Indeed, the bankruptcy judge in *Smith* may not have realized that his was the first opinion interpreting section 523(a)(2)(C), but he certainly should have been aware that it was among the first. It seems unjust that sanctions should be imposed for filing a complaint not "warranted by existing law"[49] when in fact no law beyond a bare statute existed when the complaint was filed.

SECTION 523(d): ATTORNEY'S FEES

Background

The purpose of section 523(d) before and after the 1984 Act has been to allow a debtor to recover attorney's fees from a creditor who hinders the bankruptcy petition by objecting to discharge.[50] In the event that the creditor's objection is denied, the debtor may ask for attorney's fees. Amended section 523(d) reads as follows:

> (d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such

46. *Id.*
47. *In re Smith*, 50 Bankr. at 575.
48. *Id.* at 573.
49. *Id.* at 576.
50. Prior to amendment, section 523(d) read:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment against such creditor and in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding to determine dischargeability, unless such granting of judgment would be clearly inequitable.

11 U.S.C.A. § 523(d) (West 1979).

> debt is discharged, the court *shall* grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if *the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.*[51]

At the time of the amendment to section 523(d), many commentators suggested that the new language favored creditors.[52] Previously, the section called for the court to assess fees "unless clearly inequitable."[53] Commentators viewed the amendment as favorable to creditors because it required the court to find that the creditor was "not substantially justified" *and* that no special circumstances mitigate in favor of the creditor before assessing costs.

At least two commentators viewed the amendment as favoring debtors.[54] They pointed out that the new section contains the language of a typical attorney's fees statute and emphasized that the court "*shall* grant judgment in favor of the debtor" unless special circumstances dictate otherwise.[55] Prior to the amendment there were few instances of awards of attorney's fees,[56] but, according to the authors, the new language has the potential for deterring creditors from fighting discharge.[57]

Still another commentator saw the amendment as striking a middle ground between creditors and debtors:

> The new standard seeks to strike an appropriate balance between protecting the debtor from unreasonable challenges to dischargeability of debts . . . while deterring creditors from making [un]reasonable challenges. . . . The new standard, however, should not be read to raise a presumption that the creditor was not substantially justified, simply because it lost the challenge.[58]

The case law reflects the foregoing controversy as well as the bankruptcy courts' failure to effectively distinguish between the old and new sections. A federal case decided under the old section denied attorney's fees to the *creditor* under 523(d) and at the same time interpreted Congress' intent under the 1978 Act to be debtor-oriented:

> The congressional failure to award attorney's fees to prevailing creditors was not accidental. Congress enacted section 523(d) out

51. 11 U.S.C.A. § 523(d) (West Supp. 1985) (emphasis added).
52. *See, e.g.*, Snider, *supra* note 4; Montali, *Preliminary Comments on the Bankruptcy Code Changes Affecting Consumers*, 12 NORTON BANKR. L. ADVISER 6 (December 1984); Williamson, Mimms and Taylor, *supra* note 8.
53. 11 U.S.C.A. § 523(d) (West 1979).
54. Martin and Fagan, *supra* note 4, at 1782.
55. *Id.*
56. *Id.*
57. *Id.* "The standard of section 523(d) at best leaves creditors' counsel in doubt as to the possible levy of attorney's fees and, at worst, substantially deters creditors from bringing arguably legitimate claims for nondischargeability."
58. 126 BANKR. L. REPORTS (CCH) para. 307 (1984).

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> of concern that creditors were using the threat of litigation to induce consumer debtors to settle for reduced sums, even though the debtors were in many cases entitled to discharge.[59]

This conclusion was supported by cases holding that "absent a finding of clear inequity, no judicial discretion" was permitted in determining whether attorney's fees should be awarded under the old section 523(d).[60] In cases decided after the 1984 amendments, this presumption in favor of debtors began to erode.

In *In re Fuerinsky,*[61] the bankruptcy court held that the plaintiff/creditor had failed to sustain his burden of showing clear inequity in awarding attorney's fees to the debtor, and assessed "reasonable" fees against him.[62] In a footnote the judge explained that new section 523(d) was not yet in effect but observed that "[i]n the Bankruptcy Amendments and Federal Judgeship Act of 1984, the Congress tilted toward a more creditor oriented version of § 523(d). It is clear the version I must apply here is more severe toward unsuccessful creditors."[63]

In re Jones[64] was one of the first cases to be guided by the amended section. The debtor sought discharge of a lease obligation running to the plaintiff/creditor. The court held that the creditor had failed to sustain his burden to defeat discharge but denied attorney's fees to the debtor.[65] After quoting the new section 523(d) the court went on to state:

> Some courts have found that only cases of "clear inequity" relieves an unsuccessful creditor from the prospect of paying a discharged debtor's costs of defending against a suit to determine nondischargeability. These courts would agree that "absent a finding of clear inequity, § 523(d) does not provide for judicial discretion in this matter".[66]

The *Jones* court also discussed the legislative history of amended section 523(d).[67] This same legislative history was relied on by the Delaware bankruptcy court in *In Re Walter,* an opinion denying attorney's fees.[68]

59. *In re* Martin, 761 F.2d 1163, 1167 (6th Cir. 1985).
60. Commerce Union Bank of Sumner County v. Watson (*In re* Watson), 44 Bankr. 183, 185 (M.D. Tenn. 1984) (citing Thorp Credit, Inc. v. Carmen, 723 F.2d 16 (6th Cir. 1983)).
61. 41 Bankr. 724 (Ariz. 1984).
62. *Id.* at 729. The determination of what were reasonable fees was left to the parties. To guide the parties in their negotiations the court stated that in the event of a failure to reach agreement "[i]t is unlikely I will award counsel fees of $23,010.00 for defending discharge of a $4,206.82 claim."
63. *Id.* at 728.
64. 49 Bankr. 431 (D.C. 1985).
65. *Id.* at 437.
66. *Id.* at 436 (citing Thorp Credit, Inc. v. Carmen, 723 F.2d 16, 18 (6th Cir. 1983)).
67. *In re* Jones, 49 Bankr. at 436. "The relevant legislative history . . . states that the purpose of the provision is to discourage creditors from engaging in the practice of initiating suits of this type in the hopes of obtaining a settlement from honest debtors anxious to save attorney's fees. Such a practice is contrary to the spirit of the bankruptcy laws and is therefore sanctioned."
68. Walter v. Walter (*In re* Walter), 50 Bankr. 521, 522 (Del. 1985).

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The legislative history relied on by both courts, however, was applicable to the 1978 Act, not the 1984 amendment.[69]

In *Walter*, the court held that a son's loan to his father for business purposes was not a "consumer debt"[70] under 523(d) and thus an award of attorney's fees was not proper.[71] The court proceeded, in dicta, to address the question of whether the creditor was substantially justified in objecting to discharge.[72] *Walter* was based on a peculiar set of facts in that the debtor's twenty-six year old son was the objecting creditor. The court stated that even if the son "was not substantially justified, it would not be fair to order him to pay his father's counsel fees. Congress did not intend equally positioned private parties, absent an abusive filing, to bear the expense of the other's cost of litigation."[73]

Analysis

The effect of a statute is not determined until it is judicially interpreted. A court's interpretation may or may not rely on legislative history. When a court relies on outdated legislative history,[74] the potential for confusion is clear. With the initial disagreement over the meaning of amended section 523(d),[75] a quagmire appears to be enveloping the amendment.

The effect of 523(d) on awards of attorney's fees against creditors remains to be seen because the initial cases discussed above have not established any solid precedent. The bankruptcy judge in *Jones*[76] quoted the new section 523(d) but relied on case law, language and legislative history relevant to the *old* section 523(d).[77] Additionally, *Jones* involved a lease which may not fall within the section 101(7) definition of consumer debt.[78] At any rate, the court did not discuss this aspect when applying 523(d) to the case.[79] An attorney citing *Jones* would be well-advised to exercise caution in offering the case as thorough, substantive authority.

Perhaps the *Walter* opinion contains a more searching analysis, but at the same time the court's discussion of substantial justification was dictum. Additionally, *Walter* involved an unusual fact pattern.[80] The court disposed of the case on the basis that a consumer debt was not sought to be discharged.[81] The court then went on to assume that a consumer debt was involved and further that the creditor was not substantially

69. 11 U.S.C.A. § 523 (West 1979). *Walter* was also decided under the amended section 523(d).
70. *Id.* § 523(d) (West Supp. 1985).
71. *In re Walter*, 50 Bankr. at 523.
72. *Id.*
73. *Id.*
74. *See supra* text accompanying note 69.
75. *See supra* text accompanying notes 52-58.
76. 49 Bankr. 431 (D.C. 1985).
77. *Id. See supra* text accompanying note 69.
78. 11 U.S.C.A. § 101(7) (West 1979): " 'consumer debt' means debt incurred by an individual primarily for a personal, family or household purpose."
79. *In re Jones*, 49 Bankr. at 431.
80. *In re Walter*, 50 Bankr. at 521. *See supra* text accompanying note 73.
81. *In re Walter*, 50 Bankr. at 522.

justified.[82] With each assumption, the court concluded that attorney's fees would not be awarded.[83] The court's holding may be summarized by saying that a father may not recover attorney's fees under 523(d) from a son who objects to discharge of a business debt owed by father to son. Although this would have been an excellent case for denying attorney's fees because of "special circumstances," the court did not rely on that language.[84]

In summary, thus far the amended section 523(d) has controlled two cases where attorney's fees were not awarded against the creditor. Neither of the cases analyzed the "substantially justified" language as part of the basis of its decision, nor did the two cases involve clear instances of consumer debt. The language of section 523(d) is sufficiently vague so that a court could set precedent favorable to debtors,[85] contrary to the initial predictions of the commentators, especially if the appropriate legislative history is not brought to the court's attention.

It would seem that Congress intended to benefit creditors by changing the standard of "clearly inequitable" to "not substantially justified" and by further adding that special circumstances will serve as a basis for denying attorney's fees. A creditor should have an easier burden when attempting to show that he was "substantially justified" (which calls for a determination of what rises or falls to the level of "substantial") than when attempting to show that an award against him will result in "clear inequity" (which means it is either clearly inequitable or it is not). The courts' recognition of this shift in emphasis should guide them in their application of section 523(d) as well as in their examination of the legislative history.[86]

SECTION 524(c): REAFFIRMATION AGREEMENTS

Background

Often a debtor may wish to stay in the good graces of a creditor by executing an agreement with the creditor stating that the debtor will pay the creditor despite past or future financial difficulties. Such agreements are called reaffirmation agreements and are controlled by section 524(c) of the Bankruptcy Code. In enacting subparagraphs (2)-(4) to amend section 524(c), Congress made it easier for a creditor to obtain reaffirmation of a debt from the debtor prior to discharge:[87]

> (c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt

82. *Id.* at 523.
83. *Id.*
84. 11 U.S.C.A. § 523(d) (West Supp. 1985).
85. *See supra* text accompanying notes 53-57.
86. Lenzycki v. Nicholson (*In re* Nicholson), 51 Bankr. 198 (M.D. Fla. 1985) was decided on February 6, 1985. *Nicholson* involved another 523(d) decision which denied fees because a business debt was involved rather than a consumer debt.
87. Snider, *supra* note 4, at 780.

that is dischargeable in a case under this title is enforceable only to an extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, or 1328 of this title;

(2) such agreement contains *a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court,* whichever occurs later, by giving notice of rescission to the holder of such claim;

(3) such agreement has been filed with the court and, if applicable, *accompanied by a declaration or an affidavit of the attorney that represented the debtor* during the course of negotiating an agreement under this subsection, *which states that such agreement—*

(A) *represents a fully informed and voluntary agreement by the debtor;* and

(B) *does not impose an undue hardship on the debtor or a dependent of the debtor;*

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of recission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) *in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement* under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) *Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.*[88]

Under the 1978 Act, section 524(c) required court approval for reaffirmation agreements because the general sentiment was that creditors were harassing debtors into reaffirmation.[89] The process of judicial approval under the old section could be very time consuming and cumbersome for both the parties and the court because reaffirmation agreements are relatively common and court approval was always required.[90] The 1984 amendment disposes with court involvement to a great extent and thus would appear to favor creditors. The procedure is faster and only involves the debtor's attorney, who is more likely to follow the wishes of his client

88. 11 U.S.C.A. § 524(c) (West Supp. 1985) (emphasis added).

89. Snider, *supra* note 4, at 780.

90. *See, e.g.,* Midlothian State Bank v. Roth (*In re* Roth), 43 Bankr. 484 (N.D. Ill. 1984); *In Re* Bryant, 43 Bankr. 189 (E.D. Mich. 1984); *In Re* Malagesi, 39 Bankr. 629 (E.D. Pa. 1984).

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than the court would be. Under the 1978 Act, the debtor's attorney undoubtedly examined the agreement before submitting it to the court, so the 1984 amendment essentially eliminates the second stage of approval that the creditor had to achieve.[91]

Unlike the former section 524(c), a debtor may now reaffirm a debt as long as: 1) there is a "clear and conspicuous" statement in the reaffirmation agreement advising the debtor that he may rescind the agreement any time prior to discharge or within sixty days after the agreement is filed with the court; 2) an affidavit from the debtor's attorney has been filed stating that the debtor is fully informed, that the agreement is voluntary, and that it does not impose an undue hardship; and 3) there has been no showing that the debtor has abused the recission right.[92] Court approval is only required where the debtor is not represented by an attorney.[93]

Analysis

Section 524(c) is still in need of judicial treatment, but a number of issues are certain to arise. First, whether the court will continue to be active in reviewing reaffirmation agreements remains to be seen. The old section was clearly designed to ensure that the creditor did not take advantage of the debtor. The amendment sweeps away much of that protection by only providing for judicial approval when the debtor is not represented by an attorney. There appear to be no means by which the court can invalidate a reaffirmation if the debtor's attorney approves the agreement. Without judicial review, creditors will no doubt begin to seek reaffirmation from a tougher bargaining position, knowing that their agreements with debtors will not be subjected to judicial scrutiny. Debtors' attorneys should recognize that they now have a greater duty to protect their clients when reaffirmation is sought. When an attorney fails to realize this duty, the court should be enabled to protect the debtor by exercising the ultimate veto power over any reaffirmation agreements.

Second, the old section specifically exempted reaffirmation agreements secured by realty from the requirement of judicial approval.[94] The amended version of 524(c) does not change this provision when court approval is necessary because the debtor is not represented by an attorney. There is no provision, however, dealing with the question of whether the debtor who *is* represented by an attorney must seek approval when the reaffirmation agreement is secured by real property. This could lead to a situation in which the debtor must incur attorney's fees because he is represented by an attorney. In other words, the debtor could reaffirm without the court's approval at no legal expense if he was not represented by an attorney.

Third, as mentioned above, the amendment appears to place a great burden on the debtor's attorney. One commentator has pointed out that

91. Snider, *supra* note 4, at 780. *Contra* Martin and Fagan, *supra* note 4, at 1783.
92. Montali, *supra* note 52, at 7.
93. 11 U.S.C.A. § 524(c)(6) (West Supp. 1985).
94. *In re* Moore, 50 Bankr. 301, 302 (S.D. Ohio 1985).

the potential for malpractice is great and that the attorney, unlike the court, is not saved by judicial immunity.[95] A situation could arise in which the debtor wants to reaffirm but his attorney will not approve. Under a literal interpretation of the statute, the debtor could be precluded from seeking judicial approval. Likewise, if the court does not review the reaffirmation agreement, the debtor who does gain approval of his reaffirmation agreement by his attorney may later claim that the attorney failed to adequately protect the debtor. Any ensuing malpractice litigation would involve a determination of the duty owed by the attorney to the debtor; this is not clearly delineated by the statute.[96]

Congress attempted to make it easier to obtain reaffirmation agreements by doing away with judicial involvement. Its intent may be frustrated, however, in light of the foregoing considerations, by wary debtors and attorneys. Creditors may find that the former drawbacks of court approval[97] have been replaced by protracted negotiation with debtors' attorneys who are attempting to protect both their clients and themselves.

SECTION 707(b): DISMISSAL FOR SUBSTANTIAL ABUSE

Background

An amendment which is perhaps most symbolic of the preferential treatment afforded creditors is new subsection (b) of section 707. Under this section the court, on its own motion, may dismiss a bankruptcy petition for substantial abuse. This novel section was the source of much debate in Congress and already has produced some noteworthy case law:

> (b) After notice and a hearing, *the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss* a case filed by an individual debtor under this chapter whose debts are *primarily consumer debts* if it finds that the granting of relief would be a *substantial abuse* of the provisions of this chapter. *There shall be a presumption in favor of granting the relief requested by the debtor.*[98]

Some of the bill's provisions that were the focus of debate and undoubtedly will be discussed in bankruptcy court opinions for some time include: 1) only the bankruptcy court, and not creditors, may move to dismiss for substantial abuse; 2) only debtors with "primarily consumer debts" may have their petitions dismissed for substantial abuse; and 3) there remains a presumption in favor of granting the debtor's petition.[99]

Additionally, there has been substantial controversy as to whether a future income test should be applied by the bankruptcy court.[100] In other

95. Williamson, Mimms and Taylor, *supra* note 8, at 554.
96. 11 U.S.C.A. § 524(c) (West Supp. 1985).
97. *See supra* text accompanying note 90.
98. 11 U.S.C.A. § 707(b) (West Supp. 1985) (emphasis added).
99. *Id.*
100. Snider, *supra* note 4, at 780.

words, should the bankruptcy court evaluate the debtor's future earning capacity to determine whether or not he would be able to pay his creditors under a Chapter 13 plan or some other installment method? If a future income test is contemplated by 707(b), it follows that where a debtor appears to have sufficient future earnings, relief would be denied under Chapter 7.

Senator Howard Metzenbaum argued that section 707(b) did not contemplate a future income test:

> It would have forced bankruptcy judges to become soothsayers and engage in the impossible task of predicting someone's earnings and financial obligations. Bankruptcy relief would have become hostage to a judge's guesses about how much an individual would earn, what their financial burdens would be, whether they would become sick, unemployed, and so on. In some cases, because judges are human, they would simply be wrong.[101]

Since only the court may bring a 707(b) motion, section 707(b) also raises the issue of how the bankruptcy judge can know that the potential for substantial abuse exists.[102] Furthermore, it has been noted that because the court must make the motion and decide the motion, it plays the role of both prosecutor and judge.[103] Unlike the other amendments discussed in this comment, however, the courts have set to work in tackling some of the issues raised by this new provision.

The first case to address new section 707(b) was *In re Bryant,* a North Carolina case decided by Judge Wooten.[104] The court decided that review of the debtor's petition warranted a 707(b) hearing because the debtor's income exceeded his expenses by approximately $200 per month and the expenses listed were greatly inflated.[105]

At the hearing on the court's motion, the debtor contended that his debts were not "primarily consumer debts" and thus did not fall under section 707(b).[106] The court, however, determined that the debtor's home mortgages were consumer obligations and that the debtor intentionally had omitted debts owed on at least seven or eight credit cards.[107] The court found that the debtor had the following debts, expenses and income:

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101. 130 CONG. REC. S7624 (daily ed. June 19, 1984) (statement of Senator Metzenbaum). *See also* 130 CONG. REC. H1941 (daily ed. March 26, 1984) (Chairman Rodino: "This provision would not create a future income test") *but cf.* 130 CONG. REC. H7499 (daily ed. June 29, 1984) (Representative Anderson: "Furthermore, a bankruptcy court could dismiss a Chapter 7 filing if, in its opinion, the filing constitutes a 'substantial abuse' of the Bankruptcy Code because the debtor is found capable of fulfilling the terms of a Chapter 13 repayment agreement.")

102. *Section 707(b): Some Thoughts on "Substantial Abuse" Dismissal,* 1 NORTON BANKR. L. ADVISER 8, 9 (January 1985).

103. *Id.*

104. 47 Bankr. 21 (W.D.N.C. 1984).

105. *Id.* at 23. When the debtor files a petition for bankruptcy he must attach a schedule of assets and liabilities unless the court directs otherwise pursuant to Bankruptcy Code section 521(1).

106. *Id.* at 23.

107. *Id.*

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Consumer Debts	$46;844.97
Non-Consumer Debts	$40,248.00
Monthly Expenses	$ 3,537.00
Income	$41,400.00[108]

The court denied the debtor's petition and in doing so made it clear that 707(b) is a powerful tool enabling the bankruptcy judge to deny bankruptcy to debtors he feels are undeserving. Judge Wooten wrote:

> First, this case was brought, not because of the Debtor's unemployment or an inability to pay on his part, but because he simply decided to shuck a couple of his debts. . . .
>
> Secondly, the Court finds on the part of the Debtor an utter disregard of his duties under the § 522 of the Code to truthfully list all of his obligations, his monthly expenses, and to disclose his general financial position to the Court. . . .
>
> Third, it is the opinion of the court that the Debtor's Statement of Monthly Expenses filed with his petition was done in bad faith and that these amounts were greatly overstated with the intention of misrepresenting his financial picture.[109]

Many of the expenses claimed by the debtor were exorbitant.[110] The court stated that "it was not the design of the Bankruptcy laws to allow the Debtor to lead the life of Riley while his creditors suffer on his behalf."[111]

The court recognized that the phrases "substantial abuse" and "primarily consumer debt" were in need of definition. Of "substantial abuse" the court simply said that the phrase would be given its ordinary, plain meaning.[112] Judge Wooten, however, did not limit "primarily consumer debts" to the aggregate amount of consumer debt but said the court should look at the relative number as well. The opinion held that the debtor's petition involved primarily consumer debts because the debtor's consumer debts exceeded his non-consumer debts by more than $7,000.00 and numbered approximately twelve to five.[113]

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108. *Id.*
109. *Id.* at 24.
110. *Id.* For example, laundry expenses were listed as $100 per month although the debtor owned a washing machine. The debtor also listed expenses on his company car and his wife's 1984 Buick as totalling $731 per month.
111. *Id.* at 26.
112. *Id.* at 24.
112. *Id.* at 26.
113. *Id.* at 26. Five months after the *Bryant* decision, Judge Wooten decided another 707(b) motion in *In re* White, 49 Bankr. 869 (W.D.N.C. 1985). In that opinion, he held that a debt for a personal injury judgment was not a consumer debt and because that was the only debt listed by the debtor, the case did not fall under section 707(b). *Id.* at 872. The court also reiterated its conclusion from *Bryant* that "substantial abuse" should be given its plain and ordinary meaning. *Id.* at 873.

Perhaps the most thorough analysis of any of the consumer credit amendments appeared in *In Re Edwards*, decided July 5, 1985.[114] In that case the Bankruptcy Court of the Southern District of New York addressed a number of the issues raised by section 707(b). The court brought the 707(b) motion upon examining the debtors' schedule of debts and finding the only debts listed to be $10,500 for consumer purchases and $3,000 for student loans. Furthermore, the debtors had an annual gross income of $60,000 with monthly expenditures of $2,366 including $250 for recreation. There was a budget surplus of $184. A hearing was ordered for the debtors to show cause why their petition should not be dismissed under section 707(b).[115]

The court did not dismiss the debtors' petitions. It based its decision on affidavits submitted by the debtors which explained the debtors' inability to meet the requirements of a repayment plan the previous year as well as their expectation of increased expenses upon the forthcoming birth of their fourth child.[116] In the course of the opinion, the court made several observations concerning section 707(b). It held that section 707(b) was to be applied as a motion for failure to state a claim for relief:

> It is to be used to deny Chapter 7 relief to those persons whose pleadings in the form of the petition, schedules, statement of affairs and statement of income and expenses fail to reflect a need for the relief being sought because they do not reflect that the debtor is now suffering or will suffer in the near future from any meaningful economic hardship.[117]

Perhaps the most significant aspect of the *Edwards* decision was the court's statement that "a debtor whose income and reasonable expenses indicate that he would pay over three years an amount equal to 100% of the principal owed to his creditors is not suffering from sufficient economic hardship to warrant use of Chapter 7."[118] In other words, the court was applying a future income test.[119]

In applying the future income test the court noted that upon the birth of the debtors' fourth child, Mrs. Edwards would temporarily stop working and the debtors would lose a second income. Although the court pointed out that $100 per month for recreation and church contributions might not be appropriate for a debtor facing bankruptcy, it found that

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114. 50 Bankr. 933 (S.D.N.Y. 1985).
115. *Id.* at 935.
116. *Id.* at 939-40.
117. *Id.* at 936.
118. *Id.* at 937.
119. *Id.* n.3: "Both the legislative background to adoption of Code § 707(b) and the creditor protections against bankruptcy abuse long found in other sections of the Bankruptcy Code have caused the court to determine that the debtor's future ability to pay is the proper focus of Code § 707(b)." The court did not indicate what legislative background it relied on in reaching this conclusion.

these were essential to some degree for family harmony.[120] Taking these factors together, the court concluded that "any doubts the court might still have are overcome by the presumption in the Debtors' favor."[121]

Finally, the court addressed the problem of procedure under section 707(b). After reviewing the court's procedure up to that time[122] the court set guidelines to control future 707(b) cases. It stated that "in the future, the court intends to notify the debtor that the debtor will be permitted to testify if he wishes or rely solely on a written response."[123]

The court then went on to address the due process considerations involved with the proposed procedure under 707(b):

> Applying such a procedure is logical, practical and reasonable. It avoids unduly burdening the court with evidentiary hearings at which it must be judge and prosecutor and displaces any possible intrusion on constitutional due process constraints. . . . It seems unlikely that Congress intended or envisioned that the court would engage in pretrial discovery or subpoena third-party witnesses in connection with Code § 707(b).[124]

In *In re Grant* the Bankruptcy Court of the Northern District of Ohio dismissed the debtors' petition under section 707(b).[125] The court quoted extensively from the House floor debates on the substantial abuse section and cited the *Bryant* and *White* decisions. The court found that the debtors had made little attempt to cut back on their extravagant lifestyle and dismissed their petition.[126]

In dismissing the petition the court stated that in considering section 707(b) cases it would consider four factors. They are: 1) whether the debtor had sufficient future income to fund a chapter 13 repayment plan; 2) whether the debtors' petition was filed in bad faith; 3) whether the debtors had engaged in any eve of bankruptcy purchases; and 4) whether the debtor had suffered an unforeseen calamity or was "merely using the chapter 7 provisions to gain relief from past excesses."[127]

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120. *Id.* at 940-41. In reaching this conclusion the court quoted from the United States Supreme Court case of Eisenstadt v. Baird, 405 U.S. 438, 453 (1972): "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child." The judge in *Edwards* appears to have implied a right of privacy as to certain expenses unless they are grossly disproportionate.

121. *Edwards,* 50 Bankr. at 941.

122. *Id.*

123. *Id.* "In time, performance of the court's responsibility under Code § 707(b) will become as second nature to the court . . . as the court's responsibility under Code § 329 to review for excessiveness of attorneys' fees paid in contemplation of bankruptcy has become."

124. *Id.* at 942.

125. 51 Bankr. 385 (N.D. Ohio 1985).

126. *Id.* at 392. The court noted that the debtors had listed expenditures of $2,800 at exclusive clothing stores as well as a $9,000 loan for Christmas items. The court posited that "the Grants' Christmases must be quite an extravaganza."

127. *Id.* at 393-94.

Analysis

Obviously, section 707(b) has been the object of much more judicial development than the other amendments discussed in this comment. There are, however, still questions to be resolved as well as questions raised by the cases themselves.

The *Bryant* case is an outstanding example of a court exercising broad judicial discretion. Judge Wooten refused to give "substantial abuse" any definition beyond its plain, ordinary meaning in *Bryant.*[128] Yet Judge Wooten refused relief because he believed the debtor was trying to "shuck" his debts, the debtor failed to truthfully list all of his obligations pursuant to code section 522, and he believed that the debtor's statement of expenses was in bad faith.[129] Because Congress failed to delineate what would constitute substantial abuse, Judge Wooten necessarily had to make a somewhat subjective appraisal. The section does not mention bad faith, however, which appears to have been the basis of Judge Wooten's holding.

Although the debtor in *Bryant* did not appear to be a forthright petitioner, it is not clear whether he could meet his financial obligations. His petition for bankruptcy was dismissed on the basis of bad faith with no analysis of his future ability to pay. In *Edwards,* no definition for "substantial abuse" was given beyond a dictionary meaning, but the court applied a future income test which the debtors failed and thus were granted relief.[130] Granted, the debtors in *Edwards* appeared to be acting in good faith, but it seems somewhat arbitrary to throw the bad faith debtor in *Bryant* at the mercy of his creditors without some determination of his ability to satisfy the claims of those creditors. For the substantial abuse provision to co-exist with the "fresh start" policy of the Bankruptcy Code, a future income test should be applied along with the bankruptcy judge's subjective evaluation of the debtor's good faith, as was done in the *Grant* case.[131] Without such a test, Senator Metzenbaum's fears about judge's being human may prove to be all too real.[132]

Another issue raised by the *Bryant* decision is the court's analysis of what constitutes "primarily consumer debts."[133] The court's holding that the number of consumer debts as well as the aggregate amount should be considered presents an almost insurmountable obstacle for debtors,[134] because most individuals will have a greater number of consumer debts than non-consumer debts. It would be a far more reliable gauge to analyze consumer debt in terms of aggregate amount rather than relative number.

128. *See supra* text accompanying note 112; note 113.
129. *See supra* text accompanying note 109.
130. *See supra* text accompanying notes 118-19.
131. *See supra* text accompanying note 127.
132. *See supra* text accompanying note 101.
133. *See supra* text accompanying note 113.
134. *In re* Bryant, 47 Bankr. 21, 26 (W.D.N.C. 1984). In reaching its definition of "primarily consumer debt" the court stated that "it is my firm impression that Congress intended to leave the definition of this term to the Bankruptcy Judge who has the case file before him and who can make the decision in light of all the facts and circumstances presented." No legislative history is cited in support of this proposition.

When the debtor has a large number of low cost consumer debts, such a test could arbitrarily lead to dismissal even though the debtor has incurred a tremendous *aggregate* debt trying to get his business or career on a sound basis. Such efforts should not be punished because the debtor may well have incurred the consumer debts expecting that his non-consumer debt would bear the fruits of prosperity.

The *Edwards* decision's analysis of procedure under section 707(b) presents some answers and some problems.[135] As a practical matter, the court's statement of its intended future procedure under 707(b) is of value to the bankruptcy practitioner who is confused as to how a section 707(b) case may commence and be conducted.

The court's due process analysis, however, is not very convincing.[136] The court acknowledged that it holds the sole responsibility for promulgating the section 707(b) motion, for taking affidavits or testimony and deciding the case.[137] Because the court does not contemplate taking extensive testimony or engaging in searching cross-examination, it implies that it is thereby rendered a fair adjudicator of its own motion.[138] No matter how a court chooses to handle section 707(b), a valid due process argument can always be made when a motion is brought and decided by the same person.

Finally, as one commentator has observed, the court is the only one empowered to bring a section 707(b) motion, but in doing so the court must overcome the section's presumption of relief for the debtor.[139] Thus, the court must determine when its responsibility for overcoming the presumption creates due process problems. Section 320 of the 1984 Act provides that the Supreme Court will prescribe rules controlling the procedure under section 707(b).[140] The Court should attempt to clarify how the bankruptcy judge can fulfill his conflicting roles without violating the Due Process Clause.

CONCLUSION

This comment has focused on the most controversial of the Consumer Credit Amendments. There are other important consumer credit amendments in the 1984 Act with which the Wyoming bankruptcy attorney should be familiar.[141]

Any legislation is the product of compromise and the Consumer Credit Amendments are no exception.[142] Many saw the amendments as a policy reversal of the 1978 Act with a shift toward favoring creditors. As the

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135. *See supra* text accompanying notes 123-24.
136. *See supra* text accompanying note 124.
137. *Edwards*, 50 Bankr. at 941.
138. *Id.* at 943.
139. *See supra* note 102, at 8-9.
140. *Id.*
141. *See, e.g.*, 11 U.S.C.A. §§ 109(f), 522(d)(3) and (5), 524(f) (West Supp. 1985).
142. *See supra* text accompanying note 101; notes 8, 101.

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cases indicate, however, the pendulum is not swinging rapidly. Indeed, in the first year of the amendments' operation, only two cases have been dismissed for substantial abuse, the most potentially powerful amendment for creditors.

The issues raised by the amendments are numerous. The Wyoming practitioner who is confronted by the amendments should recognize the arguments that can be turned to his or her client's advantage and present these to the court. There is no precedent in the Tenth Circuit but the initial decisions of other jurisdictions are instructive.

The bankruptcy lawyer in the Tenth Circuit is faced with an opportunity to test the waters of a challenging new set of laws. The bankruptcy judges of the Tenth Circuit should scrutinize the work of their brethren in other circuits before following their dictates. With the growing number of bankruptcy cases,[143] a cogent body of law is needed so that practitioners and their clients can proceed confidently in the bankruptcy courts. With predictability comes expediency, and for the parties involved this means a reduction in the delay of debt collection and a quicker "fresh start."

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143. *See supra* text accompanying note 6.

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