



TESTIMONY OF H. JASON GOLD, ON BEHALF OF
THE AMERICAN BANKRUPTCY INSTITUTE
BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW
HEARING ON CHAPTER 7 BANKRUPTCY TRUSTEE
RESPONSIBILITIES AND REMUNERATION
JULY 27, 2011

Chairman Coble, Vice-Chairman Gowdy, Ranking Member Cohen and members of the subcommittee, I am Jason Gold, a partner in the McLean, Virginia office of Wiley Rein LLP, a law firm with over 275 lawyers practicing in nearly two dozen practice areas. I am the Chair of our firm's Bankruptcy and Financial Restructuring Practice and have more than 30 years of experience in complex restructuring and insolvency matters. In recent years, the focus of my practice has been on major media, retail, real estate, automotive, aviation and telecommunications cases.

Relevant to this hearing, I am also a Chapter 7 panel trustee in the Eastern District of Virginia, one of the nation's busiest courts. I have been a Chapter 7 trustee in this district for more than 24 years.

I appear today as a representative of the American Bankruptcy Institute, the nation's largest, multi-disciplinary association of insolvency professionals, with over 13,000 members. Founded in 1982 on Capitol Hill, ABI is non-profit and non-partisan, and since 1982 has provided continuing legal education in the field of bankruptcy, while also serving as a resource for members of Congress and their staff on matters affecting the bankruptcy system. We are honored to be asked to appear today to present views on the important role of Chapter 7 trustees in the bankruptcy system, and how best to fairly compensate trustees. The views I present today are mine.

I appreciate the opportunity to testify in support of the increase in compensation for chapter 7 bankruptcy trustees in those 90 percent of the chapter 7 bankruptcy cases filed nationally in which there are no assets to administer for the benefit of creditors. The \$60 no-asset fee has not been raised since 1994 while the responsibilities placed upon me as a chapter 7 bankruptcy trustee have increased substantially. The increase is necessary, overdue and essential to the operations of our bankruptcy system which is the envy of the world.

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Since being appointed as bankruptcy trustee, I have been designated as the chapter 7 trustee in over 21,000 cases. I first started practicing law as a solo practitioner in 1979 by hanging out a shingle after graduating from law school and passing the bar exam. I have been a solo practitioner, established and developed my own private law firm, and am now a partner at a major national multi-practice firm in Washington, D.C. I was certified as a business bankruptcy law specialist by the American Board of Certification in its first class in 1991, have maintained that certification to date, served on the committee that prepared the written course materials concerning the written examination necessary to become board certified, taught that course, and have served on the American Board of Certification's Board of Directors since 2010.

During my thirty two years plus legal career, I have represented the poorest of the poor in their individual consumer bankruptcy filings, small "ma and pa" businesses that failed and needed to be reorganized or liquidated, and represented local, regional and national banks and private lenders in their efforts to mitigate their losses upon being confronted with a bankruptcy filing. I have also been involved in some of the largest bankruptcies in the country, either representing creditors, committees of creditors formed in these larger cases, and have also represented large publicly traded companies reorganizing under chapter 11 of the Bankruptcy Code. My prior law firm, Gold Morrison & Laughlin, P.C. also had the privilege of being engaged as special counsel to the Attorney General of the Commonwealth of Virginia to advise and represent the Commonwealth on bankruptcy matters as assigned to us.

I provide this detail because I have experience in virtually every perspective and facet of liquidation and reorganization in the sometimes devastating wake of financial insolvency. My career as a bankruptcy lawyer and my views on the need for this fee increase comes from my experiences representing the poor, honest debtor in need of relief, a sovereign state seeking to advance and protect its interests, lenders and some of the largest corporations in some of the nationally prominent "mega-cases" of the last decade, all while acting as a chapter 7 bankruptcy trustee.

The Bankruptcy Trustee's Vital Role in Our System

Fortunately, most honest citizens of our country do not have any interaction with the Federal Courts. A bankruptcy filing may be the only time one of our citizens is exposed to the Federal Judiciary. When the bankruptcy law was changed in 1978 and Referees became Judges, the tasks of reviewing the bankruptcy filing, the lists of assets and liabilities and the bankrupt's pre-filing conduct was passed to the chapter 7 bankruptcy trustee. Almost all people filing for bankruptcy never appear in court before a bankruptcy judge, but rather appear before me, the chapter 7 trustee. These debtors' appearance at the first meeting of creditors required under Section 341 of the Bankruptcy Code may be their only exposure to the Federal Judiciary, the bankruptcy system and our government. It has been not only my duty and privilege, but also a distinct honor to serve as a panel bankruptcy trustee.

While I assume these duties willingly, the scope and responsibility of my role as the face of the bankruptcy system presents a number of challenges. The initial duties start after the bankruptcy cases is filed and before the debtor's appearance before me and creditors at the 341 meeting.

I must review the bankruptcy petition, the schedules of assets and liabilities, and the sworn statement of financial affairs prior to that meeting in each of the approximately 110 cases assigned to me every two weeks on a monthly basis before I conduct those meetings. In the 90 percent plus cases that are "no asset cases" and result in the filing of a "No Distribution Report", I have continued responsibilities and duties. All of this for \$60 per case, and in those cases where the debtor is appearing *in forma pauperis*, for free. But "no asset" does not mean "no work".

There is still plenty of work to be done from ensuring that the debtor has performed the requirement to state his intention with respect to encumbered property, ensuring that the debtor has filed his Federal tax returns, along with a review of the most recent return, providing important notices to holders of domestic support obligations about the bankruptcy filing, reviewing the debtor's petition to see if he is eligible under the means test for Chapter 7 relief, conducting the Section 341 meeting and examination, among many other explicit duties.

Certain of my responsibilities are more demanding and challenging than others. If the debtor served as an administrator of an employee benefit

plan, as trustee, I am obligated to continue to perform the obligations required of that administrator. In health care bankruptcies, trustees also have obligations to transfer patients from facilities that are being closed and to safeguard patient privacy and healthcare records.

Serving as a cop on the beat is an essential part of the chapter 7 trustee function. The chapter 7 trustee thus is responsible for any determination of potential misconduct on the part of the debtor, including criminal activity to be reported to the United States Trustee Office for referral to the U.S. Attorney. Those debtors who seek to game the system are first rooted out by the Chapter 7 bankruptcy trustee, who has a fiduciary duty to the estate. Meeting this obligation is essential for the bankruptcy system to be properly policed and to work the way we have crafted it.

The 2005 Law Adds Significantly to Trustee Workload

With the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), our role and duties as trustees, and the role we play as a watchdog for the courts and the Office of the United States Trustee has expanded, without any increase in the base, no asset case fee.¹ Congress asked the Government Accountability Office to study the dollar costs associated with BAPCPA, including costs to private sector system providers such as Chapter 7 trustees. GAO found that the new law's requirements related to documentation, verification and reporting have increased the time and resources needed to be devoted to administer every case. Specifically, GAO found the provisions with the most significant impact include:

New documentation requirements. Trustees must confirm that debtors have submitted documentation required under the act, which includes 2 months of wage statements and the tax return from the year prior to filing. The trustees must safeguard all tax return documents according to procedures set by the Trustee Program—for example, access to tax records

¹ Attached to my testimony is the Preliminary Report on BAPCPA's Impact on Chapter 7 Trustees Administering Consumer Cases, prepared by Prof. Lois R. Lupica of the University of Maine. Prof. Lupica's work measuring empirically the costs of BAPCPA is funded by a grant from the ABI Anthony H.N. Schnelling Endowment Fund.

must be restricted and sensitive documents must be properly secured, destroyed, or returned to the debtor.

Domestic support obligations. In cases where a debtor has a domestic support obligation—alimony or child support—private trustees must notify the claimant (such as the custodial parent) and the relevant state child support enforcement agency of the bankruptcy. The trustee must notify applicable parties twice during the bankruptcy process—once around the time of the meeting of the creditors and once at the time of discharge.

Means test. Chapter 7 trustees must review the means test form submitted by debtors and verify the calculation of current monthly income. In those cases where the income is below the state median—and therefore not presumed abusive—the trustees are to verify that the income is truly below the median by examining wage statements and tax documents.

Uniform final reports. Once the Trustee Program issues a final rule, private trustees will be required to submit a uniform final report of each bankruptcy case. For Chapter 7 trustees, the proposed reporting forms add additional responsibilities since they require reporting data not currently collected for no-asset cases, and they must enter this information manually.

The Economic Burdens on Trustees Rise with the Caseload

The chapter 7 trustee executes the important public policy initiatives set forth in the Bankruptcy Code, serving a vast constituency of creditors, the debtor, the Bankruptcy Court and the Office of the United States Trustee. The volume is excessively high and the legal and factual issues presented are sometimes complicated and challenging. These tasks and responsibilities are not waived or reduced because the case is a no asset case.

Over the course of my career and tenure as a chapter 7 trustee, there have been hundreds, if not thousands of cases where substantial amounts of billable time and cost advances have been made to only realize at the end of the case, there is no recovery at all, and only the \$60 fee is available as compensation. I understand this nature of my role as trustee and am fortunate to have such a firm as Wiley Rein that understands this process and is willing to endure the economic consequences of this part of my practice.

Of course, trustees at smaller more local practices may not have this type of support and without this fee increase, may not be able to continue to fulfill this vital role.

The role and workload of the nation's Chapter 7 trustees is also tied to the level of new bankruptcy cases filed in the United States. Until very recently, bankruptcy filings in the U.S. have grown sharply since the aftermath of Congress' major rewrite of the laws in 2005, with BAPCPA. For example, filings grew nationally from 617,660 in 2006 to nearly 1.6 million in 2010. More than 70 percent of these cases were filed under Chapter 7 of the Bankruptcy Code.

In the Eastern District of Virginia, there were 27,535 total non-business, or consumer, filings during 2010, and 18,211 of these were Chapter 7 cases, representing 66 percent of the total. The total number of cases in our district last year was the highest since 2005, and more than 200 percent higher than filings in 2006.

Conclusion

In the U.S., we ask much of our bankruptcy system, as no less than the commercial law courts of the country. The system will this year handle more than 1.5 million cases, far greater than the total cases handled by all the rest of the Federal courts. Indeed, no court system touches more people than bankruptcy. And no player within that system reaches both debtors and creditors like the Chapter 7 trustee. No system, however well designed, can be better than the people who operate within it. Therefore, we must retain and attract competent, honest and committed trustees. As designed, our present system simply will not work effectively without them. In other insolvency systems around the world, government officials on a public payroll handle the duties of administration, oversight, monitoring and investigation. But our system relies on private parties to provide these functions, at a fraction of the cost to the system and the taxpayers.

Statutory fees are increased for Court appointed counsel to the criminally accused and to jurors, but the \$60 no asset fee to trustees, as quasi-judicial officers of the bankruptcy courts, has not been increased in over 17 years. Given the vital role that bankruptcy trustees play in the bankruptcy system, I recommend that Congress increase this fee to \$120.