

## **Bankruptcy and Traumatic Brain Injury**

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An informal survey of State Brain Injury Associations and Lawyers from around the country who, known by this author, practice *neurolaw*, revealed that Federal Bankruptcy Judges often times do not understand or seek to advance recovery of Traumatic Brain Injury victims. After a traumatic brain injury, survivors and family members typically undergo significant financial hardship as a result of the injury and its impact on a person's ability. Once a person's ability is negatively affected, whether physically, emotionally or cognitively due to brain injury, their competitive employment opportunities can be diminished to a greater or lesser extent. As a result they many times seek Bankruptcy protection. A survivor's diminished ability may cause a lack of understanding regarding obligations under Federal bankruptcy law. One such obligation is the right of the Bankruptcy trustee to the property, including lawsuit recovery, of the traumatically brain injured debtor. This author believes that survivor's and their families need good legal counsel regarding the impact of filing Bankruptcy on the lawsuit for traumatic brain injury. A Bankruptcy lawyer is typically not proficient to offer such advise and should refer the person, immediately, to his trial lawyer or, if one is not retained a trial lawyer who practices neurolaw.

Pursuant to Title 11 of the United States Bankruptcy Code, a person filing under Chapter 7 turns over his property to a Bankruptcy trustee appointed by a Federal Judge. (For a very readable article on Bankruptcy see, Bankruptcy Law for the Non-Bankruptcy Practitioner by Hon. Gregg Zive, Kristi Saylor, and Molly Anderson, *Communique*, Clark County Bar Association, May 2003.) Typically a person filing for Bankruptcy protection feels that they owe much more then they can afford and have very little to pay their debts. There are exceptions to what property the Bankruptcy trustee can use to pay the

creditors but, for the most part, you lose your property rights by asking the Federal Judge to Order your creditors to erase your debt; A big price for a big write-off. However, the price includes whatever a traumatic brain injured debtor may recover in a lawsuit against a third party – even an at-fault third party.

Few lawyers are qualified to represent persons with mild to moderate traumatic brain injuries competently. Joe Consumer usually does not have a fund of knowledge about the legal process or a lawyer's qualifications. Far too many times lawyers and doctors fail to recognize the symptoms associated with mild to moderate traumatic brain injury. (See, generally, Sherrod Taylor, *Neurolaw: Brain and Spinal Cord Injuries*, ATLA Press, 1998) When a client complains of problems, a lawyer may improperly assume a client is a "problem client." When the client is left to consider options, Bankruptcy may seem a viable choice. The client goes to a Bankruptcy lawyer, pays the fee, and awaits an Order discharging their debt. They see that creditors no longer call and harass them. Rarely however do they appreciate the extent of Bankruptcy.

If the debtor is brain injured, and without trial counsel, the Bankruptcy issue first manifests when the brain injured debtor retains trial counsel. Otherwise trial counsel, retained prior to filing, should strongly advise and insist that the debtor not file Bankruptcy. In some circumstances, it has been argued, failure to give such advice amounts to legal malpractice. When a lawyer represents a client who has been diagnosed with traumatic brain injury, she should never allow that person to file Bankruptcy and give up rights to the recovery asset. If there is no way to avoid it, serious consideration should be given to continuing representing the brain injured debtor. The trial attorney no longer exercises independent and exclusive control of the case. Here is why.

Once the client files Bankruptcy, the estate, including recovery from the "personal injury" lawsuit, becomes property of the Trustee for distribution to creditors. This includes the Trustee's fees and the trustee's attorney's fees (these can be significant).

However the amount of the lawsuit asset is undetermined until trial verdict or settlement. The trial attorney is no longer able to represent the client since the decision of who should be trial counsel rests with the Trustee. The trustee takes advice from the Trustee's lawyer.

The brain injured debtor loses the right to pick and choose counsel. But this part is not as bleak as it seems since the current trial counsel can make Application to be Special Counsel. Basically this is an application by the trial attorney, with knowledge of the case, to handle the litigation instead of the Trustee's attorney who has little if any knowledge of the case, or, for that matter, personal injury: let alone brain injury.

This all sounds pretty good. The trial attorney is back in the driver's seat; free to make important trial decisions in a trial he has invested time and money. However, even the fee and costs expended, are subject to Federal Bankruptcy Court review and approval. Time after time, Federal Judges, cut away at costs expended by the trial attorney and reduces earned fees in favor of the "creditors." Understanding it is the Federal Judge's main purpose to pay creditors, it is reasonable to expect that Judge to look at the recovery for brain injury as a *means* to pay creditors. The Judge also readily allows compensation, using recovery funds, to pay costs of Bankruptcy – the trustee and trustee's lawyer's fees. By the time trial costs and fees related to the underlying brain injury case are reimbursed the brain injured client/debtor may be left with little or no money to help defray loss of earnings and/or life care costs.

Since the cost of putting on and proving mild to moderate traumatic brain injury can easily exceed \$50,000 or even \$100,000, care and consideration must be exercised before a trial lawyer accepts such a case where the client has filed Bankruptcy. The end result is that persons with mild to moderate traumatic brain injury typically lack the ability to make sound decisions regarding Bankruptcy. Since these people often experience loss of earning capacity due to cognitive and emotional decrease in function,

their ability to pay bills decreases and the resort to Bankruptcy increases. Once Bankruptcy is filed, the person's ability to retain trial counsel and recover from an at-fault third party decreases. So, as said earlier, the very person who lacks the ability to earn income and make sound decisions regarding finances due to mild to moderate traumatic brain injury, who files Bankruptcy, also loses their ability to obtain competent trial counsel to represent them for their injury.

Bankruptcy lawyers and neurolawyers should work together toward the overall good of their brain injured client. Hopefully this article will help promote awareness of this issue.

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