

**Lawless, Robert M**

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**From:** Holtkamp, David <David.Holtkamp2@cityofchicago.org>  
**Sent:** Wednesday, May 03, 2017 11:39 AM  
**To:** Lawless, Robert M; Ariane Holtschlag  
**Subject:** Consumer Committee - Statement for Consideration.

*The opinions in this letter are my personal opinions and not the opinions of the City of Chicago.*

Prof. Lawless;

I would really like to thank you and the other committee members for taking the time to put together, and serve on, this important committee on consumer bankruptcy. As the primary attorney for the City of Chicago in bankruptcy matters, I handle cases in all chapters across the country and feel that consumer bankruptcy is too often ignored, and swept aside as unimportant. I don't have the statistics, but based what I see in my current role, I would posit that substantially more debt is put into bankruptcy due to consumer cases each year than due to commercial cases. Thus, the work of this committee is just as important as any other committee focused on chapter 11, if not more so.

I understand that you and the other committee members likely have a good number of issues already slated to be addressed, but I believe there is one issue that should be made a priority: The number or allocation of bankruptcy judgeships. The belief that chapter 11 is important, and the other chapters are not, appears to be the main basis for allocating judgeships across the districts. This needs to change.

For example, the Central District of California currently has 27 bankruptcy judges. The Northern District of Illinois currently has 11 (these are the number of judges sitting, including senior status judges). So does the CDCA have 2 ½ times the cases? Maybe, if only chapter 11 cases are counted. Through March of 2017, the CDCA had 75 chapter 11 filings, while the NDIL had 28. That means that in each district there were about 2.5 chapter 11 cases filed per judge sitting. But it is just silly to allocate judgeships based on the number of chapter 11 cases alone. Should a district have 16 more judges just because it has 15 more chapter 11 filings a month? Probably not. This is especially true, considering that neither of these districts are mega chapter 11 havens. And these numbers can swing wildly due to just one large entity and its subsidiaries filing.

The extreme disparity between the resources allocated to each district, however, is really borne out by the number and types of consumer cases. Through March of 2017, the NDIL had a total of 11,194 consumer cases opened (assuming all 7's are consumer). In the CDCA, for the same period, there were only 9,334 consumer cases. Thus, there were nearly 2,000 more consumer cases filed in the NDIL so far this year and less than half the number of judges to handle them.

If these numbers are not bad enough, the types of case makes matters worse. In the NDIL, 5,234 of those consumer cases through March of 2017 were chapter 13 cases, leaving about a 50/50 split between 13's and 7's in the district. In the CDCA, 2,531 of the consumer cases were chapter 13 cases. The remainder—6803—were chapter 7 cases. Therefore, chapter 7 case are filed at a rate of about 3 to 1 to chapter 13 cases in the CDCA, while the ratio is about 1 to 1 in the NDIL. Because

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chapter 13 cases take a lot more court time on average than a chapter 7, this exaggerates the already huge disparity between the judicial resources allocated to the CDCA and the NDIL. Judges in the NDIL routinely hear over 600 chapter 13 matters each chapter 13 day, week in and week out.

It is certainly time that Congress is made aware of the disparity, and how the burden placed on the courts in some districts is far too large. As the primary attorney for the City of Chicago in bankruptcy cases, I see the burden the consumer case volume, and mainly chapter 13 case volume, puts on the judges. I would really like to see the addition of judges be made a high priority in underserved districts to ensure debtors and creditors alike get the relief the Code provides, and in an efficient and effective way.

Therefore, I would ask that the committee look into the number of judgeships in the various districts and propose that additional judgeships be added where necessary, based on the type and number of consumer cases filed in each district.

At the same time, while probably not as important, I would ask the committee to look into the number of chapter 13 trustee's in each district. As the number of chapter 13 cases in the NDIL has swollen, so have the workloads of the 2 chapter 13 trustees that handle Cook County, Illinois, cases. They are now the busiest two trustees in the country, and by a very large margin. It is likely appropriate to suggest that the Department of Justice add chapter 13 trustees in the NDIL and likely in other districts as well.

Thanks,  
-David Holtkamp



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## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

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ABI Commission on Consumer Bankruptcy: Panel on the Committee on Case Administration  
and the Estate

Judge John E. Waites

Thank you for the opportunity to present comments regarding consumer bankruptcy law issues  
for your consideration.

1. **Credit Counseling**: The credit counseling requirements of 11 U.S.C. § 109(h) are not effective or useful as an eligibility requirement to file a bankruptcy case.
2. **Discharge Issues under 11 U.S.C. § 1328(a)**: Section 1328(a) of the Bankruptcy Code should be clarified to indicate whether a debtor's failure to make direct payments to a creditor as provided for in a confirmed chapter 13 plan prohibits the issuance of a discharge under that section.
3. **Student Loan Debt**: Bankruptcy laws, rules, and procedures should more effectively provide remedies for student loan debt, including:
  - a. Congress should better define the "undue hardship" standard set forth in 11 U.S.C. § 523(a)(8), and establish reasonable criteria for meeting that standard.
  - b. The Bankruptcy Code should be clarified to promote and facilitate repayment of student loan debt through a confirmed chapter 13 plan.
    - i) Amend § 1322(b)(1) to expressly permit discrimination in the payment of student loan debt, much like Congress did with respect to co-debtor claims.
    - ii) Clarify the Code to indicate that the cure and maintain option for student loan debt allows separate classification without regard to § 1322(b)(1), and allows the payment of interest without regard to § 1322(b)(10).
4. **Current Monthly Income under 11 U.S.C. § 101(10A)(B)**: The definition of "current monthly income" in 11 U.S.C. § 101(10A)(B), and to the degree necessary § 1325(b)(2), should be amended to exclude veteran's benefits.
5. **"Vesting" of Property of the Estate**: The meaning and effect of the "vesting" of property of the estate pursuant to 11 U.S.C. § 1327(b) & (c) should be clarified, including its relationship to §§ 541 and 1306(a).
6. **Pro Se Filings**: The Bankruptcy Code and federal rules should be amended to recognize and address reoccurring issues related to *pro se* filings of chapter 13 cases, including:
  - a. Fed. R. Bankr. P. 1006(b)(3), which relates to the payment of filing fees in installments. This Rule should be clarified to allow a *pro se* filer to engage and pay counsel before all of the filing fee has been paid.
  - b. Either Bankruptcy Courts should be allowed to promulgate a simpler chapter 13 form plan for use by *pro se* debtors, or a simplified national chapter 13 plan should be created to be utilized by *pro se* debtors.

- c. For those *pro se* debtors who qualify for pro bono legal representation, but who are unable to obtain it, a Chapter 13 trustee should be allowed (if not encouraged), to work more closely with the *pro se* debtor to formulate a confirmable plan of reorganization. One method to accomplish this would include allowing a Chapter 13 trustee to host a monthly workshop for low income qualified debtors. The workshop would be presented either by a member of the trustee's staff or third party who would provide qualified debtors with instructions on the completion of schedules, statements, and a plan.

**Biographical Information for Judge Waites**

The Honorable John E. Waites was appointed as a United States Bankruptcy Judge for the District of South Carolina on June 27, 1994 and was reappointed in 2008. He served as the District's Chief Bankruptcy Judge from March 1, 2006 until March 1, 2013.

NCBJ Service

He presently serves on the Executive Committee for the National Conference of Bankruptcy Judges (NCBJ) as Secretary. He has previously served as Co-chair of the Legislative Committee for NCBJ and as a member of the NCBJ Board of Governors from 2010 – 2014, as well as various committees, including Public Outreach. On March 15, 2017, he was elected President-Elect beginning in October, 2017, and will become President of NCBJ in October, 2018.

Other Notable Service

On October 1, 2013, he was appointed by the Chief Justice of the United States Supreme Court to serve on the Judicial Conference Committee on the Administration of the Bankruptcy System. He was reappointed in 2016. He also served as a member and chairman of the Bankruptcy Judges Advisory Group for the Administrative Office of the United States Courts from 2008 - 2013. He has served as a member of the Access to Justice Commission of the South Carolina Supreme Court since 2006. In 2016, he was appointed as a member of the South Carolina Bar's Pro Bono Board, having previously served on its Pro Bono Committee. He presently serves as the Judicial Chair of the ABI Southeastern Seminar.

Awards/Recognition

In 2013, he was recognized by South Carolina Legal Services for his efforts to ensure equal access to justice for South Carolina citizens and was also the recipient of a *pro bono* award from the South Carolina Bar for his leadership in promoting *pro bono* efforts in the U.S. Bankruptcy Court. On May 3, 2014, the South Carolina Bankruptcy Law Association presented Judge Waites with the J. Bratton Davis Professionalism Award, which is the Association's highest honor. On December 10, 2015, he was awarded the U.S. District Court Judge Matthew J. Perry, Jr. Civility Award from the Richland County Bar Association. In 2016, he received Legal Services Corporation's *Pro Bono Award*.

**Lawless, Robert M**

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**From:** Soneet Kapila <SKapila@kapilamukamal.com>  
**Sent:** Thursday, September 07, 2017 1:40 PM  
**To:** aquackenboss@abiworld.org  
**Cc:** Lawless, Robert M; Ronald R. Peterson - Jenner & Block, LLC (rpeterson@jenner.com)  
**Subject:** Chapter 7 committee of the ABI Consumer Bankruptcy Review Commission

Amy and team:

I do not plan to testify in person but do have the following input as a trustee for over 25 years:

1. Should trustees get a raise on no asset cases and if so how should it be paid. **This is absolutely a YES. The responsibility of trustees have increase multifold over the 2 decades plus and the compliance and filing requirements are demanding. The Trustee practice can no longer be operated with an inexpensive clerokal person. It requires skilled and trained Trustee assistants who are well compensated. The only increase I have seen is from \$45/case to \$60/ case. Inflation ignored. Trustees are expected to do rpo se pleadings for what is labeled as "Trustee functions".**
2. How do we pay trustees for *in forma pauperis* cases.
3. Should trustees be able to hire their own firms as attorneys or accountants. **A definite YES again. The efficiencies far outweigh the costs of retaining outside firms. Good trustees always retain outside FAs and counsels on a need basis and not be territorial about it. However I do believe that neither counsel nor FA/accountants should bill for both the time of the Trustee on the professional fee application and Trustee fees too. E.g. I as trustee never bill for my time on the accountant fee application. I pass on that. The CPA firm bills for all the professionals otherwise. Matter of fact, the case gets the benefit of my time and skills as an FA free of cost. I only seek trustee fee. That seems a fair approach.**
4. Do we really need credit counseling and post-petition debtor education. **Philosophically this sounds good but I am not sure how many debtors benefit from it. Not sure if there is any empirical evidence. But based on what I observe it is a "check the box" item.**
5. How are we doing administering pension plans? **An enormous burden on trustees especially in my experience ERISA does not support the necessary fees and costs incurred. Either the Code should allow for trustees to be compensated and also permit professional fees for the dissolution of the pension plans; or the Code should permit abandonment' or the ERISA should undertake the process. The rules around "orphan plans" are themselves cumbersome to administer by a trustee. Case law on compensating trustees for the administration and termination of pension plans has**

gone unfavorably against trustees due to the plain interpretation and application of the code.

- 6. How happy are you with the new forms? **Unhappy. Burdensome. This has multiplied the effort needed from Trustees to review the forms and administer the cases with no added value to the case administration. It would have been helpful and nice if some had explained the goal and objective of these new forms. Evidently no trustee has managed to nail it down. Thus it cannot be serving a valuable purpose.**

Thank you.....Soneet

**Soneet R. Kapila**  
**Partner**



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## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

### Lawless, Robert M

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**From:** Stanley J. Kartchner <trustee@aztrustee.com>  
**Sent:** Friday, September 15, 2017 1:42 PM  
**To:** aquackeboss@abiworld.org; rpeterson@jenner.com; Lawless, Robert M  
**Subject:** Bankruptcy Review Commission

Responding to NABT President Ronald Peterson's invitation below, I observe that one of the intended purposes of the forms "modernization" project (I use the quotes because my distaste for the so-called modernized forms has been previously and abundantly expressed in various forums) was to move the system toward entirely data-enabled forms. I have observed exactly the opposite effect, especially with respect to pro se debtors, whether or not assisted by bankruptcy petition preparers.

With the loss of low-cost bankruptcy software providers following the "modernization" project, whereas the bpp's in this district previously would prepare and file data-enabled forms, they have now reverted to using the online fillable forms and filing those as non-data-enabled scanned copies. And, of course, the forms completed by unassisted pro se debtors continue to be scanned by the court and thus are not data-enabled. And even some infrequent bankruptcy attorneys have resorted to using the fillable forms rather than invest in the costly bankruptcy forms preparation software products that appear to be the only available options at this point.

With the modernized forms already being much more difficult to comprehend (for those filling them out) and review (for those of us charged with that task), having a large percentage of those now filed with court as non-data-enabled forms significantly undermines the promised utility of having fully data-enabled forms. Full attention should therefore be given in this latest effort toward understanding, anticipating and making appropriate allowances for how the system actually works, and will work with proposed changes, and not how academics or judges think it should work. Actually listening to those of us in the trenches who deal with these issues on a regular basis (and in significant volumes) would be a good start.

Thank you,

#### Stanley J Kartchner

Chapter 7 Trustee  
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On Friday afternoon at our annual convention, September 15, 2015,, the Chapter 7 committee of the ABI Consumer Bankruptcy Review Commission will hold a public hearing on reforming Chapter 7 of the bankruptcy code. You have two options. First, you may submit written testimony to the ABI at the addresses I have listed below. Second, I have six slots open for live testimony in panels. The committee will hear from 4 panels of three for an aggregate time of 90 minutes. The same amount of time NACBA got.

Here are the issues that might impact your practices

1. Should trustees get a raise on no asset cases and if so how should it be paid. There is not unanimous support on the ABI committee for a raise, and they **NEED TO HEAR FROM YOU!**
2. How do we pay trustees for *in forma pauperis* cases.
3. Should trustees be able to hire their own firms as attorneys or accountants. There is a sizeable belief on the committee that trustees should not have this right.

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If you don't come to testify on these critical issues, the ABI will simply conclude that you don't care. In addition, the committee is very interested in issues such as

- a. What to do with student loans
- b. Post-Petition fees for Chapter 7 debtor's lawyers.
- c. What is a tax return for purposes of dischargeability.
- d. Do we really need credit counseling and post-petition debtor education.
- e. How are we doing administering pension plans?
- f. How happy are you with the new forms?
- g. What information should a debtor's counsel supply the trustee prior to the 341 meeting and how should it be supplied.
- h. What if the debtor doesn't disclose property. Is it still deemed abandoned by the trustee?
- i. Do we need a ground for objecting to exemptions for concealed property. *Law v. Seigel* problem.

This is the time for you to be heard on matters that dramatically affect your practice. You may file written testimony or register to testify by emailing 'Amy Quackenboss' [aquackenboss@abiworld.org](mailto:aquackenboss@abiworld.org) with a copy to me at [rpeterson@jenner.com](mailto:rpeterson@jenner.com) and a copy to Lawless, Robert M [rlawless@illinois.edu](mailto:rlawless@illinois.edu)

I need a few good trustees to let the ABI commission know what we need for our practices. Please register or submit written testimony.

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

### Lawless, Robert M

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**From:** Walter Kelley <WKelley@kelleylovett.com>  
**Sent:** Monday, July 17, 2017 12:49 PM  
**To:** ConsumerCommission@abiworld.org  
**Subject:** Thoughts from a Chapter 7 Trustee

Good morning,

I hope the Commission would debate whether two credit-counseling courses for debtors are necessary.

As a panel trustee with over 30 years experience, I see no benefit

to anyone other than the credit counseling industry. I think the first course should be eliminated or merged into the final one.

Sincerely, Walter Kelley

#### Walter W. Kelley

Senior Partner

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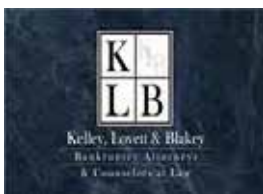
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Consumer Bankruptcy Commission

December 1, 2017

Comments and testimony by David R. Kuney

Thank you for permitting me to address this Commission today. The Commission is doing important work. When I teach my law students at Georgetown University Law Center I often tell them that bankruptcy law is at the epicenter of many of the important changes in our society and culture. That statement is even more true in the case of consumer bankruptcy. One telling mark of any civilization is how it treats its poor and needy. For that reason, I deeply share your desire to make our consumer bankruptcy laws more just and fair to all constituents.

My topic concerns an issue that affects thousands of bankruptcy debtors under Chapter 13 and which relates to their ability to contribute to their pension funds and provide for an economically sound retirement. The issue is this: may a chapter 13 debtor exclude from the calculation of his or her “projected disposable income” those amounts which he or she proposes to contribute to their qualified retirement plan, such as a 401(k) plan. I contend the Code says “yes.” Most courts agree. But there is significant disagreement over the meaning of the relevant code provisions, and an unfortunate decision from the Sixth Circuit that says that

debtors may not do this. There is an urgent need for a congressional fix, or resolution by the Supreme Court. Let me explain why.

But by way of full disclosure, I am currently representing a client, pro bono, on this very issue in a case now pending before the Fourth Circuit Court of Appeals. More on that in a minute.

The issue here deals with the central aspect of plan confirmation for a chapter 13 debtor—namely, the calculation of the debtor’s “projected disposable income.” This is the key test. In determining what is “disposable” the Code contains a test for permitted expenses and also defines certain items, such as social security payments, which are excluded.

Section 1325 of the Code provides that in those cases in which a creditor or the U.S. trustee objects to the plan, the plan must then provide that the debtor devote all of his or her disposable income over the applicable commitment period to the repayment of creditors. For above-median debtors, disposable income is generally determined by examining the “amounts reasonably necessary to be expended” in accordance with specific statutory allowance, including some IRS standards and some actual expenses.

The Code initially said nothing about whether voluntary contributions to a qualified pension plan should be excluded from calculating the projected

disposable income. This was changed in 2005 when Congress amended the Code under BAPCPA.

First, Congress amended section 541(b)(7) which now states that property of the estate does not include “any amount— withheld by an employer from the wages of employees for payment as contributions to [a qualified employee retirement benefit plan.”] The same change was made with respect to any amount “received by an employer from employees for payment as contributions” to qualified retirement plans.

In addition, and here is the key, Congress added two well-known hanging paragraphs; each says the following: “except that such amount under this paragraph shall not constitute disposable income, as defined in in section 1325(b)(2).”

Congress also added section 1322(f) which states that a “plan may not materially alter the terms of a loan [used to repay a loan from a pension plan to the debtor] and further, that “any amounts required to repay such loan shall not constitute “disposable income” under section 1325.

I believe the goal of congress was clear and important. Congress wanted to exclude from disposable income BOTH the amount of voluntary contributions and

money used to repay loans taken from a pension fund. In my view, the amendments achieved this and made the exclusion clear. Most courts agree.

But unfortunately, a few bankruptcy courts and one court of appeals have now split into **three widely recognized different rulings**.

Initially there was no confusion. What became the majority rule first emerged in the decision of *In re Johnson*, 346 B.R. 256 (Bankr. S.D. Ga. 2006). *Johnson* held that the plain language of section 541(b)(7) clearly expressed congress intention to exclude voluntary contributions to a qualified pension fund from the calculation of projected disposable income. The court stated that “any amount that is either withheld by or received by a debtor’s employer for qualifying [employment benefit contributions] shall not constitute disposable income, as defined in section 1325(b).” The bankruptcy courts in approximately 10 circuits now follow the *Johnson* rule.

The divergence in thinking occurred four years later in a decision from the Sixth Circuit BAP in *Seafort*. *In re Seafort*, 437 B.R. 204 (B.A.P. 6<sup>th</sup> Cir 2010). The BAP held that a debtor could deduct contributions to a qualified plan but only to the extent that the debtor had been doing so on the petition date. This rule meant that if a debtor had suspended making contributions on the date of its bankruptcy petition, because they were then repaying loans to their pension fund,

they could not exclude future contributions from the calculation of disposable income. Also, debtors who had been unemployed on the petition date, but later found work, would not be permitted to exclude the contributions. Thus, the “fresh start” of bankruptcy was made harder for those debtors who were unable to make contributions on the date of the bankruptcy filing. This rule in my judgment was also harsh and lacked any statutory foundation. This view from the B.A.P. was later dubbed the so-called “middle ground” or what the U. Trustee called the Goldilocks’ rule in the *Cantu* case.

In 2012 the Sixth Circuit reviewed the B.A.P decision and came up with an ever harsher rule. *In re Seafort*, 669 F.3d 662 (6<sup>th</sup> Cir. 2012) adopted what has become known as the *Prigge* rule, from *In re Prigge*, 441 B.R. 667 (Bankr. D. Mont. 2010). *Seafort* held that projected disposable income did not exclude voluntary contributions made during the commitment period, *regardless of* what the debtor was doing on the petition date. Its core ruling was that the exclusion for loan repayments was squarely in chapter 13, but Congress did not locate the exclusion for contributions within the body of chapter 13 itself. Thus, the Sixth Circuit ruled that the only pension contributions that can be excluded from the calculation of disposable income are funds already in the hands of the employer on the petition date, but not future contributions made during the course of a five

year plan. This rule strikes me as both unduly harsh and wholly inconsistent with congress' purpose.

This case has now reached the Fourth Circuit in the case of Ricardo Cantu. Mr. Cantu was an agent for the Department of Homeland Security. He had made contributions for over 12 years but had been suspended from making contributions because he had borrowed money from his pension plan and was required to repay the loans before he could re-commence contributions. When he filed for Chapter 13 his loans were about to be fully repaid and he filed a plan which deducted the lawful amount of his future voluntary contributions to his pension plan. The U.S. Trustee objected.

The Bankruptcy court in Alexandria, Virginia, Judge Brian Kenney agreed with the rule in the *Johnson* case, which is the majority rule. *In re Cantu*, 553 B.R. 565 (Bankr. E.D. Va. 2016). The U.S. Trustee appealed. The District Court affirmed in a summary affirmance of one paragraph. The matter was then appealed to the Fourth Circuit. Oral argument occurred on October 25, 2017. During oral argument, Judge Diaz <sup>1</sup>asked, why shouldn't the Fourth Circuit just follow the only other circuit court decision of *Seafort*? The Fourth Circuit may be disinclined to create a circuit split but in my view there is a critical need for just that.

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<sup>1</sup> Three judge panel also included Judges Thatcher and Harris.  
Document Number: 2106329  
Document Name: Consumer Bankruptcy Commission  
12/5/2017 10:08 AM

A decision may be issued sometime in late December or January 2018. The U.S. Trustee has advised us that if the Fourth Circuit affirms the decision of the bankruptcy court this will create a circuit split and that it will file a petition for certiorari. Whichever side does not prevail is likely to seek *en banc* review by the fourth circuit.

I recommend the Commission propose a statutory fix. Congress can get to the root of this issue and fix; the root of the problem is probably the location of the hanging paragraphs and the exclusion. The most direct change would be to relocate the exclusion now found in the hanging paragraph of 541(b)(7) to section 1322. Or it could change the definition of disposable income in section 101, as it does with social security. These changes would in my view be consistent with sound economic policy and a just bankruptcy system that protects a debtor's retirement.

RECORD NUMBER: 17-1034

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**United States Court of Appeals**  
*for the*  
**Fourth Circuit**

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THOMAS PATRICK GORMAN,

*Trustee/Appellant,*

– v. –

RICARDO CANTU, JR., a/k/a Rick Cantu,

*Debtor/Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

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**BRIEF OF APPELLEE**

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Appeal: 17-1034 Doc: 20 Filed: 05/02/2017 Pg: 12 of 269

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1034 Caption: Thomas P. Gorman, Trustee v. Ricardo Cantu, Jr.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ricardo Cantu, Jr.  
(name of party/amicus)


who is appellee, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
  
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

Appeal: 17-1034 Doc: 20 Filed: 01/30/2017 Page: 23 of 269

- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:
  
- 5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
  
- 6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:  
Trustee is Thomas Gorman

Signature: David R. Kuney   
Counsel for: Appellee

Date: January 30, 2017

CERTIFICATE OF SERVICE

\*\*\*\*\*

I certify that on January 30, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

  
(signature)

January 30, 2017  
(date)

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**STATEMENT OF THE CASE**

**A. Introduction**

Section 1325(b) of the bankruptcy code states that when a debtor in a Chapter 13 bankruptcy case proposes a plan of reorganization, he or she must devote their disposable income to repay creditors.<sup>1</sup> However, section 541(b)(7) excludes contributions to a qualified retirement plan from the calculation of disposable income. Mr. Cantu’s plan did exactly what section 541(b)(7) permits and the bankruptcy court properly confirmed his plan. The Trustee (the Appellant) now claims this was error, but Congress expressly sought to protect retirement savings, and no valid reason is offered to disregard the plain mandate of section 541(b)(7).

**B. Factual background**

On December 31, 2015, Mr. Cantu, a border patrol agent for over fifteen years with the United States Department of Homeland Security, filed a voluntary petition for relief under Chapter 13 of the U.S. Bankruptcy Code. (A 11.) Appellant, Thomas Gorman, was assigned as the bankruptcy Trustee.

Mr. Cantu was a thirty-eight-year-old resident of Stafford, Virginia when he filed for bankruptcy. Despite having a monthly income of approximately \$9,000 (A

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<sup>1</sup> All references are to 11 U.S.C. § 101 *et seq.* (the “Code”).

39), he was in financial distress. (A 21-22.) He was a divorced father with two children, making bi-weekly alimony and child support payments of \$750. (A 169.) Mr. Cantu had over \$147,000 of unsecured debts, including student loans of over \$30,000 (A 36), secured loans of \$4,942 and only \$13,451 in assets. (A 90.)

As an employee of the United States Government, Mr. Cantu was, and remains, eligible to make voluntary contributions to his retirement plan, which is covered by the Federal Employees Retirement System. (A 94, 150.)<sup>2</sup> Mr. Cantu had been making regular contributions to his retirement plan during most of his fifteen-year career with the Department of Homeland Security. (A 171.)

Prior to his bankruptcy filing, Mr. Cantu had taken two loans from his retirement plan “in order to try to avoid bankruptcy.” (A 94, 150-151.)<sup>3</sup> As a result of these loans, Mr. Cantu was not eligible to make employee contributions for a period of two years, including a post-petition period (from November 2015 to May 11, 2016). (A 94, 224.) On one of these loans, which was due to be repaid on

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<sup>2</sup> Mr. Cantu’s retirement plan is a Thrift Savings Plan (“TSP”), a defined-contribution retirement savings plan similar to 401(k) plans offered to private sector employees. A TSP account is regulated according to 5 U.S.C. §§ 1600-1690, the funds of which are inalienable and, therefore, excluded from a bankruptcy estate. *See* 5 U.S.C. §§ 8437(e) and (g); 11 U.S.C. § 541(c)(2).

<sup>3</sup> Mr. Cantu was granted a “financial hardship withdrawal” from his TSP and was advised that he was “not entitled to make employee contributions . . . .” (A 94.)

January 20, 2016 (A 94), Mr. Cantu was making monthly loan repayments in the amount of \$268.62. (A 142.)

**C. Mr. Cantu's Chapter 13 plan**

Mr. Cantu filed his initial plan on January 14, 2016, outlining how he proposed to repay his creditors based on his calculation of “disposable income” as required by Code section 1325(b)(1)(B). (A 69.) Schedule J listed his payments of spousal and child support at \$1,625 per month. (A 42.)<sup>4</sup> These payments were being made bi-weekly and were apparently being made over a period of time. (A 169.)<sup>5</sup>

The Trustee filed a written objection to confirmation of the plan, claiming that Mr. Cantu had overstated the amount of his retirement loan repayments (because one of the loans had now been repaid), and Mr. Cantu's payments for alimony and support, as shown on Schedule J, were overstated, and should have been \$1,500 per month, based on the Decree of Divorce. (A 82.)

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<sup>4</sup> Schedule J, Official Form 106J, line 18, requires disclosure of “your payments of alimony, maintenance, and support.” Code section 101(14A) defines a domestic support obligation as including a “separation agreement” or “an order of a court of record.” The Trustee's argument that section 101(14A) only refers to an amount established by a court order is incorrect. (Br. 16.)

<sup>5</sup> The amount of \$1,625 per month was based on bi-weekly payments of \$550 for child support and \$200 for spousal support. Payments of \$750 every two weeks is equal to \$19,500 per year. This, in turn, yields \$1,625 per month. Mr. Cantu's testimony suggests payments being made over a period of months. *Id.*

Mr. Cantu's written response to the Trustee's objection (filed on March 4, 2016) answered both objections. (A 86.) The response stated that Mr. Cantu's obligations to his wife were correctly reflected on Schedule J, and the amounts being paid were "according to a fully-executed Separation Agreement dated June 5, 2015." *Id.* The response further stated that the executed Separation Agreement had been provided to the Trustee on February 10, 2016. *Id.* The Trustee acknowledges that he was provided a copy of the Separation Agreement. (Appellant's brief, 10, n. 1.)<sup>6</sup>

Mr. Cantu's written response to the Trustee's objection also acknowledged that one of the loans had been paid off on January 20, 2016, and, accordingly, these dollars (\$268.37) would be considered part of his disposable income for March and April 2016. (A 86.) However, starting in May 2016, when his suspension from being able to contribute to his retirement plan ended, he intended to contribute the \$268.37 to his qualified retirement plan. (A 86.)

Mr. Cantu filed an amended Chapter 13 plan on March 13, 2016. (A 90-97.) The amended plan proposed that he would recommence voluntary contributions to

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<sup>6</sup> Hereafter, "App. Br." The Trustee's acknowledgement that he had the written Separation Agreement (since February 2016) is significant. This agreement corroborates that the amount of the payments the Cantus had agreed to in June 2015 slightly varied from what the court entered in the Decree of Divorce in July 2015 (hence, the "scrivener's error"). The Trustee's possession of this document is inconsistent with his arguments that the agreement to increase the payments was made "verbally" and on the eve of bankruptcy (*e.g.*, December 2015)(Br. 14, 22.)

his retirement plan in the amount of \$268.00 per month starting in May of 2016 when his TSP suspension was due to expire. (A 94.) These contributions were not to be included as part of his “disposable income” as expressly permitted by Code section 541(b)(7).

No creditor objected to the amended plan. Nevertheless, on April 27, 2016, the Trustee filed the sole objection to Mr. Cantu’s amended plan. (A 112-114.) The objection asserted that the savings from his loan repayment of \$268.62 had to be included as part of his disposable income and used for repayment to creditors. *Id.* The Trustee’s written objections referred solely to *In re Seafort*, 669 F.3d 662 (6th Cir. 2012). (A 112.) The Trustee further claimed the plan was not proposed in “good faith” as required by Code section 1325(a)(3) because Mr. Cantu had overstated his obligations for child and spousal support. *Id.*<sup>7</sup>

#### **D. The confirmation hearing**

The bankruptcy court held a confirmation hearing on May 12, 2016. Mr. Cantu testified that he had been contributing to his retirement plan since the beginning of his employment at the Department of Homeland Security, and he would have continued to make the contributions but for his hardship loans. (A 170-171.) These post-petition contributions were about one-third of what was permitted

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<sup>7</sup> A second objection related to his home lease issue was apparently resolved by Mr. Cantu agreeing to amend Schedule G. (A 88-89.)

by law. (A 120.) Mr. Cantu's counsel argued that the resumption of his contributions to his retirement plan was permitted under Code section 541(b)(7).

The Trustee argued that Mr. Cantu was not permitted to exclude his voluntary contributions to his retirement plan in calculating his "disposable income," relying on *In re Seafort*, 437 B.R. 204 (B.A.P. 6th Cir. 2010), *aff'd*, 669 F.3d 662 (6th Cir. 2012). (A 144-146, 161-163.) The bankruptcy court asked the Trustee whether he was relying on the position taken by the BAP or the Court of Appeals, as these courts had differed. The Trustee replied that the more moderate "middle view" of the BAP was the "Goldilocks" view, and was the "just right ruling." (A 163.) The "middle view" is that "debtors may continue to make voluntary contributions to their retirement plans if the debtor was making contributions in comparable amounts pre-petition." *In re Cantu*, 553 B.R. 565, 573 (Bankr. E.D. Va. 2016), citing *Seafort*, 437 B.R. at 209-10.

Conversely, when asked by the bankruptcy court about the "third line of cases" as exemplified by *Prigge*,<sup>8</sup> the Trustee stated this view was "overly harsh to debtors." (A 162-163.) *Prigge* held that debtors may not make *any* post-petition contributions to their retirement plans, regardless of whether they were doing so at the time of the filing. The Sixth Circuit in *Seafort* essentially agreed with *Prigge*. *Seafort*, 669 F.3d 674, n.7. In view of these representations, the bankruptcy court

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<sup>8</sup> See *In re Prigge*, 441 B.R. 667, 672-78 (Bankr. D. Mont. 2010).

found that the Trustee's objection to confirmation was based on the BAP decision's "middle ground." *Cantu*, 553 B.R. at 575.

The bankruptcy court also heard evidence and representations by counsel concerning the second issue on this appeal, namely the calculation of Mr. Cantu's expenses related to child and spousal support obligations. Mr. Cantu testified that when he and his wife initially separated (June 2, 2014; A 201), he was paying his wife \$300 per month (A 168) but later agreed to increase the amount. (A 169.) His testimony was consistent with the June 5, 2015 Separation Agreement<sup>9</sup> in which he agreed to pay his wife \$750 bi-weekly from his bi-weekly paycheck.<sup>10</sup> This increase was written and not oral. (A 215).<sup>11</sup> Mr. Cantu's payments and his

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<sup>9</sup> The Separation Agreement was included as part of the record on appeal to both this Court and the district court (A 215). It was provided to the Trustee on February 10, 2016 (A 86.) It was not introduced as an exhibit at the May 2016 hearing, but it had been referenced and summarized in the underlying pleadings relating to the confirmation hearing. (A 86, 185.) The designation of an item is tantamount to a request to take judicial notice, and an appellate court may take judicial notice at any time, especially where the other side has notice and actual possession of the document. By taking notice of the Separation Agreement, the Court would accurately and readily determine the date and non-oral nature of the agreement. *See* Fed. R. Evid. 201; *In re Indian Palms Associates, Ltd. v. California Federal Bank*, 61 F.3d 197, 206 (3d Cir. 1995).

<sup>10</sup> Mr. Cantu's pay stubs confirm he was paid bi-weekly. (A 208.)

<sup>11</sup> The Trustee repeatedly argued that the increase was "oral." (*See e.g.*, Br. 22.) The Trustee refers to the oral agreement as lacking in "corroboration" (*id.*) without disclosing his knowledge of the corroboration in the Separation Agreement.

bankruptcy schedules are entirely consistent with this payment structure. (*See* Schedule J, A 42.)

However, Mr. Cantu testified that when he and his wife filed for divorce, “the court put it down as 1,500 every month.” (A 169.) The divorce filing appears to be July 28, 2015, the date when Ms. Cantu executed the Decree of Divorce. (A 207.) The amount “put down” by the court varied slightly from what the Cantus had agreed in their Separation Agreement of June 5, 2015, which required bi-weekly payments of \$750 for child and spousal support. (A 216-217.)

**E. The bankruptcy court’s decision and Confirmation Order**

At the conclusion of the hearing, the bankruptcy court issued a partial oral ruling. The bankruptcy court “accept[ed] the debtor’s testimony that the divorce decree simply is not reflective of what the parties agreed to in the 750 dollars per pay period.” (A 180.) The court found that the “[divorce decree] doesn’t accurately reflect the intention of the parties at the time it was entered into.” (A 179.) The court also denied the good faith objection based on the failure to identify whether Mr. Cantu would be assuming or rejecting his lease. (A 180.) The court took under advisement the issue of Mr. Cantu’s contributions to his retirement plan.

The bankruptcy court issued its written memorandum opinion on July 14, 2016, confirming the amended plan and denying the remainder of the Trustee’s objections. (A 118.) The bankruptcy court found that Mr. Cantu was lawfully

permitted to make contributions to his qualified retirement plan under the express terms of Code section 541(b)(7) and as permitted by the vast majority of cases, including *In re Johnson*, 346 B.R. 256 (Bankr. S.D. Ga. 2006). On August 18, 2016, the bankruptcy court entered an Order Confirming Modified Plan (“Confirmation Order”). (A 139.)

The Trustee appealed to the U.S. District Court for the Eastern District of Virginia on August 31, 2016. (A 138.) The district court affirmed the ruling on December 12, 2016. (A 267.) The Trustee filed a notice of appeal on January 6, 2017. (A 268.)

#### SUMMARY OF THE ARGUMENT

**A. Section 541(b)(7) expressly provides that contributions to a qualified retirement account may be excluded from the calculation of disposable income.**

The principal issue before this Court is whether a debtor may exclude from “disposable income” the amounts the debtor contributes to a qualified retirement plan. (Br. 6-7.) The answer is yes. “Disposable income” is the amount that must be used for repayment of a debtor’s creditors in a Chapter 13 plan. The exclusion is expressly provided for in the plain language of Code sections 541(b)(7) and 1325. The bankruptcy court’s Confirmation Order should be affirmed. The following reasons support this:

First, the bankruptcy court’s decision correctly applied the plain meaning of section 541(b) which directs that property of the estate “does not include” voluntary contributions to a qualified retirement fund and such contributions “shall not constitute disposable income as defined in section 1325(b)(2).”

Second, the bankruptcy court’s decision is in accord with the vast majority of cases; bankruptcy courts from at least ten circuits have held that the plain meaning of section 541(b)(7) excludes voluntary contributions to a qualified retirement plan from the calculation of projected disposable income. *See In re Johnson*, 346 B.R. at 263. (“‘Any amount’ that is either ‘withheld by’ or ‘received by’ a debtor’s employer for qualifying [employment benefit plan] . . . ‘shall not constitute disposable income, as defined in section 1325(b)(2)’”).

Third, the bankruptcy court’s decision was consistent with the legislative and judicial history of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).<sup>12</sup> BAPCPA added section 541(b)(7) to the Code and expresses Congress’ desire to strengthen the protection of retirement savings in a bankruptcy case. “The intent of section 224<sup>13</sup> is to *expand* the protections for tax-favored retirement plans or arrangements that may not be already protected under

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<sup>12</sup> Pub. L. No. 109-8, 119 Stat. 2 (2003).

<sup>13</sup> Section 224 of BAPCPA is titled “Protection of Retirement Savings in Bankruptcy.” It revises sections 362(b), 522, 523(a) and 1322 of the Code.

Bankruptcy Code section 541(c)(2) pursuant to *Patterson v. Shumate* or other state or Federal law.” H.R. REP. No. 109-31, pt.1, at 63-64 (2005) (emphasis added).

Fourth, the bankruptcy court’s decision is in accord with the long-standing congressional policy of protecting retirement savings and excluding such savings from the reach of creditors in an individual bankruptcy case. *See In re Solomon*, 67 F.3d 1128, 1133 (4th Cir. 1995). Over 250,000 individuals filed for Chapter 13 relief in 2016.<sup>14</sup> Under the rule urged by the Trustee, large numbers of Chapter 13 debtors would be at grave risk of no longer being able to contribute to their retirement savings during the five-year period of required repayments.

**B. The Trustee has failed to show any basis for disregarding the plain meaning of Code section 541(b)(7) which permits exclusion of contributions to retirement plans from disposable income.**

No reason advanced by the Trustee justifies reversal of the bankruptcy court decision. First, the Trustee urges this Court not to follow *Johnson* and instead to adopt the “middle view” of the BAP in *Seafort*. The BAP held that “debtors may continue to make voluntary contributions to their retirement plans if the debtor was making contributions in comparable amounts pre-petition.” *Cantu*, 553 B.R. at 573. The Trustee informed the bankruptcy court that the BAP position was “just

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<sup>14</sup> *See* The United States Department of Justice, FY-2016 Chapter 13 Trustee Audited Annual Reports, Chapter 13 Trustee and Data Statistics, March 2, 2017, available at <https://www.justice.gov/ust/private-trustee-data-statistics/chapter-13-trustee-data-and-statistics>.

right” and the “Goldilocks” view. (A 163.) The bankruptcy court understood this to be the view advocated by the Trustee. *Cantu*, 553 B.R. at 575.

On this appeal, the Trustee appears to rely on the BAP decision. He argues that if a debtor “had been making voluntary retirement contributions at the time their bankruptcy petition was filed, [they can] continue to make such contributions post-petition.” (Br. 40).

The bankruptcy court correctly declined to accept the position of the Sixth Circuit BAP.<sup>15</sup> First, this view, upon which the Trustee primarily relies for reversal here, was expressly *disavowed* by the Sixth Circuit. *Seafort*, 669 F.3d at 674, n.7.<sup>16</sup> Second, this interpretation finds no basis in the plain language of section 541(b)(7). Third, the middle view acknowledges that post-confirmation contributions *are permitted* for debtors who had the economic means to be making contributions on their petition date. No such condition or restriction appears in the Code and no reason is advanced why Congress would penalize those who were out of work when they filed or had existing pension loans and were suspended from making contributions.

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<sup>15</sup> Although the bankruptcy court did not accept the middle view, had it done so, it could have confirmed the plan, based on Mr. Cantu’s long history of making contributions to his plan.

<sup>16</sup> While the court may have affirmed the outcome, it did not agree with the middle view of the BAP.

The Trustee has also listed as one of his appeal issues whether retirement contributions can be excluded from the calculation of projected disposable income “regardless” of whether the debtor had been making such contributions at the time of the petition. (Br. 6, issue 3.) As framed, this issue is essentially the same as the “third view,” set forth in the minority view of *Prigge*. The Trustee informed the bankruptcy court that the view in *Prigge* was “overly harsh” and apparently declined to urge its adoption. Nowhere does the Trustee’s brief state that he is now urging its adoption by this Court. Nor should he. *Prigge* is both harsh and incorrect, is at odds with the plain language of section 541(b)(7) and has failed to find any meaningful support from most courts.

Second, the Trustee argues that the bankruptcy court failed to distinguish “disposable income” from “projected disposable income,” and, thus, failed to follow *Hamilton v. Lanning*, 560 U.S. 505 (2010). (Br. 26, *et seq.*) The Trustee argues that the substantive meaning of “projected disposable income” does not carry forward the same exclusions as the term “disposable income.” This is categorically incorrect. The Trustee made an almost identical argument to this Court in *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013), which this Court rejected. We respectfully submit the Court should do so again in this case.

Third, the Trustee argues that other circuit courts are in accord with its view. However, the cases, cited by the Trustee, support exactly the opposite view, or, at least, fail to address the issues raised here.

**C. The bankruptcy court's factual finding of good faith was not clearly erroneous.**

The Trustee further appeals the factual determination that Mr. Cantu's plan was proposed in good faith. Reversal is only permitted if the finding was "clearly erroneous." Mr. Cantu's plan, which sought only to restore the level of retirement contributions permitted by law and was consistent with his pre-bankruptcy practice, was not remotely in "bad faith." Nor did Mr. Cantu attempt to alter his divorce obligations on the eve of bankruptcy, an assertion which the Trustee knows is incorrect, based on his possession of the June 2015 Separation Agreement which shows the opposite.

At the conclusion of the confirmation hearing, the Trustee acknowledged that Mr. Cantu was "very nice and well-intentioned." (A 172.) The bankruptcy court likewise found him credible, and no basis was shown to suggest that his plan was proposed in bad faith.

**D. The bankruptcy court had the authority to interpret the parties' contractual obligations related to their Decree of Divorce.**

As a separate appellate issue, the Trustee argues that the bankruptcy court lacked the authority under the Full Faith and Credit Clause of the U.S. Constitution

and/or Va. Code section 20-88.39 to “modify” Mr. Cantu’s contractual obligations under his Virginia Decree of Divorce. (Br. 6.)

The bankruptcy court’s construction of the Decree of Divorce did not violate the Full Faith and Credit Clause of the U.S. Constitution. The Full Faith and Credit Clause does *not* apply to federal courts, but only to the states. The statutory analog, 28 U.S.C. § 1738, is not mentioned in the Trustee’s Brief.

The bankruptcy court’s interpretation of the parties’ actual intent was entirely consistent with the ruling that a Virginia state court could make. A Virginia state court could properly look to the underlying contractual agreements incorporated into the Decree of Divorce and enforce the parties’ actual contractual intent, notwithstanding a variance in the Decree of Divorce. *See White v. White*, 509 S.E.2d 323 (Va. 1999). Nor did the court’s ruling exceed its subject matter jurisdiction under *Stern v. Marshall*, 564 U.S. 462 (2011), because confirmation is a core proceeding in bankruptcy administration, and the interpretation of contracts that relate to the confirmation process is well within that jurisdictional reach.<sup>17</sup>

Accordingly, the Confirmation Order should be affirmed.

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<sup>17</sup> *See* 28 U.S.C. § 157(b)(2)(L) listing confirmation as a core proceeding and authorizing a bankruptcy court to “hear and determine” such matters.

**STANDARD OF REVIEW**

“[W]e review legal conclusions by the bankruptcy court *de novo* and may overturn its factual determinations only upon a showing of clear error.” *In re Quigley*, 673 F.3d 269, 271 (4th Cir. 2012).

Factual questions are reviewed for “clear error.” “[A] finding is clearly erroneous only if, after reviewing the record, we are left with ‘a firm and definite conviction that a mistake has been committed.’” *In re Taneja*, 743 F.3d 423, 429 (4th Cir. 2014).

**ARGUMENT**

**I. The bankruptcy court correctly ruled that the plain meaning of section 541(b)(7) provides that a debtor’s projected disposable income does not include voluntary contributions to a qualified pension plan.**

**A. Bankruptcy Code section 541(b)(7) expressly provides that retirement contributions do not constitute property of the estate nor are to be included in the calculation of disposable income.**

The bankruptcy court’s Confirmation Order should be affirmed; it was properly grounded on the plain meaning of section 541(b)(7), as well as the statutory scheme for confirmation of a debtor’s plan found in section 1325. These two sections control the outcome here. “In arriving at the plain meaning, we . . . assume that the legislature used words that meant what it intended; that all words had a purpose and were meant to be read consistently; and that the statute’s true meaning provides a rational response to the relevant situation.” *Salomon Forex*,

*Inc. v. Tauber*, 8 F.3d 966, 975 (4th Cir. 1993); *see also, Carroll v. Logan*, 735 F.3d 147, 150 (4th Cir. 2013).

Court approval or “confirmation” of a debtor’s plan under Chapter 13 is governed mostly by Code sections 1322 and 1325. Confirmation typically requires that the debtor satisfy the “best interests test” of section 1325(a)(4); the disposable income test of section 1325(b); the feasibility test of section 1325(a)(6) and the good faith requirement of section 1325(a)(3). The “best interests” test and the disposable income test (sometimes called the “best efforts test”) are the two key financial tests pertinent here.

The “best interests” test requires that a creditor must receive at least as much as it would if the debtor were liquidated under Chapter 7 of the Code. This typically requires that creditors receive their *pro rata* share of the value of the “property of the estate” under section 541. This calculation is based on a liquidation model and generally does not involve any determination concerning a debtor’s future income.

Conversely, the disposable income test is forward-looking and adds an additional test, namely that the debtor devote his or her projected disposable income to the payment of creditors over a five-year commitment period. This test is found in section 1325(b)(1)(B), which states that the court may not approve the plan, if a creditor objects, unless, as of the effective date of the plan,

(B) the plan provides that all of the debtor’s projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.<sup>18</sup>

BAPCPA has two different approaches for determining disposable income. For some debtors (“below median debtors”), disposable income is measured by “current monthly income” less “amounts reasonably necessary to be expended” for the maintenance and support of the debtor. 11 U.S.C. § 1325(b)(2). *See Mort Ranta, supra*. Current monthly income means the debtor’s average monthly income from all sources excluding certain things, such as social security. 11 U.S.C. § 101(10A)(B).

Other debtors are classified as “above median debtors” based on a determination of income and expenses set forth in code section 707(b)(2)(A)(i). Since Mr. Cantu was an “above median debtor,” the calculation of disposable income requires that a bankruptcy court apply the “means test” found in section 707(b). 11 U.S.C. § 1325(b)(3). This means test is a “statutory formula for determining whether a presumption of abuse arises in Chapter 7 cases—when calculating the “amounts reasonably necessary to be expended” for the debtor’s maintenance or support. *Id.* at 251.

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<sup>18</sup> The phrase “projected disposable income” is not itself defined in the Code, but the term “disposable income” is defined in sections 1325(b)(2) and (b)(3).

In this case, the key issue is whether the calculation of projected disposable income is controlled by the straightforward statement in section 541(b)(7) that “disposable income” does not include amounts a debtor contributes to his or her qualified retirement plan. The answer is that this section expressly permits such amounts to be excluded from the calculation of disposable income. Section 541(b)(7) states as follows:

(b) property of the estate does not include—

\* \* \* \*

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to-

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code:

\* \* \* \*

[ ] except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)[.]<sup>19</sup>

The bankruptcy court correctly held that, in determining “projected disposable income” under section 541(b)(7), a debtor may exclude those amounts contributed to a qualified retirement plan during the commitment period. “The

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<sup>19</sup> The same language is used in section 541(b)(7)(B)(i) referring to amounts received by an employer from employees as contributions. References to “541(b)(7)” includes both of these subsections.

proper analysis of this issue is straightforward. Disposable income does not include any amount withheld as a Qualified Contribution.” *In re Seafort*, 437 B.R. at 217 (Shea-Stonum, J., dissenting). *See also In re Johnson*, 346 B.R. at 263. (“So long as a debtor’s contributions are within the legal limits permitted by the [retirement plan], ‘any amount’ of this contribution is exempted from disposable income.”)

The plain meaning emerges from the text and its function. Section 541(b)(7)(A) has two distinct and logical purposes, both of which relate to the financial tests for confirmation in a Chapter 13 case. First, it expresses an unmistakable intent *to remove* retirement “contributions” from property of the estate under section 541 and second, it declares that such contributions are excluded from the calculation of disposable income under section 1325. There are two exclusions, because there are two financial tests for confirmation, as noted above. These dual exclusions are ample evidence of Congress’ intent to provide fulsome protection to retirement accounts and contributions.

The bankruptcy court’s plain meaning relied on various textual sign posts. Most directly, the core directive of the section is that voluntary contributions *shall not constitute* disposable income. This is a short, direct and positive statement that admits of no uncertainty. The term “shall” connotes a positive and unmistakable command. *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (“[S]hall... is the language of command.”).

The plain meaning also arises from the use of the phrase “any amount.” In language that is direct and plain, sections 541(b) to 541(b)(7)(A) state first that “property of the estate does not include. . . *any amount*. . . withheld . . . as contributions” to a qualified plan. The use of the word “any” signifies that all contributions enjoy the exclusion, regardless of when made and regardless of pre- or post-petition. As various courts have noted, the phrase “any amount” connotes there is no temporal test for this exclusion.<sup>20</sup>

The reference to “such amounts” (in the “hanging paragraph”) is further confirmation of the plain meaning of this section. Section 541(b)(7)(A)(i)(III) and 541(b)(7)(B)(i)(III) state, without any equivocation, that “such amounts. . . shall not constitute disposable income as defined in section 1325(b).” The reference to “such amount under this subparagraph” refers to subparagraphs (b)(7)(A) and (b)(7)(B).<sup>21</sup> Subparagraphs (7)(A) and (7)(B) pertain to “any amount—withheld [or received] . . . for payment as contributions.” Further, because “contributions” is in

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<sup>20</sup> See *In re Vanlandingham*, 516 B.R. 628, 635 (Bankr. D. Kan. 2014), noting that the use of “any” shows that there is no “temporal limitation.”

<sup>21</sup> According to the guidelines set forth by the Deputy Legislative Counsel of the United State House of Representatives, the organizational structure of legislation is labeled as follows: Section(subsection)(paragraph)(subparagraph)(clause) [formatted as Arabic numeral(lowercase letter)(Arabic numeral)(uppercase letter)(lowercase Roman numeral)]. M. Douglass Bellis, *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges* at 8-10 (Fed. Judicial Ctr. 2008). Therefore, the “subparagraph,” referenced by this phrase, is section 541(b)(7)(A).

the plural, it is consistent with present *and* future contributions. These provisions make no distinction between pre-bankruptcy and post-petition contributions made after plan confirmation.

Lastly, the bankruptcy court looked to the use of the term “contributions” and not “retirement funds.” *Cantu*, 553 B.R. at 576. As the court noted, once pre-petition contributions are made, they become part of a retirement fund. “If congress meant to exclude only pre-petition retirement funds from property of the estate it might have used the term ‘retirement funds’ instead of contributions.” *Id.* at n.6. Further, if section 541(b)(7) was intended only to exclude pre-petition retirement funds, then section 541(b)(7) would have been redundant to section 522(b)(3)(C), which exempts retirement funds from being property of the estate.

The words are few in number and concise. The inclusion of the word “except” does not obscure the plain meaning, nor does the nature of the section as a “hanging paragraph” detract from its meaning. The vast majority of courts agree. The bankruptcy court’s reliance on the most direct interpretation of section 541(b)(7) is a sufficient grounds, by itself, for affirmance of the decision below.

**B. The bankruptcy court’s decision is consistent with the majority view of section 541(b)(7).**

A significant majority of the courts have concluded that voluntary retirement contributions are excluded from the calculation of disposable income, based on the

plain meaning of section 541(b)(7). Bankruptcy courts in 10 circuits now support the rationale and/or the outcome in the leading decision of *In re Johnson, supra*, upon which the bankruptcy court relied, among others.<sup>22</sup>

In *Johnson*, the debtors, like Mr. Cantu, were above median debtors. The Johnsons sought to exclude loan repayments to their 401(k) retirement savings

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<sup>22</sup> First Circuit: *In re Drapeau*, 485 B.R. 29 (Bankr. D. Mass. 2013) (lack of plan contributions on petition date will not necessarily bar debtor, on good faith grounds, deducting retirement contributions from disposable income); *In re Njugana*, 357 B.R. 689 (Bankr. D. N.H. 2006) (below median income case), Second Circuit: (*In re Leahy*, 370 B.R. 620 (Bankr. D. Vt. 2007)) (Chapter 7 case; § 541(b)(7) exclusion from property of estate not limited to “gap” period amounts, but applied to all amounts withheld from debtor’s wages as contributions to retirement annuity without regards to the timing of the contributions to retirement annuity without regards to the timing of the contributions)), Third Circuit: ((no reference in § 541(b)(7) to petition date being determinative; post-petition retirement contributions may exceed pre-petition contributions and are excluded)), Fifth Circuit: *In re Devilliers*, 358 B.R. 849 (Bankr. E.D. La. 2007) (retirement contributions are excluded from calculation of disposable income and are not modified by necessary and reasonable limitation), Seventh Circuit: (*In re Hall*, 2013 WL 6234613 (Bankr. N.D. Ill. 2013) (agreeing with the *Seafort* dissent; case involved continuing pre-petition 401(k) contributions)); Eighth Circuit: (*In re Melander*, 506 B.R. 855 (Bankr. D. Minn. 2014) (post-petition continuation of voluntary retirement contributions that debtor had made for the last fourteen years are allowable expenses excluded from disposable income where no suggestion that debtor was motivated by bad faith)); Ninth Circuit (*In re Gibson*, 2009 WL 2868445 (Bankr. D. Idaho 2009) (whether debtor had been making contributions pre-petition “is of no moment” in the disposable income analysis because the Code expressly excepts them)); Tenth Circuit: (*In re Vanlandingham*, 516 B.R. 628 (Bankr. D. Kan. 2014)); Eleventh Circuit: (*In re Garrett*, 2008 WL 6049236 (Bankr. M.D. Fla. 2008) (401(k) contributions not included in disposable income without regard to whether a debtor is below or above median income); *In re Glisson*, 430 B.R. 920 (Bankr. D. Ga. 2009); *In re Shelton*, 370 B.R. 861 (Bankr. N.D. Ga. 2007).

account and to increase their contributions to their 401(k) accounts during the commitment period. While other objections to plan confirmation were confirmed, the court overruled the trustee's objections to both aspects of the debtors' plan, focusing on the plain meaning of the phrase "any amount:"

Debtors are also permitted to shelter certain contributions to employee benefit plans (EBPs). "Any amount" that is either "withheld" by or "received" by a debtor's employee for qualifying EBP's. . . shall not constitute disposable income as defined in section 1325(b)(2). 11 U.S.C. § 541(b)(7)(A) & (B). (Emphasis added in original).

*Johnson, id.* at 263.

A similar result was reached in *In re Vanlandingham*, 516 B.R. 628, 634, (Bankr. D. Kan. 2014), which recognized that *Johnson* was now the majority view. ("My examination of the case law on this issue suggests that the majority of courts follow *Johnson*"). The debtor in *Vanlandingham* had submitted paperwork to enroll in her employer's 401(k) plan, but had not started making contributions until after she had filed for bankruptcy. The trustee objected on the grounds that section 541(b)(7) only applies to contributions which were established before the petition date. The bankruptcy court disagreed and held that *Johnson* was both the majority and correct rule. The bankruptcy court also relied on the phrase "any amount" and found that "the much more cogent [way] to read the § 541(b)(7) hanging paragraph" is to note that the exclusion refers to "any amount withheld" and has no temporal limitation. *Id.* at 635. "Nothing in either § 541(b)(7) or § 1325(b)

expressly conditions these exclusions on the debtor having begun to contribute before filing.” *Id.*

The courts that follow *Johnson* often refute the notion the exclusion of voluntary contributions does not apply to post-petition contributions. Some of these courts look to the expanded notion of “property of the estate” that is unique to Chapter 13 and found in section 1306. Section 1306 states that “[P]roperty of the estate includes, in addition to the property specified in section 541 of this title- (1) All property. . . that the debtor acquires after the commencement of the case but before the case is closed. . . .” This includes “earnings from services performed by the debtor.”

The significance of section 1306 was addressed in *In re Drapeau*, 485 B.R. 29 (Bankr. D. Mass. 2013). *Drapeau* held that section 1306 incorporates all of section 541 into Chapter 13’s operative provisions. Thus, there is no need for a redundant provision in Chapter 13. Second, the incorporation includes section 541(b), where the exclusion is stated, making it fully operative in Chapter 13. Third, the incorporation embraces section 541(a) and, thus, the temporal limit in section 541(a) (“commencement of the case”) is overridden by the more specific provision of section 1306. Under section 1306, property of the estate is not limited to what exists at the “commencement of the case,” but now includes future income.

Likewise, there is a temporal expansion of the exclusions from property of the estate, which now include future contributions to retirement plans:

Section 1306 incorporates *all* of section 541 into the definition of estate property in the Chapter 13 case, including those exceptions detailed in subsection (b). And because § 541(b)(7) expressly excludes voluntary retirement contributions from the bankruptcy estate, there is no need for § 1306 to contain a duplicative provision excepting such contributions. The exception becomes applicable with the wholesale incorporation of § 541.

*Cantu*, 553 B.R. at 575 citing to *Drapeau*, 485 B.R. at 36. (Emphasis in original).

*See also In re Egan*, 458 B.R. 836 (Bankr. E.D. Pa. 2011) (holding that section 1306, by expanding the definition of what is property of the estate, “incorporates the exclusions provided by § 541(b)” on a prospective basis; that is, the exclusion of retirement contributions includes both existing and prospective contributions.) *Id.* at 846.

The majority rule in *Johnson* is soundly grounded on the plain meaning of section 541(b)(7), as well as the impact of section 1306 on the temporal extension of what is property of the estate. These cases fully support affirmance of the Confirmation Order.

**C. The bankruptcy court's decision is consistent with the legislative and judicial history which protects a debtor's contributions to qualified pension funds.**

Because the language of section 541(b)(7) is sufficiently precise, resort to legislative history is not mandated. *Hartford Underwriters, Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). (“When the statute’s language is plain the sole function of the courts—is to enforce it according to its terms.”)

Nevertheless, the legislative history supports the ruling below. Prior to BAPCPA, the Supreme Court ruled broadly in favor of protecting retirement savings. In *Patterson v. Shumate*, 504 U.S. 753 (1992), the Court held that pension plans under the Employee Retirement Income Security Act of 1974 (ERISA) were excluded from the bankruptcy estate, because section 206(d)(1) of ERISA was an enforceable restriction that prohibited the assignment or alienation of plan benefits. 504 U.S. at 758-61. Most importantly for this case, the Supreme Court held that this would ensure bankruptcy filing status would not vary the treatment of pension benefits and acknowledged the holding would give “full and appropriate effect to ERISA’s goal of protecting pension benefits.” *Id.* at 764-65.<sup>23</sup> The *Patterson* court also noted that

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<sup>23</sup> Prior to *Patterson*, the Court recognized the public policy of protecting pension benefits and declined to allow any exceptions to ERISA § 206(d), even in circumstances where an employer sought to recover embezzled funds through the corrupt official’s pension benefits. *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 492 U.S. 365, 376 (1990). Following *Patterson*, this Court has recognized that “Congress has expressed a deep and continuing interest in the preservation of

ERISA's anti-alienation provision "reflects a considered congressional policy choice. . . to safeguard a stream of income for pensioners. . . even if that decision prevents others from securing relief for the wrongs done them." *Id.* at 765.

However, despite *Patterson*, and still pre-BAPCPA, some courts, including the Sixth Circuit, held that funds used by a debtor to make both 401(k) loan repayments and contributions were considered part of a debtor's disposable income. *Seafort*, 669 F.3d at 665; *see also Harshbarger v. Pees (In re Harshbarger)*, 66 F.3d 775, 777 (6th Cir. 1995). Indeed, the Sixth Circuit adopted the most strident rule, holding that repayment of a retirement loan was not "reasonably necessary" for the maintenance and support of the debtor, and, hence, funds used for loan repayments were part of disposable income.

This harsh view led to congressional revisions. BAPCPA's addition of section 541(b)(7) then "changed the law. . . [such that] qualified retirement plan contributions are no longer included in calculating disposable income and are not required to be contributed toward their Chapter 13 plan." *In re Vanlandingham*, 516 B.R. at 636, n.34. BAPCPA effectively overruled *Harshbarger* and similar cases. "One thrust of these provisions was to legislatively overrule decisions that had construed the Bankruptcy Code as prohibiting both unaltered repayment of

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pension plans and in encouraging retirement savings." *In re Solomon*, 67 F.3d 1128, 1133 (4th Cir. 1995).

loans from debtors' retirement plans and participation in such plans by debtors during the Chapter 13 plan." *In re Seafort*, 437 B.R. at 216 (Shea-Stonum, J., dissenting). See also *Eisen v. Thompson*, 370 B.R. 762, 771 (N.D. Ohio 2007) ("The bankruptcy court has also pointed out that § 1322(f) [excluding loan repayments from disposal income] expressly overruled *In re Harshbarger*, 66 F.3d 775 (6th Cir. 1995), and I agree.").

The legislative history is abundantly clear on this intent. In its report on BAPCPA, the House Judiciary Committee made its intentions well-known:

Section 323 of the Act amends sections 541(b) of the Bankruptcy Code to exclude as property of the estate funds withheld or received by an employer from its employees' wages for payment as contributions to specified employee retirement plans, deferred compensation plans and tax-deferred annuities. *Such contributions do not constitute disposable income as defined in section 1325(b) of the Bankruptcy Code.*<sup>24</sup> (Emphasis added).

As a result of these amendments, "courts outside the Sixth Circuit repeatedly have observed [that] Chapter 13 debtors may increase or decrease Qualified Contributions during the course of their Chapter 13 plans." *In re Seafort*, 437 B.R. at 216. (Shea-Stonum, J., dissenting). "By expressly removing [401k] contributions from the definition of disposable income under § 1325. . . Congress has

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<sup>24</sup> H.R. REP. NO. 109-31, Pt. 1, 109th Cong., 1st Sess., 2005 WL 832198 at \*82, 2005 U.S.C.C.A.N. 88, 149 (April 8, 2005), as cited in *In re Vanlandingham*, 516 B.R. at 636-637.

implemented a policy of protecting and encouraging retirement savings.” *Id.* at 215, citing *In re Mati*, 390 B.R. 11, 17 (Bankr. D. Mass. 2008).

Section 541(b)(7) was not enacted simply to repeat the holding of *Patterson*. It was enacted to extend or clarify *Patterson*, so as to exclude retirement funds and contributions from being property of the estate and considered as disposable income. The bankruptcy court’s ruling on this legal issue was correct.

**II. The Trustee has failed to show why the majority rule of *In re Johnson* should be disregarded in favor of the minority rule of *Seafort* and/or *Prigge*.**

**A. This Court should not adopt the minority view of the BAP in *Seafort* which permits exclusions of retirement savings only for debtors who were making contributions when they filed for bankruptcy.**

The Trustee urges this Court to disregard the majority rule of *Johnson* and adopt instead either the decision of the Sixth Circuit BAP or the Sixth Circuit Court of Appeals in *Seafort*. These two decisions are different, and the Trustee has conflated their holdings. Both are incorrect and this Court should endorse neither.

The argument that the Trustee made before the bankruptcy court was the “middle view” of the BAP. That decision *permits* voluntary contributions to be excluded from the calculation of disposable income, but limits this rule only to contributions being consistently made before the debtor filed for bankruptcy. *See Cantu*, 533 B.R. at 575. (“The Trustee in this case urges the Court to adopt the

middle ground of the Sixth Circuit B.A.P.'s opinion in *Seafort*, limiting contributions to those consistently made by the debtor pre-petition.”).

On appeal, the Trustee continues to rely on the “middle view” and argues that the best “balance” is “achieved by allowing debtors who had been making voluntary retirement contributions at the time their bankruptcy petition was filed to continue to make such contributions post-petition. . .,” but not to those who were not contributing on the petition date. (Br. 40.)

The bankruptcy court properly rejected this “middle ground” and applied *Johnson*, stating that section 541(b)(7) “does not limit the debtor’s ability to make contributions post-petition, nor is there any distinction between pre-petition contributions and post-petition contributions in the statute.” *Id.*

First, it must be emphasized that the Sixth Circuit Court of Appeals disavowed the holding of the BAP on this key foundational argument by the Trustee. The trustee in *Seafort* “conceded” that “if a debtor is making voluntary contributions when the bankruptcy petition is filed, then such continuing contributions may be excluded from disposable income.” *Seafort*, 699 F.3d at 674, n.7. To this, the Sixth Circuit stated, “We do not agree with this assertion, for the reasons stated in *Prigge*.” *Id.* Thus, the Trustee’s reliance on the so-called “affirmance” is misplaced. (*See* Br. 19.)

Further, by arguing the “middle ground,” the Trustee has acknowledged that the language of section 541(b)(7) does permit, in many cases, for the exclusion of the voluntary retirement payments made during the commitment period in the calculation of disposable income.<sup>25</sup> The Trustee then imposes a non-statutory condition that the debtor must have been making voluntary contributions on the day of the bankruptcy or some undefined pre-petition period. The concession is correct; the condition, however, is not.

The condition, suggested by the BAP’s “middle view,” is illogical and finds no statutory basis. If applied, it would favor mostly wealthy debtors who were financially strong enough to have been making contributions when they filed for bankruptcy and had not been required to obtain loans from their retirement funds. Conversely, those debtors, who were suffering more financial stress and had taken loans which are repaid during the commitment period, face a harsher rule and cannot protect their savings. Worse, debtors, who had lost their jobs shortly before filing, and, hence, were not then making contributions, would entirely be foreclosed from making contributions post-bankruptcy. *Seafort*, 437 B.R at 221 (Shea-Stonum, J., dissenting).

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<sup>25</sup> The BAP in *Seafort* stated that a debtor could not “start” making contributions post-confirmation and exclude them; and that contributions which “commence” after the filing of the case cannot be excluded. *Seafort*, 437 B.R. at 209. But, Mr. Cantu’s contributions did start pre-bankruptcy and were only temporarily suspended.

Second, although the bankruptcy court did not adopt the middle view of the Sixth Circuit BAP, Mr. Cantu would have satisfied that test. The middle ground looks to contributions which are “consistently made by the debtor pre-petition.” *Cantu*, at 575. Mr. Cantu had been making payments for about 15 years prior to his filing and ceased only because his right was temporarily “suspended” by the government during the period of loan repayments to his retirement fund. Thus, in this sense, he falls within the general thrust of the *Seafort* BAP decision.

The bankruptcy court correctly declined to accept the “middle view” of *Seafort*. We urge this Court to do the same and hold that there is no temporal limit on the right to contribute to a qualified retirement plan.

**B. The bankruptcy court correctly declined to adopt either the harsh view of the Sixth Circuit in *Seafort* or *Prigge*.**

On appeal to this Court, the Trustee has listed as one of his issues whether contributions can be made post-confirmation “regardless” of whether they were being made at the time of the filing. (Br. 6.) This is essentially the view of *Prigge* and the Sixth Circuit in *Seafort*, which the Trustee acknowledged was “overly harsh” to debtors. (A 163.) Despite listing this as an issue, the Trustee has failed to advance any substantive argument in favor of either *Prigge* or the harsh view of the Sixth Circuit in *Seafort*. Thus, the Trustee has essentially abandoned this argument.

The Sixth Circuit in *Seafort* rejected the view that debtors, who are making contributions to their retirement fund before bankruptcy, may exclude future contributions from post-confirmation “disposable income.” *Seafort*, 669 F.3d at 674, n.7. *Prigge* and *Seafort* (Sixth Circuit) are, thus, nearly identical.<sup>26</sup> The very “harshness” that the Trustee declined to embrace before the bankruptcy court appears to be embraced within the “issues” identified by the Trustee despite it being inconsistent with his earlier arguments.

Regardless, the *Prigge* and the Sixth Circuit view in *Seafort* make little sense in view of the BAPCPA amendments and legislative history. The harsh view, which emerges from both cases, is decidedly the minority view and one that appears to have only a vapor of support. (“[T]here are no cases that have reached the conclusion that a debtor may make Qualified Contributions during the course of a Chapter 13 bankruptcy only to the extent that such contributions were ongoing at the time the petition was filed.”)<sup>27</sup>

Further, the *Prigge* view is essentially the same rule that was in effect in some courts prior to the BAPCPA amendments. The view is regressive and would

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<sup>26</sup> The Sixth Circuit stated that, while it agreed with the ruling in *Prigge*, the issue from *Prigge* was not before it. *Id.*

<sup>27</sup> *Seafort*, 437 B.R. at 219 (Shea-Stonum, J., dissenting). The court in *Vanlandingham* could find only two decisions, both from California which follow *Prigge*, these being *In re Parks*, 475 B.R. 703 (9th Cir. B.A.P. 2012); *In re McCullers*, 451 B.R. 498 (Bankr. N.D. Cal. 2011).

effectively negate the legislative history and congressional intent to adopt a rule that protects savings. Indeed, *Patterson* had already established that the amounts held in a fund were not property of the estate and were entitled to protection from creditors. Under *Prigge*, the changes in BAPCPA to section 541 would have effectively added practically nothing to the Code's protection of retirement savings.

The foundational argument of the Trustee, when viewed as either *Seafort* or from *Prigge*, is based on the flawed premise that the commencement date of the case is a "fixed point" which governs the right to make future contributions to a debtor's qualified plan. *See Seafort*, 669 F.3d at 668. ("Read together, § 541(a) and (b) establish a fixed point in time at which parties and the bankruptcy court can evaluate what assets are included or excluded from the property of the estate."). *See also Cantu*, 553 B.R. at 576. ("The Sixth Circuit B.A.P. also placed reliance on the fact, that under Section 541, property of the estate is determined at the outset of the case.").

The "fixed point" argument rests on a fundamental flaw that the date of the case commencement governs what is property of the estate. But, this is not true in Chapter 13. In Chapter 13, property of the estate expands during the case to include post-petition income. *See* 11 U.S.C. § 1306. And, the temporal expansion of what is included within the estate carries forward the same substantive

exclusions from “disposable income.” The Trustee’s fixed point argument is also at odds with the underlying logic in this Court’s ruling in *Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013). “The overwhelming majority of courts to have addressed this issue ‘agree that § 1306 modifies the § 541 time period in Chapter 13 cases.’” *Id.* at 151. This Court’s ruling that section 1306 now expands to include the “kind of property” set forth in section 541 should be read to mean that section 1306 likewise expands both the inclusions and exclusions from the “kind of property” that is within the estate. *Carroll v. Logan* is, thus, decidedly at odds with the entire thrust of the Trustee’s position.

**C. The bankruptcy court properly applied the standard for “projected disposable income” as required by *Hamilton v. Lanning*.**

One of the principal arguments made by the Trustee is that the bankruptcy court conflated the phrase “disposable income” with “projected disposable income,” and, thus, erred. (Br. 37, *et seq.*). The Trustee relies primarily on *Hamilton v. Lanning*, 560 U.S. 505 (2010).

The Trustee’s reliance on *Hamilton v. Lanning* for its “conflation argument” is incorrect. *Lanning* did not alter the substantive content of the definition of either disposable income or projected disposable income. The Court was addressing whether bankruptcy courts should use a mechanical test—that is, one where projected disposable income is “simply annualized disposable income over the

length of the plan.” *McCarty v. Lasowski (In re Lasowski)* 575 F.3d 815, 819 (8th Cir. 2009) . Instead, it adopted a forward-looking approach and properly directed the bankruptcy courts to use disposable income as the “starting point” and then to make adjustments, based on what was reasonably likely to occur. Nothing in the bankruptcy court’s decision below is counter to *Lanning*. Indeed, *Lanning* should be read as requiring that the calculation of projected disposable income contains the same exclusions from the definition of income as does the phrase “disposable income.”

More recently, this Court in *Mort Ranta, supra* rejected a nearly identical argument made by the same Trustee concerning the import of *Lanning*. In *Mort Ranta*, the question presented was whether future social security payments had to be included in projected disposable income. Social security payments are excluded from the definition of “current monthly income” in section 101(10A), which this Court has held excludes such payments from being included as “disposable income.” *Id.* at 251. The Trustee argued that, under *Lanning*, the same exclusion would not apply to “future” social security payments because, he claimed, the test for “projected disposable income” did not carry forward the same exclusions.

This Court rejected the Trustee’s argument, holding that while foreseeable changes in the debtor’s financial condition must be taken into account in calculating “projected disposable income,” this did not mean the basic formula for

“disposable income” may be ignored. “Nothing in *Lanning* suggests a court may disregard the Code’s definition of disposable income in calculating projected disposable income. The discretion *Lanning* affords. . . does not permit the court to alter the items to be included in and *excluded* from income.” *Mort Ranta*, 721 F.3d at 252 (emphasis added).

**D. The Trustee incorrectly contends that his harsher view of § 541(b)(7) is supported by decisions from other circuits.**

The Trustee argues that his view is supported by decisions from other circuits. (Br. 37, *et seq.*). The Trustee is incorrect. The cases, relied upon by the Trustee, do not support his view and, in many cases, support the opposite view.

The Trustee contends that his view is supported by *In re Nowlin*, 576 F.3d 258 (5th Cir. 2009). (Br. 27.) This is incorrect. *Nowlin* supports the result reached by the bankruptcy court below. In *Nowlin*, the debtor had been contributing to her 401(k) plan and repaying a loan at the time of her filing. *Id.* She then proposed to use the savings from the loan repayment *exactly* as Mr. Cantu did, namely to make payments to her qualified retirement plan. The Fifth Circuit did not reverse the bankruptcy court’s holding that, after she had paid off her loan, “she could contribute an additional \$187.49 to her 401(k) plan, which would bring her monthly 401(k) contributions to the maximum of \$1,250 per month.” *Id.* at 261. Instead, the Fifth Circuit only held that the amount *beyond* what was to be

contributed to her 401(k) plan should be included in her projected disposable income. See *In re Seafort*, 437 B.R. at 219. (“In *Nowlin*, the debtor was permitted to increase her Qualified Contribution to the maximum allowable under her employer’s plan [post-petition].” *Nowlin* is fully supportive of Mr. Cantu’s position in this case.

Nor does *McCarty v. Lasowski (In re Lasowski)*, *supra* support the Trustee’s position. In *Lasowski*, the debtor was making loan repayments on a 401(k) loan that were scheduled to be repaid during the course of the plan. Nothing was stated as to how the additional funds were to be used once the loan was paid. The only question, addressed by the Eighth Circuit, was whether the calculation of a debtor’s projected disposable income can take into account changes in the debtor’s financial circumstances that are reasonably certain to occur during the term of the debtor’s proposed plan. *Lasowski*, 575 F.3d at 819. The Eighth Circuit held that it does.

However, the Eighth Circuit did not remotely address whether the funds previously being used for the loan repayments, could then be used for a qualified retirement plan, as opposed to being paid to creditors. The Eighth Circuit cited *Nowlin* with approval. *Id.* at 819. *Nowlin*, as noted, permitted former loan repayments to be used for contributions to qualified retirement funds. Nothing in the *Lasowski* decision remotely suggests that the Eighth Circuit disagreed with the

right of a debtor to use monies once devoted to loan repayments to make contributions to qualified retirement plans.

The Trustee incorrectly argues that *In re Quigley* is counter to the decision by the bankruptcy court. (Br. 31.) The facts of *Quigley* are materially different from this case and the decision does not address the issue of contributions to a retirement fund. The debtor in *Quigley* asserted that the calculation of her disposable income under section 1325(b)(2) should have been reduced by loan repayments on two vehicles that she would no longer be making during the course of her plan's commitment period. The debtor argued that the test for income was "mechanical" and looked only to the debtor's average monthly income for the six months prior to the bankruptcy filing. *Quigley*, 673 F.3d at 273-74. This Court, however, rejected these assertions and concluded that "projected disposable income should reflect changes... that will occur and that are known as of the date of plan confirmation." *Id.* at 272. The debtor, however, wanted the funds to be used in her discretion. The debtor in *Quigley* did not invoke section 541(b)(7). Nor does *Quigley* suggest that section 541(b)(7) limits the right to exclude contributions to a qualified retirement plan from post-petition income.

In short, the Trustee can find no meaningful support for the harsh view, as reflected in *Prigge*, because, in truth, there is little justification for such a view; the case law wisely has moved entirely in the other direction.

**III. The bankruptcy court’s decision correctly reflects congressional policy to protect retirement savings and afford debtors a fresh start.**

This case raises important issues that potentially affect tens of thousands of retirees,<sup>28</sup> and, in particular, debtors who file for bankruptcy with modest or insufficient savings in their retirement plans. There is a well-documented “crisis” in the lack of savings for retirement.<sup>29</sup> The Trustee, himself, acknowledged that Mr. Cantu’s desire to contribute to his retirement reflects a “compelling purpose.” (A 173.)

Since the 1970s, there has been a massive shift in the way Americans save for retirement from employee-sponsored defined benefit plans to 401(k) employer-sponsored employee contribution plans.<sup>30</sup> “401(k) plans are fundamentally different from other employer-sponsored plans in that they are primarily funded with voluntary contributions from the employees themselves.” *Kim, supra* at 348.

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<sup>28</sup> See Tara Twomey & Todd F. Maynes, Protecting Nest Eggs and Other Retirement Benefits in Bankruptcy, 90 Am. Bankr. L.J. 235, 241 (2016).

<sup>29</sup> Tony James and Teresa Ghilarducci, America's looming retirement savings crisis, CNBC, March 15, 2016, *available at* <http://www.cnbc.com/2016/03/15/americas-looming-retirement-savings-crisis-commentary.html>.

<sup>30</sup> See James Winston Kim, Saving Our Future: Why Voluntary Contributions to Retirement Accounts Are Reasonable Expenses, 26 Emory Bankr. Dev. J. 341, 344-348 (2010); see also U.S. Department of Labor, Private Pension Plan Bulletin, September 2016, *available at* <https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2014.pdf> (last visited April 7, 2017).

Thus, Americans are shouldered with the burden of ensuring their own financial security at retirement. *Id.* at 347-348.

These stark figures point to a growing retirement crisis for American seniors. “Retirement inequality has grown because most 401(k) participants are required to contribute to these plans in order to participate.”<sup>31</sup> This has a disproportionate effect on low-income wage earners and bankruptcy debtors. *See id.*; *see also Twomey, supra* at 235. “Even for those [bankruptcy debtors] in the prime of their working years, losing retirement assets can represent a major lifelong setback.” *Twomey, supra* at 235. Preventing bankruptcy debtors from making voluntary contributions to retirement savings plans only aggravates the looming retirement crisis. *See id.* at 266.

In *Patterson*, the court sought to safeguard a “stream of income for pensioners...even if that decision prevents others from securing relief for the wrongs done them.” *Patterson*, 504 U.S. at 765. “Congress intended to tilt this balance [of maximum debtor payout and personal retirement savings] in favor of retirement savings and away from ensuring debtors to pay to creditors the maximum amount they can afford.” *Egan*, 485 B.R. at 848 .

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<sup>31</sup> Monique Morissey, [The State of American Retirement](http://www.epi.org/publication/retirement-in-america), Economic Policy Institute, March 3, 2016, available at <http://www.epi.org/publication/retirement-in-america>. (last visited April 7, 2017).

This Court has articulated the same policy rationale in *In re Solomon*, 67

F.3d at 1133:

In sum, we do not think it a condition of invoking the protections of Chapter 13 that one withdraw pension or retirement income to fund a plan that otherwise meets the § 1325 prerequisites for confirmation. A contrary holding could have devastating results for pension and retirement savings. By requiring an otherwise eligible Chapter 13 debtor to withdraw such monies to fund a Chapter 13 plan, we would effectively undercut the very purpose of retirement and pension plans: to ensure that workers have sufficient funds with which to support themselves and their dependents during their retirement years. . . . “Congress has expressed a deep and continuing interest in the preservation of pension plans, and in encouraging retirement savings, as reflected in the statutes which have given us ERISA, Keogh plans and IRAs. . .”

Here too, a reversal would have devastating effects on debtors seeking a fresh start. Filing bankruptcy under Chapter 13 would now mean that thousands of retirees could not continue to make contributions to their retirement savings during the five-year commitment period. For some, that may mean much of their remaining work-life. The Trustee’s position runs counter to Congress’ “deep and continuing” interest in protecting retirement savings.

**IV. The bankruptcy court’s factual determination of good faith was not clearly erroneous and should be affirmed.**

The Trustee incorrectly argues that Mr. Cantu’s plan does not satisfy the good faith requirement. Section 1325(a)(3) requires that a Chapter 13 plan be

“proposed in good faith and not by any means forbidden by law.” The Bankruptcy Code does not contain any definition of “good faith.” However, in *In re Solomon*, 67 F.3d at 1134, this Court held that the “totality of the circumstances” was the controlling test.

A determination of good faith is a factual question.<sup>32</sup> See *In re Taneja*, 743 F.3d at 429. A determination of good faith is subject to reversal under the “clear error” standard. “Under this standard, we will not reverse a bankruptcy court’s factual finding that is supported by the evidence unless that finding is clearly wrong.” *In re ESA Envtl. Specialists, Inc.*, 709 F.3d 388, 399 (4th Cir. 2013).

Mr. Cantu’s plan complied with the good faith requirement and the bankruptcy court’s determination was not “clear error.” Mr. Cantu’s proposed contributions were consistent with his long-standing practices, and were only one-third of the amount the law permits to be contributed. (A 12.) *Cantu*, 553 B.R. at 577. Second, Mr. Cantu’s decision to recommence voluntary contributions was done in good faith, and was not evidence of any intent to “game” the system. He had ceased making contributions only because his right to do so had been

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<sup>32</sup> See, generally, *Behrmann v. Nat’l Heritage Found., Inc.*, 663 F.3d 704, 709 (4th Cir. 2011) (“[T]he standard of review is well-settled: a court’s finding with respect to the good faith requirement imposed under 11 U.S.C. § 1129(a)(3) is reviewed for clear error.”).

temporarily suspended, due to loans taken from his retirement funds. (A 150-151.)

He had borrowed from his pension fund in order to avoid bankruptcy. (A 150.)

Mr. Cantu's lack of good faith cannot be based on his lawful utilization of the exclusions permitted by section 541(b)(7). *See In re Egan*, 458 B.R. at 850 (“absent additional circumstances, bad faith cannot be inferred from the Debtors’ decision to increase their post-petition 401(k) plan contributions. . . generally speaking, bad faith cannot be inferred from conduct permitted by the Bankruptcy Code.”).<sup>33</sup>

Nor can bad faith be based on the assertions that Mr. Cantu entered into a verbal agreement concerning his divorce obligations on the eve of bankruptcy to avoid paying his creditors. Mr. Cantu, when asked directly about this, confirmed that he had not done so. (A 169.) Indeed, the agreement to pay his wife the bi-weekly amount of \$750 had been agreed to in June 2015, as the Trustee, himself, knows, having acknowledged possession of the June Separation Agreement. (Br. 10, n.1.) The Decree of Divorce, with the scrivener’s error, was executed by Ms. Cantu in July 2015. (A 207.) Mr. Cantu did not retain bankruptcy counsel until October 2015. There is no evidence that he remotely understood that the payments

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<sup>33</sup> *See also Mort Ranta*, 721 F.3d at 253, n.15. (“When a Chapter 13 debtor calculates his repayment plan payments as the Bankruptcy Code and the Social Security Act allow him to. . . that exclusion cannot constitute a lack of good faith.”).

to his wife would alter his obligations under a complex bankruptcy concept of “disposable income.”<sup>34</sup>

At the conclusion of the evidence, the Trustee, himself, acknowledged Mr. Cantu’s essential credibility: “He is. . .very nice [and] well-intentioned.” (A 172.) The bankruptcy judge, in the best position to evaluate his credibility, found likewise. “[D]eference to the bankruptcy court’s findings is particularly appropriate when, as here, the bankruptcy court presided over a bench trial in which witnesses testified and the court made credibility determinations.” *In re Taneja*, 743 F.3d at 434. The bankruptcy court correctly held that “the debtor is proceeding in good faith,” *Cantu*, 553 B.R. at 577, and no reason has been given to justify a finding of “clear error.”

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<sup>34</sup> Mr. Cantu himself was never asked for the exact date when he and his wife agreed to change from the “lower amount” (\$300) to the current level, although the June 2015 Separation Agreement confirms it was well before the bankruptcy. (A 215.) Counsel’s statement that it was after the Divorce Decree (A 148) was not date-specific and appears to have meant it was done around the time of Ms. Cantu’s execution of the Decree of Divorce in July 2015 and the divorce filing. (A 207.)

**V. The bankruptcy court’s interpretation of the Decree of Divorce did not violate the Full Faith and Credit Clause of the U.S. Constitution.**

**E. The court’s interpretation of the Cantu’s marital agreements does not violate the Full Faith and Credit Clause.**

Separately, the Trustee challenges the bankruptcy court’s determination of the amount of child and spousal support that Mr. Cantu was obligated to pay. The Trustee’s appeal narrowly argues only that the court lacked the *authority* to determine the amount, claiming this determination was an impermissible “modification” of the Decree of Divorce, and this violated the Full Faith and Credit Clause of the U.S. Constitution. He also claims that it was not permitted under Va. Code § 20-88.39. Notably, the Trustee does not appear to question the *factual determination* by the bankruptcy court that there was in fact a scrivener’s error. (*See* Br. 17.)

First, the bankruptcy court did not modify the Decree of Divorce, but merely construed its terms as part of its determination of Mr. Cantu’s financial obligations. There is a distinction between “modification” and “interpretation.”<sup>35</sup> The Trustee does not cite to a single bankruptcy court decision that stands for the proposition

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<sup>35</sup> In a different context, the Second Circuit recently noted the distinction between modification and interpretation. *In re Tronox*, No. 16-343, 2017 WL 1403001, at \*10 (2d Cir. April 20, 2017). *See also Wilder v. Bernstein*, 49 F.3d 69, 72 (2d Cir. 1995). The Second Circuit pointed out that if a court’s interpretation of an order is correct on the merits, then the “interpretation” is *not* considered a “modification.”

that a court cannot interpret judicial orders as part of its duties in calculating a debtor's monetary obligations.

Second, the Full Faith and Credit Clause of the U.S. Constitution does not apply to federal courts; instead, it only imposes a requirement upon the state courts. It requires that full faith and credit “be given in each *State*. . . to the judicial proceedings of another state.” (Emphasis added).<sup>36</sup> This Constitutional requirement has no bearing on the federal courts. *See e.g., In re Goodman*, 25 B.R. 932, 935 (Bankr. N.D. Ill. 1982).

Federal courts are governed instead by 28 U.S.C. § 1738, which contains a “full faith and credit” requirement, albeit with somewhat different conditions, which the Trustee failed to follow.<sup>37</sup> The Trustee's Brief makes no reference to 28 U.S.C. § 1738. Under this section, a bankruptcy court must give the Decree of Divorce the same deference that a Virginia state court would. The bankruptcy court complied with this.

At the heart of the Trustee's argument is the notion that the bankruptcy court was strictly bound to enforce the facial terms of the Decree of Divorce and could

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<sup>36</sup> Article IV, Section 1 of the United States Constitution, provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”

<sup>37</sup> 28 U.S.C. § 1738 states that an “authenticated” record of a state court proceeding “shall have the same full faith and credit in every court within the United States. . . as they have by law or usage in the courts of such State. . .”

not look to the underlying contractual obligations for the parties' actual intent.

Virginia law provides for exactly the opposite. *See White v. White, supra.*

The power of a Virginia court (and, hence, the bankruptcy court) to interpret the parties' intent concerning a Decree of Divorce arises in part from Va. Code § 20-109.1. This section authorizes a Virginia trial court to affirm, ratify and incorporate by reference "any valid agreement between the parties. . .concerning the conditions of the maintenance of the parties, or either of them. . .or establishing or imposing any other condition or consideration, monetary or nonmonetary." In the present case, the Decree of Divorce states that it "ratifies and affirms and incorporates, but does not merge [into the Decree]" the Marital Settlement Agreement reached between the parties on July 24, 2015. (A 201).

Since there was an incorporated written agreement (the Marital Settlement Agreement), a Virginia court could apply normal contract rules in both enforcement and interpretation. Such settlements are "subject to the same rules of construction that apply to the interpretation of contracts generally." *Southerland v. Estate of Southerland*, 457 S.E.2d 375, 378 (Va. 1995). Where such an agreement exists, under Va. Code § 20-109(C),<sup>38</sup> "the intent of the parties as expressed in the

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<sup>38</sup> Va. Code § 20-109(C) provides that "no decree or order directing the payment of support . . . for the spouse. . . shall be entered except in accordance with the . . . contract."

agreement controls, and the agreement is treated as a contract and construed in the same manner as all contracts.” *White*, 509 S.E.2d at 325.

In determining the “intent of the parties” a Virginia court would apply the same rules of interpretation that govern any contract. Thus, in *White*, the state court looked not only to the express terms of the Decree of Divorce, but rather to the parties’ actual intent in the underlying contractual agreement, finding that the husband’s obligation to continue to make mortgage payments had ceased, despite the language in the Decree of Divorce.

In the present case, a Virginia court could have determined that the underlying contract contained a scrivener’s error and enforced the parties’ actual intent. The bankruptcy court had the same authority. Either a state court or the bankruptcy court could have properly concluded that the incorporated, but unmerged, Marital Settlement Agreement did not reflect the parties’ actual intent. That intent could be based on *any* credible evidence, with or without the underlying Separation Agreement. Since the Trustee did not appeal from the factual determination as to what the parties intended, this Court could properly affirm on the basis of this legal issue alone.

None of the cases, cited by the Trustee (Br. 22), support the proposition that the bankruptcy court erred in determining there was a scrivener’s error in the Decree of Divorce. Notably, all of the cases, cited by the Trustee, deal only with

child support, and none with spousal support. These cases outline three limitations on parties' right to contract regarding *child support*. *Shoup v. Shoup*, 556 S.E.2d 783, 788 (Va. Ct. App. 2001). First, a court must review the child support provisions for consistency with the children's best interests. *Id*; *Watkinson v. Henley*, 409 S.E.2d 470, 474 (Va. Ct. App. 1991). Second, the parties' agreement may not "prevent the court from exercising its power to change, modify or enforce its decree concerning" child support. *Shoup*, 556 S.E.2d at 788; *Kelley v. Kelley*, 449 S.E.2d 55, 56 (Va. 1994); *Featherstone v. Brooks*, 258 S.E.2d 513, 515 (Va. 1979). Finally, the parties may not use the agreement to terminate a parent's duty to support his or her child. *Shoup*, 556 S.E.2d at 788; *Kelley*, 449 S.E.2d at 56.

None of these requirements for child support are implicated here. By enforcing the original intent of the parties in entering into the Decree of Divorce and by finding a contractual intent to provide *more* support than the literal terms of the Decree of Divorce, the bankruptcy court in no way impinged on the divorce court's determination that the agreement was in the best interests of Mr. Cantu's children.

The bankruptcy court "accept[ed] the debtor's testimony that the divorce decree simply is not reflective of what the parties agreed to in the 750 dollars per pay period." (A 180.) Mr. Cantu's written response to the Trustee's Objection to Confirmation expressly informed the Trustee that the "Debtor has paid Child

Support and Spousal Support according to his executed Separation Agreement dated June 5, 2015. A copy of said agreement was furnished to the Trustee on February 10, 2016.” (R. 82.) The amount “put down” by the Circuit Court was similar, but different, because of the use of a monthly payment and not a bi-weekly payment, as discussed above.

That is, the court saw this evidence of the parties’ actual intent, and not a “modification” of the agreement or decree. The bankruptcy court gave the Decree of Divorce the same legal effect as would a Virginia court.

Nor did the court’s ruling run afoul of Va. Code § 20-88.39. This section provides that, “[a] tribunal of the Commonwealth that has issued a child support order consistent with the law of the Commonwealth has and shall exercise continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order.”

However, the Virginia legislature cannot limit the jurisdiction or power of the bankruptcy court; it may define its own jurisdiction, but not that of a federal court, including a bankruptcy court. *Duchek v. Jacobi*, 646 F.2d 415, 419 (9th Cir. 1981).

The Trustee makes a passing reference to *Stern v. Marshall*, but offers no substantive argument. The citation of a case is not an argument. We submit he has abandoned this argument and should not be permitted to expand upon it in a reply

brief. Even the passing reference was incorrect. A bankruptcy court, in confirming a plan, has jurisdiction to interpret and apply the parties' various contracts. Such is a normal and typical aspect of its core jurisdiction. 28 U.S.C. § 157(b)(1)(L), stating that confirmation of plans is a core proceeding.

**RELIEF REQUESTED**

We respectfully urge this Court to affirm the decision below and to adopt the majority rule that a debtor may exclude from the calculation of disposable income or projected disposable income all contributions made to a qualified retirement plan during the commitment period, and regardless of whether such payments were made prior to filing.

**REQUEST FOR ORAL ARGUMENT**

Ricardo Cantu respectfully requests that this Court hear oral argument in this case. This appeal raises serious issues concerning the ability of Chapter 13 debtors to continue to make voluntary contributions to their qualified retirement plans, and a reversal of the ruling of the bankruptcy court would create wide spread and deep financial harm to thousands of bankruptcy filers each year under Chapter 13.

Respectfully submitted,

/s/ David R. Kuney

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1034 Caption: Thomas Gorman v. Ricardo Cantu, Jr.

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(s) David R. Kuney

Party Name Ricardo Cantu, Jr.

Dated: 5/9/2017

11/14/2016 SCC

Appeal: 17-1034 Doc: 20 Filed: 05/09/2017 Pg: 69 of 69

**CERTIFICATE OF SERVICE**

I certify that on 5/9/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ David R. Kuney  
Signature

5/9/2017  
Date

STATEMENT OF LEGAL SERVICES AND PRO BONO ATTORNEYS  
ABI COMMISSION ON CONSUMER BANKRUPTCY  
SEPTEMBER 26, 2017

Dear Commission Members,

We are legal services and pro bono attorneys who represent low-income debtors in cases under chapters 7 and 13. While our clients share the concerns of median-income consumer debtors addressed by several of the NACBA commenters, many of the issues our clients face are unique and often bear on accessing justice. The most important difference our clients have from median-income debtors is that our clients cannot afford attorneys. Because of this, many of our clients have resorted to filing pro se in the past. From working with these clients, we have gained insight into these pro se filers, a growing body of bankruptcy consumers whose voices may not be adequately reflected among other commenters. We hope that our statement assists the Commission by providing an insight into the obstacles faced by low-income debtors, both represented and pro se, in accessing justice through the bankruptcy system.

**FILING FEES**

Filing fees are perhaps the most persistent barrier to justice faced by low-income individuals. Justice Stewart, dissenting in *United States v. Kras*,<sup>1</sup> noted that an unwaivable filing fee denies the promise of a fresh start “to those who need it most, to those who every day must live face-to-face with abject poverty,” creating a situation where “some of the poor are too poor even to go bankrupt.”

Congress has created a system where chapter 7 debtors below a percentage of the relevant poverty guideline may seek waivers of the filing fee. However, the reality is that even today many debtors are still “too poor even to go bankrupt.”

**Chapter 7**

Under 28 U.S.C. § 1930(f)(1), the bankruptcy court may waive the filing fee for an individual chapter 7 debtor with income less than 150% of the relevant poverty guideline and who is “unable to pay that fee in installments.” It is this second factor, ability to pay in installments, which creates the greatest obstacle to bankruptcy relief.

Under its statutory authority, the Judicial Conference has issued a policy to assist courts in implementing the bankruptcy fee waiver statute (the “Policy”).<sup>2</sup> The Policy states that a court considering ability to pay in installments should consider the “totality of the circumstances.” In effect, this leads to nearly unchecked discretion on which low-income debtors may file bankruptcy.

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<sup>1</sup> 409 U.S. 434, 457 (1973) (Stewart, J., dissenting).

<sup>2</sup> 4 JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICY § 820 (2015).

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As we have experienced in practice, denials of chapter 7 fee waivers for “ability to pay in installments” are often for subjective reasons. While Official Form B 103B, Application to Have the Chapter 7 Filing Fee Waived, asks questions related to ability to pay in installments, courts are not constrained to look only to contents of Official Form B 103B. Courts can impart judgment on the causes and purpose of debtor’s bankruptcy filing and scrutinize the reasonableness of the debtor’s expenses, including fees paid to help file the bankruptcy case.

Despite the fact that the Judicial Conference Policy provides that “[a] debtor may qualify for a waiver of the filing fee even if the debtor has paid or promised to pay a bankruptcy attorney, bankruptcy petition preparer, or debt relief agency in connection with the filing,” we have experienced courts routinely denying fee waiver applications to debtors who have paid for bankruptcy assistance, even at reduced fee or “low bono” rates. As bankruptcy courts have the authority to disgorge unreasonable fees paid for bankruptcy assistance,<sup>3</sup> it makes no sense to punish debtors who have made these payments and who presumably cannot themselves get them back to pay the filing fee in installments.

Courts may also speculate about hypothetical sources of future earnings such as upcoming tax refunds. Conditioning relief on speculations about post-petition income diminishes the fresh start to which chapter 7 debtors are entitled. Further, as noted in the following section regarding the earned income tax credit, many low-income families rely on tax refunds to pay for year-round expenses.

Orders denying fee waivers are seldom published and appealing a denial of a fee waiver is likely to be fruitless: Even if a debtor who could not pay or waive the filing fee can somehow pay or waive the appeal fee, denials are reviewed under a deferential abuse of discretion standard. In pro se cases, a denial of a fee waiver is effectively a dismissal of the case.

The Commission should investigate practices involving filing fee waivers and should recommend a change in the bankruptcy rules or Judicial Conference Policy to curb this discretion or provide clearer standards for what a court may consider in determining ability to pay in installments. One possibility is adopting a bright line test for determining ability to pay in installments. Such a test could impose limits on surplus income and/or liquid assets (adjusted under Section 104) determined as of the petition date. Such a test should be a “safe harbor,” meaning that a debtor who fails to meet the test could still offer special circumstances why the filing fee is not affordable.

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<sup>3</sup> 11 U.S.C. §§ 110(h)(3)(A), 329(b).

### Chapter 13

The filing fee in chapter 13 can create a huge burden in low-income cases where the assumption is that debtors are using all of their disposable income for a plan payment. For many low-income debtors, a filing fee installment is higher than their plan payment. In 1998, the Federal Judicial Center issued a report about six districts which implemented pilot fee waiver programs (the “Report”).<sup>4</sup> In the Report, The FJC considered whether the filing fee waiver should be extended to chapter 13 debtors. While conceding that few debtors who could not afford the filing fee could propose a confirmable chapter 13 plan, the FJC noted that a fee waiver in a chapter 13 “might be the only road to filing for a low-income Chapter 13 debtor with a home of modest value who is struggling to pay mortgage arrearages in order to avoid foreclosure.”

The FJC also surveyed districts which allowed payment of the filing fee through the plan. At the time, most districts did not allow this form of payment. In the Spring of 1994, the Advisory Committee on Bankruptcy Rules took no action on a proposed amendment to Federal Rule of Bankruptcy Procedure 1006 which would have allowed the practice. The problem of filing fees burdening low-income debtors has not gone away since then. The Commission should recommend that the Rules Committee reassess this issue. The Commission should also consider whether a sliding scale filing fee based upon income may increase accessibility to chapter 13 for low-income filers.

### Other Fees

Once a debtor who is not entitled to a fee waiver overcomes the hurdle of paying the filing fee, he or she may be tripped up by various “miscellaneous fees.” For example, while the fee for amending Schedules D or E/F is small (\$31), for our clients, it can make a big difference. Fees such as the schedule amendment fee discourage pro se debtors from disclosing all of their creditors and in some cases can be case dispositive if a schedule amendment is necessary for confirmation. The Commission should propose abolishing the schedule amendment fee.

While Judicial Conference Policy and 28 U.S.C. 1930(f)(2) permits waivers of “other fees” such as the schedule amendment fee or motion filing fees, there is no clear procedure for seeking such waivers, and the Policy leaves that matter to local rule. For debtors otherwise unable to seek a waiver of the case fee, the Policy incorporates the chapter 7 fee waiver test “defined in Guide, Vol 4, § 820.30(a)(1),”<sup>5</sup> namely income below 150% of the relevant poverty guideline and inability to pay in installments. As it is unusual for a miscellaneous fee to be paid in installments,

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<sup>4</sup> FED. JUDICIAL CTR., REPORT TO THE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON IMPLEMENTING AND EVALUATING THE CHAPTER 7 FILING FEE WAIVER PROGRAM (1998)

<sup>5</sup> So in original. Likely should be a reference to 820.20(a)(1).

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presumably this incorporates the problematic “totality of the circumstances” guideline. The Commission should recommend clarification of what standards apply to these waivers and what procedures are necessary to seek them, possibly with an amendment to Fed. R. Bankr. P. 1006 or by proposing a new form.

Finally, with regard to the \$298 appeal fee, it is not clear which court is responsible for determining whether to waive the fee. The fee is collected by the bankruptcy clerk, but fee waivers are routinely decided by appellate district courts under the general district court *in forma pauperis* statute, 28 U.S.C. § 1915(a). The Ninth Circuit has determined that its Bankruptcy Appellate Panel lacks authority to grant fee waivers,<sup>6</sup> leading to time consuming transfers of such applications to the district court. The process should be streamlined with a single form which clarifies which court should consider the application and under what statute.

#### **EARNED INCOME TAX CREDIT**

The Earned Income Tax Credit (“EITC”) is a crucial public benefit to many of our working clients who struggle to provide for their family. Though the EITC is paid once a year, clients rely on the EITC to cover year-round expenses. Unfortunately, a bankruptcy filing can be triggered by something unexpected, like a garnishment or foreclosure. A family’s ability to use the EITC to cover vital family expenses should not be hindered by when they happen to file.

While we are not proposing the Commission pursue an amendment to the bankruptcy code itself, we wish to draw the Commission’s attention to several provisions of the code which treat the EITC differently than other public benefits, placing a burden on our clients:

- Sections 522(b)(3) and 522(d) provide exemptions for social security, unemployment compensation, public assistance benefits, veteran’s benefits, disability benefits, illness benefits, or unemployment benefits, but not the EITC.
- 11 U.S.C. 101(10A), which determines current monthly income for the means test and for the projected disposable income test, excludes social security from current monthly income, but does not exclude other public benefits such as the EITC.
- 11 U.S.C. 1325(b)(2), which determines disposable income, excludes from current monthly income child support payments, foster care payments, or disability payments for a dependent child, but does not exclude the EITC. The test does, however, exclude from disposable income amounts necessary for the maintenance or support of the debtor or a dependent of the debtor. Despite the fact that the EITC exists for just such a purpose, in practice this is not taken into account when determining how much of the EITC must be paid to creditors as part of the bankruptcy case.

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<sup>6</sup> *Perroton v. Gray (In re Perroton)*, 958 F.2d 889 (9th Cir. 1992); *Determan v. Sandoval (In re Sandoval)*, 186 B.R. 490, 496 (9th Cir. BAP 1995).

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- 28 U.S.C. 1930(f) and the implementing fee waiver Policy (as noted above), exclude amounts received as non-cash government assistance from the income prong of the fee waiver standard. They do not, however, exclude the EITC from the income prong or from consideration as a source of funds for the ability to pay in installments prong.

The Commission should investigate these discrepancies and consider whether proposals which protect the EITC to the extent reasonably necessary for the support of the debtor and any dependent of the debtor would increase access to bankruptcy for low-income debtors.

#### **MEETING OF CREDITORS**

The new meeting of creditors notices introduced in 2015 (Form B 309A–I) contained many changes designed to ease use by national creditors. However, some of these changes were made at the expense of pro se debtors. The notice, which is full of important information, is difficult to navigate for pro se debtors. One oversight is the fact that the date, time, and location of the meeting of creditors are tucked away on the second page. The notice should place this information front and center.

One of the biggest obstacles to low-income and rural debtors is having to travel a significant distance to the bankruptcy court for a Meeting of Creditors. In “No-Asset” chapter 7 cases, creditors rarely appear. The Commission should research the costs and benefits of handling 341 meetings in such cases by telephone or sworn affidavit. Such a change would streamline the process, reduce the amount of time spent on simple cases, cut costs, and reduce obstacles for the debtors.

#### **CONDUIT PAYMENTS**

As attorneys who represent low-income homeowners, we regularly experience confusion and frustration from our clients who have to start writing two separate checks after filing bankruptcy. Frequently, this leads to unexpected stay relief motions and end-of-case payment disputes. Conduit plans (where the trustee collects and pays ongoing mortgage payments) have the potential to cut down on these risks, but if trustees can charge their standard rate on the payments, it could effectively block many of our clients from using chapter 13. While the overall effect of more money coming into the trustee’s office would presumably result in a decrease in the trustee’s fee percentage, the result would still be that homeowners would bear a disproportionate share of the fees. The Commission should explore the possibility of adopting a national rule on conduit payments, while also considering protections for low-income debtors from excessive trustee fees. Such protections might include a lower trustee commission (such as 1%) on mortgage conduit payments.

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### **OTHER ISSUES**

The following are other issues we have encountered as part of our practice we think the Commission should consider in drafting its report. While we are not proposing the Commission pursue an amendment to the bankruptcy code, we believe studying these issues will help the Commission get a better understanding of how consumer bankruptcies work in practice and potential barriers to accessing justice.

#### **Means Test**

- The means test already excludes social security from current monthly income, but does not exclude veteran's benefits.
- Debtors who have lost their jobs have to wait 6 months for that income to stop being held against them.

#### **Student Loans**

- The rules on unfair discrimination in chapter 13 classification has led to a situation where many borrowers are required to default on current student loans to file chapter 13. As a result, they may experience administrative wage or social security garnishment and intercepts of their tax refunds after discharge.
- Low-income communities have been hit particularly hard by student loan debt, especially for predatory, private schools which target our clients. The current system of requiring proof of undue hardship to discharge all student loans has allowed these predatory institutions to flourish while our clients are burdened with their student debt indefinitely.

#### **Mortgage Mediation**

- Mortgage mediation programs have worked out well in the districts that implement them. The Commission should propose best practices for districts interested in starting a program.

We appreciate the Commission's consideration of our statement.

Signed,

Nathan Juster, Atlanta Legal Aid Society, Inc.  
Rachel M. Lazarus, Gwinnett Legal Aid  
Wilson Webb, Legal Services Alabama, Inc.  
Amy P. Hennen, Maryland Volunteer Lawyers Service  
Anna Deknatel, Brooklyn Legal Services Corp. A  
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**STATEMENT OF DAVID P. LEIBOWITZ  
ON BEHALF OF UPRIGHT LAW  
TO THE AMERICAN BANKRUPTCY INSTITUTE  
CONSUMER BANKRUPTCY COMMISSION**

My name is David Leibowitz. I practice in Illinois and Wisconsin. I was admitted for several years in Arizona as well. Among other roles, I am the Chief Legal Officer of UpRight, a consumer bankruptcy firm which practices throughout the country. UpRight, like all firms, has “bricks and mortar” but unlike some firms, UpRight facilitates the delivery of legal services to clients in the comfort of their homes at a time of their choosing.

Our mission at UpRight is to improve lives through access to justice – one person at a time. Headquartered in Chicago with approximately 125 lawyers and support staff, we have almost 400 partners resident in local offices across the country. Our partners have an average of greater than 20 years’ experience representing consumers. UpRight has filed more than 20,000 consumer bankruptcy cases to date. My work at UpRight - as well as my practice in three states – each with their unique characteristics – has led me to understand that consumer bankruptcy practice in the United States needs to embrace technology and uniformity of practice.

As a brief introduction to six specific topics that we believe the Commission should address and include among its final recommendations for consumer bankruptcy reform, I would like to first provide some context about my personal background and commitment to UpRight.

Like most UpRight attorneys around the country, my personal bankruptcy law practice is conducted through a small independent bankruptcy law firm that I founded - Lakelaw. Currently a member of the Board of Directors of the American Bankruptcy Institute, I was the first lawyer in Northern Illinois or Southern Wisconsin to be board certified both as a business bankruptcy lawyer and as a consumer bankruptcy lawyer. My entire professional career has been premised upon providing excellent, compliant, ethical and successful experiences for my clients.

Lakelaw has modest offices – our clients of modest means are more comfortable that way. Over the past years, we have consolidated our work from five “bricks and mortar” offices from Chicago to Milwaukee to just one in Chicago – serving the same geographic area. We do this with our cutting-edge lawyers using the latest technology. We represent clients from all over the country and even other parts of the world who have legal issues in Illinois and Wisconsin. Frequently, we don’t meet them personally. We don’t shy away from complex and sometimes difficult cases because we take the greatest pleasure in helping consumers achieve financial freedom and a fresh start. This is the same approach I have taken for the past 25 years in my services as a Chapter 7 trustee in Chicago. I do not shy away from innovation or difficult cases. I’m sure that many of the judges here would testify to that.

UpRight’s commitment to “bringing the law office to the living room” for consumers no matter where they live and no matter when in the day they need it resonates with me. When I lived in Tucson, I was able to effectively represent people in remote areas of Arizona by taking advantage of technology. I could literally work with my clients while seeing them in their living room several hundred miles away.

UpRight's clients have continually expressed a high degree of satisfaction. Still, during its early stage and unprecedented growth, UpRight encountered growing pains establishing its multi-state law partnership, implementing quality control and compliance systems and other occasional challenges associated with providing legal services in an innovative, technology-powered manner. Many of these challenges were self-identified and self-reported but others were highlighted by regulators and panel trustees.

UpRight has evolved to focus on internal compliance together with effective mitigation and remediation of individual case issues, which represent a small fraction of the successful outcomes achieved. Having developed and implemented a remediation plan to address past operational issues and inculcate best practices across the law firm, we at UpRight are moving aggressively to pursuing cooperative resolution of any regulatory concerns that remain. While we should have done better earlier on, we are committed to bridging the real disconnect between the reality of who are and what we are working every day to accomplish against how we are perceived by some of our regulators.

We present this context because within it is a very meaningful opportunity to share with the Commission our broad experience across the nation's judicial circuits while being at the forefront of leading legal-tech innovation to help consumer bankruptcy debtors efficiently achieve financial freedom. We think that artificial barriers to justice must be eliminated. People who cannot easily come to physical law offices by reason of work commitments or remoteness of their residence should be able to avail themselves of technology-powered legal services that meet their needs – just like people used to avail themselves of the Sears catalog and just like they log onto Amazon today to purchase goods not available locally, or when the store is closed, or to allow for delivery to their doorstep.

For generations, consumers have suffered meaningful gaps in access to justice in our country. The disparities in access to legal services are most pronounced when observing the enormous benefits that corporate America realizes from utilizing some of the most talented, and well-paid law firms in the country for representation in a variety of matters, from mergers and acquisitions to bankruptcy. Over the last seven years, in the face of the recession and then the recovery, corporate bankruptcy has increased, in parallel with growth in the stock market. At the same time, household wages have fallen or become stagnant, consumer debt levels are at an all-time high, yet we have seen a meaningful reduction in consumer bankruptcy filings. Corporations have been able to use bankruptcy to start over and they have benefitted, but consumers do not have the same access. Why is this?

For distressed businesses, understanding and accessing rights under the bankruptcy system has become fairly routine although it is expensive and suffers its own set of challenges especially for smaller companies (as addressed by the ABI's Business Bankruptcy Commission). Indeed, measuring distressed outcomes is a core part of our national economy that informs markets and defines execution paths for healthy companies. None of those synergies attach to the consumer bankruptcy system. The average consumer has little information about bankruptcy, often does not know how to access assistance, or has both information and know how, but does not have the ability to obtain relief due to financial, economic, geographic, demographic or psychological limitations. Most commonly, fear of the unfamiliar is the biggest barrier to receiving assistance.

Consumers must navigate a national bankruptcy system in which other stakeholders such as mortgage servicers, automobile financing companies and credit card companies rely on and benefit from a proliferation of multi-state law firms that are closely connected and coordinated with their clients through complex computer networks and cloud-based systems. Simply stated, the creditors in the consumer bankruptcy system reap huge benefits from scale, from technology and from working closely with service providers who are not attorneys in order to further represent their clients' interests. They do so to create efficiencies and to address the complexities associated with widely varying practices across dozens of federal jurisdictions.

Consumers must interact with today's evolving legal practice that benefits others but not them. For example, lawyers no longer walk to the courthouse to file papers. Papers, pleadings and petitions are filed electronically. Lawyers no longer sign legal documents with ink. They do so electronically using their CM/ECF certificates. The "Bates Stamp" has been replaced by electronic numbering in Adobe Acrobat™. Documents can be indexed electronically and searched by word or even character. Law libraries are becoming obsolete because on-line resources have replaced them. Indeed, this presentation and the references herein have been prepared without the need to visit a law library. Law offices are shrinking and even being eliminated. More and more people seek legal services in virtual space, just as they might seek higher education through distance learning. Travel to a location to obtain products and services that can be obtained from the comfort one's home is not seen as a value proposition.

This trend is seen in the medical profession as well. Services formerly provided only by doctors, are now provided in mini-clinics at places such as at department stores by nurse practitioners or physician-assistants under supervision of a hospital or medical team. Pharmacists, in many instances, can administer vaccinations. Telemedicine is transforming the delivery of medical care in the United States - making it possible for people in rural areas to obtain routine and even specialty care without travelling to an urban medical center. Consumers of legal service deserve and need the same level of service and convenience.

In this cloud-based technology evolution and revolution, the Bankruptcy Code has evolved much more slowly than society in the United States. The foundation of the bankruptcy in the United States, of course, was the Bankruptcy Act of 1898, which except for changes related to securities and reorganization in the 1930s, remained in place until 1978 with the advent of the Bankruptcy Code. The Code has now been in place for over 40 years. And, even the Bankruptcy Abuse Prevention and Consumer Protection Act of 2006 was enacted more than a decade ago. The world has changed profoundly in the forty years since the Code was enacted. It has changed significantly even in the past ten years since the enactment of BAPCPA.

As a long-tenured certified consumer bankruptcy law practitioner and for my colleagues both at UpRight and Lakelaw, we appreciate the Commission's mandate and vision to reexamine the Bankruptcy Code in light of society's present needs and circumstances. From our vantage point as a national consumer debtor's bankruptcy firm, we propose six changes to the Bankruptcy Code and Rules. Each change is intended to take advantage of technology, to level the playing field for consumer debtors, and to promote uniform and fair practice throughout the country.

**1. Expressly authorize use of remote video access for creditors meetings under Section 341 and for court hearings.**

Every bankruptcy filer faces the cost of physically traveling to meet his or her bankruptcy trustee. Accordingly, a potential bankrupt located in an area close to a bankruptcy trustee will face lower geographically imposed filing costs compared to a potential bankrupt who lives in an area remote from a bankruptcy trustee. Courts and judges already are well aware of the significant burdens imposed for brief appearances. Judges in the District of Arizona routinely preside at far-flung locations within that state by remote video. Courts in both the Eastern and Western Districts of Wisconsin permit attorneys to appear for most routine matters by telephone as a matter of course.

Travel to a 341 meeting also should not be an impediment to a debtor receiving bankruptcy relief or impose significant additional costs. Some courts around the country have already eased the burden on debtors' counsel and the United States Trustee by expanding use of videoconferencing for court hearings. The U.S. Bankruptcy Court for the District of Montana has put one such framework in place. With the proper safeguards, there is no reason why the same accommodations cannot be extended to debtors who are in the greatest need of alternate ways to fulfill their obligations without avoidable inconvenience and expense. Some of the features of a possible framework might be:

- authentication at the time of the meeting, such as the debtor answering random questions from a credit report
- presentation of photo identification by video means
- requirement that the debtor's attorney be present with the debtor and to submission of an affidavit to the trustee attesting that the attorney confirmed the debtor's identity
- imposition of minimum quality requirements for the panel trustee to conduct the meeting

The framework could establish other requirements such as some affidavit or other proof that travel to the 341 meeting location would produce an undue hardship, which should be well-defined and not open to subjective application. A request for videoconference attendance at a 341 meeting that is more than 100 miles from the debtor's home should be entitled to a presumption of reasonableness and automatically approved through a form-based application. In any event, the bankruptcy system ought to expand access to justice to those individuals who, due to geography or life circumstances, currently must incur significant expense or unreasonable inconvenience in order to get out of debt. Affordable technological solutions already exist. There should be a national framework to implement this. Now, even in the jurisdictions which permit video conferences, the debtor must appear at a local United States Trustee's office, be sworn locally and have identification verified locally. People who appear in court by telephone or video conference don't have to travel to a local courthouse to do so.

Anecdotal evidence suggests that private trustees, with the permission of their local United States Trustee office, will allow for video 341 meetings using technology such as Skype or FaceTime, for debtors who are physically unable to attend a meeting owing to disability or illness. The needs to be served by a 341 meeting or many routine court appearances, such as a reaffirmation hearing, can well be met by means other than a physical, in person appearance, at a remote courthouse. Even taking into consideration localization of meetings, for some places, such as Arizona, meeting locations such as Flagstaff, Bullhead City, Phoenix, Tucson and Prescott still can be hours away

from the residence of many debtors. In a state such as Montana, the distances can be even more daunting. Technology can solve this problem and should be utilized.

### **2. Authorize and validate authenticated electronic signatures and records.**

Debtors' signatures are necessary for them to declare the accuracy of their petition, schedules, statements of financial affairs and other bankruptcy papers. However, the manner in which a debtor may affix a signature is vague and uncertain under the Bankruptcy Code and Rules. Attorneys already sign all documents in the federal system by electronic means. Most states are also adopting electronic filing of documents. Electronic signatures are being adopted as legally binding throughout the world. The United States adopted the Electronic Signatures in Global and National Commerce Act (E-Sign Act) in 2000. Interestingly, the exceptions provided in the E-Sign Act don't appear to relate to bankruptcy. The Uniform Electronic Transactions Act has been adopted by 47 states, the District of Columbia and the United States Virgin Islands. As a result of this Act, physical records of most records are no longer required. Records retention of checks and other legal documents is now permitted and handled electronically. Furthermore, the three states that have not adopted the Uniform Electronic Transactions Act (Illinois, New York and Washington) all have laws authorizing and recognizing electronic signatures as valid and binding.

The idea that "wet signatures" are required in bankruptcy is burdensome and tends to prejudice consumers and delay or defer immediate relief when they need it the most. The perceived harms to be prevented by wet signatures can be addressed equally well by electronic signature authentication routinely utilized in commerce and authorized by the E-Sign Act. Utilization of electronic signatures will allow debtors to promptly and efficiently authenticate and sign not only their bankruptcy petitions but also their statements of financial affairs, declarations, engagement agreements, amendments to petitions and affidavits or declarations that might be necessary in their cases. Numerous trips to attorneys' offices - and concomitant days lost from work - will be eliminated. The speed and efficiency of electronic transactions can be incorporated into consumer bankruptcy practice allowing for better service and at reasonable cost.

Just as the courts' paper files have given way to electronic records, attorneys' lateral filing cabinets have given way to electronic records as well, all maintained in the cloud. Paper files and wet signatures are becoming obsolete. Electronic technology will allow for long term record maintenance as well as significantly improved signature authentication than may be permitted by so-called "wet signatures." Electronic signatures are nationally and internationally recognized in virtually all areas of commerce. They should certainly be recognized for all purposes under the Bankruptcy Code.

To the extent that the Bankruptcy Code requires records to be maintained, for example in Section 527(d), the Code should expressly provide that maintenance of such records may be electronic and cloud based.

### **3. Promote Uniformity of Practice.**

The Bankruptcy Clause of the Constitution authorized Congress to enact uniform laws on the subject of bankruptcies throughout the United States. As the courts have interpreted the bankruptcy laws over the years and the courts across the 94 federal districts have promulgated local rules, the bankruptcy laws are now far from uniform. Recently, the United States Courts

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have adopted a model Chapter 13 plan, but with the opt-out provisions of Federal Rule 3015, the intention to create more nationwide consistency in Chapter 13 practice has been undermined. Uniformity of practice nation-wide should be encouraged.

The implementation of uniform practices in the highly cost-limited environment in which the consumer bankruptcy system exists will promote scale, efficiency, compliance and enhanced outcomes. Multi-state practice uniformity benefits consumers and law practices alike. For example, in the Chicago metropolitan area, numerous firms practice in both Illinois and Wisconsin or in both Illinois and Indiana. The same is seen in the Cincinnati area covering Ohio and Kentucky, in the New York area covering New York, Connecticut and New Jersey, in the District of Columbia area covering Maryland, Virginia and the District of Columbia, in the St. Louis area covering Illinois and Missouri and in the Kansas City area covering Missouri and Kansas, among others.

Differences in the local rules promulgated from district to district, even within one state, vary dramatically. While local rules are intended to simply codify procedural requirements, they often substantively impact consumer access, increase costs and affect case outcomes. A bankruptcy attorney practicing in both the Southern District of Ohio, Cincinnati Division and also right across the border in the Western District of Kentucky, Covington Division, may have completely different requirements in cases filed in each division.

Inconsistency in processes leads to increased complexity and error rate, as well as inefficiency and challenges in providing best in industry service. Certainly, not all inconsistency in local rules can be eliminated, but the bankruptcy system could benefit from creating greater consistency where possible. To the extent that law firms execute administrative processes using automation, consistency in these rules could insure greater compliance so that systems do not have to operate under different sets of rules. And, to the extent that lawyers can use these systems, they can operate more efficiently and represent more clients while maintaining stable costs. In turn, clients will receive better service, lawyers have greater ability to pass savings onto client and regulators' burdens can be reduced by having fewer errors to police.

The Commission should recommend that Congress empower – and direct – the Bankruptcy Rules Committee to comprehensively examine local rules nationwide to determine which rules and procedures represent best practices. Those best practices should be incorporated as a part of the Federal Rules of Bankruptcy Procedure. Inconsistent local rules that are determined not to be best practices should be eliminated. Uniformity in rules and procedures nationally will allow for more efficient provision of legal services for all parties in interest and relieve burdens upon the courts and other interested parties. Simple changes such as uniformity in motion practice, more uniform application of the “notice and hearing” procedures contemplated by the Bankruptcy Code, and even simple changes such as standardizing the forms and formats of documents, captions and case numbering would go a long way to simplifying practice and lowering costs. This is quite consistent with the recent amendment to the Federal Rule of Bankruptcy Procedure 9009 mandating the use of official forms nationwide.

**4. Authorize consumer debtors' lawyers to be paid either prepetition or in post-petition installments during chapter 7 cases**

The Bankruptcy Code should be amended in light of the Supreme Court's decision in *Lamie v United States Trustee*.<sup>1</sup> Under present law, a debtor's obligation to pay an attorney's fee to his attorney is a pre-petition obligation that is discharged in bankruptcy. Some courts allow the fiction of both pre-petition and post-petition contracts with the debtor so as to allow a debtor to pay some portion of his attorney's fee for a chapter 7 case post-petition. These strategies are detailed by Professors Foohey, Lawless, Porter and Thorne (the "Professors") in their recent article "*No Money Down*" *Bankruptcy*.<sup>2</sup>

Plainly, debtors should not be incented to select between chapter 7 and chapter 13 depending upon whether they can pay their attorneys' fees in full prior to the commencement of their petition. The Bankruptcy Code should be amended to allow debtors to pay bankruptcy attorney fees in installments during the course of their chapter 7 cases. Making chapter 7 more accessible would allow all people struggling with debts to use the bankruptcy system irrespective of their income, savings or ability to borrow money. Adopting this approach would eliminate any incentives debtors might currently have to borrow money or to incur more debt in order to fund payment of a bankruptcy attorneys' fee - an activity that is otherwise discouraged by the Bankruptcy Code. Further, if the Bankruptcy Code were amended to treat debtors' attorneys' fees as non-dischargeable, there should be a greater willingness of attorneys to represent debtors in bankruptcy cases without a significant pre-petition retainer - a retainer that some debtors might be unable to provide given their exigent financial circumstances.

**5. Establish meaningful pre-petition bankruptcy counseling.**

To the extent that pre-petition credit counseling was intended to somehow benefit consumer debtors, it has been an abject failure. Congress' objective with respect to credit counseling was to afford prospective debtors information about alternatives to bankruptcy with the view that many would attempt to settle their debt obligations outside of the bankruptcy system. Section 502(k) of the Bankruptcy Code demonstrates the complete disconnect between policy and reality. Under Section 502(k), Congress posited that the Court could reduce a claim of a creditor by no more than 20% if the debtor proves that:

- the creditor unreasonably refused to negotiate a reasonable alternative repayment schedule
- the plan was proposed on the debtor's behalf by a credit counseling agency described in section 111
- the offer was made at least 60 days prior to the date of the petition
- the plan provided for payment of at least 60 percent of the debt
- the plan period did not to exceed the repayment period of the loan or some reasonable extension thereof

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<sup>1</sup> 540 U.S. 526 (2004)

<sup>2</sup> 90 UNIV. OF SOUTHERN CAL. L. REV. 1055, 1067 (2017).

- no part of the debt was otherwise non-dischargeable.

The debtor would then also have the burden of proving by clear and convincing evidence that the creditor unreasonably refused to consider the debtor's proposal and that the alternative repayment schedule was made prior to the expiration of the 60 days prior to the date of the petition. The supposed "consumer protection" afforded by the credit counseling requirement is cynically illusory.

As stated by the court in *In re Hayes*,<sup>3</sup>: [Section 504(k)]

establishes a penalty against unsecured creditors in favor of debtors under certain limited circumstances with the apparent goal of encouraging non-bankruptcy repayment plans for consumer debt. The provision is a would-be carrot for a debtor and a would-be stick for the creditor. But the standards that § 502(k) establishes for debtors to take advantage of the claim reduction penalty are more vexing to determine than they might appear on initial reading. And based on those standards, the prospect of a debtor recovering such a penalty in any given case appears more illusory than practical and realistic, even where, as here, it appears that the creditor would have been better off if it had accepted the proposal for an alternative repayment schedule.

As the court noted, in order to obtain even the minimal relief offered by Section 502(k), the debtor would have to sustain his burden of proof on 11 separate elements of proof - by clear and convincing evidence. The court in *Hayes* found that the debtor did not meet the timeliness requirement and denied her petition. No reported case has been found granting relief under Section 502(k). Rarely are clients diverted from filing bankruptcy cases because of their credit counseling. So pre-bankruptcy counseling ought to be for something more constructive.

If debtors are to receive counseling prior to bankruptcy, they should be counseled about the bankruptcy process, the types of bankruptcy available and other information which they could use in order to make an informed decision. Today, debtors' attorneys are required to - and should be required to - counsel debtors about these aspects of the bankruptcy system and non-bankruptcy alternatives. Wouldn't it make more sense for the prospective debtor to have this information provided by an independent source so as to better understand the nomenclature of the bankruptcy system as well as the rights and responsibilities of a debtor?

We believe that debtors who are represented by attorneys really do not need prepetition bankruptcy counseling from an independent agency. The attorney must provide the debtor the necessary information that debtors will need to make an informed decision. On the other hand, debtors who are not represented by an attorney or receiving bankruptcy information from some other debt relief agency, should demonstrate that they have been counseled as to their rights under chapter 7 and chapter 13, the notices they will receive under section 342 of the Bankruptcy Code, the information required to be given to the debtor by a debt relief agency pursuant to section 527(a)(2) and the information set forth in Section 527(b) and information as to the debtor's responsibilities under Section 521, including the matters related in Section 527(c)(1)-(3) inclusive.

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<sup>3</sup> 385 B.R. 644 (Bankr. N.D. Ohio 2007).

Since debtors' attorneys and other debt relief agencies are required to provide all such information, it only stands to reason that pre-bankruptcy counseling should be required for unrepresented debtors so that they have the information they need to fulfill the requirements of the Bankruptcy Code. By amending the Bankruptcy Code to eliminate the need for pre-bankruptcy counseling for represented people and focusing on pre-bankruptcy counseling to advise non-represented people as to their options and responsibilities, the pre-bankruptcy counseling requirement can be made meaningful rather than the burdensome and illusory exercise that is often the case today.

**6. Clarify and expand Federal Rule of Bankruptcy Procedure 4002(b) to promote uniformity of practice.**

Debtors are required to provide minimal documentation to the Bankruptcy Trustee at the meeting of creditors under section 341 of the Bankruptcy Code. This documentation includes:

- evidence of current income such as the most recent payment advice
- unless the trustee instructs otherwise, statements for each of the debtor's depository and investment accounts
- documentation of monthly expenses claimed by the debtor if required by section 707(b)(2)(A)
- most recent tax return

This list of documents required by the Federal Rules of Bankruptcy Procedure, however, does not represent practice in many districts throughout the country, where trustees require submission of substantially more documentation. Local rules in many districts require additional documentation as well. For example, there is a standard bankruptcy questionnaire that must be completed by all Nevada debtors. See form at [https://www.justice.gov/sites/default/files/ust-regions/legacy/2011/07/13/ch7\\_dbtr\\_doc\\_req.pdf](https://www.justice.gov/sites/default/files/ust-regions/legacy/2011/07/13/ch7_dbtr_doc_req.pdf). A different set of documents is required in the Western District of Florida, Tampa Division. <http://www.timsierra.com/Chapter-7-TRUSTEE-DOCS-Requirements.pdf>. Some bankruptcy trustees require completion of a questionnaire and copies of substantially more documents prior to the meeting of creditors. See, for example, Trustee David Birdsell's requirements at: [http://azbktrustee.com/wp-content/uploads/2016/02/341-Hearing-Demand-packet\\_Pro-Se.pdf](http://azbktrustee.com/wp-content/uploads/2016/02/341-Hearing-Demand-packet_Pro-Se.pdf).

In a national consumer bankruptcy system that is supposed to be uniform in its approach and practice, it is burdensome and impractical to impose differing requirements in differing jurisdictions. This is as true for the practitioner who practices in multiple jurisdictions as it is for the practitioner who must comply with different requirements of different trustees within the same jurisdiction. From the consumer's perspective, why should a debtor in one jurisdiction be subject to different documentation requirements than another? And why should one debtor within a jurisdiction be subject to different documentation requirements than another solely based on the needs and wants of a particular panel trustee? Trustees certainly are entitled to reasonable set of documents to be produced by a debtor at the meeting of creditors pursuant to section 341. At the same time, the current requirements of Federal Rule of Bankruptcy Procedure 4002(b) are unreasonably limited. It is fair that a debtor produce the same sort of documents that the debtor and the debtor's attorney necessarily used in order to prepare the bankruptcy petition.

Federal Rule of Bankruptcy Procedure 4002(b) should be amended to expand, but to make uniform, the documents to be produced by a debtor at a meeting of creditors pursuant to section 341 of the Bankruptcy Code. Should further documents be required, the trustee should have the right to seek such documentation pursuant to Bankruptcy Rule 2004. The requirement that debtors produce such documents should be governed by a standard of proportionality where the benefit of the production to the estate is weighed against the burden of production to the debtor.

Nevertheless, the proliferation of varying requirements for production of documents at meetings of creditors (a) by different trustees within the same district and (b) across different districts, is both unfair and inappropriate. By expanding the standard menu of documents that a trustee may, but need not, request and by introducing a standard of proportionality, trustees will be able to obtain the documentation they need to evaluate an estate and debtors and their counsel can gather the documents that are reasonably expected to be necessary before a 341 meeting and without the need for unnecessary motion practice.

### **Conclusion**

UpRight Law's perspective as a national consumer bankruptcy firm has allowed us to have a broad perspective of bankruptcy practice, both locally and nationally. While we certainly do not believe that we have all the answers, we believe that we have posed legitimate issues that merit the Commission's attention and inclusion among your recommendations for consumer bankruptcy reform. We hope that the solutions we have offered are given careful consideration. UpRight shares the Commission's desire to strengthen and enhance consumer bankruptcy practice – which indeed constitutes the bulk of the bankruptcy courts' business – not just for our consumer clients but for the benefit of all participants in the system.

We seek fair, efficient, accessible and economical justice to all participants in the bankruptcy process. Our purpose here is to present six practical areas where relatively straight-forward, actionable revisions to the Bankruptcy Code and Rules can be supported by most thoughtful participants in the consumer practice. If enacted, these reforms would meaningfully improve the consumer bankruptcy system.

Thank you for your consideration of these observations and recommendations.



**Frederick M. Luper**

Direct Dial: (614) 229-4409  
fluper@lntorneys.com

November 3, 2017

Via Email: [rlawless@illinois.edu](mailto:rlawless@illinois.edu)

Robert M. Lawless  
Co-Director, Program on Law, Behavior & Social Science  
University of Illinois College of Law

RE: ABI Commission on Consumer Bankruptcy  
Mandatory §#341(a) Meetings of Creditors

Dear Bob:

My wife is having surgery Tuesday so, unfortunately, I will not be able to attend the commission hearing on November 10 in person. I have enclosed a written version of my testimony which I hope will be helpful and can be made part of the record.

When my partner of 40 years, Bill Logan, saw my proposal, he expressed strong opposition. When neither of us could talk the other out of his position, Bill asked, and I agreed, to submit his opposing memo with my memo, so I am attaching his paper along with mine. He would like his position to be made part of the record also, if that is possible.

I appreciate the invitation and hope that both my written testimony and Bill's will be useful.

Yours truly,

  
Frederick M. Luper

FML:jb

Enc.



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## AMERICAN BANKRUPTCY INSTITUTE

To: The ABI Commission on Consumer Bankruptcies

From: Frederick M. Luper

Date: November 3, 2017

Frederick M. Luper's testimony for the ABI Commission on Consumer Bankruptcy, November 10, 2017

Thank you for allowing me to testify about changes to the consumer Bankruptcy process and for making this letter part of the record of the Commission. These are *my* thoughts and do not express the opinion of my firm or its attorneys. In fact, two of them disagree with me and have asked me to attach their views to my testimony. Their paper is attached. The data in this letter is drawn exclusively from Dalie Jimenez's article in the American Bankruptcy Law Journal "ABLJ" entitled **The Distribution of Assets in Consumer Chapter 7 Cases**. (83 ABLJ 795).

I have been a bankruptcy trustee continually since 1963, even before I became a lawyer. I believe I am the longest serving trustee in the United States. I was also certified as a Business Bankruptcy Specialist the first time the certification was offered.

My recommendation is that Sec. §341(a) meetings of creditors be abolished unless a party in interest requests that one be held. While I recognize that there are valid reasons to hold a §341(a) meeting in every case (e.g. the recognition of the seriousness and solemnity of the system by having a debtor appear in person, and actually swear an oath). On balance, however, I believe the macro-economics of the costs vs. benefits of the §341 meetings cry out for reform. If a debtor does not have to miss work, pay a baby sitter, pay for transportation and parking to get to the meeting, and does not have to pay her/his attorney to attend, the bankruptcy system could save millions of dollars.

According to a report of the Office of the U.S. Trustee, footnoted in the Jimenez article, there were 5,815,152 Chapter 7 cases filed between 1994 and 2000. Of those cases, there were only 205,745 "asset cases" (3.5%). Moreover, the median distribution to unsecured creditors in those asset cases was 7.9% (83 ABLJ 802).

An old bankruptcy treatise quoted in a footnote of the Jimenez article says, "First purpose of Bankruptcy Act to benefit creditors and [t]he second great purpose of the Bankruptcy Act is to benefit the debtor himself." (*ibid*, p.795). We can see from the data that since only 3.5% of all filed cases are denominated "asset cases," *after a trustee conducts the §341(a) meeting*, and since unsecured creditors in asset cases receive a median dividend of only 7.9%, it can be reasonably inferred that creditors do not substantially benefit from attending a §341(a) meeting. In fact (anecdotally from my dockets), very few creditors ever attend.

Debtors do not benefit from attending a §341(a) meeting either (except for the intangible benefit of understanding the seriousness of the process referred to above). They do have more immediate (and in my view more significant) *detriments* from having to miss work, incur legal fees, transportation, parking and in some cases babysitting expenses to attend. If a debtor's

lawyer didn't have to include in his fixed fee the time for attending the §341(a) meeting (say \$200) and the debtor didn't have to miss a day's pay and incur the other costs associated with attending the meeting (say \$150), the system would have saved over \$20,000,000 in the 1994-2000 time frame covered by the UST study.

The answer to almost every question asked by a panel trustee in a §341(a) meeting has already been sworn to in the Schedules and SOFA by the debtor. My average §341(a) meeting takes between 6 and 8 minutes. I have received in advance (by local rule and by written request) tax returns, pay advices, 90 days of bank records, car titles, real estate deeds and mortgages, proof of insurance beneficiaries, proof that any retirement plans are truly not property of the estate. If the trustee has need for more documents, he can request them as can (and often does) the office of the UST. And of course, as I have said, any party in interest (trustee, UST, or a creditor) can request that the debtor appear for a §341(a) and testify in person and under oath if further clarification is needed. My colleagues opine in their paper that often they uncover unscheduled assets because of the incompetence of debtor's lawyers in advising their clients and preparing their schedules. That seems not to be a valid reason for continuing this generally useless process. It is important to remember that my proposal recommends that any party in interest may request a §341(a) meeting. That includes my colleagues. If they feel (and they have not presented any empirical evidence to support their contentions), that a §341(a) meeting is necessary to carry out their duties, they can call one *in every case*, should they so desire.

Thank you for this opportunity.

Frederick M. Luper

**Why 341 Meeting of Creditors are important**

The meeting of creditors has always been an opportunity for the Chapter 7 Trustee to examine the debtor under oath regarding the debtor's financial condition, assets, liabilities and other matters critical to the efficient and productive administration of a Chapter 7 case. As such it serves a valuable role in the process and should not be abolished. One of the quid pro quos of filing a bankruptcy and obtaining a discharge of indebtedness (sometimes quite a large number) is the requirement that the debtor submit to examination by the Chapter 7 Trustee.

Contrary to assertions, not every question asked by the Chapter 7 Trustee has already been answered in the bankruptcy papers filed with the Court. Additionally, there are many times that a debtor will answer a question differently at the meeting of creditors than they answered it in the sworn Schedules or Statement of Financial Affairs, either because they now understand the question or because their attorney did not adequately explain the question in preparation of the bankruptcy papers. Many Chapter 7 Trustees actually ask different questions (or ask the question differently) than those presented in the bankruptcy papers, all in the search of assets to administer for the benefit of creditors. Many times (in my experience) the answer to one question leads to other questions and possibly assets. Without a required meeting of creditors, there would be no automatic opportunity to examine the debtors on these matters. Many times assets are found through this examination that would have otherwise been missed. There simply is no substitute for looking a person in the eyes while examining them under oath regarding these critical matters.

While it is true that Chapter 7 Trustees are to be provided with tax returns and pay information prior to the meeting of creditors, it is generally not accurate to state that real estate documents, titles, bank statements and other asset documents are required to be provided before a 341 meeting. They are not. Additionally, based upon the review of those other documents, Trustees generally should (and most do) have other questions that only arise after a thorough review of the documents.

The economics of attending 341 meetings are not as simple as presented (savings of millions of dollars). First, most debtor's attorneys charge a flat fee for preparing a Chapter 7 bankruptcy and to conclude that number will go down as a result of abolishing the meeting of creditors is simply not a rational conclusion. Even if that flat fee did decrease, there is no basis whatsoever to conclude that the amount would decrease by \$200. Second, the costs to the debtor for attending that meeting of creditors are simply part of the quid pro quo that as long been recognized as what the debtor must do in order to obtain a discharge of indebtedness. Most debtors get it figured out so they can attend.

Contrary to any savings, there could easily be an increase in costs. Under any proposal to abolish the meeting of creditors, a Chapter 7 Trustee would be required (to meet his or her fiduciary duties) to review every item in the bankruptcy papers, determine whether to request a meeting of creditors, presumably notice that meeting out to everyone, and then attend the requested meetings. Since the meeting of creditors would no longer be part of the flat fee charged by debtor's counsel (although the flat fee would likely not decrease), attorneys would have an opportunity to charge their clients (the debtors who are already cash strapped) additional

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fees for attending the requested meeting. Administration of cases would slow, given that there would no longer be a set time for meetings, and creditors would wait longer for distributions. All in all, not a good savings for anyone.

The bottom line is that meetings of creditor serve an integral part of Chapter 7 case administration and should not be abolished.

# AMERICAN BANKRUPTCY INSTITUTE

## Lawless, Robert M

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**From:** Lyons, Raymond T. <rlyons@foxrothschild.com>  
**Sent:** Monday, August 14, 2017 1:55 PM  
**To:** consumercommission@abiworld.org  
**Subject:** student loans

Allow bankruptcy judges to bifurcate a student loan into an amount that can be paid without hardship over 60 months (the non-dischargeable amount) and an amount that would be a hardship (the dischargeable amount). The non-dischargeable amount of the student loan should be a priority claim.

### Raymond T. Lyons

Counsel

### Fox Rothschild LLP

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### Lawless, Robert M

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**From:** Pamela Maggied <pmaggied@rrohio.com>  
**Sent:** Tuesday, September 05, 2017 10:09 AM  
**To:** ConsumerCommission@abiworld.org  
**Subject:** mandatory conduit payments in chapter 13s

Consumer Commission:

I oppose a requirement of mandatory conduits for all mortgage payments in chapter 13s.

If a debtor is behind in mortgage payments then a conduit makes sense. Presuming the plan ends successfully, the mortgage will be brought current and the debtor will have the creditor's admission that both pre- and post-petition payments have been brought current as of a particular date.

If the debtor's filing is caused by something other than a mortgage problem though, a conduit requirement is punitive. Requiring a mortgage conduit in all chapter 13 cases infantilizes debtors who don't need the trustee's help with that issue. It will cause the debtor's ongoing payments to fall behind, at least initially. Because of the trustee's percentage fee of all money paid through the plan, even if the percentage for conduit mortgages is lower than usual it will take funds away from unsecured creditors. Please continue to allow debtors who enter chapter 13s with current mortgages to continue without training wheels, i.e. to keep paying their own mortgage payments.

It would be helpful to clear up a proof of claim issue in conjunction with this though, so that projected escrow shortages and the like that are plugged into the proof of claim forms on the "arrearage" line will be read for what they are, and not treated as actual arrearage just because that's the label that was applied to them. Bankruptcy has a history of considering substance over labels, and this is another example of where that is important.

Thank you for your consideration.

Pamela N. Maggied, Attorney at Law  
PAMELA N. MAGGIED CO., LPA  
**85 East Gay Street, Suite 600**  
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# AMERICAN BANKRUPTCY INSTITUTE

## Lawless, Robert M

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**From:** Michael G. Malaier <mmalaier@chapter13tacoma.org>  
**Sent:** Tuesday, May 09, 2017 12:04 PM  
**To:** ConsumerCommission@abiworld.org  
**Subject:** Comments on ABI Bankruptcy Commission

Good Morning,

Please accept this email as my formal comment on the Commission's study.

Chapter 13 is an essential program for consumers and, in general, works well for them. While I am cognizant of the various definitions of "success" in Chapter 13, I like to focus on two: completion rates for confirmed plans (which, by definition, weeds out those plans that are either filed in bad faith or filed in such a deficient manner as to prevent confirmation) and success in Debtors' receiving a reinstatement on delinquent mortgages. At its most basic, I view Chapter 13 as a way for consumers to save their homes and deal with tax debt that has caught up to them. To date, I process more than \$50 million per year and have a trustee fee of 4.75% (which is the highest it has been in a decade). My district's attorney fees, too, are proportionally lower than most nationwide. I submit that these statistics are due to the fact that we are a conduit jurisdiction, with a local rule requiring ongoing mortgage payments to come inside the plan when the underlying note is delinquent. Over the life of a plan, the cost associated with this is far outweighed by the certainty Debtors receive in knowing that every mortgage payment will be made, that my office will assist in payment disputes, and in the fact that we obtain reinstatements for every such case. The number of motions for relief from stay are minimized and we will work constantly on Debtors' behalf to ensure accurate ongoing payments.

That said, I offer the following substantive changes that would benefit the largest number of filers.

Given the \$1 trillion student debt load nationwide, it only makes sense that Chapter 13 offer some way in which to deal with this debt while offering the benefits and protections of the chapter. I don't necessarily believe that student debt need be dischargeable to find better solutions in managing it. For starters, Debtors ought to be able to make their monthly contractual payments regardless of general unsecured dividend. This would obviate the current scenario in which a Debtor finishes her plan, yet comes out of Chapter 13 with onerous penalties and fees associated from making reduced, *pro rata*, payments for 3 or 5 years. I can't foresee colleges and universities reducing tuition to the point where student loans will become obsolete, but the massive monthly payments are already hindering young people from buying homes and vehicles. Not only does this undermine, at a structural level, the economy as a whole, it forces borrowers to the brink without any real options in dealing with the debt. Along these lines, there ought to be, at minimum, a carve out for payments being made pursuant to a federal debt remission program.

Regarding mortgages, I believe that every jurisdiction should be conduit. As noted above, the increased revenue keeps trustee fees low and offers tangible benefits to Debtors in the form of consistent, reliable payments, and assistance in dealing with servicing companies. Allowing electronic payment, directly, via some form of TFS or other similar system, simply transfers the fee associated with it to a payment conduit, without providing the expertise and diligence that we trustees are able to offer Debtors.

I have no issue with the new forms (petition and schedules), though I strongly favor opting out of the new national form plan.

Finally, the debt limits should be raised considerably. Given that the 9<sup>th</sup> Circuit's recent mandate that the absolute priority rule apply in all individual Chapter 11s, many Debtors are left without a meaningful debt adjustment remedy. Let those folks come into Chapter 13 where their financial circumstances can be ably vetted and a meaningful plan of repayment confirmed.

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Thank you for considering my brief comments.

MICHAEL G. MALAIER  
Chapter 13 Standing Trustee  
1551 Broadway, Ste. 600 | Tacoma, Washington 98402  
Telephone 253.680.4064 | [www.chapter13tacoma.org](http://www.chapter13tacoma.org)

[www.chapter13tacoma.org](http://www.chapter13tacoma.org) | [Access your case online](#)

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## AMERICAN BANKRUPTCY INSTITUTE

### Lawless, Robert M

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**From:** Janice Marsh <janicemarsh1@gmail.com>  
**Sent:** Sunday, September 10, 2017 8:18 AM  
**To:** aquackenboss@abiworld.org  
**Cc:** RPeterson@jenner.com; Lawless, Robert M  
**Subject:** RE: Chapter 7 Commission of the ABI Consumer Bankruptcy Review Commission

I am writing to clarify and to put into context my comment no. 2 below:

I am a sole practitioner, and I do not employ any associate attorney. If I employ an attorney at another law firm, I supervise the attorney. Based upon my experience, I have found that the costs to the estate increase, and the administration of the case is delayed, to the extent the attorney is not familiar with either the local rules or the local practice.

Thank you.

Janice G. Marsh  
Janice G. Marsh, LLC  
446 Main St., 19<sup>th</sup> Fl.  
Worcester, MA 01608  
Telephone 508-797-5500  
[Janicemarsh1@gmail.com](mailto:janicemarsh1@gmail.com)

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**From:** Janice Marsh [<mailto:janicemarsh1@gmail.com>]  
**Sent:** Thursday, September 07, 2017 8:46 PM  
**To:** 'rlawless@illinois.edu' <[rlawless@illinois.edu](mailto:rlawless@illinois.edu)>  
**Cc:** 'aquackenboss@abiworld.org' <[aquackenboss@abiworld.org](mailto:aquackenboss@abiworld.org)>; 'RPeterson@jenner.com' <[RPeterson@jenner.com](mailto:RPeterson@jenner.com)>  
**Subject:** FW: Chapter 7 Commission of the ABI Consumer Bankruptcy Review Commission

I had typed incorrectly your email address.

Thank you.

Janice G. Marsh  
Janice G. Marsh, LLC  
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Worcester, MA 01608  
Telephone 508-797-5500  
[Janicemarsh1@gmail.com](mailto:janicemarsh1@gmail.com)

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**From:** Janice Marsh [<mailto:janicemarsh1@gmail.com>]  
**Sent:** Thursday, September 07, 2017 8:38 PM  
**To:** 'aquackenboss@abiworld.org' <[aquackenboss@abiworld.org](mailto:aquackenboss@abiworld.org)>  
**Cc:** 'RPeterson@jenner.com' <[RPeterson@jenner.com](mailto:RPeterson@jenner.com)>; 'rlawless@ilinois.edu' <[rlawless@ilinois.edu](mailto:rlawless@ilinois.edu)>  
**Subject:** Chapter 7 Commission of the ABI Consumer Bankruptcy Review Commission

I will not be able to attend, but I would like to submit the following as my written testimony:

The most notable advantages of a trustee's being able to hire the trustee's own law firm that readily come to my mind:

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1. The elimination of duplication of work, eg, a trustee would have to educate another attorney about the case or matter;
2. The elimination of having to supervise the other attorney;
3. Matters might be so urgent that there is no time to locate a qualified attorney, whereas a trustee can file an application to employ the trustee's law firm in less than an hour and service of the application is limited (ie to the debtor and those who have requested notice, as opposed to all creditors), thereby saving both time and expense to the estate;
4. A trustee is experienced in trustee work, which a nontrustee attorney is not;
5. I frequently waive or reduce drastically my attorney fees in cases in order to make or to increase distributions to creditors. Another attorney likely will get tired of having to work for free or at a drastic loss, thereby reducing the pool of qualified attorneys. I have tried to hire experienced special counsel to represent me as trustee, only to be told that, unless he can be assured of being paid for his services and expenses, he is not interested;
6. The United States Trustee and the bankruptcy court can, and do, require separate counsel if it is necessary; and
7. Basically, the trustee's being able to hire the trustee's own firm saves time and money for the estate.

Thank you.

Janice G. Marsh  
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Telephone 508-797-5500  
[Janicemarsh1@gmail.com](mailto:Janicemarsh1@gmail.com)

TO: ABI Consumer Commission  
Chapter 7 (c/o rlawless@illinois.edu)

FROM: Richard J. Mason

CC: R. Peterson (N.A.B.T. Representative)

DATE: September 1, 2017

RE: Trustee Commission on distributions to debtor

I am writing to urge the Commission to consider an amendment to 11 U.S.C. §326(a) as it relates to distributions to the debtor.<sup>1</sup> In individual consumer cases where there is a surplus, §326 does not fairly compensate the trustee for his or her services. It also provides the trustee with incentives inconsistent with underlying policies of the Bankruptcy Code.

The Statute

§326(a) reads, in part, as follows:

“In a case under Chapter 7 or 11, the court may allow reasonable compensation under Section 330 of this title for the Trustee’s services ... upon all monies disbursed or turned over in the case by the trustee to parties in interest excluding the debtor ...” (Emphasis added.)

Notably, Section 48(c) of the Bankruptcy Act of 1898, which controlled trustee compensation, did not exclude monies disbursed to the debtor from its compensation formula. That section employed a formula based on “all moneys disbursed or turned over . . . to any persons, including lienholders...”

I have been unable to find any legislative history explaining the reason for the change.

The Problem

The clerk of the bankruptcy court frequently does not send out notice to creditors soliciting the filing of proofs of claim until the trustee has established there are funds for distribution. See Bankruptcy Rules 2000(a) and 3002(c)(5). Despite the notice, creditors often do not file proofs of claim. Thus, the estate is left with a significant surplus to distribute to the debtor. This may be caused by assignments of claims, changes in a creditor’s addresses, long delays between the commencement of the bankruptcy and the transmission of the notice, or simply creditor neglect.

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<sup>1</sup> In my view, §§326(a), 330(a)(1), 330(a)(2) and 330 (a)(7) should be completely overhauled to make absolutely clear that the court should treat the §326(a) formula as a mandatory trustee commission except in extraordinary circumstances. See *In re Rowe*, 750 F.3d 394 (4 Cir. 2014). However, since the focus of the Commission is on consumer bankruptcy, I have limited my comments to matters typically involving consumer debtors.

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September 1, 2017

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Faced with a "surplus" case, trustees are motivated by self-interest to track down creditors to persuade them to file claims. The trustee may also have a disincentive to object to an invalid claim. These solicitations place an undue burden on the trustee to assist non-responsive creditors and also raises questions about whether the solicitation of claims is consistent with the trustee's duties to the estate. The solicitation of claims can reduce the distribution to the debtor, or in some cases, other creditors whose distributions are diluted.

§326 also treats a trustee unfairly. The amount of work needed to liquidate and administer an estate for creditors' benefit does not change when a portion of the estate funds are disbursed to the debtor.

I do not see any sound policy underlying the exclusion for distributions to the debtor. At most, the exclusion should be limited to a distribution of exempt property.

### The Solution

To remedy the situation, I believe the Commission should consider providing the trustee with a commission on distributions to the debtor.

McGuireWoods LLP

**STATEMENT OF JOHN D. MCMICKLE/DRAFT**

**Summary of Statement**

The ABI Commission can play a valuable role in vetting bankruptcy policy proposals to assist Congress when or if Congress considers consumer bankruptcy reform proposals. In order to ensure that the Commission's work resonates with policy makers, I would suggest that all stakeholders be integrated in the process for developing Commission recommendations. I would also point out that, as an overriding principle, Congress prefers predictable legal systems that produce predictable results. Thus, in my view, the Commission should be mindful that proposals that create uncertainty would unlikely to meet with broad support in Congress. In other words, the Commission should propose reforms that rely on bright line rules.

Following the 2008 financial crisis, the bankruptcy system – through enforcement actions and changes to the rules of procedure – has focused heavily on creditor misconduct that may harm consumers. Ten years on from the crisis, I believe there should be an equal focus on debtor attorney conduct that may harm consumers. As discussed below, attorneys representing debtors can be susceptible to many of the same financial motivations as creditors to the detriment of consumers.

Finally, I suggest the ABI Commission propose greater transparency and oversight, increased enforcement and explore the use of software programs to enable consumers to file bankruptcy.

**Overview and Principles for Bankruptcy Reform Proposals**

My name is John McMickle and I am pleased to provide a statement to the ABI Commission on Consumer Bankruptcy. I am not a practitioner in this area of the law. I was, however, the staff counsel for the Senate Judiciary Committee for most of the time that Congress considered BAPCPA. As such, I would like to share my perspective on the process for developing bankruptcy policy in Congress. Finally, from a consumer protection perspective, I suggest greater oversight of all stakeholders in the bankruptcy system.

As an initial matter, I would encourage the Commission to seek input from everyone. When or if Congress decides to revisit consumer bankruptcy

issues, the Commission can play a valuable role in vetting various reform proposals. When I worked for the Senate, there was a strong perception in Congress that the National Bankruptcy Review Commission had not fully included all points of view. This perception was reinforced by individual commissioners who believed the process had been unfair and slanted. As a result, many of that Commission's proposals were viewed with caution. It would be a mistake and lost opportunity, in my view, for the ABI Commission to labor long and produce a similar result.

At the very beginning the bankruptcy reform process that led to the enactment of BAPCPA, in the late 1990s, Congress made a fundamental policy decision to reduce the amount of discretion in the bankruptcy process. This decision was premised on the belief that a rules-based system is preferable for all participants. Policy makers believed that there was simply too much variation under prior law that resulted in less consistent legal outcomes to the detriment of the US economy. Stated another way, increased discretion correlates to increased variability and Congress tends to prefer legal frameworks with the predictable results (even if that goal is not perfectly achieved as was the case with BAPCPA.)

The evolution of the means test for determining chapter eligibility illustrates this point. Initially, the Senate passed legislation that simply removed certain legal barriers to creditor-initiated abuse motions with little in the way of guidance for judges to evaluate 707(b) motions. The House of Representatives, on the other hand, passed legislation that provided objective, bright line standards for determining which prospective debts belonged in a repayment plan. As happens in Congress, the two bodies met in a conference committee and reconciled the two approaches. The Senate agreed to bright line standards, but also insisted on exceptions. The essence of this conceptual compromise laid the groundwork for the current means test.

It also became clear to me during the deliberations on bankruptcy reform that all sides of the bankruptcy equation were advocating for narrow parochial interests. Car lenders sought to protect liens on automobiles, credit card companies wanted to decrease losses from customer defaults, student lenders wanted to reduce underwriting risk by preventing the discharge of student loans and attorneys representing debtors sought to protect fees and reduce legal risk by opposing various proposals related to attorney conduct.

For policy makers, creditor interests are straightforward. Creditors seek to ensure repayment of loans and the protection of collateral. Debtor attorney interests were less clear at first blush. I believe it is important to understand that, like various creditors, debtor attorneys have parochial self-interests. This notion is not to imply that debtor attorneys are in some way less trustworthy than other participants in the bankruptcy process, merely that policy makers may view them as stakeholders with unique financial interests.

The efforts to ensure payment of attorneys' fees provides a clear example. On the one hand, during the debate on bankruptcy reform, many arguments were made by debtor attorney representatives that excepting debts from discharge would burden the fresh start. On the other hand, debtor attorney representatives and others have argued attorney fees should be excepted from discharge. There is, of course, nothing inherently wrong with a creditor - in this case an attorney - seeking payment for services rendered. My point is simply that attorneys-as-creditors advocate for policy outcomes that support their own financial self-interest.

The growth of third party financing for attorneys also shows how attorneys may seek income in ways that can be injurious to clients. As I will discuss below in more detail, when an attorney functionally receives his or her payment for services from third party, legitimate questions may arise as to the opacity of financing arrangements. In fact, Congress has examined this issue in hearings, and I understand that legislation is being drafted to require greater disclosure of such financial arrangements.

The attorney-as-stakeholder dynamic is further illustrated by the resistance to Section 526, which among other things prohibits attorneys from counseling a client to incur debt in contemplation of bankruptcy. Such conduct was viewed as abusive and contrary to the "clean hands" required of a litigant seeking extraordinary equitable relief. The opposition to this proposal in Congress colored the view of many policy makers. As we know, the Supreme Court later unanimously upheld this prohibition in the *Milavetz* decision.

In short, to the extent that the ABI Commission makes recommendations to further increase predictability, and balances the interests of all stakeholders, I believe – based on my experience - such proposals may have broad support

in Congress. If, on the other hand, the ABI Commission makes recommendations that single out certain creditors for particularly favorable treatment while disadvantaging others, I would suspect that Congress would view such ideas with caution.

Finally, I would raise a new consumer protection concern that has received much attention in Congress recently. Arising from a bankruptcy case in North Carolina, *In re Garlock Sealing Technologies, LLC*, there is credible evidence that claims filed by individuals in mass tort Chapter 11 cases are false or fraudulent. The evidence to date seems to indicate that attorneys for consumers who have claims have advised clients to make false representations in Proofs of Claim, 2019 statements and demands filed with post-confirmation trusts. These assertions may directly conflict with statements made in state courts. In my view, the ABI Commission should consider recommendations to require audits and review of claims filed by tort plaintiff attorneys against post-confirmation trusts, to include comparisons with claims made in state court litigation. Such a proposal would also reinforce the recommendations of the ABI Commission to the Reform of Chapter 11, which pointed out the need for greater transparency for post-confirmation trusts.

### **The Next Step in Consumer Protection in the Bankruptcy System**

As is well known, as a result of the surge in delinquencies and home foreclosures arising from the 2008 financial crisis, the US Trustee Program was involved securing in the National Mortgage Settlement. Under this agreement, the Department of Justice and 49 states reached a settlement agreement with the nation's five largest mortgage servicers to address mortgage servicing, foreclosure, and bankruptcy practices. This settlement was approved in 2012. At the time, the US Trustee Program described the National Mortgage Settlement as "the largest consumer financial protection settlement in United States history."

Whatever criticism may be leveled at particular elements of the National Mortgage Settlement, it is surely not controversial to say that all actors in the bankruptcy system – including mortgage creditors - must act with integrity to ensure that system operates in a balanced, transparent way.

Beginning under the prior Administration in 2016, the US Trustee Program seemingly turned more of its attention to protecting consumers and the

bankruptcy system from misconduct by debtor attorneys. I believe this is a positive development and would be supported by the Congressional champions of BAPCPA.

As mentioned earlier in my statement, attorneys representing consumer debtors are best viewed as one of many stakeholders with specific financial interests of their own. Just as creditors can bend the rules in order to maximize recoveries in a bankruptcy case, so too can debtor attorneys who seek to maximize fee income.

Viewed from this perspective, one can see a clear need for independent oversight of debtor attorney business practices to ensure that the financial interests of an attorney do not conflict with or override the financial interests of the client. For instance, BAPCPA mandated certain disclosures in advertising by debtor attorneys, mandated fee disclosure and required certifications by attorneys that reaffirmation will not be subject debtors to an undue hardship. In addition, the law also provided for fee limitations to prevent non-attorney petition preparers from overcharging consumers.

There are recent examples of the financial interests of attorneys possibly overriding the interests of consumers. The so-called “No Money Down” cases from California are one such example. According to court documents, in these cases, attorneys offering legal services for consumers seeking to file bankruptcy failed to follow the advertising mandates mentioned above, failed to disclose the financial interests of third party lenders and failed to disclose income received by clients. As an article in Bloomberg Law noted, in one case, the client unknowingly paid a lender interest and fees amounting to 40 percent. As I understand it, in these cases, an attorney offers to prepare and file a bankruptcy election for no fee. However, the consumer agrees to pay the attorney for post-bankruptcy services, often for a set amount. A factor then advances to the attorney a discounted amount and bills the client for the full fee. It appears, based on press reports and legal documents that the consumer is not aware of the financial arrangement between the law firm he or she has retained and the factor.

I would suggest that failure to disclose such financial relationships is highly inconsistent with protecting consumers. The CFPB and consumer groups have routinely criticized hidden fees and expenses and used the legal process to compel transparency.

The same principle should apply to attorneys representing debtors, perhaps to an even greater degree because – unlike a credit card or pre-paid card company seeking a new customer – an attorney has a fiduciary duty to his or her clients.

The ABI Commission should consider recommending that all terms and provisions of any agreement used by an attorney that involves factors or other providers of credit be disclosed on a standard form created by the Judicial Conference. The Commission should also recommend that Congress ask the GAO to survey the use of factors and other providers of credit to determine the extent of this business practice and to determine whether additional rules should be adopted.

The monetary sanctions leveled against Upright Law provide another example of the need for increased consumer protection. In this case, debtors were counseled to engage in sham transactions with a towing company and as a result of “high pressure sales tactics.” The judge in that case specifically noted that UpRight Law focused on “cash flow over professional responsibility.” While this case is on appeal, the comments of the judge are noteworthy.

Unfortunately, in some instances, there may even be examples of debtor attorneys furthering their financial interests at the expense of the clients in a manner that disproportionately affect African American consumers. Pro Publica and the Atlantic Monthly collaborated to publish an article that reveals minority consumers are often steered into Chapter 13 repayment plans simply because the attorney representing the consumer can be more easily compensated. In the article, a Memphis bankruptcy judge specifically cites attorney compensation as a primary driver for filing Chapter 13 bankruptcy cases. As the author of the Pro Publica article noted, “an entrenched legal culture has made bankruptcy a boon for attorneys while miring clients” in a cycle of futility. In other words, the economic motives of attorneys – rather than the best interests of consumers – can drive bankruptcy filing decisions. This situation is clearly ripe for consumer protection enforcement initiatives.

There are of course many debtor attorneys who provide a valuable service to consumers in need, just as there are many lenders who provide credit to consumers in need. The lesson of the “Zero Money Down” cases and UpRight is to understand that consumers can be helped or harmed by

creditors *and* by debtor attorneys. The legal system should be there to guard against abuse that might arise from any quarter. Accordingly, I believe the ABI Commission should recommend that the Justice Department, perhaps in conjunction with state authorities, be directed to devote additional resources to investigating attorney-as-creditor conduct to ensure consumer protection.

Of note, there is a possible a technology-based solution to some of these financial concerns. I would encourage the ABI Commission to recommend the use of software-based programs that would permit consumers to file bankruptcy without the need for an attorney or other professional. Just as tax preparation software has revolutionized the tax filing process for low-to-moderate consumers, bankruptcy preparation computer programs could provide consumers better and less expensive access to bankruptcy court.

### **Recommendations and Conclusion**

Thank you for this opportunity to provide my perspective. In general, proposals for reform should rely on clear rules that promote uniformity and predictability, based on input from borrowers, lenders and other stakeholders. To summarize, I would suggest the ABI Commission consider making the following specific recommendations:

- The ABI Commission should consider recommending that all terms and provisions of any agreement used by an attorney that involves factors or other providers of credit be disclosed on a standard form created by the Judicial Conference.
  - The Commission should also recommend that Congress ask the GAO to survey the use of factors and other providers of credit to determine the extent of this business practice and to determine whether additional rules should be adopted.
- The ABI Commission should consider recommendations to require audits and review of claims filed by plaintiff attorneys against post-confirmation trusts, to include comparisons with claims made in state court litigation.
- The ABI Commission should recommend the use of software-based programs that would permit consumers to file bankruptcy without the need for the use of an attorney or other professional.

- The ABI Commission should recommend that the Justice Department, perhaps in conjunction with state authorities, be directed to devote additional resources to investigating attorney-as-creditor conduct to ensure consumer protection.

**Lawless, Robert M**

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**From:** Andy Miofsky <ndinstl@gmail.com>  
**Sent:** Thursday, April 20, 2017 12:21 PM  
**To:** ConsumerCommission@abiworld.org  
**Subject:** Standardization of Chapter 7 and Chapter 13 Trustee Methods of Document Delivery  
**Attachments:** 0 BANK Trustee Document Requirements.pdf

Mr. McGuire: Are you listening?

Benjamin: Yes, I am.

Mr. McGuire: **Plastics**.

Benjamin: Exactly how do you mean?

Mr. McGuire: There's a great **future** in **plastics**. [From: The Graduate 1967.]

I practice exclusively in the Southern District of Illinois where there currently are five different trustees, one Standing Chapter 13 Trustee and four Chapter 7 Trustees. The Code and Rules specify certain documents a debtor must provide the assigned case trustee prior to the Section 341 Meeting of Creditors. Each trustee in the Southern District of Illinois has particular requirements regarding acceptance of those documents, a copy of the requirements is attached to this message as a .pdf file. My comment only concerns the method by which a debtor delivers documents to the trustee. This is not a discussion of the type of documentation required.

Some trustees accept all documents via email, usually through a third party portal.

Other trustees require all documents via hard paper copies.

Some trustees still require hard paper copies of the complete Voluntary Petition and Schedules [PetScheds], even though they receive the original digitized version via Case Management/Electronic Case Files [CM/ECF].

A Debtor's failure to comply with these particular requirements by a date certain will in some cases result in the trustee rescheduling the Meeting of Creditors, thus delaying case administration and requiring all participants, including creditors, debtors, counsel and associated staff, to provide for another event on their daily calendar.

Just like Benjamin would learn about plastics 50 years ago, today's future is **optimization** - the action of making the best or most effective use of a situation or resource.

I ask for a rule standardizing the manner in which documents are delivered to the trustee. Each trustee should utilize their own original document of the PetScheds that they already receive from CM/ECF instead of requiring a hard copy from debtor. Each trustee should accept all other documents via email, preferably via the same third party portal, for example, like Epic Systems Document Delivery Portal, or though other portal systems as may be appropriate.

Currently, pro se debtors comply with document delivery requirements as best they can and in most cases without regard to the requirements imposed upon represented debtors. These methods could improve by standardization or they could remain unchanged. Clerks could provide scanning and email delivery solely for pro se debtors or trustees could accept hard copy documents as an exception only in pro se cases, while requiring trustees to accept email documents in all other cases.

Standardization of document delivery would provide the industry with the following benefits. It would increase efficiency by insuring accurate and complete delivery of all documents in a speedy manner via

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internet. Standardization would reduce photocopying, postage and hard copy storage and document shredding costs.

Clerks of each Bankruptcy Court maintain records of the amount of Chapter 7 Trustee commissions earned each year above and beyond the minimum per case fee. The monthly expense of a portal delivery system would be a minor cost of doing business that is affordable to trustees and would be offset by the time, efficiency, and savings achieved from eliminating hard copy document handling across the industry.

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618.931.1313

[www.ABankruptcyLawyer.net](http://www.ABankruptcyLawyer.net)  
[www.IllinoisForeclosureAttorney.com](http://www.IllinoisForeclosureAttorney.com)  
[www.BankruptcyLawNetwork.com](http://www.BankruptcyLawNetwork.com)

NACBA State Chair-Downstate Illinois

# AMERICAN BANKRUPTCY INSTITUTE

## Chapter 7 and 13 Trustee Requirements Southern District of Illinois (as of June 1, 2012)

Revised 11/29/2016

Trustee (Listed in alphabetical order)	Petition, Schedules, Statement of Financial Affairs, & Statement of Current Monthly Income	Tax Returns - State and Federal	Payment Advices (evidence of payment received from employer 60 days prior to filing)	Bank Statements
<b>Bruegge, Robert T</b> Chapter 7 Trustee 130 North Main St PO Box 510 Edwardsville, IL 62025 <b>Email:</b> rbtrustee@lawdept.net <b>Phone:</b> (618) 301-4878	Through ECF - paper copies not needed	Submit through Blue Syllus	Submit through Blue Syllus	Submit through Blue Syllus
<b>Eggmann, Robert E</b> Chapter 7 Trustee 1606 Eastport Plaza Dr, Suite 110 PO Box 479 Collinsville, IL 62234 <b>Email:</b> reetrustee@carmodymacdonald.com <b>Phone:</b> (618) 222-1900	Through ECF - paper copies not needed	E-mail Preferred - If capability not available, paper copies.	E-mail Preferred - if capability not available, paper copies.	E-mail Preferred - if capability not available, paper copies.
<b>Frazier, Dana S</b> Chapter 7 Trustee PO Box 159 Murphysboro, IL 62966 <b>Email:</b> frazierlaw@frontier.com danasuefrazier@frontier.com <b>Phone:</b> (618) 687-5707	Paper Copies	Paper Copies	Paper Copies	Paper Copies
<b>Hagan, Cynthia A</b> Chapter 7 Trustee 206 W College St Suite 12 Carbondale, IL 62901 <b>Email:</b> CynthiaAHagan@aol.com <b>Phone:</b> (618) 529-2274	Paper Copies	Paper Copies	Paper Copies	Paper Copies

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<p><b>Samson, Donald M</b>                  Chapter 7 Trustee                  226 W Main St                  Suite 102                  Belleville, IL 62220  <b>Email:</b> dnldsamson@gmail.com  <b>Phone:</b> (618) 235-2226</p>	<p>Paper Copies</p>	<p>Paper Copies</p>	<p>Paper Copies</p>	<p>Paper Copies</p>
<p><b>Simon, Russell C</b>                  Chapter 13 Trustee                  24 Bronze Pointe                  Swansea, IL 62226  <b>Email:</b> See Trustee Website for                  Specific Email Addresses  <b>Phone:</b> (618) 277-0086  <b>Fax:</b> (618) 234-0124  <b>Website:</b> www.simonch13trustee.com</p>	<p>Through ECF - paper copies                  not needed</p>	<p>E-mail or Fax                  Preferred (See Trustee                  Website for specific e-                  mail addresses) - If                  capability not                  available, paper                  copies.</p>	<p>E-mail or Fax Preferred                  (See Trustee Website for                  specific e-mail addresses) -                  If capability not available,                  paper copies.</p>	<p>E-mail or Fax Preferred                  (See Trustee Website for                  specific e-mail addresses) -                  If capability not available,                  paper copies.</p>

STATEMENT OF CATHLEEN MORAN  
MOUNTAIN VIEW, CALIFORNIA  
ABI CONSUMER LAW COMMISSION  
MAY, 2017

I've practiced bankruptcy law in the Silicon Valley of the Northern District of California, for 37 years. I've been a bankruptcy specialist, certified by the California State Bar Board of Legal Specialization, for 21 years.

I've divided my comments into two general categories: the specific and the systemic. Both need change if bankruptcy is going to realize its potential to enable individuals to lead financially stronger lives.

### **Specific Changes**

**Student loans** I'm sure you'll hear from others much about student loan discharge and the need for a better balance between the interests of student loan lenders and guarantors and the interests of borrowers. Short of changing the test for the discharge of student loans, there are two lesser changes which would aid borrowers in dealing with their loans. One, recognize student loans as long term debt on which payments can properly be maintained through out the life of a Chapter 13 plan. Allow separate classification of student loans in the plan. Alternatively, permit debtors to continue to service student loans directly. Where I practice, neither are presently permitted. Instead we effectively require debtors to default on their student loans and incur significant collection costs in addition to the oft crippling loans themselves.

**Use Chapter 13 to practice savings** No credible financial counselor would craft a budget for a client that had them spending every penny they take in. Yet that's how our Chapter 13 calculation of monthly disposable income works. The means test makes no allowance for routine replacement of household goods, the repair of appliances, much less the unexpected or catastrophic event. Without an approved mechanism for an emergency fund, a bump in the financial road leads to plan defaults, the need for plan modification, additional attorneys fees, or dismissal. Even when a family can get through 5 years without some unplanned expense, the system has missed an opportunity to build a saving habit. Three or five years of practice at saving would be more powerful in the future lives of debtors than a one hour financial management class.

**Retirement** The bankruptcy system contributes to our national attitude that retirement will take care of itself. That's an exercise in wishful thinking. Saving for retirement should be a reasonable and necessary living expense. To conduct ourselves as though it isn't is to perpetuate the hope that old age will take care of itself, magically. Our current system allows only retirement savings where contributions are mandatory; yet fewer and fewer individuals have the kind of employment that requires retirement savings.

**Early plan payoff** Chapter 13, as it operates, is divorced from financial common sense when it resists early payoff of Chapter 13 plans. Whether by reason of improving finances or an unexpected windfall, or the willingness to reach into exempt assets to fund plan pay off, too many Chapter 13 trustees oppose early payoff. What creditor would reject payment of \$100 now, in favor of 10 future payments of \$10.

Which is a segue to attitudinal changes within the system.

### **Systemic Changes**

**Chapter 13 as serving time** The system's approach to early payoff is an expression of the ACP as a sentence of financial incarceration to be served. With a system that exposes any improvement in circumstances to capture for the benefit of creditors, it becomes harder for counsel to pitch the advantages of Chapter 13 over alternatives. Chapter 20 looks better. Debt settlement which fixes the payment schedule at the outset look better. The risks of Chapter 13 are becoming disproportionate to the benefits of the shrunken Chapter 13 discharge.

**Conditioning access increases costs disproportionately** The misbegotten idea that consumers were flocking to bankruptcy in an irresponsible attempt to avoid paying their just debts has led to the enormous increase in the cost of bankruptcy representation. The means test, the need for supporting documents, and the threat of having to defend your need for bankruptcy against a taxpayer funded lawyer from the Office of the US Trustee with a prosecutorial mentality makes bankruptcy difficult for the unsophisticated or the stressed consumer. My sense is that trustees feel their supervisors expect them to act as inquisitors. Yet the statistics about "abusive filings" suggest this is a remedy without an ailment. We've just succeeded in pricing bankruptcy out of the reach of too many.

**Fair compensation of counsel** While the Code and pronouncements from the bench mouth the platitudes about compensating counsel for consumer debtors consistent with fees paid to lawyers in other fields, it doesn't happen consistently enough to attract capable and committed lawyers to this field. Court sanctioned "flat fees" are crafted not so much to pay the average value of services, but rather the minimum that a consumer case could cost. Judges apparently fear overpaying the journeyman lawyer more than they do starving the capable out of the field. The issue of how fees for representation after plan completion but before discharge, such as lien stripping and Rule 3002.1 is without guidance or procedures.

# AMERICAN BANKRUPTCY INSTITUTE

**Lawless, Robert M**

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**From:** Cathy Moran <cathymoran@gmail.com>  
**Sent:** Saturday, May 06, 2017 9:46 AM  
**To:** ABI consumer commission  
**Subject:** Compensation of Debtor's Counsel

Thank you for the opportunity to address the Commission this morning. I am buoyed by the interest in making bankruptcy work better for consumers.

I've written several pieces on the issue of attorneys fees that might be useful.

No Look Fees <https://goo.gl/hLSiqg>

Fees Cut <https://goo.gl/oGkJ3V>

Gap Between Judges & Attorneys Over Fees <https://goo.gl/owrKAU>

I would be glad to provide whatever help might be useful to the Commission.

--

Cathy Moran  
ND CA  
[www.bankruptcyinbrief.com](http://www.bankruptcyinbrief.com)

**Lawless, Robert M**

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**From:** Jeanne Mount <jgriffinlion@yahoo.com>  
**Sent:** Thursday, April 27, 2017 10:47 PM  
**To:** ConsumerCommission@abiworld.org  
**Subject:** input

The bankruptcy courts would be better off using the ADR process a lot more. They would also do much better by not deferring to lending institutions, and just following the law as its written. They should be using the ADR process to assist Chapter 13 plans. They have it, but they don't appear to use it.

It's confusing for the bankruptcy courts to have their own rules based on the federal civil court rules. There should be one set of rules, not two sets which are substantially similar, with one based on the other.

Jeanne Mount  
9846 Portola Drive  
Beverly Hills, CA 90210

*Reporter's Note: This was attached to an email from Jeff Moyer, chapter 7 trustee in the W.D. of Michigan with the note "These ideas were an amalgamation from 3 panel trustees here in the Western District of Michigan."*

These responses were formulated collectively by 3 panel Chapter 7 trustees from the Western District of Michigan, the same panel as Judge Jim Boyd and Kelly Hagan, both former NABT presidents.

1. Should trustees get a raise on no asset cases and if so how should it be paid?

Two words. April 1994. That's how long it has been since the fee for "no asset" cases was raised. No government employee, agency, or government-controlled entity has gone 23 & ½ years without their compensation being raised. For the first 10 years after the Bankruptcy Code was enacted, trustees got paid \$45 out of the \$75 filing fee at that time, or 60% of the entire filing fee. **Now** trustees get \$60 out of a filing fee of \$335 (~17.9%). Where did all that increase in filing fees go, you ask? The Bankruptcy Court now takes substantially more, the Administrative Office (AO) gets more, and the US Trustee's office is funded in large part by those increases. Everyone involved has had their compensation increased, - except the party who actually does all the work to administer these "no assets" cases, - the panel trustees themselves. How paid? Raise the Chapter 7 filing fee to \$400 and raise the trustee's fee to \$120 per case. Again, - "April 1994".

2. How do we pay trustees for *in forma pauperis* cases?

Two (or 3)-part solution. First, take all the checks from TFR's that are under \$5.00 which are currently forfeited to the Bankruptcy Court and instead forward them to some central fund to be distributed pro rata after the end of the year based on how many IFP cases, or filing fees by installments cases that didn't complete their installments, that each trustee had. The amount each respective trustee was 'shorted' each year is childishly easy to compute by the Court's own computer records. Secondly, you could have interest at the Federal judgment interest rate (or the Prime rate) accrue on those funds interplead into the Court registry after trustees exhaust all means of finding a new, valid address for a creditor who had previously filed a Proof of Claim, was entitled to a distribution, but was unable to be located. Finally, amend FRBP 1006(b) and (c) to **require** a Court hearing for each IFP waiver and each filing fee by installment requested. That alone would substantially reduce both filing fees by installment (which are being greatly abused in this District) and IFP waivers. To the extent that would have a mild chilling effect on those least able to afford paying the full filing fee up front, it would at least require the debtors to show they have a sincere and legitimate interest in seeing their bankruptcy proceed ("skin in the game"). It certainly is no more of an inconvenience to the debtor than to require trustees to fully administer a dozen or possibly many more cases per year for no compensation whatsoever.

3. Should trustees be able to hire their own firms as attorneys or accountants?

Yes. It's more efficient from a cost standpoint. It allows the trustee to administer smaller cases without retaining outside counsel that simply won't take those smaller cases, particularly in Districts which have 'caps' for attorneys' fees in trustee cases. The trustee has the best understanding of the overall case and all the information available, and will be able to better minimize administrative costs to the estate.

a. What to do with student loans?

Make all student loans dischargeable if (A) ten (10) or more years have passed since all the student loans first became due, and (B) the debtor has been unable to work in the field of the degree they were pursuing or received their degree in, for more than three (3) years cumulatively, within the previous 10 years prior to filing bankruptcy.

b. No comments.

c. No comments.

d. Do we really need credit counseling and post-petition debtor education?

Both are complete and needless wastes of everyone's time, effort and money. They have created a cottage industry for fraud and abuse and are not even consistently enforced by the US Trustee, or the Court, and serve no realistic benefit whatsoever. Laudable concept, miserable application in reality.

e. No comments.

f. How happy are you with the new forms?

They are an abomination. They are a horrible exercise in letting bureaucrats with no first-hand knowledge of administering Chapter 7 cases, create forms that do nothing more than facilitate easier data collection. They are confusing. They make it difficult to determine which spouse, owns which asset. They make it difficult to determine marital status. They create fodder for unnecessary objections to exemptions by the whole "100% of value" block. Schedules A and B need to be separate. Schedules E and F need to be separate.

g. What information should a debtor's counsel supply the trustee prior to the 341 meeting and how should it be supplied.

Last year's tax returns, - Federal, State and any City returns; minimum of 60 days pre-petition paystubs; minimum of 90 days of pre-petition bank statements for every account debtor[s] are signatories on; any Divorce judgments within previous 6 years; copies of most recent statement for all retirement accounts; copies of all vehicle titles; copies of all recorded mortgages and deeds to all real property. All should be uploaded and transmitted to trustee electronically by service provider a minimum of seven (7) days prior to the scheduled §341 meeting.

- h. What if the debtor doesn't disclose property? Is it still deemed abandoned by the trustee?

??? Unsure of this question. This is already fully (and properly) addressed by the provisions of §554(d).

- i. Do we need a ground for objecting to exemptions for concealed property? *Law v. Seigel* problem.

Yes. Make the provisions of FRBP 4003(b)(2) include reference to some definition that makes any property not disclosed by proper amendment to Schedule A or B prior to the earlier of entry of the Discharge, or within 90 days after the trustee closes the §341 meeting, presumptively fraudulent. Let the debtor prove up why he, she or they failed to disclose that property after filing schedules under oath and penalty of perjury, and then later testified under oath at their §341 meeting and again failed to disclose that property after direct questioning by the trustee as to the accuracy and completeness of their schedules.

Between *Law v Seigel* and *Ellman v Brown* (6<sup>th</sup> Circuit), the debtors make a mockery out of concealed property which the trustee subsequently discovers, based on the only real possible penalty being a §727 revocation of Discharge action by the trustee, something most Bankruptcy Courts are loathe to grant upon even the flimsiest assertion by the debtor of 'I forgot'.

**Lawless, Robert M**

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**From:** Doug Neway <dneway@ch13jaxfl.com>  
**Sent:** Thursday, June 29, 2017 2:12 PM  
**To:** ConsumerCommission@abiworld.org  
**Cc:** Doug Neway  
**Subject:** Chapter 13 Working Group

Dear Working Group Members:

I am writing to express my thoughts on the report that you are undertaking to presumably improve the Consumer Bankruptcy practice. I don't have any specific suggestions for change, but rather would ask you to please be mindful of the impact your recommendations may have.

For more than the past year, the Middle District of Florida has been working on Districtwide Forms and Administrative Orders to address the coming Amendments to the Federal Rules of Bankruptcy procedure. Most notably creating a model plan to opt out from the National Form Plan and most recently establishing new procedures and practices to address the changes contained in the rules that were made to accommodate the National Form Plan that we are opting out from. Interestingly, I am aware of only a handful of districts nationwide that are not opting out from the National Form Plan, yet the rule changes supporting the National Form Plan impact us all. The way I see this is that a small group on the rules committee came up with the idea of a national plan. Despite the feedback that they received during the long process of enacting it, which seemed overwhelmingly opposed to it, the committee refused to yield. Yes, there were revisions to try and improve on a bad idea, but it was still a bad idea.

Bankruptcy practice and especially Chapter 13 practice must be efficient and affordable for debtors. Each Court establishes a culture that everyone adopts and allows each constituency to understand how things will progress through a case and also establishes a presumptively reasonable fee that debtors may rely upon. I'm unaware of any Chapter 13 Trustee or bankruptcy judge that isn't always willing to make improvements to their procedures to create a more thorough and efficient system. However, any revisions are to the local culture and customs and practices. The history of these customs are understood and this allows for reason and logic to prevail. I must assume that at the very least, by now you have seen this. Customs and practices in New York differ from Florida which differ from Alabama, which differ from Nevada and so on. To come in with a uniform overhaul is a tremendous disruption that often times results in greater work by attorneys and ultimately, greater cost to the debtors.

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My hope is that you consider the problems associated with wholesale change and recognize that bankruptcy courts, clerks and trustees in cooperation with debtor and creditor bars are best suited to establish procedures for their local communities.

**Douglas W. Neway**

Chapter 13 Standing Trustee  
U.S. Bankruptcy Court, Middle District of Florida  
Jacksonville Division  
P.O. Box 4308  
Jacksonville, Florida 32201-4308  
904-358-6465 Phone  
904-634-0038 Facsimile

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

### Lawless, Robert M

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**From:** Mike Nicastro <[mnicastro@nicastropc.com](mailto:mnicastro@nicastropc.com)>  
**Sent:** Monday, July 17, 2017 1:12 PM  
**To:** Lawless, Robert M  
**Cc:** J. Scott Bovitz; Bruce Alan Markell; Randall Dunn  
**Subject:** RE: RE: Bovitz and ABI

Prof. Lawless:

Yes, feel free to treat the email as correspondence.

Thank you,

Mike

### **PLEASE NOTE OUR NEW FIRM NAME AND CONTACT INFORMATION**

**Nicastro & Associates, P.C.**  
**2 Park Plaza, Suite 650**  
**Irvine, CA 92614**  
**Tel: (949) 534-6990**  
**Fax: (949) 590-4987**

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**From:** Lawless, Robert M [<mailto:rlawless@illinois.edu>]  
**Sent:** Monday, July 17, 2017 8:01 AM  
**To:** Mike Nicastro <[mnicastro@nicastropc.com](mailto:mnicastro@nicastropc.com)>

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**Cc:** J. Scott Bovitz <bovitz@bovitz-spitzer.com>; Bruce Alan Markell <bmarkell@law.northwestern.edu>; Randall Dunn <dunnrandy28@gmail.com>  
**Subject:** RE: RE: Bovitz and ABI

Mr. Nicastro:

I am the reporter for the ABI Commission on Consumer Bankruptcy. With your permission, can I treat your email to Bruce Markell as correspondence to the Commission? The practical upshot is that I will put the email in a shared folder to which all the persons working with the Commission have access.

Bob

--

Robert M. Lawless  
Max L. Rowe Professor of Law  
Co-director, Program on Law, Behavior & Social Science  
University of Illinois College of Law

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**From:** Bruce Alan Markell [<mailto:bmarkell@law.northwestern.edu>]  
**Sent:** Saturday, July 15, 2017 6:03 AM  
**To:** Randall Dunn <[dunnrandy28@gmail.com](mailto:dunnrandy28@gmail.com)>  
**Cc:** J. Scott Bovitz <[bovitz@bovitz-spitzer.com](mailto:bovitz@bovitz-spitzer.com)>; Mike Nicastro <[mnicastro@nicastropc.com](mailto:mnicastro@nicastropc.com)>; Lawless, Robert M <[rmlawless@illinois.edu](mailto:rmlawless@illinois.edu)>  
**Subject:** Fwd: RE: Bovitz and ABI

Randy:

Mike Nicastro sent me (via Scott Bovitz) the following issue that he is seeing in his practice. It seems to be something that your Chapter 7 committee would be interested in, so I am forwarding it to you, with copies to Mike.

I hope all is well.

BAM

--

Bruce A. Markell | Professor of Bankruptcy Law and Practice  
[bmarkell@law.northwestern.edu](mailto:bmarkell@law.northwestern.edu) | 312.503.4060

On July 14, 2017 at 9:54:31 PM, Mike Nicastro ([mnicastro@nicastropc.com](mailto:mnicastro@nicastropc.com)) wrote:

BAM:

The topic for consideration is the inconsistent application of Section 724 by Chapter 7 Trustees to liquidate debtors' fully encumbered residences where the IRS has a recorded pre-petition lien. Some trustees have taken the position that they can sell debtors' residences without paying the claimed homestead exemption or make a distribution to unsecured non-priority creditors in such circumstances. Trustees are doing this by creating and inserting their post-petition administrative fees and costs in-between the IRS lien and the consensual liens on the residences via their interpretation of the **distribution scheme** in 724. The concept is that the estate's administrative claims (as a priority claim) create a claim that can be paid to satisfy the chapter 7 trustee's duty to make a meaningful distribution to unsecured creditors (their own claim). If this gap then pushes the IRS lien off the value of the property, all the better! Then there is another class of unsecured claim (albeit priority) to be paid from

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the proceeds of the sale. Under this approach, Trustees are incentivized to incur professional fees to create a post-petition unsecured priority claim so they then can use this self-fulfilling claim to assist in the liquidation of the residence.

Allowing trustees generate fees through a practice that renders a debtor homeless, deprives the debtor of his or her homestead exemption, and increases the size of the debtor's non-dischargeable tax debt seems contrary to the legislative purpose underlying the Chapter 7 system. This practice also seems contrary to well-reasoned case authority. When this practice first surfaced under the Bankruptcy Act, it was roundly condemned by the circuits courts, and it is barred by the majority position governing the application of 11 U.S.C. § 363(f) in the case of over-encumbered properties, absent lienholder consent. See Clear Channel Outdoor v. Knupfer, 391 B.R. 25 (B.A.P. 9th Cir. 2008). It is also contrary to the US Trustee's handbook. This handbook requires trustees to consider whether sufficient funds will be generated from a sale to make a meaningful distribution to unsecured creditors, including priority creditors, **before** they elect to administer a case as an asset case. Notwithstanding these authorities, we have seen this practice grow in this district and it appears to be regular practice in some districts around the country. We have cases and briefs on the issue.

As for your committee's consideration, this topic hits three (3) different sections on the overall list of topics: *Committee on Case Administration & the Estate* - 3(a) Inconsistent application of statutes and 7(a) Trustee's sale of exempt property, as well as, *Committee on Chapter 7 – 2(a) Compensation of chapter 7 trustees*.

Thank you for your consideration,

Mike

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**From:** Bruce Alan Markell [<mailto:bmarkell@law.northwestern.edu>]

**Sent:** Friday, July 14, 2017 11:29 AM

**To:** Mike Nicaastro <[mnicastro@nicastropc.com](mailto:mnicastro@nicastropc.com)>; Bruce Alan Markell <[bmarkell@law.northwestern.edu](mailto:bmarkell@law.northwestern.edu)>

**Cc:** J. Scott Bovitz <[bovitz@bovitz-spitzer.com](mailto:bovitz@bovitz-spitzer.com)>

**Subject:** Re: Bovitz and ABI

Mike:

The committees are already working on a list of topics (those that Scott sent you a link for). So the sooner the better. Absolute deadline would be the the NCBJ, when the last public meeting of the Commission (or one of its Committees) is held. But the longer the delay, the less likely the Commission will feel that it can give the topic fair study.

BAM

--

Bruce A. Markell | Professor of Bankruptcy Law and Practice

[bmarkell@law.northwestern.edu](mailto:bmarkell@law.northwestern.edu) | 312.503.4060

On July 14, 2017 at 7:12:32 PM, Mike Nicaastro ([mnicastro@nicastropc.com](mailto:mnicastro@nicastropc.com)) wrote:

Your Honor:

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What is the deadline to submit my topic?

Mike Nicastro

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Statement of Raymond Obuchowski, Chapter 7 Trustee, to the Committee on  
Chapter 7 for the ABI's Commission on Consumer Bankruptcy  
September 15, 2017

I am Raymond Obuchowski and I am a Chapter 7 panel Trustee and practice law in the State of Vermont for over the past 30 years. My practice, besides being a Trustee, includes the representation of many consumer debtors. I have also handled a majority of the Chapter 11 and 7 business cases filed within the District during that period.

I have been a member of the National Association of Bankruptcy Trustees since 1987, and have served on the Board since 2009. As a Board Member, I have been the Chair of the NABT Rules Committee with my primary focus on addressing NABT's interests with the Advisory Committee on Bankruptcy Rules. While my efforts for NABT have related primarily to the Rules and Forms, my earlier work and review of the impact of fee waiver cases (IFPs) is the basis for my statements today.

With the enactment of BAPCPA, the implementation of the waiver of the Section 1930 filing fee commenced. My interest in fee waivers arose following the settling of the dust of the pre-BAPCPA case surge. In the summer of 2006, the Clerk of our Court commented that case filings were starting to increase. I looked over my new filings and noted the increase didn't help as nearly 10% of my assigned cases were fee waiver cases and that I found myself working for nothing. This led to my interest in the fee waiver provision and eventually to Elizabeth Wiggins and the 1998 Study of the Federal Judicial Center on Implementing and Evaluating the Chapter 7 Filing Fee Waiver Program. Ms. Wiggins was the Project Director. As a result, I conducted a review of the filing trends throughout the country, resulting in the Article and subsequent update for the NABT Journal. These articles have been provided to the Commission in addition to the 1998 FJC Study.

The problem is Chapter 7 trustees are not compensated in IFP cases, and the enactment of the fee waiver program was an "unfunded mandate." Further the failure to compensate Trustees for their work is neither appropriate or fair, nor was nonpayment ever contemplated as part of the Program. In the Pilot Districts for the Fee Waiver program, as reviewed in the 1998 FJC Study, chapter 7 trustees were compensated. Over the past eleven years there has been various discussions of how to address this problem, including remedies similar to the payment of the filing fee by installments of only the Trustee portion of the filing fee. However, the most obvious answer appears to have been overlooked.

As a general matter, Trustees don't oppose the Fee Waiver program, they just oppose the imposition of an involuntary titling by a law that fails to provide for the compensation for services provided.

To put in brief perspective, in the period of October 1, 2007 through September 30, 2016, there were 7,108,564 individual chapter 7 cases filed. IFP cases in which the fee was waived totaled

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231,288 cases, or the equivalent of approximately \$77.4 million of filing fees. Of that amount, \$13.8 million represents the trustee portion of the unpaid filing fee. Based upon an arbitrary average number of trustees serving during that period at 1100 trustees, this equates to slightly over \$1400 per trustee of unpaid fees per year. Effectively, chapter 7 trustees have contributed over nearly \$14 million dollars to the fee waiver program in the past 10 years.

Additionally, there is great geographic disparity as to the impact of the fee waiver program depending upon effective judicial acceptance of the program. Districts like West Virginia - Southern have increased from an initial rate in 2008 of 6.42% to 13.11% in 2016, of the District of Columbia from 5.62% to 16.01%. As of September 30, 2016 at least 5 Districts over the past couple of years have well exceeded 10% IFP cases. This has significant economic impact upon the Trustees in those Districts.

With the problem stated how can it be addressed? A solution has always been out there which doesn't impair the purpose or goal of the Fee Waiver Program. It has been over ten years when I first looked at this issue, and as I prepared for today's testimony and reviewing the 1998 FJC study, I began to really appreciate truly how good the 1998 study was. I knew that there were some pretty smart folks which worked in its preparation, but the realization of the relative accuracy of the Report's projections is impressive. The FJC report utilized 2.9% as the projected IFP filing rate, and the actual results for the period of 2008 to 2016 were 3.25%.

The solution for the problem noted today can be found at page 68 of the FJC Report which addressed the method to fund the Chapter 7 Filing Fee Waiver program. The Fee Waiver program, as envisioned and described in the FJC Study, was not meant to be an unfunded mandate. The Study suggested "the most straightforward way to fund a national program would be for Congress to increase the judiciary's appropriation by this amount, which represents 2/10 of 1% of the judiciary's total 1997 fiscal appropriation."

The report further suggested a secondary method requesting authorization for application of the US Treasury share of the filing fee to a "no year" account to fund the program, the caveat of the Study being that it might be insufficient dependent upon future circumstances as filing rates. However, based upon the current number of cases and even at the increased fee, it appears this would still work.

What I request this Commission to consider in the preparation of its Report, to include the recommendations from the 1998 FJC Study as to address the "unfunded mandate" which in turn addresses the non-payment of chapter 7 trustees in fee waiver cases.

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District Code	District Name	Sum of Total Bankruptcy Filings	Sum of Total Individual Bankruptcy Filings	Sum of Individual Bankruptcy Filings Pro Se	Sum of Individual Bankruptcy Filings Ch. 7	Sum of Individual Bankruptcy Filings Pro Se Ch. 7	Sum of Individual Bankruptcy Filings Pro Se Ch. 7	Sum of Individual Bankruptcy Filings Pro Se Ch. 13	Sum of Individual Bankruptcy Filings Pro Se Ch. 13	Sum of Individual Bankruptcy Filings Ch. 11	Sum of Individual Bankruptcy Filings Pro Se Ch. 11	Sum of Individual Bankruptcy Cases Filing Fee Waived	Sum of Individual Bankruptcy Cases Filing Fee Chapter 7	Fee Waivers as a Percentage of Individual Chapter 7 cases
9/30/2008	ALL Districts	1042806	1028549	64286	672726	39509	353655	24531	1882	235	13776		2.05%	
00	Maine	2800	2740	84	2228	62	502	20	5	2	112		5.03%	
01	Massachusetts	15632	15378	1006	11379	345	3952	652	44	9	304		2.67%	
02	New Hampshire	3676	3612	125	2734	70	872	54	5		48		1.76%	
03	Rhode Island	3919	3888	244	3191	86	697	158			88		2.76%	
04	Puerto Rico	8645	8464	41	2002	10	6410	30	30	1	3		0.15%	
05	Connecticut	7704	7521	539	5738	201	1763	335	19	3	109		1.90%	
06	New York - Northern	10877	10800	301	7784	260	3005	41	5		150		1.93%	
07	New York - Eastern	15498	15327	2336	11574	818	3727	1513	26	5	301		2.60%	
08	New York - Southern	9538	8971	1327	7080	827	1866	498	25	2	247		3.49%	
09	New York - Western	9113	9043	112	6412	77	2621	35	5		82		1.28%	
10	Vermont	1155	1145	28	845	24	297	4	1		51		6.04%	
11	Delaware	2827	2136	230	1305	98	829	132	2		83		6.36%	
12	New Jersey	24764	24174	1433	16212	800	7904	629	58	4	699		4.31%	
13	Pennsylvania - Eastern	11022	10872	653	6312	263	4540	390	19		362		5.74%	
14	Pennsylvania - Middle	8480	8373	217	5564	87	2799	130	8		150		2.70%	
15	Pennsylvania - Western	12733	12551	189	8907	121	3574	65	64	2	233		2.62%	
16	Maryland	16926	16662	1916	10177	742	6393	1166	91	7	360		3.54%	
17	North Carolina - Eastern	8955	8808	146	3313	57	5456	84	34	5	48		1.45%	
18	North Carolina - Middle	6264	6182	94	2931	40	3245	54	4		15		0.51%	
19	North Carolina - Western	6388	6305	116	3799	65	2491	51	14		25		0.66%	
20	South Carolina	7987	7885	220	2861	93	4997	125	27	2	145		5.07%	
22	Virginia - Eastern	19538	19312	761	12122	355	7140	400	50	6	87		0.72%	
23	Virginia - Western	6852	6782	164	4473	75	2290	86	14	2	31		0.69%	
24	West Virginia - Northern	1994	1964	37	1746	19	213	17	4	1	46		2.63%	
25	West Virginia - Southern	3083	3038	124	2725	117	304	7	9		175		6.42%	
26	Alabama - Northern	16114	15998	193	6948	109	9012	84	35		87		1.25%	
27	Alabama - Middle	6415	6368	59	1799	26	4559	33	7		28		1.56%	
28	Alabama - Southern	5049	5011	28	1368	17	3637	11	5		18		1.32%	
29	Florida - Northern	3806	3742	176	2974	135	757	41	10		37		1.24%	
36	Louisiana - Western	10341	10268	112	2876	53	7379	59	6		10		0.35%	
37	Mississippi - Northern	5467	5411	31	2623	18	2775	13	12		6		0.23%	
38	Mississippi - Southern	6349	6295	75	2893	34	3392	40	7		3		0.10%	
39	Texas - Northern	15340	14856	335	6409	139	8417	192	25	4	83		1.30%	
3A	Florida - Middle	38714	37866	4041	24949	2775	12853	1259	60	7	502		2.01%	
3C	Florida - Southern	18563	17996	1947	13150	1137	4807	803	36	6	136		1.03%	
3E	Georgia - Northern	37825	37310	2982	19465	1303	17790	1671	52	8	423		2.17%	
3G	Georgia - Middle	10702	10642	205	3898	85	6726	118	7	1	48		1.23%	
3J	Georgia - Southern	9310	9269	102	1911	36	7346	66	10		34		1.78%	
3L	Louisiana - Eastern	3209	3113	180	1521	47	1587	133	5		10		0.66%	
3N	Louisiana - Middle	1863	1845	88	929	37	914	51	2		6		0.65%	
40	Texas - Eastern	6281	6072	144	3135	53	2923	91	9		24		0.77%	
41	Texas - Southern	12053	11725	622	5149	174	6525	443	46	5	90		1.75%	
42	Texas - Western	10077	9908	249	5087	137	4794	111	25	1	56		1.10%	
43	Kentucky - Eastern	9684	9617	123	7147	112	2463	11	5		190		2.66%	
44	Kentucky - Western	10753	10679	93	7797	68	2870	25	9		160		2.05%	
45	Michigan - Eastern	41227	40904	1742	30622	1369	10259	372	15	1	805		2.63%	
46	Michigan - Western	12113	11972	618	10176	591	1783	25	9	2	129		1.27%	
47	Ohio - Northern	29047	28943	766	21305	417	7618	348	18	1	539		2.53%	

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48	Ohio - Southern	25577	25403	512	16626	339	8764	173	10			272	1.64%
49	Tennessee - Eastern	14922	14864	124	8581	66	6260	58	16			70	0.82%
50	Tennessee - Middle	11551	11410	157	5811	57	5560	97	37	3		55	0.95%
51	Tennessee - Western	18694	18629	167	4609	64	14014	103	6			86	1.87%
52	Illinois - Northern	38119	37640	1593	25469	980	12127	611	43	2		425	1.67%
53	Illinois - Central	8777	8720	77	6778	60	1933	17	3			16	0.24%
54	Illinois - Southern	5701	5661	69	3113	59	2536	9	9			49	1.57%
55	Indiana - Northern	14041	13946	412	10435	296	3491	116	14			6	0.06%
56	Indiana - Southern	23494	23343	504	15829	402	7490	99	19	3		217	1.37%
57	Wisconsin - Eastern	13706	13639	732	10005	626	3624	106	3			329	3.29%
58	Wisconsin - Western	6574	6536	144	5600	125	915	19	17			65	1.16%
60	Arkansas - Eastern	8085	8047	51	3941	29	4099	22	3			77	1.95%
61	Arkansas - Western	5156	5114	63	2902	23	2200	40	8			45	1.55%
62	Iowa - Northern	2807	2796	32	2650	26	145	6				48	1.81%
63	Iowa - Southern	5014	4998	72	4457	63	538	9	1			53	1.19%
64	Minnesota	15554	15402	346	12814	289	2570	56	12	1		244	1.90%
65	Missouri - Eastern	12012	11940	341	7791	232	4143	108	4	1		70	0.90%
66	Missouri - Western	12404	12338	209	8919	130	3405	79	10			102	1.14%
67	Nebraska	6430	6388	103	4570	97	1801	6	8			176	3.85%
68	North Dakota	1330	1328	21	1184	17	138	4	3			15	1.27%
69	South Dakota	1459	1455	29	1245	25	208	4	1			4	0.32%
7	Alaska	851	834	86	703	77	126	9	4			46	6.54%
70	Arizona	16908	16458	3940	13078	3269	3278	662	100	9		329	2.52%
71	California - Northern	18966	18631	1970	12218	1097	6272	836	141	37		307	2.51%
72	California - Eastern	28616	28358	4771	22693	3519	5610	1232	52	20		911	4.01%
73	California - Central	57153	55943	12736	41969	6992	13783	5697	189	45		439	1.05%
74	California - Southern	12256	12112	932	10109	443	1987	484	16	5		223	2.21%
75	Hawaii	1810	1783	112	1377	75	401	36	4	1		22	1.60%
76	Idaho	4741	4679	197	3866	160	796	36	9	1		67	1.73%
77	Montana	1894	1877	167	1552	144	314	23	7			97	6.25%
78	Nevada	16756	16524	983	11178	734	5322	245	23	4		212	1.90%
79	Oregon	11615	11554	838	8520	729	3017	109	14			165	1.94%
80	Washington - Eastern	5170	5116	171	3939	149	1167	22	6			356	9.04%
81	Washington - Western	14726	14587	1210	10140	940	4409	265	37	4		277	2.73%
82	Colorado	19692	19521	1448	16686	1362	2817	84	16	2		87	0.52%
83	Kansas	8637	8587	215	5786	174	2782	41	6			183	3.16%
84	New Mexico	4268	4234	478	3810	458	408	20	15			62	1.63%
85	Oklahoma - Northern	3037	3003	78	2625	61	371	15	7	2		10	0.38%
86	Oklahoma - Eastern	1694	1681	46	1429	39	249	7	1			6	0.42%
87	Oklahoma - Western	5740	5681	163	4146	114	1524	49	1			29	0.70%
88	Utah	8403	8300	376	4829	291	3460	83	11	2		96	1.99%
89	Wyoming	774	758	35	637	29	117	5	3			20	3.14%
90	District of Columbia	863	836	219	427	61	395	153	14	5		24	5.62%
91	Virgin Islands	15	12	2	8	2	3		1				0.00%
93	Guam	128	127		114		13						0.00%
94	Northern Mariana Islands	14	13	1	13	1						6	46.15%
<b>9/30/2009</b>	<b>ALL Districts</b>	<b>1402816</b>	<b>1379965</b>	<b>93644</b>	<b>978511</b>	<b>64730</b>	<b>398114</b>	<b>28543</b>	<b>2947</b>	<b>346</b>	<b>22015</b>	<b>2.25%</b>	
00	Maine	3761	3690	123	3090	102	585	20	10	1		102	3.30%
01	Massachusetts	19805	19375	868	15771	520	3522	338	78	9		422	2.68%
02	New Hampshire	4976	4851	153	3921	110	917	42	11			87	2.22%
03	Rhode Island	5096	5033	250	4304	133	726	117	2			155	3.60%
04	Puerto Rico	10922	10709	34	2854	11	7787	20	51	1		7	0.25%
05	Connecticut	9710	9507	501	8270	264	1210	233	25	4		167	2.02%
06	New York - Northern	12185	12081	331	9109	269	2952	59	9	3		136	1.49%

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07	New York - Eastern	20508	20208	2664	16691	1208	3469	1443	48	13	569	3.41%
08	New York - Southern	13252	11403	1473	9518	1113	1816	355	68	5	336	3.53%
09	New York - Western	9457	9362	146	6807	108	2545	36	7	2	81	1.19%
10	Vermont	1527	1511	35	1162	31	347	4			74	6.37%
11	Delaware	4592	2784	177	1960	103	815	74	6		97	4.95%
12	New Jersey	34070	33253	1640	24966	1074	8212	559	73	7	818	3.28%
13	Pennsylvania - Eastern	13019	12779	576	8720	266	4036	306	23	4	433	4.97%
14	Pennsylvania - Middle	10158	9994	230	7092	150	2895	79	6	1	166	2.34%
15	Pennsylvania - Western	13588	13326	209	10178	154	3082	52	59	2	219	2.15%
16	Maryland	24179	23832	2212	17685	1268	6046	936	100	7	525	2.97%
17	North Carolina - Eastern	11326	11111	178	4356	111	6707	65	43	2	82	1.88%
18	North Carolina - Middle	7432	7311	110	4051	66	3255	42	5	2	21	0.52%
19	North Carolina - Western	8159	8041	167	5453	105	2567	58	18	4	39	0.72%
20	South Carolina	9739	9577	179	4512	97	5030	81	31	1	289	6.41%
22	Virginia - Eastern	26056	25704	1051	17251	577	8396	466	56	8	146	0.85%
23	Virginia - Western	9312	9214	211	6358	128	2848	82	7	1	36	0.57%
24	West Virginia - Northern	2863	2830	73	2536	53	288	19	5	1	59	2.33%
25	West Virginia - Southern	3489	3454	162	3143	153	307	8	4	1	334	10.63%
26	Alabama - Northern	20014	19891	228	9533	130	10319	98	37		141	1.48%
27	Alabama - Middle	8444	8372	99	2532	55	5825	44	13		51	2.01%
28	Alabama - Southern	6256	6201	33	1900	24	4278	9	22		35	1.84%
29	Florida - Northern	5308	5227	204	4499	168	715	31	8	2	71	1.58%
36	Louisiana - Western	11923	11832	82	3102	48	8705	33	20	1	9	0.29%
37	Mississippi - Northern	6959	6911	43	3619	29	3280	14	9		15	0.41%
38	Mississippi - Southern	7495	7437	94	4077	46	3347	46	10	2	18	0.44%
39	Texas - Northern	19472	18725	346	8954	171	9716	169	49	6	101	1.13%
3A	Florida - Middle	57956	56662	6047	41494	4696	15024	1336	125	15	1379	3.32%
3C	Florida - Southern	27683	27086	3103	20290	1949	6742	1149	53	4	307	1.51%
3E	Georgia - Northern	49488	48777	3371	29876	1658	18824	1693	75	19	604	2.02%
3G	Georgia - Middle	12681	12608	197	5122	93	7454	103	16	1	64	1.25%
3J	Georgia - Southern	11463	11370	101	2826	43	8518	57	16	1	40	1.42%
3L	Louisiana - Eastern	4337	4220	163	2353	73	1853	87	13	3	16	0.68%
3N	Louisiana - Middle	2008	1979	63	1115	37	860	26	3		9	0.81%
40	Texas - Eastern	7165	6932	178	3839	88	3069	86	22	4	50	1.30%
41	Texas - Southern	13060	12540	546	6087	198	6392	344	59	4	108	1.77%
42	Texas - Western	13192	12731	283	6811	188	5883	94	36	1	95	1.39%
43	Kentucky - Eastern	12249	12173	118	9321	101	2841	17	9		213	2.29%
44	Kentucky - Western	12474	12387	98	9340	83	3034	13	8		161	1.72%
45	Michigan - Eastern	51286	50896	3557	41666	3315	9191	237	27	4	1634	3.92%
46	Michigan - Western	15719	15540	752	13641	719	1879	31	17	2	225	1.65%
47	Ohio - Northern	37595	37408	748	30757	527	6638	221	12		868	2.82%
48	Ohio - Southern	32020	31854	549	22747	410	9085	139	19		353	1.55%
49	Tennessee - Eastern	19149	19014	123	11880	77	7101	46	22		104	0.88%
50	Tennessee - Middle	14833	14584	132	8532	71	5967	60	79	1	73	0.86%
51	Tennessee - Western	20299	20210	197	5938	95	14246	102	24		120	2.02%
52	Illinois - Northern	52663	51833	1940	39015	1451	12744	482	73	7	586	1.50%
53	Illinois - Central	10496	10402	119	8176	93	2211	24	7	1	37	0.45%
54	Illinois - Southern	6536	6485	85	3945	70	2525	15	12		86	2.18%
55	Indiana - Northern	18437	18313	437	14470	350	3828	87	14		42	0.29%
56	Indiana - Southern	28451	28297	553	19644	474	8622	78	27	1	228	1.16%
57	Wisconsin - Eastern	18025	17897	1028	13918	925	3962	102	15	1	402	2.89%
58	Wisconsin - Western	8513	8464	196	7403	178	1026	18	20		111	1.50%
60	Arkansas - Eastern	9669	9560	58	4817	29	4727	29	10		110	2.28%
61	Arkansas - Western	6554	6502	59	3907	28	2575	30	15	1	82	2.10%

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62	Iowa - Northern	3697	3677	69	3494	67	181	2	1	61	1.75%	
63	Iowa - Southern	6195	6175	89	5577	79	593	10	2	61	1.05%	
64	Minnesota	20490	20246	519	17427	464	2789	52	18	287	1.65%	
65	Missouri - Eastern	15299	15251	418	11173	345	4067	73	8	95	0.85%	
66	Missouri - Western	14726	14644	279	11026	214	3596	63	16	2	1.28%	
67	Nebraska	7347	7274	123	5237	112	2007	10	10	1	1.87	3.57%
68	North Dakota	1590	1585	25	1416	24	164		2		33	2.33%
69	South Dakota	1790	1774	32	1587	28	181	3	5	1	16	1.01%
7-	Alaska	933	911	103	770	91	139	10	2	2	35	4.55%
70	Arizona	31017	30308	6685	25132	6022	5016	640	158	23	767	3.05%
71	California - Northern	30052	29557	3704	19848	1999	9518	1675	183	29	535	2.70%
72	California - Eastern	44023	43625	7273	36199	5722	7322	1538	85	13	1629	4.50%
73	California - Central	97481	95643	22951	73912	13490	21404	9400	324	61	965	1.31%
74	California - Southern	19282	19062	1614	15957	788	3059	814	43	11	558	3.50%
75	Hawaii	2941	2902	222	2336	183	560	36	4	2	57	2.44%
76	Idaho	7203	7122	288	6257	239	835	46	22	1	118	1.89%
77	Montana	2593	2545	292	2163	271	369	20	8	1	178	8.23%
78	Nevada	27560	27094	2308	19605	1791	7386	508	103	9	368	1.88%
79	Oregon	17200	17094	1238	13259	1060	3812	171	21	7	267	2.01%
80	Washington - Eastern	7070	6990	205	5568	185	1402	19	16	1	486	8.73%
81	Washington - Western	22450	22197	1598	16815	1263	5321	330	56	3	445	2.65%
82	Colorado	26608	26335	1930	22457	1818	3832	107	41	3	93	0.41%
83	Kansas	10588	10508	230	7413	206	3064	23	17	1	277	3.74%
84	New Mexico	5765	5713	496	5238	468	456	27	18	1	72	1.37%
85	Oklahoma - Northern	4020	3978	76	3609	63	368	13	1		19	0.53%
86	Oklahoma - Eastern	2213	2195	35	1942	29	253	6			6	0.31%
87	Oklahoma - Western	7372	7268	195	5547	138	1711	55	6	2	31	0.56%
88	Utah	13660	13523	676	8698	552	4808	122	15	2	224	2.58%
89	Wyoming	1249	1215	41	1049	34	159	5	6	2	9	0.86%
90	District of Columbia	1095	1051	239	684	115	352	119	15	5	45	6.08%
91	Virgin Islands	31	22	5	15	3	7		2			0.50%
93	Guam	212	210	2	194	2	16				1	0.52%
94	Northern Mariana Islands	11	4	1	3	1	1				1	33.33%
<b>9/30/2010</b>	<b>ALL Districts</b>	<b>1596355</b>	<b>1575424</b>	<b>121685</b>	<b>1136303</b>	<b>82857</b>	<b>434743</b>	<b>38495</b>	<b>3816</b>	<b>306</b>	<b>28173</b>	<b>2.48%</b>
00	Maine	4149	4114	126	3533	108	561	18	9		134	3.79%
01	Massachusetts	23485	23153	1146	17905	633	5130	501	111	10	522	2.92%
02	New Hampshire	5671	5462	197	4412	131	1037	63	13	3	113	2.56%
03	Rhode Island	5365	5305	196	4582	102	717	93	6	1	162	3.54%
04	Puerto Rico	12232	11992	40	3966	12	7960	28	54		13	0.33%
05	Connecticut	11554	11365	578	10175	387	1150	187	37	4	193	1.90%
06	New York - Northern	12130	12055	328	9297	281	2734	46	7	1	170	1.83%
07	New York - Eastern	22803	22448	2558	19162	1211	3250	1344	34	3	656	3.42%
08	New York - Southern	13772	12753	1517	10566	1193	2130	315	57	9	390	3.69%
09	New York - Western	9236	9182	122	6721	91	2455	30	3	1	79	1.18%
10	Vermont	1676	1659	29	1308	28	344		4	1	55	4.20%
11	Delaware	4459	3337	217	2458	127	875	89	4	1	97	3.95%
12	New Jersey	40775	40060	1715	30916	1246	9049	459	92	8	1012	3.27%
13	Pennsylvania - Eastern	15094	14843	740	10097	302	4707	433	34	4	390	3.86%
14	Pennsylvania - Middle	10789	10638	279	7572	182	3049	95	9	2	193	2.55%
15	Pennsylvania - Western	13588	13368	175	10156	128	3137	45	65	1	165	1.62%
16	Maryland	29938	29592	3160	21729	1927	7726	1219	132	14	776	3.57%
17	North Carolina - Eastern	11176	11003	209	4235	113	6700	94	58	2	70	1.65%
18	North Carolina - Middle	7397	7272	110	3926	64	3343	46	3		30	0.76%
19	North Carolina - Western	8785	8645	202	6422	126	2194	73	27	3	61	0.95%

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20	South Carolina	9559	9427	227	4713	123	4675	101	38	3	356	7.55%
22	Virginia - Eastern	28511	28176	1680	18995	972	9104	702	75	6	333	1.75%
23	Virginia - Western	9173	9096	185	6421	112	2663	72	8	1	39	0.61%
24	West Virginia - Northern	2909	2865	72	2554	61	306	11	5		90	3.52%
25	West Virginia - Southern	3580	3531	111	3227	96	301	15	3		324	10.04%
26	Alabama - Northern	20157	20045	316	10306	188	9686	128	46		168	1.63%
27	Alabama - Middle	8320	8251	114	2467	45	5764	69	15		55	2.23%
28	Alabama - Southern	6212	6144	46	2077	20	4048	26	19		38	1.83%
29	Florida - Northern	5509	5429	218	4763	182	650	32	14	4	66	1.39%
36	Louisiana - Western	12536	12444	80	3606	52	8812	28	18		16	0.44%
37	Mississippi - Northern	6718	6659	55	3503	36	3140	19	7		13	0.37%
38	Mississippi - Southern	7854	7746	107	4525	50	3212	57	6		29	0.64%
39	Texas - Northern	20847	20174	538	9818	208	10299	326	48	4	126	1.28%
3A	Florida - Middle	66881	65618	7007	49271	5508	16117	1477	205	20	2106	4.27%
3C	Florida - Southern	39160	38444	5168	28343	2666	10020	2499	80	3	441	1.56%
3E	Georgia - Northern	54948	54265	4512	33970	2205	20229	2301	59	6	862	2.54%
3G	Georgia - Middle	12953	12845	220	5375	99	7432	121	10		57	1.06%
3J	Georgia - Southern	10892	10774	114	2717	53	8025	61	27		38	1.40%
3L	Louisiana - Eastern	4633	4537	183	2430	84	2101	97	6	2	21	0.86%
3N	Louisiana - Middle	2067	2033	84	1170	46	860	37	2		18	1.54%
40	Texas - Eastern	7903	7681	208	4299	98	3344	108	33	2	63	1.47%
41	Texas - Southern	15491	14946	803	6574	259	8298	540	65	4	131	1.99%
42	Texas - Western	13877	13533	367	7396	191	6084	172	52	4	125	1.69%
43	Kentucky - Eastern	12871	12810	149	9713	130	3089	19	4		211	2.17%
44	Kentucky - Western	12781	12690	105	9494	90	3183	14	7		199	2.10%
45	Michigan - Eastern	53218	52894	2311	44529	2136	8326	175	32		1685	3.78%
46	Michigan - Western	16752	16621	700	14584	641	2013	58	11	1	214	1.47%
47	Ohio - Northern	38902	38705	825	31981	647	6695	177	25		803	2.51%
48	Ohio - Southern	33605	33459	664	23592	515	9837	146	21	1	427	1.81%
49	Tennessee - Eastern	17995	17877	136	11347	74	6481	59	30	1	210	1.85%
50	Tennessee - Middle	14456	14285	131	8629	74	5563	55	89	2	88	1.02%
51	Tennessee - Western	19146	19077	335	5917	188	13140	147	20		166	2.81%
52	Illinois - Northern	65443	64637	2393	49772	1850	14792	540	67	3	726	1.46%
53	Illinois - Central	10727	10652	109	8488	101	2157	8	2		39	0.46%
54	Illinois - Southern	6341	6302	122	3837	105	2456	17	8		87	2.27%
55	Indiana - Northern	19538	19392	397	15411	342	3966	53	13	2	14	0.09%
56	Indiana - Southern	28905	28703	786	20355	683	8323	102	22	1	328	1.61%
57	Wisconsin - Eastern	20687	20610	1667	16097	1523	4489	144	11		566	3.52%
58	Wisconsin - Western	9541	9489	223	8395	190	1054	32	18	1	157	1.87%
60	Arkansas - Eastern	9785	9746	83	5036	47	4697	35	8	1	108	2.14%
61	Arkansas - Western	7033	6945	65	4242	44	2683	21	16		91	2.15%
62	Iowa - Northern	3649	3636	62	3463	59	166	3	1		62	1.79%
63	Iowa - Southern	6505	6477	117	5830	106	642	11	4		71	1.22%
64	Minnesota	22628	22489	695	19592	622	2872	73	13		333	1.70%
65	Missouri - Eastern	17633	17562	483	12918	384	4634	99	5		102	0.79%
66	Missouri - Western	15854	15779	369	11526	311	4217	57	24	1	170	1.47%
67	Nebraska	7924	7843	167	5768	153	2031	10	22	2	197	3.42%
68	North Dakota	1651	1642	36	1456	32	181	2	1		52	3.57%
69	South Dakota	2018	2008	42	1812	39	183	3	9		28	1.55%
7-	Alaska	1132	1113	118	920	97	189	21	3		38	4.13%
70	Arizona	42216	41463	8525	34418	7708	6785	797	256	18	921	2.68%
71	California - Northern	38632	38153	5084	25300	2601	12594	2457	251	25	835	3.30%
72	California - Eastern	54389	54031	8452	43975	6395	9908	2040	112	15	1996	4.54%
73	California - Central	138585	136608	34915	105316	20909	30774	13948	509	57	1656	1.57%

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74	California - Southern	23509	23260	1765	18724	908	4473	854	60	3	881	4.71%
75	Hawaii	3862	3826	303	3060	252	758	49	7	2	83	2.71%
76	Idaho	8392	8290	301	7300	266	956	35	25		158	2.16%
77	Montana	3167	3112	299	2644	280	447	18	11	1	193	7.30%
78	Nevada	30637	30117	3016	22731	2447	7217	563	168	6	559	2.46%
79	Oregon	20460	20365	1669	16020	1363	4313	305	21	1	414	2.58%
80	Washington - Eastern	7471	7391	276	5989	240	1385	35	13	1	253	4.22%
81	Washington - Western	26671	26403	1906	20532	1427	5747	463	122	16	474	2.31%
82	Colorado	32636	32353	2728	27157	2594	5119	129	68	5	611	2.25%
83	Kansas	11379	11299	270	7964	238	3308	32	14		296	3.72%
84	New Mexico	6659	6603	651	6060	612	519	37	19	1	120	1.98%
85	Oklahoma - Northern	4564	4510	87	4047	74	454	13	8		23	0.57%
86	Oklahoma - Eastern	2393	2371	45	2126	39	241	5	3	1	12	0.56%
87	Oklahoma - Western	8271	8199	256	6379	211	1799	41	14	3	70	1.10%
88	Utah	17888	17726	1449	11852	1131	5856	316	17	2	540	4.56%
89	Wyoming	1560	1535	103	1317	93	211	9	7	1	38	2.89%
90	District of Columbia	1286	1221	231	831	135	367	91	23	5	69	8.30%
91	Virgin Islands	24	21	1	15	1	4		2			0.00%
93	Guam	211	208	3	177	3	31				2	1.13%
94	Northern Mariana Islands	9	7	1	7	1					1	14.29%
<b>9/30/2011</b>	<b>ALL Districts</b>	<b>1467221</b>	<b>1449988</b>	<b>125444</b>	<b>1028541</b>	<b>82968</b>	<b>417405</b>	<b>42193</b>	<b>3476</b>	<b>259</b>	<b>30406</b>	<b>2.96%</b>
00	Maine	3835	3788	90	3223	79	550	11	10		145	4.50%
01	Massachusetts	21208	20872	1067	15689	566	5075	491	80	10	595	3.79%
02	New Hampshire	5132	5039	176	3871	108	1156	65	11	3	89	2.30%
03	Rhode Island	5250	5211	256	4327	160	883	96	1		180	4.16%
04	Puerto Rico	11827	11550	43	4038	8	7419	34	60	1	23	0.57%
05	Connecticut	10179	10027	443	9049	323	947	117	31	3	216	2.39%
06	New York - Northern	9966	9899	179	7687	154	2198	25	5		189	2.46%
07	New York - Eastern	20585	20270	1635	18369	1107	1873	523	27	4	708	3.85%
08	New York - Southern	12865	12000	1171	10109	1023	1847	146	41	2	406	4.02%
09	New York - Western	7423	7362	84	5365	54	1991	30	3		120	2.24%
10	Vermont	1243	1235	23	1006	19	224	4			36	3.58%
11	Delaware	4195	3621	322	2498	180	1116	142	7		124	4.96%
12	New Jersey	39688	39114	1637	30781	1306	8268	323	62	6	1146	3.72%
13	Pennsylvania - Eastern	13924	13726	643	9333	316	4360	324	26	2	407	4.36%
14	Pennsylvania - Middle	9310	9190	214	6533	120	2651	93	5	1	189	2.89%
15	Pennsylvania - Western	12159	11987	172	8985	131	2955	39	42	2	196	2.18%
16	Maryland	26829	26561	2983	21104	2288	5384	689	71	6	940	4.45%
17	North Carolina - Eastern	10288	10132	144	3613	77	6443	67	67		63	1.74%
18	North Carolina - Middle	6279	6178	103	3062	50	3111	52	5	1	27	0.88%
19	North Carolina - Western	7799	7677	186	5388	106	2273	78	10	2	66	1.22%
20	South Carolina	8406	8278	160	4039	83	4199	73	36	3	360	8.91%
22	Virginia - Eastern	26504	26249	1659	17303	1008	8877	643	64	6	385	2.23%
23	Virginia - Western	7968	7905	184	5557	100	2335	83	10	1	33	0.59%
24	West Virginia - Northern	2399	2363	91	2055	63	299	24	8	3	63	3.07%
25	West Virginia - Southern	2706	2662	96	2338	92	314	4	9		268	11.46%
26	Alabama - Northern	17830	17717	321	8469	162	9199	159	40		149	1.76%
27	Alabama - Middle	7842	7780	115	2161	49	5604	65	11	1	74	3.42%
28	Alabama - Southern	5631	5592	67	1868	38	3707	29	15		51	2.73%
29	Florida - Northern	4692	4629	190	4057	156	567	33	3		49	1.21%
36	Louisiana - Western	11455	11381	82	3040	56	8317	26	12		10	0.33%
37	Mississippi - Northern	6217	6176	51	3101	31	3058	20	10		15	0.48%
38	Mississippi - Southern	7737	7689	134	4525	67	3155	67	9		20	0.44%
39	Texas - Northern	19121	18563	678	8422	266	10099	409	33	3	170	2.02%

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3A	Florida - Middle	56972	55940	5869	42142	4772	13629	1089	158	7	2034	4.83%
3C	Florida - Southern	38404	37835	4727	27959	2674	9778	2049	95	4	549	1.96%
3E	Georgia - Northern	53825	53319	6435	30690	2479	22553	3951	69	5	854	2.78%
3G	Georgia - Middle	12064	11993	266	4616	122	7336	144	16		71	1.54%
3J	Georgia - Southern	9777	9697	88	2291	57	7378	31	22		44	1.92%
3L	Louisiana - Eastern	4458	4366	188	2329	69	2027	118	10	1	18	0.77%
3N	Louisiana - Middle	2093	2075	97	1055	35	1019	62	1		6	0.57%
40	Texas - Eastern	7120	6908	239	3551	102	3330	135	22	1	76	2.14%
41	Texas - Southern	15305	14832	1000	5871	266	8893	726	63	7	167	2.84%
42	Texas - Western	12412	12100	364	6307	159	5732	199	55	6	78	1.24%
43	Kentucky - Eastern	11077	11012	88	8183	71	2820	17	7		174	2.13%
44	Kentucky - Western	11500	11431	93	8534	79	2885	14	7		258	3.02%
45	Michigan - Eastern	46118	45834	2295	38057	2125	7732	169	37		1825	4.80%
46	Michigan - Western	14483	14391	590	12396	566	1975	24	9		244	1.97%
47	Ohio - Northern	32413	32283	784	26295	607	5978	177	8		951	3.62%
48	Ohio - Southern	28950	28858	631	20085	471	8747	156	14	3	475	2.36%
49	Tennessee - Eastern	16346	16268	126	9920	58	6298	68	36		170	1.71%
50	Tennessee - Middle	13508	13381	159	7860	84	5449	74	68	1	107	1.36%
51	Tennessee - Western	17877	17789	274	5303	157	12470	116	14		129	2.43%
52	Illinois - Northern	60976	60279	2396	45527	1926	14665	463	83	6	785	1.72%
53	Illinois - Central	9170	9103	98	7311	81	1787	17	5		41	0.56%
54	Illinois - Southern	5508	5482	171	3432	137	2044	33	3		103	3.00%
55	Indiana - Northern	16477	16397	361	12952	323	3432	38	10		12	0.09%
56	Indiana - Southern	24727	24585	872	17535	769	7026	102	19	1	340	1.94%
57	Wisconsin - Eastern	19841	19759	2171	15082	2017	4660	153	7		1081	7.17%
58	Wisconsin - Western	8319	8268	204	7139	158	1096	44	18	2	144	2.02%
60	Arkansas - Eastern	9022	8969	46	4406	28	4554	18	7		117	2.66%
61	Arkansas - Western	6265	6221	66	3820	42	2371	22	15	2	76	1.99%
62	Iowa - Northern	3053	3040	41	2873	35	158	6	2		49	1.71%
63	Iowa - Southern	5258	5234	105	4672	88	555	17	3		70	1.50%
64	Minnesota	19919	19780	665	16896	560	2854	105	20		262	1.55%
65	Missouri - Eastern	16313	16277	571	11799	451	4463	120	11		156	1.32%
66	Missouri - Western	14127	14043	397	10308	289	3713	108	15		159	1.54%
67	Nebraska	7073	6999	161	5008	141	1970	20	9		233	4.65%
68	North Dakota	1354	1348	27	1202	23	143	4	3		88	7.32%
69	South Dakota	1934	1928	46	1735	41	182	5	5		20	1.15%
7-	Alaska	1019	1012	105	853	92	156	13	1		52	6.10%
70	Arizona	39148	38703	8279	32748	7504	5741	756	206	18	831	2.54%
71	California - Northern	36663	36230	5655	23269	2546	12678	3077	269	32	939	4.04%
72	California - Eastern	51481	51166	8716	40538	6150	10493	2555	111	11	2082	5.14%
73	California - Central	139882	137934	38398	102367	21897	35018	16443	540	58	1632	1.59%
74	California - Southern	22285	22057	1678	17573	899	4401	774	81	5	842	4.79%
75	Hawaii	3566	3523	348	2701	284	811	63	10	1	127	4.70%
76	Idaho	7912	7833	289	6890	220	909	69	23		146	2.12%
77	Montana	2705	2684	221	2256	200	414	19	6	1	182	8.07%
78	Nevada	26239	25756	3000	19749	2016	5809	977	194	7	538	2.72%
79	Oregon	18281	18206	1511	14240	1249	3925	259	26	3	382	2.68%
80	Washington - Eastern	6490	6426	261	5013	204	1393	56	15	1	252	5.03%
81	Washington - Western	26389	26131	2178	20316	1487	5717	680	95	10	524	2.58%
82	Colorado	31092	30875	2963	25724	2811	5104	149	45	2	1084	4.21%
83	Kansas	10402	10344	260	7132	221	3164	39	23		292	4.09%
84	New Mexico	5897	5833	651	5343	624	470	27	18		158	2.96%
85	Oklahoma - Northern	3947	3920	73	3492	55	422	17	4	1	22	0.63%
86	Oklahoma - Eastern	2118	2106	41	1895	34	205	5			15	0.73%

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87	Oklahoma - Western	7425	7358	216	5733	173	1612	42	8	1	45	0.78%
88	Utah	19046	18825	2243	12470	1698	6332	543	21	2	681	5.46%
89	Wyoming	1469	1446	86	1187	71	243	15	5		38	3.17%
90	District of Columbia	1063	1010	159	803	122	202	37	5		63	7.85%
91	Virgin Islands	22	15	1	15	1						0.00%
93	Guam	146	145	1	116	1	29				1	0.86%
94	Northern Mariana Islands	4	3	1	2	1	1					0.00%
<b>9/30/2012</b>	<b>ALL Districts</b>	<b>1261140</b>	<b>1246186</b>	<b>111337</b>	<b>867242</b>	<b>75051</b>	<b>375448</b>	<b>36063</b>	<b>3050</b>	<b>199</b>	<b>30647</b>	<b>3.53%</b>
00	Maine	3125	3084	86	2640	67	429	18	7		122	4.62%
01	Massachusetts	17793	17504	874	12899	424	4511	447	66	3	526	4.08%
02	New Hampshire	4240	4164	144	3147	94	1013	50	4		65	2.07%
03	Rhode Island	4237	4170	196	3517	112	650	83	3	1	121	3.44%
04	Puerto Rico	10727	10522	140	3706	7	6691	133	93		16	0.43%
05	Connecticut	8546	8392	393	7374	249	983	142	32	2	195	2.64%
06	New York - Northern	8542	8462	182	6704	167	1737	15	4		185	2.76%
07	New York - Eastern	17721	17423	1323	15818	893	1570	427	35	3	616	3.89%
08	New York - Southern	11198	10214	825	8583	684	1595	140	34	1	359	4.18%
09	New York - Western	6362	6297	82	4599	60	1690	22	6		163	3.54%
10	Vermont	1052	1043	23	819	20	219	3	2		29	3.54%
11	Delaware	3879	3171	268	2220	143	947	125			124	5.59%
12	New Jersey	33431	32881	1636	25635	1306	7177	326	68	3	1148	4.48%
13	Pennsylvania - Eastern	12550	12375	586	8143	265	4209	318	21	3	373	4.58%
14	Pennsylvania - Middle	7751	7639	207	5326	96	2305	111	4		176	3.30%
15	Pennsylvania - Western	9838	9681	120	6887	74	2743	46	42		141	2.05%
16	Maryland	24064	23840	3385	19141	2833	4640	549	56	3	990	5.17%
17	North Carolina - Eastern	9472	9302	161	2959	64	6262	96	72	1	74	2.50%
18	North Carolina - Middle	5818	5736	119	2476	52	3253	64	5	2	17	0.69%
19	North Carolina - Western	6865	6774	220	4393	123	2366	96	10	1	54	1.23%
20	South Carolina	8085	7966	224	3514	96	4425	126	23	2	418	11.90%
22	Virginia - Eastern	23481	23267	1751	14858	1125	8372	624	37	2	368	2.48%
23	Virginia - Western	7153	7105	200	4893	110	2204	89	7	1	46	0.94%
24	West Virginia - Northern	1795	1775	64	1518	41	253	22	4	1	78	5.14%
25	West Virginia - Southern	2310	2266	86	1987	71	278	14	1	1	235	11.83%
26	Alabama - Northern	15901	15828	270	7426	155	8384	115	15		129	1.74%
27	Alabama - Middle	7935	7880	96	1881	37	5995	59	2		74	3.93%
28	Alabama - Southern	4808	4776	59	1506	24	3255	34	15	1	35	2.32%
29	Florida - Northern	3887	3823	202	3224	173	579	28	19	1	70	2.17%
36	Louisiana - Western	10462	10402	70	2627	39	7759	31	12		10	0.38%
37	Mississippi - Northern	5681	5632	34	2614	14	3004	20	12		10	0.38%
38	Mississippi - Southern	7127	7064	151	4001	63	3048	88	14		22	0.55%
39	Texas - Northern	18084	17661	819	7542	280	10065	536	45	3	176	2.33%
3A	Florida - Middle	47513	46786	5689	34263	3951	12362	1727	148	8	1886	5.50%
3C	Florida - Southern	32802	32336	4328	23052	2451	9195	1875	89	2	712	3.09%
3E	Georgia - Northern	47329	46857	5781	26305	2472	20488	3303	52	4	920	3.50%
3G	Georgia - Middle	10726	10661	218	3984	94	6646	123	16	1	65	1.63%
3J	Georgia - Southern	9024	8955	103	2112	48	6808	55	28		41	1.94%
3L	Louisiana - Eastern	3984	3908	209	2033	89	1860	117	15	3	37	1.82%
3N	Louisiana - Middle	1898	1879	139	1010	53	864	84	4	1	12	1.19%
40	Texas - Eastern	6433	6258	262	2954	111	3282	150	21	1	75	2.54%
41	Texas - Southern	13459	13172	1118	4999	295	8120	817	50	6	175	3.50%
42	Texas - Western	11338	11082	405	5599	162	5451	242	28	1	108	1.93%
43	Kentucky - Eastern	9822	9776	90	7231	69	2529	20	9		133	1.84%
44	Kentucky - Western	10626	10561	140	7681	90	2862	50	12		129	1.68%
45	Michigan - Eastern	39146	38849	2510	32076	2271	6719	238	47	1	2170	6.77%

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46	Michigan - Western	12362	12288	462	10469	432	1802	28	13	2	258	2.46%
47	Ohio - Northern	26942	26841	646	21953	491	4875	154	11	1	801	3.65%
48	Ohio - Southern	25206	25131	699	17564	533	7555	164	11	2	541	3.08%
49	Tennessee - Eastern	14471	14408	127	8283	53	6090	74	23		257	3.10%
50	Tennessee - Middle	12334	12218	160	7206	78	4944	82	67		152	2.11%
51	Tennessee - Western	17830	17771	318	4889	155	12863	162	18		146	2.99%
52	Illinois - Northern	57289	56607	3076	40050	2389	16496	682	61	5	818	2.04%
53	Illinois - Central	7829	7766	96	6250	77	1510	17	5	2	48	0.77%
54	Illinois - Southern	4805	4779	192	3058	158	1717	34	3		110	3.60%
55	Indiana - Northern	14560	14483	398	10998	317	3475	81	6		21	0.19%
56	Indiana - Southern	21909	21781	728	15449	617	6322	110	9	1	254	1.64%
57	Wisconsin - Eastern	18732	18659	2150	13622	1950	5009	200	13		796	5.84%
58	Wisconsin - Western	7225	7179	191	6090	139	1055	52	14		153	2.51%
60	Arkansas - Eastern	7895	7856	48	3723	32	4121	16	10		133	3.57%
61	Arkansas - Western	5160	5133	56	3201	44	1917	10	6	2	96	3.00%
62	Iowa - Northern	2506	2492	46	2312	35	174	11	1		53	2.29%
63	Iowa - Southern	4223	4200	75	3758	56	436	17	3	1	48	1.28%
64	Minnesota	17666	17569	490	14612	376	2938	110	9	1	267	1.83%
65	Missouri - Eastern	15013	14966	670	10950	570	4008	100	7		273	2.49%
66	Missouri - Western	12199	12112	465	8694	326	3398	138	18	1	236	2.71%
67	Nebraska	5872	5838	148	4091	121	1734	27	8		194	4.74%
68	North Dakota	1060	1056	26	934	22	120	4	1		63	6.75%
69	South Dakota	1620	1617	23	1469	19	144	4	1		11	0.75%
7-	Alaska	841	837	90	697	71	138	18	1	1	40	5.74%
70	Arizona	30135	29705	6829	25539	6234	3972	580	189	14	777	3.04%
71	California - Northern	28935	28594	5048	17448	2417	10962	2611	167	17	1006	5.77%
72	California - Eastern	39481	39215	7114	31144	5085	7925	2014	109	11	2213	7.11%
73	California - Central	111909	110249	30694	83984	18959	25794	11697	467	38	1786	2.13%
74	California - Southern	18359	18189	1689	14447	849	3681	829	61	11	886	6.13%
75	Hawaii	2672	2656	239	2023	210	627	28	5	1	101	4.99%
76	Idaho	6690	6631	288	5873	244	735	43	13	1	117	1.99%
77	Montana	2175	2145	165	1776	127	359	36	8	1	199	11.20%
78	Nevada	19434	19110	2161	15165	1572	3752	585	192	4	490	3.23%
79	Oregon	16048	15980	1381	12468	1147	3485	231	22	3	381	3.06%
80	Washington - Eastern	5726	5686	231	4508	172	1169	59	6		242	5.37%
81	Washington - Western	22955	22703	2027	18238	1466	4389	553	76	8	645	3.54%
82	Colorado	27578	27411	2925	22726	2748	4642	175	42	2	1183	5.21%
83	Kansas	9301	9249	302	6075	263	3150	38	15	1	336	5.53%
84	New Mexico	4937	4891	525	4433	500	439	25	18		107	2.41%
85	Oklahoma - Northern	3642	3613	92	3207	61	403	31	1		25	0.78%
86	Oklahoma - Eastern	1903	1893	36	1704	29	187	7	1		10	0.59%
87	Oklahoma - Western	6727	6695	256	5294	218	1389	37	9	1	53	1.00%
88	Utah	16545	16432	1738	11014	1375	5395	360	23	3	580	5.27%
89	Wyoming	1307	1290	75	1095	64	186	11	7		55	5.02%
90	District of Columbia	913	875	146	737	125	128	20	10	1	57	7.73%
91	Virgin Islands	35	28	1	19	1	8		1			0.00%
93	Guam	153	151	6	119	6	32					0.00%
94	Northern Mariana Islands	11	9	1	8	1	1				1	12.50%
<b>9/30/2013</b>	<b>ALL Districts</b>	<b>1107699</b>	<b>1094970</b>	<b>97018</b>	<b>748235</b>	<b>68545</b>	<b>343594</b>	<b>28288</b>	<b>2798</b>	<b>173</b>	<b>30011</b>	<b>4.01%</b>
00	Maine	2575	2547	85	2125	72	407	12	9	1	127	5.98%
01	Massachusetts	13201	13005	420	10205	279	2722	139	52	1	495	4.85%
02	New Hampshire	3376	3313	124	2498	80	806	44	9		78	3.12%
03	Rhode Island	3547	3496	178	2951	131	544	47	1		50	1.69%
04	Puerto Rico	11043	10861	159	3802	7	6924	152	115		23	0.60%

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05	Connecticut	7321	7185	362	6191	226	969	135	23	1	153	2.47%
06	New York - Northern	7838	7799	190	6207	155	1577	33	9	2	160	2.50%
07	New York - Eastern	14314	14012	1353	12560	822	1425	528	27	3	498	3.96%
08	New York - Southern	9298	8843	749	7391	618	1416	130	34	1	311	4.21%
09	New York - Western	5742	5690	80	4016	54	1663	26	8		134	3.34%
10	Vermont	933	922	21	732	15	188	6			28	3.83%
11	Delaware	3581	2534	195	1801	117	730	78	3		139	7.72%
12	New Jersey	28882	28446	1707	21945	1340	6434	365	66	2	1160	5.29%
13	Pennsylvania - Eastern	11973	11774	657	7054	250	4690	404	25	3	360	5.10%
14	Pennsylvania - Middle	6855	6764	254	4596	100	2161	153	5	1	189	4.11%
15	Pennsylvania - Western	8735	8591	172	5707	98	2840	73	38	1	136	2.38%
16	Maryland	23193	22976	3899	17638	3146	5265	741	70	12	1177	6.67%
17	North Carolina - Eastern	8429	8327	203	2542	92	5723	110	61	1	81	3.19%
18	North Carolina - Middle	5126	5048	145	2104	49	2939	96	3		16	0.76%
19	North Carolina - Western	5883	5823	244	3464	107	2342	137	13		51	1.47%
20	South Carolina	7618	7538	225	3108	85	4400	135	26	5	401	12.90%
22	Virginia - Eastern	20239	20040	1658	12298	1029	7684	623	57	6	400	3.25%
23	Virginia - Western	6339	6286	209	4177	107	2097	102	10		32	0.77%
24	West Virginia - Northern	1627	1617	66	1375	39	238	27	4		74	5.38%
25	West Virginia - Southern	2138	2096	66	1803	43	290	22	2	1	260	14.42%
26	Alabama - Northern	15058	14988	261	6997	150	7967	110	22	1	170	2.43%
27	Alabama - Middle	7963	7910	89	3791	35	6109	54	7		65	3.63%
28	Alabama - Southern	4657	4633	55	1389	19	3236	36	8		63	4.54%
29	Florida - Northern	3415	3369	212	2835	165	509	46	20		44	1.55%
36	Louisiana - Western	10387	10334	74	2368	46	7949	28	14		8	0.34%
37	Mississippi - Northern	5654	5616	42	2352	19	3254	23	7		4	0.17%
38	Mississippi - Southern	7284	7245	157	3908	80	3325	77	11		32	0.82%
39	Texas - Northern	15353	14993	665	6239	285	8712	380	39		180	2.89%
3A	Florida - Middle	42512	41901	6261	30231	4334	11500	1917	158	8	1957	6.47%
3C	Florida - Southern	31996	31536	4846	21191	2712	10253	2129	90	5	909	4.29%
3E	Georgia - Northern	41285	40892	4607	23189	2388	17646	2212	46	5	989	4.26%
3G	Georgia - Middle	10276	10227	218	3612	107	6594	110	14	1	66	1.83%
3J	Georgia - Southern	8744	8690	125	1942	53	6729	72	17		38	1.96%
3L	Louisiana - Eastern	3764	3681	207	1926	87	1743	119	12	1	38	1.97%
3N	Louisiana - Middle	1821	1803	158	1019	66	782	92	2		18	1.77%
40	Texas - Eastern	5942	5795	257	2692	117	3088	140	15		79	2.93%
41	Texas - Southern	11480	11229	950	4197	243	7000	705	32	2	151	3.60%
42	Texas - Western	10005	9768	434	4898	174	4829	257	40	3	118	2.41%
43	Kentucky - Eastern	9278	9218	117	6732	90	2476	27	7		134	1.99%
44	Kentucky - Western	9394	9343	185	6723	130	2608	55	8		161	2.39%
45	Michigan - Eastern	33146	32933	2056	26889	1897	5997	157	38	2	1937	7.20%
46	Michigan - Western	10886	10796	489	9136	449	1641	39	12	1	319	3.49%
47	Ohio - Northern	26404	26314	676	21185	511	5109	165	18		844	3.98%
48	Ohio - Southern	22291	22204	802	15710	600	6476	199	13	3	690	4.39%
49	Tennessee - Eastern	13628	13565	183	7473	63	6059	120	26		244	3.27%
50	Tennessee - Middle	11633	11524	187	6759	90	4713	96	48	1	210	3.11%
51	Tennessee - Western	17649	17590	303	4793	144	12776	159	21		153	3.19%
52	Illinois - Northern	56300	55745	5267	37137	4092	18516	1172	92	3	905	2.44%
53	Illinois - Central	6940	6889	138	5324	103	1551	33	14	2	43	0.81%
54	Illinois - Southern	4885	4865	234	2967	200	1893	34	3		170	5.73%
55	Indiana - Northern	13907	13836	417	10583	362	3235	55	13		15	0.14%
56	Indiana - Southern	20588	20467	712	14179	602	6265	110	21		310	2.19%
57	Wisconsin - Eastern	17067	17018	2052	12282	1877	4720	174	13	1	458	3.73%
58	Wisconsin - Western	6406	6376	208	5334	124	1013	83	10		119	2.23%

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60	Arkansas - Eastern	7847	7815	56	3388	22	4414	34	10		118	3.48%
61	Arkansas - Western	4733	4702	56	2699	29	1981	25	14	1	77	2.85%
62	Iowa - Northern	2209	2203	57	2072	45	128	12	1		42	2.03%
63	Iowa - Southern	3683	3664	73	3267	54	394	19	2		46	1.41%
64	Minnesota	15003	14915	366	12405	257	2485	106	13	3	253	2.04%
65	Missouri - Eastern	14970	14827	806	10325	706	4496	100	6		422	4.09%
66	Missouri - Western	10981	10929	534	8059	411	2852	123	14		226	2.80%
67	Nebraska	5362	5319	134	3674	112	1632	21	7	1	225	6.12%
68	North Dakota	872	865	23	779	22	86	1			41	5.26%
69	South Dakota	1366	1361	28	1236	24	122	4			10	0.81%
7-	Alaska	638	612	72	500	54	110	17	2	1	31	6.20%
70	Arizona	24046	23763	5124	20471	4646	3145	462	146	16	617	3.01%
71	California - Northern	21841	21555	3675	12846	1924	8540	1741	159	10	816	6.35%
72	California - Eastern	30685	30464	5494	24362	4140	5994	1346	85	8	1962	8.05%
73	California - Central	82861	81593	20966	65469	14555	15794	6383	328	27	1791	2.74%
74	California - Southern	13816	13672	1166	10930	599	2701	563	40	3	700	6.40%
75	Hawaii	2313	2286	188	1684	163	594	23	8	2	81	4.81%
76	Idaho	5643	5602	323	5071	276	516	47	12		104	2.05%
77	Montana	1851	1832	168	1564	141	262	26	5		207	13.24%
78	Nevada	14483	14236	1616	11678	1331	2413	279	144	6	443	3.79%
79	Oregon	13677	13623	1148	10995	1031	2602	114	18	3	345	3.14%
80	Washington - Eastern	5253	5208	222	4146	173	1053	49	9		230	5.55%
81	Washington - Western	20477	20287	1912	15991	1265	4222	642	74	5	609	3.81%
82	Colorado	23976	23800	2583	19859	2369	3884	211	54	2	1249	6.29%
83	Kansas	8604	8557	360	5351	327	3182	33	17		342	6.39%
84	New Mexico	4502	4459	519	4033	486	410	31	15	2	124	3.07%
85	Oklahoma - Northern	3191	3172	77	2808	59	363	18			18	0.64%
86	Oklahoma - Eastern	1657	1652	41	1486	31	162	10	2		17	1.14%
87	Oklahoma - Western	6133	6090	256	4832	224	1243	32	3		38	0.79%
88	Utah	14939	14870	1655	10083	1374	4773	279	13	2	519	5.15%
89	Wyoming	1241	1217	88	1075	72	138	16	4		47	4.37%
90	District of Columbia	855	818	163	685	144	123	18	10	1	87	12.70%
91	Virgin Islands	21	15	2	9	2	5		1			0.00%
93	Guam	159	155	2	126	2	28					0.00%
94	Northern Mariana Islands	7	6		5				1			0.00%
<b>9/30/2014</b>		<b>963739</b>	<b>953371</b>	<b>83905</b>	<b>637550</b>	<b>58872</b>	<b>313188</b>	<b>24868</b>	<b>2321</b>	<b>153</b>	<b>27422</b>	<b>4.30%</b>
00	Maine	2135	2118	63	1744	55	360	8	6		59	3.38%
01	Massachusetts	10789	10607	372	8350	232	2200	139	40	1	434	5.20%
02	New Hampshire	2704	2651	101	2038	70	606	31	5		73	3.58%
03	Rhode Island	3124	3099	222	2598	138	501	84			52	2.00%
04	Puerto Rico	11377	11235	73	4307	8	6778	61	127	4	29	0.67%
05	Connecticut	7001	6875	435	5782	246	1069	187	23	2	188	3.25%
06	New York - Northern	7177	7137	146	5663	113	1464	32	1	1	134	2.37%
07	New York - Eastern	12936	12678	1519	11026	796	1611	720	41	3	442	4.01%
08	New York - Southern	8438	7905	803	6468	612	1397	185	39	6	310	4.79%
09	New York - Western	4954	4906	100	3584	52	1311	48	7		120	3.35%
10	Vermont	769	759	20	587	13	171	7			22	3.75%
11	Delaware	3070	2423	229	1670	115	748	114	3		160	9.58%
12	New Jersey	27931	27464	1840	20456	1344	6937	492	70	3	1212	5.92%
13	Pennsylvania - Eastern	10610	10434	739	6044	290	4365	445	23	4	348	5.76%
14	Pennsylvania - Middle	6208	6122	304	3988	123	2123	180	10	1	203	5.09%
15	Pennsylvania - Western	7717	7613	116	5078	68	2483	48	45		118	2.32%
16	Maryland	21006	20857	3939	15128	2913	5659	1015	68	11	1156	7.64%
17	North Carolina - Eastern	7686	7566	187	2255	77	5259	110	48		30	1.33%

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18	North Carolina - Middle	4522	4466	115	1874	47	2585	68	4	17	0.91%	
19	North Carolina - Western	4875	4828	228	2730	95	2092	133	6	35	1.28%	
20	South Carolina	7524	7473	219	3043	88	4412	128	14	3	399	13.11%
22	Virginia - Eastern	18634	18415	1666	11039	1104	7345	559	30	3	476	4.31%
23	Virginia - Western	5932	5909	141	3948	79	1955	62	4	35	0.89%	
24	West Virginia - Northern	1455	1434	60	1236	38	197	22	1	71	5.74%	
25	West Virginia - Southern	1969	1930	67	1698	48	224	19	6	243	14.31%	
26	Alabama - Northern	13220	13145	242	6549	130	6586	112	10	249	3.80%	
27	Alabama - Middle	7916	7892	102	1609	47	6280	55	3	69	4.29%	
28	Alabama - Southern	4383	4348	31	1287	14	3049	17	11	67	5.21%	
29	Florida - Northern	3062	3005	221	2442	160	546	61	13	31	1.27%	
36	Louisiana - Western	10170	10090	72	1998	38	8074	34	13	9	0.45%	
37	Mississippi - Northern	5047	5007	55	2078	27	2916	28	11	15	0.72%	
38	Mississippi - Southern	6431	6380	116	3346	51	3022	65	10	24	0.72%	
39	Texas - Northern	13401	13097	569	5358	249	7693	315	35	4	183	3.42%
3A	Florida - Middle	36694	36183	6317	25289	4142	10748	2168	125	5	1606	6.35%
3C	Florida - Southern	30424	30089	5197	17767	2800	12182	2388	132	5	891	5.01%
3E	Georgia - Northern	35643	35337	3953	19760	2200	15539	1753	28	1013	5.13%	
3G	Georgia - Middle	9489	9445	237	3022	84	6403	153	13	61	2.02%	
3J	Georgia - Southern	8409	8381	141	1818	52	6551	88	10	1	32	1.76%
3L	Louisiana - Eastern	3623	3555	224	1693	87	1855	137	7	40	2.36%	
3N	Louisiana - Middle	1662	1650	121	851	39	798	82	1	12	1.41%	
40	Texas - Eastern	5138	4998	215	2372	97	2611	118	14	76	3.20%	
41	Texas - Southern	9796	9552	781	3561	218	5957	561	29	2	157	4.41%
42	Texas - Western	8627	8461	413	4074	150	4366	261	21	2	106	2.60%
43	Kentucky - Eastern	8719	8679	107	6279	75	2395	32	3	132	2.10%	
44	Kentucky - Western	8738	8697	140	6414	92	2272	48	10	135	2.10%	
45	Michigan - Eastern	27872	27707	1743	22303	1630	5363	113	29	1724	7.73%	
46	Michigan - Western	8970	8900	369	7460	341	1432	28	4	229	3.07%	
47	Ohio - Northern	22600	22534	687	18569	507	3953	180	12	870	4.32%	
48	Ohio - Southern	19857	19795	689	13994	504	5793	184	7	1	604	4.69%
49	Tennessee - Eastern	12389	12350	138	6800	50	5523	88	25	200	2.94%	
50	Tennessee - Middle	10517	10434	148	5988	59	4393	85	52	4	114	1.90%
51	Tennessee - Western	17212	17178	321	4244	147	12917	174	17	113	2.66%	
52	Illinois - Northern	51673	51253	5039	32367	3319	18804	1717	81	3	923	2.85%
53	Illinois - Central	6073	6048	131	4905	103	1138	26	3	2	68	1.39%
54	Illinois - Southern	4208	4186	199	2701	169	1480	30	5	152	5.63%	
55	Indiana - Northern	11952	11893	417	9061	344	2824	73	8	11	0.12%	
56	Indiana - Southern	18147	18035	664	12491	558	5529	106	12	298	2.39%	
57	Wisconsin - Eastern	16056	16023	2230	11604	2027	4405	202	9	1	390	3.36%
58	Wisconsin - Western	5632	5608	210	4726	146	853	62	16	2	156	3.30%
60	Arkansas - Eastern	7280	7256	59	3140	30	4110	29	2	130	4.14%	
61	Arkansas - Western	4057	4017	48	2223	20	1778	28	10	61	2.74%	
62	Iowa - Northern	2056	2051	50	1932	36	115	14	1	43	2.23%	
63	Iowa - Southern	3211	3195	71	2852	52	340	19	2	51	1.79%	
64	Minnesota	12704	12616	283	10653	167	1949	114	10	2	166	1.56%
65	Missouri - Eastern	12453	12397	908	8685	816	3706	92	5	530	6.10%	
66	Missouri - Western	9226	9183	529	6614	423	2550	106	15	285	4.31%	
67	Nebraska	4817	4788	144	3272	119	1509	25	4	154	4.71%	
68	North Dakota	707	705	16	628	13	74	3	2	33	5.25%	
69	South Dakota	1235	1231	33	1113	26	115	6	3	7	0.63%	
7-	Alaska	458	452	45	380	32	71	13	3	22	5.79%	
70	Arizona	20907	20645	4345	17899	3973	2616	363	127	9	588	3.29%
71	California - Northern	15430	15159	2482	9175	1494	5867	976	105	12	712	7.76%

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72	California - Eastern	22383	22233	3594	18145	2814	4018	769	55	10	1446	7.97%
73	California - Central	60545	59596	13946	47916	9879	11405	4052	274	14	1531	3.20%
74	California - Southern	10992	10863	822	8797	458	2041	358	25	6	547	6.22%
75	Hawaii	1805	1793	114	1263	92	523	20	6	2	63	4.99%
76	Idaho	4976	4945	304	4461	251	470	53	8		93	2.08%
77	Montana	1625	1602	130	1398	102	197	25	6	3	157	11.23%
78	Nevada	11676	11476	1507	9477	1250	1887	251	110	5	442	4.66%
79	Oregon	12660	12622	1021	10321	916	2285	101	15	4	348	3.37%
80	Washington - Eastern	4840	4803	254	3849	209	945	44	8	1	227	5.90%
81	Washington - Western	17380	17219	1655	13559	1181	3598	467	61	7	541	3.99%
82	Colorado	18460	18356	2736	15515	2605	2813	131	26		998	6.43%
83	Kansas	7720	7695	361	4600	331	3077	28	9	2	330	7.17%
84	New Mexico	3956	3921	450	3621	427	289	23	11		107	2.95%
85	Oklahoma - Northern	2915	2906	51	2618	42	286	9	1		15	0.57%
86	Oklahoma - Eastern	1551	1546	39	1415	34	126	4	4	1	11	0.78%
87	Oklahoma - Western	5603	5567	285	4384	254	1178	30	2		37	0.84%
88	Utah	13828	13765	1436	8879	1201	4882	235	4		485	5.46%
89	Wyoming	1031	1019	59	898	51	118	8	2		43	4.79%
90	District of Columbia	783	737	178	622	148	107	30	8		93	14.95%
91	Virgin Islands	24	23	5	15	4	8	1				0.00%
93	Guam	147	145		112		33					0.00%
94	Northern Mariana Islands	5	5	2	5	2						0.00%
<b>9/30/2015</b>	<b>ALL Districts</b>	<b>860182</b>	<b>850390</b>	<b>76504</b>	<b>545444</b>	<b>50809</b>	<b>302603</b>	<b>25562</b>	<b>2030</b>	<b>114</b>	<b>25656</b>	<b>4.70%</b>
00	Maine	1930	1899	58	1585	46	303	12	4		77	4.86%
01	Massachusetts	9280	9117	446	6828	231	2229	214	48	1	434	6.36%
02	New Hampshire	2211	2166	147	1632	98	532	49	2		69	4.23%
03	Rhode Island	2611	2586	230	2149	116	434	114	3		48	2.23%
04	Puerto Rico	10533	10402	56	4284	15	6016	41	89		46	1.07%
05	Connecticut	6486	6377	453	5230	253	1122	194	24	6	171	3.27%
06	New York - Northern	6671	6612	151	5138	113	1459	38	6		148	2.88%
07	New York - Eastern	11663	11379	1918	9230	841	2097	1073	50	4	449	4.86%
08	New York - Southern	7795	7232	871	5710	612	1487	256	33	3	330	5.78%
09	New York - Western	4553	4504	133	3197	75	1297	58	8		90	2.82%
10	Vermont	664	656	20	514	14	140	6			25	4.86%
11	Delaware	2699	2174	129	1471	68	700	61	3		166	11.28%
12	New Jersey	25652	25297	1826	18016	1218	7209	605	72	3	1124	6.24%
13	Pennsylvania - Eastern	9583	9462	730	5283	332	4150	396	28	2	352	6.66%
14	Pennsylvania - Middle	5797	5704	281	3672	122	2026	159	6		195	5.31%
15	Pennsylvania - Western	7136	7030	137	4610	94	2390	40	24	1	124	2.69%
16	Maryland	18521	18315	3736	12925	2586	5318	1145	71	5	1127	8.72%
17	North Carolina - Eastern	7308	7231	183	2202	77	4966	104	54	2	32	1.45%
18	North Carolina - Middle	4269	4219	118	1753	51	2464	67	2		25	1.43%
19	North Carolina - Western	4317	4270	196	2348	99	1911	96	9	1	59	2.51%
20	South Carolina	7080	7026	178	2791	80	4222	95	13	3	358	12.83%
22	Virginia - Eastern	17633	17286	1612	10178	1066	7073	542	33	4	460	4.52%
23	Virginia - Western	5585	5525	163	3529	94	1988	69	4		39	1.11%
24	West Virginia - Northern	1316	1293	54	1100	34	191	20	1		69	6.27%
25	West Virginia - Southern	1925	1904	73	1645	50	256	23	2		253	15.38%
26	Alabama - Northern	12986	12901	294	6345	141	6545	153	10		496	7.82%
27	Alabama - Middle	8175	8146	102	1542	37	6591	65	8		61	3.96%
28	Alabama - Southern	4344	4323	40	1219	16	3096	24	8		73	5.99%
29	Florida - Northern	2863	2825	270	2237	171	569	98	16	1	52	2.32%
36	Louisiana - Western	8893	8817	87	1652	36	7147	51	15		4	0.24%
37	Mississippi - Northern	4680	4655	66	1894	36	2758	30	2		15	0.79%

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38	Mississippi - Southern	6183	6140	98	3213	51	2918	47	6		26	0.81%
39	Texas - Northern	12325	12033	578	4799	241	7203	336	25		188	3.92%
3A	Florida - Middle	31459	30993	5735	21213	3462	9630	2263	137	7	1521	7.17%
3C	Florida - Southern	24728	24399	3961	13780	1924	10515	2033	101	3	842	6.11%
3E	Georgia - Northern	34288	34054	3736	18079	1925	15942	1806	26	3	931	5.15%
3G	Georgia - Middle	9083	9059	238	2763	83	6271	155	10		75	2.71%
3I	Georgia - Southern	7869	7851	153	1568	38	6270	115	5		35	2.23%
3L	Louisiana - Eastern	3446	3395	198	1465	65	1922	131	7	2	35	2.39%
3N	Louisiana - Middle	1615	1598	112	787	36	809	76	2		11	1.40%
40	Texas - Eastern	4626	4507	199	1992	100	2504	99	10		82	4.12%
41	Texas - Southern	9313	9058	826	3115	178	5910	646	32	2	131	4.21%
42	Texas - Western	8044	7862	501	3699	166	4130	335	33		102	2.76%
43	Kentucky - Eastern	7981	7911	75	5558	56	2347	18	2		131	2.36%
44	Kentucky - Western	7707	7670	157	5399	132	2263	25	4		140	2.59%
45	Michigan - Eastern	25725	25558	1613	19951	1465	5568	148	29		1726	8.65%
46	Michigan - Western	7597	7556	397	6137	354	1396	42	10	1	211	3.44%
47	Ohio - Northern	20628	20553	795	16789	619	3758	175	6	1	915	5.45%
48	Ohio - Southern	18681	18613	755	12616	538	5981	215	12	2	657	5.21%
49	Tennessee - Eastern	11614	11574	181	6151	74	5400	106	17	1	182	2.96%
50	Tennessee - Middle	9485	9422	164	4911	54	4470	110	40		92	1.87%
51	Tennessee - Western	15545	15517	288	3642	104	11865	184	10		98	2.69%
52	Illinois - Northern	48601	48097	5112	27641	3276	20392	1830	63	5	950	3.44%
53	Illinois - Central	5434	5395	167	4359	130	1033	37	1		81	1.86%
54	Illinois - Southern	3939	3917	244	2498	221	1412	23	3		194	7.77%
55	Indiana - Northern	11033	10987	409	8104	326	2865	83	11		16	0.20%
56	Indiana - Southern	16270	16205	665	11069	551	5122	113	9	1	260	2.35%
57	Wisconsin - Eastern	14322	14289	2110	10069	1848	4203	262	8		304	3.02%
58	Wisconsin - Western	4827	4812	176	4014	124	772	51	11		140	3.49%
60	Arkansas - Eastern	6773	6737	69	2874	28	3857	41	3		137	4.77%
61	Arkansas - Western	3486	3454	37	1911	16	1530	21	9		26	1.36%
62	Iowa - Northern	1794	1789	51	1672	38	111	12			38	2.27%
63	Iowa - Southern	2769	2749	76	2429	49	318	27	2		49	2.02%
64	Minnesota	10976	10890	252	9249	156	1624	96	6		177	1.91%
65	Missouri - Eastern	11540	11519	928	7790	853	3724	75	4		459	5.89%
66	Missouri - Western	8017	7978	489	5586	380	2383	108	5		286	5.12%
67	Nebraska	4244	4229	159	2839	134	1380	25	5		137	4.83%
68	North Dakota	592	587	25	534	21	51	4	1		32	5.99%
69	South Dakota	1110	1106	26	987	19	111	7	3		9	0.91%
7	Alaska	426	417	58	337	42	79	16	1		28	8.31%
70	Arizona	17448	17230	3397	14760	3029	2366	362	102	6	395	2.68%
71	California - Northern	11892	11666	2046	6543	1128	5032	913	91	5	576	8.80%
72	California - Eastern	17681	17541	2974	13897	2242	3599	724	32	7	1313	9.45%
73	California - Central	48487	47618	11686	36510	7716	10884	3955	222	13	1318	3.61%
74	California - Southern	8889	8787	685	6904	371	1874	309	9	5	405	5.87%
75	Hawaii	1593	1573	136	1119	113	452	23	2		60	5.36%
76	Idaho	4162	4127	244	3692	199	423	45	8		74	2.00%
77	Montana	1310	1295	115	1120	97	170	17	3		114	10.18%
78	Nevada	9902	9730	1297	7728	1048	1882	245	120	4	480	6.21%
79	Oregon	11134	11102	1034	9000	926	2088	106	13	2	388	4.31%
80	Washington - Eastern	4450	4431	250	3489	185	935	65	7		250	7.17%
81	Washington - Western	14567	14425	1450	10813	984	3566	464	45	2	430	3.98%
82	Colorado	15389	15272	2108	12536	1929	2710	176	22	2	620	4.95%
83	Kansas	6998	6970	313	3978	275	2979	37	6		271	6.81%
84	New Mexico	3508	3461	412	3181	388	269	24	10		65	2.04%

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85	Oklahoma - Northern	2523	2511	90	2196	58	313	32	2		27	1.23%
86	Oklahoma - Eastern	1459	1449	29	1279	22	168	7	1		6	0.47%
87	Oklahoma - Western	5213	5176	315	4079	276	1091	39	4		45	1.10%
88	Utah	12520	12454	1100	7631	913	4817	185	6	2	262	3.43%
89	Wyoming	921	911	76	813	62	96	14	2		37	4.55%
90	District of Columbia	723	694	173	558	146	131	26	5	1	93	16.67%
91	Virgin Islands	20	18	1	12	1	5		1			0.00%
93	Guam	133	132	1	105	1	27					0.00%
94	Northern Mariana Islands	6	4	1	3	1	1				2	66.67%
<b>9/30/2016</b>	<b>ALL Districts</b>	<b>805580</b>	<b>795560</b>	<b>69777</b>	<b>494012</b>	<b>43703</b>	<b>299150</b>	<b>25911</b>	<b>2018</b>	<b>142</b>	<b>23182</b>	<b>4.69%</b>
00	Maine	1613	1597	44	1312	38	275	5	6	1	55	4.19%
01	Massachusetts	8873	8703	515	5925	233	2718	281	49	1	418	7.05%
02	New Hampshire	1878	1853	131	1399	73	448	58	6		63	4.50%
03	Rhode Island	2364	2343	278	1792	121	550	157	1		39	2.18%
04	Puerto Rico	10973	10676	50	4553	10	6037	40	70		56	1.23%
05	Connecticut	5914	5800	468	4666	220	1122	248	12		168	3.60%
06	New York - Northern	6241	6183	186	4810	134	1352	51	3	1	162	3.37%
07	New York - Eastern	11846	11592	2568	8583	885	2969	1679	40	4	448	5.22%
08	New York - Southern	7639	7043	948	5335	602	1664	343	42	3	283	5.30%
09	New York - Western	4182	4134	122	2955	72	1168	49	8		89	3.01%
10	Vermont	604	596	17	483	12	113	5			22	4.55%
11	Delaware	2876	2148	184	1410	93	738	91			165	11.70%
12	New Jersey	25651	25296	2118	16709	1186	8503	927	79	4	1067	6.39%
13	Pennsylvania - Eastern	9341	9218	713	4855	293	4342	415	19	5	383	7.89%
14	Pennsylvania - Middle	5460	5384	286	3378	114	2000	171	4		177	5.24%
15	Pennsylvania - Western	7161	7032	132	4461	70	2533	61	31		112	2.51%
16	Maryland	17212	17066	3674	11410	2492	5594	1173	59	8	1010	8.85%
17	North Carolina - Eastern	6950	6885	229	2251	105	4585	123	42	1	46	2.04%
18	North Carolina - Middle	4021	3967	140	1644	57	2320	82	3	1	23	1.40%
19	North Carolina - Western	4304	4254	246	2197	112	2049	133	8	1	55	2.50%
20	South Carolina	6731	6676	175	2623	75	4041	100	7		332	12.66%
22	Virginia - Eastern	17376	17225	1811	9829	1181	7359	626	35	4	553	5.63%
23	Virginia - Western	5595	5565	179	3395	103	2160	74	4		64	1.89%
24	West Virginia - Northern	1336	1308	55	1105	35	201	20	1		66	5.97%
25	West Virginia - Southern	2002	1953	65	1731	46	216	19	6		227	13.11%
26	Alabama - Northern	13618	13571	279	6570	161	6991	118	9		714	10.87%
27	Alabama - Middle	8010	7982	116	1649	46	6331	69	2	1	115	6.97%
28	Alabama - Southern	4463	4444	48	1229	20	3207	28	8		92	7.49%
29	Florida - Northern	2457	2415	243	1920	166	475	77	17		34	1.77%
36	Louisiana - Western	8945	8863	79	1687	44	7153	34	17	1	3	0.18%
37	Mississippi - Northern	4656	4642	65	1939	41	2689	24	7		27	1.33%
38	Mississippi - Southern	6621	6564	127	3467	76	3090	51	6		52	1.50%
39	Texas - Northern	12112	11773	571	4638	262	7106	309	24		195	4.20%
3A	Florida - Middle	25944	25569	4175	17089	2241	8317	1924	148	9	1064	6.23%
3C	Florida - Southern	19317	19025	2669	10029	1259	8883	1404	112	6	578	5.76%
3E	Georgia - Northern	32420	32171	3217	16320	1536	15833	1681	17		666	4.08%
3G	Georgia - Middle	8381	8343	233	2568	66	5743	167	9		53	2.06%
3J	Georgia - Southern	7291	7259	150	1422	49	5818	100	13		51	3.59%
3L	Louisiana - Eastern	3362	3305	183	1514	75	1787	108	4		42	2.77%
3N	Louisiana - Middle	1518	1500	114	795	56	702	58	3		18	2.26%
40	Texas - Eastern	4721	4581	224	1993	107	2568	117	20		61	3.06%
41	Texas - Southern	9072	8661	812	3115	236	5514	572	30	4	166	5.33%
42	Texas - Western	7850	7586	556	3631	189	3924	365	31	2	101	2.78%
43	Kentucky - Eastern	7891	7858	75	5415	51	2438	24	2		119	2.20%

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44	Kentucky - Western	7419	7395	143	4795	113	2585	30	4			125	2.61%
45	Michigan - Eastern	24250	24110	1592	18616	1465	5448	127	34			1676	9.00%
46	Michigan - Western	7117	7067	424	5628	374	1428	49	8	1		205	3.64%
47	Ohio - Northern	19696	19598	816	15993	638	3598	178	7			1020	6.38%
48	Ohio - Southern	17619	17588	806	12002	599	5578	206	6	1		702	5.85%
49	Tennessee - Eastern	11426	11369	154	5958	51	5380	103	23			141	2.37%
50	Tennessee - Middle	9573	9499	164	4799	70	4669	94	31			103	2.15%
51	Tennessee - Western	14999	14959	275	3511	99	11435	176	13			97	2.76%
52	Illinois - Northern	45838	45564	4188	25371	2645	20157	1539	33	1		913	3.60%
53	Illinois - Central	5163	5141	153	4199	125	939	28				97	2.31%
54	Illinois - Southern	3855	3846	242	2524	217	1313	25	4			193	7.65%
55	Indiana - Northern	10026	9969	351	7175	281	2777	70	13			15	0.21%
56	Indiana - Southern	14667	14612	684	9842	561	4754	122	13	1		275	2.79%
57	Wisconsin - Eastern	12816	12782	1688	8457	1456	4303	232	11			235	2.78%
58	Wisconsin - Western	4498	4478	182	3672	136	782	46	7			118	3.21%
60	Arkansas - Eastern	7270	7229	93	3130	41	4089	52	4			105	3.35%
61	Arkansas - Western	3265	3242	63	1746	31	1484	32	5			48	2.75%
62	Iowa - Northern	1714	1708	39	1548	27	150	12				31	2.00%
63	Iowa - Southern	2636	2624	96	2265	59	350	37	1			47	2.08%
64	Minnesota	9776	9720	264	8178	182	1524	81	7			142	1.74%
65	Missouri - Eastern	11100	10824	1011	7100	930	3716	81	3			339	4.77%
66	Missouri - Western	7473	7443	436	5109	337	2325	99	7			164	3.21%
67	Nebraska	4114	4088	174	2690	158	1381	15	7			74	2.75%
68	North Dakota	666	659	25	571	18	80	7	3			35	6.13%
69	South Dakota	1078	1078	30	969	26	103	4	2			10	1.03%
7	Alaska	434	412	41	351	30	59	11	2			19	5.41%
70	Arizona	15895	15671	3031	12989	2567	2576	454	105	10		283	2.18%
71	California - Northern	10607	10402	2030	5410	1027	4879	983	111	19		502	9.28%
72	California - Eastern	15528	15404	2650	11784	1872	3572	766	34	11	1077	9.14%	
73	California - Central	42225	41386	10169	30465	5927	10677	4219	237	21		946	3.11%
74	California - Southern	8263	8159	710	6320	378	1820	329	19	3		387	6.12%
75	Hawaii	1463	1445	145	978	110	461	33	6	2		51	5.21%
76	Idaho	3841	3817	174	3379	132	428	42	8			81	2.40%
77	Montana	1365	1348	139	1137	107	207	32	1			99	8.71%
78	Nevada	9063	8893	1225	6881	984	1897	239	114	2		432	6.28%
79	Oregon	9488	9448	834	7412	717	2022	116	9	1		317	4.28%
80	Washington - Eastern	4120	4094	199	3102	140	988	59	2			177	5.71%
81	Washington - Western	12739	12618	1220	9107	809	3457	403	51	6		421	4.62%
82	Colorado	13191	13077	1592	10424	1390	2639	200	14	2		426	4.09%
83	Kansas	6553	6442	298	3766	266	2650	31	10	1		293	7.78%
84	New Mexico	3315	3281	335	2959	302	311	32	10			58	1.96%
85	Oklahoma - Northern	2459	2445	69	2178	45	264	24	1			15	0.69%
86	Oklahoma - Eastern	1372	1356	46	1234	38	119	8				13	1.05%
87	Oklahoma - Western	5330	5275	299	4119	253	1149	45	7	1		54	1.31%
88	Utah	11667	11613	925	6876	712	4732	213	5			261	3.80%
89	Wyoming	936	925	78	823	54	100	23	2	1		39	4.74%
90	District of Columbia	697	673	198	531	156	132	41	10	1		85	16.01%
91	Virgin Islands	24	23	2	17	2	6					2	11.76%
93	Guam	152	147	3	117	1	30	2					0.00%
94	Northern Mariana Islands	7	5	2	4	2	1						0.00%
	<b>FY 2008-FY 2016 ALL Districts</b>	<b>10507538</b>	<b>10374403</b>	<b>843600</b>	<b>7108564</b>	<b>567044</b>	<b>3237900</b>	<b>274454</b>	<b>24338</b>	<b>1927</b>	<b>231288</b>	<b>3.25%</b>	

# Implementing and Evaluating the Chapter 7 Filing Fee Waiver Program

*Report to the Committee on the Administration of the  
Bankruptcy System of the Judicial Conference  
of the United States*

Federal Judicial Center  
1998

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This report was undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct research on federal courts and in response to a specific request from the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States in response to Pub. L. No. 103-121, § 111 (1993). The Conference approved this report for submission to Congress pursuant to that statute.

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## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

### *Implementing & Evaluating the Chapter 7 Filing Fee Program*

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## Executive Summary

In the appropriation act funding the judiciary for fiscal 1994, Congress directed the Judicial Conference of the United States to implement and study in up to six districts the effect of waiving the \$175 filing fee for individual Chapter 7 debtors who are unable to pay the fee in installments (H.R. 2519, cited as the "Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1994," Pub. L. No. 103-121, 107 Stat. 1153). In *United States v. Kras*, 401 U.S. 371 (1971), the Court held that the right to file a bankruptcy petition was not a fundamental right requiring access to court for all citizens, thus upholding a required filing fee. The Judicial Conference charged its Committee on the Administration of the Bankruptcy System with overseeing the implementation and evaluation of the pilot fee-waiver program, and the Federal Judicial Center conducted the evaluation for the Committee. The pilot program was operative from October 1, 1994, through September 30, 1997, in the following six districts: the Southern District of Illinois, the District of Montana, the Eastern District of New York, the Eastern District of Pennsylvania, the Western District of Tennessee, and the District of Utah.

Below we summarize the evaluation and its findings under three major headings: (1) Description of the Pilot Program; (2) Projections for a National Program: Number of Applications and Waivers and the Cost; and (3) Issues for Subsequent Legislation or Rules if the Program Is Implemented Nationwide.

### Description of the Pilot Program

**How many fee-waiver applications were filed and granted in the pilot districts?  
What factors account for interdistrict variation in fee-waiver activity?**

Across years and districts, an application for waiver of the filing fee was filed in 3.4% of all non-business Chapter 7 cases, and the fee was actually waived in 2.9% of all such cases. Over the course of the pilot program, 4,518 applications were filed and 3,867 (85.6%) were granted. The number of fee-waiver applications and actual waivers rose from 1,300 and 1,035 in fiscal 1995 to 1,634 and 1,441 in fiscal 1997. The increase in the number of applications appears to be the result of an increase in the number of non-business Chapter 7 cases. The increase in the number of actual waivers is due in part to an increase in the number of Chapter 7 cases. It also reflects an increase, particularly early in the program, in the likelihood that an application would be granted.

For the three-year period, the percentages of non-business cases involving fee-waiver activity varied across the districts. The percentage of non-business Chapter 7 cases in which an application was filed ranged from 0.3% in the Western District of Tennessee to 8.3% in the Eastern District of Pennsylvania. The percentage of non-business Chapter 7 cases in which the filing fee was actually waived ranged from

0.2% in the Western District of Tennessee to 7.8% in the Eastern District of Pennsylvania.

The higher rate of applications in the Eastern District of Pennsylvania appears due to the availability of legal services and pro bono representation to Chapter 7 debtors. Eighty-six percent of the applicants in the Eastern District of Pennsylvania were represented by a pro bono or legal services attorney, but only 21% of the applicants across the other districts were so represented.

**For what reasons were applications denied and how did petitioners meet the fee obligation, if at all, subsequent to the denial?**

The most commonly given reason for denying an application was that the debtor's income, expenses, and assets indicated an ability to pay the required filing fee, at least in installments. Other reasons for denying applications were that an attorney or non-attorney had been paid (at all or at an inappropriately high fee) and that the debtor provided insufficient/ambiguous information and failed to supplement it. In a few cases, the application was denied because the debtor had a history of repetitive filing or because bankruptcy was an inadequate solution to the problem the debtor was trying to solve (e.g., the only debt to be discharged was non-dischargeable; the debtor was attempting to protect property belonging to a third party).

When the request for a fee waiver was denied, the debtor paid the filing fee approximately 73% of the time. The fee was paid in a lump sum about 44% of the time and in installments 56% of the time.

**For how many applications were objections filed, hearings held, and rulings modified?**

Across the pilot districts, the U.S. trustee offices filed objections to less than 1% of the applications. The U.S. trustee office in the Eastern District of Pennsylvania played a more active role than did the U.S. trustee offices in the other pilot districts, providing a statement of review, comment, or objection on every application. That office provided comment, short of objection, in about 12% of the fee-waiver cases in that district.

Hearings were scheduled on 300 (8%) of the 3,732 applications in the case-closing sample and actually held on 267 (7%). Most of the hearings (90%) were set sua sponte (although the U.S. trustee had entered comments in some cases), and most were held before the court's initial ruling on the application (92%) and before the section 341 meeting (84%).

The initial ruling on about 2% of the applications was vacated, rescinded, or otherwise modified by the court. Only two orders were appealed. In one case, the

bankruptcy court was affirmed on the merits, and in the other the appeal was dismissed because it was not timely filed.

### **Who used the program?**

The report contains paragraph-length descriptions of 200 applicants that were represented by the Consumer Bankruptcy Assistance Project in Philadelphia. The paragraphs describe the applicants' circumstances at the time of filing bankruptcy, the consequences of filing bankruptcy for the applicants, and why paying the filing fee in installments was not possible.

To provide other information about the users of the program, we compared the type of unsecured debt they listed on schedule F (and amendments thereto) to that listed by other Chapter 7 petitioners. We made this comparison in the Eastern District of New York and the Eastern District of Pennsylvania because that is where the bulk of the applications were filed.

The average number of unsecured debts held by *in forma pauperis* (IFP) petitioners did not differ from the number held by non-IFP petitioners, nor did the number of debts held by petitioners in the Eastern District of Pennsylvania differ from the number held by petitioners in the Eastern District of New York. However, the amount of total debt did differ between IFP and non-IFP petitioners and between petitioners in the two districts. Across the districts, the debt of IFP petitioners was less than that of non-IFP petitioners. Regardless of IFP status, debtors from the Eastern District of New York had greater debt than those from the Eastern District of Pennsylvania.

The nature of debt also differed between IFP and non-IFP petitioners and between districts. In the Eastern District of Pennsylvania substantially more IFP petitioners, compared to non-IFP petitioners, had debts related to basic subsistence—to education, health, utility services, and housing. A large percentage (63%) of the housing-related debts of IFP petitioners were owed to public housing authorities (the creditor for only one of the non-IFP housing debts was a public housing authority). Fewer IFP petitioners had unsecured debts stemming from bank credit cards, major department store credit cards, individual store charges and credit cards, and bank loans. Only 22% of the total unsecured debt held by IFP debtors was credit card debt—a greater percentage (27%) of the debt was health-related. The analogous percentages for non-IFP debtors were credit card, 48%, and health, 11%.

In the Eastern District of New York, most of the petitioners—both IFP and non-IFP—had bank credit card debt, which accounted for almost two-thirds of the total debt. Compared to non-IFP petitioners, somewhat more IFP petitioners had debt related to health and utility services, but the total debt for these categories was only a small fraction of the credit card debt. In addition, four IFP petitioners, but no non-IFP petitioners, had debt stemming from Social Security Administration or welfare overpayments.

The distinction between credit card debt and debt related to basic subsistence may of course be illusory. Debtors may have high credit card debt because they used their cards to cover basic needs. Still, debtors who possess lines of credit arguably are better able to meet the filing-fee obligation. In commenting on the program, the Executive Office for U.S. Trustees noted that to the extent fee-waiver applicants are seeking to discharge credit card debt, they evidently possess sufficient assets to secure lines of credit and should be able to pay the requisite filing fee in installments. This, of course, assumes credit card eligibility equates to financial competence (a current point of debate).

**Did the program increase access to the bankruptcy courts?**

Responses to two questions in the survey of fee-waiver applicants indicate that the fee-waiver program may make the bankruptcy courts more accessible to low-income debtors. Almost 11% of the successful applicants said they would not have filed bankruptcy had there been no waiver program, and a little less than a third said they would have filed anyway, but at a later date. Among those who received a waiver, 10% said they would not have continued with their case absent the waiver. Half said they would have continued, but a third did not know.

The Committee on Bankruptcy Issues of the Third Circuit Task Force on Equal Treatment in the Courts found a higher single-female filing rate and markedly fewer joint filings for IFP cases than non-IFP cases in the Eastern District of Pennsylvania. That committee concluded that the fee-waiver program may have enhanced access to the bankruptcy system for indigent single women. A working committee of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts reached the same basic conclusion in its draft report to the Second Circuit Task Force.

**Did users of the program obtain a discharge of their debts, and did they reaffirm debts?**

Debtors whose fee-waiver applications were granted were more likely to obtain a discharge compared to debtors whose applications were denied (95.4% versus 72.4%). This pattern was found for each district separately, except for the Southern District of Illinois, where the rates for the two groups did not significantly differ, and was more pronounced in the Eastern District of Pennsylvania.

Overall and in each district, the discharge rate for debtors whose fee was waived was similar to that for all other Chapter 7 debtors in the pilot districts (95.4% versus 95.9%). Where we were able to obtain relevant information, we found estimates of the discharge rates for cases in which an installment application was filed to be lower than the discharge rates for cases in which the fee was waived.

Across the pilot districts, reaffirmation agreements were filed in between 1.4% and 25% of cases in which the filing fee was waived (Southern Illinois, 24%;

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Montana, 12.3%; Eastern Pennsylvania, 1.4%; Eastern New York, 4.5%; Western Tennessee, 25%; and Utah, 15.5%).

#### **Did the program encourage people to file bankruptcy with no intention of following through to discharge?**

Of cases in which a fee-waiver application was filed, the petition was filed complete with the mailing matrix, all schedules, and the statement of financial affairs about 80% of the time. Another 6% of the cases were missing just one document, which was most often the mailing matrix (83%). This suggests that the petitioner's goal in filing bankruptcy went beyond just obtaining relief from the stay.

#### **What were the less tangible benefits of filing bankruptcy for the users of the program?**

Responses to four questions in the applicant survey suggest some of the less tangible benefits filing bankruptcy may have had for users of the fee-waiver program.

Of the respondents whose fees were waived, about three-quarters said collection agencies were calling and writing their household attempting to collect money; over half said they or their spouse were very worried or emotionally upset because of debt problems; and almost half of the applicants said they had recently lost their job or become unable to work for other reasons. About a third said they were behind in paying a utility bill so that the company had shut off or threatened to shut off service, and at least 20% said they were behind in paying rent and that they or someone they support had recently had serious medical problems and big medical bills.

Compared to debtors whose fee-waiver request was denied, debtors whose fee waiver was granted were more likely to report they were trying to obtain public housing, behind in paying rent, facing eviction, and behind in paying a utility bill, and less likely to report that someone to whom they owed money was taking their wages or had threatened to take their wages.

Debtors whose fees were waived were more likely to report that filing bankruptcy made it easier to keep or get housing (29.4% compared to 13.8% for those whose fee-waiver request was denied). They were also more likely to say that filing bankruptcy reduced the tension or stress in their household (85.6% versus 65.3%). This pattern held for most districts, but in Utah, those whose applications were denied more frequently said filing bankruptcy had increased household stress (47.1% versus 24.5% overall), and less frequently said it reduced stress (29.4% versus 65.3% overall). And in Eastern Pennsylvania, among the unsuccessful applicants, filing increased stress 31.6% of the time (versus 24.5% overall) and decreased it only 52.6% of the time (versus 65.3% overall).

Most applicants, whether their fee was waived or not, said filing bankruptcy had no effect on their employment situation. Of those whose fee was waived, only about

8.7% said filing bankruptcy made it easier to work at their job or to obtain a job, and only about 3.8% said filing bankruptcy made it harder.

In sum, it does appear that many IFP debtors benefited from filing bankruptcy. However, some of them might have benefited more from a lesser remedy (e.g., referral to consumer credit counseling or social services to work-out agreements with quasi-public utility services or public housing). Such remedies would not restrict the debtors' ability to obtain bankruptcy relief when they might need it more. For example, we know that at least 89 of the Eastern Pennsylvania applicants were assisted by tenant organizations, and presumably were filing bankruptcy to discharge public housing debt so they could keep or obtain such housing. The Consumer Bankruptcy Assistance Project's summaries also indicate some of its clients filed for this purpose. A change in non-bankruptcy law or policy might provide these very poor debtors more straightforward solutions to their problems.

**Did the program increase Chapter 7 filings?**

From 1994 to 1997, yearly consumer filings in each of the pilot courts rose dramatically, and in all pilot districts but New York the change was due to both an increase in the number of Chapter 7 and in Chapter 13 filings. This pattern of change mirrors that found nationwide and complicates determining whether the fee-waiver program resulted in a shift of filings from Chapter 13 to Chapter 7, or in an increase in filings overall. It is clear, however, that only a small fraction of the increased filings are due to the program. The percentage increase in Chapter 7 filings and total consumer filings is basically the same in all pilot courts, including and excluding the fee-waiver cases.

**Did the fee-waiver program encourage debtors to file under Chapter 7 even when Chapter 13 was more appropriate?**

The Western District of Tennessee was included in the study in part because it has a high number of Chapter 13 cases relative to Chapter 7 cases and so was a good place to examine the issue. There is no indication that debtors in this district filed in Chapter 7 rather than Chapter 13 merely to obtain benefit of the fee-waiver program. The proportion of consumer cases filed under Chapter 7 is the same, even if one assumes that all cases in which an application was filed would have been filed under Chapter 13 in the absence of the pilot program.

In only one of the other five pilot districts (the Eastern District of Pennsylvania) did the percentage of consumer cases filed as Chapter 7 seem to increase during the pilot program. But because only a small fraction of the increased filings in this district could be due to the fee-waiver program, the change in the percentage must be only partially, if at all, due to the fee-waiver program.

### **Did the program increase the number of bankruptcy petitions by inmates?**

The Southern District of Illinois was selected as a pilot district partly because it has three federal and eleven state correctional institutions and thus would provide a good test of whether the program would increase the number of bankruptcy petitions, including frivolous ones, by inmates. During the first two and a half years of the program, only seven inmates in this district asked that their filing fee be waived. Six inmates received a waiver of the filing fee and six received a general discharge of their debts.

Across all the pilot districts during the first two and a half years of the program, 27 inmates asked that their filing fee be waived; 17 of the requests were granted, 8 were denied, and 2 were not decided before the case was dismissed. Nineteen of the 27 inmates received a discharge.

These prisoner cases presented no extraordinary issues to the courts, with the exception of one case in the Southern District of Illinois. See *In re Merritt*, 186 B.R. 924 (Bankr. S.D. Ill. 1995), in which an IFP debtor appealed the bankruptcy court's decision regarding the dischargeability of a penalty imposed for damaging prison property.

### **Did the program bring more pro se debtors into the bankruptcy courts?**

Another concern about the program was that it would indirectly increase the workload of the clerk's office and judge's staff because the program would bring more pro se debtors into court. Overall, 38% of the fee-waiver applicants appeared pro se. The percentage ranged across the districts from 10.8% in Eastern Pennsylvania to 78.5% in Eastern New York. In New York, legal services attorneys assisted with the preparation of petitions without entering a court appearance in 354 cases—if these debtors are considered to be represented, the percentage of pro se debtors in the district drops to 50.3%.

It appears that the percentage of fee-waiver applicants that appear pro se is disproportionately high compared to other Chapter 7 debtors—more or less so depending on the availability of pro bono legal services and the judicial inclination to waive the fee when an attorney has been paid. Thus, these filings may be disproportionately burdensome to the clerk's office, judges, trustees, and other parties.

### **Did the program exacerbate problems associated with petition preparers?**

Of the 3,732 cases filed under the program in its first two and a half years, an application was filed in 224 cases in which a non-attorney had been paid, and the application was granted in 165 cases. Most of these cases were filed in the Long Island offices of the Eastern District of New York by petition preparers, with a notable number also being filed by petition preparers in the District of Utah. Most of

the New York applications (80%), but only about a third of those in Utah (38%), were granted. Not surprisingly, the number of such applications appears to be declining because action has been taken against petition preparers who have filed fee-waiver applications in both Eastern New York and Utah.

**Projections for a National Program: Number of Applications and Waivers and the Cost**

**How many applications would be filed if the program were implemented nationwide?**

Table S-1 shows the projected number of applications and waivers assuming, alternatively:

- the same percentage as the overall percentage in the pilot courts (row 1);
- the same percentage as the overall percentage in the pilot courts, excluding those cases in which an attorney had been paid in connection with the case (row 2);
- the same as the overall percentage in the pilot courts, excluding those cases in which a non-attorney had been paid in connection with the case (row 3);
- the same as the overall percentage in the pilot courts, excluding those cases in which an attorney or non-attorney had been paid (row 4);
- the percentage of Chapter 7 debtors with income below the poverty line (row 5);
- the percentage of Chapter 7 debtors represented pro bono (row 6); and
- the percentage of Chapter 7 debtors represented pro bono, adjusted upward according to the percentage of applicants in the pilot districts proceeding pro se (row 7).

These projections are based on the number of non-business Chapter 7 cases filed in fiscal 1997 (926,183) and are subject to increase if the number of filings increases. The number of non-business Chapter 7 cases rose by 26% from fiscal 1996 to fiscal 1997 and the Administrative Office expects filings to continue to rise through fiscal 1998 and then remain steady in fiscal 1999.

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**Table S-1: Projected Number of Applications and Waiver Applying Alternative Assumptions**

Alternative Standard or Assumption	Estimated Number of Applications Based on FY 97 Filings	Estimated Number of Waivers Based on FY 97 Filings
1. Totality of circumstances	31,490	26,859
2. Totality of circumstances, prohibiting waivers when an attorney had been paid	29,638	25,933
3. Totality of circumstances, prohibiting waivers when a non-attorney had been paid	31,490	25,933
4. Totality of circumstances, prohibiting waivers when an attorney or non-attorney had been paid	29,638	25,007
5. Income below the poverty line	300,083	300,083
6. Number of Chapter 7 debtors represented pro bono	19,841	19,841
7. Number of Chapter 7 debtors represented pro bono, plus pro se debtors	36,075	32,406

Not all those eligible under the “income below the poverty line” standard requested a waiver of the filing fee in the pilot program (e.g., only 8.3% of consumer Chapter 7 debtors requested a fee waiver in the Eastern District of Pennsylvania but 38.5% are thought to have income below the poverty line). Thus, if the courts waived the filing fee for all debtors with income below the poverty line, whether or not the debtor requested a waiver, the number of waivers would likely increase greatly.

Some judges in the pilot courts used the poverty guidelines as informal criteria to guide their decisions. This suggests that even if the poverty guidelines are not published as the eligibility standard, the number of waivers may increase as the program becomes better known and determinations become more routine. This is especially true if waivers are allowed when attorneys are paid because attorneys would nearly always suggest non-payment of the fee to clients who qualified. Thus, the percentage of debtors falling below the poverty line can be taken as an estimate of the upper limit of the percentage of debtors that would receive a waiver.

Before the start-up of the fee-waiver program, the bankruptcy court in the Central District of California expressed an interest in participating in the pilot program because of its significant problem with petition preparers filing bankruptcy petitions to temporarily stay an eviction or foreclosure with no intention of the debtor appearing at the section 341 meeting or even filing schedules (so-called, unlawful detainer cases). Given the petition preparers’ sophistication, it was thought that they would attempt to avoid paying the filing fee if a national program were

implemented. The Bankruptcy Committee did not identify the district as a pilot, but has met with the representatives from the district about the probable impact of a national program.

To avoid improper waivers of the filing fee, the district representatives believe it is essential for their judges to have clear authority to review and rule on fee-waiver applications before the automatic stay goes into effect, and to deny the waiver if a case is being filed for an improper purpose. This type of review would necessitate the debtor filing complete schedules and statements along with the petition and fee-waiver application. The district representatives think existing statutory authority under 11 U.S.C. § 707(a) and (b) for dismissing a case for cause or substantial abuse is inadequate for dealing with the unlawful detainer cases because once the automatic stay is in effect, the petitioners in these cases have gotten what they want and do not care whether the case is dismissed.

**What would a national fee-waiver program cost?**

In Table S-2 we show the lost revenue and personnel costs associated with each of the scenarios listed in Table S-1. The lost revenue due to a national program falls within a comparatively narrow range (\$3.5 million to \$5.8 million) assuming all the alternative eligibility standards, except one. If “below the poverty line” is adopted as a “bright-line” standard, the estimated lost revenue is much more (\$53 million). The cost for additional clerk’s office personnel also falls within a comparatively narrow range (from about \$1 million to about \$1.9 million) for all the alternative standards, except “below the poverty line.” Our formula results in a much more significant cost for the “below the poverty line” standard. This is likely an overestimate because application of this standard would require minimal review and discretion, and the formula is based on the time required to review applications under a discretionary standard.

Judges spent little time on the program, and thus a national program should not necessitate additional judgeships, assuming the number of applications remains at the current level. Looking to the Eastern District of Pennsylvania (the district with the highest number of applications), bankruptcy judges spent approximately 298 hours on the program across all three years, or about 99 hours per year, excluding time related to the study and publicizing the pilot program. This is about 60 hours per judge for the three years, combined or 20 hours per judge per year. Judges spent approximately 45% of the time devoted to the program reviewing fee-waiver applications and meeting with IFP clerks about specific applications; 6% of the time presiding at hearings related to the applications; 29% of the time preparing/signing related memoranda and orders; 13% of the time on administrative and other routine matters related to the program; and 6% of the time on miscellaneous matters related to the program.

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**Table S-2: Projected Number of Applications that Would Be Granted and Lost Fees, Given Alternative Eligibility Standards and Assumptions**

Alternative Standard or Assumption	Lost Filing Fee (\$175 per case)	Lost Miscellaneous Fees (\$2.76 per case)	Personnel Cost for Additional Clerk's Office Personnel (see note 1)
1. <b>Totality of circumstances</b>	\$4,700,325	\$74,131	\$1,695,408 \$1,495,551
2. <b>Totality of circumstances, prohibiting waivers when an attorney had been paid</b>	\$4,538,275	\$71,575	\$1,596,003 \$1,407,864
3. <b>Totality of circumstances, prohibiting waivers when a non-attorney had been paid</b>	\$4,538,275	\$71,575	\$1,695,408 \$1,495,551
4. <b>Totality of circumstances, prohibiting waivers when an attorney or non-attorney had been paid</b>	\$4,376,225	\$69,019	\$1,596,003 \$1,407,864
5. <b>Income below the poverty guidelines</b>	\$52,514,525	\$828,229	\$16,169,880 \$14,263,752 (see note 2)
6. <b>Number of Chapter 7 debtors represented pro bono</b>	\$3,472,175	\$54,761	\$1,071,365 \$945,071 (see note 2)
7. <b>Number of Chapter 7 debtors represented pro bono, plus pro se debtors</b>	\$5,671,050	\$89,441	\$1,943,920 \$1,714,768
<i>Note:</i>			
1. Top entry in each cell for the column "Personnel Costs" is first-year cost; bottom entry is subsequent year cost.			
2. Our formula for estimating personnel costs most likely overestimates the time required to process applications if income below the poverty line is adopted as a "bright-line" standard (row 5 of the table) or if the filing fee is waived for all debtors represented by legal services or organized pro bono groups (row 6). Application of these standards would require minimal review and discretion.			

Another factor contributing to the cost of the program is the extent to which it produces additional bankruptcy filings. Our findings suggest that although the pilot program increased access to the courts for certain debtors, the net increase in the number of filings was small. Use of eligibility standards other than some variant of the totality of the circumstances (e.g., the poverty line) might result in a larger increase of filings.

The work and lost revenue associated with waivers of the filing fee should be offset by some of that associated with paying the fee in installments. Presumably,

some debtors who request a waiver of the filing fee would attempt to pay the filing fee in installments in the absence of a fee-waiver program. Clerk's office and judge time would be required to process and determine motions for nonpayment of fees and to hold related hearings. Moreover, some, if not all, of the filing fee would be left unpaid. The Administrative Office does not routinely maintain a record of the number of installment applications and the amount of the filing fee actually paid pursuant to them. We are attempting to obtain the information on a district-by-district basis.

### **Issues for Subsequent Legislation or Rules if the Program Is Implemented Nationwide**

We provide information relevant to a number of issues to be considered if a national program is implemented, including:

- How should the cost of a national program be offset?
- What procedures should be used to process the applications and what eligibility criteria should be applied?
- What role should the U.S. trustee and the Chapter 7 trustees play?
- Should waiver of the filing fee constitute waiver of all miscellaneous fees?
- Should the fee-waiver program be extended to Chapter 13?
- Can the installment program be modified to eliminate the need for a fee-waiver program?

Here we summarize the first of these issues.

#### **How should the cost of a national program be offset?**

In discussing ways to offset the costs of a national program, we assume the rate of waivers will mirror that in the pilot courts, but the rate could vary greatly according to the several factors: eligibility standard employed; the public's and bar's awareness of the program; the degree of scrutiny given applications; and the overall rate of Chapter 7 filings.

Assuming applications will be filed and granted at the rate found in the pilot districts, a national fee-waiver program would result in approximately \$4,700,325 in lost filings fees, approximately \$74,131 in waived miscellaneous fees for IFP debtors, and approximately \$1,495,551 in salary for additional clerk's office personnel, for a total of approximately \$6,270,007. The Bankruptcy Committee endorsed the recommendation of its IFP subcommittee that the most straightforward way to fund

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a national program would be for Congress to increase the judiciary's appropriation by this amount, which represents 2/10 of 1% of the judiciary's total fiscal 1997 appropriation.

If monies are not directly appropriated to cover the costs of the program, the subcommittee suggested and the committee secondarily endorsed requesting authorization for application of the U.S. Treasury share of the filing fee to cover the cost of the program. Currently, the general fund of the U.S. Treasury receives \$15 from the filing fee for each Chapter 7 case. In fiscal 1997 alone, the general fund received approximately \$13,892,745 from Chapter 7 bankruptcy filings. Thus, lost revenue due to waived fees would be recovered if the judiciary could retain this portion of the fee for all non-IFP cases in a special fund designated as "no year" money. From the fund, \$160 would be allocated for each IFP case among the entities who would have benefited from the filing fee (e.g., the judiciary would receive \$70, the U.S. trustee system would receive \$30 dollars, and the case trustee would receive \$60). The drawback to this approach is that the fund may be insufficient to cover the costs of the program in subsequent years if the ratio of IFP to non-IFP cases dramatically increases. Designating the fund's receipts as "no year," however, would enable the judiciary to better respond to moderate filing fluctuations.

## **I. Action to Implement the Program by the Congress and the Committee on the Administration of the Bankruptcy System**

In the appropriation act funding the judiciary for FY94, enacted October 14, 1993, Congress directed the Judicial Conference of the United States to study two variations on the system of filing fees in bankruptcy courts. For Chapter 7 cases, the Conference was to implement and study in up to six districts the effect of waiving the filing fee for individual debtors who are unable to pay the fee in installments. For chapter 11 and 13 cases, the Conference was instructed to study, but not implement, a graduated fee system based on assets, liabilities, or both.<sup>1</sup> The Judicial Conference's report to Congress, which is to be submitted by March 31, 1998, must include:

- an estimate of the costs and benefits that would result from waiving bankruptcy fees payable by debtors who are individuals;
- recommendations regarding various revenue sources to offset the net costs of waiving such fees;
- an evaluation of the effects that would result in cases under chapters 11 and 13 of title 11, U.S. Code, from using a graduated bankruptcy fee system based on the debtor's assets, liabilities, or both; and
- recommendations regarding various methods to implement such a graduated bankruptcy fee system.

Anticipating the congressional directive on bankruptcy fees, in December 1992, the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) appointed a subcommittee on *in forma pauperis*.<sup>2</sup> Working with staff of the Federal Judicial Center, the subcommittee explored options for evaluating the potential effects of waiving the filing fee in consumer bankruptcy cases and concluded that a pilot study was the only reliable way to determine (1) the effect of a fee-waiver provision on the workloads of clerks' offices and judges, including an assessment of the time needed to process fee-waiver applications and to meet the needs of additional pro se debtors; (2) the number of applications and additional filings that would be generated by a nationwide fee-waiver provision; and (3) the costs associated with a fee-waiver provision. In June 1993, the Bankruptcy Committee approved the Subcommittee's recommendation that the Judicial Conference

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1. H.R. 2519, cited as the "Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1994," Pub. L. No. 103-121, 107 Stat. 1153. In *United States v. Kras*, 401 U.S. 371 (1971), the Court held that the right to file a bankruptcy petition was not a fundamental right requiring access to court for all citizens, thus upholding a required filing fee.

2. Original members of the subcommittee were Bankruptcy Judge W. Homer Drake and District Judge Donald E. Walter (chair). Judge Drake is no longer a member of the Bankruptcy Committee and has been replaced on the subcommittee by Bankruptcy Judge Michael J. Kaplan. Michael W. Dobbins, clerk liaison to the Bankruptcy Committee during two years of the pilot program, also worked with the subcommittee.

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- recommend that Congress fund a pilot study to assess accurately the full impact of an *in forma pauperis* provision on the bankruptcy courts, with the understanding that no pilot project can be undertaken unless the Congress will provide additional and adequate funding to defray the costs of the study (including the need for additional support staff in the pilot districts) and the loss of revenue to the system resulting from the waiver of filing fees; and
- express its concern about the implementation of an *in forma pauperis* provision in bankruptcy but defer taking a formal position pending completion of the pilot study or empirical survey.

The Judicial Conference adopted these recommendations.<sup>3</sup>

When the 1993 legislation mandating the pilot program was passed, the Judicial Conference charged its Bankruptcy Committee (and in turn, the Bankruptcy Committee charged its IFP subcommittee) with overseeing the program's implementation and evaluation, including its budget. The legislation did not provide additional funding to cover the costs of the program, as recommended by the Judicial Conference. Instead, Congress assumed, in its report on the legislation, that the judiciary would not incur a cost of more than \$1,500,000 to comply, of which not more than \$100,000 could be spent on the analyses associated with the report.<sup>4</sup> The Federal Judicial Center agreed to assume the primary responsibility for evaluating the pilot fee-waiver program and the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts agreed to assume the primary responsibility for evaluating the effects of a graduated fee system for chapter 11 and 13 cases.<sup>5</sup>

Before the pilot program began, the subcommittee recommended that

- the following districts be selected for the study based on a number of statistical, geographical, and other factors: Southern District of Illinois, District of Montana, Eastern District of New York, Eastern District of Pennsylvania, Western District of Tennessee, and District of Utah;<sup>6</sup>
- the determination of *in forma pauperis* status should be in the judge's discretion based on consideration of the circumstances of individual cases, rather than based on a set standard (e.g., income below the federal poverty guidelines);

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3. Report of the Judicial Conference Committee on the Administration of the Bankruptcy System, Agenda Item F-4 (September 1993); Report of the Proceedings of the Judicial Conference of the United States 41 (September 1993).

4. Conference Report on H.R. 2519.

5. Memorandum of Understanding between the Federal Judicial Center and the Administrative Office dated April 12, 1994. The study of graduated fees will be forwarded to Congress together with this report.

6. See section II.A, *infra*.

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- a standard fee-waiver application developed by the subcommittee be used in all pilot districts and that applicants certify that the information provided is accurate and that they are unable to pay the filing fee in installments;
- the U.S. trustee be given notice of and an opportunity to object to each application; and
- the Judicial Conference authorize the creation of temporary positions to assist the pilot courts with processing the applications.

These recommendations were approved by the Bankruptcy Committee and the Judicial Conference.<sup>7</sup>

In addition, the subcommittee developed a set of guidelines for processing fee-waiver applications and the underlying Chapter 7 cases and worked with the pilot courts to develop the specific procedures to be used in processing the applications. To underscore its commitment to the fee-waiver program and to ensure the participating courts knew it stood ready to help make the program a success, the subcommittee met with the chief bankruptcy judges and clerks of court for the pilot districts in Washington, D.C., in May 1994, and traveled to each court during the fall of 1994. The subcommittee has worked with the pilot courts throughout the project to assess personnel and other resource needs and to develop and monitor the related budgets.

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7. Report of the Judicial Conference Committee on the Administration of the Bankruptcy System, Agenda Item F-4 (March 1994); Report of the Proceedings of the Judicial Conference of the United States 11-12 (March 1994).

## II. Implementation of the Pilot Program

### A. Selection of the Pilot Districts

To help select the pilot districts, the Center developed a descriptive profile for each district. The profiles were based on information concerning the following factors:

- the proportion of non-business Chapter 7 cases, filed in 1992, in which fees were paid in installments;
- the proportion of these cases that were dismissed within 120 days;
- the proportion of these cases in which the debtor was pro se; and
- the forecasted change in Chapter 7 filings from 1992 to 1993.<sup>8</sup>

We surveyed bankruptcy clerks to obtain information about the first three factors; we received responses from all but eight districts. Information needed to forecast the change in filings was obtained from the Administrative Office.

We ranked the districts according to information obtained about these four factors. For example, the proportion of non-business Chapter 7 cases in which fees were paid in installments was highest in the Eastern District of Tennessee, so this district was ranked first; the proportion was lowest in Rhode Island, so this district was ranked 83rd. (Information concerning this factor was missing for some districts.)

In selecting the pilot districts, the subcommittee attempted to obtain variation along these rankings, as well as the following other factors:

- the number of 1992 non-business Chapter 7 filings;
- the ratio of 1992 Chapter 13 filings to 1992 non-business Chapter 7 filings;
- the ratio of 1992 non-business Chapter 7 filings to all 1992 bankruptcy filings;
- geographic location of the district;
- whether the district was urban or rural;
- size of the court; and
- the availability of legal service or pro bono legal assistance.

In addition, the subcommittee considered whether (1) there was a district that matched the potential pilot district fairly closely on the relevant factors for comparative purposes; (2) the district was currently understaffed in relation to its weighted caseload; and (3) characteristics of a court's operation might facilitate/hamper a successful study (for example, a change of clerks immediately before or during the study period).

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8. The forecasts were based on both business and non-business Chapter 7 filings for two reasons: first, from a theoretical perspective the distinction between business and non-business Chapter 7 cases is sometimes ill-defined; and second, as a practical matter we did not have a data set that distinguished between these two classes of Chapter 7 cases at the time the forecasts were produced.

**B. Procedures for Processing the Applications**

The *in forma pauperis* subcommittee developed guidelines for processing fee-waiver applications and the underlying Chapter 7 cases (see Appendix A). The purpose of the guidelines was to advise the courts in developing the specific procedures for their districts, while recognizing that the courts might revisit and resolve some issues differently over time. A summary of the procedures adopted by the districts is in Appendix B; copies of the standing orders implementing the fee-waiver program in the pilot districts and setting forth the related procedures are on file with the Center. The application form developed by the subcommittee for use in all the pilot courts is in Appendix C.

**C. IFP Clerk Positions**

At the outset of the pilot program, the workload implications were unclear but were expected to be substantial. Thus, on the recommendation of the Bankruptcy Committee and its IFP subcommittee, the Judicial Conference approved the authorization of nine temporary law clerks.<sup>9</sup> The interim standards for the IFP clerk set the top grade for this position at JSP-10. The position description is included in Appendix D.

During the first year of the program, each district except Montana employed at least one IFP clerk; the Eastern District of New York employed three IFP clerks and the Eastern District of Pennsylvania employed two. In Montana, much of the substantive work performed by the IFP clerks in the other pilot districts was performed by the judge's law clerk. This law clerk's term expired in August 1995; the Bankruptcy Committee authorized expending IFP funds to provide for a two-month employment overlap between that clerk and a new one so the new clerk could receive instruction regarding the fee-waiver program. A separate position description was developed for this clerk to reflect these other responsibilities (see Appendix D).

Since the first year, the number of positions changed as follows:

- Because very few applications were filed in the Western District of Tennessee, the Bankruptcy Committee did not reauthorize its IFP clerk position for fiscal 1996 and fiscal 1997.
- Because the number of applications was low in the Southern District of Illinois and the hours expended by the IFP clerk on the program were minimal during the first two years, the Bankruptcy Committee did not re-

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9. In March 1994, the Judicial Conference approved eight positions. Report of the Judicial Conference Committee on the Administration of the Bankruptcy System, Agenda Item F-4 (March 1994); Report of the Proceedings of the Judicial Conference of the United States 12 (March 1994). On August 8, 1994, the Executive Committee of the Judicial Conference approved nine rather than eight positions.

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authorize its IFP clerk position for fiscal 1997. In addition, the Bankruptcy Committee did not reauthorize the third position for the Eastern District of New York for fiscal 1997.<sup>10</sup>

#### **D. Publicity of the Fee-Waiver Program**

The subcommittee worked with the pilot districts to ensure that the bar and the public received adequate notice of the program. All pilot courts engaged in a vigorous campaign to notify newspapers, professional journals and newsletters, law schools, bar associations, social services agencies, community organizations, and pro bono and legal services attorneys of the program. In addition, information about the program was posted in the courthouse and made available at the intake counter. IFP clerks and bankruptcy judges also spoke about the program at seminars and bar meetings. Appendix E describes the publicity efforts of each pilot court.

Responses to one question on the survey of fee-waiver applicants (see section III.C, *infra*) show how applicants learned of the program. Table 1 shows that a notable percentage of applicants heard of the program from the court, but in no district was the court the most frequent source of information. For all but one district (S.D. Ill.), the most common source of initial information was an unpaid attorney, with this percentage being much higher in Eastern Pennsylvania than elsewhere. In the Southern District of Illinois, applicants were somewhat more likely to hear of the program from a paid attorney than from an unpaid attorney. Only in the Eastern District of New York did a notable number of applicants say they heard of the program from a paid non-attorney.

In sum, the IFP subcommittee and the pilot districts made substantial and concerted efforts to help the pilot program run smoothly and effectively.

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10. Actually, the Eastern District of New York operated with two clerks for part of fiscal 1996 as well because one of the IFP clerks resigned and was not replaced due to the Bankruptcy Committee's decision regarding fiscal 1997. In addition, another of the IFP clerks resigned in fiscal 1997 and the duties were assumed by existing clerk's office staff.

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**Table 1: Applicant Survey**  
**How did you find out that you might be allowed to file bankruptcy without paying a filing fee?**  
**(Please check all that apply.)**

	S.D. Ill.	D. Mont.	E.D.N.Y.	E.D. Pa.	W.D. Tenn.	D. Utah
Newspaper	4 5.5%	1 4.2%	8 2.2%	12 2.1%	0 0.0%	4 5.0%
T.V. or radio	0 0.0%	0 0.0%	6 1.7%	7 1.2%	0 0.0%	0 0.0%
The court	7 9.6%	2 8.3%	79 21.9%	21 3.7%	3 25.0%	24 3.0%
An attorney I paid, or another person in that attorney's office	32 43.8%	3 12.5%	11 3.0%	19 3.3%	2 16.7%	7 8.8%
An attorney I did not pay, or another person in that attorney's office	24 32.9%	12 50.0%	148 41.0%	429 74.9%	5 41.7%	27 33.8%
A person I paid to help me complete the bankruptcy petition, other than an attorney or person who works for an attorney	1 1.4%	1 4.2%	60 16.6%	9 1.6%	0 0.0%	3 3.8%
Another person who had filed bankruptcy	0 0.0%	0 0.0%	22 6.1%	28 4.9%	0 0.0%	2 2.5%
A family member or friend	9 12.3%	2 8.3%	43 11.9%	66 11.5%	1 8.3%	9 11.3%
Other (see note)	5 6.8%	4 16.7%	13 3.6%	23 4.0%	1 8.3%	13 16.3%
<b>Total (see note)</b>	<b>73</b>	<b>24</b>	<b>361</b>	<b>573</b>	<b>12</b>	<b>80</b>
<p><i>Note:</i> Percentages are of column totals; percentages within a column do not sum to 100 because some applicants checked more than one response. Twenty of the 1,143 applicants who returned the questionnaire did not answer this question. Those people who checked the "other" category gave social services, library books, bankruptcy kits, and, in a few cases, creditors and prison inmates as their sources of information on the fee-waiver program.</p>						

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### III. Evaluation of the Pilot Program

#### A. Potential Drawbacks and Benefits of the Program

In a 1993 Center survey, an overwhelming majority of bankruptcy judges reported that they either moderately or strongly opposed allowing eligible individuals to proceed *in forma pauperis* in Chapter 7 and in Chapter 13 (see Table 2).<sup>11</sup>

**Table 2**  
**1993 Survey of Bankruptcy Judges**  
 Please indicate the extent to which you support or oppose allowing eligible individuals to proceed *in forma pauperis* in Chapter 7 and in Chapter 13. (Percentages are of the total, excluding the category of “no response/ambiguous response.”)

	Chapter 7		Chapter 13	
	<i>n</i>	%	<i>n</i>	%
<b>Strongly support</b>	19	8.9	12	5.7
<b>Moderately support</b>	10	4.7	8	3.8
<b>Have mixed feelings</b>	20	9.3	12	5.7
<b>Moderately oppose</b>	32	15.0	18	8.5
<b>Strongly oppose</b>	127	59.3	157	74.1
<b>No opinion</b>	6	2.8	5	2.4
<b>No response/ambiguous response</b>	11		13	
<b>TOTAL</b>	225		225	

Judges’ opposition to *in forma pauperis* for Chapter 7 debtors appeared to stem from the following interrelated perceptions:

- A fee-waiver program would encourage people to file bankruptcy even when there was no benefit in doing so. Debtors who cannot afford the filing fee probably do not benefit from filing bankruptcy because they are judgment-proof, or because their principal problem may be solved by a lesser remedy (e.g., referral to consumer credit counseling or social services) that would not restrict their ability to obtain bankruptcy relief when they may need it more.
- Nearly everyone who files a Chapter 7 case will request the filing fee to be waived. Adequate screening of the applications will be time-consuming and thus costly. Such screening is necessary, however, to avoid excessive loss of revenue to the judiciary and to ensure adequate revenue to pay the Chapter 7 trustees.

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<sup>11</sup> The 1993 survey was conducted to help the Center plan its research on the bankruptcy system. Responses were received from 225 bankruptcy judges (77%).

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- A fee-waiver program would increase the number of people who file to benefit from the automatic stay with no intention of following through to a discharge (e.g., people will file to temporarily avoid eviction).
- The program would encourage inappropriate filings from certain groups of people (tax protesters and prison inmates).
- Allowing debtors to proceed *in forma pauperis* in Chapter 7 cases but not Chapter 13 cases would encourage debtors to file in Chapter 7 even when Chapter 13 was more appropriate.
- A fee-waiver program would increase “bankruptcy mill” activity. Petitions filed by petition preparers, on the whole, would be ill-conceived and badly prepared.
- A fee-waiver program would indirectly increase the workload of the clerk’s office and judge’s staff because the program would bring more pro se debtors into court. Large amounts of clerk and court time would be required to clean up incomplete and faulty pleadings, and trustees would be required to spend time determining facts omitted from the pleadings.

More generally, opponents of allowing debtors to proceed *in forma pauperis* argued that the filing-fee requirement denies individuals access to the bankruptcy courts only in rare circumstances. Most debtors, they argued, enjoy access because they maintain an income despite their liabilities and as a result are able to pay the filing fee. Moreover, Fed. R. Bankr. P. 1006 allows individuals with limited resources to pay the filing fee in installments over a 120-day period, which can be extended by the court to 180 days. In addition, some judges have suggested that alternatives other than a fee waiver may increase access to the courts without producing as many negative side effects. For example, debtors could be allowed to pay the filing fee over time by means of a wage-deduction order or debtors could be allowed to pay a reduced fee based on the level of scheduled assets and liabilities.

On the other hand, proponents of allowing eligible debtors to proceed *in forma pauperis* argue first and foremost that poor people should not be denied access to bankruptcy simply because they cannot pay the filing fee.<sup>12</sup> In addition, they argue that:

- Even so-called “judgment proof” debtors may benefit from filing bankruptcy. They may file, for example, to prevent utility shutoff or a repossession of essential property; to protect or restore a driver’s license under a state financial responsibility law due to an unpaid judgment; to discharge a debt that is an impediment to participating in a government program such as

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12. Henry J. Sommer, *In Forma Pauperis in Bankruptcy: The Time Has Long Since Come*, 2 Am. Bankr. Inst. L. Rev. 93 (Spring 1994).

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public housing; to prevent garnishment of wages (which is allowed in some states even when the debtor's income is below the poverty line); and to end repeated, and perhaps harassing, calls from creditors and collection agencies.

- The number of debtors qualifying for waiver of the filing fee should not be overwhelming because eligibility would turn primarily on income, not on an imbalance between assets and liabilities.
- The work required to process fee-waiver applications will not greatly increase the workload of the bankruptcy judges and clerks' offices. The work may simply replace or reduce that needed to process and monitor an application to pay the fee in installments.
- Some people who would benefit from filing bankruptcy cannot afford to pay even the first installment of the filing fee in an emergency situation (such as to avoid a utility shutoff or sheriff's sale).
- A fee-waiver program would not exacerbate problems associated with "bankruptcy mills"; these mills are already sophisticated enough to know how to file a bankruptcy petition at little or no cost. In any event, the solution to abuse by petition mills is not to restrict access to the system for all indigent persons but rather to curtail it with criminal prosecutions.<sup>13</sup>

#### **B. Scope of this Report**

In this report, we provide information related to questions falling into three major categories: (1) Description of the Pilot Program; (2) Projections for a National Program; and (3) Issues for Legislation or Rule if the Program Is Implemented Nationwide. In describing the pilot program, we answer the following questions:

- How many fee-waiver applications were filed and granted in the pilot districts?
- What factors account for interdistrict variation in fee-waiver activity?
- For what reasons were applications denied and how did petitioners meet the fee obligation, if at all, subsequent to the denial?
- For how many applications were objections filed, hearings held, and rulings modified?
- Who used the program?
- Did the program increase access to the bankruptcy courts?
- Did users of the program obtain a discharge of their debts, and did they reaffirm debts?

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13. For further discussion of these arguments, see Sommer, *supra* note 12, and Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting on and Beyond United States v. Kras*, 2 Am. Bankr. Inst. L. Rev. 57 (Spring 1994).

- Did the program encourage people to file bankruptcy with no intention of following through to discharge?
- What were the less tangible benefits of filing bankruptcy for the users of the program?
- Did the program increase Chapter 7 filings?
- Did the fee-waiver program encourage debtors to file under Chapter 7 even when Chapter 13 was more appropriate?
- Did the program increase the number of bankruptcy petitions by inmates?
- Did the program bring more pro se debtors into the bankruptcy courts?
- Did the program exacerbate problems associated with petition preparers?

In projecting the cost of a national program, we estimate the number of applications that would be filed nationwide, assuming alternative eligibility criteria. We then project the cost of a national program, including lost revenue and additional personnel, based on the alternative estimates.

In concluding, we discuss several issues for subsequent legislation or rules if the program is implemented nationwide.

- How should the cost of a national program be offset?
- What procedures should be used to process the applications and what eligibility criteria should be applied?
- What roles should the U.S. trustee and the Chapter 7 trustees play?
- Should waiver of the filing fee constitute waiver of all miscellaneous fees?
- Should the fee-waiver program be extended to Chapter 13?
- Can the installment program be modified to eliminate the need for a fee-waiver program?

## **C. Information Used in Evaluating the Program**

In this section, we describe the primary information sources on which we rely for this report.

**Case-Closing Reports.** The IFP clerk completed a case-closing report for each case in which a fee-waiver application was filed, whether or not it was granted. The form was completed at the time a discharge was granted or, if an objection to the discharge was filed, when the case was ready to be closed. The clerk sent the form to the Center along with a copy of the docket sheet, the fee-waiver application, and any documents related to the fee-waiver application (e.g., order setting hearing, order granting or denying).

The form requested information about the processing of the fee-waiver application (e.g., whether an objection was filed or a hearing held and whether the application was granted or denied); about the debtor (e.g., whether the debtor appeared pro se throughout the pendency of the case and, if not, whether the debtor was represented by a paid, pro bono, or legal services attorney, and whether the

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debtor was a prisoner); and about the administration of the case in general (e.g., whether schedules were filed, whether an objection to the discharge was made, and whether miscellaneous fees were waived). The form is in Appendix F.

In this report, we present information from case-closing forms for the 3,733 fiscal 1995, fiscal 1996, and first-half fiscal 1997 cases in which a fee-waiver application was filed, with the exception of one case.<sup>14</sup> Eleven of the 1,299 fiscal 1995, 20 of the 1,584 fiscal 1996, and 32 of the 849 fiscal 1997 cases were pending at the time we compiled the final database, so only partial information is available for these cases.<sup>15</sup>

#### **Activity Logs Completed by the Bankruptcy Judges and Other Court**

**Employees.** Since the second month of the program, bankruptcy judges and IFP clerks or persons who perform the duties of an IFP clerk reported the time they spent on the program and the nature of the work performed. One log was designed for use by bankruptcy judges; another was designed for use by IFP clerks or persons who performed the duties of an IFP clerk while the IFP clerk was on annual, sick, or other leave, or for other reasons such as to help the IFP clerk complete “backlogged” work. If the court did not hire an IFP clerk, the second form was completed by the persons in the clerk’s office or chambers who were given these duties. It was also used by bankruptcy judges’ law clerks if they helped review or otherwise process the applications. The activity logs and the instructions are in Appendix G. All districts returned information during the first two years of the program and some districts continued reporting until the end of the third year.

**Interviews of Participants in the Program.** During the fall of 1995, Center staff traveled to the pilot districts to interview people involved with the program. In each district, staff interviewed the bankruptcy judges, bankruptcy clerk, IFP clerks, systems administrator or manager, financial administrator, U.S. trustee or assistant U.S. trustee, representative Chapter 7 trustees and Chapter 7 debtors’ attorneys, and representatives from legal services and pro bono groups who provide assistance to Chapter 7 debtors. Standard interview protocols were used across districts, although they were slightly modified to include district-specific questions. An example protocol, that used in the Eastern District of Pennsylvania, is in Appendix H.

The chair of the IFP subcommittee and Center and AO staff traveled to the pilot courts during the summer of 1997 to re-interview bankruptcy judges and bankruptcy clerks. In addition, they traveled to the Central District of California and met with representatives from the bankruptcy court, U.S. trustee’s office, and U.S. attorney’s office to discuss the effect of a fee-waiver program in that district.

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14. We did not discover this case, which had been inadvertently left off the district’s list, until our final database had been compiled.

15. The pending cases were distributed across the districts as follows: Southern District of Illinois, 1 of 142 cases; District of Montana, 0 of 103 cases; Eastern District of New York, 39 of 1,253 cases; Eastern District of Pennsylvania, 18 of 1,954 cases; Western District of Tennessee, 0 of 37 cases; and District of Utah, 5 of 243 cases.

**Survey of Fee-Waiver Applicants.** At case closing, applicants for a fee waiver were asked to complete a questionnaire about (1) the process of applying for a waiver of the filing fee; (2) whether the filing fee was waived and, if not, whether and how the fee was paid; (3) the petitioner's circumstances when he or she decided to file for bankruptcy; (4) how he or she went about filing for bankruptcy; (5) the outcome of the bankruptcy case; (6) how filing bankruptcy affected the petitioner and his or her family; and (7) demographic information. The questionnaire is in Appendix I. Since the beginning of the program, the pilot courts have sent the questionnaire at case closing to every person who applied for a fee waiver.

As of October 28, 1997, we had received 1,143 questionnaires, reflecting a response from approximately 25% of all those who requested a waiver.<sup>16</sup> The sample appears relatively representative of all fee-waiver applicants: 90.6% of the survey respondents received a waiver compared to 85.6% of all applicants,<sup>17</sup> and the percentage of respondents from each district is similar to the percentage of applicants from each district overall.<sup>18</sup> However, the discharge rate reported by those who were denied a waiver is higher in this sample (91.7%) than in the case closing sample (72.4%).<sup>19</sup>

**Survey of Attorneys.** In August 1997, we surveyed 483 attorneys in the pilot courts who had been identified by the courts as having served as paid or pro bono counsel to one or more debtors who requested a filing fee waiver. In the Eastern District of New York, we surveyed all attorneys who had requested a fee waiver on behalf of a client for whom we had received a case-closing report by mid-July 1997. In the other pilot districts, we surveyed all attorneys who had requested a fee waiver on behalf of a client as of July or August 1997, whether or not the case was closed. The questionnaire is in Appendix J.

Overall, 226 (47%) attorneys returned the survey (five respondents who said they had no experience with the program were excluded from further analyses).<sup>20</sup> About

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16. Because survey responses were anonymous and the courts sent out the questionnaires, it is difficult to calculate the actual response rate. It would be somewhat higher than 25% since applicants whose cases closed after our cut-off date for compiling the dataset would be excluded from the denominator.

17. Although the difference between these two percentages is significantly different ( $z = 4.31, p < .01$ ), it appears to be of little practical significance. Of the survey respondents, 968 (90.6%) said their application was granted and 101 (9.4%) said their application was denied (74 respondents either did not provide this information or gave an ambiguous response).

18. The percentage of survey respondents from each district compared to the percentage of fee-waiver applicants from each district is as follows: Southern District of Illinois, 6.5% of respondents compared to 4% of all applicants; District of Montana, 2% compared to 3%; Eastern District of New York, 32% compared to 33%; Eastern District of Pennsylvania, 51% compared to 53%; the Western District of Tennessee, 1% compared to 1%; and District of Utah, 7% compared to 6%.

19.  $z = 4.01, p < .01$ .

20. Returning the questionnaire were 18 of 37 (49%) attorneys in Southern Illinois; 9 of 29 (31%) attorneys in the District of Montana; 34 of 78 (44%) attorneys in the Eastern District of New York; 125

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half of the attorneys served as counsel for fewer than three debtors requesting a fee waiver and half served as counsel for more than three such debtors. Attorneys reported that they served pro bono in about 89% of the cases and that about 83% of the fee-waiver requests were granted.

**Survey of Panel Trustees.** In August 1997, we surveyed the 70 Chapter 7 trustees in the 6 pilot districts. (A copy of the questionnaire is in Appendix K.) Overall, 36 trustees (51%) returned the questionnaire.<sup>21</sup> Not surprisingly, the responding trustees reported serving in widely divergent numbers of cases. Trustees from Western Tennessee reported serving in an average of 2 cases, whereas those from the Eastern District of Pennsylvania reported serving in about 23 cases each, and those from the Eastern District of New York in about 30 cases each. The trustees in the other pilot courts reported serving in an average of 10 to 15 cases each. Overall, the number of cases in which a trustee reported serving ranged from 0 to 75; about half of the trustees reported serving in 19 or fewer cases and half reported serving in more than 19 cases.

**Information about Applicants from the Consumer Bankruptcy Assistance Project.** The Consumer Bankruptcy Assistance Project (CBAP) in Philadelphia provided descriptions of approximately 200 fee-waiver cases they handled. The descriptions include information about the circumstances leading up to bankruptcy, the availability of funds to pay the filing fee, and the positive and negative consequences that filing bankruptcy had for the debtor. See Appendix L.

**Information about Applicants Compiled by Second and Third Circuit Task Forces.** Some aspects of the pilot program are touched on in the draft report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts and the report of the Third Circuit Task Force on Equal Treatment in the Courts. Relevant information is included in the present report. See Appendix M.

**Information about the Nature of the Debtors' Unsecured Debt.** Chief Bankruptcy Judge Conrad Duberstein of the Eastern District of New York analyzed a sample of fee-waiver cases to ascertain the nature of the unsecured debt held by IFP debtors. His analysis is presented in Appendix N of this report. We collected similar information about a random sample of fee-waiver and non-fee-waiver cases filed in the Eastern District of New York and in the Eastern District of Pennsylvania between April 1, 1996, and September 30, 1996. Included in our analyses were 75 fee-waiver cases and 76 non-fee-waiver cases from the Eastern District of New York,

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of 249 (50%) attorneys in the Eastern District of Pennsylvania; 12 of 19 (63%) attorneys in the Western District of Tennessee; and 28 of 71 (39%) attorneys in Utah.

21. The number of trustees who returned questionnaires in each district is as follows: 4 of 6 trustees in Southern Illinois; 5 of 8 in Montana; 12 of 26 in Eastern New York; 3 of 10 in Eastern Pennsylvania; 6 of 10 in Western Tennessee; and 5 of 10 in Utah. The district of one respondent could not be determined.

and 75 fee-waiver and 72 non-fee-waiver cases from the Eastern District of Pennsylvania.<sup>22</sup>

**District Survey.** We asked all 94 districts about the availability of pro bono representation for Chapter 7 debtors and the operation of the installment payment program. We obtained more in-depth information about the installment payment program in the pilot courts.

**Accounting of Costs and Lost Revenues Associated with the Program.** The pilot districts were asked to regularly send a status-of-funds report specific to the fee-waiver program budget to the Center and to the Bankruptcy Judges Division of the Administrative Office. The pilot courts were also asked to send a report tracking revenues lost by the judiciary, U.S. trustee system fund, and general fund of the U.S. Treasury, including payments to the case trustees and waivers of miscellaneous fees. This information has been summarized by the Bankruptcy Judges Division of the Administrative Office (the summary is in Appendix O).

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22. We excluded from our analyses 13 cases in the random samples for which schedule F information was missing. The excluded cases were about equally distributed between the two districts and between fee-waiver and non-fee-waiver cases. Because the sample was drawn from a six-month period, rather than across a year, it may be subject to some seasonal bias.

### IV. The Number of Applications Filed and Their Disposition

#### A. Overall Filing and Case-Processing Information

**Number of Applications and Waivers.** Tables 3a and 3b show information about the number of applications for waiver of the filing fee that were filed and granted in each of the pilot districts during the entire study period; Table 3c shows the information for the first two and a half years of the program. The cases in the latter table are those for which we received completed case-closing forms and on which many of the counts and percentages that follow are based. The tables in Appendix Q show the information separately for each fiscal year.

Across years and districts, an application for waiver of the filing fee was filed in 3.4% of all non-business Chapter 7 cases, and the fee was actually waived in 2.9% of all such cases. Over the course of the pilot program, 4,518 applications were filed and 3,867 (85.6%) were granted. The number of fee-waiver applications and actual waivers rose from 1,300 and 1,035 in fiscal 1995 to 1,634 and 1,441 in fiscal 1997.

The increase in the number of applications appears to be due to an increase in the number of non-business Chapter 7 cases. From fiscal 1995 to fiscal 1996 the number of applications and the number of non-business Chapter 7 cases in the pilot districts rose by similar percentages (22% and 24%, respectively), but after the first year, the increase in Chapter 7 filings outstripped waiver application growth: from fiscal 1996 to fiscal 1997 applications increased only 3%, but Chapter 7 filings increased by 28%. Over the entire period, applications increased 26% while filings increased 59%.

The increase in the number of actual waivers is due in part to an increase in the number of Chapter 7 cases filed. It also reflects an increase, particularly early in the program, in the likelihood that an application would be granted. The percentage of applications granted rose from 79.6% in fiscal 1995 to 87.8% in fiscal 1996, but only slightly in the next year to 88.2%. Such an increase and apparent stabilization was expected, and indeed was predicted by some bankruptcy judges, as the standard for waiving the fee became more settled and better known.

**Reasons for Denying Applications.** The most commonly given reason for denying an application was that the debtor's income, expenses, and assets indicated an ability to pay the required filing fee, at least in installments. Many orders specifically identified assets that could be tapped (e.g., a bank account or tax refund) or discretionary expenditures that could be reduced (e.g., recreation, donations to charity, hair care, dry cleaning, long-distance telephone, support of emancipated child, and high food expenses for individuals without dependents) to permit the debtor to pay the filing fee. Other common reasons for denying applications were that an attorney or non-attorney had been paid (at all, or at an inappropriately high fee) and that the debtor provided

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**Table 3a: Applications for Waiver of the Chapter 7 Filing Fee and Their Disposition,  
October 1, 1994, Through September 30, 1997**

	Applications Filed 10/1/94 Through 9/30/97	Applications Granted	Applications Denied	Other
Southern District of Illinois	181	150 82.9%	29 16.0%	2 1.1%
District of Montana	137	67 48.9%	67 48.9%	3 2.2%
Eastern District of New York	1,494	1,218 81.5%	265 17.7%	11 0.7%
Eastern District of Pennsylvania	2,388	2,220 93.0%	97 4.1%	71 3.0%
Western District of Tennessee	46	32 69.6%	10 21.7%	4 8.7%
District of Utah	272	180 66.2%	89 32.7%	3 1.1%
Total	4,518	3,867 85.6%	557 12.3%	94 2.1%

*Note: "Other" included incidents with these frequencies: application withdrawn, 53 cases; case dismissed before application ruled on, 22 cases; case converted to Chapter 13 and waiver vacated, 12 cases; assets uncovered and fee paid after waiver, 3 cases; waiver denied as moot, 1 case; pending, 3 cases.*

**Table 3b: Percentage of Non-Business Chapter 7 Cases in Which a Fee-Waiver Application Was  
Filed and Granted, October 1, 1994, Through September 30, 1997**

	Applications Filed 10/1/94 Through 9/30/97	Applications Granted	Non-Business Chapter 7 Cases Filed 10/1/94 Through 9/30/97
Southern District of Illinois	181 1.7%	150 1.4%	10,758
District of Montana	137 2.2%	67 1.1%	6,142
Eastern District of New York	1,494 2.6%	1,218 2.1%	57,129
Eastern District of Pennsylvania	2,388 8.3%	2,220 7.8%	28,600
Western District of Tennessee	46 0.3%	32 0.2%	13,489
District of Utah	272 1.8%	180 1.2%	15,417
Total	4,518 3.4%	3,867 2.9%	131,535

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**Table 3c: Case Closing Sample: Applications for Waiver of the Chapter 7 Filing Fee and Their Disposition, October 1, 1994 through March 31, 1997**

	Applications Filed 10/1/94 Through 3/31/97	Applications Granted	Applications Denied	Other
Southern District of Illinois	142	111 78.2%	29 20.4%	2 1.4%
District of Montana	103	56 54.4%	45 43.7%	2 1.9%
Eastern District of New York	1,253	1,003 80.0%	239 19.1%	11 0.9%
Eastern District of Pennsylvania	1,954	1,818 93.0%	77 3.9%	59 3.0%
Western District of Tennessee	37	26 70.3%	7 18.9%	4 10.8%
District of Utah	243	161 66.3%	79 32.5%	3 1.2%
Total	3,732	3,175 85.1%	476 12.8%	81 2.2%

*Note:* The count for the Eastern District of Pennsylvania does not include one case filed during the time period for which we inadvertently did not obtain a case-closing report.

insufficient/ambiguous information and failed to supplement it. In a few cases, the application was denied because the debtor had a history of repetitive filing or because bankruptcy was an inadequate solution to the problem the debtor was trying to solve (e.g., the only debt to be discharged was non-dischargeable; the debtor was attempting to protect property belonging to a third party).

**Payment of the Filing Fee After a Denial of the Application.** When the request for a fee waiver was denied, the debtor paid the filing fee approximately 73% of the time. The fee was paid in a lump sum about 44% of the time and in installments 56% of the time.<sup>23</sup>

**Hearings.** Hearings were scheduled on 300 (8%) of the 3,732 applications in the case-closing sample and actually held on 267 (7%). Most of the hearings (90%) were set sua sponte (although the U.S. trustee had entered comments in some cases), and most were held before the court's initial ruling on the application (92%) and before the section 341 meeting (84%).<sup>24</sup>

**Objections by the U.S. Trustees and Case Trustees.** Of the 3,732 applications in the case-closing sample, the U.S. trustee offices objected to 26 applications and case trustees objected to only one, although case trustees did uncover assets and pay the filing fee in a few other cases (see note to Table 3a). Hearings were set in 17 of the 27

23. Percentages calculated from the case-closing sample.

24. The number of hearings set/held in each district was as follows: Southern Illinois, 14/12; Montana, 1/1; Eastern Pennsylvania, 204/184; Eastern New York, 36/29; Western Tennessee, 22/20; and Utah, 23/21.

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cases in which an objection was filed and held in 15. The application was granted in 12 cases, denied in 9, and withdrawn in 6 cases.

The U.S. trustee office in the Eastern District of Pennsylvania played a more active role than did the U.S. trustee offices in the other pilot districts, providing a statement of review, comment, or objection on every application.<sup>25</sup> That office provided comment, short of objection, in 228 instances in the case-closing sample. The issues raised in the comments are summarized in Table 4.<sup>26</sup> Hearings were set in 72 of the cases and held in 62. The application was granted in 173 cases, denied in 35, withdrawn in 16, vacated in 2 cases that converted to Chapter 13, and not ruled on in 2 cases that were dismissed.

**Table 4: Case-Closing Sample: Issues Raised in the U.S. Trustee Comments in the Eastern District of Pennsylvania**

	<b>Number of Cases</b>	<b>Percentage of 228 Cases</b>
<b>Fee-Waiver Application Is Ambiguous or Incomplete</b>	47	20.6%
<b>Fee-Waiver Application Is Inconsistent with Schedules</b>	33	14.5%
<b>An Attorney or Non-Attorney Was Paid</b>	36	15.8%
<b>Debtor's Income Is Above the Poverty Line</b>	34	14.9%
<b>Debtor Lists Questionable Expenses or Has Disposable Income/Assets from Which the Fee Could Be Paid</b>	101	44.3%
<b>Schedules and Statements Are Not Attached to the Application</b>	98	43.0%
<b>Other</b>	18	7.9%
<b>Total Cases in Which an Objection Was Filed</b>	228	
<i>Note: Percentages do not sum to 100 because comments sometimes covered more than one issue.</i>		

**Modified orders.** The initial ruling on 59 applications (2%) was vacated, rescinded, or otherwise modified by the court.<sup>27</sup> Only 2 orders were appealed. In one

25. See section VIII.D for a description of the procedures followed by each U.S. trustee office.

26. Based on our interviews, we know that case trustees filed comments in a few other instances, but the case-closing form did not systematically capture this information.

27. The following are the number of modified rulings in each district: Southern Illinois, 6; Montana, 6; Eastern Pennsylvania, 21; Eastern New York, 15; Western Tennessee, 1; and Utah, 10. The number of cases and type of modification is as follows:

- 36 cases: an order denying the fee waiver was rescinded and an order waiving the fee was entered;
- 2 cases: an order granting the waiver was reissued to place a condition on the waiver;
- 2 cases: order granting the waiver was vacated and a denial order entered;

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case, the bankruptcy court decision was affirmed on the merits and in the other, the appeal was dismissed because it was not timely filed.

**Schedules and Statements.** The petitions in 2,972 (79.6%) of the 3,732 cases in the case-closing sample were filed complete with the mailing matrix, all schedules, and the statement of financial affairs. Another 230 cases (6.2%) were missing just one document, which was most often the mailing matrix (83%). The fee-waiver applications of debtors who were missing no more than one document at filing were slightly more likely to be granted than the applications of debtors missing two or more documents.<sup>28</sup>

In sum, the pilot program did not result in an overwhelming number of *in forma pauperis* filings, although the number of such filings in the Eastern District of Pennsylvania was substantial. Most applicants filed petitions complete with schedules, suggesting that the applicants intended to proceed with their cases to discharge. Although the number of hearings and objections related to the applications was low, it appears that the courts and the U.S. trustee offices, particularly the office in Eastern Pennsylvania, gave the applications careful review.

#### **B. Interdistrict Variation in the Number of Applications**

For the three-year period, the percentages of non-business cases involving fee-waiver activity varied across the districts. The percentage of non-business Chapter 7 cases in which an application was filed ranged from 0.3% in the Western District of Tennessee to 8.3% in the Eastern District of Pennsylvania, and the percentage of non-business Chapter 7 cases in which the filing fee was actually waived ranged from 0.2% in the Western District of Tennessee to 7.8% in the Eastern District of Pennsylvania.

The higher rate of applications in the Eastern District of Pennsylvania appears due to the availability of legal services and pro bono representation for Chapter 7 debtors. Eighty-six percent of the applicants in the Eastern District of Pennsylvania were represented by a pro bono or legal services attorney, but only 21% of the applicants across the other districts were so represented (see Table 7, *infra*).

Several explanations for the low rate of applications (0.3%) in the Western District of Tennessee were offered by judges, trustees, and attorneys in the district:

- It is easy to file an installment application. The debtor does not have to make an initial payment at the time of filing and the district has a liberal policy of

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- 9 cases: an order granting the waiver was vacated because the case was converted to Chapter 13;
  - 3 cases: an order granting the waiver was vacated when assets were uncovered;
  - 2 cases: an order granting the waiver was vacated when the debtor withdrew the application;
  - 1 case: an order granting the waiver was vacated when the debtor filed a motion to dismiss; and
  - 4 cases: an order was reissued to correct errors in form.
28. 87% versus 83%, chi square, 1 *df* = 5.56, *p* < .05.

extending the time to make payments. (Our analyses did not support this explanation; see section IV.C.)

- There is a lack of pro bono representation for Chapter 7 debtors in the district. Although informed, legal services was not involved in the program. (This explanation is questionable, however, because the court prepared a packet of material about filing bankruptcy and the fee-waiver program for distribution by legal services and the bar association lawyer referral services. In addition, the court has a list of about seven attorneys who are willing to take cases on a pro bono basis, and the Memphis bar and court are taking steps to help establish a formal pro bono panel.)
- The need for the program is minimal in this district because debtors who might qualify for waiver of the filing fee generally file Chapter 13 rather than Chapter 7.

Attorneys will file a Chapter 13 case with no money down from the debtor because the attorney's fee and filing fee are paid through the plan. By contrast, in Chapter 7 cases, attorneys generally require payment of the filing fee and a partial retainer before filing the case.

Chapter 7 debtors in the district generally have very large credit card or medical debts and a regular income, and they reaffirm everything except the big debt. A number of Chapter 7 cases also evolve from domestic situations, with people wanting to discharge debt after divorce. Chapter 13 debtors are more likely to be the chronically poor (e.g., no regular income except public assistance, ongoing medical problems, financed car, house on the edge of foreclosure). They are filing to maintain the status quo and retain the few assets they have.

- Creditors in the district do not “chase” people who are unemployed or who are judgment proof, so these people, who would be candidates for waiver of the filing fee, do not file bankruptcy.

### C. Filing in Chapter 13 Versus Chapter 7

One issue of interest was whether allowing debtors to proceed *in forma pauperis* in Chapter 7 cases but not in Chapter 13 cases would encourage debtors to file in Chapter 7 even when Chapter 13 is more appropriate. The Western District of Tennessee was included in the study in part because it has a high number of Chapter 13 cases relative to Chapter 7 cases and so was a good place to examine the issue. There is no indication that debtors in this district filed in Chapter 7 rather than Chapter 13 merely to obtain benefit of the fee-waiver program. The proportion of consumer cases filed under Chapter 7 remains the same, even if one assumes that all

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cases in which a fee-waiver application was filed would have been filed under Chapter 13 in the absence of the pilot program.

From 1994 to 1997, yearly consumer filings in each of the pilot courts rose dramatically, and in all pilot districts but New York the change was due to an increase in both Chapter 7 and Chapter 13 filings (see Table 5). This pattern of change mirrors that found nationwide and complicates determining whether the fee-waiver program prompted a shift of filings from Chapter 13 to Chapter 7, or led to an increase in filings overall.<sup>29</sup>

It is clear, however, that only a small fraction of the increased filings are due to the program. Table 5 shows that the percentage increase in Chapter 7 filings and total consumer filings is basically the same in all pilot courts, including and excluding the fee-waiver cases.

In addition, Table 6 shows for each pilot district the percentage of consumer cases filed under Chapter 7 for FY92 through fiscal 1997. In Montana and Utah, the percentage of consumer cases filed as Chapter 7 continued a downward trend, which began before the onset of the pilot program. In Southern Illinois, the Eastern District of New York, and the Western District of Tennessee, the percentage of consumer cases filed under Chapter 7 and the yearly fluctuations in that percentage were within the range seen in the years immediately before the onset of the pilot. Only in the Eastern District of Pennsylvania did the percentage of consumer cases filed as Chapter 7 seem to increase during the pilot program. But because only a small fraction of the increased filings in this district could be due to the fee-waiver program, the change in the percentage must be only partially, if at all, due to the fee-waiver program.

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29. Appendix R shows the number of consumer filings for fiscal 92–fiscal 1997, broken down by chapter, for each pilot district and the nation.

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**Table 5: Percentage Increase in Consumer Bankruptcy Filings from 1994–1997 for the Nation and the Fee-Waiver Pilot Courts**

	Percentage Change in Filings from 1994 Through 1997					
	Including Fee-Waiver Cases			Excluding Fee-Waiver Cases		
	Chpt. 7	Chpt. 13	All Consumer	Chpt. 7	Chpt. 13 (see note)	All Consumer
Nation	42	38	40			
Nation Excluding Pilot Courts				42	38	41
Southern Illinois	54	47	52	53	47	51
Montana	41	58	44	39	58	43
Eastern Pennsylvania	58	38	51	55	38	48
Eastern New York	33	1	27	32	1	26
Western Tennessee	43	29	32	43	29	32
Utah	28	60	42	28	60	42

*Note:* Numbers in this column are the same as the “Chapter 13 column including fee-waiver cases” since all fee-waiver cases are Chapter 7. This table is based on Table F-2 in the fiscal 94–fiscal 1996 Reports of the Director of the Administrative Office of the U.S. Courts, and a pre-publication copy of Table F-2 for fiscal 1997.

**Table 6: Percentage of Consumer Cases Filed Under Chapter 7 in Fee-Waiver Pilot Districts**

	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
<b>Southern Illinois</b>	73	74	72	70	71	74
<b>Montana</b>	90	87	84	85	81	79
<b>Eastern New York</b>	80	78	75	74	78	82
<b>Eastern Pennsylvania</b>	57	56	54	57	61	63
<b>Western Tennessee</b>	24	22	20	20	22	23
<b>Utah</b>	74	73	70	63	67	56

### D. Applications by Inmates

The Southern District of Illinois was selected as a pilot district partly because it has three federal and eleven state correctional institutions and thus would provide a good test of whether the program would increase the number of bankruptcy petitions, including frivolous ones, by inmates. During the first two and a half years of the program, only seven inmates in this district asked that their filing fee be waived. Six inmates received a waiver of the filing fee and six received a general discharge of their debts.

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Across all the pilot districts during the first two and a half years of the program, 27 inmates asked that their filing fee be waived; 17 of the requests were granted, 8 were denied,<sup>30</sup> and 2 were not decided before the case was dismissed. Nineteen of the 27 inmates received a discharge.

These prisoner cases presented no extraordinary issues to the courts with the exception of one case in the Southern District of Illinois. See *In re Merritt*, 186 B.R. 924 (Bankr. S.D. Ill. 1995), in which an IFP debtor appealed the bankruptcy court's decision regarding the dischargeability of a penalty imposed for damaging prison property.

#### **E. Applications by Pro Se Petitioners**

Another concern about the program was that it would indirectly increase the workload of the clerk's office and judge's staff because the program would bring more pro se debtors into court. Table 7 shows the number of fee-waiver applicants who appeared pro se and the number who were represented by pro bono or paid attorneys during the first two and a half years of the program. Overall, 38% of the fee-waiver applicants appeared pro se. The percentage ranged across the districts from 10.8% in Eastern Pennsylvania to 78.5% in Eastern New York. In New York, legal services attorneys assisted with the preparation of petitions without entering a court appearance in 354 cases—if these debtors are considered to be represented, the percentage of pro se debtors in the district drops to 50.3%.

The percentage of fee-waiver applicants who appeared pro se was higher than the percentage for all cases filed in fiscal 1997 for each district. The percentage of fiscal 1997 applicants appearing pro se and the percentage of all fiscal 1997 Chapter 7 petitioners appearing pro se for each district is the following: Southern Illinois, 12.8% versus 1.2%; Montana, 66.7% versus 7.4%; Eastern New York, 79.6% versus 12.9%; Eastern Pennsylvania, 8.2% versus 2.2%; Western Tennessee, 25% versus 0.8%; and Utah, 60.0% versus 5.4%.<sup>31</sup>

It appears that the percentage of fee-waiver applicants that appear pro se is disproportionately high compared to other cases—more or less so depending on the availability of pro bono legal services and the judicial inclination to waive the fee when an attorney has been paid. Thus, these filings may be disproportionately burdensome to the clerk's office, judges, trustees, and other parties.

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30. In one Utah case, the inmate applicant listed no assets and only one creditor who held a claim for restitution. Because there appeared to be no reason for the debtor to file bankruptcy other than to attempt to discharge the restitution claim that was most likely non-dischargeable under *Kelly v. Robinson*, 479 U.S. 36 (1986), the court denied the application for waiver of the filing fee. See Utah Bankruptcy Case 96-24156.

31. For Eastern Pennsylvania, the second percentage is based on fiscal 1997 Chapter 7 cases excluding the fee-waiver cases. In all the other districts, the second percentage is based on all fiscal 1997 Chapter 7 cases; the percentage excluding fee-waiver cases would be somewhat lower.

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**Table 7: Case-Closing Information: Attorney Representation of the Applicants for a Waiver of the Filing Fee**

	S.D. Ill.		D. Mont.		E.D.N.Y.		E.D. Pa.		W.D. Tenn.		D. Utah	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
<b>1. Pro se</b>	23	16.2	60	58.3	984	78.5	211	10.8	14	37.8	127	52.3
<b>2. Represented by attorney</b>	118	83.1	41	39.8	261	20.8	1,742	89.2	23	62.2	114	46.9
<b>2a. Represented by legal services or pro bono attorney</b>	42	35.6	24	58.5	202	77.4	1,673	96.0	14	60.9	95	83.3
<b>2b. Represented by paid attorney</b>	76	64.4	15	36.6	55	21.1	67	3.8	9	39.1	17	14.9
<b>2c. Could not determine whether attorney was paid or unpaid</b>	0	0.0	2	4.9	4	1.5	2	0.1	0	0.0	2	1.8
<b>3. Unknown whether represented or not</b>	1	0.7	2	1.9	8	0.6	1	0.1	0	0.0	2	0.8
<b>4. Total</b>	142		103		1,253		1,954		37		243	

*Note:* The percentage of applicants represented by a pro bono or legal services attorney for the Eastern District of New York is an underestimate because legal services attorneys assisted with the preparation of petitions without entering a court appearance in 354 cases. If debtors in these cases are considered to be represented, the pro se rate drops to 50.3% and the represented rate increases to 49.1%. Percentages in rows 1, 2, and 3 are of the totals in row 4. Percentages in rows 2a, 2b, and 2c are of the numbers in row 2.

### V. Benefits of the Program to its Users

#### A. Who Used the Fee-Waiver Program?

Appendix L contains paragraph-length descriptions of 200 applicants that were represented by the Consumer Bankruptcy Assistance Project in Philadelphia. The paragraphs describe the applicant's circumstances at the time of filing bankruptcy, the consequences of filing bankruptcy for the applicant, and why paying the filing fee in installments was not possible.

To provide other information about the users of the program, we compared the type of unsecured debt they listed on Schedule F (and amendments thereto) to that listed by other Chapter 7 petitioners. We made this comparison in the Eastern District of New York and the Eastern District of Pennsylvania because that is where the bulk of the applications were filed. This analysis is best viewed as providing information on debtors' personal circumstances at the time they filed bankruptcy. It does not represent the type of debt that was actually discharged because we did not collect information on reaffirmation agreements or dischargeability actions, nor have we subdivided our sample according to whether a general discharge was received by the petitioner.<sup>32</sup>

The average number of unsecured debts held by IFP petitioners did not differ from the number held by non-IFP petitioners, nor did the number of debts held by petitioners in the Eastern District of Pennsylvania differ from the number held by petitioners in the Eastern District of New York (see Table 8).

As seen in Table 9, however, the amount of total debt did differ between IFP and non-IFP petitioners and between petitioners in the two districts. In both districts, the debt of IFP petitioners was less than that of non-IFP petitioners. Regardless of IFP status, debtors from the Eastern District of New York had greater debt than those from the Eastern District of Pennsylvania.<sup>33</sup>

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32. We fashioned our analysis after an earlier one by Judge Duberstein in the Eastern District of New York. The table in Appendix N shows how he classified the claims in a sample of that district's fiscal 1995 fee-waiver cases. In that sample, approximately half of the total debt in dollars was credit card debt; approximately 90% of the debtors listed one such claim. A substantial number of debtors also listed claims related to health (45%), utility services (37%), goods (33%), and bank loans (31%), but the total debt in dollars for these categories together was only about half of the credit card debt.

33. These conclusions are supported by regression analyses in which the total number of debts and the total amount of debt were predicted by district, IFP status, and the interaction of the two. The model for total number of debts was insignificant ( $F_{3,294} = 0.501$ , n.s.). The model for total amount of debt was initially tested using all observations. This analysis revealed one observation to be an extreme outlier which had likely biased the results. The outlier was excluded and the model re-tested. With this analysis, the model for total amount of debt was significant ( $F_{3,293} = 12.401$ ,  $p < .01$ ). Both district ( $t = 2.15$ ,  $p < .05$ ) and IFP status ( $t = 3.55$ ,  $p < .01$ ) were significant predictors of total amount of debt. For 22 petitioners, we had nearly complete information but the amount of one or more claims was missing. We re-ran the analysis excluding these petitioners as well as the outlier described above and obtained substantially similar results.

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**Table 8: Number of Unsecured Debts as Represented on Schedule F for IFP and Non-IFP Debtors in Two Pilot Districts**

	IFP Debtors	Non-IFP Debtors	IFP and Non-IFP Debtors Combined
Eastern District of New York			
<i>n</i>	75	76	151
mean (std. dev.)	10.35 (6.97)	10.77 (6.26)	10.56 (6.60)
median	9	9.5	9
Eastern District of Pennsylvania			
<i>n</i>	75	72	147
mean (std. dev.)	10.6 (8.90)	11.74 (6.93)	11.16 (7.98)
median	9	10.5	10
Two Districts Combined			
<i>n</i>	150	148	298
mean (std. dev.)	10.47 (7.96)	11.24 (6.59)	10.86 (7.31)
median	9	10	10

**Table 9: Amount of Unsecured Debts as Represented on Schedule F for IFP and Non-IFP Debtors in Two Pilot Districts**

	IFP Debtors	Non-IFP Debtors	IFP and Non-IFP Debtors Combined
Eastern District of New York			
<i>n</i>	75	76	151
mean (std. dev.)	22,604 (19,802)	39,705 (35,123)	31,211 (29,730)
median	17,764	26,309	20,529
Eastern District of Pennsylvania			
<i>n</i>	75	72	147
mean (std. dev.)	15,473 (18,492)	33,592 (36,135)	24,348 (29,848)
median	10,051	25,524*	16,825
Two Districts Combined			
<i>n</i>	150	148	298
mean (std. dev.)	19,039 (19,426)	36,731 (35,629)	27,825 (29,936)
median	13,694	25,524	19,245
* After excluding the extreme outlier identified in the regression analyses, this mean and standard deviation drops to 30,598 and 25,878, respectively.			

The nature of debt also differed between IFP and non-IFP petitioners and between the two districts (see Tables 10 and 11). Considering first the Eastern District of Pennsylvania, we find substantially more IFP petitioners, compared to non-IFP petitioners, had debts related to basic subsistence: to education, health, utility services, and housing. A large percentage (63%) of the housing-related debts of IFP petitioners were owed to public housing authorities (by comparison, the creditor for only one of the non-IFP housing debts was a public housing authority). Fewer IFP petitioners had unsecured debts stemming from bank credit cards, major department store credit cards, individual store charges and credit cards, and bank loans. Only 22% of the total unsecured debt held by IFP debtors was credit card

debt; a greater percentage (27%) of the debt was health-related. The analogous percentages for non-IFP debtors are as follows: credit card, 48%; and health, 11%.

In the Eastern District of New York most of the petitioners—both IFP and non-IFP—had bank credit card debt, which accounted for almost two-thirds of the total debt. Compared to non-IFP petitioners, somewhat more IFP petitioners had debt related to health and utility services, but the total debt for these categories was only a small fraction of the credit card debt. In addition, four IFP petitioners, but no non-IFP petitioners, had debt stemming from Social Security Administration or welfare overpayments.

The distinction between credit card debt and debt related to basic subsistence may of course be illusory. Debtors may have high credit card debt because they used their cards to cover basic needs. Still, whether debtors possess lines of credit has an implication for how they could meet the filing fee obligation. In commenting on the program, the Executive Office for U.S. Trustees noted that to the extent fee-waiver applicants are seeking to discharge credit card debt, they evidently possess sufficient assets to secure lines of credit and should be able to pay the requisite filing fee in installments.<sup>34</sup> This, of course, assumes credit card eligibility equates to financial competence (a current point of debate).

### **B. Did the Fee-Waiver Program Increase Access to the Bankruptcy Courts?**

In this section we present information about whether the program provided access to the courts to debtors who would otherwise be unable to file.

**Applicant Survey.** Responses to two questions in the applicant survey indicate that the fee-waiver program may make the bankruptcy courts more accessible to low-income debtors. Almost 11% of the successful applicants said they would not have filed bankruptcy had there been no waiver program, and a little less than a third said they would have filed anyway, but at a later date. Table 12 shows a somewhat different pattern for unsuccessful applicants; a majority of them (71%) said they would have filed their cases at the same time as they did under the program.<sup>35</sup> Table 13 shows that among those who received a waiver, 10% said they would not have continued with their case absent the waiver. Half said they would have continued, but a third did not know.

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34. Letter from Joseph Patchan, director, Executive Office for U.S. Trustees, to Elizabeth C. Wiggins, Federal Judicial Center (December 19, 1997) (on file with the Federal Judicial Center, Research Division).

35. Chi-square with three degrees of freedom = 63.2,  $p < .01$ .

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**Table 12: Applicant Survey**  
**If you could not have applied for waiver of the filing fee would you have filed your bankruptcy case anyway? (Please check one.)**

	Waiver Granted		Waiver Denied	
	<i>n</i>	%	<i>n</i>	%
<b>Yes, I would have filed my case at the same time that I did.</b>	300	31.5	71	71.0
<b>Yes, but I would have filed my case at a later date.</b>	312	32.7	18	18.0
<b>No</b>	102	10.7	3	3.0
<b>I don't know</b>	240	25.2	8	8.0
<b>Missing or ambiguous response</b>	14		1	
<b>Total</b>	968		101	

*Note:* The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table.

**Table 13: Applicant Survey**  
**Answer this question only if your filing fee was waived: Would you have continued with your bankruptcy case if the court had not waived the filing fee? (Please check one.)**

	<i>n</i>	%
<b>Yes</b>	532	55.0
<b>No</b>	100	10.3
<b>I don't know</b>	315	32.5
<b>Missing or ambiguous response</b>	21	
<b>Total</b>	968	

**Task Force Reports.** The Committee on Bankruptcy Issues of the Third Circuit Task Force on Equal Treatment in the Courts found a higher single-female filing rate and markedly fewer joint filings for IFP cases than non-IFP cases in the Eastern District of Pennsylvania. That committee concluded that the fee-waiver program may have enhanced access to the bankruptcy system for indigent single women.<sup>36</sup> A working committee of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts reached the same basic conclusion in its draft report to the Second Circuit Task Force.<sup>37</sup>

36. Report of the Committee on Bankruptcy Issues to the Third Circuit Task Force on Equal Treatment in the Courts 192–211 (available from the Third Circuit Office of the Circuit Executive). See Appendix M for the relevant part of the committee report.

37. Draft Report of the Working Committees to the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, Appendix A to the preliminary draft of the Task Force's report (June 5, 1997). See Appendix M to this report for the relevant part of that report.

### C. Did the Users of the Program Obtain Discharges of Their Debts?

One indication of the program's benefit is whether the debts of its users are discharged. One concern is that the program will encourage people to file merely to benefit from the automatic stay and with no intention of following through to a discharge. (To obtain a discharge, a debtor must file all required documents, appear for examination under oath, cooperate fully with the case trustee, obey all lawful orders of the court, and sometimes meet other obligations.)

As seen in Table 14, debtors whose fee-waiver applications were granted were more likely to obtain a discharge compared to debtors whose applications were denied (95.4% versus 72.4%).<sup>38</sup> This pattern was found for each district separately, except for the Southern District of Illinois, where the rates for the two groups did not significantly differ.<sup>39</sup> It was most pronounced in the Eastern District of Pennsylvania.

Overall and in each district, the discharge rate for debtors whose fee was waived is similar to that for all other Chapter 7 debtors in the pilot districts (95.4% versus 95.9%).<sup>40</sup> Where we were able to obtain relevant information, we found estimates of the discharge rates for cases in which an installment application was filed generally to be lower than the discharge rates for cases in which the fee was waived.<sup>41</sup>

Across the pilot districts, reaffirmation agreements were filed in between 1.4% and 25% of cases in which the filing fee was waived (Southern Illinois, 24%; Montana, 12.3%; Eastern Pennsylvania, 1.4%; Eastern New York, 4.5%; Western Tennessee, 25%; and Utah, 15.5%).<sup>42</sup>

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38. Chi square, 1 *df* = 299.66, *p* < .01.

39. The discharge rates for debtors whose fee-waiver applications were granted and for those whose applications were denied in each of the pilot districts were: Southern Illinois, 95.5/89.3; Montana, 100/84.4; Eastern Pennsylvania, 93.9/54.8; Eastern New York, 97.7/74.8; Western Tennessee, 96.2/71.4; and Utah, 94.9/69.3.

40. Discharge rates for debtors whose fees were waived versus that for all other Chapter 7 debtors in each district were: Southern Illinois: 95.5/98.4; Montana 100/97.2; Eastern Pennsylvania: 93.9/95.4; Eastern New York: 97.8/97.0; Western Tennessee, 96.1/93.8; and Utah, 94.9/93.2.

41. Estimates of the discharge rates for installment cases were Southern Illinois, 86.6% for fiscal 1995–fiscal 1997 combined; Montana, 83.9% for fiscal 1995, fiscal 1996, and the first half of fiscal 1997 combined; Eastern New York: 82.3% for fiscal 1996; Western Tennessee: 80.8% for fiscal 1995 and fiscal 1996 combined; and Utah 81% for fiscal 1995–1997 combined. In each of these districts, the percentage of installment cases in which the debtor received a discharge is statistically different from the percentage of fee-waiver cases in which the debtor received a discharge. The information was unavailable in the Eastern District of Pennsylvania because of the manner in which the district's electronic database had been archived.

42. In Eastern Pennsylvania and Eastern New York this percentage is based on a 20% sample of cases in which the fee was waived. In all other districts, the percentage is based on all such cases filed during a specified time period (Southern Illinois, all years of program; Montana, 10/1/94–6/30/97; Western Tennessee, all years of program; Utah, first 2.5 years of program).

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**Table 14: Case-Closing Sample: Disposition Cases in Which a Fee-Waiver Application Was Filed**

	Fee-waiver application was granted	Fee-waiver application was denied	Total
<b>Debtor obtained a discharge</b>	2,979 (95.4%)	331 (72.4%)	3,310 (92.4%)
<b>Debtor did not obtain discharge</b>	145 (4.6%)	126 (27.6%)	271 (7.6%)

*Note:* This table does not include pending cases, cases converted to Chapter 13, or cases in which the disposition of the application fell into the other category.

### **D. What Were the Less Tangible Benefits of Filing Bankruptcy for the Users of the Program?**

Responses to four questions in the applicant survey suggest some of the less tangible benefits filing bankruptcy may have for users of the fee-waiver program. Table 15 shows the responses to a question in which applicants were asked to check every statement that described their circumstances at the time they decided to file bankruptcy. Of the respondents whose fees were waived, about three-quarters said collection agencies were calling and writing their household attempting to collect money; over half said they or their spouse were very worried or emotionally upset because of debt problems; and almost half of the applicants said they had recently lost their job or become unable to work for other reasons. About a third said they were behind in paying a utility bill and the company had shut off or threatened to shut off service, and at least 20% said they were behind in paying rent and that they or someone they support had recently had serious medical problems and big medical bills.<sup>43</sup>

Compared to debtors whose fee-waiver request was denied, debtors whose fee waiver was granted were more likely to report they were trying to obtain public housing,<sup>44</sup> behind in paying rent,<sup>45</sup> facing eviction,<sup>46</sup> and behind in paying a utility bill,<sup>47</sup> and less likely to report that someone to whom they owed money was taking their wages or had threatened to take their wages.<sup>48</sup>

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43. The pattern of responses differed somewhat between the pilot districts. Fewer respondents in the Southern District of Illinois, the District of Montana, and the Western District of Tennessee said they were behind in paying their rent, and a much higher percentage of respondents from the District of Montana and Utah reported that that they or someone they support had recently had serious medical problems and big medical bills.

44.  $z = 1.57, p < .06$  (one-tailed).

45.  $z = 2.18, p < .05$  (one-tailed).

46.  $z = 1.71, p < .05$  (one-tailed).

47.  $z = 1.51, p < .07$  (one-tailed).

48.  $z = -2.60, p < .01$  (two-tailed).

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**Table 15: Applicant Survey**  
**Please check every statement below that describes your circumstances at the time you decided to file bankruptcy (check all that apply).**

	Fee Waiver Was Granted		Fee Waiver Was Denied	
	<i>n</i>	%	<i>n</i>	%
I was trying to obtain public housing.	68	7.1	3	3.0
I was behind in paying rent for where I live.	225	23.4	14	13.9
I was facing eviction from where I live because I was behind in paying rent.	136	14.1	8	8.0
I was behind in making mortgage payments on my home.	86	8.9	8	8.0
I was facing foreclosure on the mortgage of my home.	67	7.0	4	4.0
I had recently lost my job or become unable to work for other reasons.	450	46.8	44	43.6
My spouse had lost his or her job or become unable to work for other reasons.	83	8.6	14	13.9
I was behind in paying a utility bill (like gas, electricity, oil, or water), and the company had shut off or was threatening to shut off the utility.	339	35.2	28	27.7
I, my spouse, or someone else I support was having or recently had had serious medical problems.	262	27.2	33	32.7
I, my spouse, or someone else I support had big medical bills.	190	19.8	24	23.8
I had lost or was in danger of losing my driver's license due to a debt arising from an accident.	28	2.9	1	1.0
Collection agencies or other debt collectors were calling my household, attempting to collect money.	745	77.4	77	76.2
Collection agencies or other debt collectors were writing my household, attempting to collect money (that is, they had been sending letters other than the regular bills).	733	76.2	73	72.3
Someone to whom I owed money was taking my wages or had threatened to take my wages.	136	14.1	24	23.8
I or my spouse was very worried or emotionally upset because of my debt problems.	583	60.6	63	62.4
There were other circumstances leading to financial difficulty. (see note)	407	42.3	49	48.5
Total (# of the 1,063 respondents who answered this question)	962		101	
<p><i>Note:</i> Percentages are column percentages. The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table. Six respondents who provided disposition information did not answer this question. Other circumstances that were described include: separation and divorce, death of a spouse, birth of a child, lack of child support, being a victim of a crime, being imprisoned, being a student and having student loans, being a welfare recipient, and spending too much on credit cards.</p>				

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Table 16 shows that debtors whose fees were waived were more likely to report that filing bankruptcy made it easier to keep or get housing (29.4% compared to 13.8% for those whose fee-waiver request was denied).<sup>49</sup> They were also more likely to say that filing bankruptcy reduced the tension or stress in their household (85.6% versus 65.3%) (see Table 18).<sup>50</sup> This pattern held for most districts, but in Utah, those whose applications were denied more frequently said filing bankruptcy had increased household stress (47.1% versus 24.5% overall) and less frequently said it reduced stress (29.4% versus 65.3% overall). And in Eastern Pennsylvania, among the unsuccessful applicants, stress was increased by filing 31.6% of the time (versus 24.5% overall) and decreased only 52.6% of the time (versus 65.3% overall).

Most applicants, whether their fee was waived or not, said filing bankruptcy had no effect on their employment situation (see Table 17). Of those whose fee was waived, only about 8.7% said filing bankruptcy made it easier to work at their job or to obtain a job, and only about 3.8% said filing bankruptcy made it harder.

**Table 16: Applicant Survey**  
**Did filing bankruptcy make it easier or harder for you to keep or get housing? (Please check one.)**

	Waiver Granted		Waiver Denied	
	<i>n</i>	%	<i>n</i>	%
<b>Filing bankruptcy made it easier for me to keep or get housing.</b>	255	29.4	13	13.8
<b>Filing bankruptcy had no effect on my housing situation.</b>	544	62.7	67	71.3
<b>Filing bankruptcy made it harder for me to keep or get housing.</b>	69	8.0	14	14.9
<b>Missing or ambiguous response</b>	100		7	
<b>Total</b>	968		101	

*Note:* The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table.

49. Chi square with 2 *df* = 13.09, *p* < .01. This effect was most pronounced in the Eastern District of Pennsylvania where 35.9% of successful applicants said filing bankruptcy made it easier for them to keep or get housing and 9.4% said it was harder.

50. Chi square with 2 *df* = 32.03, *p* < .01.

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**Table 17: Applicant Survey**  
**Did filing bankruptcy make it easier or harder for you to work at your job or to obtain a job?**  
 (Please check one.)

	Waiver Granted		Waiver Denied	
	<i>n</i>	%	<i>n</i>	%
Filing bankruptcy made it easier for me to work at my job or to obtain a job.	73	8.7	8	8.5
Filing bankruptcy had no effect on my employment situation.	736	87.5	79	84.0
Filing bankruptcy made it harder for me to work at my job or to obtain a job.	32	3.8	7	7.5
Missing or ambiguous response	127		7	
<b>Total</b>	968		101	
<i>Note:</i> The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table.				

**Table 18: Applicant Survey**  
**Did filing bankruptcy reduce or increase the tension or stress in your household?**  
 (Please check one.)

	Waiver Granted		Waiver Denied	
	<i>n</i>	%	<i>n</i>	%
Filing bankruptcy reduced the tension or stress in my household.	805	85.6	64	65.3
Filing bankruptcy had no effect on the tension or stress in my household.	62	6.6	10	10.2
Filing bankruptcy increased the tension or stress in my household.	74	7.9	24	24.5
Missing or ambiguous response	27		3	
<b>Total</b>	968		101	
<i>Note:</i> The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table.				

In sum, it does appear that many IFP debtors benefit from filing bankruptcy. However, some of them might benefit more from a lesser remedy (e.g., referral to consumer credit counseling or social services to work-out agreements with quasi-public utility services or public housing). Such remedies would not restrict the debtors' ability to obtain bankruptcy relief when they might need it more. For example, we know that at least 89 of the Eastern Pennsylvania applicants were assisted by tenant organizations and presumably were filing bankruptcy to discharge public housing debt so they could keep or obtain such housing. The CBAP summaries also indicate some of its clients filed for this purpose. A change in non-

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bankruptcy law or policy might provide these very poor debtors more straightforward solutions to their problems.

## **VI. Forecasting the Number of Applications Under a National Program**

The cost of a national program will be driven almost exclusively by the number of applications that are filed and granted. One way to forecast the number of applications that would be filed and granted if the program were implemented nationwide is to multiply the across-district percentages presented in Table 3b by the number of non-business cases filed within the last year. Using this method, one would predict that had the program been operative nationally, an application for waiver of the filing fee would have been filed in 31,490 of the 926,183 non-business cases filed in fiscal 1997, and the filing fee would have actually been waived in 26,859 of the cases.<sup>51</sup>

The above approach is justified only if one assumes that (1) the factors influencing the number of applications to be filed and granted are represented fairly by the pilot districts; (2) the number of non-business Chapter 7 cases filed last year represents the number to be filed next year; and (3) a national program would employ procedures and an eligibility standard similar to that used in the pilot districts. Below we explore the possible effect of a national program if these assumptions do not hold true.

### **A. Effect of an Increase in the Number of Non-Business Chapter 7 Cases**

Any forecast regarding the cost of the program will have to make assumptions about the expected increase/decrease in the number of non-business Chapter 7 filings. The number of non-business Chapter 7 cases rose by 26% from fiscal 1996 to fiscal 1997 and the Administrative Office expects filings to rise through FY98 and then remain steady in 1999.<sup>52</sup>

### **B. Effect of a Change in the Eligibility Standard**

A change in the eligibility standard can greatly affect the number of applications that are granted.<sup>53</sup> Although a totality of the circumstances standard was followed in the pilot districts during the pilot study, we can estimate the impact of alternative standards by assessing how many debtors in the pilot districts would qualify for waiver of the filing fee if those alternative standards were in place nationally.

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51. Table F-2 of the *Judicial Business of the Courts: 1996 Report of the Director of the Administrative Office of the United States Courts* lists the number of non-business Chapter 7 filings for fiscal 1996 as 731,363. A pre-publication copy of the same table for fiscal 1997 lists the number of non-business Chapter 7 cases as 926,183.

52. Memorandum from John R. Golmant through Steven J. Schlesinger to Gregory D. Cummings, chief, Budget Division (June 30, 1996) (bankruptcy forecasts to fiscal 1999).

53. For example, in August 1995, the Southern District of Illinois court determined that payment to an attorney did not bar waiver of the filing fee, reversing the standard the court had applied during the first year and a half of the program. During the week following the change, the number of applications for waiver equaled the number made the previous nine months.

Based on responses to the 1993 FJC survey of bankruptcy judges<sup>54</sup> and interviews of persons in the pilot courts, we decided to examine the following alternative standards: (1) Totality of the Circumstances Standard But No Waiver if an Attorney or Other Entity Has Been Paid in Connection with the Case; (2) Income Below the Poverty Line; and (3) Qualification for Legal Services.

**Totality of the Circumstances Standard But No Waiver if an Attorney or Other Entity Has Been Paid in Connection with the Case**

Fed. R. Bankr. P. 1006 prohibits payment to an attorney or any person rendering service in connection with a bankruptcy case before the filing fee has been paid to the court in full. Thus, a debtor may not pay the fee in installments if he or she has paid an attorney. In the pilot districts, the filing fee was waived for some people who would not qualify to pay the fee in installments because they had paid an attorney or other entity in connection with the case.

**Payments to Attorneys.** Of the 3,732 cases in the case-closing sample, an application for waiver of the fee was filed in 239 cases in which an attorney had been paid and the application was granted in 128 of those cases. As seen below, applications were filed by paid counsel in every district, with varying rates of success (from 0% granted in Montana to 70% granted in Southern Illinois).

- **Southern Illinois:** 76 applications [53 (70%) granted, 22 denied, and 1 withdrawn] (53 of the applications were filed by one attorney).
- **Montana:** 15 applications [14 denied and 1 withdrawn].
- **New York:** 55 applications [28 (51%) granted, 25 denied, 1 withdrawn, and 1 vacated when assets were uncovered].
- **Eastern Pennsylvania:** 67 applications [40 (60%) granted, 18 denied, 6 withdrawn, 1 not ruled on before case was dismissed, 2 vacated when case converted to Chapter 13].
- **Western Tennessee:** 9 applications [3 (33%) granted, 4 denied, 1 withdrawn, and 1 denied as moot].
- **Utah:** 17 cases [4 (24%) granted, 13 denied; all those granted were early in the program].

Applications were filed by paid counsel in about equal numbers across the fiscal years, but were more likely to be granted in fiscal 1996 and the first half of fiscal 1997.

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54. See note 11, *supra*.

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- **Fiscal 1995:** 99 applications [35 (35%) granted; 58 denied, 4 withdrawn, 1 denied as moot, and 1 not ruled on].
- **Fiscal 1996:** 88 applications [55 (63%) granted; 25 denied, 5 withdrawn, 2 vacated when case converted to Chapter 13, 1 vacated when assets were uncovered].
- **First half of fiscal 1997:** 52 applications [38 (73%) granted, 13 denied, and 1 withdrawn].

If none of these applications had been filed<sup>55</sup> and none of the waivers had been granted, the percentage of Chapter 7 cases in which an application was filed and a waiver was granted would drop to 3.2% (from 3.4%) and 2.8% (from 2.9%), respectively. Based on these percentages, one would predict that had the program been operative nationally, applications would have been filed in 29,638 (instead of 31,490) of the 926,183 non-business cases filed in fiscal 1997, and granted in 25,933 (instead of 26,859).

**Payments to Non-Attorneys.** Of the 3,732 cases in the case-closing sample, an application for waiver of the fee was filed in 224 cases in which a non-attorney had been paid and the application was granted in 165 cases. Most of these cases were filed in the Long Island offices of the Eastern District of New York by petition preparers, with a notable number also being filed by petition preparers in the District of Utah.<sup>56</sup> Most of the New York applications (80%) but only about a third of those in Utah (38%) were granted. Not surprisingly, as shown below, the number of such applications appears to be declining because action has been taken against petition preparers who have filed fee-waiver applications in both Utah and Eastern New York.

- **Fiscal 1995:** 115 applications [82 (71%) granted; 33 denied].
- **Fiscal 1996:** 84 applications [67 (80%) granted; 16 denied, 1 vacated when assets were uncovered].
- **First half of fiscal 1997:** 25 applications [16 (64%) granted, 9 denied].

It is unclear how many of these applications would have been filed if waiver of the fee were prohibited by statute or rule, but it is likely that some would have been filed due to the debtors' ignorance of the standard or petition preparers' abuse of the program. Assuming all of the applications would have been filed (i.e., the worst-case scenario) and none of the waivers would have been granted, the percentage of Chapter 7 cases in which an application was filed would remain the same and the percentage of cases in which a waiver was granted would drop to 2.8% from 2.9%.

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55. Presumably few retained attorneys would file fee-waiver applications if the prohibition against waivers when an attorney had been paid were adopted by statute or rule.

56. In New York, applications were filed in 191 cases in which a non-attorney had been paid. They were granted in 152 cases, denied in 38, and the waiver was vacated when assets were uncovered in 1 case. In Utah, applications were filed in 21 such cases and granted in 8. The number filed and granted for the other districts are: Southern Illinois, 1/0; Montana, 5/0; Eastern Pennsylvania, 6/5; and Western Tennessee, 0/0.

Based on these percentages, one would predict that had the program been operative nationally, applications would have been filed in 31,490 of the 926,183 non-business cases filed in fiscal 1997, and granted in 25,933 (instead of 26,859).

**Payments to Attorneys and Non-Attorneys.** Assuming none of the applications would have been filed when an attorney had been paid and none of the waivers would have been granted when either an attorney or non-attorney had been paid, the percentage of Chapter 7 cases in which an application was filed and a waiver was granted would drop to 3.2% and 2.7%. Based on these percentages, one would predict that had the program been operative nationally, applications would have been filed in 29,638 of the 926,183 non-business cases filed in fiscal 1997, and granted in 25,007.

### **Income Below the Poverty Line**

The most commonly suggested eligibility standard is income below the federal poverty line. Recent estimates suggest that approximately 32.4% of Chapter 7 bankruptcy debtors have incomes below the federal poverty line.<sup>57</sup> Based on this percentage, approximately 300,083 of the 926,183 individuals who filed under Chapter 7 in fiscal 1997 would fall below the poverty guideline, and approximately a third of the non-business Chapter 7 filing fees (\$52,514,525 of \$162,082,025) would have been paid by those individuals. If the courts had granted a waiver to all such persons (i.e., there was a “bright-line” standard that said all were qualified and a relatively easy way to determine those beneath the line) the number of fee waivers would have resulted in a significant loss of revenue.

Not all those eligible under this standard requested a waiver of the filing fee in the pilot program (e.g., only 8.3% of consumer Chapter 7 debtors requested a fee waiver in the Eastern District of Pennsylvania but 38.5% are thought to have income below the poverty line).<sup>58</sup> Thus, if the courts waived the filing fee for all debtors with income below the poverty line, whether or not the debtor requested a waiver, the number of waivers would likely increase greatly.

Some judges in the pilot courts used the poverty guidelines as informal criteria to guide their decisions. This suggests that even if the poverty guidelines are not published as the eligibility standard, the number of waivers may increase as the program becomes better known and determinations become more routine. This is especially true if waivers are allowed when attorneys are paid because attorneys

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57. Teresa A. Sullivan et al., *Consumer Bankruptcy Project Phase Two, Special Computer Run (12/9/97)* (on file at the Federal Judicial Center, Research Division). This estimate is based on samples drawn from the Eastern District of Pennsylvania, the Northern District of Illinois, the Western District of Texas, the Middle District of Tennessee, and the Central District of California. Earlier work put the figure at about 25%. Teresa A. Sullivan et al., *As We Forgive Our Debtors: Bankruptcy And Consumer Credit In America* 63–83 (1989); Philip Shuchman, *The Average Bankrupt: A Description and Analysis of 753 Bankruptcy Filings in Nine States*, 88 Com. L.J. 288, 289–91 (1983).

58. See Table 3b, *supra*, and Sullivan et al. (12/9/97), *supra* note 57.

would nearly always suggest nonpayment of the fee to clients who qualified. Thus, the percentage of debtors falling below the poverty line can be taken as an estimate of the upper limit of the percentage of debtors that would receive a waiver.<sup>59</sup>

### **Qualification for Legal Services**

In some state courts, people are automatically eligible to proceed *in forma pauperis* if they qualify for legal services. Under these systems, the attorney certifies to the need for *in forma pauperis* status and attaches supporting financial information.

Use of such a system could decrease the amount of time needed to review fee-waiver applications, at least in some districts. However, it is feasible only to the extent legal services and organized pro bono groups adopt eligibility standards similar to that of the court. Moreover, the debtors' attorneys are advocates and arguably may not be the best judges of how to use the court's limited resources.

The pilot program experience indicates that *in forma pauperis* standards used by the courts and legal services are similar, but not identical. Across all years, only 38 of 1,674 applications (2.3%) filed by legal services or pro bono attorneys in the Eastern District of Pennsylvania (where the pro bono bar is quite organized) were denied.<sup>60</sup> However, the percentage denied was somewhat higher in the first two years of the program (2.6%) compared to the last year (1.4%), although not significantly so, suggesting that legal services and CBAP may have adjusted their internal standards for requesting a waiver to respond to the court's standard.

One way to approximate the number of applications that would be filed under this standard is to assume an application would be filed in every case in which the debtor was represented by a legal services or pro bono attorney. In our fall 1997 district survey, we asked clerks to estimate the percentage of the Chapter 7 debtors in their district who received free legal services, providing them the response categories shown in Table 19.

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59. Presumably, some of the debtors eligible under this standard would have paid an attorney. If for this reason they are ineligible for a waiver, the percentage would be lower. On the other hand, any set standard would include a provision to allow the court to waive the fee for good cause shown even if the standard were not met.

60. The percentages of denials for the other districts, in ascending order, are as follows: the Western District of Tennessee, 6.7%; the Southern District of Illinois, 7.1%; the Eastern District of New York, 7.4%; the District of Montana, 12.5%; and the District of Utah, 16.8%.

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**Table 19: District Survey**  
**Approximately what portion of the Chapter 7 debtors in your district receive free legal services?**

1. Response	2. Number of Districts	3. Aggregate FY97 Filings	4. Aggregate FY 97 Filings, Distributing Filings for "Can't Say" Districts (see note)	5. Rate of Applications (see note)	6. Number of Applications
Virtually none	39	404,240	533,891	.5%	2,670
1-5%	26	236,838	312,796	3%	9,384
6-10%	3	45,781	60,464	8%	4,837
11-20%	3	14,408	19,029	15.5%	2,950
Over 20%	0	0	0		
Can't say	23	224,916			
Total	94	926,183	926,183		19,841 (2.1% of total filings)

*Note:* The responses of the pilot districts were as follows: Southern Illinois, Montana, and Western Tennessee, virtually none; Utah, 1-5%; Eastern New York, 6-10%; and Eastern Pennsylvania, 11-20%. In column 4, the filings for "can't say" districts were distributed across the other categories proportionate to their size. We assumed the application rate to be .5% for the "virtually none" category and to be the mid-point of the response option for the other categories (column 5).

Columns 1-3 of Table 19 show the number of districts providing each response, along with the districts' aggregate fiscal 1997 filings. To estimate the number of applications, we redistributed the Chapter 7 filings for districts who were unable to say what portion of their Chapter 7 debtors received free legal service across the other response categories proportionately (column 4), and assumed the application rate to be .5% for the "virtually none" category and to be the mid-point of the response option for the other categories (column 5). Based on these assumptions, it appears that applications would be filed (and presumably granted) in 2.1% (19,841) of all Chapter 7 cases.

We know from the pilot courts that only 55% of all fee-waiver applications were filed by debtors represented by pro bono or legal services attorneys (see Table 7), suggesting that the current estimate might better reflect the national number of applications if it were adjusted upward to account for waivers granted to pro se debtors. With this adjustment, the number of applications would increase by 16,234

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to 36,075, or to 3.9% of all filings.<sup>61</sup> In the pilot courts, approximately 77.4% of applications filed by pro se debtors were granted. Applying this percentage, we would expect 12,565 of the additional 16,234 applications to be granted.

Thus, if all debtors who receive free legal service file an application that is granted, and the number of applications filed by and granted for pro se debtors is similar to that found in the pilot courts, the number of applications that would have been filed nationwide in fiscal 1997 is 36,075 (instead of 31,490, or 3.9% of Chapter 7 cases instead of 3.4%), and the number of actual waivers is 32,406 (instead of 26,859, or 3.5% instead of 2.9%).

### C. District-Specific Characteristics that May Affect the Number of Applications

**Procedures for Installment Applications.** One explanation given for the low level of fee-waiver applications in the Western District of Tennessee is that a Chapter 7 debtor does not have to make an initial payment at the time an application to pay the fee in installments is filed. Our data do not support this explanation. This is the practice in Southern Illinois where the rate of applications is low (1.7% of non-business Chapter 7 cases), but it is also the practice in Eastern Pennsylvania where the rate is high (8.3% of non-business Chapter 7 cases). This suggests that not requiring a first installment payment when petitioners choose to pay in installments would not necessarily depress applications for waiver of the fee.

**Central District of California.** Before the start-up of the fee-waiver program, the Central District of California expressed an interest in being selected as a pilot district for two primary reasons: (1) because that district's filings account for approximately 10% of all filings nationwide, the effect of a fee-waiver program depends heavily on what happens there; and (2) the effect of the program in the Central District of California might differ from other districts because of the prevalence of non-attorney petition mills. More specifically, it has been argued that as many as 50% of the consumer petitions in the district are filed pro se, with a substantial portion of them prepared by non-attorney petition mills on behalf of tenants to delay eviction (i.e., are "unlawful detainer" cases), and that a fee-waiver program might exacerbate this problem.<sup>62</sup>

The Bankruptcy Committee declined to include the Central District of California in the pilot program for two reasons: first, Central California may not be representative of what happens in other parts of the country; and second, to include it in the study would have been prohibitively expensive, given the legislative assumption that the cost of the pilot program and study would be limited to \$1.5 million. In implementing and studying the program, however, the subcommittee and Center staff considered the district's views about *in forma pauperis*, as expressed

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61. Total applications = 19,841 / .55.

62. Testimony of Bankruptcy Judge Lisa Hill Fenning before the Advisory Committee on Bankruptcy Rules (February 28, 1992). See also Sommer, *supra* note 12.

in an April 1994 document from the court,<sup>63</sup> and met with representatives from the bankruptcy court, the U.S. trustee's office, and the U.S. attorney's office in August of 1997.<sup>64</sup>

At that meeting, the district representatives reported a significant problem with "mills" filing bankruptcy petitions to temporarily stay an eviction or foreclosure, with no intention of the debtor appearing at the section 341 meeting or even filing schedules. The apparent goal of such filings is to obtain the benefit of the automatic stay for a month or two. The mills sometimes try to save on filing fees by combining one or more names as "aka's" (even though there is no relationship between the different people named in the caption), or they transfer numerous properties into the name of one person whom they have paid to file bankruptcy. Given the mills' sophistication, it was thought that the mills would attempt to avoid paying the filing fee if a national program were implemented.

The district representatives strongly urged that any national fee-waiver program be sufficiently flexible that bankruptcy courts could address local problems. They believe it would be essential for the judges in their district to have clear authority to review and rule on fee-waiver applications before the automatic stay went into effect and to deny the waiver if a case was being filed for an improper purpose.<sup>65</sup> This type

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63. *In Forma Pauperis: Key Issues for Developing and Implementing Standards*, United States Bankruptcy Court for the Central District of California (April 1994).

64. Interview of Hon. Geraldine Mund (chief bankruptcy judge), Hon. Vincent P. Zurzolo (bankruptcy judge), Mr. Jon D. Cerretto (bankruptcy clerk of court), Ms. Marcy Tiffany (then U.S. trustee), and Ms. Maureen A. Tighe (assistant U.S. attorney, deputy chief, major frauds section) by Hon. Donald E. Walter (chair, IFP subcommittee), Mr. Francis F. Szczebak (Bankruptcy Judges Division, Administrative Office of the U.S. Courts), and Ms. Elizabeth C. Wiggins (Research Division, Federal Judicial Center) (interview notes on file at the Federal Judicial Center, Research Center). In addition, see the follow-up letter sent to Elizabeth C. Wiggins by Majorie Lakin Erickson (Assistant U.S. Trustee) and Maureen A. Tighe (on file at the Center).

65. The pilot courts set some precedent for basing the IFP determination partially on the merits of the case in extraordinary circumstances. See *In re Stephenson*, 205 B.R. 52 (Bankr. E.D. Penn. 1997) (the frivolous nature of debtor's bankruptcy filing fee warranted denial of fee-waiver application, although merit generally is not an issue in determining a fee-waiver request). This case held that even if the debtor qualified economically for *in forma pauperis* relief, her application for waiver of the Chapter 7 filing fee pursuant to the pilot program would be denied on grounds that the bankruptcy filing was frivolous within the meaning of 28 U.S.C. § 1915(e)(2)(B)(i). The primary objective of debtor's bankruptcy was to protect property belonging to nondebtor family members from being sold at a sheriff's sale, but bankruptcy was an ineffective remedy for this problem. Under Pennsylvania law, however, the debtor could defeat the sheriff's sale by spending \$30 to file a property claim and claim of exemptions. Under the circumstances, a reasonable person who had been informed of the options would not have filed bankruptcy if she had to pay the \$175 fee. See also *In re Merritt*, 186 B.R. 924 (Bankr. S.D. Ill. 1995). In this case, the court denied a request to waive the fee and costs for filing an appeal of a dischargeability judgment by a debtor whose bankruptcy filing fee had been waived. The court concluded that legal merit must be demonstrated in order to secure such relief and that the standard to determine legal merit was more rigorous when economic rather than liberty interests are at stake. At issue was a \$47.25 dischargeability judgment, which the court found *de minimis* when compared to the \$105 appeal fee and the costs of the transcript. The court noted in its ruling that legal merit was not an issue in determining the fee-waiver request for filing a bankruptcy petition itself

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of review would necessitate the debtor filing complete schedules and statements along with the petition and fee-waiver application.<sup>66</sup> The district representatives think existing statutory authority under 11 U.S.C. § 707(a) and (b) for dismissing a case for cause or substantial abuse was inadequate for dealing with the unlawful detainer cases; once the automatic stay is in effect, the petitioners in these cases have gotten what they want and do not care whether the case is dismissed.

A statutory or rule change probably would be needed to ensure that judges had the desired authority. Under the current code and rules, the clerk would arguably be obligated to accept a petition accompanied by a fee-waiver application (but with or without the schedules and statements) for filing before the application was determined, thus setting in motion the automatic stay. Under section 362 of the Bankruptcy Code, the filing of a petition under Chapter 7 automatically stays (i.e., stays without any court action by operation of law) most actions against the debtor or the debtor's property. And Fed. R. Bankr. P. 5005(a)(1) was amended in 1993 to eliminate any discretion by the clerk in accepting the filing of a petition.<sup>67</sup> Moreover, Fed. R. Bankr. P. 1007 generally permits a Chapter 7 debtor to file required schedules and statements within 15 days of the petition, if the petition is accompanied by a list of the names and addresses of the debtor's creditors.

Currently, the judges in the Central District of California review and determine applications to pay the filing fee in installments before providing a debtor with documentation that an automatic stay is in effect.<sup>68</sup> When a petition is filed with an installment application, the clerk's office commences the case but does not give the debtor a case number until the installment application is granted or the fee is paid. Staff from the clerk's office accompany the debtor to a same-day hearing on the application. If the application is denied and the debtor does not pay the filing fee in full, the cover sheet is marked to indicate that the stay is not in effect. This procedure has kept the percentage of Chapter 7 cases with an installment application to about .4%. The court thinks a similar procedure with fee-waiver applications would keep the number of such applications at a manageable level.

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since the legal eligibility requirements for filing a case are set by statute. Also see note 29, *supra*, describing a Utah case in which waiver of the fee was denied because the debtor's debts were non-dischargeable.

66. The chief bankruptcy judge predicted that the total judge time needed to process fee-waiver applications would be two to five hours per day, assuming the rate of fee-waiver applications in the pilot courts and procedures like the district's installment procedures were used.

67. The relevant part of Fed. R. Bankr. P. 5005(a)(1) provides that "[t]he clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or local rules or practices."

68. These procedures were fully implemented in 1993. In 1992, the debtor typically had a 10-day wait prior to hearing. From 1992 to 1993, the percentage of L.A. Chapter 7 cases with an installment application dropped from .9% to .4%, and has remained fairly constant since then. Since 1993, the percentage of requests granted has increased from 31.4% to 54.5%.

## VII. Forecasting the Cost of a National Program<sup>69</sup>

In this section, we estimate for a national fee-waiver program the lost revenue from waived filing and miscellaneous fees and from additional personnel costs, assuming various eligibility standards are applied. We also discuss the extent to which work and lost revenue associated with installment applications offsets that associated with fee-waiver applications.

### A. Lost Revenue

In this section, we use the fee-waiver projections set out in the previous section to estimate the amount of lost revenues and expenditures that could be expected if the fee-waiver program were national.

Currently, each \$175 filing fee is distributed as follows: (1) \$70 to the judiciary (this includes the \$30 noticing fee); (2) \$60 to the case trustee; (3) \$30 to the U.S. Trustee System Fund (administered by the Department of Justice); and (4) \$15 to the general fund of the U.S. Treasury.<sup>70</sup> Using the simplest estimate of waivers (the number of non-business Chapter 7 filings multiplied by 2.9%, the percentage of Chapter 7 cases in which the fee was waived in the pilot courts), one would have expected 26,859 fee waivers if the program had been implemented nationally in fiscal 1997. This translates into \$4,700,325 in lost filing fees. Table 20 shows how this loss is divided among the different funds.<sup>71</sup>

In addition, judges sometimes waived miscellaneous fees in cases where the filing fee was waived (see discussion in section VIII.E, *infra*). The amount waived per fee-waiver case was approximately \$2.76.<sup>72</sup> Accordingly, the expected dollar amount associated with waived miscellaneous fees for the fiscal 1997 cases is \$74,131, bringing the total lost revenue to \$4,774,456.

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69. Costs associated with the pilot program are summarized in Appendix O, provided by the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts.

70. The filing fee during part of the pilot program (before October 22, 1995) was \$160; trustees serving in cases that closed before this date received \$45 rather than \$60. 28 U.S.C. § 330(b) as amended by section 117 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, October 22, 1994.

71. The actual noticing costs associated with the fee-waiver cases are likely to be less than the standard \$30 noticing fee that is charged. Based on the cost of noticing in the non-pending fee-waiver cases, the cost of noticing would be \$23.49 per case. This amount represents the sum of the average number of notices sent out by the clerk's office in a fee-waiver case multiplied by .44 and the average number of notices sent out by the Bankruptcy Noticing Center multiplied by .37. Information regarding the cost of noticing was obtained from the Bankruptcy Court Administration Division of the Administrative Office.

72. We did not include in this average any waiver of fees for filing a complaint because these fees are generally waived in all no-asset cases and therefore should not be considered a cost of the fee-waiver program.

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**Table 20: Costs Assuming IFP Status Is Granted in 2.9% of 1997 Non-Business Chapter 7 Cases**

<b>Number of 1997 Non-Business Chapter 7 Filings</b>	926,183
<b>Projected Number of Fee Waivers (filings multiplied by 2.9%)</b>	26,859
<b>Lost Filing Fee (\$175 per case)</b>	\$4,700,325
<b>Loss of Noticing Fee to Judiciary (\$30)</b>	\$805,770
<b>Other Loss to Judiciary (\$40 per case)</b>	\$1,074,360
<b>Payments to Trustees (\$60 per case)</b>	\$1,611,540
<b>Loss to the U.S. Trustee System Fund (\$30 per case)</b>	\$805,770
<b>Loss to the General Fund of the U.S. Treasury (\$15 per case)</b>	\$402,885

In Table 21, we show the lost filing and miscellaneous fees that would result if the various alternative standards were applied nationally. The estimates in the table assume, alternatively, that the percentage of Chapter 7 cases in which the fee would be waived would be:

- the same percentage as the overall percentage in the pilot courts (row 1; this is the same information as in Table 20);
- the same percentage as the overall percentage in the pilot courts, excluding those cases in which an attorney had been paid in connection with the case (row 2);
- the same as the overall percentage in the pilot courts, excluding those cases in which either a non-attorney had been paid in connection with the case (row 3);
- the same as the overall percentage in the pilot courts, excluding those cases in which an attorney or non-attorney had been paid (row 4);
- the percentage of Chapter 7 debtors with income below the poverty line (row 5);
- the percentage of Chapter 7 debtors represented pro bono (row 6); and
- the percentage of Chapter 7 debtors represented pro bono, adjusted upward according to the percentage of applicants in the pilot districts proceeding pro se (row 7).

All but one of the cost estimates fall within a comparatively narrow range, from approximately \$3.5 million to \$5.8 million. If “below the poverty line” is adopted as

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a “bright-line” eligibility criteria and all debtors meeting the criteria are granted a waiver, the estimated lost revenue increases to over \$53 million.

**Table 21: Projected Number of Applications that Would Be Granted and Lost Fees, Given Alternative Eligibility Standards and Assumptions**

<b>Alternative Standard or Assumption</b>	<b>Estimated Waivers in FY 97</b>	<b>Lost Filing Fee (\$175 per case)</b>	<b>Lost Miscellaneous Fees (\$2.76 per case)</b>	<b>Total Lost Revenue</b>
<b>1. Totality of circumstances</b>	26,859	\$4,700,325	\$74,131	\$4,774,456
<b>2. Totality of circumstances, prohibiting waivers when an attorney had been paid</b>	25,933	\$4,538,275	\$71,575	\$4,609,850
<b>3. Totality of circumstances, prohibiting waivers when a non-attorney had been paid</b>	25,933	\$4,538,275	\$71,575	\$4,609,850
<b>4. Totality of circumstances, prohibiting waivers when an attorney or non-attorney had been paid</b>	25,007	\$4,376,225	\$69,019	\$4,445,244
<b>5. Income below the poverty guidelines</b>	300,083	\$52,514,525	\$828,229	\$53,342,754
<b>6. Number of Chapter 7 debtors represented pro bono</b>	19,841	\$3,472,175	\$54,761	\$3,526,936
<b>7. Number of Chapter 7 debtors represented pro bono, plus pro se debtors</b>	32,406	\$5,671,050	\$89,441	\$5,760,491

**B. Additional Work Associated with the Fee-Waiver Program**

A second cost that must be estimated is that for additional personnel needed to process the applications. We first look at the cost for additional clerk’s office personnel (e.g., for IFP clerks) and then for bankruptcy judges.

**IFP Clerks.** The IFP clerks, judges, and clerks of court thought the IFP clerk’s position description fairly reflected the work of the IFP clerks. IFP clerks generally reviewed the fee-waiver applications, made recommendations to the assigned judge, and handled many administrative aspects (other than budget and accounting) of the program. In the District of Montana and the Western District of Tennessee, the IFP clerks’ responsibilities were shared by the judges’ law clerks and clerk’s office personnel.

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Time records submitted by the IFP clerks since near the beginning of the program are summarized in Appendix P. Based on these records, few districts would need a stand-alone IFP clerk if the program were implemented nationwide and the number of applications mirrored that found in the pilot program. In the Eastern District of Pennsylvania, where the highest number of applications were filed, the IFP clerks together spent approximately 2,191 hours on the program during all three years, excluding time spent preparing/transmitting information for study purposes, publicizing the fee-waiver program, and docketing case events. This is approximately 731 hours a year.

Below we describe the four steps we followed to estimate the cost of personnel that would be needed on a national level. We developed the approach in consultation with the Bankruptcy Court Administration Division, Bankruptcy Judges Division, Budget Division, and Analytical Services Office of the Administrative Office.<sup>73</sup> In our description, we assume the percentage of Chapter 7 debtors who file a fee-waiver application would be about 3.4% (i.e., the percentage found across all pilot courts during the pilot program). We then project the cost, assuming various eligibility standards (see Table 23).

#### Step 1: Average amount of time needed to process a fee-waiver application

We estimate the average amount of time needed to process a fee-waiver application using the time reports that IFP clerks (or persons who have performed the duties of an IFP clerk) have submitted since the second month of the program. We exclude time spent preparing/transmitting information for study purposes and publicizing the fee-waiver program because these activities would not be required if the program became permanent. We also exclude time spent docketing case events on the assumption that the Administrative Office has already allocated resources to the clerks' offices for this activity. Then we divided the amount of time reported by the IFP clerks by the number of applications.

Table 22 shows the results of this calculation by fiscal year and district and identifies the best estimate of the time needed to process a fee-waiver application for each district.

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73. See also memorandum from David Cook, chief, Administrative Office Analytical Services Office, to Francis F. Szczebak, chief, Administrative Office Bankruptcy Judges Division (November 2, 1994) (on file at the Federal Judicial Center, Research Division).

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**Table 22: Average Time Spent (in Hours) per Application by Fiscal Year and District**

	FY 95	FY 96	FY 97	Three Years Combined	FY 95 & FY 96 Combined	FY 96 & FY 97 Combined	Best Estimate
Southern Illinois (see note 1)	8:05	1:52	1:41	3:11	--	--	3:11
Montana (see note 2)	1:11 1:52	2:01 2:34	0:28 0:41	1:08 1:35	--	--	1:35
Eastern New York (see note 3)	1:18	0:59	--	--	1:08	--	1:08
Eastern Penn.	1:05	1:07	0:36	0:55	--	--	0:55
Western Tenn. (see note 4)	9:31 9:33	2:45 2:58	2:07 2:16	5:01 5:29	--	2:27 2:38	2:38
Utah (see note 5)	0:53	0:51	1:00	0:53	--	--	0:53
Average of district averages							1:43

*Note:* Entries are in hours and minutes. Entries exclude time spent preparing /transmitting information for study purposes and publicizing the fee-waiver program because these activities would not be required if the program was permanent. Still included is time spent providing assistance to individual debtors and attorneys who have filed or who are interested in filing fee-waiver applications. Time spent docketing case events is also excluded on the assumption that courts are already receiving staff for this activity.

1. Fiscal 1995 time is higher than in the other years due to time spent on *In re Merritt*(see section IV.D, *supra*).
2. The first entry in each column is the time spent by clerk's office personnel; the second entry includes law clerk time. Because law clerks had a primary role in processing the applications in this district, the second entry is generally the best estimate of the time needed to process an application.
3. Clerk's office personnel in the Brooklyn office did not return time forms for fiscal 1997.
4. The amount of time spent on the program in fiscal 1995 is much higher than that spent in the second two years, probably because the district had a dedicated law clerk that year but few filings. The average time spent across the second two years of the program is probably a better estimate of the work requirements. Like Montana, the first entry in each column is the time spent by clerk's office personnel; the second entry includes law clerk time. Because law clerks had a primary role in processing the applications in this district, particularly in fiscal 1996 and fiscal 1997, the second entry is generally the best estimate of the time needed to process an application.
5. The fiscal 1997 average is based on cases filed and time spent from October 1, 1996, to May 30, 1997.

The best estimate of the time needed to process a fee-waiver application varied across the districts, from just about an hour for three districts with high and mid-range levels of applications to about three hours for a district with a mid-range level of applications, but which handled an extremely time-consuming prisoner case. We use the average of the best estimates (1:43) as the estimate of time that would be spent per application on a national basis. This average is less likely than other possible estimates to underrepresent the overhead time of smaller districts.

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Step 2: Amount of time that would be needed to process all fee-waiver applications filed nationally

We estimate the amount of time that would be needed to process all fee-waiver applications filed nationally. This is done by multiplying the average amount of time needed to process a fee-waiver application (1 hour and 43 minutes) by the number of applications expected nationally. The simplest national estimate for 1997 was 31,490 applications; the estimated time for processing them would be 54,163 hours.

Step 3: The number of positions that would be needed nationwide

Third, the number of positions that would be needed nationwide is calculated by dividing the amount of time that would be needed to process all fee-waiver applications (54,163 hours) by 1763.04. The Analytical Services Office uses 1763.04 hours in its work measurement formula. The result is 30.7 positions.

Step 4: The cost of the positions in the first year and subsequent years of the program

Finally, the cost of the positions in the first year is obtained by multiplying the number of positions by \$55,225; the cost for subsequent years is obtained by multiplying the number by \$48,715. (The Administrative Office uses these numbers to cost out new FY98 positions in the bankruptcy clerks' offices.) Thus, the cost for 30.7 positions in the first year of a national program would be \$1,695,408 and the cost in subsequent years would be \$1,495,551.

Table 23 shows the personnel costs, given the number of applications expected under the alternative eligibility standards and assumptions set out in Table 21. Our formula most likely overestimates the time required to process applications if income below the poverty line is adopted as a "bright-line" standard (row 5 of the table) or if the filing fee is waived for all debtors represented by legal services or organized pro bono groups (row 6). Application of these standards would require minimal review and discretion, and the formula is based on the time required to review applications under a discretionary standard.

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**Table 23: Personnel Costs Given Alternative Eligibility Standards and Assumptions**

Alternative Standard or Assumption	Number of Applications	Number of Positions	Cost (see note 1)
1. Totality of circumstances	31,490	30.7	\$1,695,408 \$1,495,551
2. Totality of circumstances, prohibiting waivers when an attorney had been paid	29,638	28.9	\$1,596,003 \$1,407,864
3. Totality of circumstances, prohibiting waivers when a non-attorney had been paid	31,490	30.7	\$1,695,408 \$1,495,551
4. Totality of circumstances, prohibiting waivers when an attorney or non-attorney had been paid	29,638	28.9	\$1,596,003 \$1,407,864
5. Income below the poverty guidelines	300,083	292.8	\$16,169,880 \$14,263,752 (see note 2)
6. Number of Chapter 7 debtors represented pro bono	19,841	19.4	\$1,071,365 \$945,071 (see note 2)
7. Number of Chapter 7 debtors represented pro bono, plus pro se debtors	36,075	35.2	\$1,943,920 \$1,714,768
<i>Note:</i>			
1. Top entry in each cell is first-year cost; bottom entry is subsequent-year cost.			
2. Our formula most likely overestimates the time required to process applications if income below the poverty line is adopted as a "bright-line" standard (row 5 of the table) or if the filing fee is waived for all debtors represented by legal services or organized pro bono groups (row 6). Application of these standards would require minimal review and discretion.			

**Bankruptcy Judges.** Judges spent little time on the program, and thus, a national program should not necessitate additional judgeships, assuming the number of applications remains at the current level. Looking to the Eastern District of Pennsylvania, the district with the highest number of applications, bankruptcy judges spent approximately 298 hours on the program across all three years or about 99 hours per year, excluding time related to the study and publicizing the pilot program. This is about 60 hours per judge for the three years combined or 20 hours per judge per year. Judges spent approximately 45% of the time devoted to the program reviewing fee-waiver applications and meeting with IFP clerks about

specific applications; 6% of the time presiding at hearings related to the applications; 29% of the time preparing/signing related memoranda and orders; 13% of the time on administrative and other routine matters related to the program; and 6% of the time on miscellaneous matters related to the program. The time expended by the bankruptcy judges on the program is summarized by district in Appendix P.

### **C. Increased Number of Chapter 7 Filings Due to the Fee-Waiver Program**

Another factor contributing to the cost of the program is the extent to which it produces additional bankruptcy filings. See sections IV.C and V.B, suggesting that although the program increased access to the courts for certain debtors, the net increase in the number of filings was small. Use of eligibility standards other than some variant of the totality of the circumstances (e.g., the poverty line) might result in a larger increase of filings.

### **D. Work and Lost Revenue Associated with Installment Payments Versus Fee Waivers**

The work and lost revenue associated with waivers of the filing fee should be offset by some of the work and lost revenue associated with paying the fee in installments. Presumably, some debtors who request a waiver of the filing fee would attempt to pay the filing fee in installments, in the absence of a fee-waiver program. Clerk's office and judge time would be required to process and determine motions for nonpayment of fees and to hold related hearings. Moreover, some, if not all, of the filing fee would be left unpaid.<sup>74</sup>

### **E. Summary**

The lost revenue due to a national program falls within a comparatively narrow range (\$3.5 million to \$5.8 million) assuming all the alternative eligibility standards, except one. If "below the poverty line" is adopted as a "bright-line" standard and the fee is waived for all debtors meeting that standard, the amount of lost revenue would be much more (\$53 million). The cost for additional clerk's office personnel also falls within a comparatively narrow range (from about \$1 million to about \$1.9 million) for all the alternative standards, except "below the poverty line." Our formula results in a much more significant cost for the "below the poverty line" standard, but this is likely an overestimate because application of this standard would require minimal review.

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<sup>74</sup> The Administrative Office does not routinely maintain a record of the number of installment applications and the amount of the filing fee actually paid pursuant to them. We are attempting to obtain the information on a district-by-district basis, and if successful, will forward it to Congress.

## VIII. Issues for Subsequent Legislation or Rules if the Program Is Implemented Nationwide

In this section we describe several issues that need to be resolved administratively, by rule, or by legislation, and provide cross-references to related parts of the report.

### A. How Should the Cost of a National Fee-Waiver Program Be Offset?

In discussing ways to offset the costs of a national program, we assume the rate of waivers will mirror that in the pilot courts, but the rate could vary greatly according to the eligibility standard employed, the public's and bar's awareness of the program, the degree of scrutiny given applications, and the overall rate of Chapter 7 filings.

Assuming applications will be filed and granted at the rate found in the pilot districts, a national fee-waiver program would result in approximately \$4,700,325 in lost filing fees, approximately \$74,131 in waived miscellaneous fees for IFP debtors, and approximately \$1,495,551 in salary for additional clerk's office personnel, for a total of approximately \$6,270,007.<sup>75</sup> The Bankruptcy Committee endorsed the recommendation of its IFP subcommittee that the most straightforward way to fund a national program would be for Congress to increase the judiciary's appropriation by this amount, which represents approximately 2/10 of 1% of the judiciary's total fiscal 1997 appropriation.

If monies are not directly appropriated to cover the costs of the program, the subcommittee suggested and the committee secondarily endorsed requesting authorization for application of the United States Treasury share of the filing fee to cover the cost of the program. Currently, the general fund of the U.S. Treasury receives \$15 from the filing fee for each Chapter 7 case. In fiscal 1997 alone, the general fund received approximately \$13,892,745 from Chapter 7 bankruptcy filings. Thus, lost revenue due to waived fees would be recovered if the judiciary could retain this portion of the fee for all non-IFP cases in a special fund designated as "no year" money.<sup>76</sup> From the fund, \$160 would be allocated for each IFP case among the entities who would have benefited from the filing fee (e.g., the judiciary would receive \$70, the U.S. trustee system would receive \$30 dollars, the case trustee would receive \$60). The drawback to this approach is that the fund may be insufficient to cover the costs of the program in subsequent years if the ratio of IFP to non-IFP cases dramatically increases. Designating the fund's receipts as "no year," however, would enable the judiciary to better respond to moderate filing fluctuations.

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75. First-year personnel costs would be approximately \$1,695,408. The costs for subsequent years would be less because they would not include non-recurring costs (the second-year expense would be approximately \$1,495,551). The \$6.3 million does not include any money that the EOUST might request to offset the cost of any additional work occasioned by the program.

76. By definition, these funds are already used to offset other governmental expenditures but the subcommittee believes they would be more appropriately used to offset the costs of the IFP program.

### **B. What Procedures Should Be Adopted to Process the Applications, and What Type of Application Form and Eligibility Criteria Should Be Used?**

#### **Views of Judges, Attorneys, U.S. Trustees, and Case Trustees**

**Procedures for Processing the Applications.** All persons in the pilot courts interviewed during the fall of 1995 and the summer of 1997 thought the procedures for processing the applications and underlying Chapter 7 cases were working well. In addition, 90% percent of the attorneys responding to the August 1997 survey reported that they were very or somewhat satisfied with the process used by the courts to waive filing fees. Trustees responding to the August 1997 survey were similarly positive about process, with 92% reporting that they were very or somewhat satisfied.<sup>77</sup>

We nevertheless received a number of suggestions for improving the process, which should be taken into account in developing the procedures for any national program. The suggestions include the following:

- Shortening the application form, at least for debtors who file completed statements and schedules with their petition or for debtors who meet the eligibility criteria set by legal services and pro bono programs. (Some others thought the length of the form deterred ineligible debtors from applying for fee waivers and highlighted the worth of the benefit to be conferred, without unduly burdening those qualified for the waiver.)
- Clarifying or expanding questions on the application form. Specific suggestions include revising the form to do the following: request net rather than gross pay; provide examples of types of “other assets” that should be reported; request more specific information about the type of public assistance received and the direct beneficiary of that assistance; request a list of exempt and non-exempt property; ask debtors how much of their cash on hand or in the bank will be spent on the current month’s legitimate expenses; indicate whether pre-bankruptcy expenses as opposed to anticipated post-bankruptcy expenses should be reported; and limit the information about past employment for unemployed applicants to about two years.
- Changing the deadline for the U.S. trustee or case trustee to object to the fee-waiver application to shortly after the section 341 hearing; this would allow the case trustees to review the application in the ordinary course.

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<sup>77</sup> When asked whether they were satisfied with the process the court used to determine whether to waive the filing fee, 22 (92%) of the 24 trustees who answered the question reported that they were very or somewhat satisfied with the process, whereas only 2 (8%) were somewhat or very dissatisfied (12 trustees skipped this question or responded “can’t say”). Only those trustees who had been appointed in at least one fee-waiver case were included in the analysis. The trustee responses did not differ substantially according to amount of experience. Trustees with 21 or more cases responded in the same general fashion as did trustees with three or fewer.

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- Requiring the debtor to submit Schedules I and J, rather than provide expense and income information in a slightly different way on the application form.
- To the extent possible, avoiding hearings on the applications. Some hearings on the applications could have been avoided by just a phone call and an amended application; telephonic hearings might be another alternative.
- Informing the debtor of the basis of any challenge to the waiver prior to hearing.
- Requiring the attorney to sign the application.
- Ensuring that judges have the necessary authority to avoid improper waivers of the filing fee by reviewing and ruling on applications before the automatic stay goes into effect, and denying the waiver if a case is being filed for an improper purpose.

**Eligibility Criteria—Totality of the Circumstances, Presumptive, or “Bright-Line” Criteria.** Based on our summer 1997 interviews, there is some support among bankruptcy judges in the pilot courts for each type of eligibility standard: totality of the circumstances, presumptive, or “bright-line,” with greater support for either a totality of the circumstances or presumptive standard. Some judges think presumptive or bright-line criteria would ensure that debtors deserving of a waiver receive it,<sup>78</sup> that the bar and public understand the eligibility requirements, and that the work associated with processing the applications would be less burdensome. Other judges think it is impractical if not impossible to develop nationwide criteria and that presumptive or “bright-line” criteria might lead to “rubber-stamping” of applications. Judges supporting presumptive criteria generally wanted an “escape clause” to deal with the exceptional case, which might generate as much work as a totality of the circumstances criteria. Judges supporting a totality of the circumstances standard often expressed some explicit criteria they would follow (e.g., no waiver if an attorney had been paid, the debtor intended to reaffirm debts, or the debtor was attempting to discharge non-dischargeable debts).

Attorneys seem to favor the totality of the circumstances standard, although some proposed alternatives. Of the attorneys responding to the August 1997 survey, 82% preferred the totality of the circumstances criteria over presumptive or “bright-line” criteria, and 74% reported that they had sufficient guidance about the eligibility criteria for a fee waiver.

Similarly, trustees responding to the Center’s survey favored the totality of the circumstances standard; 94% preferred the totality of the circumstances criteria over

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78. Most notably, Chief Bankruptcy Judge Scholl of the Eastern District of Pennsylvania believes that all debtors with income below the poverty line should be eligible and that this criteria should be stated in the national rule.

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presumptive or “bright line” criteria and 90% reported that they had sufficient guidance about the eligibility criteria for a fee waiver.

**Eligibility Criteria—Payments to Attorneys and Non-Attorneys in Connection with the Case.** Bankruptcy judges even within the same pilot district were divided over whether waiver of the filing fee should be prohibited when the debtor has paid an attorney. The following are some illustrative opinions:<sup>79</sup>

- The standard for waiving the fee should be at least as stringent as that for paying the fee in installments. Because Fed. R. Bankr. P. 1006 disallows paying the fee in installments when an attorney has been paid, the fee should not be waived when an attorney has been paid.
- Fed. R. Bankr. P. 1006 does not preclude a debtor from paying an attorney; it only defers such payment until the filing fee has been paid. Applying Rule 1006 to the fee-waiver situation would preclude indigent individuals from ever retaining counsel in the case. Moreover, it is not traditional in other areas of the law to deny IFP status merely because the applicant has paid an attorney.
- The court should consider applications on a case-by-case basis, looking to the source and amount of the payment and other circumstances; there should not be a blanket rule against waiver if an attorney has been paid or has been paid above a particular amount.
  - Payment of a reduced fee to cover the attorney’s expenses should not bar waiver of the filing fee.

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79. Culled from notes from fall 1993 interviews of bankruptcy judges by Center staff. Judges in the pilot courts also published a number of opinions on the issue. *In re Stephenson*, 205 B.R. 52 (Bankr. E.D. Pa. 1997) (payment of attorney fees by a family member did not automatically bar IFP status; Rule 1006(b)(3) “suspended” for pilot districts); *In re Koren*, 176 B.R. 740 (Bankr. E.D. Pa. 1995) (payment of attorney fee by debtor’s son did not automatically bar IFP status; Rule 1006(b)(3) not applicable to IFP applications); *In re Caldwell*, 203 B.R. 666 (Bankr. W.D. Tenn. 1997) (Rule 1006(b)(3) must yield to IFP statute); *In re Shannon*, 180 B.R. 189 (Bankr. W.D. Tenn. 1995) (granting IFP status after debtor was unable to pay fee in installments even though debtor had promised to pay an attorney \$100, and stating that compensation to attorney was only one factor to consider in determining whether fee should be waived); *In re Dotson*, 179 B.R. 85 (Bankr. W.D. Tenn. 1995) (granting IFP status despite debtor’s promise to pay attorney, where debtor appeared unable to pay and attorney had agreed to remain on case whether or not he was paid); *In re Beecham*, 181 B.R. 335 (Bankr. W.D. Tenn. 1994) (denying IFP status for failure to show inability to pay in installments, and further finding that Rule 1006(b)(3) strictly barred court from waiving filing fee where debtor had paid attorney \$500 via a loan from sister); *In re Thompson*, 177 B.R. 890 (Bankr. W.D. Tenn. 1994) (denying IFP status for failure to show inability to pay in installments, where debtor exhibited financial ability to pay attorney \$500 via funds from spouse); *In re Takeshorse*, 177 B.R. 99 (Bankr. D. Mont. 1994) (denying IFP status; finding ability to pay filing fee when debtor had paid attorney \$450; Rule 1006(b)(3) applied). See also *In re Clark*, 173 B.R. 142 (Bankr. W.D. Tenn. 1994) (stating that the court will consider a totality of the pre- and postpetition facts and circumstances in determining whether or not to waive the filing fee).

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- Although the determination should be made on a case-by-case basis, generally if debtors can find the money to pay an attorney, they can find the money to pay the filing fee.
  - The court has to weigh the cost of waiving the fee against the increased burden to the court of handling a pro se case.
  - Although the determination should be made on a case-by-case basis, a waiver of the filing fee when an attorney has been paid should be granted only in the exceptional case.
  - It is important to consider whether pro bono representation is available in the district.
- A uniform approach regarding payments to attorneys is needed; perhaps a rule could set a presumptive limit (e.g., \$500) but leave final determination to the judge for both installment payment and fee-waiver applications.

The bankruptcy judges we interviewed were also divided on whether the filing fee should be waived when the debtor has paid a petition preparer. Some judges view the payment as an absolute or presumptive bar to waiver of the filing fee. Others are more receptive to waiver of the filing fee because they think (1) debtors should not be penalized for using a petition preparer doing a competent job (without engaging in the unauthorized practice of law) because such preparers offer a valuable commodity to debtors at the only price the debtors can afford; and (2) debtors should not be penalized if they have been “victimized” by an incompetent, unethical, or illegal petition preparer.

Attorneys also have mixed views about waiver of the filing fee when an attorney or non-attorney had been paid. In the August 1997 survey of attorneys in the pilot districts, we asked whether fees should be waived if the debtor or a third-party had paid an attorney or non-attorney in full or in part in connection with the case.<sup>80</sup> At one extreme, 30% of the respondents said that the fee should never be waived if the debtor has paid an attorney, and 49% said that the fee should never be waived if the debtor has paid a non-attorney. At the other extreme, 28% of the respondents said that the fee should be waived under certain circumstances even if the debtor has paid the attorney’s customary fee, and 26% said that the fee should be waived under

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80. The question regarding payments to attorneys read: “If the debtor had paid an attorney, when should the filing fee be waived? (check all that apply) (1) should never be paid if the debtor has paid an attorney; (2) should be waived if the debtor paid the attorney a reduced fee and is otherwise eligible for waiver of the fee; (3) should be waived if a third party (e.g., friend or family member), rather than the debtor, paid the attorney a reduced fee and the debtor is otherwise eligible for waiver of the fee; (4) should be waived if a third party (e.g., friend or family member), rather than the debtor, paid the attorney’s customary fee and the debtor is otherwise eligible for waiver of the fee; (5) should be waived under certain circumstances even if the debtor has paid the debtor’s customary fee.” The question regarding payments to non-attorneys was parallel to the above.

certain circumstances even if the debtor has paid the non-attorney's customary fee. In between, 33% of the respondents said that the fee should be waived if a third party such as a friend or relative paid the attorney's customary fee and 26% said that the fee should be waived if a third party paid the non-attorney's customary fee. These latter two percentages increased to 46% and 30%, respectively, if the third party paid a reduced fee, and to 47% and 30%, respectively, if the debtor paid the reduced fee.<sup>81</sup>

From the survey of trustees in the pilot courts, we found trustees to be more opposed than attorneys to waiver of the filing fee when an attorney or non-attorney had been paid.<sup>82</sup> Seventy percent of the trustees said that the fee should never be waived if the debtor has paid an attorney, and 72% said that the fee should never be waived if the debtor has paid a non-attorney.<sup>83</sup>

**Views of Fee-Waiver Applicants.** One measure of the success of the program is the degree to which those who use it are satisfied with its procedures. Approximately 92% of the respondents to the applicant survey were somewhat or very satisfied with the process the court used to determine whether to waive the fee—only 8% were somewhat or very dissatisfied with the process. To a large extent, the level of satisfaction or dissatisfaction is attributable to whether the filing fee was waived. As seen in Table 24, most of those whose applications were denied were either somewhat or very dissatisfied with the process, and nearly all of those whose applications were granted were either somewhat or very satisfied. Most of those

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81. Because respondents were asked to check all circumstances in which the fee should be waived, the percentages do not sum to 100. In addition, some of the circumstances are mutually exclusive and, in a very small number of cases, inconsistent multiple responses were recoded to only the most restrictive circumstances. For example, if a respondent indicated that the fee should never be waived if the debtor has paid an attorney and that it should be waived if the debtor paid a reduced fee, only the first circumstance was coded.

Attorney responses did vary somewhat across districts, but, for the most part, the differences were small and did not appear to be systematic. In other words, attorneys in one district were no more or less likely to report different circumstances under which filing fees should be waived. However, attorneys with the most experience (11 or more fee-waiver requests) were far less likely to say that fees should never be waived if an attorney was paid and more likely to say that fees should be waived under the less restrictive circumstances. This pattern was not repeated with respect to payments to non-attorneys.

82. The questions posed to the trustees parallel those asked of the attorneys. Again, because respondents were asked to check all circumstances in which the fee should be waived, the percentages do not sum to 100.

83. At the other extreme, 10% of the respondents said that the fee should be waived under certain circumstances even if the debtor has paid the attorney's customary fee, and 10% said that the fee should be waived under certain circumstances even if the debtor has paid the non-attorney's customary fee. In between, 10% of the respondents said that the fee should be waived if a third party such as a friend or relative paid the attorney's customary fee, and 10% said that the fee should be waived if a third party paid the non-attorney's customary fee. These percentages increased slightly to 13% and 14%, respectively, if the third party paid a reduced fee, and to 13% and 17%, respectively, if the debtor paid the reduced fee. Only the responses of trustees who had been appointed in at least one fee-waiver case are reported here.

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who were unable to say whether their applications were granted or denied were also satisfied with the program.

What factors other than the outcome might explain the dissatisfaction of persons whose applications are denied? Most (78%) understood what they needed to do to avoid dismissal of their case—either they could pay the fee in a lump sum or they could pay the fee in installments—but a smaller percentage (60%) reported that they understood the reason for the denial. Perhaps it is this lack of understanding that led to their dissatisfaction.

We asked several other questions that help explain applicants’ degree of satisfaction with the procedures.

The majority of survey respondents (63.0%) reported that the application form was either somewhat or very easy to complete, but 13.6% found the application somewhat or very difficult to complete. (Another 20.6% said they did not know and 2.7% failed to answer the question.)

Also, most of those who had requested help from the clerk’s office reported that the employees were either very helpful (80%) or somewhat helpful (14%), although about half of the respondents had not requested such help.

**Table 24: Applicant Survey**  
**How satisfied were you with the process the court used to decide whether or not to waive the filing fee in your case? (Please check one.)**

	<b>Filing Fee Was Waived</b>	<b>Filing Fee Was Not Waived</b>	<b>Missing or Ambiguous Information about Fee Waiver</b>	<b>All Applicants</b>
<b>Very satisfied</b>	830 89.4%	7 7.1%	55 80.9%	892 81.5%
<b>Somewhat satisfied</b>	87 9.4%	21 21.4%	6 8.8%	114 10.4%
<b>Somewhat dissatisfied</b>	5 0.5%	29 29.6%	4 5.9%	38 3.5%
<b>Very dissatisfied</b>	6 0.7%	41 41.8%	5 4.4%	50 4.6%
<b>Missing or ambiguous response</b>	40	3	6	49
<b>Total</b>	968	101	74	1,143

*Note: Percentages are of column totals excluding missing and ambiguous responses.*

Finally, applicants are likely to be more satisfied to the extent they received help completing the application. Ninety-three percent of applicants who received help were somewhat or very satisfied with the procedures, compared to 88% of those who did not receive help. In all districts, at least half of all applicants received help

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in completing the application; of these, most received help from an attorney (see Table 25).

**Table 25: Applicant Survey**  
**Who, if anyone, helped you fill out the application for waiver of the filing fee?**  
**(Please check all that apply.)**

	S.D. Ill.	D. Mont.	E.D.N.Y.	E.D. Pa.	W.D. Tenn.	D. Utah
<b>1. No one helped me fill out the application</b>	14 19.2%	11 45.8%	134 37.4%	74 13.1%	5 41.7%	32 40.0%
<b>2. Received help</b>	59 80.8%	13 54.2%	224 62.6%	491 86.9%	7 58.3%	48 60.0%
<b>Distribution of sources of help, where applicant had help filling out application</b>						
<b>2a. An employee of the court</b>	1 1.7%	0 0.0%	56 25.0%	15 3.1%	0 0.0%	3 6.3%
<b>2b. An attorney I paid, or another person in that attorney's office</b>	30 50.8%	2 15.4%	13 5.8%	16 3.3%	1 14.3%	7 14.6%
<b>2c. An attorney I did not pay, or another person in that attorney's office</b>	20 33.9%	7 53.9%	129 57.6%	426 86.8%	4 57.1%	26 54.2%
<b>2d. A person I paid to help me complete the bankruptcy petition, other than an attorney or person who works for an attorney</b>	3 5.1%	0 0.0%	3 1.3%	9 1.8%	0 0.0%	2 4.2%
<b>2e. A family member or friend</b>	5 8.5%	3 23.1%	31 13.8%	32 6.5%	1 14.3%	7 14.6%
<b>2f. Other</b>	1 1.7%	1 7.7%	2 0.9%	7 1.4%	1 14.3%	4 8.3%
<b>TOTAL</b>	73	24	358	565	12	80
<p><i>Note:</i> Percentages in rows 1 and 2 are of the column totals. Percentages in rows 2a–2f are of the number in row 2. Thirty-one of the 1,143 applicants who returned the questionnaire did not answer this question. Respondents who checked the “other” category said they received help from social services and other miscellaneous sources.</p>						

Although most applicants were satisfied with the program's procedures, a number of debtors offered suggestions for its improvement, including the following:

- **Wider Publicity:** A few applicants from each of the pilot court districts commented that there should be more information about the availability of

the program to the public. This might be accomplished through private attorneys, credit counselors, and clerks' offices.

- **Defining Eligibility Criteria:** More comments addressed eligibility criteria than any other issue, stating that the criteria for waiving the fee should be more objective and clearly stated on the application form. Some commented specifically that waiver of the fee should be more "automatic" for low income people (e.g., below the poverty line) or that the court should use a sliding fee scale depending on income and number of dependents.
- **Simplifying Application Forms:** Suggestions for improving the application centered on simplifying the form and consolidating it with the petition and schedules to avoid duplication. Some noted that the clerk's office was unable to provide enough help in filling out the form; when asked for assistance, clerk's office personnel say they cannot give legal advice. A pamphlet explaining the system would have helped applicants complete the form, and it might be useful to hold classes or group sessions at the court to explain the process and forms.
- **Streamlining Court Procedures:** Some respondents commented that improvements to the application form would help to streamline the approval/denial process. Several said that telephonic hearings could replace courtroom hearings, thereby reducing the need for travel and absence from work. And, if the fee-waiver application is denied, debtors would like more time to pay the filing fee or more time to pay in installments.

**C. What Court Personnel Are Needed to Process Applications for Waiver of the Filing Fee?**

See section VII.B above.

**D. What Role Should the U.S. Trustees and Chapter 7 Trustees Have in Monitoring Applications for Waiver of the Filing Fee?**

According to the Executive Office for United States Trustees (EOUST), the pilot program did not impose significant additional workload requirements on the U.S. trustees offices, except perhaps in Philadelphia, where office staff reviewed and/or commented on all fee-waiver applications, nor did it otherwise adversely affect U.S. trustees operations. The bankruptcy courts appear to have taken the lead in evaluating the applications under standards of strict scrutiny, which the EOUST believes is the appropriate course of action if the program is expanded to nationwide status. In those circumstances where more information is desired, the U.S. Trustee may, of course, be requested to comment, and the case trustees may, as a matter of course, inquire into IFP eligibility at the section 341 meeting and whenever any relevant financial data come to light.<sup>84</sup>

84. Letter from Joseph Patchan, director, Executive Office for United States Trustees, to Elizabeth C. Wiggins, Research Division, Federal Judicial Center (December 19, 1997) (on file at the Federal Judicial Center, Research Division).

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Below we describe the procedures followed by the U.S. trustee offices, as described to us by them in the fall of 1995.

**Notice to the U.S. Trustee.** The guidelines for processing fee-waiver applications that were developed by the IFP Subcommittee of the Bankruptcy Committee state that the pilot districts may differ as to when the U.S. trustee is notified of the fee-waiver application. Some districts, for example, provide the U.S. trustee with an opportunity to review a fee-waiver application before the court determines whether to grant or deny it. Other districts notify the U.S. trustee only after the court has granted or denied the application or set a hearing. When we interviewed them in the fall of 1995, the U.S. trustee offices were satisfied with whatever procedures were followed in their respective districts. Being notified after the court has issued a provisional ruling or set a hearing reportedly reduces the effort required by the U.S. trustee office. Moreover, the benefit of a second review before the court rules may not be worth the delay it entails.

**Review by the U.S. Trustee Office.** In four districts, the U.S. trustee office reviewed all applications. In two of these districts, the U.S. trustee office reportedly filed some response to every application (i.e., a “statement of review” if there were no questions or concerns; a “comment” if there were points of information to bring to the court’s attention; or an objection and a request for a hearing). In the two other districts, the court assumed that if no response was filed, the U.S. trustee had no additional information to provide and did not object.

In the fifth district, the U.S. trustee office regularly received a copy of the applications and related orders and notices, but did not regularly review them. The court and assistant U.S. trustee reported that the U.S. trustee was understaffed. The assistant U.S. trustee randomly reviewed about a third of the applications and brought unusual circumstances to the assigned case trustee’s attention.

Finally, in the sixth district, the U.S. trustee office received copies of the orders, but not the applications, and so provided only minimal review.

**Attendance at Hearings by U.S. Trustee Office.** The policy of the U.S. trustee office regarding attendance at hearings differed somewhat from district to district, as set forth below.

First District—Attendance at all hearings is impractical due to travel demands; hearings are attended if someone from the office is at the courthouse at the time, if the judge so requests, or a contested issue is involved.

Second District—The assistant U.S. trustee said he would attend any hearing set on an application, at least those involving novel issues.

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Third District—A representative from the U.S. trustee office probably would not regularly attend hearings on the applications, even if the office were fully staffed, but would attend if the court so requested or a contested issue were involved.

Fourth District—Someone from the office attends all hearings on fee-waiver applications.

Fifth District—If the U.S. trustee has filed “no objection” to an application and the judge sua sponte sets a hearing, no one from the U.S. trustee office attends the hearing without being specifically asked by the judge to do so. If the court wants personnel from the office to attend hearings regularly, U.S. trustee office staff would do so, but would request the court to schedule hearings in the divisional office on the days someone from the office was already there.

Sixth District—The office receives notice of and monitors or participates in hearings.

**Involvement of the Case Trustees.** Some of the case trustees we interviewed in the fall of 1995 were somewhat confused as to their role in the fee-waiver program and how to bring issues regarding eligibility before the court. However, 89% of the trustees responding to the Center’s August 1997 survey said they had sufficient information about the fee-waiver program and their role with respect to it.<sup>85</sup>

Trustees were asked in the survey about the range of responsibilities panel trustees could be given as part of a national program, including reviewing each IFP application before judicial action; commenting on and, if appropriate, objecting to the appropriateness of each application before judicial action; attending some or all hearings; and monitoring the fee waiver and reporting to the court any discovery of assets. Given their general lack of support for a national program (55% somewhat or strongly disapproved of a national program, and 28% expressed neither approval or disapproval), it is not surprising that trustees identified few responsibilities. Approximately a quarter of the trustees said trustees should have none of the responsibilities listed above. The most frequently endorsed responsibility, by 43% of the trustees, was monitoring the fee waiver and reporting new assets. Both survey and objective information about the processing of the fee-waiver cases in the pilot courts support the trustees having such a monitoring role, but little else.<sup>86</sup>

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85. Only those trustees who had been appointed in at least one fee-waiver case were included in these analyses and those reported in the remainder of this subsection.

86. As stated in section IV.A, case trustees rarely objected to fee-waiver applications. Seventeen percent (5) of the trustees responding to the survey reported uncovering assets from which the filing fee could be paid in at least one case, but as noted in section IV.A, the number of cases in which this occurred appears to be low.

### **E. Should Waiver of the Filing Fee Constitute a Waiver of All Miscellaneous Fees?**

The subcommittee guidelines note that individuals whose fee-waiver applications have been granted by the court may subsequently seek the waiver of fees scheduled by the Judicial Conference pursuant to 28 U.S.C. § 1930(b) and (c). The guidelines suggest that because of their close relationship to the initial petition, fees associated with filing amended schedules and lists of creditors and with bifurcating jointly filed cases would seem to be covered by the legislation authorizing waiver of the filing fee in the pilot courts. Thus, they ought to be waived for debtors who have qualified for waiver of the filing fee, except perhaps in situations involving repeated amendments.

The guidelines further provide that if the debtor files a notice of appeal arising out of an order denying the fee-waiver application and also files a request to proceed with the appeal without prepayment of the \$105.00 fee (see Items 9 & 16 of the Judicial Conference Bankruptcy Court Miscellaneous Fee Schedule), such requests should be treated and administered like similar requests under 28 U.S.C. § 1915, bearing in mind the importance of providing applicants with the opportunity to appeal the denial of a fee-waiver application in appropriate circumstances.<sup>87</sup> Because courts disagree as to whether bankruptcy courts have the authority to waive fees and costs associated with bankruptcy matters that have been scheduled by the Judicial Conference under the authority of 28 U.S.C. § 1930(b), the decision to grant or deny such a request may lie with the bankruptcy court or the district court.

Finally, the guidelines note that requests for the waiver of all other scheduled fees may be granted or denied in the discretion of the bankruptcy or district court as long as debtors whose fee-waiver applications have been granted are treated no more harshly than other debtors.

Resolution of this issue resides at the policy level, but we note here that the pilot courts generally did waive the miscellaneous fees, and the estimated lost revenue from doing so in a national program does not add a substantial cost (except assuming a “below the poverty line” bright-line standard).

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87. Courts disagree as to whether bankruptcy courts have the authority to waive fees and costs associated with bankruptcy matters that have been scheduled by the Judicial Conference under the authority of 28 U.S.C. § 1930(b), such as the fee to appeal. Compare *In re Perroton*, 958 F.2d 889 (9th Cir. 1992) (holding that the bankruptcy court is not a “court of the United States” and does not have the authority to waive fees under 28 U.S.C. § 1915, and that such relief must be sought from the district court) with *In re Shumate*, 91 B.R. 23 (Bankr. W.D. Va. 1988); *In re Fontaine*, 10 B.R. 175 (Bankr. D. R.I. 1981); *In re Palestino*, 4 B.R. 721 (Bankr. M.D. Fla. 1980); and *In re Gurda Farms, Inc.*, 10 B.R. 479 (S.D.N.Y. 1980) (all holding that bankruptcy courts do have the authority to waive fees other than the fee for filing the petition). The reasoning of the latter courts is either that the bankruptcy courts are “courts of the United States” and therefore have the authority to waive fees under § 1915, that the bankruptcy courts have the authority to waive fees by way of the general order of reference entered pursuant to 28 U.S.C. § 157(a), or that the Congress intended the absolute requirement that fees be paid to apply only to the fee for filing a petition, as set forth in 28 U.S.C § 1930(a).

**F. Should the Fee-Waiver Program be Extended to Chapter 13 Debtors?<sup>88</sup>**

As seen earlier in Table 2, bankruptcy judges in 1993 were more strongly opposed to allowing debtors to proceed *in forma pauperis* in Chapter 13 than in Chapter 7. Arguably, if a person is unable to pay the filing fee installments, he or she will be unable to consummate a plan. More generally, opponents argue, fee waivers are inconsistent with the goal of Chapter 13 as a repayment chapter.

Others think that although very few Chapter 13 debtors would be expected to need the fee-waiver program, the program should be chapter-neutral.<sup>89</sup> For example, the program might be the only road to filing for a low-income Chapter 13 debtor with a home of modest value who is struggling to pay mortgage arrearages in order to avoid foreclosure.

A workable alternative to waiver of the fee in Chapter 13 might be to allow debtors to pay the filing fee through the Chapter 13 trustee, as part of the plan. In the spring of 1994, the Advisory Committee on Bankruptcy Rules considered a proposed amendment to Fed. R. Bankr. P. 1006 that would have explicitly allowed this practice.

The Center surveyed the clerks of the bankruptcy courts to obtain information to inform the committee's discussion. We asked several questions about current and past practices with respect to this procedure and inquired about its advantages and disadvantages.<sup>90</sup> Of the 73 districts that responded to the survey,

- 45 (61.6 %) of the districts did not currently permit Chapter 13 debtors to pay filing fee installments to the Chapter 13 trustee for transmission to the clerk;
- 9 (12.3%) of the districts reported that Chapter 13 debtors were permitted to pay filing fee installments to the Chapter 13 trustee for transmission to the clerk *in an occasional case* (in one of these districts, the practice was permitted in only one of two divisions); and
- 19 (26.0%) of the districts reported that Chapter 13 debtors were permitted to pay filing fee installments to the Chapter 13 trustee for transmission to the clerk *on a routine basis*. (In one of the 18 districts, the practice was permitted on a routine basis in only one of the district's five divisions. It was permitted in an occasional case in another division, but was not permitted at all in the three remaining divisions. In another of the eighteen districts, the practice

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88. See the Judicial Conference report on the use of graduated fees in Chapter 13 bankruptcy cases, which is being submitted to Congress in conjunction with this report.

89. See Sommer, *supra* note 12, for further discussion.

90. The survey results are summarized in a memorandum from Beth Wiggins, Federal Judicial Center, to Alan Resnick, reporter to the Advisory Committee on Bankruptcy Rules (February 21, 1994) (on file at the Federal Judicial Center, Research Division).

### *Implementing & Evaluating the Chapter 7 Filing Fee Program*

also was permitted in only one of the district's divisions; no information was provided about practices elsewhere in the district.)

According to the clerks, the procedure might help the debtor complete the installment payments because he or she would only have to remit one check a month. It also might enable debtors to file in emergency situations when money to pay the first installment might be hard to find. On the other hand, the procedure might lead to duplication of work between the clerk's office and the Chapter 13 trustee's office, increase the difficulty of tracking payments, and cause delays in responding to missed payments. Some clerks noted that transfer of the administrative process might disadvantage debtors and creditors if the filing fee were counted in calculating the trustee's compensation, and that, in any event, it would require a statutory change to relocate this function away from the clerk's office.

The Rules Committee declined to take action.

#### **G. Could the Installment Payment Program Under Fed. R. Bankr. P. 1006(b) Be Modified to Eliminate the Need for a Chapter 7 Fee-Waiver Program?**

In the August 1997 survey, 38% (12) of the responding trustees reported that the installment payment program contained in Bankruptcy Rule 1006(b) could be modified to eliminate the need for a fee-waiver program. (Thirty-one percent said the installment program could not be modified to such effect and another 31% said that there was no need for a fee-waiver program.)

Only 13% of the attorneys responding to the August 1997 survey thought the installment payment program could be modified to eliminate the need for a fee-waiver program. (Eighty-two percent of the attorneys stated that the program could not be so modified and 5% said there was no need for a fee-waiver program.)

The attorneys, trustees, and bankruptcy judges in the pilot courts offered the following suggestions for modifying the installment program:

- Allow the debtors to make a small payment up front and similar size payments until the fee is paid. Debtors would receive a discharge within the statutory period but it could be revoked if the payments are not completed.
- Give the courts the discretion to extend the period in which the debtor has to pay the fee, and if the time period extends beyond the discharge, the discharge would be conditional on full payment.
- Extend the time to complete payment of the filing fee, holding up dischargeability until the fee is paid—up to a year if necessary.
- In no asset cases, extend the payment period to the dischargeability deadline; in asset cases, permit payment as an administrative claim.

*Implementing & Evaluating the Chapter 7 Filing Fee Program*

- Allow the debtor to pay in installments if an attorney has been paid a reduced fee.
- Provide an option for waiver of the remaining fee if the debtor becomes unable to make installment payments.
- Implement a sliding fee based on ability to pay.<sup>91</sup>

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91. See *supra* note 88.

**NABT** Talk<sup>®</sup>

WINTER 2006

# “I Feel Poorer”

A Chapter 7 Trustee’s Definition  
for the “IFP” Acronym  
Under BAPCPA



JOURNAL OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

This article was publicly submitted to the ABI Commission on Consumer Bankruptcy.

On April 20, 2005, President Bush signed into law the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005."<sup>1</sup> The enactment of BAPCPA resulted in many substantive changes for the chapter 7 trustee in the administration of consumer and business bankruptcy cases. Most of the substantive changes for chapter 7 trustees have been well-chronicled.<sup>2</sup> However, one of the changes that escaped scrutiny was the modified statutory treatment for the payment, or more accurately, the waiver, of the filing fee to commence a chapter 7 case.<sup>3</sup>

As a result of Section 418 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. 109-8, § 418, 119 Stat. 23, 109) which added sub-section (f) to 28 U.S.C. § 1930, bankruptcy courts may now waive the filing fee in an individual debtor's chapter 7 case. In pertinent part, this new section provides:

Under the procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981) applicable to a family of the size involved and is unable to pay that fee in installments. For purposes of this paragraph, the term "filing fee" means the filing fee required by subsection (a), or any other fee prescribed by the Judicial Conference under subsections (b) and (c) that is payable to the clerk upon the commencement of a case under chapter 7.<sup>4</sup>

Congress's effort to increase judicial accessibility for the truly needy debtor may be laudable, however this effort has created an unfunded mandate directly adverse to the interests of chapter 7

trustees. The Congressional mandate allowing for waiver of the bankruptcy filing fee directly eliminates the funds presently available and necessary to pay the chapter 7 trustee for their administration and handling of the case.<sup>5</sup>

#### I. Historical Outlook on *In Forma Pauperis* cases in the Bankruptcy Courts.

Prior to October 17, 2005, an individual filing for bankruptcy could not proceed *in forma pauperis*. See *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).<sup>6</sup> As noted by the Court in *In re: Stephenson*, 205 B.R. 52 (E.D.Pa. 1997):

Under the Bankruptcy Act, a debtor could not receive a discharge unless filing fees were paid. Bankruptcy Act of 1898, §§14(b)(2) & 14(c)(8), 11 U.S.C. §§32(b)(2) & (c)(8) (repealed). The constitutionality of that provision was upheld by the Supreme Court in *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973). The *Kras* Court, observing that obtaining a discharge of one's debts was not a constitutional right, upheld the statutory fee requirements as not violative of due process or equal protection rights and found that the general statute providing *in forma pauperis* relief in federal courts, 28 U.S.C. §1915, was not applicable in bankruptcy. Contemporaneously with the enactment of the Bankruptcy Reform Act of 1978, the *Kras* decision was essentially codified in 28 U.S.C. § 1930(a) which excepts bankruptcy filing fees from the federal *in forma pauperis* statute, 28 U.S.C. § 1915.<sup>7</sup>

As noted above, 28 U.S.C. §1930, which addresses bankruptcy fees provides, in part, that a party commencing a case under Title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court certain fees based upon the chapter for which relief was being sought.<sup>8</sup> Further, an individual commencing a voluntary case or a joint

case under Title 11 may pay such fee in installments.<sup>9</sup>

In general, *in forma pauperis* proceedings in federal court are governed by 28 U.S.C. §1915. However, the application of §1915 has been limited by 28 U.S.C. §1930 when dealing with bankruptcy proceedings. Prior to October 17, 2005<sup>10</sup> many courts considered the issues regarding *in forma pauperis* requests in procedural contexts other than filing fees at the commencement of the case,<sup>11</sup> and the outcomes varied. As the Bankruptcy Court noted in *In re: Hobby*:

[T]here has been much controversy and discussion about whether bankruptcy courts can waive filing fees at all, and if so, which ones may they waive. See *e.g.*, *In re: Fitzgerald*, 167 B.R. 689, 691 (Bankr. N.D. Ga. 1994)(holding that §1930 prohibits the waiving of filing fees in any bankruptcy proceeding), *Harris v. M.E.I. Diversified, Inc.*, 156 B.R. 814, 815 (Bankr. E.D. Mo. 1993)(same), *In re: Rogers*, 147 B.R. 16, 17 (Bankr. E.D. Va. 1992)(same); *cf. In re: Perroton*, 958 F.2d 889, 896 (9th Cir. 1992)(determining that the bankruptcy court is not a "court of the United States" under §1915(a) and therefore cannot waive fees under that statute). *But see, In re: Brooks*, 175 B.R. 409, 412 (Bankr. S.D. Ala. 1994)(holding that the bankruptcy court is a part of the district court under 28 U.S.C. § 151 and has the authority to rule on *in forma pauperis* motions by order of reference), *In re: McGinnis*, 155 B.R. 294, 296-97 (Bankr. D.N.H. 1993)(holding that 28 U.S.C. § 157(b), which grants the bankruptcy courts jurisdiction to hear cases under title 11 and enter appropriate orders therein, also authorizes those courts to hear *in forma pauperis* motions brought by creditors), *cf. In re: Fitzgerald*, 192 B.R. 861, 862 (Bankr. E.D. Va. 1996)(holding that the prohibition against waiving fees applies only to the filing of a bankruptcy petition and not other proceedings in bankruptcy court).<sup>12</sup>

*continued on next page*

The *Hobby* court ultimately determined, like others under the law prior to BAPCPA, that bankruptcy courts may waive a variety of fees in bankruptcy proceedings but were specifically excluded from waiving the fee associated with the filing of a chapter 7 bankruptcy petition.

The Courts reviewing 28 U.S.C. § 1915(a) determined there are two threshold requirements which had to be met prior to the waiver of a filing fee. The party seeking to proceed *in forma pauperis* must first submit a financial affidavit listing all assets, and second, the party must not be able to pay the filing fee. A third requirement, relevant to appeals, limited waiver to cases in which the trial court certified in writing that the appeal was taken in good faith.<sup>15</sup> The requisites under § 1915(a) were ultimately incorporated into similar *in forma pauperis* provisions under 28 U.S.C. § 1930, first in conjunction with pilot programs commenced in 1993, and subsequently under BAPCPA.

## II. The Fee Waiver (*In Forma Pauperis*) Pilot Program and Report.

In 1993, Congress, as part of the judiciary appropriations act, directed the Judicial Conference of the United States to implement and study in up to six districts the effect of waiving the filing fee for individual Chapter 7 debtors who were unable to pay the fee in installments. The pilot program was operated from October 1, 1994, through September 30, 1997, in the following six districts: the Southern District of Illinois, the District of Montana, the Eastern District of New York, the Eastern District of Pennsylvania, the Western District of Tennessee, and the District of Utah.<sup>14</sup> In 1998, the Report regarding the pilot program was issued,<sup>15</sup> with some of the key findings:

- Overall, 3.4% of chapter 7 debtors in the pilot districts applied for a fee

waiver, and 2.9% were actually approved (85.6% of those who applied);

- The percentage of debtors who applied for a fee waiver ranged from a low of .3% in the Western District of Tennessee to a high of 8.3% in the Eastern District of Pennsylvania;
- Over one-half of the fee waiver applications filed and granted in the six pilot districts were in the Eastern District of Pennsylvania, where legal services and pro bono representation were widely available to Chapter 7 debtors;
- Fee waiver applicants were more likely to have filed pro se than other Chapter 7 debtors;
- Attorneys had been paid in 6.4% of the cases, and non-attorney petition preparers had been paid in another 6.0% of the cases.
- Availability of fee waivers had little or no effect on total filings or the chapter mix of filings in the pilot districts.<sup>16</sup>

It was unclear whether chapter 7 trustees were paid the normal 11 U.S.C. § 330 fee during the pilot program through the Report.<sup>17</sup> Inquiry of trustees serving in one of the pilot districts failed to confirm that § 330 fees were or were not paid during the program, but subsequent discussions with Elizabeth C. Wiggins, the Report's Project Director, confirmed that the § 330 fees had been paid in the normal course.<sup>18</sup> The Report recognized the costs associated with implementation of a national program (in lost filing fees and additional personnel costs) could be between \$4.7 million to \$7.7 million per year,<sup>19</sup> but noted that "the rate could vary greatly according to the eligibility standard employed, the public's and bar's awareness of the program, the degree

of scrutiny given the applications, and the overall chapter 7 filings."<sup>20</sup> In any event, the Report suggested methods by which a national program which over time would have staggering costs could be funded.<sup>21</sup> None of these were incorporated under BAPCPA.

The pilot program also obliged many districts having to consider as a matter of first impression the standards for waiver of the bankruptcy filing fee. "To fill this vacuum pilot district courts have drawn on the rather considerable jurisprudence under 28 U.S.C. § 1915."<sup>22</sup> The pilot district courts also had to consider and reconcile the prohibition of the payment of attorney fees when payment of the filing fee was allowed by installment.<sup>23</sup> As noted in the Report, courts even within the same pilot district were divided over whether waiver of the filing fee should be prohibited when the debtor has paid an attorney.<sup>24</sup> Ultimately it appeared that the courts' consideration of the "totality of the circumstances" in each case would be sufficient to address the concerns even when counsel had been paid.

The FJC Report thoroughly evaluated and examined the Pilot Program and the users of the program and provided forecasts for the future of fee waivers in the context of a national program and its potential costs. Nowhere in the Report was it suggested that payment to chapter 7 trustees for their services in administering cases be eradicated, and the only concession by trustees, through questionnaires, was their willingness to forego a fee only when all other professionals donated their time as well. (i.e. - no attorney fees paid).

## III. BAPCPA and the fee waiver provisions

### A. The Numbers.

A total of 163,222 chapter 7 cases were filed nationally in the period since the effective date of BAPCPA, of October 17, 2005 through June 30, 2006. Of the 163,222 cases filed, IFP or fee waivers have been granted in 3424 cases.<sup>25</sup>



Effectively, chapter 7 trustees have not been paid a total of \$205,440.00 for services rendered during this period. The national average of cases in which the filing fee has been waived is 2.09%. The Fifth Circuit has had the lowest average at 1.02% while the Ninth Circuit had the highest average at 4.36%. Broken down by district, Puerto Rico reported no IFP waivers or 0.00% while Vermont had the highest percentage at 9.77% of the Chapter 7 cases filed.

The breakdown of the IFP filings since the enactment of BAPCPA follows (see chart right and on following page):

From October 17, 2005 through December 31, 2005, filing fees were waived in 429 cases. The number of cases in which the filing fee was waived increased by 268% through March 31, 2006, and increased by an additional 61% over the prior quarter for the period ending June 30, 2006.<sup>27</sup> The national average of filing fees waived being 2.1174% of chapter 7 cases filed is clearly within the contemplated projections of the FJC Report. However, if IFP cases continue to increase by 60% over the quarter ending June 30, 2006, with a presumed leveling of 40% the following quarter, filing fees will have been waived in slightly less than 10,200 cases, and more than \$611,000.00 in chapter 7 trustee § 330 compensation will have been lost.<sup>28</sup>

**B. The Courts.**

Judicial review of 28 U.S.C. § 1930(f), since October 17, 2005, as reported in decisions upon fee waivers, is limited.<sup>29</sup> The Courts in applying § 1930(f) are guided by interim procedures or guideline promulgated by the Judicial Conference on August 11, 2005.<sup>30</sup> The application of § 1930(f) commences with the review of whether the Debtor "has income of less than 150 percent of the income official poverty line (as defined by the Office of Management and Budget...) applicable to a family of the size involved and is unable to pay that fee

October 17, 2005 through June 30, 2006			
	Ch. 7 cases filed	IFP fee waived cases	Percentage of cases in which filing fee waived
<b>First Circuit</b>			
Maine	426	8	1.8779%
New Hampshire	560	8	1.4286%
Massachusetts	2265	60	2.6490%
Puerto Rico	592	0	0.0000%
Rhode Island	587	12	2.0443%
<b>Total</b>	<b>4430</b>	<b>88</b>	<b>1.9865%</b>
<b>Second Circuit</b>			
Connecticut	1398	37	2.6466%
New York			
Eastern	2870	69	2.4042%
Northern	2235	19	0.8501%
Southern	2064	66	3.1977%
Western	1999	25	1.2506%
Vermont	225	22	9.7778%
<b>Total</b>	<b>10791</b>	<b>238</b>	<b>2.2055%</b>
<b>Third Circuit</b>			
Delaware	343	14	4.0816%
New Jersey	3802	171	4.4976%
Pennsylvania			
Eastern	1743	133	7.6305%
Middle	1537	40	2.6025%
Western	3019	98	3.2461%
<b>Total</b>	<b>10444</b>	<b>456</b>	<b>4.3661%</b>
<b>Fourth Circuit</b>			
Maryland	2243	91	4.0571%
North Carolina			
Eastern	1362	13	0.9545%
Middle	1134	2	0.1764%
Western	1242	8	0.6441%
South Carolina	835	27	3.2335%
Virginia			
Eastern	2084	28	1.3436%
Western	1279	27	2.1110%

<b>West Virginia</b>			
Northern	521	7	1.3436%
Southern	593	22	3.7099%
<b>Total</b>	<b>11293</b>	<b>225</b>	<b>1.9924%</b>
<b>Fifth Circuit</b>			
Louisiana			
Eastern	497	6	1.2072%
Middle	286	6	2.0979%
Western	1045	3	0.2871%
Mississippi			
Northern	696	6	0.8621%
Southern	1020	1	0.0980%
Texas			
Eastern	1083	11	1.0157%
Northern	2199	33	1.5007%
Southern	2151	31	1.4412%
Western	1884	14	0.7431%
<b>Total</b>	<b>10861</b>	<b>111</b>	<b>1.0220%</b>
<b>Sixth Circuit</b>			
Kentucky			
Eastern	1575	48	3.0476%
Western	1986	67	3.3736%
Michigan			
Eastern	7303	86	1.1776%
Western	2834	19	0.6704%
Ohio			
Northern	5468	63	1.1522%
Southern	4598	76	1.6529%
Tennessee			
Eastern	2204	15	0.6806%
Middle	1715	13	0.7580%
Western	1568	16	1.0204%
<b>Total</b>	<b>29251</b>	<b>403</b>	<b>1.3777%</b>
<b>Seventh Circuit</b>			
Illinois			
Central	1960	9	0.4592%
Northern	6247	163	2.6093%
Southern	944	19	2.0127%
<i>Data continues next page</i>			

October 17, 2005 through June 30, 2006			
	Ch. 7 cases filed	IFP fee waived cases	Percentage of cases in which filing fee waived
<b>Seventh Circuit (continued)</b>			
Indiana			
Northern	2308	8	0.3466%
Southern	3558	40	1.1242%
Wisconsin			
Eastern	2688	112	4.1667%
Western	1292	28	2.1672%
<b>Total</b>	<b>18997</b>	<b>379</b>	<b>1.9951%</b>
<b>Eighth Circuit</b>			
Arkansas			
Eastern & Western	1338	13	0.9716%
Iowa			
Northern	677	11	1.6248%
Southern	1197	8	0.6683%
Minnesota	2566	59	2.2993%
Missouri			
Eastern	2184	25	1.1447%
Western	2430	31	1.2757%
Nebraska	1228	47	3.8274%
North Dakota	270	2	0.7407%
South Dakota	361	3	0.8310%
<b>Total</b>	<b>12251</b>	<b>199</b>	<b>1.6244%</b>
<b>Ninth Circuit</b>			
Alaska	230	17	7.3913%
Arizona	2619	63	2.4055%
California			
Central	6279	84	1.3378%
Eastern	2929	97	3.3117%
Northern	2202	115	5.2225%
Southern	1399	44	3.1451%
Hawaii	425	10	2.3529%
Idaho	1047	14	1.3372%

<b>Ninth Circuit (continued)</b>			
Montana	468	18	3.8462%
Nevada	1489	40	2.6864%
Oregon	2527	90	3.5615%
Washington			
Eastern	1297	61	4.7032%
Western	2725	148	5.4312%
<b>Total</b>	<b>25636</b>	<b>801</b>	<b>3.1245%</b>
<b>Tenth Circuit</b>			
Colorado	3587	17	0.4739%
Kansas	1949	107	5.4900%
New Mexico <sup>26</sup>	1081	32	2.9602%
Oklahoma			
Eastern	368	6	1.6304%
Northern	746	13	1.7426%
Western	1070	5	0.4673%
Utah	1665	43	2.5826%
Wyoming	288	14	4.8611%
<b>Total</b>	<b>10754</b>	<b>205</b>	<b>2.1945%</b>
<b>Eleventh Circuit</b>			
Alabama			
Middle District	648	13	2.0062%
Northern	2164	21	0.9704%
Southern	346	12	3.4682%
Florida			
Middle District	4506	94	2.0861%
Northern	671	12	1.7884%
Southern	2358	31	1.3147%
Georgia			
Middle District	1348	19	1.4095%
Northern	5461	101	1.8495%
Southern	862	14	1.6241%
<b>Total</b>	<b>18364</b>	<b>317</b>	<b>1.7262%</b>
<b>D.C. Circuit</b>			
District of Columbia	150	2	1.3333%
<b>Total</b>	<b>150</b>	<b>2</b>	<b>1.3333%</b>
<b>National Totals</b>	<b>163,222</b>	<b>3455</b>	<b>2.1174%</b>

in installments.<sup>31</sup> While application of this standard would appear non-controversial, at least one court has questioned, or more accurately raised for clarification, “[w]hat is the ‘official poverty line defined by the Office of Management and Budget?’”<sup>32</sup>

The second requisite of 28 U.S.C. §1930(f) is that the Debtor be unable to pay the filing fee in installments. This determination regarding the ability to pay is to be based upon the totality of the circumstances.<sup>33</sup> One of the major changes between pre-BAPCPA installment fee cases and waiver cases is the Judicial Conference guideline regarding the payment of attorneys’ fees. Previously, the filing fee had to be paid in full before the debtor could pay an attorney or any other person who rendered services to the debtor in connection with the case.<sup>34</sup> The Guidelines now provide, in part, “A debtor is not disqualified for a waiver of the filing fee solely because the debtor has paid (or promised to pay) a bankruptcy attorney, bankruptcy petition preparer, or debt relief agency in connection with the filing.”<sup>35</sup> While the removal of the prohibition of payment to the debtor’s attorney appears clear, such payment may still be considered in the “totality of circumstances” as well as factors including: collateral sources of payment; existence and value of exempt property; exigent circumstances for filing;<sup>36</sup> and the possibility of future needs.<sup>37</sup> Further, the review of current expenditures in considering “totality” will not necessarily be controlled by the IRS guidelines.<sup>38</sup>


The burden to prove entitlement under the totality of circumstances falls squarely upon the debtor. The courts have made clear that the debtor has the burden of showing that the application for waiver of the filing fee should be granted,<sup>39</sup> and that such burden is by a preponderance of the evidence.<sup>40</sup> Further, the requisites of 28 U.S.C. §1930(f) are conjunctive and not disjunctive, where the debtor fails to meet both factors, the request for waiver of the filing fee must be denied.<sup>41</sup>

#### IV. Summary and comment.

Chapter 7 trustees will continue to face difficult challenges with administration of bankruptcy cases under BAPCPA, but none will be more trying from the trustee's business perspective than the total lack of any § 330 compensation in IFP cases, combined with the continued failure of Congress to address the long awaited increased of § 330 fees. Trustees who exercise "business judgment" and decline IFP cases may find that the U.S. Trustee's office will seek reprimand or removal, when all that is being sought by the trustee is fair and reasonable compensation. Still the Courts are not blind to the trustees' dilemma in IFP cases. Bankruptcy Judge Lamar W. Davis Jr., while noting that "[b]eing a chapter 7 trustee is a difficult and risky business"<sup>42</sup> in review of § 1930(f), further stated:

I agree with the Chapter 7 Trustees' contention that a fee of \$60.00 for services this extensive is frequently insufficient to cover the true cost of a Trustee's time and effort. It is even clearer that abuse may occur in a bankruptcy case without a Trustee's active and diligent involvement and that participation should be compensated. The cumulative effect of a liberal application of 28 U.S.C. § 1930(f)(1) could be detrimental to the operation of an effective, transparent, and abuse-free system for bankruptcy relief. Given the terms of the statute, however, I am not free to require the payment of a fee in all Chapter 7 cases. Rather, I must balance the public policy concerns for ensuring an efficient, fair bankruptcy system with Congress's clear command to permit bankruptcy relief to an honest but impoverished debtor. In doing so, I conclude that the discretion to waive a filing fee should be sparingly exercised.<sup>43</sup>

As the bar and the public become more familiar with the availability of fee waiver, Chapter 7 trustees will need to aggressively review and, to the extent

necessary, oppose such applications to insure that waivers only occur in the truly dire cases. If such cautious review does not occur, and courts automatically grant such requests, chapter 7 trustees will clearly find themselves saying *I'm Feeling Poorer*. 

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The author notes the proof-reading and editing assistance of Jennifer Emens-Butler, Esq., without whose assistance, this article would have been significantly more difficult to read and certainly just cause to send the author a copy of *Strunk and White's Elements of Style* and the *The Bluebook: A Uniform System of Citation*.

#### Footnotes:

<sup>1</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) [hereinafter BAPCPA or 2005 Act] (to be codified at 11 U.S.C.) (amending Bankruptcy Code).

<sup>2</sup> See Samuel K. Crocker and Robert H. Waldschmidt, *Impact of the 2005 Bankruptcy Amendments on Chapter 7 Trustees*, 79 Am. Bankr. L.J. 333 Spring 2005.

<sup>3</sup> Section 418- Bankruptcy Fees. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

<sup>4</sup> 28 U.S.C. § 1930(f)(1).

<sup>5</sup> Currently the chapter 7 trustee, in a "no asset" case is compensated under the statutory authority of 11 U.S.C. § 330(b)(1), which provides, in part: "There shall be paid **from the filing fee** (emphasis supplied) in a case under chapter 7 of this title \$45 to the trustee...and (b)(2) "to pay \$15 to trustee serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such \$15 shall be paid in addition to the amount paid under paragraph(1).

<sup>6</sup> *In re: Isaac*, 2005 Bankr. LEXIS 2691, (Bankr. N.D. Ga. Nov. 17, 2005)

<sup>7</sup> 205 B.R. at 55.

<sup>8</sup> The filing fees for a chapter 7 as the source for payment of chapter 7 trustee are derived from a combination of statutory sources. Presently, the filing fee for a chapter 7 under § 1930(a) is \$245.00. There is also an administrative charge of \$39.00, and lastly a charge under 28 U.S.C. § 1930(b) of a \$15.00 trustee surcharge as prescribed by the Judicial Conference of the United States. The current total fee for the commencement of a chapter 7 case is \$299.00. The fees have varied over the past 20 years in which significant increases have occurred during the past 3 years.

<sup>9</sup> 28 U.S.C. § 1930(a).

<sup>10</sup> There are three periods of time in which *in forma pauperis* decisions should be classified: First, decisions arising prior to October 1, 1994; next, decisions arising after October 1, 1994, such date being the operative date of a pilot *in forma pauperis* program conducted in six judicial districts for a three year period; and lastly, those decisions arising after October 17, 2005 under BAPCPA.

<sup>11</sup> Requests for *in forma pauperis*, were made by both debtors and creditors as it applied to adversary proceeding filing fees for objections to discharge or exception to discharge, and generally as to appeals. Appeals had an additional requirement relative to good faith and frivolity.

<sup>12</sup> 2005 Bankr. LEXIS 1183 at \*8 (E.D. Va, 2005).

<sup>13</sup> See *In re: Hobby*, 2005 Bankr. LEXIS 1183 (E.D.Va 2005). Cited therein *In re: Fitzgerald*, 192 B.R. 861, 862 (Bankr. E.D. Va. 1996); *Fromal v. Jackson (In re: Fromal)*, 1995 U.S. App. LEXIS 8910, \* 2-\* 3 (4th Cir. 1995), *In re: Shumate*, 91 B.R. 23, 26 (Bankr. W.D. Va. 1988); and, *Burrell v. Letterlough*, 150 B.R. 369 at 373. See also 28 U.S.C. §§ (a)(1), (a)(3).

<sup>14</sup> Implementing and Evaluating the Chapter 7 Filing Fee Waiver Program - Report to the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States, Federal Judicial Center,

1998, page 1. Hereinafter referred to as the "FJC Report" or "Report."

<sup>15</sup> See footnote 14. The report is available at: <http://www.abiworld.org/research/ifp.html>.

<sup>16</sup> The Report findings were also summarized in a Department of Justice Memorandum entitled *Bankruptcy By the Numbers - The Impact of the Coming Fee-waiver Provision* by Edward Flynn of the Executive Office of the United States Trustee and Gordon Bermant of Burke Virginia.

This report is available at: [http://www.usdoj.gov/ust/eo/public\\_affairs/articles/docs/abi01julnumbers.html](http://www.usdoj.gov/ust/eo/public_affairs/articles/docs/abi01julnumbers.html)

<sup>17</sup> The FJC Report references at 28 in the paragraph entitled "Accounting of Costs and Lost Revenues Associated with the Program," the payments to case trustees. This would support the belief that § 330 fees were paid in the ordinary course.

<sup>18</sup> The author was advised by Ms. Wiggins that the Pilot Program failed to have specific funding provisions for the payment of the panel trustees, however there were sufficient funds within the Program which allowed for the trustees to be paid.

<sup>19</sup> See footnote 16.

<sup>20</sup> See FJC Report at page 68.

<sup>21</sup> See FJC Report at 68.

The Bankruptcy Committee endorsed the recommendation of its IFP subcommittee that the most straightforward way to fund a national program would be for Congress to increase the judiciary's appropriation by this amount, which represents approximately 2/10 of 1% of the judiciary's total fiscal 1997 appropriation.

If monies are not directly appropriated to cover the costs of the program, the subcommittee suggested and the committee secondarily endorsed requesting authorization for application of the United States Treasury share of the filing fee to cover the cost of the program. Currently, the general fund of the U.S. Treasury receives \$15 from the filing fee for each Chapter 7 case. In fiscal 1997

alone, the general fund received approximately \$13,892,745 from Chapter 7 bankruptcy filings. Thus, lost revenue due to waived fees would be recovered if the judiciary could retain this portion of the fee for all non-IFP cases in a special fund designated as "no year" money. From the fund, \$160 would be allocated for each IFP case among the entities who would have benefited from the filing fee (e.g., the judiciary would receive \$70, the U.S. trustee system would receive \$30 dollars, the case trustee would receive \$60). The drawback to this approach is that the fund may be insufficient to cover the costs of the program in subsequent years if the ratio of IFP to non-IFP cases dramatically increases. Designating the fund's receipts as "no year," however, would enable the judiciary to better respond to moderate filing fluctuations.

<sup>22</sup> See *Shepardson* at 56 citing *In re: Merritt*, 186 Bankr. 924, 929 (Bankr. S.D. Ill. 1995); *In re: Koren*, 176 Bankr. 740, 742-45 (Bankr. E.D. Pa. 1995).

<sup>23</sup> Federal Rule of Bankruptcy Procedure Rule 1006(b)(3).

<sup>24</sup> FJC Report at 71. As more specifically set forth in footnote 79:

Judges in the pilot courts also published a number of opinions on the issue. *In re: Stephenson*, 205 B.R. 52 (Bankr. E.D. Pa. 1997) (payment of attorney fees by a family member did not automatically bar IFP status; Rule 1006(b)(3) "suspended" for pilot districts); *In re: Koren*, 176 B.R. 740 (Bankr. E.D. Pa. 1995) (payment of attorney fee by debtor's son did not automatically bar IFP status; Rule 1006(b)(3) not applicable to IFP applications); *In re: Caldwell*, 203 B.R. 666 (Bankr. W.D. Tenn. 1997) (Rule 1006(b)(3) must yield to IFP statute); *In re: Shannon*, 180 B.R. 189 (Bankr. W.D. Tenn. 1995) (granting IFP status after debtor was unable to pay fee in installments even though debtor had promised to pay an attorney \$100, and stating that compensation to attorney was only one factor to consider in determining whether fee should be waived); *In re:*

*Dotson*, 179 B.R. 85 (Bankr. W.D. Tenn. 1995) (granting IFP status despite debtor's promise to pay attorney, where debtor appeared unable to pay and attorney had agreed to remain on case whether or not he was paid); *In re: Beecham*, 181 B.R. 335 (Bankr. W.D. Tenn. 1994) (denying IFP status for failure to show inability to pay in installments, and further finding that Rule 1006(b)(3) strictly barred court from waiving filing fee where debtor had paid attorney \$500 via a loan from sister); *In re: Thompson*, 177 B.R. 890 (Bankr. W.D. Tenn. 1994) (denying IFP status for failure to show inability to pay in installments, where debtor exhibited financial ability to pay attorney \$500 via funds from spouse); *In re: Takeshorse*, 177 B.R. 99 (Bankr. D. Mont. 1994) (denying IFP status; finding ability to pay filing fee when debtor had paid attorney \$450; Rule 1006(b)(3) applied). See also *In re: Clark*, 173 B.R. 142 (Bankr. W.D. Tenn. 1994) (stating that the court will consider a totality of the pre- and post-petition facts and circumstances in determining whether or not to waive the filing fee).

<sup>25</sup> The information for this article was collected by the author through the CM/ECF court site for each District. The report obtained through CM/ECF was for the period of October 17, 2005 to June 30, 2006, for only Chapter 7 cases whether open or closed. The data from the Court generated report was copied to an Excel spreadsheet and the data searched for the term IFP for the determination of the number of waiver cases. Unfortunately, CM/ECF presently does not have available to the public information regarding the actual number of applications for waiver filed, and correspondingly the number of applications which were denied. It is the author's desire to follow up with part two of this article, after consultation with each court, to determine the second side of the statistical story. The author has also received information that the Administrative Office is collecting similar statistical information, but understands the AO is not yet satisfied with

the reliability of the information it has received.

<sup>26</sup> The author received an independent report for New Mexico, which did reflect the number of applications filed, approved and denied, and whether the debtor was pro se, had a bankruptcy petition preparer, or counsel. Unfortunately, the author found the report differed with the CM/ECF report which through April 2006 appeared to report fee waiver cases as "installment" cases. This would appear to justify the AO's concern regarding the reliability of the total reporting, although this was the only District where the author noticed such differences.

<sup>27</sup> From October 17, 2005 to December 31, 2005 there were 16,266 chapter 7 cases filed. January 1, 2006 to March 31 2006 saw 60,025 chapter 7 cases filed, an increase of over 369% from the prior quarter, and 86,931 cases filed in the period of April 1, 2006 to June 30, 2006, being a further increase of 69% over the prior quarter.

<sup>28</sup> The author has made the assumption that the learning curve for the filing of waiver applications will continue to increase in the third quarter of 2006, with a leveling in the fourth quarter. The author has also assumed that the 330 fees remain at \$60.00, without the long awaited and anticipated increase to \$100.00, in which case the lost compensation during 2006 would exceed \$779,000.00.

The Congressional Budget Office Cost Estimate of April 4, 2005, upon S. 256, in addressing fee waivers stated:

Section 418 would permit a bankruptcy court or district court to waive the chapter 7 filing fee and other fees for a debtor who is unable to pay such fees in installments. Based on information from the AOUSC, CBO expects that, in fiscal year 2006, chapter 7 filing fees would be waived for about 5.5 percent of all chapter 7 filers and that the percentage waived would gradually increase to about 10 percent by fiscal year 2009.

The author believes his assumptions to be reasonable in view of the FJC Report and CBO estimates, and in fact, may understate the problem and potential lost compensation for chapter 7 trustees.

<sup>29</sup> *In re: Bradshaw*, Case No. 06-50413, (E.D. Tenn, August 25, 2006).

<sup>30</sup> *In re: Nuttall*, 334 B.R. 921, 922 (W.D. Mo. December 27, 2005); See also *In re: Bradshaw*. The Judicial Conference guidelines may be found at <http://www.uscourts.gov/bankruptcycourts/jcusguidelines.html>.

<sup>31</sup> 28 U.S.C. § 1930(f)(1).

<sup>32</sup> *In re: Shawn Nelson*, Case No. 06-60001-7, (D. Montana, January 5, 2006). After a rather thorough review of Section 673(2) of the Omnibus Budget Reconciliation Act of 1981 [42 U.S.C. §9902(2)], and Internet materials from the U.S. Department of Health & Human Services regarding the distinction between the poverty guidelines and the poverty thresholds, the court concluded: "As the poverty guidelines are used for eligibility and poverty thresholds are used for statistical purposes, the Court concludes, based upon the above discussion, that the poverty guidelines are to be used in determining the official poverty line, even though 11 U.S.C. § 1930(f) does not specifically state one term or the other and even though §1930(f) references the language "official poverty line defined by the Office of Management and Budget," which has been interpreted by HHS to mean poverty thresholds." The Court determined the Debtor met the income guideline, but then in review of the second factor of whether the debtor was unable to pay the fee by installments determined that the Debtor had net monthly income of \$910.00 and stated no reason why he could not pay the fee in installments.

<sup>33</sup> See *In re: Lineberry*, 2006 Bankr. LEXIS 1397 \* 16 (W.D. Va. Roanoke Div. May 1, 2006), reciting the Judicial Conference of the United States Interim Procedures Regarding the Chapter 7 Fee Waiver Provisions of the Bankruptcy Abuse

Prevention and Consumer Protection Act of 2005, promulgated August 11, 2005.; *In re: Burr*, 344 B.R. 234; 2006 Bankr. LEXIS 1008 \*3 (Bankr. W.D.N.Y. June 2, 2006).

<sup>34</sup> F.R.B.P. 1006(b)(3).

<sup>35</sup> The Judicial Conference Guidelines further stated at footnote 5: Inability to pay the filing fee in installments is one of the requirements for a fee waiver. If the attorney payment prohibition were retained, payment of an attorney's fee would render many debtors ineligible for installment payments and thus enhance their eligibility for the fee waiver. Deletion of this prohibition from the rule, which was not statutorily required, ensures that debtors who have the financial ability to pay the fee in installments will do so rather than request a waiver.... In the installment application, debtors must certify they will not make additional payment or transfer any additional property to an attorney or other person for services in connection with the case until the filing fee is paid in full.

<sup>36</sup> *In re: Mildred K. Robinson, et. al.*, Case Nos. 06-40288; 06-40471; 06-40472; 06-40481; 06-40563, (Bankr. S.D. Ga July 2006) citing therein: *In re: Nuttall*, 334 B.R. 921, 923 (Bankr. W.D. Mo 2005).

<sup>37</sup> See *Bradshaw*.

<sup>38</sup> See *Nuttall*, 334 B.R. at 924; and, *Bradshaw* where the Court stated: "Congress has given no directive that the court apply the IRS standards to applications to proceed *in forma pauperis* in contrast to the 11 U.S.C. §707(b) means test where the use of the IRS standards is expressly mandated."

<sup>39</sup> See *Nuttall*, 334 B.R. at 923.

<sup>40</sup> See *In re: Burr*, 344 B.R. at 234.

<sup>41</sup> *In re: Shawn Nelson, id.*

<sup>42</sup> Citing *In re: Fisher*, 210 B.R. 467, 469 (Bankr. D. Minn. 1997).

<sup>43</sup> *In re: Mildred K. Robinson, et. al.*, Case Nos. 06-40288; 06-40471; 06-40472; 06-40481; 06-40563, (Bankr. S.D.Ga July 2006).

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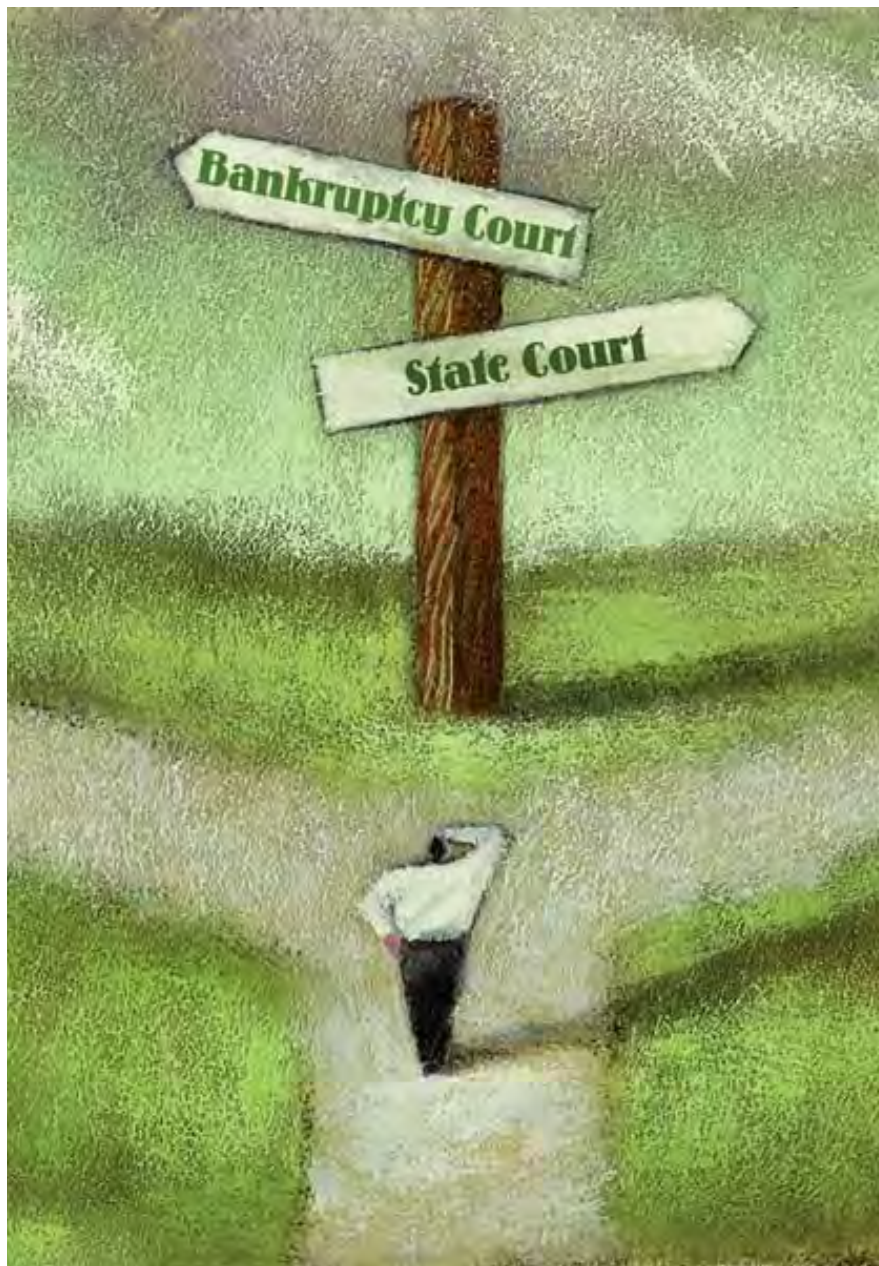
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# More Work for Trustees, Less Compensation A Review of Trends in IFP Fee Waivers in Chapter 7 Filings



Raymond J. Obuchowski  
and Robert Scharf

**F**ive years ago the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005” (“BAPCPA”) was signed into law.<sup>1</sup> BAPCPA’s enactment resulted in many changes for the chapter 7 trustee in the administration of consumer and business bankruptcy cases. One of the substantive changes was the modified statutory treatment for the payment, or more accurately, the waiver, of the filing fee to commence a chapter 7 case.<sup>2</sup> With little fanfare, Section 418 of BAPCPA, which added subsection (f) to 28 U.S.C. § 1930 allowing for waiver of the bankruptcy filing fee, directly eliminated the funds available and necessary to pay the chapter 7 trustee for administration and handling of the case where waiver is granted.<sup>3</sup>

In a 2006 *NABTalk* article entitled “I Feel Poorer,” the author Raymond Obuchowski reviewed the new BAPCPA changes, the impacts they might have on addressing *in forma pauperis* (IFP) fee waiver requests, and possible ramifications on trustee work. Five years later, this brief article examines BAPCPA’s fee waiver provisions, developments in case law, and how chapter 7 filing and fee waiver statistics have changed over the period.

***In Forma Pauperis: Then and Now***

Prior to October 17, 2005, an individual filing for bankruptcy was not granted the right to proceed *in forma pauperis*. See *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973). In general, *in forma pauperis* proceedings in federal court are governed by 28 U.S.C. § 1915. However, application of § 1915 in the bankruptcy context was limited prior to BAPCPA by 28 U.S.C. § 1930. While there was uncertainty amongst the courts on whether bankruptcy filing fees could be judicially waived, one court ultimately established that bankruptcy courts may waive a variety of fees in bankruptcy proceedings, but were specifically excluded from waiving the fee associated with the filing of a chapter 7 bankruptcy petition. See *In re Hobby*, 2005 Bankr. LEXIS 1183 (E.D.Va.2005).

In 1993 and as part of the judiciary appropriations act, Congress directed the Judicial Conference of the United States to implement and study in up to six districts the potential effect of waiving the filing fee for individual chapter 7 debtors who are unable to pay the fee in installments.<sup>4</sup> What followed was a post-pilot Federal Judicial Center evaluation examining the pilot program and forecasts for the future of fee waivers in the context of a national program. Despite this, Section 418 in BAPCPA allowed bankruptcy courts to waive the filing fee in an individual debtor's chapter 7 cases without addressing many of the issues that had been raised in pilot districts.<sup>5</sup> While BAPCPA has clarified some issues in the context of fee waivers, many of the early predictions on the possible impacts of BAPCPA have proven to be accurate.

***BAPCPA and the Fee Waiver Provisions***

Following passage of BAPCPA, debtors are permitted to seek a waiver of the bankruptcy filing fee. Pursuant to 28 U.S.C. § 1930(f), a "bankruptcy court may waive the filing fee . . . if the court determines that such individual has less than 150 percent of the official income poverty line . . . applicable to a family of the size involved and is unable to pay that fee in installments." By the terms of the statute, a court's ability to waive the fee is permissive ("may waive"), not mandatory, and is premised upon a finding that a debtor meets the income and inability to pay in installments criteria. *In re Rock*, No. 08-60582, 2008 Bankr. LEXIS 662 at \*1 (N.D. Ohio, March 7, 2008). A two-prong test therefore applies. First, the debtor's income must be less than 150% of the income official poverty line. *In re Spisak*, 361 B.R. 408, 412 (Bankr. D. Vt. 2007); *In re Kauffman*, 354 B.R. 682, 685 (Bankr. D. Vt. 2006). Second, the debtor must be unable to pay the filing fee in installments. *In re Stickney*, 370 B.R. 31, 36 (Bankr. D.N.H. 2007). Both prongs of the test must be satisfied for a court to waive filing fees.

The first prong of the test to determine whether the filing fee may be waived follows the interim guidelines set out by the Judicial Conference on August 11, 2005. The statute requires the debtor have income of less than 150 percent of the income official poverty line, applicable to a family of the size involved. In calculating the debtor's income, the income of a spouse is included whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. *In re Pugh*, No. 09-32177-H3-7, 2009 Bankr. LEXIS 1390, at \*6 (Bankr. S.D.Tx., June 1, 2009) (denying waiver and finding that the debtor listed her marital status as "married" thus, the debtor's monthly income, including that of her spouse, should have been reflected as such on Schedules I, J, and the

Application For Waiver.)

Courts generally determine whether a debtor qualifies for a fee waiver by direct review of the debtor's filed schedules against the income figures for a family of the debtor's size as set out and updated by the OMB. "The court has no authority to waive filing fees where the debtors have income greater than 150% of the poverty line as defined by the Office of Management and Budget for a family of the size of the debtors." *In re Hartly*, No. 05-39123-B-72007, Bankr. LEXIS 3370 at \*2 (E.D. Ca., October 1, 2007). The first prong is therefore objective and not subject to much interpretation.

It is the second prong of the test which requires discretionary interpretation by the courts. This prong requires that the debtor demonstrate that he or she is unable to pay the fee in installments. *In re Cabos*, No. 08-00682, 2008 Bankr. LEXIS 2946 at \*2 (Bankr., D.D.C., October 27, 2008). In making this determination, courts apply a totality of the circumstances analysis on a case by case basis. *In re Van Luvender*, 21 Fla. L. Weekly Fed. B 790 *ref'g In re Spisak*, 361 B.R. at 412; *In re Kauffman*, 354 B.R. at 685; *In re Stickney*, 370 B.R. at 40; *In re Barrick*, 402 B.R. 39, 42 (Bankr.M.D.Fl.2008).

In its survey of the case law, the *Stickney* court found that courts have considered various factors in making a determination on the ability to pay, including, but not limited to:

- (i) discrepancies between a debtor's application and schedules;
- (ii) collateral sources of income from family or friends from which the filing fee may be paid;
- (iii) excessive or unreasonable expenses that could be utilized for payment of the filing fee;
- (iv) whether the debtor agreed to pay a portion of her [the] attorney's fee after the filing of the case;
- (v) whether the debtor has any property from which the filing fee could be paid; and
- (vi) significant equity held in assets."

*Stickney*, 370 B.R. at 40-42.

The courts generally agree that exempt assets may be considered for purposes of the totality of the circumstances analysis under the second prong of § 1930(f)(1), especially when such asset can easily be converted into cash. See 2006 Bankr. LEXIS 3359 at \*2-3; *Stickney*, 370 B.R. at 42-43; *Spisak*, 361 B.R. at 414. Courts examine other payments made prior to filing and pending any hearing date. *In re Barrick supra* (finding based on totality of circumstances that debtor through exempt property and as exemplified by other payments has the ability to pay the filing fee in installments.); see also *In re Davis*, 372 B.R. 282, 285 (Bankr. W.D. Va. 2007) (reasoning that the ability of the Debtor to place funds in escrow indicates that the Debtor has the ability to pay the filing fee.).

Where the debtor has certain disposable income or an ability to make economic choices regarding household expenditures that would arguably free up adequate funds, the courts have generally

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found that the debtor is required to put those resources towards the filing fee. See *In re Eadie*, No. 07-51799-C 2007 Bankr. LEXIS 2503 at \*5 (W.D.Tex., July 24, 2007) (“The statute forces her to decide whether this particular expense—the filing fee—is important enough to warrant not paying for something else.”); see also *In re Phillips*, 375 B.R. 201, 208 (W.D.Va.2007). In *Phillips*, the court denied the waiver request based on preponderance of evidence that the debtors were not unable to pay the filing fee in installments because the bankruptcy schedules revealed that they were able to afford a \$130 per month Christmas Club account deduction, \$107 per month for cellular phone service so that both debtors could enjoy the convenience of having cell phones, and \$79 per month for satellite TV service, and which reflected an excess of income over expenses of approximately \$25 per month. When making such a determination, the court found it appropriate to compare the debtors’ expenses to the “Internal Revenue Service guidelines that ‘establish a standard as to expenses which have been accepted by Congress elsewhere as a starting point in determining reasonableness.’” *Phillips*, 375 B.R. at 205 quoting *In re Nuttall*, 334 B.R. 921, 923 (Bankr. W.D. Mo. 2005)).

In many instances, even a one-time receipt of funds would be considered adequate by the courts to fund the filing fee. In *In re Gould*, NO. 08-60828, 2008 Bankr. LEXIS 1359 at \*3 (N.D. Ohio April 28, 2008). In *Gould*, the court found that the debtor’s tax refund provided the means to pay the filing fee and denied the application to proceed *in forma pauperis*. Where a debtor has made choices to expend those funds, courts have sometimes held them to account for expenses incurred rather than for the filing fee. In *In re Lephew*, 380 B.R. 171,178 (Bankr.W.D.Va.,2007) (concluding that the debtors’ application for waiver be denied because debtors used funds available to them to meet filing fee costs for other uses).

An issue resolved soon after enactment of BAPCPA involves the situation where the debtor makes payment to an attorney or other counselor while attempting to waive the filing fee. In deciding whether the payment of fees to a bankruptcy attorney should necessitate the denial of fee waiver requests, courts have generally found that attorney payment is but one factor to be considered in the analysis, and is not conclusive of an ability to pay for the filing fee. See *In re Walker*, No. 07-10498-72007 Bankr. LEXIS 2426 at \* 13 (Kan., July 24, 2007) (“While a debtor’s ability to pay an attorney is some evidence the debtor could also pay the filing fee, th[is] Court is convinced it cannot regard that evidence as conclusive proof in all cases.”). This form of judicial logic is maddening and disheartening from a trustee’s perspective, since it is logical to assume that where there are funds available to pay attorneys, it is just as likely that there are funds available to pay the filing fee.

Courts continue to utilize discretion in granting fee waivers. For example, where there appears to be little disposable income in schedules, courts have been hesitant to find adequate resources to pay the filing fee. In *In re Cunningham*, No. 08-00426, 2008 Bankr. LEXIS 4072 at \*2 (D.D.C., July 1, 2008). The *Cunningham* court also took the next step, and determined that the debtor had likely underestimated her expenses for basic necessities, and deemed “it inappropriate to treat the \$301.31 in stated disposable income as available for payment of the filing fee in installments.” Courts have also been willing to reconsider the denial of fee waivers based on a change in a debtor’s circumstances. In *In re Holmes*, No. 08-

007152008 Bankr. LEXIS 3807 at\*3-4 (D.D.C., November 26, 2008) (granting motion for reconsideration and waiving filing fees because of a drastic drop in debtor’s income).

A few courts have looked at the issue of timing as to when a determination should be made on ability to pay filing fees in installments. Since a fee may be paid in installments, the courts have looked at the debtor’s ability to pay over time, normally for a period not more than 120 days after the filing date, and not exceeding 180 days for cause. Fed. R. Bankr.Pro. 1006(b)(2). However, the courts have strictly used the petition date where the debtor may have had the ability to pay the filing fee but spent funds in an attempt to avoid responsibility for paying the filing fee. See *In re Lephew*, 380 B.R. at 178 (using the date of petition to determine whether the debtor had the means to pay the filing fee, not a later hearing date, after debtor had expended these resources).

**Trends on In Forma Pauperis**

A total of 728,387 chapter 7 cases were filed nationally in the twelve-month period ending June 30, 2009.<sup>6</sup> Of the 728,387 cases filed, IFP or fee waivers have been granted in 15,847 cases. Effectively, chapter 7 trustees have not been paid a total of \$950,820 for services rendered during this period. The national average of cases in which the filing fee has been waived is 2.17%, an increase of 2.75% over the same period in 2006. The Fifth Circuit remained the circuit with the lowest percentage of cases with fee waivers at 0.96% while the District of Columbia had the highest percentage at 6.17%. Broken down by district in those locations with more than nominal filings, Rhode Island was the district with the fewest fees waived at just 640 or 0.07% of cases, while Western Washington was the district with the highest percentage of the chapter 7 cases filed with 330 fees waived or 7.28% of cases.

A number of districts increased significantly since 2006, while some others have declined by a small amount. The following table sets out the top ten districts where IFP filings increased, and the ten districts which saw these filings decrease (see top of page 39).

**Summary and Comments**

The situation for chapter 7 trustees since the enactment of BAPCPA continues to become more difficult. Over the last five years, the percentage of IFP’s granted in proportion to the overall number of filings has grown nationally.<sup>8</sup> In some districts, there have been significant and alarming increases in the percentage granted, resulting in an even greater burden on the trustees in those districts. While the courts have made welcome advances in curtailing debtors’ use of funds for other expenses to avoid paying the filing fee, and put the onus on the debtor to pay the fee in installments where possible, there remains an upward trend in use of IFP, perhaps for the simple reason the debtor bar is becoming more familiar with use of the fee waiver.

On top of it, all trustees have experienced an increase in other duties under BAPCPA, without any corresponding increase in compensation to pay for the additional staff needed to handle these responsibilities. Even without factoring in the costs of the additional duties, our compensation still lags, given that trustees haven’t received an increase in compensation since 1994. (During that time, the consumer price index has increased in the neighborhood

*continued on bottom of page 40*

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

Top 10 increases in IFP filings (rounded to the nearest percentage)

District of Columbia	363%
Northern NY	267%
Eastern MI	213%
North Dakota	184%
Northern OH	160%
Eastern & Western AR	137%
Maine	137%
Middle NC	110%
Western MI	101%
Southern IA	100%

Top 10 declines in IFP filings (rounded to the nearest percentage)

Rhode Island	-96%
Eastern OK	-84%
Northern OK	-75%
Southern AL	-71%
Western VA	-69%
Northern MS	-68%
Northern IN	-55%
Wyoming	-53%
Eastern LA	-53%
Oregon	-50%

A comparison of statistical data from 2005-2006 and 2008-2009<sup>7</sup> follows (chart continues on page 40-41):

	2005-2006			2008-2009			Change in % of cases in which filing fee was waived
	Chapter 7 cases filed	IFP fee waived cases	% of cases in which filing fee was waived	Chapter 7 cases filed	IFP fee waived cases	% of cases in which filing fee was waived	
<b>First Circuit</b>							
Maine	426	8	1.8779%	2,514	112	4.4551%	137.2315%
Massachusetts	2265	60	2.6490%	11,982	333	2.7792%	4.9136%
New Hampshire	560	8	1.4286%	2,639	53	2.0083%	40.5836%
Puerto Rico	592	0	0.0000%	3,648	140	3.8377%	Γ
Rhode Island	587	12	2.0443%	2,520	2	0.0794%	-96.1177%
<b>Total</b>	<b>4430</b>	<b>88</b>	<b>1.9865%</b>	<b>23303</b>	<b>640</b>	<b>2.7464%</b>	<b>38.2577%</b>
<b>Second Circuit</b>							
Connecticut	1398	37	2.6466%	6,514	119	1.8268%	-30.9753%
New York							
Eastern	2870	69	2.4042%	8,020	135	1.6833%	-29.9848%
Northern	2235	19	0.8501%	12,106	378	3.1224%	267.2950%
Southern	2064	66	3.1977%	7,430	284	3.8223%	19.5351%
Western	1999	25	1.2506%	6,171	83	1.3450%	7.5463%
Vermont	225	22	9.7778%	947	56	5.9134%	-39.5219%
<b>Total</b>	<b>10791</b>	<b>238</b>	<b>2.2055%</b>	<b>41188</b>	<b>1055</b>	<b>2.5614%</b>	<b>16.1359%</b>
<b>Third Circuit</b>							
Delaware	343	14	4.0816%	1,539	95	6.1728%	51.2346%
New Jersey	3802	171	4.4976%	18,545	753	4.0604%	-9.7215%
Pennsylvania							
Eastern	1743	133	7.6305%	6,813	369	5.4161%	-29.0204%
Middle	1537	40	2.6025%	6,040	152	2.5166%	-3.3013%
Western	3019	98	3.2461%	8,506	196	2.3043%	-29.0148%
Virgin Island	n/a	n/a	n/a	5	0	0.0000%	Γ
<b>Total</b>	<b>10444</b>	<b>456</b>	<b>4.3661%</b>	<b>41448</b>	<b>1565</b>	<b>3.7758%</b>	<b>-13.5206%</b>
<b>Fourth Circuit</b>							
Maryland	2243	91	4.0571%	13,443	433	3.2210%	-20.6075%
North Carolina							
Eastern	1362	13	0.9545%	3,801	60	1.5785%	65.3816%
Middle	1134	2	0.1764%	3,235	12	0.3709%	110.3246%
Western	1242	8	0.6441%	4,424	37	0.8363%	29.8429%
South Carolina	835	27	3.2335%	3,618	179	4.9475%	53.0055%
Virginia							
Eastern	2084	28	1.3436%	13,725	107	0.7796%	-41.9755%
Western	1279	27	2.1110%	5,164	34	0.6584%	-68.8111%
West Virginia							
Northern	521	7	1.3436%	1,983	52	2.6223%	95.1733%
Southern	593	22	3.7099%	2,722	201	7.3843%	99.0398%
<b>Total</b>	<b>11293</b>	<b>225</b>	<b>1.9924%</b>	<b>52115</b>	<b>1115</b>	<b>2.1395%</b>	<b>7.3838%</b>

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	2005-2006			2008-2009			Change in % of cases in which filing fee was waived
	Chapter 7 cases filed	IFP fee waived cases	% of cases in which filing fee was waived	Chapter 7 cases filed	IFP fee waived cases	% of cases in which filing fee was waived	
<b>Fifth Circuit</b>							
Louisiana							
Eastern	497	6	1.2072%	1,579	9	0.5700%	-52.7866%
Middle	286	6	2.0979%	918	11	1.1983%	-42.8831%
Western	1045	3	0.2871%	2,842	10	0.3519%	22.5663%
Mississippi							
Northern	696	6	0.8621%	2,866	8	0.2791%	-67.6204%
Southern	1020	1	0.0980%	3,232	6	0.1856%	89.3564%
Texas							
Eastern	1083	11	1.0157%	3,055	21	0.6874%	-32.3226%
Northern	2199	33	1.5007%	7,330	84	1.1460%	-23.6364%
Southern	2151	31	1.4412%	5,054	90	1.7808%	23.5623%
Western	1884	14	0.7431%	5,402	71	1.3143%	76.8710%
<b>Total</b>	<b>10861</b>	<b>111</b>	<b>1.0220%</b>	<b>32278</b>	<b>310</b>	<b>0.9604%</b>	<b>93.9727%</b>
<b>Sixth Circuit</b>							
Kentucky							
Eastern	1575	48	3.0476%	8,023	196	2.4430%	-19.8398%
Western	1986	67	3.3736%	8,310	174	2.0939%	-37.9342%
Michigan							
Eastern	7303	86	1.1776%	31,356	1,157	3.6899%	213.3398%
Western	2834	19	0.6704%	10,447	141	1.3497%	101.3139%
Ohio							
Northern	5468	63	1.1522%	24,380	729	2.9902%	159.5265%
Southern	4598	76	1.6529%	18,460	278	1.5060%	-8.8895%
Tennessee							
Eastern	2204	15	0.6806%	9,301	74	0.7956%	16.9021%
Middle	1715	13	0.7580%	7,040	64	0.9091%	19.9301%
Western	1568	16	1.0204%	5,309	102	1.9213%	88.2840%
<b>Total</b>	<b>29251</b>	<b>403</b>	<b>1.3777%</b>	<b>122626</b>	<b>2915</b>	<b>2.3771%</b>	<b>72.5407%</b>
<b>Seventh Circuit</b>							
Illinois							
Central	1960	9	0.4592%	7,256	29	0.3997%	-12.9609%
Northern	6247	163	2.6093%	30,175	469	1.5543%	-40.4325%
Southern	944	19	2.0127%	3,188	59	1.8507%	-8.0499%
Indiana							
Northern	2308	8	0.3466%	10,797	17	0.1575%	-54.5753%
Southern	3558	40	1.1242%	16,573	212	1.2792%	13.7839%
Wisconsin							
Eastern	2688	112	4.1667%	11,043	318	2.8797%	-30.8883%
Western	1292	28	2.1672%	6,233	100	1.6044%	-25.9701%
<b>Total</b>	<b>18997</b>	<b>379</b>	<b>1.9951%</b>	<b>85265</b>	<b>1204</b>	<b>1.4121%</b>	<b>-29.2215%</b>
<b>Eighth Circuit</b>							
Arkansas							
Eastern & Western	1338	13	0.9716%	7,108	164	2.3073%	137.4702%
Iowa							
Northern	677	11	1.6248%	2,648	52	1.9637%	20.8597%
Southern	1197	8	0.6683%	4,405	59	1.3394%	100.4058%
Minnesota	2566	59	2.2993%	13,483	241	1.7874%	-22.2617%
Missouri							
Eastern	2184	25	1.1447%	8,492	64	0.7537%	-34.1611%
Western	2430	31	1.2757%	8,747	115	1.3147%	3.0584%
Nebraska	1228	47	3.8274%	4,690	182	3.8806%	1.3909%
North Dakota	270	2	0.7407%	1,188	25	2.1044%	184.0909%
South Dakota	361	3	0.8310%	1,098	8	0.7286%	-12.3254%
<b>Total</b>	<b>12251</b>	<b>199</b>	<b>1.6244%</b>	<b>51859</b>	<b>910</b>	<b>1.7548%</b>	<b>8.0278%</b>

of 40%.) In sum, trustees as a group have been saddled with unfunded mandates which have cost us close to \$1 million per year. Even though we as trustees understand the need and appropriate-

ness for the fee waiver provision of BAPCPA, it is difficult to understand why chapter 7 trustees have been made to bear the costs of this and other programs. ☹

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

	2005-2006			2008-2009			Change in % of cases in which filing fee was waived
	Chapter 7 cases filed	IFP fee waived cases	% of cases in which filing fee was waived	Chapter 7 cases filed	IFP fee waived cases	% of cases in which filing fee was waived	
<b>Ninth Circuit</b>							
Alaska	230	17	7.3913%	654	41	6.2691%	-15.1826%
Arizona	2619	63	2.4055%	12,495	355	2.8411%	18.1101%
California							
Central	6279	84	1.3378%	39,417	423	1.0731%	-19.7827%
Eastern	2929	97	3.3117%	27,355	1,164	4.2552%	28.4884%
Northern	2202	115	5.2225%	14,556	390	2.6793%	-48.6971%
Southern	1399	44	3.1451%	12,304	308	2.5033%	-20.4080%
Hawaii	425	10	2.3529%	1,813	33	1.8202%	-22.6420%
Idaho	1047	14	1.3372%	4,226	90	2.1297%	59.2692%
Montana	468	18	3.8462%	1,828	114	6.2363%	62.1444%
Nevada	1489	40	2.6864%	9,252	184	1.9888%	-25.9684%
Oregon	2527	90	3.5615%	9,331	166	1.7790%	-50.0492%
Washington							
Eastern	1297	61	4.7032%	12,084	440	3.6412%	-22.5802%
Western	2725	148	5.4312%	4,528	330	7.2880%	34.1876%
Guam	n/a	n/a	n/a	119	1	0.8403%	Γ
NMI	n/a	n/a	n/a	7	4	57.1429%	Γ
<b>Total</b>	<b>25636</b>	<b>801</b>	<b>3.1245%</b>	<b>149969</b>	<b>4043</b>	<b>2.6959%</b>	<b>-13.7180%</b>
<b>Tenth Circuit</b>							
Colorado	3587	17	0.4739%	16,625	61	0.3669%	-22.5805%
Kansas	1949	107	5.4900%	5,422	165	3.0432%	-44.5690%
New Mexico	1081	32	2.9602%	4,209	69	1.6393%	-44.6209%
Oklahoma							
Eastern	368	6	1.6304%	1,555	4	0.2572%	-84.2229%
Northern	746	13	1.7426%	2,746	12	0.4370%	-74.9230%
Western	1070	5	0.4673%	4,196	24	0.5720%	22.4023%
Utah	1665	43	2.5826%	5,535	126	2.2764%	-11.8548%
Wyoming	288	14	4.8611%	611	14	2.2913%	-52.8642%
<b>Total</b>	<b>10754</b>	<b>237</b>	<b>2.2038%</b>	<b>40899</b>	<b>475</b>	<b>1.1614%</b>	<b>-47.3010%</b>
<b>Eleventh Circuit</b>							
Alabama							
Middle District	648	13	2.0062%	2,289	31	1.3543%	-32.4932%
Northern	2164	21	0.9704%	8,709	103	1.1827%	21.8728%
Southern	346	12	3.4682%	1,495	15	1.0033%	-71.0702%
Florida							
Middle District	4506	94	2.0861%	25,872	645	2.4930%	19.5069%
Northern	671	12	1.7884%	3,254	52	1.5980%	-10.6433%
Southern	2358	31	1.3147%	14,495	179	1.2349%	-6.0673%
Georgia							
Middle District	1348	19	1.4095%	4,549	47	1.0332%	-26.6976%
Northern	5461	101	1.8495%	23,846	471	1.9752%	6.7963%
Southern	862	14	1.6241%	2,442	42	1.7199%	5.8968%
<b>Total</b>	<b>18364</b>	<b>317</b>	<b>1.7262%</b>	<b>86951</b>	<b>1585</b>	<b>1.8229%</b>	<b>5.5997%</b>
<b>D.C. Circuit</b>							
District of Columbia	150	2	1.3333%	486	30	6.1728%	362.9630%
<b>Total</b>	<b>150</b>	<b>2</b>	<b>1.3333%</b>	<b>486</b>	<b>30</b>	<b>6.1728%</b>	<b>362.9630%</b>
<b>National Totals</b>	<b>163222</b>	<b>3456</b>	<b>2.1174%</b>	<b>728387</b>	<b>15847</b>	<b>2.1756%</b>	<b>2.7519%</b>

### Footnotes:

- <sup>1</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).
- <sup>2</sup> Section 418- Bankruptcy Fees. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).
- <sup>3</sup> The bankruptcy code revisions also failed to reflect many of the findings and recommendations contained in the Federal Judicial Center's Report to the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States.

- <sup>4</sup> The Fee Waiver pilot program operated from October 1, 1994, through September 30, 1997, in the Southern District of Illinois, the District of Montana, the Eastern District of New York, the Eastern District of Pennsylvania, the Western District of Tennessee, and the District of Utah. Following implementation of the pilot program, a survey and report were issued by the Federal Judicial Center<sup>[iv]</sup> The Federal Judicial Center Report recognized that the costs associated with implementation of a national program (in lost filing fees and additional personnel costs) could be between \$4.7 million to \$7.7 million per year, and that "the rate  
*footnotes continue on page 43*

**Findings Based on Audits Conducted During the Period FY 2004-2008<sup>2</sup>**

Description of Finding	Frequency of Occurrence
Asset not timely investigated, pursued, liquidated or collected	96
Inadequate supervision of professionals	41
Estate funds commingled with non-estate accounts	32
Untimely, inadequate, or no inventory of estate assets	22
Assets not secured or untimely secured	21
Undeposited funds found in estate file or other unsecure location	18
Trustee or staff cannot operate computer system	15
Trustee or auctioneer cannot account for all assets	6
Trustee does not actively supervise employees	6
Signature stamp not controlled by trustee or used to sign checks	5
Trustee not the sole authorized signer on estate accounts	3
Checks issued payable to cash or bearer	2
No computer security or access controls	2

help you conduct an honest appraisal of your systems and procedures. The correct answer for nearly every question on this form is “yes.” If you can honestly answer “yes” to the questions, your operation should be in good shape for an audit.

The next step is to review various documents to correct common errors and avoid repeating past mistakes. Since Form 1 errors are the most common finding, review your forms to ensure they are complete, accurate and up to date. In addition, verify the accuracy of UTCs. It is also a good idea to look at findings from past audits, field exams, and TIR reviews for areas to focus on to avoid repeat deficiencies.

Most important, do not wait until the auditor calls to prepare for the audit. Your normal office routine should include timely deposits, bank reconciliations, and pursuit of assets; supervision of staff and professionals; documentation of case progress reviews and asset administration decisions; protection of estate assets; and information security measures that limit unauthorized access to case management data, sensitive documents and personally identifiable information.

During the audit, it is important for the trustee to be present as much as possible. If section 341 meetings are scheduled on the date proposed by the auditor, it is advisable to ask the auditor to reschedule. However, in order for the audit to be conducted timely, the rescheduled date should be as close to the original date as possible.

It is also helpful to provide the auditors a

comfortable place to work and to show them where to find things in your office. Typically, the auditors are present for two to three days. We realize this may disrupt the normal functioning of your office, and we appreciate your cooperation.

**Conclusion**

Audits are an important oversight tool for the Program, and we take them very seriously. They are also an important tool for trustees, because they enable you to have an independent third party assess how well you and your staff are implementing internal control procedures and adhering to policies in the *Handbook*.

We hope that the information presented in this article will help you successfully prepare for your next audit. If you have any questions about the audit process, please contact your local U.S. Trustee field office. ▲

**Footnotes:**

- <sup>1</sup> These audits were conducted by the Department of Justice’s Office of the Inspector General prior to FY 2004.
- <sup>2</sup> These findings are organized in order of frequency. One finding, “assets sold to insiders or related parties,” is grounds for an “inadequate” opinion, but is excluded from the chart because there were no occurrences during FY 2004 through FY 2008.

— IFP Fee Waivers continued from page 41

could vary greatly according to the eligibility standard employed, the public’s and bar’s awareness of the program, the degree of scrutiny given the applications, and the overall chapter 7 filings.” The Report further noted that courts even within the same pilot district were divided over whether waiver of the filing fee should be prohibited when the debtor has paid an attorney. Nowhere in the report was it suggested that trustee fees be eradicated. The Report alternately suggested methods to fund a national program, which over time would have staggering costs, though none of its recommendations were incorporated into BAPCPA.

<sup>5</sup> In pertinent part, this section provides:

Under the procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981) applicable to a family of the size involved and is unable to pay that fee in installments. For purposes of this paragraph, the term “filing fee” means the filing fee required by subsection (a), or any other fee prescribed by the Judicial Conference under subsections (b) and (c) that is payable to the clerk upon the commencement of a case under chapter 7.

28 USC § 1930(f)(1).

<sup>6</sup> Data contained in this article is from a 12 month period from 7/1/08 to 6/30/09 and is here compared with the available data used in my prior article following enactment of BAPCPA for the 8 month period from 10/17/05 to 6/30/06.

<sup>7</sup> Source

<sup>8</sup> While this study could be more informative if the number of IFP applications made and subsequently denied were known, unfortunately such information is not available in many districts. This is not due to the lack of software available for this purpose, it simply is not being utilized by some districts, and therefore the ability to capture the true costs and policy implications of BAPCPA on fee waiver issues cannot be fully known. It is difficult to know whether the courts and trustees have been able to mitigate against this trend through careful review of waiver applications and objections/motions for reconsideration. In short, although trends appear to be worsening in terms of the costs of the policy, we simply do not know the extent of its impact.

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

### Lawless, Robert M

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**From:** David Ostrander <david@ostranderlaw.com>  
**Sent:** Thursday, July 27, 2017 1:27 PM  
**To:** consumercommission@abiworld.org  
**Subject:** suggestions

My current comments are primarily directed towards the bankruptcy forms that were revised (poorly, in my humble opinion) in, I believe, December, 2015. Here they are:

1. Incorporate secured debts into Schedule A/B in some manner (sort of back to the future as this is the design used years ago).
2. The age of the Debtor(s) should be listed SOMEWHERE (note, I am NOT suggesting that the date of birth be publicly disclosed in the bankruptcy documents, just the age).
3. If the Debtor is divorced, the year of the divorce judgment and the court location of the divorce.
4. A question about any real estate owned in the last 4 (FOUR) years and if so, what happened to it.

All for now. Thank you for your interest and efforts. David

PS: as you may have guessed, I am a Chapter 7 Trustee for the District Of Massachusetts (Springfield); about 20 years now.

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# AMERICAN BANKRUPTCY INSTITUTE

## Lawless, Robert M

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**From:** C.E. Petit <cepetit@scrivenserror.com>  
**Sent:** Thursday, April 27, 2017 6:31 PM  
**To:** Lawless, Robert M  
**Subject:** Some Thoughts on Consumer Bankruptcy Reform

... from the perspective of someone who represented consumers for years, and before that commanded military personnel (who often skirted the need for bankruptcy, but generally could not avail themselves of it because of the interaction between "bankruptcy filing" and "security clearance suspension"...):

(1) The schedules for consumers need to be made for ease of filling out by non-lawyers, not for ease of lawyers' reference. Further, they need at least an explanation at the top of each one in non-legalese for what should be on them. Yeah, Joe the Plumber understands what an "executory contract" is... and saying "if Joe the Plumber has any executory contracts, his lawyer will fill the form out for him" assumes the conclusion -- Joe won't tell his lawyer about something that Joe doesn't comprehend!

(2) There's no good reason that the schedules cannot be done in the form of a relatively comprehensive checklist via a web interface, that then prints out only the relevant parts. The continued assumption that all forms MUST be produced as if they will be filled out in badly-printed pen is ludicrous:

Every public library in the country, every courthouse in the country, and darned near every school in the country has public-access, internet-connected computers that could run a simple HTML5 script that doesn't transmit any information back (and, therefore, doesn't have any privacy issues). Of course printed forms and schedules can still be used, but even the military isn't so stuck in the past!

Building the schedules as input-based checklists that reformat for output is the way people have come to expect their taxes to be done; I recommend looking at the clean interface for TaxAct as a potential model. This would even be a useful starting point for bankruptcy practitioners...

(3) There should be an explicit cover sheet for consumers reminding them to declare pending insurance claims, pending legal and refund claims, and pending tax issues as assets -- or they'll risk losing out on them. Just this year, the Seventh Circuit alone has already issued several reported decisions in which consumers ran into trouble because they at least arguably didn't properly/fully disclose these sorts of things so the Trustee could do the Trustee things with them. This tells me that the instructions aren't good enough, either for practitioners or the public: If it was just occasional sloppiness, these wouldn't be reported decisions.

(4) Finally, a side issue. Healthcare providers (especially for mid- and longterm care) frequently try to pressure consumers by claiming that charges incurred for longterm care must be paid and doing everything they can short of falsely, explicitly saying that such charges aren't dischargeable to convince consumers/patients/families not to declare bankruptcy. That industry needs to have its suspenders snapped on this issue -- and, in particular, state licensing authorities for nursing-facility administrators need to be educated that this practice is misleading.

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C.E. Petit

<http://www.scrivenserror.com> <http://scrivenserror.blogspot.com>

This message may contain legal commentary. Unless specifically noted otherwise, such commentary is NOT intended as legal advice for any particular situation.

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

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October 31, 2017

Subject Matter: "Attorney fees Only Chapter 13's"

To Whom It May Concern:

I practice in the Southern District of Texas, Houston Division, and I have filed a number of these "attorney-fee only" cases allowing clients to finance every single dollar of attorney's fees in their case. These cases tend to be very successful and I am absolutely confident that this is an extremely viable practice, providing a successful option for many prospective clients who might otherwise benefit from a chapter 7 case but lack the immediate resources to pay for the service.

Notwithstanding the above, I do think it is very important that bankruptcy attorneys are candid when presenting the alternatives. I'm diligent to explain both consumer chapters of the bankruptcy code, their pros and cons, etc. It is no surprise that the questions from prospective clients inevitably turn to costs. They want to know whether there's an economically feasible option for them. I explain the costs of the Chapter 13 case and that the Trustee will pay those attorney's fees via their monthly payment in the Chapter 13 Plan. I compare the costs of a chapter 13 to a chapter 7 so they know precisely what they are getting into. I distinguish that the full balance of attorney's fees and costs have to be paid "prior" to a chapter 7 filing. Often enough, that statement generates a sigh, or visible disappointment registers in their faces until I present them with an attorney-fee only chapter 13 option.

I make no hints or allusions to ethical arguments some might think permeate this practice of attorney fee only chapter 13 cases. In other words, there is no talk of "making an effort to repay your creditors" or any hint whatsoever of self-righteous overtones or coercive tactics in discussing these two chapters. Clients are told that the Chapter 13 Trustee will make a monthly distribution to my office to satisfy their attorney's fees without interest, so that upon the conclusion of the case in three years, they will have a discharge of their debts listed in the case and their attorney's fees will be satisfied in full. They are often quite relieved that they don't have to make a direct payment to me for attorney's fees on top of a trustee payment. I see this revelation register on their faces all the time: "I can afford this!!" Further and more to the point, clients they have protection from creditor harassment via the automatic stay throughout their pending case. No upsetting calls!! The ability to reorganize in peace!! *THAT* is the fresh start clients have been searching for!!

If I had clients in these attorney's fee only cases voicing anger or displeasure with me, I assure you I would quit the practice altogether. But as I said at the outset, the feedback I've experienced has been overwhelmingly positive time and again! It's important attorney's talk dollars with prospective clients in terms that they can understand. There's no bait and switch. Give clients the facts and let them decide. It's my opinion that the majority of people don't want something for free, they just want truly affordable relief and access to justice!

Granted there will be some who argue: "why can't people simply save money up until they have the balance and then file?" Absolutely, they can and some do!! But I can guarantee you that the majority of the attorney fee only chapter 13 cases have logically concluded that there will always be another bill, another emergency to divert their savings, or another obstacle which prevents their efforts indefinitely.

A chapter 13 case lets this person take immediate pro-active steps to take their life in a positive direction financially. You don't need a life-coach or guru to explain to you that when this happens, all other facets of life come together so much easier.

Very Truly Yours,



Phillip H. Trueba

**Lawless, Robert M**

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**From:** John Pottow <pottow@umich.edu>  
**Sent:** Tuesday, November 21, 2017 1:53 PM  
**To:** Lawless, Robert M  
**Subject:** consumer commission

I had one recommendation: clarify that residential lessees get to stay in their apartments if they make reasonable provisions to cure arrears (365 suggests trustee could abandon).

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John A. E. Pottow,  
John Philip Dawson Collegiate Professor of Law,  
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**Lawless, Robert M**

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**From:** Steve Powrozek <spowrozek@LOGS.com>  
**Sent:** Tuesday, June 27, 2017 11:58 AM  
**To:** ConsumerCommission@abiworld.org  
**Subject:** Written Statement on Chapter 13 Debt Limits and request for oral time to speak at NACTT Meeting July 15th

Members of the ABI's Commission On Consumer Bankruptcy,

I am the Supervising Bankruptcy Attorney for Shapiro, Fishman & Gaché, LLP practicing in Tampa Florida who has represented National and Regional Mortgage Banking clients for over 15 years and I would appreciate the opportunity to speak for five minutes or less on this topic of chapter 13 11 USC 109(e) debt limits at the upcoming NACTT meeting July 15<sup>th</sup> from 4:00-5:00 pm in Seattle, Washington.

**Topic:** The chapter 13 11 USC 109(e) debt limits should be increased or eliminated to allow individuals the option to file under chapter 13 who have secured and unsecured debts of \$5,000,000 or less or just eliminate the debt limit altogether. The benefits of this would be shared by the Debtor and Creditor alike. The Debtor would be able to avoid the much higher costs of filing a chapter 11 case and retaining counsel to represent the DIP and will not have to prepare monthly or quarterly operating reports for the UST and will not have to pay UST quarterly fees. The Debtor still will have the election of filing under 11 if they seek to utilize chapter 11. The main benefit to the mortgage creditor stems from the orderly accounting provided by the Chapter 13 Trustee monitoring the flow of payments by the Debtor. Pre-confirmation and post confirmation individual chapter 11 cases bring unique issues which I believe chapter 11 was never meant to cover.

**Pre-confirmation chapter 11 issues:** Currently many individual chapter 11 case are filed by attorneys who lack the requisite knowledge to navigate chapter 11 for their clients. Sometimes the chapter 11 case lays doormat without a plan or disclosure statement being filed for over a year. Debts are not being serviced and the automatic stay is being abused and it is up to the creditor to attempt to obtain "adequate protection" pre-confirmation payments which often is nothing more than repayment of actual and necessary expenses advanced post-petition for taxes and insurance. In other cases, chapter 11 cases are properly filed with an intent to reorganize and reach confirmation.

**Post-confirmation chapter 11 issues:** Confirmation brings about a new set of issues in the individual chapter 11 case. Unlike chapter 13 the automatic stay expires upon confirmation a chapter 11 plan. Debtors and Creditors to continue to have post-confirmation disagreements about the actual implementation of confirmed chapter 11 plan terms which results in protracted unnecessary litigation over payment disputes. The proper forum to bring the dispute varies based on the intentions of the parties. Does a creditor take an aggressive stance and proceed with State court remedies and risk Debtor filing an adversary proceeding or motion for contempt? Should the creditor file a motion to compel Debtor to adhere to plan terms or just file a motion to dismiss the case? Compared to conduit chapter 13 jurisdictions where there is a Chapter 13 Trustee receiving and disbursing payments to ensure the Debtor in an individual chapter 11 is making plan payments directly to the creditors after the effective date of the plan there is no procedure to verify the Debtor is making timely plan payments and similarly that the creditor is actually implementing the correct chapter 11 terms correctly. In chapter 13 the Trustee would file a motion to dismiss upon default in plan terms or a notice of final cure payment if the Debtor preforms on the plan. In chapter 11 Creditors are on their own to determine how to proceed in the event of default by the Debtor and the Debtor is left to assume the creditor implemented the plan terms correctly.

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Often a post confirmation status conference is held which results in nothing more than the United States Trustee providing an update on monthly operating reports and status of payments of quarterly United States Trustee fees to the presiding Judge. This results in frustrating post-confirmation motions or adversary proceedings being filed post-confirmation in individual chapter 11 cases as chapter 11 was not meant to deal with these issues on the scale or magnitude seen in consumer chapter 11 cases. Often there are disputes involving lack of credit reporting, escrow changes and disputes, code enforcement issues, missing, short or returned payments and a basic lack of organization to process multiple loans which may have been crammed-down in a chapter 11 plan which may have been modified numerous times since originally filed and may have been modified in the Order confirming plan itself. All these post-confirmation individual chapter 11 issues could be handled in the context of chapter 13 if not for the 11 USC 109(e) eligibility issue as it has arbitrarily forced Debtor's into chapter 11.

**Conclusion:** By raising the chapter 13 eligibility debt limits or eliminating the limit altogether the Debtor would be given the option to utilize chapter 13 and keep costs down and increase certainty of payments being properly processed to the allowed claimants.

**Steve Powrozek, Esq.**

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**Statement of N. Neville Reid, Chapter 7 Trustee, to the Committee on Chapter 7  
for the ABI's Commission on Consumer Bankruptcy**

**September 14, 2017**

I am Neville Reid, a partner in the law firm of Fox Swibel Levin & Carroll LLP in Chicago, Illinois and the Co-Chair of its Bankruptcy, Restructuring and Creditors' Rights Group. I have been a Chapter 7 Panel Trustee for 23 years, and in that capacity have performed trustee duties in thousands of individual and corporate Chapter 7 bankruptcy cases.

I have been a member of the Board of Directors of the National Association of Bankruptcy Trustees for three years, and have served as Co-Chair of its Legislative Committee for the past two years. I have also served as Editor of the NABT's national journal and as a member of the NABT Amicus Committee. Recently, the Board selected me to serve as its Secretary for 2017-2018.

One of my main focuses as a member of the NABT Amicus Committee and the NABT Board has been to secure fair compensation for bankruptcy trustees. In addition to writing and arguing amicus briefs on behalf of trustees unfairly denied their commission compensation under the Bankruptcy Code, as Co-Chair of the Legislative Committee I have also worked closely with our Board, past NABT presidents, other national organizations and our outside lobbyists to draft and advance legislation in Congress increasing the fee paid to trustees in no-asset cases from its current \$60 per case to \$120 per case. Our collective efforts have culminated in our pending bill, HR 3553, which provides for the fee increase and is expected to be scheduled for hearings in October or November of this year. Notably, although the trustee fee increase is funded from an increase in the filing fee by \$60, the bill does not change the current rule which allows indigent debtors to pay the filing fee in installments or obtain a waiver of the filing fee altogether.

In addition to the excellent points made by my colleagues in support of the fee increase proposed in our bill, I would like to provide at least three additional reasons why the increase is so important and our bill should be enacted into law.

First, trustees incur substantial non-payment risk over extended periods of time in performing their fiduciary duties, and the fee increase, while not eliminating that risk, will lessen the financial burden of that risk. Trustees are required by law to investigate assets, many of which include potential litigation claims against parties that illegally received historical transfers from the debtor, such as fraudulent conveyances. Frequently, the targets of these investigations are well-funded and hostile parties unwilling to settle with the trustee until after they have forced the trustee to expend substantial time in protracted litigation, including expensive discovery disputes. There is usually not enough cash in the bankruptcy estate to adequately fund the trustee's investigation and litigation of these potential claims, and often the cases are too small to attract litigation funding from third parties. Finally, even if the trustee obtains a judgment and can collect on some of it or manages to liquidate other assets, the trustee usually does not seek full recovery of her fees and costs of administering his bankruptcy estate, just in order to enable her to make a distribution of estate funds to the creditors. The fee increase, as applied to the broad array of cases in which the trustee investigates assets but has to write off substantial time or collects nothing at all, will lessen the financial burden of those write-offs.

Second, the fee increase at least begins to correct an asymmetry in the bankruptcy system as between the trustee and similarly-situated professionals. The trustee compensation has been flat in absolute terms for over 20 years, but has actually declined in real terms due to the fact that it is not indexed for inflation and general prices have increased a total of 65% between 1994 and 2017. As one commentator has noted, there are very few professions in which a worker is expected to take on more tasks, as trustees have, and receive over 50% less in real compensation over 23 years of his or her career. By contrast, attorneys representing debtors in chapter 7 cases have seen increases in their fees at least since the enactment of BAPCPA. According to one study published in 2012 ( by Lois Lupica, a law professor at the University of Maine Law School), the mean

debtor attorney fees charged in no asset Chapter 7 cases increased by 48% since the enactment of BAPCPA.

Finally, the trustee fee increase achieves these aforementioned benefits without unduly burdening debtors. While the trustee fee increase is funded by a parallel \$60 increase in the Chapter 7 filing fee, debtors who cannot afford the overall fee will still have the ability as they do now to obtain approval of an installment plan to pay the filing fee over time, or a waiver of the fee, as circumstances warrant. From a broader, system-wide perspective, any incremental burden on debtors from the filing fee increase is more than offset by the continued substantial benefits they experience from the bankruptcy system and the work of trustees. In 2016, for example, Chapter 7 debtors in the aggregate filed petitions listing over \$137 billion in net general unsecured liabilities. The overwhelming majority of this debt has been or will be discharged, all to the debtors' substantial benefit. In addition, many debtors will continue to receive certain benefits from the trustees' investigative and asset collection efforts, in that net proceeds received from those efforts are first applied to the debtors' priority claims, which include tax liabilities that would otherwise be non-dischargeable. Each year, trustee collections result in payment of millions of dollars to federal, state and local taxing authorities, amounts which would likely not have been paid otherwise given that debtors typically have less ability, motivation or legal tools as trustees do to investigate and liquidate assets for the benefit of their creditors.

In conclusion, the proposed trustee fee increase will reduce (albeit not eliminate) some of the economic burdens imposed on trustees by an expanded set of statutory duties, without unduly burdening debtors.

# AMERICAN BANKRUPTCY INSTITUTE

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
THOMAS F. EAGLETON UNITED STATES COURTHOUSE  
111 SOUTH TENTH STREET - SEVENTH FLOOR SOUTH  
ST. LOUIS, MISSOURI 63102

CHARLES E. RENDLEN, III  
UNITED STATES BANKRUPTCY JUDGE

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## COMMENTS OF THE HON. CHARLES E. RENDLEN, III, AND ABIGAIL B. WILLIE TO THE AMERICAN BANKRUPTCY INSTITUTE COMMISSION ON CONSUMER BANKRUPTCY ON OCTOBER 10, 2017

### I. Introduction.

Good afternoon. I am Judge Charles Rendlen. I have presided on the U.S. bankruptcy court for the Eastern District of Missouri since 2006. Prior to that, I served as the U.S. Trustee for Region 13, and prior to that, I was in private practice in Hannibal, Missouri. I am joined today by Abigail B. Willie. Ms. Willie has served as my law clerk throughout my tenure on the bench. Her background includes serving as a law clerk to the U.S. Court of Appeals for the Eighth Circuit and as a law clerk to the U.S. District Court for the Southern District of Texas, and working in private practice in corporate insolvency and restructuring. We would like to speak today on the issue of judicial estoppel in light of the recent case of *Slater v. U.S. Steel* from the Eleventh Circuit. I will begin our comments, and Ms. Willie will conclude them.

### II. Judge Rendlen's Comments.

As this Commission is aware, judicial estoppel is the equitable doctrine that prevents a party from relying on a representation that is inconsistent with a representation made by that party in a prior proceeding. Recently, the U.S. Court of Appeals for the Eleventh Circuit, sitting en banc,<sup>1</sup> considered the test to be applied by the U.S. district court in determining whether judicial estoppel applies to a claim brought in district court by a consumer debtor, when that claim was omitted from the schedules filed in the debtor's bankruptcy case.

*Slater* held that the district court should not apply a bright-line rule in determining whether the debtor's omission of the claim in the bankruptcy proceeding judicially estops the debtor from asserting that same claim in a later proceeding. Rather, according to *Slater*, the district court should consider the totality of the facts and circumstances surrounding the omission, to determine the debtor's motivation in making the omission. This would ensure that the requisite mental state of culpability is established to support the application of the judicial

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<sup>1</sup> *Slater v. U.S. Steel*, 2017 WL 4110047 (11th Cir. Sept. 18, 2017)(en banc).

estoppel doctrine. In setting forth this standard, *Slater* stated that the district court should “not be blind” to proceedings in the bankruptcy court following the omission—particularly not to the bankruptcy court’s decision about whether to allow the debtor to amend the disclosures or reopen the case.

*Slater* is an important consumer case because it was decided en banc, offered considerable discussion on the purpose of judicial estoppel, and reversed the Eleventh Circuit’s previous precedent on this issue. That previous precedent resulted in any omission by the debtor being deemed to establish the intent to “make a mockery of judicial system”—a standard that could result in a severe consequence for a debtor who had no actual intent to mislead.

We are now presented with the issue: if the totality of the circumstances test requires that the district court consider the record in the bankruptcy court proceedings when determining whether a debtor is judicially estopped from asserting an omitted claim, how can the bankruptcy court—as an arm of the district court—be utilized to ensure that such record is clear and available?

### **III. Abigail Willie’s Comments**

Under *Slater*, the record of the bankruptcy court may be evidence in the district court’s determination of whether judicial estoppel applies to prevent a debtor from asserting a claim that was not scheduled or otherwise properly raised in the bankruptcy proceeding. In most cases, of course, the record of the bankruptcy proceedings reveals little about the reason that a debtor omitted a claim or the debtor’s intent in omitting the claim. It is common for a debtor to add a claim that was accidentally forgotten or mistakenly omitted. This is usually done while the case is still open. Many, if not most, later-included claims were omitted as a result of ignorance or negligence. In such circumstances, the bankruptcy record may be evidence of nothing more than the fact that the case was unexceptional.

However, when a debtor seeks to re-open the case to add a claim after the case is closed, the matter is more complicated. The court first must determine whether reopening the case is proper. If the reopening request is made under “suspect” circumstances—such as being made long after the closing of the case and while the debtor tries to assert the same claim in another forum—the best practice for the bankruptcy court may be to make a record of all relevant facts in its order on the motion to reopen. This likely would require a hearing on the motion to reopen, if the motion is contested. Taking evidence on the matter would allow the court to make findings of fact. Testimony of the debtor would be given and the court could consider the debtor’s intent and credibility. This extra step of a hearing and an order memorializing the court’s findings, while somewhat burdensome to the bankruptcy court, would make a record for the district court’s consideration on the judicial estoppel issue.

In addition, the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure, and the corresponding local rules, could be amended to add a streamlined procedure by which the district court could obtain the evidence that it needs from the bankruptcy court. A procedure could be established pursuant to which the district court could direct the bankruptcy court to prepare proposed findings of fact in the form of a Statement of the Record. In such Statement, the bankruptcy court would set forth all relevant events and facts known to the bankruptcy court regarding the omission of the claim, any attempt to later add it, and any findings of bad faith or abuse by the debtor made during the course of the case, or whether the debtor had the discharge revoked and why. The district court could then either accept the proposed findings of fact, or modify them, or reject them—but it would spare the district court from having to rely on the parties' interpretation of the bankruptcy events, or from having to hunt-and-peck through the bankruptcy record, to ascertain what is relevant.

Last, the Bankruptcy Code or the Bankruptcy Rules could be amended, to provide a uniform standard for determining whether the addition of a previously omitted claim was made in good faith. *Slater* demonstrates the need for such a uniform standard, as the Eleventh Circuit not only reversed its own precedent on the issue, but pointed to the different standards used in various Circuits. In some Circuits, the standard remains more bright-line, with any omission imputing bad faith intent, while other Circuits require that the debtor's actual intent be examined more closely. Further, it is not just the district court that may need evidence of the debtor's intent in making the omission and the amendment; for example, a case trustee may seek a determination of the nature of the debtor's intent when the debtor seeks to add previously omitted property, then seeks an exemption. The Code or Rules may be amended to include a standard for determining the debtor's intent to add an omitted claim—with such standard being consistent with *Slater*, such that the determination is based on the totality of the circumstances indicating the debtor's actual intent. Such a provision also could include a non-exhaustive list of factors to consider, such as the length of time that the claim has been omitted; the amount of the claim; whether the debtor had actual knowledge of the claim; the circumstances under which the omitted claim was discovered; the trustee's position on the issue of the debtor's intent; whether the debtor seeks to exempt the property in its entirety; and other relevant factors.

**Access to  
Justice Lab** | Center on the  
Legal Profession  
Harvard Law School



**Open Letter to the ABI Commission on Consumer Bankruptcy:  
Language Access in Bankruptcy Proceedings**

November 16, 2017

The Access to Justice Lab at Harvard Law School is engaged in a randomized control trial to investigate the effectiveness of legal assistance and financial counseling on consumers facing financial distress, including bankruptcy.<sup>1</sup> Through the course of our research and development of self-help materials for study participants, we have learned that federal bankruptcy court forms and information are not available in languages other than English. The lack of language access in bankruptcy court constitutes a significant access to justice gap in bankruptcy proceedings.

The federal government has acknowledged that bankruptcy proceedings are complex and that people who participate in them need a minimal level of support. To that end, it established the U.S. Trustee Program, which assists with some aspects of preparing for bankruptcy proceedings, including interpreting and translation.<sup>2</sup> In fact, the U.S. Trustee Program is *required* to do so. Federal agencies, including the Executive Office for United States Trustees—the office that oversees the U.S. Trustee Program—must comply with Executive Order 13166, which requires federal agencies and recipients of federal funding to provide language access to avoid discrimination on the basis of national origin.<sup>3</sup> As required by Executive Order 13166, the

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<sup>1</sup> More information about the Financial Distress Research Project is available on the Access to Justice Lab website, at <http://a2jlab.org/current-projects/signature-studies/financial-distress/>.

<sup>2</sup> “The United States Trustee Program is the component of the Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustees under 28 U.S.C. § 586 and 11 U.S.C. § 101, et seq.” <https://www.justice.gov/ust>

<sup>3</sup> *Improving Access to Services for Persons with Limited English Proficiency*, 65 Fed. Reg. 50,121 (Aug. 16, 2000), available at <https://www.gpo.gov/fdsys/pkg/FR-2000-08-16/pdf/00-20938.pdf>. See also *Lau v. Nichols*, 414 U.S. 563 (1974) (failure to provide language access constitutes national origin discrimination, in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.).

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Trustee Program has developed a language access plan that lays out its strategic goals for providing written and spoken language access to LEP individuals navigating the trustee process.<sup>4</sup>

Unfortunately, language access stops cold when bankruptcy proceedings begin in court. Paradoxically, limited English proficient (LEP) individuals seeking financial relief can move forward in a language they understand, but only up to the courthouse doors. With the disappearance of translated materials and interpreters, LEP parties must surmount the twin obstacles of dense legal procedure and language barriers.

State courts are required by the federal government to provide exactly this type of language access. After the promulgation of Executive Order 13166, regulations and guidance from the Department of Justice made clear that state trial courts are required to provide interpreters and translated written materials in whatever languages people need in order to understand their interactions with the courts.<sup>5</sup> Indeed, the Department of Justice has engaged in a number of enforcement actions against state court systems that fail to provide adequate language access.<sup>6</sup>

While federal law has been interpreted to require language access in federal executive agencies and state courts alike, that interpretation has not been uniformly extended to federal courts. Title VI does not apply to federal courts, as federal courts are ironically not considered recipients of federal financial assistance nor “federally-conducted programs.”<sup>7</sup> The question of

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<sup>4</sup> Executive Office for United States Trustees, *Language Access Plan for Implementation of Executive Order 13166* (2011), available at [https://www.justice.gov/sites/default/files/ust/legacy/2012/03/26/lang\\_assistance\\_plan.pdf](https://www.justice.gov/sites/default/files/ust/legacy/2012/03/26/lang_assistance_plan.pdf). The Bankruptcy Information Sheet, for example, has been translated into over fifteen languages. See <https://www.justice.gov/ust/bankruptcy-information-sheet-0>. No such language access plan or translation of instructions exists in the bankruptcy court system.

<sup>5</sup> See 28 CFR 42.104(b)(2); *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (2002), available at <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/DOJFinLEPFRJun182002.pdf>.

<sup>6</sup> The Department of Justice has conducted investigation and/or enforcement of state court systems in Arizona, California, Colorado, Hawai'i, Kentucky, Maine, Michigan, New Jersey, North Carolina, Pennsylvania, Rhode Island, Tennessee, and Washington State. “State Court Enforcement and Investigation Materials,” <https://www.lep.gov/resources/resources.html#SCGuidance>. See *Language Access Guidance Letter to State Courts from Assistant Attorney General Thomas E. Perez* (Aug. 16, 2010), available at [http://www.lep.gov/final\\_courts\\_ltr\\_081610.pdf](http://www.lep.gov/final_courts_ltr_081610.pdf) (admonishing state courts for slow implementation of Title VI requirements, noting court policies and practices that “significantly and unreasonably impede, hinder, or restrict participation in court proceedings and access to court operations based upon a person’s English language ability.”). See also Justice Index, mapping states’ promulgation of language access requirements in civil proceedings.

<sup>7</sup> “Activities wholly carried out by the United States with Federal funds . . . are not included in the list [of federally assisted programs]. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal ‘assistance.’ While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of title VI.” *U.S. Dept. of Transp. v. Paralyzed Veterans of America*, 77 U.S. 597, 612 (1986), quoting legislative history of Title VI, 110 Cong. Rec. 13380 (1964). The scope of Executive Order 13166 is limited to the executive branch.

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whether lack of language access is a violation of due process has been argued in federal court, with mixed results.<sup>8</sup>

One federal statute does make plain that language access should be available in bankruptcy courts: the Court Interpreters Act.<sup>9</sup> While this Act does not specifically mention written translations, it does require courts to respond to litigants' requests for interpreters "where possible, [by] mak[ing] such services available to that person on a cost-reimbursable basis."<sup>10</sup> On this narrower interpretation of language access, bankruptcy courts still fail. They do not provide certified interpreters as described in the law.

As the Commission considers recommendations for the future, including changes to court forms and notices, we urge the adoption of translated forms and certified interpreters in bankruptcy proceedings. Translation of vital documents<sup>11</sup> such as court forms is consistent with the spirit of due process, Title VI, and the fair administration of justice, and has the added benefit of improving efficiency and accuracy of court proceedings.

Thank you for your consideration.

Sincerely,

Erika J. Rickard, Esq.  
Associate Director of Field Research  
Access to Justice Lab  
erickard@law.harvard.edu

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<sup>8</sup> E.g., *Loyola v. Potter*, No. C 09-0575 PJH, 2009 WL 1033398, at \*2 (N.D. Cal. Apr. 16, 2009); *Fessehazion v. Hudson Grp.*, No. 08 Civ. 10665(BJS)(RLE), 2009 WL 2596619, at \*2 (S.D.N.Y. Aug. 21, 2009), abrogated on other grounds by *Fessehazion v. Hudson Grp.*, No. 08 Civ. 10655(BSJ)(RLE), 2009 WL 2777043 (S.D.N.Y. Aug. 31, 2009); *In re Morrison*, 22 B.R. 969, 970 (Bankr. N.D. Ohio 1982) (holding that the Constitution did not require appointment of an interpreter in a bankruptcy case because no fundamental right was at stake). See generally Laura K. Abel, *Language Access in the Federal Courts*, 61 DRAKE L. REV. 593 (2013) (examination of due process rights to LEP litigants in criminal and civil proceedings in federal courts, including bankruptcy court), available at <http://ncforaj.org/wp-content/uploads/2013/12/abel-ncaj-language-access-federal-courts.pdf>.

<sup>9</sup> 28 U.S.C. § 1827 (2006).

<sup>10</sup> *Id.* at § 1827 (g)(4). The Act provides greater language access obligations in proceedings initiated by the federal government. In other proceedings, the court can charge the litigant for the cost of the interpreter. In practice, this provision of certified interpreters, even reimbursed by the litigants themselves, is not followed.

<sup>11</sup> In the context of courts, "vital" documents include "court forms, consent or complaint forms, notices of rights, and letters or notices that require a response." Department of Justice, *Language Access Planning and Technical Assistance Tool for Courts* 2, 13 (2002), [https://www.lep.gov/resources/courts/022814\\_Planning\\_Tool/February\\_2014\\_Language\\_Access\\_Planning\\_and\\_Technical\\_Assistance\\_Tool\\_for\\_Courts\\_508\\_Version.pdf](https://www.lep.gov/resources/courts/022814_Planning_Tool/February_2014_Language_Access_Planning_and_Technical_Assistance_Tool_for_Courts_508_Version.pdf). See also *Guidance to Federal Financial Assistance Recipients*, *supra* n. 5.

# AMERICAN BANKRUPTCY INSTITUTE

## Lawless, Robert M

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**From:** Keith Rucinski <krucinski@ch13akron.com>  
**Sent:** Friday, June 30, 2017 1:47 PM  
**To:** ConsumerCommission@abiworld.org  
**Subject:** Comments for Consumer Commission

I am not able to attend the public hearing in Seattle, but wanted to offer some observations. So, in no particular order:

The full means test is not really useful in Chapter 13. The three year (below median income) and five year (above median income) is helpful. After *Lanning* most means test can be rebutted with any reasonable change in circumstances reflected on schedules I and J. A lot of counsel fail to complete the means test correctly and cannot rebut with real changes. The Chapter 13 trusteeship spends a lot of time fixing the means test for counsel as not doing so would be detrimental to the debtors. Once we know the applicable commitment period, Schedule I and J should control. The fiction of using real numbers and IRS standard is not a good bench mark of what a debtor can repay – real expenses are a good benchmark. This process of having counsel prepare the means test and having the trustee review the means test is a waste of resources. I really think trustees and judges know what is reasonable in their areas.

The means test may be useful in Chapter 7 for 707B reviews for abuse.

Modify 1322(d) to allow plans to go longer than five years with permission of the court. For Akron, most plans go 60 to 65 months. We have about a 65% discharge rate and an average unsecured dividend is 35%. Allowing some reasonable extension helps both the debtors and creditors. I have seen some recent case law where courts stay focused on the 60 month as a deadline – other courts do not. Would be helpful to clearly give the court discretion to allow plans to go longer than 60 months.

Strengthen 109(G)(1) to deter abusive serial filers. A six month bar is not long enough for creditors to pursue state court foreclosure. The bar should be at least two years if the court agrees the debtors actions in continuing filing bogus Chapter 13 plans is abusive. (We ask for one or two year bars or in rem on the property after three abusive filings using 109g1 and 105, but really could be stronger if 109g1 is amended).

Eliminate credit counseling. It comes too late for most debtors on the verge of filing bankruptcy. Keep the personal financial management course (I teach the course personally and also sponsor an on line program through the Trustee Education Network) as I think the financial course helps people complete their plan. Require the course to be taken within six months of filing to help debtors with their plans – we do this and have the support of most of our local counsel.

Double the secured and unsecured debt limits. Akron has about 20% self employed/business cases ranging from a simple 1099 contractor to full fledge small businesses. If a small business owner cannot file Chapter 13 then they are forced into Chapter 11 with high administrative costs and lower returns to parties. I could not do some cases over the years, not do to the cases being complex, but simply barred by the debt limit.

Allow guarantees of student loans to discharge that guarantee in Chapter 13 as an unsecured debt as other guarantors can do. Most of these guarantors are mom, dad, grandparents, etc. I am convinced after talking to these people that they had no understanding of what they were signing. Really “no meeting of the minds” and equal bargaining power of the parties, *University v. Mom and Dad*. I had one debtor tell me they would have to continue to file Chapter 13 “until they die” as they cannot repay the student loan which they signed as a guarantor. I think the debtor was about 70. I see a lot retired people listing guaranteed student loan debt as the primary reason for filing Chapter 13.

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

Allow the primary party of the student loan debt (the student) to do a ten year Chapter 13 plan. Trustees could monitor the income. Similar to the income contingency plan, but no cost to the federal government since the debtor pays the trustee fee, the debtor has a finite end time, and no tax consequences in bankruptcy for discharged debt as there is in programs outside bankruptcy. If other debt needs serviced in the plan, pay that debt first, and the balance to the student loan. So, say a debtor has a 3 year applicable commitment period, that debt would be paid first and the student loan would get the same dividend as other creditors in the first three years. The balance of the plan, 7 years, all funds go to the student loan creditor.

New schedules are still too new. I do not find all the info useful, but perhaps others may. I would suggest reviewing once schedules have been used for five years.

I would ask the commission to be skeptical of comments that the trustees ask for too much documentation. We use a portal system as it is more secured. We allow counsel to choose their own password. Good counsel supply documents and can back up their plan. Other counsel just write down "what the debtor told me" and have no verification process. Not asking for much here, but when we get car insurance info, we would like to see it match the cars on the petition. We review bank statements for unusual transactions (large cash withdraws, trips to the casino, etc.) If a bank statement shows large transfer to/from another account, we really need to see that other account also. In essence, whatever counsel used to put petition together, we also need to see. Most good counsel will do this and supply the info timely – their 341s last about 10 minutes as we reviewed everything ahead of time. Counsel who do not supply info or bring the info for the first time to the 341 meeting end up having a 30 minutes plus hearing. I was once told I ask more questions than the other trustees – well, it that particular case when I asked the debtor if the information in his petition was correct, he said "no". It was a much longer hearing than normal.

We use a "No Look Budget" as a guide to help debtors with reasonable expenses in our areas. We developed the guide by having the Chapter 13 staff track their expenses for a month, averaged the amounts, and added 20% for cushion. Not all line items apply in every case and if one line is high and others are not, we do not make that an issue. Counsel in our area seem to appreciate the line item. I would encourage other locations to give this concept a try.

We went to conduit mortgage payments last year. The usual argument about the trustee fee was raised. I had a graph prepared of the total Chapter 13 trustee fees for the last six years vs. the amount of attorney fees paid to counsel through the plans. In each year, attorney fees exceed trustee fees by \$500,000 or more. Since we went to conduit, our average unsecured dividend increased from 33% to 35%. One motion for relief from stay and the debtor has to pay creditor counsel fees, debtor counsel fees, and penalties. Just one relief from stay often exceeds the amount of the trustee fee for the duration of the case. Also, debtors are not subject to a late monthly payment fee as the conduit payment is deemed timely made. Lastly, the trustee files a notice to deem the mortgage current when the debtor completes the plan. I am not in favor of a two tier trustee fee – one for mortgage and one for other debt. The trustee fee will become lower over time as more conduits come into the plan and case filings increase. I have had our good counsel go from conduits to putting everything in the plan: conduit property taxes, car payments, mortgage etc. They tell me it is easier for the debtor to just make one payment. These counsel get the big picture – get the debtor to a discharge and do not worry about a small trustee fee, especially if the debtor is discharging thousands of dollars in unsecured debt.

I would support a change to the code allowing the debtors to complete earlier than their applicable commitment period if funds are other than wages. In our area debtors have used exempt funds, gifts (person making gift has to file affidavit with court), inheritance, or sale of property already disclosed on petition and included in 1325a4 equity calculation. The debtors has to file a motion to modify, serve all creditors, and state the source of the funds allowing completion. I generally negotiate these early payoffs and the dividend to creditors is usually above 70%. I would not support a debtor wanting to pull funds from a 401K loan to pay creditors a low percentage. The debtor has to show that the early payoff provides a better return to creditors than they can get by letting the debtor make payments for the applicable commitment period. Usually the debtor has to be more than half way through the plan for the Trustee to support.

## AMERICAN BANKRUPTCY INSTITUTE

Encourage courts to set up committees with the local bar association to review attorney fees on a scheduled basis. Good counsel should be paid for their work. In Akron we have a \$4,000 no look fee for counsel (and the right to opt out and itemize in any particular case). I have participated in past committees and always supported reasonable increases in fees. Reasonable compensation keeps good counsel in the practice area – and that is good thing for the debtors, the trustee, and the court.

I think ABI should do a study polling the end users, the debtors, of the bankruptcy process. I think we sometimes forget we are in our service business, and the debtor is the main customer. What did they like about the process, dislike about the process. Having taught the personal financial course since 2008, I have found the give and take at the class has made me a better trustee in understanding budgets and the issues the debtors face from their side of the fence.

I hope that some of the observations are helpful. If further information is needed, please contact me.

Thank you.

Keith L. Rucinski, CPA, JD  
Chapter 13 Trustee  
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### Student Loans in Chapter 13

Student loans are considered “non priority unsecured debt” in Chapter 13 bankruptcy matters. But student loans are one of the types of debt that is completely nondischargeable absent filing an adversary petition. Accordingly, student loan debt should be viewed, and treated, differently than other non priority unsecured debt. Doing so would not be unfair to other unsecured creditors, since there is already a different standard that is applied to this debt.

There are several approaches to consider in addressing this issue.

First, changing the classification of student loans to “priority” unsecured claims is justifiable. Other priority claims, such as taxes, alimony, and child support are generally similarly nondischargeable. There are public policy considerations to ensuring that those debts are paid. The same is true for student loans, which Congress expressly made nondischargeable except in certain circumstances and only in an adversary proceeding. The big difficulty with this change is that currently, all priority debts must be fully paid within 5 years; a time frame that is frequently impossible for student loan debt. Accordingly, if this change is implemented, the rule requiring full payment in 5 years should be modified to reflect the applicable payment plan for the student loans.

Second, even absent a rule change, debtors’ attorneys should be encouraged to file plans that separately classify student loans pursuant to §1322(b)(1). Judges can and should use their discretion to approve plans with favored treatment of student loan payments. Currently, case law generally holds that generally, the nondischargeable nature of a debt, without more, is insufficient to discriminate in favor of a student loan payment. However, there are a variety of factors that are common in most student loans that will often tip the balance in favor of separate classification.

Third and finally, debtors’ attorneys should make use of the Chapter 13 payment plan to address income-sensitive repayment (ISR) plans for student loan debt. Including an ISR payment plan for the student loan debt in the “Nonstandard Plan Provisions” section is a small but effective way to streamline the payment obligations of the debtor. A court can then approve a plan that actually includes payments toward the student loan debt, permits the debtor to enroll in an income-sensitive payment plan, and administers the student loan payments through the plan payments to the Trustee’s office. While this applies only to ISR-eligible, federally-backed debt, it is still a valuable way to address the chasm between the public policy of prioritizing payment of student loan debt and the “non priority” classification.

**WILLIAM G. SCHWAB, TRUSTEE**  
**ABI TESTIMONY**  
**September 15, 2017**

Good afternoon. My name is Bill Schwab I am a trustee from the Middle District of Pennsylvania. The district in which I practice is mainly rural and has frequently been referred to as the red neck T in Pennsylvania. I am the only board-certified business bankruptcy attorney in the district. My practice is a general practice where I also do estate planning, estates and act as the school solicitor. Bankruptcy must carry its own weight in the office. This year with IFP's I made less than \$500 a month for two months – it's been less than \$6,000 for the year so far. If I relied on no asset bankruptcy cases alone, I could not maintain an office let alone make a living. My fees as attorney for the trustee provides another income stream. To do my trustee duties I need to wear two hats or economically the system would suffer. I bring the perspective of the rural trustee.

One of the things that I want to discuss today is the non-compensated duties and activities that trustees do that becomes doable only because I am also appointing myself as attorney for the trustee—a role in which I recognize that I will get compensated for approximately only 58 percent of my billable hours doing attorney for trustee and 58 percent reflects the actual write down in 2016. Trustee time write down is higher.

In the last year I have had the FBI in my office for no less than 60 hours reviewing books and records of debtors on criminal referrals that were made by me. I have been subject to interviews by Assistant US Attorneys in the district on a least three occasions this year. I have become effectively his expert to explain the bankruptcy process with no compensation.

Last year for example I discovered that the principle of a corporate debtor in a converted Chapter 11 had diverted checks payable to the debtor to his private bank account. The man is serving 18-24 months for bankruptcy fraud and \$200,000 in restitution that was negotiated to go to two priority creditors.

And in yet in another case I was involved in a multidistrict bankruptcy in which assets were diverted between three estates. The result is the principle is serving 2-4 years. There was a \$600,000 in restitution.

These are the fancy cases. Many of our criminal referrals result in restitution orders that will be collected outside the bankruptcy system and in which I get no commission, but still benefit creditors.

But part of our job as trustee is also to uphold the integrity of the bankruptcy system. As a result I also frequently monitor debtor's attorneys and their activities.

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

In recent cases I have had a national law firm debtor's attorney who tell me "we don't require debtors to sign petitions and schedules before we file them." I've now been asking for wet copies from this attorney and notwithstanding he knows the request is coming has had two of his clients sign the schedules and petitions in the meeting room. How can I rely on the data as filed? Appropriate motions are being filed with the court with no money in any of the cases. As attorney for trustee, I am seeking sanctions only to preserve the integrity of the system. I do not expect to see a dollar for this.

We frequently also have to bring 727 actions where I have object to discharges. What attorney would accept me as a client when I have to tell him or her, there is no money in the case.

One recent case was where person sold a free and clear mobile home four days after the bankruptcy was filed and then spent the vast majority of the money she received, leaving the innocent purchasers who it spent their entire life savings holding the bag. My representation will go uncompensated for the 727 action. There is not enough money involved for a criminal prosecution.

Where I'm located I have only a few creditor bank the attorneys and they dabble in bankruptcy. If I want competent counsel, I have to represent myself or have to go to Philadelphia to hire counsel at \$4-500 per hour. In the smaller asset case how can I afford an average fee of \$75-250,000 which is what I've been charged in larger cases? They don't discount fees. In short without me being both trustee and attorney for trustee only the larger cases will be administered.

Finally many people know me for the Supreme Court case of Schwab v Reilly which involved exemptions conflicts decision throughout the nation. It was a case that involved \$16,000 of deli equipment. That case would never of been brought and the conflict would not have been resolved unless I was able to be both trustee and attorney for the trustee. It was another uncompensated duty I performed.

Thank you for giving me time to speak.

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April 17, 2017

[ConsumerCommission@abiworld.org](mailto:ConsumerCommission@abiworld.org)  
ABI'S COMMISSION ON CONSUMER BANKRUPTCY

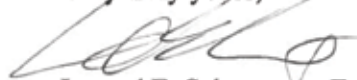
Re: Bankruptcy

Dear Commissioners,

I am an attorney who has specialized in bankruptcy since 1980. I am a Chapter 7 panel trustee for the past 13 years. These are my comments on some of the topics.

1. Student loans. The requirements for litigation for the discharge of student loans is onerous. The debtors most in need of relief are the parties who cannot afford attorneys. This leaves these debtors unrepresented and unable to pursue any relief.
2. Attorneys. Appearance counsel has worked in many consumer cases. It is a means of reducing the cost to consumer debtors.
3. Chapter 7 Trustees. Compensation is a problem. The minimum commission of \$60 hasn't been raised in years. The expansion of fee waivers for low income debtors has increased eliminating even the minimum commission. The system works only because there are a few cases which, in effect, pay for the private trustee system.
4. Surrender of collateral. It takes many under-secured creditors years to foreclose on residential property leaving the debtor or the bankruptcy estate subject to continuing costs (HOA dues, taxes) and liabilities. I have been short-selling these properties.

Very truly yours,



Lenard E. Schwartz, Esq.

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

CERTIFIED SPECIALIST -  
BANKRUPTCY LAW  
THE STATE BAR OF CALIFORNIA  
BOARD OF LEGAL SPECIALIZATION

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### ABI COMMISSION TESTIMONY OF WAYNE A. SILVER

April 30, 2017

Good morning- I'm Wayne Silver. I've been practicing bankruptcy law in the Northern District of California for more than 30 years. I chair the California State Bar's Bankruptcy Law Advisory Commission.

My practice of late focuses on bankruptcy litigation including bankruptcy crimes, and that's where I will confine my comments.

The challenge debtors' and their bankruptcy attorneys face in the litigation arena is the systemic bias against them. The deck is stacked in favor of creditors, and it's not fair. Let's face it. Most debtors can barely scrape together a minimum fee to pay a competent bankruptcy attorney. Their limited funds cover preparation of the bankruptcy schedules, an appearance at the meeting of creditors, maybe a lien strip or reaffirmation.

But what happens when a well-heeled creditor files a non-dischargeability adversary proceeding against a debtor? Or when a debtor has to defend an 11 U.S.C. 727 action for denial of discharge brought by the U.S. Trustee, perhaps where the civil action is also a discovery tool for a parallel but undisclosed criminal investigation?

There is no safe harbor in the Federal Rules of Bankruptcy procedure to level the playing field for debtors – they are treated the same as any other litigant in federal court. That's because most of the Federal Rules of Bankruptcy Procedure adopt the Federal Rules of Civil Procedure ("FRCP") verbatim. That means all of the FRCP 26 initial disclosure rules apply, including the rules covering electronically stored information ("ESI")<sup>1</sup>. Add all of the FRCP 16 pre-trial rules, and the debtor (and often her bankruptcy attorney), are suddenly overwhelmed. These are serious legal matters, and debtors should have access to qualified legal counsel to assist them. There are two things that could be done to address these problems.

First, provide a streamlined discovery and pre-trial procedure in non-dischargeability and denial of discharge adversary proceedings, and make that streamlined procedure the default in consumer debtor cases.

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<sup>1</sup> ESI has made discovery more complicated and expensive. Often an ESI expert must be retained to deal with emails, text messages, voicemails, computers, smart phones, social media, and the like.

April 30, 2017

ABI Commission Testimony of Wayne A. Silver

Page 2

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Next, incentivize qualified attorneys to represent debtors in these kinds of cases. For example, how about awarding attorneys' fees to the debtor if he or she prevails, and making sure the award is payable in "new money," not just added to the creditor's claim. Or allocating a portion of bankruptcy case filing fees (or Chapter 11 U.S. Trustee fees) to fund a legal services program that provides litigation counsel to debtors?

A few ideas to deal with a difficult issue.

Thank you.

**Lawless, Robert M**

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**From:** A Thomas Small <tomsmall@nc.rr.com>  
**Sent:** Monday, December 11, 2017 6:59 PM  
**To:** Lawless, Robert M  
**Subject:** Recommendations for ABI Consumer Commission

Bob,

I am writing to follow-up on our recent conversation regarding two recommendations I would like to make to the ABI Consumer Commission. The first involves a proposed statutory change to the Bankruptcy Code to allow bankruptcy judges to protect the privacy of an individual's mental health information. The second is a suggestion that the Commission include in its report as a "best practice" the mental health program adopted by the Bankruptcy Court for the Eastern District of North Carolina.

**Proposed Amendment to 11 U.S.C. § 107**

A debtor's mental health is not infrequently an issue in a bankruptcy proceeding. For example, a debtor might claim that her chronic depression precludes her from maintaining employment and, as a result, it would be an undue hardship to her not to have her student loan discharged. A debtor, however, may be unwilling to raise a mental illness defense, if that information will become part of the public record in the bankruptcy case. In many circumstances outside of bankruptcy the privacy of an individual's health information is protected, but not so in a bankruptcy case. Section 107(a) of the Bankruptcy Code provides that, with limited exceptions, papers filed in a bankruptcy case and dockets of a bankruptcy court "are public records and open to examination by any entity at reasonable times without charge." Section 107(b)(1) provides protection with respect to trade secrets or confidential research, development or commercial information and section 107(b)(2) protects persons with respect to scandalous or defamatory matters. My proposal is that Bankruptcy Code section 107(b) also protect the mental health information of individuals.

Specifically, I recommend adding a subsection to section 107 as follows: "(b)(3) protect an individual with respect to information regarding the individual's mental health." If section 107 is amended, Rule 9018 of the Federal Rules of Bankruptcy Procedure should be amended as well.

**EDNC Mental Health Project as a "Best Practice"**

A debtor's mental problems may be an issue in a bankruptcy proceeding or they may affect the administration of the bankruptcy case. Several years ago the Bankruptcy Court for the Eastern District of North Carolina initiated a mental health project to address some of these mental health issues. The program has essentially two components, one involves mental health evaluations when mental illness is an issue in a proceeding and the other is educational.

A defense of mental illness is not easy to prove without the expert testimony of a mental health professional. The problem for most debtors, however, is that they cannot afford to hire a mental health professional as an expert witness. The mental health program in the Eastern District of North Carolina allows debtors who cannot afford to hire an expert to ask the court to appoint an expert from a pro bono panel of mental health professionals who will perform a mental health evaluation and provide expert testimony as the court's witness. The professionals can give their opinions on the debtor's ability to maintain employment, the debtor's ability to make financial decisions and provide any other information that may be relevant to the proceeding.

The educational component of the mental health project provides information to lawyers and their clients about many aspects of mental illness, including symptoms and available resources for treatment and assistance. The project committee developed a mental health brochure that provides this information, and the brochure is available to debtors

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through lawyer's offices, at debtor education classes and at meetings of creditors. For more information about the Mental Health Project please see the bankruptcy court's website at [www.nceb.uscourts.gov](http://www.nceb.uscourts.gov).

I hope this is helpful. Please let me know if you have any questions.

Best wishes,

Tom

A Thomas Small  
US Bankruptcy Judge EDNC retired  
[tomsmall@nc.rr.com](mailto:tomsmall@nc.rr.com)  
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919-782-6696

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

### Lawless, Robert M

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**From:** Robert S. Thomas <rthomas@ch13balt.com>  
**Sent:** Thursday, May 04, 2017 5:10 PM  
**To:** ConsumerCommission@abiworld.org  
**Subject:** FW: Topic Submission to the ABI Commission Chapter 13-student loans

I response to an email from Robert Lawless –

The topic is very interesting as I think they should also look at including an allowable expense on the means test and schedule J. Many parents are required to fill out the FAFSA forms that assume most students up to the age of 24 are dependents and the parents are assumed to provide financial support through an expected family contribution “EFC”. Yet - this assistance is deemed not a reasonable expense under the Code, by many Courts and Trustees - which ignores reality and other Federal Statutes. The age should be increased to 24 for dependents – this would be in line with IRS –dependency regulations and the FAFSA and the amount attributable for educational expenses should be increased and expanded to trade or college tuition and expenses.

A priority treatment is possible, however I think it would render plans un feasible given that the large amounts.

1322 treatment and classification is likely the most workable. Providing for treatment and classification like “unsecured claims with co-debtors” or discriminatory treatment because they are nondischargeable

**Robert S. Thomas, II**  
**Chapter 13 Trustee**  
300 E. Joppa Road, #409  
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[rthomas@ch13balt.com](mailto:rthomas@ch13balt.com)

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**From:** Robert S. Thomas  
**Sent:** Thursday, May 04, 2017 11:43 AM  
**To:** Lawless, Robert M  
**Subject:** Re: Topic Submission to the ABI Commission

Thanks. I will be happy to because I don't think people see the connection.

**Robert S. Thomas, II**  
**Chapter 13 Trustee**

On May 4, 2017, at 11:31 AM, Lawless, Robert M <[rlawless@illinois.edu](mailto:rlawless@illinois.edu)> wrote:

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If you would like to write something up about this – even an email is fine – feel welcome to send it [ConsumerCommission@abiworld.org](mailto:ConsumerCommission@abiworld.org). Materials received on that account are also circulated to everyone.

Bob

---

**From:** Robert S. Thomas [<mailto:rthomas@ch13balt.com>]  
**Sent:** Thursday, May 04, 2017 5:50 AM  
**To:** Lawless, Robert M <[rllawless@illinois.edu](mailto:rllawless@illinois.edu)>  
**Subject:** Re: Topic Submission to the ABI Commission

Thanks - Robert. The topic is very interesting as I think they should also look at including an allowable expense on the means test and schedule J. Many parents are required to fill out FASFA forms that assume most students upto the age of 24 are dependents and the parents are assumed to provide financial support through an expected family contribution. Yet - this assistance is deemed not a reasonable expense under the Code, by many Courts and Trustees - which ignores reality and other Federal Statutes.

A priority treatment is possible, however I think it would render plans unfeasible given that the large amounts.

1322 treatment and classification is likely the most workable.

**Robert S. Thomas, II**  
**Chapter 13 Trustee**

On May 3, 2017, at 10:26 PM, Lawless, Robert M <[rllawless@illinois.edu](mailto:rllawless@illinois.edu)> wrote:

Mr. Thomas:

Thank you for your second submission to the ABI Commission on Consumer Bankruptcy. It probably won't surprise you to learn that student loans are popular topic in these submissions. It really helps to confirm the depth of opinion on the topic.

Bob

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Robert M. Lawless  
Max L. Rowe Professor of Law  
Co-director, Program on Law, Behavior & Social Science  
University of Illinois College of Law

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

### COMMENTS TO ABI'S COMMISSION ON CONSUMER BANKRUPTCY

Judge Deborah L. Thorne  
United States Bankruptcy Court for the Northern District of Illinois

November 10, 2017

#### 1. Chapter 7 Attorney Fees.

“No money down” chapter 13 bankruptcy filings have become more frequent. According to several reports, many consumer debtors in need of chapter 7 relief are unable to file because they do not have sufficient funds to pay the attorneys’ fees and filing fees. Although they are not trying to save a car or a home, they elect to file a chapter 13 case with an attorney that will take the case with no money down and accept fees during the life of a plan. If these debt-laden debtors were able to file a chapter 7 case, they would receive their discharge in approximately 45 days, but now must wait for three or five years to complete a chapter 13 plan.

In Chicago, chapter 7 cases require approximately \$1,500 in attorney’s fees and these fees must be paid prior to the petition date. If the fees are not paid before the petition date, the debtor’s attorney risks not being paid because the fees are a prepetition obligation and the automatic stay prevents collection of prepetition claims post-petition. For many debtors, the only way to finance the filing of a chapter 7 case is to file a “no money down” chapter 13. The fees can then be paid over 3 to 5 years. In Chicago and in many other jurisdictions, the court will approve a “no-look” \$4,000 fee for a chapter 13 case.

No look chapter 13 cases which are filed because the debtor needs to “finance” the attorneys’ fees over the length of the chapter 13 plan have been permitted. *See Berliner v. Pappalardo (In re Puffer)*, 674 F.3d 78, 83 (1st Cir. 2012) (rejecting a *per se* rule and remanding case back to bankruptcy court for consideration of the “totality of the circumstances”); *Brown v. Gore (In re Brown)*, 742 F.3d 1309 (11th Cir. 2014); *Sikes v. Crager (In re Crager)*, 691 F.3d 671 (5th Cir. 2012).<sup>1</sup>

According to *ProPublica*,<sup>2</sup> no money down chapter 13 bankruptcy cases are often filed when relief under chapter 7 would be appropriate and are more frequently filed by African American

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<sup>1</sup> Although not all Circuits have expressed an opinion yet, many bankruptcy courts have also expressed a reluctance to apply a *per se* rule and instead apply a totality of the circumstances test. *See, e.g., In re Tyrand Banks*, 545 B.R. 241 (Bankr. N.D. Ill 2016); *In re Wark*, 542 B.R. 522, 534 (Bankr. D. Kan. 2015); *In re Barnes*, 2013 Bankr. LEXIS 161, 2013 WL 153848 (Bankr. E.D.N.C. Jan. 15, 2013); *In re Platt*, 2012 Bankr. LEXIS 5407, at \*9, 2012 WL 5842899, at \*2–3 (Bankr. S.D. Ind. Nov. 19, 2012); *In re De Rua*, 2009 Bankr. LEXIS 4497, 2009 WL 8712394 (Bankr. E.D. Cal. Oct. 14, 2009).

<sup>2</sup> Paul Kiel & Hannah Fresques, *How the Bankruptcy System Is Failing Black Americans*, PROPUBLICA (Sept. 27, 2017), <https://features.propublica.org/bankruptcy-inequality/bankruptcy->

debtors than by white debtors. *See also* Pamela Foohey et al., “No Money Down” Bankruptcy, 90 S. CAL. L. REV. 1055, 1099–1103 (2017). Debtors needing to “finance” their bankruptcy case attorneys’ fees often pay \$2,000 to \$2,500 more than they would have paid had they been able to afford to file a chapter 7 case, and this does not include the commission paid to the chapter 13 trustee for administering the case primarily for the payment of the attorneys’ fees. Both the *ProPublica* and the “No Money Down” articles point out the frequency of use of “no money down” chapter 13 cases by debtors of color.

The Code should be amended to allow the payment of chapter 7 attorneys’ fees in installments over time and post-petition. This would provide better access to justice for low-income debtors who would be able to obtain a chapter 7 discharge. The fees could be determined to be non-dischargeable and thus, counsel would be protected. The Commission might also want to consider the possibility that at a discharge would not be entered until there was a certificate of counsel that the fees had been paid. With these provisions changing the Code, the attractiveness of a “no money down” chapter 13 solely for the payment of attorneys fees would disappear.

2. Credit Counseling and Financial Management Course.

The requirement to take these courses is a ridiculous impediment to debtors and is one more roadblock placed in the Code to make it difficult for debtors to succeed to discharge. I was recently curious about the Credit Counseling course, so I signed up. The on-line nature of the course is designed to make the debtor fill in a budget (which must consume 30 minutes of time). Once the 30 minutes have expired and the budget is filled in, the instructor sends back comments to the proposed budget, which is very similar to Schedules I and J of the Official Forms. After several minutes of reviewing my budget, the on-line instructor suggested that I get a roommate to offset the mortgage expense. For most debtors, however, circumstances are very dire and the reason they want or need to file bankruptcy is that they do not have enough money to make ends meet. Learning how to budget is most likely not the cure for a single, Chicago mother who lives off of a minimum-wage job and is clearly below median. Requiring the 30-minutes on-line and the follow-up with the instructors (which I did not do), doesn’t teach them how to budget.

Credit Counseling and the Financial Management Course are just two more bureaucratic hurdles that make obtaining a discharge difficult. The problems this creates for pro se debtors is even greater, as they frequently do not understand that the Code requires the credit counseling course to be completed before they file. Failure to take the Credit Counseling course is often a reason cases are dismissed and is an especially harsh punishment for a debtor that has paid the

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[failing-black-americans-debt-chapter-13/](#); Paul Kiel & Hannah Fresques, *Chicago’s Bankruptcy Boom*, PROPUBLICA (Sept. 28, 2017), <https://www.propublica.org/article/chicagos-bankruptcy-boom>.

filing fee. Similarly, the failure to take the Financial Management Course in a timely manner requires the case to be reopened (at a cost to the debtor) so that the certificate can be filed and the discharge can be entered. In short, both requirements should be eliminated.

### 3. The Debt Limits in Chapter 13<sup>3</sup> should be Removed.

On occasion, a chapter 13 debtor discovers that he or she is not eligible to file or continue in a chapter 13 because the amount of debt is too high. The current limits are \$394,725 for unsecured debt and \$1,184,200 for secured debt.<sup>4</sup> These limits are arbitrary, and for individuals needing a plan to pay creditors over five years, chapter 13 is much more appropriate and cost-efficient. Individual chapter 11 cases do not fit the needs of a wage-earning debtor who may be attempting to save his or her home but where their debt is greater than the current levels. Raising the debt limits for chapter 13 cases would not preclude a debtor needing a more sophisticated remedy found in chapter 11 from using it as a tool for reorganization. It would allow simple repayment plans to be confirmed without the costs associated with chapter 11 cases.

### 4. Section 521(i) is Inherently Ambiguous

The Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005 (“BAPCPA”) placed many impediments in the way of struggling debtors attempting to obtain a discharge. The Code and especially the BAPCPA additions are confusing and poorly drafted. Debtors often do not understand the paperwork that needs to be filed, especially when they are proceeding pro se. Through bankruptcy, an honest debtor should be afforded the opportunity to reorganize their affairs and obtain a discharge. Section 521 enumerates debtors’ duties in a bankruptcy case as well as the penalties for not following the requirements.

Section 521(i) of the Code, however, provides ambiguous and confusing direction to the court and certainly to debtors attempting to follow the rules. It may also afford a means for dishonest debtors to game the system. Mantas Valiunas provides an interesting discussion in *Anything but Automatic: Dismissal Under § 521*, 28 EMORY BANKR. DEV. J. 231 (2011), which provides detailed examples of how section 521 may hurt honest but confused debtors and may actually allow dishonest debtors to game the system.<sup>5</sup>

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<sup>3</sup> Others have suggested that this is also necessary for chapter 12 cases.

<sup>4</sup> § 109(e).

<sup>5</sup> *Anything but Automatic*, 28 Emory Bankr. Dev. J. 231, 250–53 (2011) (examining cases where honest debtors had their cases dismissed due to a strict interpretation of § 521(i)); *id.* at 253–56 (observing that in one case, the court, while concluding that the debtor had been largely abusing the bankruptcy system to frustrate the collection efforts of his secured creditors, found that it had no discretion not to dismiss the case on the debtor’s motion under § 521(i)(1) for failure to comply with § 521(a)).

Section 521 has been amended several times and perhaps the amendments have created the confusion which currently exists. Section 521(i) is neither simple nor mechanical. It is full of intertwining procedures, possibilities for motions, unclear timing rules and non-ministerial judgments. For example, under § 521(i), the debtor's case is "automatically dismissed" if the debtor does not file the required documents, as prescribed by § 521(a)(1), within forty-five days of petition. No judicial act is required and simply the passage of time results in the dismissal.

In a procedurally confusing way, section 521(i)(2) provides that in the circumstances described in § 521(a)(1), "any party in interest may request the court to enter an order dismissing the case," which the court "shall" do within seven days of the request. It seems, however, that the case should have already been dismissed on day 46 and no order would even be necessary.

Section 521(a)(3), provides an express exception to the automatic dismissal upon passage of the forty-five-day deadline. This section states that the court may extend the time to file the required information up to another forty-five days if the debtor files a motion for an extension before the forty-five days run. Reading on in section 521, another exception is found in § 521(i)(4) which provides that the trustee may ask the court to decline to dismiss the case under certain conditions. This request must be made before the forty-five days runs or before an extension is granted.

The concept of the "automatic dismissal" is confusing as it suggests that something happens behind the scene without court action. Is a case dismissed without judicial determination? The "automatic dismissal" may harm an honest debtor while a dishonest debtor may purposely fail to file a required document to provide an escape hatch if he wants his case to go away. Is the clerk's office to review each case to determine whether each paper has been filed? What if the forms are incorrectly filed out? What if all but one form is filed?

Section 521 should be amended to return judicial discretion to the dismissal process.<sup>6</sup>

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<sup>6</sup> At least two Courts of Appeals have concluded that such discretion exists by way of § 521(a)(1)(B), which provides that the information required by that sub-section is not really required "if the court orders otherwise" (and § 521(i) provides for automatic dismissal only if that "required" information is not filed within 45 days of the petition). See § 521(a)(1)(B), (i)(1). These courts concluded that the power to "order otherwise" may be exercised even after the 45-day window in § 521(i)(1) has run. See *In re Acosta-Rivera*, 557 F.3d 8, 13–14 (1st Cir. 2009) (but noting that such discretion extends only to cases where there is "no continuing need for the information" or where automatic dismissal would play into an abusive debtor's hands); *In re Warren*, 568 F.3d 1113, 1118–19 (9th Cir. 2009) (noting the same limitations on the court's discretion).

## 2018 MID-ATLANTIC BANKRUPTCY WORKSHOP

STATEMENT OF MARY IDA TOWNSON  
CHAPTER 13 STANDING TRUSTEE  
TO THE AMERICAN BANKRUPTCY INSTITUTE  
CONSUMER BANKRUPTCY COMMISSION

My name is Mary Ida Townson. I am grateful for the opportunity to submit this written testimony to the American Bankruptcy Institute Consumer Bankruptcy Commission and to appear before the Commission at its 36th Annual Spring Meeting April 19-22, 2018 in Washington, D.C.

I am one of three (3) Chapter 13 Standing Trustees in the Northern District of Georgia, with cases in the Atlanta and Rome divisions. My office currently administers approximately 10,000 active Chapter 13 cases, receiving, on average, 350-400 new case filings each month. My office disburses approximately \$4,500,000-\$5,000,000 to creditors each month.

I will celebrate my 15th anniversary as a Chapter 13 Trustee on May, 4, 2018, which means more to me than I can convey. Being a Chapter 13 Trustee is such an incredibly rewarding position in the national bankruptcy community and I am happy to say that I still look forward to coming to work each and every day.

Prior to my appointment as a Chapter 13 Trustee, I represented debtors in consumer bankruptcy cases for over seven (7) years, was a Chapter 7 panel Trustee for two (2) years, and represented mortgage lenders and servicers in consumer bankruptcy cases for almost four (4) years.

I am the Immediate Past President of the National Association of Chapter 13 Trustees (NACTT) and am the current President of the Southeastern Bankruptcy Law Institute. That said, I am submitting this written testimony, and will be appearing before the Commission, in my individual capacity and not on behalf of any association or institute.

In my capacity as a Chapter 13 Trustee, I have been asked to focus my testimony and comments on my observations over the past fifteen (15) years related to the debtor attorney bar in consumer bankruptcy cases. At the outset, I want to make it very clear that I have had the pleasure of working with so very many talented and exceptional debtor attorneys throughout my legal career.

Representing debtors in consumer cases is most definitely not an easy endeavor. Debtor attorneys are representing individuals who are usually experiencing several traumatic events all at once. Oftentimes, the debtor has lost a job, while simultaneously having medical problems, and not infrequently, he or she might be going through a divorce proceeding. These stressors, combined with the real threat of possibly losing the family residence and/or one's only source of transportation certainly may make the debtor behave uncharacteristically needy, rude, or unrealistic regarding what their attorney may be able to accomplish in a Chapter 7 or Chapter 13 case.

As previously stated, I am not appearing on behalf of the NACTT or any other association or institute. That said, I did reach out to my Chapter 13 Trustee colleagues to get a sense of what they are experiencing "in the trenches", so to speak. I want to thank so many of my colleagues for their thoughtful and well-articulated comments. I am going to break down what we are seeing nationally regarding debtor attorney practices into three (3) categories: (1) the Good, (2), the Adequate, and (3) the Unacceptable.

The Good—these are the attorneys who do the following in almost each and every case:

1. Begin the process with one or more in person extensive consultations with their prospective clients.
2. Insist that the debtor provide all necessary documents, along with a complete list of creditors, prior to the case filing.

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3. Utilize questionnaires which illicit complete and accurate answers from the debtor.
4. Strive to have as many Chapter 13 plans as possible confirmed at the first hearing date setting.
5. Employ competent and sufficient amount of staff to handle non attorney related matters.
6. Do not allow staff to perform tasks that the attorney should perform. (ie. practice law without a license)
7. Appear personally at section 341 meetings of creditors and at court hearings.
8. Return calls and emails from the debtor, creditors, and the Trustee in a timely manner.
9. Keep abreast of emerging case law and attend bankruptcy specific seminars.
10. Is realistic with the debtor when deciding what type of Chapter 13 plan the debtor should file and what plan payment the debtor can afford.
11. Charges a reasonable fee for the services provided.
12. Timely file Conflict Notices pursuant to Local Rules.
13. Think through and prepare all pleadings thoroughly and completely, including all facts and following all applicable laws.
14. Practice appropriate courtroom decorum.
15. Is respectful of the Court, the Trustee, their clients, the law, and the industry as a whole.

The Adequate—these are the attorneys who do most of the above in most cases, but who don't rise to the level of The Good attorneys. Examples:

1. Fail to obtain relevant information from the debtor that the Trustee or staff attorney for the Trustee discover at the 341 meeting of creditors.
2. File the case before obtaining certain documents such as pay advices, tax returns, and/or complete information for creditors.
3. Too often requests resets of plan confirmation hearings due to failure to cure Trustee and/or creditor objections.
4. Rely too heavily on staff to discuss issues with debtors, many of which require legal advice.
5. Fail to regularly attend consumer bankruptcy related seminars.

The Unacceptable—these are the attorneys who should not represent debtors in consumer bankruptcy cases at all. Their routine failures include the following:

1. Fail to personally meet with debtors, even at the initial consultation.
2. Provide debtors with unrealistic expectations regarding what the bankruptcy case can achieve for the debtor.
3. Fail to properly inform debtors of their responsibilities during the case, especially related to attending hearings, making payments to the Chapter 13 Trustee, remitting mortgage payments directly to the mortgage servicer, if required, and remitting annual tax returns and tax refunds, if required.
4. File petitions and plans with little or no knowledge whatsoever of the Bankruptcy Code, Bankruptcy Rules, local rules, or case law.
5. File skeletal petitions, fail to file Motions to Extend Time to File, and then either file the schedules, statement of financial affairs, means test, pay advices, etc. late or not at all.
6. Utilize staff to basically practice law without a license.
7. Fail to personally appear at section 341 meetings of creditors and/or court hearings.
8. Fail to return calls and emails from debtors, creditor attorneys, and the Trustee's office.
9. Fail to cure Trustee objections in a timely manner, requiring multiple reset hearings.

The above examples are by no means comprehensive, but I know that they are at least representative of the types of consumer bankruptcy attorneys that Chapter 13 Trustees encounter on a daily basis. While it isn't terribly difficult to identify the levels of proficiency related to the debtor attorney bar, it is a much more difficult endeavor to determine which practices and procedures might be implemented to either

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improve individual attorney performance or to prevent problem attorneys from representing debtors in consumer bankruptcy cases. I presented this question to my Chapter 13 Trustee colleagues and received several thoughtful responses. While there is no one perfect answer, I do believe that a combination of the following ideas could result in an increase in the number of The Good and a reduction in the number of The Unacceptable where the consumer debtor attorney bar is concerned.

One common theme related to this issue relates to attorney fees and to various attorney fee structures nationally. As I am sure most of the Commission is aware, the overwhelming majority of courts have implemented a “no look” fee structure in Chapter 13 cases. Under this fee structure, the court issues a general order setting a fee amount which a debtor attorney may charge a debtor without filing a fee application.

While the district in which I am a Trustee no longer has a no look fee, I do believe that this fee structure has worked well for many courts over the years. Overall, my Trustee colleagues seem to agree with this fee structure, with some common adjustments. For example, it is common for debtor attorneys to be able to charge more fees for business cases. Some courts allow debtor attorneys to charge a higher fee if they are certified by the American Board of Certification or a similar organization.

That said, several of my Trustee colleagues believe that the Chapter 13 bankruptcy system would benefit by altering the no look fee structure to include a sort of reward structure for the attorneys who consistently excel in client representation. I believe that each court would want to examine different ways to analyze debtor attorney performance, with a corresponding fee structure. Obviously, the goal would be to incentivize attorneys to consistently excel, while simultaneously to discourage failing attorneys from filing cases. Inadequate attorneys should not be rewarded by receiving the same fee as good, diligent attorneys. Doing so diminishes the consumer bankruptcy practice as a whole.

Over the twenty eight (28) years that I have worked in the consumer bankruptcy arena, I have often heard attorneys say that debtors have the option to choose any attorney they wish to hire. While that is ostensibly true, the reality is another story. Many, if not most, debtors have not previously sought legal counsel of any kind. They are uneducated regarding making informed decisions about choosing competent, or at least adequate, legal counsel. Obviously, the attorneys who have more money to spend on advertising often attract the most clients. While many of these attorneys indeed fall into The Good or The Adequate categories, extensive advertising does not equal adequate representation.

As Chapter 13 Trustees, we encourage all Courts to meet and discuss ways they are adjudicating attorney misconduct, negligence, and/or incompetence. In addition, we encourage all Courts to investigate ways to mandate that these inadequate attorneys either improve or leave the consumer bankruptcy practice altogether.

Trustees are diligently working to bring issues related to inadequate attorneys to the attention of the Courts and to the regional United States Trustees (UST's), but we need their assistance in improving the debtor bar, and ultimately, the consumer bankruptcy field as a whole. This must be a collaborative effort. To that end, I recommend that representatives of all parties in the consumer bankruptcy system come together and develop Best Practices for debtor attorneys nationally.

This proposed working group should include Bankruptcy Judges, UST's and/or their trial attorneys, debtor attorneys, creditor attorneys, Chapter 7 Trustees, and Chapter 13 Trustees. I am fully aware that this proposed Best Practices document would not solve all of the issues I have discussed in these comments. That said, I do strongly believe that having all parties come together will engender meaningful dialogue regarding debtor attorney performance, as well as the consumer bankruptcy practice as a whole. I would welcome the opportunity to participate on this proposed working group should the Commission decide to convene it.

## **AMERICAN BANKRUPTCY INSTITUTE**

In closing, I just want to once again thank the American Bankruptcy Institute Consumer Bankruptcy Commission for affording me this opportunity to provide these comments, as well as to present them to the Commission on Friday, April 20, 2018. Also, thank you all for all of your hard work on the Commission. I know that the work you are doing will result in an overall improved national consumer bankruptcy community.

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October 31, 2017

Subject Matter: "Attorney fees Only Chapter 13's"

To Whom It May Concern:

I practice in the Southern District of Texas, Houston Division, and I have filed a number of these "attorney-fee only" cases allowing clients to finance every single dollar of attorney's fees in their case. These cases tend to be very successful and I am absolutely confident that this is an extremely viable practice, providing a successful option for many prospective clients who might otherwise benefit from a chapter 7 case but lack the immediate resources to pay for the service.

Notwithstanding the above, I do think it is very important that bankruptcy attorneys are candid when presenting the alternatives. I'm diligent to explain both consumer chapters of the bankruptcy code, their pros and cons, etc. It is no surprise that the questions from prospective clients inevitably turn to costs. They want to know whether there's an economically feasible option for them. I explain the costs of the Chapter 13 case and that the Trustee will pay those attorney's fees via their monthly payment in the Chapter 13 Plan. I compare the costs of a chapter 13 to a chapter 7 so they know precisely what they are getting into. I distinguish that the full balance of attorney's fees and costs have to be paid "prior" to a chapter 7 filing. Often enough, that statement generates a sigh, or visible disappointment registers in their faces until I present them with an attorney-fee only chapter 13 option.

I make no hints or allusions to ethical arguments some might think permeate this practice of attorney fee only chapter 13 cases. In other words, there is no talk of "making an effort to repay your creditors" or any hint whatsoever of self-righteous overtones or coercive tactics in discussing these two chapters. Clients are told that the Chapter 13 Trustee will make a monthly distribution to my office to satisfy their attorney's fees without interest, so that upon the conclusion of the case in three years, they will have a discharge of their debts listed in the case and their attorney's fees will be satisfied in full. They are often quite relieved that they don't have to make a direct payment to me for attorney's fees on top of a trustee payment. I see this revelation register on their faces all the time: "I can afford this!!" Further and more to the point, clients they have protection from creditor harassment via the automatic stay throughout their pending case. No upsetting calls!! The ability to reorganize in peace!! *THAT* is the fresh start clients have been searching for!!

If I had clients in these attorney's fee only cases voicing anger or displeasure with me, I assure you I would quit the practice altogether. But as I said at the outset, the feedback I've experienced has been overwhelmingly positive time and again! It's important attorney's talk dollars with prospective clients in terms that they can understand. There's no bait and switch. Give clients the facts and let them decide. It's my opinion that the majority of people don't want something for free, they just want truly affordable relief and access to justice!

Granted there will be some who argue: "why can't people simply save money up until they have the balance and then file?" Absolutely, they can and some do! But I can guarantee you that the majority of the attorney fee only chapter 13 cases have logically concluded that there will always be another bill, another emergency to divert their savings, or another obstacle which prevents their efforts indefinitely.

A chapter 13 case lets this person take immediate pro-active steps to take their life in a positive direction financially. You don't need a life-coach or guru to explain to you that when this happens, all other facets of life come together so much easier.

Very Truly Yours,



Phillip H. Trueba

## AMERICAN BANKRUPTCY INSTITUTE

ABI Commission on Consumer Bankruptcy: Panel on the Committee on Case Administration  
and the Estate

Judge John E. Waites

Thank you for the opportunity to present comments regarding consumer bankruptcy law issues  
for your consideration.

1. **Credit Counseling**: The credit counseling requirements of 11 U.S.C. § 109(h) are not effective or useful as an eligibility requirement to file a bankruptcy case.
2. **Discharge Issues under 11 U.S.C. § 1328(a)**: Section 1328(a) of the Bankruptcy Code should be clarified to indicate whether a debtor's failure to make direct payments to a creditor as provided for in a confirmed chapter 13 plan prohibits the issuance of a discharge under that section.
3. **Student Loan Debt**: Bankruptcy laws, rules, and procedures should more effectively provide remedies for student loan debt, including:
  - a. Congress should better define the "undue hardship" standard set forth in 11 U.S.C. § 523(a)(8), and establish reasonable criteria for meeting that standard.
  - b. The Bankruptcy Code should be clarified to promote and facilitate repayment of student loan debt through a confirmed chapter 13 plan.
    - i) Amend § 1322(b)(1) to expressly permit discrimination in the payment of student loan debt, much like Congress did with respect to co-debtor claims.
    - ii) Clarify the Code to indicate that the cure and maintain option for student loan debt allows separate classification without regard to § 1322(b)(1), and allows the payment of interest without regard to § 1322(b)(10).
4. **Current Monthly Income under 11 U.S.C. § 101(10A)(B)**: The definition of "current monthly income" in 11 U.S.C. § 101(10A)(B), and to the degree necessary §1325(b)(2), should be amended to exclude veteran's benefits.
5. **"Vesting" of Property of the Estate**: The meaning and effect of the "vesting" of property of the estate pursuant to 11 U.S.C. § 1327(b) & (c) should be clarified, including its relationship to §§ 541 and 1306(a).
6. **Pro Se Filings**: The Bankruptcy Code and federal rules should be amended to recognize and address reoccurring issues related to *pro se* filings of chapter 13 cases, including:
  - a. Fed. R. Bankr. P. 1006(b)(3), which relates to the payment of filing fees in installments. This Rule should be clarified to allow a *pro se* filer to engage and pay counsel before all of the filing fee has been paid.
  - b. Either Bankruptcy Courts should be allowed to promulgate a simpler chapter 13 form plan for use by *pro se* debtors, or a simplified national chapter 13 plan should be created to be utilized by *pro se* debtors.

- c. For those *pro se* debtors who qualify for pro bono legal representation, but who are unable to obtain it, a Chapter 13 trustee should be allowed (if not encouraged), to work more closely with the *pro se* debtor to formulate a confirmable plan of reorganization. One method to accomplish this would include allowing a Chapter 13 trustee to host a monthly workshop for low income qualified debtors. The workshop would be presented either by a member of the trustee's staff or third party who would provide qualified debtors with instructions on the completion of schedules, statements, and a plan.

**Biographical Information for Judge Waites**

The Honorable John E. Waites was appointed as a United States Bankruptcy Judge for the District of South Carolina on June 27, 1994 and was reappointed in 2008. He served as the District's Chief Bankruptcy Judge from March 1, 2006 until March 1, 2013.

NCBJ Service

He presently serves on the Executive Committee for the National Conference of Bankruptcy Judges (NCBJ) as Secretary. He has previously served as Co-chair of the Legislative Committee for NCBJ and as a member of the NCBJ Board of Governors from 2010 – 2014, as well as various committees, including Public Outreach. On March 15, 2017, he was elected President-Elect beginning in October, 2017, and will become President of NCBJ in October, 2018.

Other Notable Service

On October 1, 2013, he was appointed by the Chief Justice of the United States Supreme Court to serve on the Judicial Conference Committee on the Administration of the Bankruptcy System. He was reappointed in 2016. He also served as a member and chairman of the Bankruptcy Judges Advisory Group for the Administrative Office of the United States Courts from 2008 - 2013. He has served as a member of the Access to Justice Commission of the South Carolina Supreme Court since 2006. In 2016, he was appointed as a member of the South Carolina Bar's Pro Bono Board, having previously served on its Pro Bono Committee. He presently serves as the Judicial Chair of the ABI Southeastern Seminar.

Awards/Recognition

In 2013, he was recognized by South Carolina Legal Services for his efforts to ensure equal access to justice for South Carolina citizens and was also the recipient of a *pro bono* award from the South Carolina Bar for his leadership in promoting *pro bono* efforts in the U.S. Bankruptcy Court. On May 3, 2014, the South Carolina Bankruptcy Law Association presented Judge Waites with the J. Bratton Davis Professionalism Award, which is the Association's highest honor. On December 10, 2015, he was awarded the U.S. District Court Judge Matthew J. Perry, Jr. Civility Award from the Richland County Bar Association. In 2016, he received Legal Services Corporation's *Pro Bono Award*.

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### STATEMENTS TO ABI COMMISSION ON CONSUMER BANKRUPTCY

Steven Weiss  
Shatz, Schwartz and Fentin, P.C.  
Springfield, Massachusetts

September 15, 2017

Good afternoon. Thank you for providing me the opportunity to speak to the commission today.

My name is Steven Weiss. I manage the bankruptcy practice at my firm, Shatz, Schwartz and Fentin in Springfield, Massachusetts.

I was first appointed to the panel of chapter 7 trustees in November, 1987, so I have been on the panel for almost 30 years. I periodically serve as a chapter 11 trustee, and I have also served as the chapter 12 trustee in central and western Massachusetts for almost 20 years. My private practice is varied. I have represented national and regional banks; but over the years my practice has shifted to representation of business and consumer debtors. I have also been a member of the Massachusetts local bankruptcy rules committee since it was formed in 2002.

I want to speak first about concerns apparently raised by the consumer bankruptcy bar about the propriety of having trustees employ their firms for legal or accounting services. This has been the practice in Massachusetts during my tenure as trustee. Not only do I fail to see it as a problem, I strongly believe that it strongly benefits the administration of bankruptcy cases, particularly the smaller ones.

Western Massachusetts is, at least in the context of bankruptcy administration, a relatively small market. Compared to the Boston area, let alone the larger bankruptcy markets like Delaware and New York, we get fewer business cases, and those that we do serve in are typically smaller.

Similarly, the individual cases involve smaller amounts of assets and debts, as the incomes and real estate values in our area are lower than most metropolitan areas.

Thus, the majority of cases in which my colleagues in western Massachusetts and I are able to recover assets for creditors are relatively small consumer cases. While I have not conducted a statistical analysis, I would estimate that my average cases result in recoveries of \$10,000 to \$20,000, and sometimes less. But it's worth emphasizing that creditors in consumer cases are equally entitled to the benefits of the administration of bankruptcy cases; and, also that the percentage distributions to creditors in small cases typically exceed the percentages in the larger ones.

Unlike business liquidations, attempting to recover assets in consumer bankruptcy cases is almost always contingent work. Rare is the case in which a debtor files for chapter 7 relief expecting that his or her case is anything other than a "no asset" case. Instead, the recoveries usually come from the investigations of trustees and their counsel: objections to exemptions, location of undisclosed assets, avoidance of preferential and fraudulent transfers, and avoidance of unperfected liens. These efforts are almost always vigorously opposed. And, if the trustee and counsel are unsuccessful, their services go unpaid.

Which gets me to my views on the efficacy and efficiency of being able to retain my firm as counsel. I take the administration of these small cases as seriously as the large ones. So I am willing to accept the risk of non-payment or reduced payment for my firm as part of the realities of being a panel trustee. Conversely, if I were not able to hire my own firm, and had to hire outside counsel, I am sure they would not be so receptive. Here's how I think the conversation would go: "so I'd like to hire you to oppose a debtor's homestead exemption, or pursue a \$10,000 fraudulent transfer. It will take some discovery, maybe a deposition or two, and a trial. And, of course, I

can't yet be sure we'll prevail." The attorney's natural first question will be: "How do I get paid?" My response: "there are no other assets in the case, so you only get paid if we're successful." I am virtually certain that the attorney's response will be a polite but emphatic "No thank you".

Even if there is a recovery, but the legal fees would eat up most of the potential distribution, I routinely reduce our firm's legal fees to ensure a meaningful distribution. I do not think outside counsel would be so sympathetic.

In other words, I think that in many of my cases, those small contingent recoveries will not be pursued.

In addition to these practical realities, there are also institutional protections against any conflicts or potential abuse. As this commission is well aware, trustee administration and fees for bankruptcy professionals are highly scrutinized. Pursuant to our local rules and practice, I keep separate time records for my services performed as trustee and as counsel. Those records are reviewed by the United States Trustee when I submit my final account before distribution. They are then reviewed by the bankruptcy judge, and they are of course available to creditors.

Finally, I would like to briefly speak in support of an increase in the \$60.00 fee for no-asset cases. The obvious reason is that it has been over 30 years since that fee was increased, and I'm hard pressed to think of any other fees that have not been increased for so long a time. I'm sure that others will speak about all of the services that we perform, for very little compensation, so I won't belabor that point.

But I think there's a service we provide that's often overlooked. Again, the vast majority of chapter 7 cases are consumer cases, and in almost every instance, debtors do not need to appear in court. Instead, their only personal encounter with the bankruptcy system is at the meeting with the trustee. Stated another way, for most consumer debtors, the chapter 7 trustee is the "face" of the

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bankruptcy system, under circumstances that are very stressful for people. I try to provide every debtor coming before me with respect, and with a certain amount of dignity, and I know my colleagues do the same. It is important that the bankruptcy system recognize and encourage this, and an increase in the no asset fee would be an important step in that direction.

Thank you.

U\A16\stmts.ABI Commission.1602

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**Lawless, Robert M**

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**From:** Nancy Whaley <nwhaley@njwtrustee.com>  
**Sent:** Sunday, July 09, 2017 10:39 AM  
**To:** ConsumerCommission@abiworld.org  
**Subject:** RE: Request time for public statement

Commissioners,

Please accept this as an additional written statement to my request on June 26 to be heard at the Commission's Hearing in Seattle.

My comments will address the following the issues:

Benefits of Chapter 13-very brief

Eligibility:

1. Eliminate Pre-petition Budget and Credit Counseling Requirement under 11 U.S.C. Sections 109 and 521: While this requirement was implemented for a good policy reason, the reality is that it is a bureaucratic step to filing that provides no benefit for a Debtor. It is an additional cost to filing and creates unnecessary litigation when the debtor does not obtain the counseling within the requirements. I have been told that the average time for a credit counselling session is 8 to 12 minutes. These sessions are taking place in lawyers' office and after a Debtor has decided that filing is necessary. It is an extremely rare situation that a Debtor does not file after completing the credit counseling session. Even with higher income Debtors, the counseling sessions do not produce the required budget or plan of action. While the financial management courses have strong substantial content that may provide a lasting benefit, there is no benefit from credit counseling that I have discovered.
2. Debt limit increase or elimination by amending 11 U.S.C. Section 109(e). Increasing the debt limit for Chapter 13 will give a greater access to justice for individuals that currently exceed the debt limits of Chapter 13 but cannot afford the time or money of a Chapter 11. As a Chapter 12 Trustee, I see firsthand the benefits of a higher debt limit. If farmers were constrained by the limits of Chapter 13, Chapter 12 would not be a viable option to them. In today's society, home prices vary widely throughout the country and consumers in high cost of living areas are banned from Chapter 13 because of a home mortgage. Also the debt limits prevent some D.B.A.s and professionals, such as dentists and doctors, from filing a Chapter 13. These cases are not complex and do not need the provisions of a Chapter 11 but Debtors find themselves in expensive and long drawn out individual Chapter 11s or not filing at all. These cases would benefit from being in a chapter with a trustee and the expediency of a Chapter 13.
3. Ban on bad faith/abusive filers by amending 11 U.S.C. Sections 109(g) and 1307: The current statute does not directly provide for a dismissal of a case with a ban on refiling for bad faith filers. Courts currently use 11 U.S.C. Sections 105 and/or 109(g); however, neither one of the options are direct and without challenge. Amending 11 U.S.C. Section 1307 to provide Courts with a dismissal that bars a Debtor from refiling after finding an abuse of filing in the current case would provide trustees and creditors a clear remedy to seek. It would give statutory authority to the Courts to dismiss a case with a ban on refiling without taking away the discretion of a Judge. The benefit would be to prevent abusive filings that take up the Court and Trustee's time and resources. It would also give creditors a clear path to action once a case is dismissed.

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Thank you and I look forward to the hearings in Seattle and I hope I am given the opportunity to be heard on these matters. If you have any questions, please do not hesitate to contact me. I will be reachable on my cell phone while in Seattle, 404-432-2150.

Thank you,  
Nancy J. Whaley

Nancy Whaley, Esq.  
Standing Chapter 12 and 13 Trustee  
303 Peachtree Center Avenue, Suite 120  
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**From:** Nancy Whaley  
**Sent:** Monday, June 26, 2017 10:16 PM  
**To:** 'ConsumerCommission@abiworld.org' <ConsumerCommission@abiworld.org>  
**Subject:** Request time for public statement

Please accept this as a request to make a public statement to the Commission in Seattle at the NACTT meeting. My comments will be directed at eligibility. I will specifically address the need to increase the debt limit, do away with the prepetition credit counseling requirement and the need to address bad faith repeat filers.

I am currently out of the country, but I am happy to provide a more detailed statement or any other information that is needed prior to the hearings.  
Thank you,  
Nancy Whaley

Nancy Whaley, Esq.  
Standing Chapter 12 and 13 Trustee  
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**AMERICAN BANKRUPTCY INSTITUTE**

**OFFICE OF THE CHAPTER 13 TRUSTEE, W.D. PA  
RONDA J. WINNECOUR, STANDING TRUSTEE  
U.S. STEEL TOWER – SUITE 3250  
600 GRANT STREET  
PITTSBURGH, PA 15219  
TELEPHONE: (412) 471-5566  
FAX: (412) 471-5470**

July 7, 2017

Dear Members of the Consumer Bankruptcy Commission,

I applaud all of you for this long-overdue focus on consumer bankruptcy issues. I have been a Chapter 13 Trustee and a member of the ABI for 17 years.

I am concerned that the players within the bankruptcy system have lost sight of its most important and largest constituency. We are so compartmentalized that debtors, particularly consumer debtors, pay for most of the bankruptcy system but have little place or voice in that system. I don't presume to speak for all debtors, but I have administered tens of thousands of Chapter 13 cases and I have a wish list of changes (many will require legislation) that I believe will improve the Chapter 13 experience:

1. Eliminate the unjustifiable protection from modification for all home mortgages. Chapter 12 provides the model.
2. Expand the debt limits significantly. With student loan and housing debt increasing, the secured and unsecured debt limits are unrealistic. Chapter 13 offers a cost-effective and efficient alternative for sole proprietors and self-employed individuals to reorganize their businesses and finances. For many, the debt limits preclude access to Chapter 13.
3. Allow discharge (or partial discharge) of student loan debt.
4. Overturn *Harris v. Viegelahn*, 135 S.Ct. 1829 (2015). It is a simple matter of time before a Trustee, in the middle of distribution, sends funds to creditors unaware that a case has been converted. The funds the debtor pays in should go to creditors and debtor's counsel.
5. Overturn *Midland Funding, L.L.C. v. Johnson* \_\_\_\_\_ U.S. \_\_\_\_\_, 2017 (May 15, 2017). It makes absolutely no sense that a debtor can be compelled to pay a stale claim in bankruptcy but not be obligated to do so outside of bankruptcy. *Johnson* imposes additional duties on the Chapter 13 Trustee for no bankruptcy purpose.
6. Amend RESPA to clearly delineate the Chapter 13 Trustee as an authorized person for the purpose of asserting notices of error or requesting loan information from mortgage servicers.

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7. Require all mortgage lenders to maintain loan histories in a consistent, comprehensible format both in and out of bankruptcy.
8. Repeal section 362(c), it doesn't work.
9. Debtor's counsel fees in dismissed and converted cases should be non-dischargeable.
10. Repeal the "means test" in Chapter 13 cases. All debtors should calculate "disposable income" as actual income less reasonable and necessary expenses.
11. Amend section 1326(c) to create a presumption that all payments are made by the trustee absent "clear and convincing evidence to the contrary." Paying secured debt through the trustee reduces relief from stay litigation, provides an undisputed payment history and brings the mortgage current as part of the discharge process.
12. Legislatively adopt the decision of the Third Circuit Court of Appeals to allow the debtor to complete a chapter 13 plan that has extended more than sixty months.

Again, I realize that most of this list requires legislative fixes- but if we don't ask it won't ever happen.

Thank you,

Ronda Winnecour

# AMERICAN BANKRUPTCY INSTITUTE

Statement to the ABI Consumer Bankruptcy Commission  
at the November, 2017, Chicago Conference

David S. Yen  
Oak Park, Illinois

My background is as a legal aid attorney for 40 years who spent over half of that time as a consumer bankruptcy lawyer. For the past 10 years I have also been involved with a bankruptcy help desk for *pro se* parties. In my retirement I have kept my hand in as a *pro bono* counsel for the Legal Assistance Foundation of Chicago, including the *pro se* help desk, and by writing the occasional amicus brief for the National Consumer Bankruptcy Rights Center. I have read most of the written comments that were available on the Commission's website. I have tried to raise issues that may not have been addressed already, rather than endorsing or opposing existing comments or proposals.

- I. Protecting and enhancing the fresh start
  - a. Putting teeth into the anti-discrimination provisions in section 525.

**Attorney's fees.** The major federal anti-discrimination statutes such as Title VII of the Civil Rights Act and the Age Discrimination in Employment Act (ADEA) provide for the award of attorney's fees for a prevailing plaintiff. Section 525 does not. Without an equivalent fee shifting provision debtors find it extremely difficult to find legal representation for such cases. Section 525 should be amended to include a provision for attorney's fees provisions comparable to those in Title VII, the ADEA, and 42 U.S.C. § 1988.

**Coverage.** The prohibition against discrimination by private employers should apply to hiring. Major federal anti-discrimination statutes such as Title VII and the ADEA prohibit discrimination at all stages and all aspects of the employment relationship.<sup>1</sup>

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<sup>1</sup> Title VII - Employer practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

It should also apply to employees who are contemplating bankruptcy, as advocated by Judge Reinhardt's dissent in *Leonard v. St. Rose Dominican Hosp. (In re Majewski)*, 310 F.3d 653, 656-664 (9th Cir. 2002)

**Jurisdiction.** The bankruptcy court should have jurisdiction of an action to enforce section 525 if the case is filed while the bankruptcy case is open and if granting equitable relief would enhance the debtor's ability to successfully reorganize.<sup>2</sup> If these conditions are not present, the district court and state courts would have concurrent jurisdiction, and either party would have the right to trial by jury.

**Statute of Limitations.** The residual federal statute of limitations is four years<sup>3</sup>, but to avoid needless litigation one should be specifically set forth.

**Retaliatory conduct.** All forms of retaliation for asserting rights under the Bankruptcy Code should be prohibited. Both Title VII and the ADEA outlaw retaliatory conduct. See 42 U.S.C. § 2000e-d (Title VII) and 29 U.S.C. § 623(d) (ADEA). Section 525 and a similar provision in the Equal Credit Opportunity Act (ECOA) should be amend to prohibit retaliatory conduct.

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42 U.S.C § 2000e-2

ADEA. (a) Employer practices.

It shall be unlawful for an employer-

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C § 623

<sup>2</sup> Under Title VII jurisprudence, reinstatement and back pay are considered to be equitable relief. Therefore there is no right to a jury trial if only equitable relief is sought. *See., e.g. Keller v. Prince George's County*, 827 F. 2d 952, 955 (4th Cir. 1987).

<sup>3</sup> 28 U.S.C. 1658;

- b. ECOA prohibits discrimination because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a)(3). That section should be amended to add assertion of rights under the Bankruptcy Code as a protected category. Lenders not covered by section 525 could continue to consider the fact that the consumer filed bankruptcy, unless some other federal or state law applies, but could not discriminate against the consumer because he or she sought to enforce rights that flow from the bankruptcy. A creditor could deny or restrict credit because the debtor had filed bankruptcy, but not because the debtor had filed a motion to hold a creditor in contempt for violating the automatic stay or the discharge injunction.
- c. Credit reporting of bankruptcy filings. The Fair Credit Reporting Act (FCRA) has a rule that prohibits reporting of outdated information. Bankruptcy filings can be reported for 10 years. The FCRA has exceptions to that prohibition for credit transactions over \$150,000 and jobs that pay more than \$75,000. 15 USC 1681c(b). These amounts were adjusted in 1996, but haven't been updated since then. Setting aside the issue of whether credit history is actually relevant to employment decisions, these limits are too low. They should be raised substantially – I would say at a minimum, to \$225,000 and \$125,000. Whatever the new thresholds are, after they are increased they should then automatically be indexed to inflation, as is the case in section 104 of the Bankruptcy Code.

II. Making bankruptcy unnecessary for many low income debtors by updating Federal limits on wage garnishment or offset of federal benefits.

The next group of proposals are aimed at decreasing bankruptcy filings through modest increases in debtor protections outside of bankruptcy.

- a. The Federal Consumer Credit Protection Act limits wage garnishment to 25% of net income and prohibits garnishment that would reduce the judgment debtor's net earnings to less than 30 times the federal minimum wage on a weekly basis. 15 U.S.C § 1673. This translates to protection of \$217.50 a week, or \$11,310 a year. This is below the federal poverty standard for a one person household, which is \$12,060, much less that for a household of two of \$16,240 per year. In 1968, when the threshold was set, 30 times the minimum wage exceeded the

poverty threshold for a household of two.<sup>4</sup> The threshold for garnishment should be raised to at least 40 times the minimum wage per week. This would protect \$290 a week, or \$15,080 per year.

- b. Low-income debtors who receive federal benefit payments are no longer collection proof if they owe debts to the federal government. I am not talking about debts which were incurred by fraud, but garden variety debts. This is another area where the relevant dollar amounts have not been adjusted for inflation. The threshold for offset of non-tax federal debts from federal benefits, mainly but not exclusively social security and veterans benefits, is \$750 per month (\$9,000 yearly). 31 U.S.C. § 3716(c)(3)(a)(ii). This amount was set in 1996. Social security benefits are adjusted annually for increases in the cost of living, but this threshold hasn't been. Someone who was receiving \$600 a month in 1996 was collection proof then, but isn't now. Because of cost of living increases he or she now receives about \$1,000 a month, and could have \$150 a month taken from his or her benefits. The threshold should be increased to \$1,250 per month (\$15,000 yearly), and then increased yearly at the same percentage as social security benefits.

These two changes would be a benefit to the bankruptcy system because it would keep many *pro se* cases out of the system.

- III. Changes to reduce use of the judicial estoppel doctrine against debtors and the bankruptcy estate.

Some courts have held, mistakenly in my opinion, that there is a statutory duty to disclose changes in assets during a Chapter 13 case. *See, Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274 (11th Cir. 2010). I can find nothing in the Code that would require routine disclosure of changes in assets. Unless there is something in the Code that I am missing, this could be solved by amending the Rules to say that no amended or supplemental schedules are required except as provided by Rules 1007(h) and 1019((5), unless required by a court order specific to the case in question. (There is a problem with Rule 1019(5)(C)(ii) which would be solved by my suggestion in the next paragraph.). If my approach is rejected, at least there should be some guidelines that would create *clear*

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<sup>4</sup> In 1968 the minimum wage was \$1.60 an hour. Therefore the amount protected from garnishment was \$2,498 (\$1.60 times 30 times 52 = \$2,498). The poverty guidelines in September 1968 were \$1,600 for one person and \$2,100 for a household of two.

rules about what kind of assets must be listed, when the supplemental schedules need to be filed, and how they need to be served.

The problem with Rule 1019(5)(C)(ii) is the result of the lack of a clear procedure to determine when a voluntary conversion from Chapter 13 to Chapter 7 is in bad faith, so that section 348(f)(2) applies. Here I think that the Code needs to be amended, though it is possible that a change in the rules could deal with this. My suggestion is that section 348(f)(2) and/or the Rules be amended to provide that bad faith is to be determined exclusively by the bankruptcy court, and only if a request is filed by a party within a time set by the Rules (I think 30 days after the date first set for the 341 meeting in the converted case would be about right). This would remove the vagueness that now exists about when a conversion is in bad faith. For an example of the confusion that can arise because of the murkiness of when a conversion is in bad faith see *Berge v. Mader*, 957 N.E.2d 968 (Ill. App. 2011), where the state court decided that a conversion was done in bad faith based on a faulty understanding of bankruptcy procedure.

IV. Other suggestions

- a. Protection of federal, state and local needs based benefits. All needs based federal benefits should either be exempt, or not part of the bankruptcy estate at all. Protection should not depend on whether the debtor uses state or federal exemptions. Such benefits could be excluded from the bankruptcy estate, as some pensions are. Or they could be protected as retirement funds are now in 11 U.S.C. §§ 522(b)(3)(C) and 522(d)(12), or both.

The most salient benefit is the Earned Income Tax Credit (EITC). For low income Chapter 7 debtors in Illinois this is not a burning issue because the cases have held that the EITC is exempt under Illinois law. However, there are many states where the EITC is not exempt and can be taken by Chapter 7 trustees. This is most likely to occur in *pro se* filings, as competent debtor's attorneys in states where the EITC is not exempt can usually advise their clients on ways to avoid this result. Regardless, losing the earned income credit, which can be as much as 25 to 30% of a household's annual cash receipts, should not be a price of filing bankruptcy.

Rather than listing each needs based benefit specifically, there should be a broad definition covering all such benefits. Already creative trustees have tried to monetize subsidized housing benefits.<sup>5</sup> The exact method of delivering needs based benefits may change, and the policy that they should not be lost by filing bankruptcy should not be vulnerable to changes in the form of the benefits.

- b. The Judicial Conference must promulgate a policy for waiving fees for creditors and debtors who did not qualify for a filing fee waiver. In BAPCPA Congress authorized the district court or the bankruptcy court to waive fees for “other debtors and creditors.” 28 U.S.C § 1930(f)(3). It has now been 12 years since BAPCPA became effective and the Judicial Conference has not issued a policy. At our *pro se* help desk I have talked to creditors who have real issues that should be raised in a debtor’s bankruptcy but for whom the filing fee is a hardship. A landlord whose debtor has filed under Chapter 13 may need to file both a motion to modify the stay and an adversary complaint. Unless those fees can be waived or reduced the creditor has to pay a total of \$531 in fees (\$350 for the adversary and \$181 for the motion). Prior to BAPCPA some courts differed on whether such fees could be waived; some even held that there were constitutional issues if indigent creditors were denied access.<sup>6</sup> The Judicial Conference could and should provide clarity by issuing a policy on fee waivers.
- c. I agree with the comments made by many that the pre-filing credit counseling requirement should be eliminated. If it is not, sections 362(c)(3) and 362(c)(4) should be amended so that a dismissed case where there was no credit counseling before the case was filed does not count. I have seen many *pro se* debtors who are acting in good faith but are on their second or third case within a year because they did not know of the credit counseling requirement. I believe that it is unfair to deny them the protection of the automatic stay because they did not obtain credit counseling before filing.

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<sup>5</sup> With mixed results. *Cf.*, *Matter Of Santiago-Monteverde*, 22 N.E.3d 1012, 24 N.Y.3d 283 (2014)(rent stabilized lease was exempt under New York law), *with In re Toledano*, 299 B.R. 284 (Bankr. S.D.N.Y. 2003)(trustee could sell debtor’s rights under lease to landlord and debtor was evicted)

<sup>6</sup> Sommer, *Consumer Bankruptcy Law and Practice*, 11th ed. § 14.6.2.2.