CONSUMER BANKRUPTCY

What is "Income" for Means Test Purposes?

Some recent court decisions define "income"

By Craig D. Robins

Last month I discussed the difficulties that Congress created by enacting a means test statute. In this month's column I will highlight some recent bankruptcy court decisions that shed light on interpreting what is "income" for means test purposes when a debtor receives a bonus, earns a teacher's salary, or obtains unemployment insurance benefits.

The purpose of the means test is to create a projection of the debtor's net income and expenses for a period of three to five years after the filing date to see if the debtor would have sufficient surplus funds to make some kind of reasonable payment to creditors. In doing so, the starting point is to ascertain what the debtor's income was during the six-full-month pre-petition calendar period.

When you only look at a six-month period to project the next three to five years of income, you often get a lopsided result. For example, if the debtor received a bonus in the prior half-year, his means test would effectively double this income because the means test would assume that the bonus would be paid every six months. Conversely, if the debtor waited more than six months after receiving the bonus to file the bankruptcy petition, the debtor would not even have to count the bonus as income in the means test.

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Because of this uneven result, bankruptcy attorneys often engage in a strategy of timing the filing of the petition. However, it seems that some bankruptcy courts are becoming more logical in their approach to analyzing the statute to provide a more balanced result for all parties.

A recent case from Virginia looked at a debtor who received an annual bonus in the six-month pre-petition means test period. The court held that the bonus should be prorated over a 12-month period to determine the amount necessary to calculate the debtor's "current monthly income." *In re Meade*, —— B.R. ——, 2009 WL 4456211 (Bankr. W.D. Va., Nov. 13, 2009).

The court concluded that the language "average monthly income," which is found in Bankruptcy Code section 101(10A)(A) is susceptible to two interpretations. One of them is the mechanical example I gave above, which can result in either a harsh result for the debtor or a windfall.

However, the court adopted a different, more realistic "common sense" interpretation, which the court said was more in keeping with what appeared to be the overarching purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, namely, to require debtors to make meaningful payments to their creditors if they have the funds to do so.

The court felt that Congress intended for there to be some connection between the compensation received and the period of time in which the applicable services for such compensation were rendered.

With regard to the concept that under any different interpretation, debtors' attorneys would want to time the filing of their clients' cases, the judge said, "It is difficult to believe that Congress intended such a result or desired to encourage such tactics."

The *Meade* case also addressed the wife's income, who, as a public school teacher, received her annual salary over a ten-month period.

Here the court took a totally different approach by refusing to pro-rate the wife's income. The court said that this situation was well within the framework provided by Congress of looking to the income actually received during the six month period prior to bankruptcy as the best measure of a debtor's ability to pay creditors.

This approach provides a lopsided result, but not as severe as the lump-sum bonus payment. Based on this court's holding, a teacher seeking bankruptcy relief would be better off reverting back to the strategy of timing the filing so that the petition is filed just a few months after the non-income summer months.

The means test enables a debtor to exclude from income unemployment benefits that are received under the Social Security Act. A recent Illinois case held that unemployment benefits should not be included in this exception to income, and should thus be treated as income for the means test. *In re Kucharz*, 418 B.R. 635 (Bankr. C.D. Ill., Oct. 28, 2009).

To complicate matters, the court, after providing a highly detailed history of unemployment benefits in this country, cited two bankruptcy decisions from 2007

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that held to the contrary. However, the court concluded that unemployment benefits are designed to replace wages, and since wages must be reported on the means test, then so, too, must unemployment benefits be reported as income. The court also highlighted the aim of the means test, which is to include income from all possible sources.

What can be learned from cases like this? When you have an unusual issue, it often pays to do some research prior to filing to see where the various courts stand, especially if the issue has not yet been addressed in our jurisdiction.

Keep in mind that our judges can just as easily adopt the minority view or the majority view; however, becoming acquainted with the written decisions of our Long Island Bankruptcy Court judges will help you ascertain how a particular judge is likely to rule, something I commented on in last month's column.

At any rate, if you know what the cases are, and which cases support your position, at least you'll have a better chance of persuading the trustee, U.S. Trustee or Judge to adopt your position.

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