



Discussion of Language Related to Protestors (Including Pro-Life Protestors) in the Bankruptcy Conference Report

Staff Contact: Neil Bradley x6-9717

August 28, 2002

Executive Summary

How does the Bankruptcy Conference Report differ from current law regarding the discharge of debts related to protests at abortion clinics?

Under the proposed Bankruptcy Conference Report if a pro-life protestor loses a civil lawsuit brought by an abortion clinic under the Freedom of Access to [Abortion] Clinic Entrances Act (FACE), then the judgment against the pro-life protestor would be non-dischargeable (i.e. the pro-life protestor would still have to pay the debt even if they declare bankruptcy). Under current law, the pro-life protestor may be able to discharge the debt.

Under both current law and the proposed Bankruptcy Conference Report criminal fines for violation of the FACE Act are non-dischargeable.

Will Peaceful Protestors Be Affected by the Bankruptcy Conference Report?

It is possible to sue a peaceful pro-life protestor for violating the FACE Act. Under the proposed Bankruptcy Conference Report civil judgments against peaceful pro-life protestors under the FACE Act would be non-dischargeable. Under current law, a peaceful protestor would likely be able to discharge the debt.

Will the Bankruptcy Conference Report Impact Other Protestors? Does it Disproportionately Affect Abortion Protestors?

The proposed Bankruptcy Conference Report seeks to prohibit the discharge of any debt occurring from the violation of a state or Federal law related to preventing an individual from obtaining or providing any legal good or service. Since criminal fines are already non-dischargeable, this provision will only affect civil judgments. Current Federal law only authorizes civil cases in limited circumstances such as when the legal good or service is reproductive health services. However, an expanded reading of RICO that may result from a case currently pending before the Supreme Court could subject all kinds of protestors to civil

lawsuits from the businesses they are targeting. Debts from such civil suits would likely be non-dischargeable under the proposed Bankruptcy Conference Report.

Expanded Discussion

How does the Bankruptcy Conference Report differ from current law regarding the discharge of debts related to protests at abortion clinics?

Under the Freedom of Access to [Abortion] Clinic Entrances Act (FACE) the government may file criminal charges against an individual who by force, threat of force or physical obstruction intentionally injures, interferes, or intimidates any person from obtaining or providing reproductive health services.¹ If the government wins its case (by proving it beyond a reasonable doubt) the individual may be fined and / or imprisoned. Under current bankruptcy law, such fines would be non-dischargeable (i.e. an individual could not escape them by declaring bankruptcy).²

FACE also provides that any person who is seeking to provide or obtain reproductive health services and is aggrieved by an individual who by force, threat of force or physical obstruction intentionally injures, interferes, or intimidates any person from obtaining or providing reproductive health services may file a civil lawsuit against the individual.³ If the person (or entity such as Planned Parenthood or NOW) wins its case (by proving it at a generally lower standard than in a criminal case) the individual (which are payable to the person who brought the civil suit – in some cases Planned Parenthood for example). Under current bankruptcy law, such fines could be dischargeable unless it is determined that original actions of the debtor constituted “willful and malicious injury by the debtor to another entity or to the property of another entity.”⁴

Under the proposed Bankruptcy Conference Report all criminal fines would remain non-dischargeable and, all civil judgments (awarded to the abortion clinic for example) would be non-dischargeable even if the original actions of the debtor were not willful and malicious.

	Current Bankruptcy Law	Proposed Conference Report
Fines Resulting From Criminal Prosecution Under FACE	Non-dischargeable	Non-dischargeable
Judgments Awarded to Private Parties As a Result of a Civil Suit Under FACE	Potentially Dischargeable (if debtors actions were not willful and malicious)	Non-dischargeable

¹ 18 U.S.C 248

² 11 U.S.C. 523(a)(7)

³ 18 U.S.C. 248(c)

⁴ 11 U.S.C 523(a)(6)

Will Peaceful Protestors Be Affected by the Bankruptcy Conference Report?

Under FACE it is illegal for an individual to by force, threat of force or physical obstruction intentionally injure, interfere, or intimidate any person from obtaining or providing reproductive health services.

While the terms “force or threat of force” would appear to only cover those who use violence, the term “physical obstruction” includes both violent and non-violent acts. Indeed, the FACE Act specifies penalties for “offenses involving exclusively a nonviolent physical obstruction.”⁵ The definition of “physical obstruction” includes rendering ingress or egress from a reproductive health clinic “unreasonably difficult.”⁶ So-called “bubble zones” have further expanded the concept of physical obstruction to prevent someone from even coming within a few feet of a person who is entering or working in an abortion clinic.

Right now an abortion clinic can bring a civil suit against an individual for physically obstructing access to an abortion clinic even if the obstruction is completely non-violent. The abortion clinic can be awarded damages. Under current bankruptcy law, that civil award could be discharged provided the underlying actions of the debtor were not willful and malicious. Under the proposed Bankruptcy Conference report, the civil award would be non-dischargeable irrespective of whether or not the underlying actions of the debtor were malicious.

While the Bankruptcy Conference Report does include language providing that nothing shall be construed to “affect any expressive conduct (including peaceful picketing, peaceful prayer, or other peaceful demonstration) protected from legal prohibition by the first amendment,” the FACE Act contained nearly identical language but clearly covered non-violent actions (such as non-violent physical obstructions).

Will the Bankruptcy Conference Report Impact Other Protestors? Does it Disproportionately Affect Abortion Protestors?

The Bankruptcy Conference Report provides that debts resulting from the violation by the debtor of any Federal or State law where the intentional actions of the debtor by force, threat of force or physical obstruction intentionally injure, interfere, or intimidate any person from obtaining or providing legal good or services or exercising the First Amendment right of religious freedom at a place of religious worship will be non-dischargeable.⁷

This would appear to treat all protestors equally, however it is important to remember that current bankruptcy law already makes fines owed to the government for criminal violations non-dischargeable. Therefore, the language in the Bankruptcy Conference Report in effect will likely only impact judgments awarded in civil cases. While it is unclear how many states permit civil remedies for businesses against protestors, under Federal law a civil remedy appears to be only expressly permitted in instances involving reproductive health services. Therefore, it appears

⁵ 18 U.S.C. 248(b)(2)

⁶ 18 U.S.C. 248(e)(4)

⁷ Section 330 of the Conference Report on H.R. 333

that at least under current Federal law those protesting at abortion clinics are the ones most likely to be affected.

This could change, however, depending upon the outcome of a case now pending before the Supreme Court. In *Scheilder v. NOW*, the Department of Justice has recently submitted an amicus brief asserting that current law prohibitions on extortion and racketeering are violated when an individual attempts either by force, violence or fear to obtain control over a business, including “the right to conduct a business.”⁸ Under this theory, if an individual uses illegal protest activities to attempt to get a grocery store to quit selling genetically altered beef, the individual has committed an act of extortion since the grocery store has a right to sell genetically altered beef and the use of illegal protest activities to convince them not sell such beef constitutes obtaining “control” of the grocery store. While the Justice Department contends that this will not affect social protests or consumer boycotts, a variety of organizations, including animal rights groups, homeless advocates, and civil rights groups, have argued that it will in fact affect legitimate social dissent.

Under the Racketeer Influenced and Corrupt Organization (RICO) law an individual may bring a civil suit against a person for engaging in racketeering and criminal extortion.⁹ Indeed, RICO is already being used against some pro-life protestors and anti-fur protestors. The proposed Bankruptcy Conference Report would appear to prevent the discharge of any civil penalties owed by a protestor as a result of suit brought under RICO.

Therefore, if the Supreme Court accepts the Justice Department’s arguments and permits the use of RICO against political and social protestors a wide range of protestors could be impacted by the language proposed in the Bankruptcy Conference Report. If the Supreme Court rejects the Department of Justice’s argument, then protestors at abortion clinics will still face potential civil penalties under FACE that would be non-dischargeable under the proposed language of the Bankruptcy Conference Report.

Side-by-Side Bankruptcy Conference Report Language and FACE

See next page

⁸ July 12 Friend-of-the-Court Brief filed in regard to *Scheilder v. NOW*

⁹ 18 U.S.C. 1964

Bankruptcy Conference Report H.R. 333:

SEC. 330. Nondischargeability of debts incurred through violations of law relating to the provision of lawful goods and services

(a) Debts incurred through violations of law relating to the provision of lawful goods and services.—Section 523(a) of title 11, United States Code, as amended by section 224, is amended—

- (1) in paragraph (18) by striking “or” at the end;
- (2) in paragraph (19) by striking the period at the end and inserting “; or”;
- (3) by adding at the end the following:

“(20) that results from any judgment, order, consent order, or decree entered in any Federal or State court, or contained in any settlement agreement entered into by the debtor (including any court-ordered damages, fine, penalty, or attorney fee or cost owed by the debtor), that arises from—

“(A) the violation by the debtor of any Federal or State statutory law, including but not limited to violations of title 18, that results from intentional actions of the debtor that—

“(i) by force or threat of force or by physical obstruction, intentionally injure, intimidate, or interfere with or attempt to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing lawful goods or services;

“(ii) by force or threat of force or by physical obstruction, intentionally injure, intimidate, or interfere with or attempt to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

“(iii) intentionally damage or destroy the property of a facility, or attempt to do so, because such facility provides lawful goods or services, or intentionally damage or destroy the property of a place of religious worship; or

“(B) a violation of a court order or injunction that protects access to a facility that or a person who provides lawful goods or services or the provision of lawful goods or services if—

- “(i) such violation is intentional or knowing; or
- “(ii) such violation occurs after a court has found that the debtor previously violated—

“(I) such court order or such injunction; or

“(II) any other court order or injunction that protects access to the same facility or the same person; except that **nothing in this paragraph shall be construed to affect any expressive conduct (including peaceful picketing, peaceful prayer, or other peaceful demonstration) protected from legal prohibition by the first amendment to the Constitution of the United States.**”.

(b) RESTITUTION.—Section 523(a)(13) of title 11, United States Code, is amended by inserting “or under the criminal law of a State” after “title 18”.

FACE

(Freedom of access to [abortion] clinic entrances)

Signed by President Clinton in 1994

Introduced in the House by Rep. Chuck Schumer (D-NY)

Roll Call: <http://clerkweb.house.gov/cgi-bin/vote.exe?year=1994&rollnumber=70>

18 USC Sec. 248

Sec. 248. Freedom of access to clinic entrances

(a) Prohibited Activities. - Whoever -

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

...

(d) Nothing in this section shall be construed-(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;