

Statement of Robert Furr
On behalf of
The National Association of Bankruptcy Trustees
July 27, 2011

Introduction

Chairman Coble, Ranking Member Cohen, and other distinguished Members of the Subcommittee, let me thank you for the opportunity to provide the views of the National Association of Bankruptcy Trustees to your Subcommittee on the subject of compensation for Bankruptcy Trustees. It has been 17 years since our last per case pay adjustment, thus, we are very grateful that you are turning your attention to this issue.

My name is Robert Furr and I am a past President of the National Association of Bankruptcy Trustees (NABT), a member of its board of directors and its Executive Committee. NABT is an organization of panel trustees, independent fiduciaries, appointed in every Chapter 7 bankruptcy case. Of the approximate 1,100 such Trustees nationwide, the vast majority are members of our organization.

Chapter 7 Bankruptcy and Trustees

What is Chapter 7 and why is it important? Chapter 7 bankruptcy cases are for the most part typical consumer bankruptcy cases where debtors discharge all of their debts. Chapter 7 cases also include complex individual and business cases. By a wide margin, most bankruptcies in the United States are Chapter 7. In 2010, there were 1,139,601 Chapter 7 cases filed in the U.S. bankruptcy courts. This is an eight percent increase over 2009. With continued economic uncertainty, this number may continue to climb. For your reference, there were approximately 25,000 Chapter 7 cases filed in North Carolina, and 50,000 in Tennessee in 2010.

Trustees conduct the major work involved in Chapter 7 bankruptcy. As a trustee, we protect both debtors and creditors from abuses of the system. We carry out important public policy

priorities as directed by the Congress, such as insuring that parties to child support orders are noticed of the bankruptcy filing, and the safeguarding of patient health care records and needs. As trustees, we have an obligation to secure relief for honest debtors and to investigate filings for abuse, criminal activity, fraud, mortgage fraud, fraudulent scams involving homeowners, and fraudulent foreclosure rescue operations. The Bankruptcy Code says that we are the representative of the estate which means we generally protect the interests of all parties as found in 11 USC section 323(a).

We even help federal, state and local governments by being one of the largest collectors of unpaid taxes in the U.S. Over \$132 million was paid to federal, state and local taxing authorities through trustee collections last year.

Trustees are critical because in the vast majority of Chapter 7 cases, debtors never appear before a judge, but are examined by the Trustees. The process begins with a review of the petitions filed, and a hearing conducted by the Trustees to which creditors may appear and participate. In previous testimony to this committee on September 16, 2008, I gave a detailed description of the duties of a Chapter 7 Trustee. Needless to say, a great deal of work goes into each case.

In the intervening 17 years since our last compensation adjustment, the burdens on trustees have increased. The Bankruptcy Abuse and Consumer Protection Act (BAPCPA), passed in 2005, added many new and different duties for trustees. In June 2008, the GAO conducted a study of the bankruptcy system after BAPCPA. In their report, they stated

“The Bankruptcy Reform Act has affected the responsibilities and caseloads of Chapter 7 and Chapter 13 private trustees. As a result of new provisions in the act, trustees must collect, track, store, and safeguard additional documents such as tax returns; notify appropriate parties of domestic support obligations; check calculations and review the accuracy of information in forms associated with the means test; and, once finalized, will be required to comply with new requirements for uniform final reports. Private trustees told us that these new responsibilities have significantly increased the time and resources required to administer a bankruptcy case.”

Compensation of Trustees in Chapter 7

A major concern for trustees has been the lack of any compensation adjustment since 1994. Under the present law, trustees receive \$60 for administering Chapter 7 cases in which “no assets” are liquidated. The last increase in this trustee compensation occurred in 1994, when the fee was raised from \$45 to \$60. Let me emphasize that this is a flat fee per case. A case could take an hour, a few hours, days, weeks, or in some unique circumstances, years, to bring to closure. Trustees essentially work on a “contingent” basis because if their efforts do not result in a dividend to creditors, they receive only the \$60 no asset fee. Every trustee can tell about cases in which he or she devoted many hours and much money and did not recover any assets. In other cases, trustees are obligated by their statutory duties to spend the time and money to fulfill their duty without additional compensation. That happens on a daily basis in my practice.

When that last increase took place in 1994, trustees were earning \$60 from a \$130 filing fee, nearly half of the filing fee, thus, recognizing that trustees are an integral part of the bankruptcy system. Today, trustees earn \$60 from a \$299 filing fee – only 20% of the filing fee compensates trustees for their work.

Many experienced trustees are considering leaving the system. It takes years for a new trustee to begin a profitable practice because the new trustee must build a pipeline of cases and most asset cases take more than a year to administer. Without an increase in the “no asset” fee as an income base, the new trustee will have to struggle to make his or her practice economically viable. We want new individuals to join the trustee program and stay with it; otherwise, we will eventually have a lack of seasoned trustees administering the bankruptcy system. I would like to put into the record a letter from a fellow trustee, Michael Wagner, in North Dakota who just left the panel over these issues. In an informal survey, we have been told that approximately 20 trustees departed last year, due to the compensation issue. We have learned that in Kentucky, the government is having to look outside the State because no one will take on the new duties. This pattern will continue with no positive movement on our compensation.

Just to clarify, trustees can earn more than \$60 per case from Chapter 7 cases *where there are assets*. This, however, is a very small part of the Chapter 7 caseload. In 2010, only 5.2% of

cases had assets. In fact, every case essentially begins as a no asset case; after all, Chapter 7 is liquidation bankruptcy. It is the hard work of the trustee to determine if there are assets in the estate. Of the 60,000 cases with assets, approximately 46,000 *had assets of less than \$10,000*. Trustees earn a commission on the assets they find and return to creditors.

This is an important point for creditors in bankruptcy that should not be overlooked. Last year, trustees paid \$2.3 billion to creditors. Without seasoned and experienced trustees, creditors cannot expect these kinds of recoveries. We did this by taking, on average, a commission of 5.7%. The fees trustees earn are minimal compared to collection agencies. I would also note that while trustees often return funds to debtors in bankruptcy, we are prohibited by statute from receiving a commission on these funds. Last year alone, we returned over \$101 million to debtors by liquidating their exempt property, or by returning funds to them after all creditors were paid; no commissions were paid to trustees on these funds.

Recommendations

Increasing our compensation has always enjoyed bi-partisan support in both the House and Senate. The Congress has looked at increasing our compensation, but for one reason or another, our raise has gotten entangled in other legislative battles or bickering among the parties to bankruptcy about who should bear the cost of an increase. We particularly want to thank Ranking Member John Conyers and Congressman Cohen for introducing a trustee compensation bill last year, H.R. 4950. It was the only free standing bill, in our memory, that has been introduced to address our compensation disparity.

We think to be fair, trustees should receive a per case fee increase of \$40. Based on inflation figures alone, trustees would be earning an additional \$28 per case. We have also calculated that due to the allowable *informa pauperis* (IFP) waivers, which allows a complete waiver of the filing fee altogether, (thus, no compensation at all for trustees), we are losing an additional average of \$7 per case. As a result, we think a \$40 per case increase is appropriate to bring trustees to the levels Congress intended in 1994. We are open to other approaches to adjusting

our compensation, such as a very modest adjustment upward on the commissions we receive when we sell assets.

Some have expressed concern about any increase in a bankruptcy filing fee or other court fees in order to adjust trustee per case fees. I would respond that Congress, under BAPCPA, as I just mentioned, has addressed this issue and allows debtors to waive the filing fee altogether if they can demonstrate a lack of funds – a so called *informa pauperis* filing. While we think a waiver policy is appropriate for those truly in need, in these cases, a trustee receives no income. We believe that this type of filing is on the increase.

I would also note that debtors can receive an IFP waiver even while represented by an attorney. We have no quarrels with debtors having adequate legal representation. In two cases before me in the past month, however, the attorney was paid a fee of \$1,200 while filing a motion to waive the filing fee—which motion was granted. That means I did not get paid to administer that case while the consumer debtor lawyer made \$1,200. There is no cap on debtor attorney fees and they have increased over the years, particularly after BAPCPA and are now 40% to 50% higher than just a few years ago, according to the GAO and an independent study sponsored by the American Bankruptcy Institute. We hope as well that debtor attorneys recognize that competent and experienced trustees are just as important to protecting the interest of the debtor. It is helpful to remember that the filing fee allows debtors to wipe out hundreds of thousands of dollars per case.

There are a few other issues in the Chapter 7 practice that I would like to bring to your attention.

Other Issues in Chapter 7

Trustee Commissions in Asset Cases

As I noted earlier, trustees can earn a commission in the 5% of cases where there are assets, but even this compensation can be uncertain at times. The Congress tried to address this uncertainty. Section 330 (a) (7) was added to Title 11 during BAPCPA. It was the intent of Congress to further instruct Courts that trustee compensation under Section 326 (a) is to be

treated as a *commission*, something most already did. In addition, Section 330 (3) was amended by BAPCA to remove compensation for Chapter 7 trustees from the typical “lodestar” or “Johnson-factor” analysis which centers on time spent on services and rates charged for such services. Shortly after enactment of BAPCPA, the United States Trustee announced a policy of support for the commission fee determination, it no longer required time records and would only object to fees in unusual circumstances. Certainly, bankruptcy courts must review trustee compensation for reasonableness under Section 330 (a) (1), but in making these decisions some courts have reverted to a traditional analysis of how much time was spent by the trustee, and how much should be awarded for those services on an hourly basis.

We believe that Section 330 (a) (7) should be strengthened to provide that the commission should be presumptively awarded without regard to the Section 330 (a) (3) “lodestar” factors. Trustees have to take the good with the bad cases. Commissions are designed to encourage Trustees to devote time to all cases for the better of the system.

Pension Plan Responsibilities

Section 704 (a) (11) of Title 11, as added by BAPCPA put the administration of abandoned pension plans in the hands of the Chapter 7 trustee when a business declares bankruptcy. We believe, based on regulatory developments since BAPCPA, this provision can be removed with no harm, and in fact, with benefit to pension plan participants, and creditors.

In early 2006, after the passage of BAPCPA, the Employee Benefits Security Administration (EBSA), a bureau of the Department of Labor (DOL) developed a regulatory scheme under ERISA for handling “abandoned” plans. In practice, these regulations provide for the orderly termination of orphaned plans where the sponsoring employer has not filed bankruptcy. The plans are essentially turned over to a QTA (qualified termination administrator). These are typically entities that work with ERISA plans on an ongoing basis and generally appreciate the business because of resulting account rollovers, etc.

It our view, had the EBSA regulations been in existence pre-BAPCPA, Section 704 (a) (11) would never have been adopted and likely deemed unnecessary. In view of the changed

regulatory environment due to the promulgation of these regulations, we would hope the Committee would consider the repeal of 704 (a) (11). It would be more efficient and better for pension plan participants for these plans to be managed and liquidated outside of bankruptcy by professionals in this field. Trustees have little expertise in this area, yet it imposes a substantial burden and ongoing liability on the trustee.

In addition, by placing the burden on the trustee to administer the orphan plans, the bankruptcy estate and its creditors suffer reduced funds available to distribute to creditors due to the cost of administering these plans. Further, it takes several years in most instances to complete the termination of the plan. This typically results in a delay of several years before distributions can be made to creditors. There is no party who benefits from the current law and many who are prejudiced by it.

Conclusion

We want to again thank you Chairman Coble for holding this hearing. Chapter 7 is the most common form of bankruptcy in the U.S. – with well over 1 million cases last year. Chapter 7 trustees are performing the bulk of the work in handling these cases. Even though the filing fee has been increased three times in the last 17 years, trustee compensation has not been part of any increase, thus, our compensation has been frozen in time from the early 1990's at \$60 per case. We think the time is long overdue to adjust this amount to keep the trustee system a competent, efficient corps protecting both debtors and creditors in bankruptcy, and keeping our bankruptcy courts from being at best sluggish and at worst backlogged. Thank you for allowing us this opportunity to air our views on a subject important to bankruptcy trustees throughout the U.S.