

Written Testimony of William Brewer

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Before the Subcommittee on Courts, Commercial and Administrative Law

Judiciary Committee

U.S. House of Representatives

“Chapter 7 Bankruptcy Trustee Responsibilities and Remuneration”

July 27, 2011

Chairman Coble, Ranking Member Cohen and Members of the Subcommittee:

My name is William Brewer and I am a practicing bankruptcy attorney in Raleigh, North Carolina. I serve as president of the National Association of Consumer Bankruptcy Attorneys (NACBA), on whose behalf I appear here today. NACBA is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. Formed in 1992, NACBA has nearly 5,000 members located in all 50 states and Puerto Rico. NACBA's members represent a large number of the individuals who file bankruptcy cases in the United States Bankruptcy Courts. Some NACBA members also serve as Chapter 7 Trustees, giving us perhaps a unique perspective on the issues before the Subcommittee today.

NACBA appreciates the opportunity to offer its views on compensation to Chapter 7 Trustees for no-asset cases. We can all agree that bankruptcy trustees play an important role in the bankruptcy system. They are fiduciaries who must ensure that all assets are properly administered and that the debtor warrants a discharge. Typically, a bankruptcy trustee is charged with a number of responsibilities, among them the administration, investigation and oversight of a bankruptcy case. Trustees also undertake various investigatory and audit functions and prepare reports of findings.

The duties and responsibilities of Chapter 7 Trustees were expanded under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("2005 Act"). The Government Accountability Office (GAO) in a June 2008 study of the bankruptcy system¹ summarized these new responsibilities:

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

¹ "Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," Government Accountability Office, June 2008, GAO-08-697, accessed at: <http://www.gao.gov/new.items/d08697.pdf>

Despite these expanded responsibilities and increased filing fees, the compensation to Chapter 7 Trustees was not increased under the 2005 Act. In fact, the compensation for Chapter 7 Trustees has not been increased in 17 years and currently stands at \$60 for administering a Chapter 7 case in which no assets are liquidated.

NACBA has been clear over the years in its support for increased compensation for Chapter 7 Trustees. At the same time, NACBA has been unequivocal that any such increase should not be borne by financially distressed debtors. The simple fact is that debtors already pay enough in filing fees to cover the costs of the administration of their bankruptcy case, including compensating Chapter 7 Trustees.

In just a one year span (April 2005-April 2006) Congress increased the fees associated with filing for bankruptcy by 43 percent, from \$209 to \$299. The filing fees were raised in the 2005 Act, in the 2005 emergency supplemental spending bill, and under the 2006 deficit reduction act.² But, these are not the only fee increases cash-strapped debtors have been saddled with under the 2005 Act. In that Act, Congress mandated that debtors go through pre-bankruptcy credit counseling and post-bankruptcy debtor education, at a cost of as much as \$100 for the two sessions. The combined impact of the filing fee increases and counseling/education requirements pushed the cost of a Chapter 7 bankruptcy up more than 90 percent in the wake of the 2005 Bankruptcy Act.

Not surprisingly, debtors today also face increased legal fees associated with consumer bankruptcy relief as a result of the 2005 Bankruptcy Act. Attorneys must complete a lengthy form that includes various calculations of the debtor's income and expenses and collect additional documents from the debtor such as months' worth of paystubs and tax returns for multiple years. According to the GAO report, bankruptcy cases now involve a greater number of motions and hearings, which further increase the time an attorney spends on a case.

The GAO report on costs associated with the 2005 Bankruptcy Act further reveals the bureaucratic sprawl created by the law, significantly increasing the workload not only on Chapter 7 Trustees and bankruptcy attorneys, but also on the U.S. Trustee program and the judiciary. For example, the Trustee Program estimated its costs related to carrying out the responsibilities under

² Prior to the 2005 Act, the cost of filing a chapter 7 bankruptcy case was \$209. This amount included the \$155 statutory filing fee provided by 28 U.S.C. § 1930(a), an additional noticing fee of \$39 assessed in all chapter 7 and chapter 13 filings pursuant to 28 U.S.C. § 1930(b), and another \$15 fee used to provide funds necessary for additional compensation to chapter 7 trustees mandated by 11 U.S.C. § 330(b)(2), as amended by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (1994). Enactment of the 2005 Act and several subsequent bills resulted in three Chapter 7 filing fee increases. The statutory filing fee was increased from \$155 to \$200 in the 2005 Act, resulting in a total Chapter 7 filing fee of \$254. The statutory filing fee was again increased from \$200 to \$220 in P.L. 109-13, bringing the total Chapter 7 filing fee to \$274. Yet another increase enacted in February of 2006 increased the statutory filing fee from \$220 to \$245, in P.L. 109-171 (effective April 9, 2006), resulting in the current total chapter 7 filing fee of \$299.

the 2005 Act to be approximately \$72.4 million over two years. The increased expenses went primarily to personnel costs to implement the means test and credit counseling/debtor education requirements, conduct debtor audits, comply with reporting requirements, establish information technology systems and expand facilities.³ Likewise, the Judicial Conference noted that the 2005 Act created new docketing, noticing, and hearing requirements that make “addressing bankruptcy cases more complex and time consuming.”⁴

Although it is not clear exactly how the revenue generated by the increased filing fees for debtors has been allocated, one might assume based on the GAO’s findings that it has gone to pay for the costs associated with implementing and administering the new law, rather than to the Chapter 7 Trustees who actually handle the cases. If that is true, Congress may want to re-consider the needless and burdensome paperwork requirements imposed by the 2005 Act and instead use the funds now siphoned off for that purpose to increase the compensation to Chapter 7 Trustees.

In the meantime, Chapter 7 Trustees understandably are looking once again to Congress to increase their compensation. NACBA will support such a request provided that it does not increase the filing fees or other costs imposed on cash-strapped debtors. At least two proposals have been considered in recent years that NACBA could support:

- H.R. 4950, the “Chapter 7 Bankruptcy Administration Improvement Act” introduced on March 25, 2010 by Representatives Cohen, Whitfield and Conyers and referred to this Subcommittee for consideration. That legislation would make a relatively modest adjustment to the percentage price points used to compensate trustees in the cases where there are assets (roughly five to 10 percent of cases). This adjustment will supplement the fixed fee compensation that is provided in the no asset cases. Under this approach, trustee compensation would be paid not only by debtors through existing filing fees but also by creditors who directly benefit from the trustees’ work in administering asset cases.
- Language incorporated in S. 1638, as reported by the Senate in 2008, which increased the compensation to Chapter 7 Trustees but also provided that no additional fee could be charged to the debtor to pay for the fee increase to trustees. Under this approach, the courts would fund the increase through the fees the Judicial Conference of the United States already collects.

NACBA respects the role of Chapter 7 Trustees in maintaining the professional functioning of our bankruptcy system. Our bankruptcy system should ensure that it continues to attract and retain competent, experienced, and qualified private trustees in light of the critical role they play in the system. Increased compensation for Chapter 7 Trustees is a part of that equation.

³ 2008 GAO report, page 11.

⁴ 2008 GAO report, page 14.

However, it is critical that financially distressed consumers not be asked to shoulder this increase.

NACBA stands ready to work with this Subcommittee and other interested parties in devising an equitable approach to this issue.