

# Social Security Benefits Cannot Be Included in a Debtor's Ability to Repay Creditors

Written by:

Leonard K. Welsh  
Law Offices of Leonard K. Welsh  
Bakersfield, Calif.  
lwelsh@kleinlaw.com

The chapter 7 case of an individual debtor whose debts are primarily consumer debts may be dismissed if the court finds that the granting of a discharge would be an abuse of chapter 7.<sup>1</sup> The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) offers two standards for determining "abuse." First, abuse may be presumed if the debtor's annualized income exceeds the applicable median family income and the means test shows that the debtor has the ability to repay a minimum amount of debt over five years.<sup>2</sup> Second, abuse may be found if the court determines that the debtor's petition was filed in bad faith

## About the Author

Leonard Welsh is the owner of the Law Offices of Leonard K. Welsh in Bakersfield, Calif., and of counsel to Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball.

has arisen as to whether a debtor's income from Social Security benefits can be excluded from the totality-of-the-circumstances analysis because Social Security income is excluded from the definition of "current monthly income" found in 11 U.S.C. § 101(10A)(B), and bankruptcy courts have become more focused on the provisions of the Social Security Act.

## Social Security Act § 407(a)

Section 407(a) of the Social Security Act prevents the bankruptcy

§ 407(a) of the Social Security Act provides that:

The right of any person to any future payment under [the Social Security Act] shall not be transferrable or assignable, at law or in equity, and none of the moneys [sic] paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency law.

The Eighth Circuit based its decision in part on the Sixth Circuit Court of Appeals' *Buren* decision.<sup>9</sup> Even though *Buren* involved consolidated chapter 13 cases, the Eighth Circuit found *Buren*'s holding to be instructive. The Eighth Circuit held (as did the Sixth Circuit in *Buren*) that § 407 "operates as a complete bar to the forced inclusion of past and future Social Security proceeds in the bankruptcy estate."<sup>10</sup> The Eighth Circuit's holding is clear and unequivocal: Social Security benefits are not included in the bankruptcy estate and are made a part of a bankruptcy case only if a debtor voluntarily brings the benefits into the case for purposes such as including the benefits in the money needed to fund a chapter 13 plan.<sup>11</sup>

The Eighth Circuit's holding in *Carpenter* is rational and understandable because § 407 provides that Social Security benefits are not "subject to" the operation of any bankruptcy or insolvency law, and Congress has recognized the special nature of Social Security benefits by protecting them from involuntary collection actions or other legal process.<sup>12</sup> Including Social Security benefits in a totality-of-the-circumstances analysis would make Social Security benefits "subject to" the bankruptcy law or "other legal process" and would violate § 407(a) of the Social Security Act.

## Conclusion

BAPCPA works hard to prevent debtors who can repay their debts from

## Consumer Counterpoint

or "the totality of the circumstances...of the debtor's financial situation demonstrates abuse."<sup>3</sup>



Leonard K. Welsh

The Bankruptcy Code does not define "totality of the circumstances." However, courts consider a debtor's ability to repay debt to be a primary factor in determining if the granting of a discharge would be

an abuse based on the "totality of the circumstances."<sup>4</sup> Thus, courts have considered a debtor's income from a variety of sources in determining if a debtor has sufficient income to repay his or her debt and if the debtor's case constitutes an abuse under § 703(b)(3)(B) including (1) a debtor's pension, (2) the income of a nonfiling spouse and (3) the income reported on the debtor's schedules of assets and liabilities.<sup>5</sup> A question

court from considering a debtor's Social Security income in an analysis under § 707(b)(3)(B). Several courts have held that Social Security income should not be excluded from consideration under the totality-of-the-circumstances analysis.<sup>6</sup> The *Booker* court held that:

Although Social Security income is excluded from the definition of current monthly income and is not taken into consideration in determining whether a presumption of abuse arises, the court may nonetheless consider that income source in assessing whether the debtors have the ability to pay a substantial dividend to their unsecured creditors.<sup>7</sup>

However, the *Booker* and *Calhoun* decisions have been called into question by the Eighth Circuit Court of Appeals' decision in *Carpenter v. Ries*.<sup>8</sup> The court in *Carpenter* held that Social Security income was excluded from the bankruptcy estate for all purposes because

<sup>1</sup> 11 U.S.C. § 707(b)(1).

<sup>2</sup> 11 U.S.C. § 707(b)(2)(A)(i).

<sup>3</sup> 11 U.S.C. § 707(b)(3)(B).

<sup>4</sup> *In re Pak*, 343 B.R. 239, 243 (Bankr. N.D. Cal. 2006); *In re Price*, 353 F.3d 1135, 1139-40 (9th Cir. 2004).

<sup>5</sup> *In re Kornfield*, 164 F.3d 778 (2d Cir. 1999); *In re Harter*, 397 B.R. 860 (Bankr. N.D. Ohio 2008); and *In re Crink*, 402 B.R. 159 (Bankr. M.D.N.C. 2009).

<sup>6</sup> *In re Booker*, 399 B.R. 662 (Bankr. W.D. Mo. 2009), and *In re Calhoun*, 396 B.R. 270 (Bankr. D. S.C. 2008).

<sup>7</sup> 399 B.R. at 673.

<sup>8</sup> *Carpenter v. Ries*, 614 F.3d 930 (8th Cir. 2010).

<sup>9</sup> *In re Buren*, 725 F.2d 1084 (6th Cir. 1984).

<sup>10</sup> 614 F.3d at 936.

<sup>11</sup> *In re Rotunda*, 349 B.R. 324, 332 (Bankr. N.D.N.Y. 2006); and *In re Schanuth*, 342 B.R. 601, 605-6 (Bankr. W.D. Mo. 2006). See also *In re Stegel*, 2006 WL 3483987 (Bankr. D. S.C. 2006).

<sup>12</sup> 20 CFR § 416.110. See also *Sullivan v. Zebly*, 493 U.S. 521, 524, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990).

continued on page 70

---

## ***Consumer Counterpoint: Benefits Cannot Be Included in Debtor's Ability to Repay***

*from page 35*

receiving a discharge in a chapter 7 case. However, the law recognizes the special nature of Social Security benefits and prevents them from being included in any bankruptcy case without the debtor's consent. Just as the law

prevents Social Security income from being included in "current monthly income" under 11 U.S.C. § 101(10A)(B), § 407(a) of the Social Security Act protects a debtor's Social Security benefits from being subject to the operation

of any part of the bankruptcy law without the debtor's consent and prevents the court from considering a debtor's Social Security income in the totality-of-the-circumstances analysis under 11 U.S.C. § 707(b)(3). ■

Copyright 2011  
American Bankruptcy Institute.  
Please contact ABI at (703) 739-0800 for reprint permission.