

Housing Benefit and Council Tax Benefit Circular

Department for Work and Pensions

The Adelphi, 1 - 11 John Adam Street, London WC2N 6HT

HB/CTB A3/2008

ADJUDICATION AND OPERATIONS CIRCULAR

WHO SHOULD READ	All Housing Benefit (HB) and Council Tax Benefit (CTB) staff
ACTION	Urgent – to note and action where appropriate
SUBJECT	Recovery from customers who have been declared bankrupt

Guidance Manual

The information in this circular does affect the content of the HB/CTB Overpayments Guide. Please annotate this circular number against *paragraphs 7.240 to 7.320*.

Queries

If you

- want **extra copies of this circular/copies of previous circulars**, they can be found on the website at www.dwp.gov.uk/hbctb
- have any queries about the
 - **technical content of this circular**, contact Jane Autherson
Tel: 0113 232 7755
Email: Jane.Autherson@dwp.gsi.gov.uk
 - **distribution of this circular**, contact Corporate Document Services Ltd Orderline
Tel: 0113 399 4040
Fax: 0113 399 4205
Email: orderline@cds.co.uk

Crown Copyright 2008

Recipients may freely reproduce this circular.

Contents

para

**Recovery of overpayments after discharge from bankruptcy –
following the ‘Balding’ judgement**

Background	1
Court of Appeal judgement	6
Identifying cases potentially affected	7
How to check whether a case is affected.....	10
Action to take on affected cases	12
What is meant by a ‘fraudulent’ overpayment.....	14
Action on receipt of a creditor’s form	16
Way forward.....	18

Recovery of overpayments after discharge from bankruptcy – following the ‘Balding’ judgement

Background

- 1 *HB/CTB bulletin G5/2007*, paragraphs 52 to 64, detailed a Judicial Review case, *John Balding v Secretary of State for Work and Pensions*, which challenged the Department's right to recover benefit overpayments from customers declared bankrupt, once the bankruptcy was discharged.
- 2 The case was about the relationship between the Social Security Administration Act 1992 and Insolvency legislation. The High Court considered whether liability to repay a recoverable overpayment ceases on discharge from bankruptcy under section 281 of the Insolvency Act. The court decided that only those debts specifically listed as exempt under Insolvency legislation are excluded from the effect of discharge from bankruptcy. This would include the Bankruptcy (Scotland) Act.
- 3 Social Security overpayments, including HB and CTB, are not listed as an exempt category. For Local Authorities (LAs) this means that the only overpayments which are exempt from the effect of discharge from bankruptcy and remain recoverable after discharge are those
 - due to fraud, or
 - that arose and/or were decided after the date of bankruptcy
- 4 The Department appealed against the High Court's decision. *G5/2007* outlined the action to be taken pending the outcome of that appeal. It advised LAs to suspend recovery when requested to do so by the customer or their representative, providing the
 - overpayment period and the date of the overpayment decision were before the date of bankruptcy
 - customer has now been discharged from bankruptcy, and
 - overpayment did not arise in consequence of fraud
- 5 LAs were told to keep a list of cases where suspension action was taken so that they could be re-visited following the outcome of the appeal. Any requests for refunds should have been refused at that stage. Customers should have been advised that you were awaiting the outcome of the appeal and that you would contact them after that. Also a list of customers who requested a refund should have been kept, so that they could be re-visited following the outcome of the appeal.

Court of Appeal judgement

- 6 On 13 December 2007 the Court of Appeal handed down their judgement, in which they determined that recovery from a person who is declared bankrupt should cease on that person's discharge from bankruptcy provided that the
- overpayment is not classified as fraudulent, and
 - overpayment recoverability decision was made before the date of bankruptcy

Identifying cases potentially affected

- 7 *G5/2007* advised that lists should be kept of any cases potentially affected by this judgement.
- 8 If you are able to identify cases where the claimant has been discharged from bankruptcy, the overpayment is not classified as fraudulent and the overpayment recoverability decision was made before the date of bankruptcy, you should do so.
- 9 If you are unable to identify the affected cases, you will be reliant on the customer making representation.

How to check whether a case is affected

- 10 The three categories into which an overpayment can fall when an individual is made bankrupt and then discharged are
- a the overpayment period and overpayment recoverability decision are both prior to the date of bankruptcy
 - b the overpayment period is prior to the date of bankruptcy but the overpayment recoverability decision is made after the date of bankruptcy
 - c both the overpayment period and the recoverability decision are after the date of bankruptcy
- 11 This decision only applies to category **a** and only when deductions have been made after the date of discharge. It does not apply to cases classified as fraud.

Action to take on affected cases

- 12 Once you have identified a case affected by this decision you should
- take action to stop recovery with immediate effect
 - confirm the date of discharge from bankruptcy, and
 - refund any monies recovered after the date of discharge
- 13 Whilst it is possible that information regarding the date of discharge is already held on file, it is recommended that you write out to the customer asking them to provide evidence of their date of discharge. If they do not know this date, the customer may need to contact the person or organisation that dealt with their bankruptcy.

What is meant by a 'fraudulent' overpayment

- 14 An overpayment can still be recovered after the date of discharge if it is classified as fraudulent. The word 'fraud' in section 281 of the Insolvency Act 1986 is not defined in the legislation. However, in the High Court judgement of *Mander v Evans* (3 All ER 811 [2001]), 'fraud', within the context of section 281, was held to mean 'actual fraud' and did not include constructive fraud 'such as undue influence'. It was emphasised that the word has to be given its natural meaning. It follows that there must be clear evidence of dishonesty in a particular case in order to classify an act as 'fraud'. Therefore to be able to recover an overpayment after discharge the customer must have
- been found guilty of an offence whether under statute or otherwise
 - made an admission after caution of deception or fraud for the purpose of obtaining relevant benefit, or
 - agreed to pay a penalty under section 115A of the Administration Act and the agreement has not been withdrawn

HB Reg 102(3) & (SCP) 83(3)

- 15 The definition of a 'fraudulent' overpayment in the Subsidy Order means that you are able to also classify overpayments as 'fraudulent' if you believe the customer has knowingly failed to report a relevant change of circumstances, contrary to regulation 88 of the HB Regulations 2006 (and (SPC) 69), or regulation 74 of the CTB Regulations 2006 (and (SPC) 59), with intent to obtain or retain HB or CTB, either for themselves or someone else. However, as there must be clear evidence of 'actual fraud', such as listed in the three bullet points above, the Subsidy definition of 'fraudulent' would not be sufficient to continue recovering after the date of discharge in bankruptcy cases.

Action on receipt of a creditor's form

- 16 *HB/CTB Overpayments Guide, paragraph 7.240 and 7.241*, states that it is general policy for the DWP and is considered good practice, to object to inclusion in any insolvency action.
- 17 Due to the 'Balding' judgement the DWP are considering changing their policy on this matter. In the future they may agree to inclusion in any insolvency action, so that they are able to get more of the overpaid benefit back. There is nothing that would legally prevent you from taking deductions throughout bankruptcy, ie up to the date of discharge, as well as including the debt in bankruptcy proceedings, although this may be operationally difficult. Obviously you should not recover more than the total amount of debt by using both recovery routes simultaneously. You should also always take into account a customer's health and financial circumstances when deciding the level of deduction or when to commence deductions, to avoid causing undue hardship to the customer or their dependants.

Way forward

- 18 DWP officials are looking at the impacts of the judgement and will be seeking a steer from Ministers on a way forward.