

*This month's Update includes excerpts from the September 16, 2008 hearing of the House Judiciary Subcommittee on Commercial and Administrative Law on legislation to increase the compensation of chapter 7 trustees in no-asset cases. All four witnesses are ABI members, and portions of their written statements appear below. ABI is not an advocacy organization and takes no official position on the matter considered here.*

### **Robert Furr, President, NABT**

**M**ost bankruptcies are chapter 7. In FY 2007, nearly 500,000 chapter 7 cases were filed in the U.S. bankruptcy courts. Due to recent economic circumstances, this number is rising. Members of our organization carry out the major work involved in the bankruptcy system, handling 500 to 1,000 cases each year. In our work, as a trustee, we protect both debtors and creditors from abuse of the system. Importantly, we carry out important public policy priorities as directed by the Congress, such as insuring that child support orders are enforced, safeguarding patient health care needs and records, and protecting pension obligations. We even help federal, state and local governments by being one of the largest collectors of unpaid taxes in the U.S. The particular activities that we carry out are mandated by the many provisions of the law, rules and regulations, and are necessary and crucial to the operation of bankruptcy.

As trustees, we have an obligation to secure relief for honest but unfortunate debtors and to investigate filings for abuse, criminal activity, fraud, mortgage fraud, fraudulent scams involving homeowners, fraudulent foreclosure rescue operations, fraudulent schemes targeting homeowners, as well as protecting the interests of all parties. In fiscal year 2007, the Office of the U.S. Trustee made 1,163 criminal referrals—most resulting from information provided by chapter 7 panel trustees. In fiscal year 2007, chapter 7 trustees distributed \$2.86 billion to creditors in chapter 7 cases.

A major problem, however, has been our compensation. Under the present law, trustees receive \$60 for administering chapter 7 cases in which “no assets” are liquidated. The last increase in this trustee compensation occurred in 1994, when the fee was raised from \$45 to \$60. Let me emphasize that this is a flat fee per case. A case could take an hour, a few hours, days, weeks or, in some unique circumstances, years to bring to closure.

Trustees essentially work on a “contingent” basis because if their efforts do not result in a dividend to creditors, they receive only the \$60 no-asset fee. Every trustee can tell about cases in which he or she devoted many, many hours and much money and did not recover any assets. In other cases, trustees are obligated by their statutory duties to spend the time and money to fulfill their duty without additional compensation. That happens on a daily basis in my practice.



*Bankruptcy Judge Margaret Dee McGarity, ABI Resident Scholar Jack F. Williams, NABT President Robert Furr and Eugene Crane (l-r).*

Congress has looked at increasing our compensation, but for one reason or another, our raise has gotten entangled in other legislative battles and nothing

that the Senate can pass this bill, but time may be running out again.

### **Eugene Crane**

I have served as a bankruptcy trustee for over 45 years and have practiced law for over 54 years with emphasis on representation of debtors, creditors, other trustees and creditor committees in bankruptcy cases. The 1978 Bankruptcy Code changed the proceedings so that judges no longer conduct bankruptcy hearings called 341 meetings or creditors' meetings. The function of conducting an examination into the finances and activities of a debtor passed from the court to the trustee. As a result, the vast majority of debtors never appear before a judge, but in the 95 percent of all chapter 7 cases, they appear before and are examined under oath by a panel trustee and occasionally by creditors. Having assumed the former judicial function and charged with investigating into the financial affairs of the debtor, the valid functioning of chapter 7 proceedings rests squarely on the shoulders of the trustee.

In today's chaotic economy, I am served with motions of mortgage lenders

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has happened. Increasing our compensation has always enjoyed bipartisan support. Most recently, in 2006, the House passed H.R. 5585, a bill to improve the netting of financial obligations in bankruptcy. The bill was cosponsored on a bipartisan basis by Rep. Debbie Wasserman Schulz (D-Fla.) and Rep. Patrick McHenry (R-N.C.). Section 7 of that bill provided a \$55 per-case raise for trustees. It passed the House by voice vote. Regrettably, our provision was stripped in the Senate, reportedly by some Senators who did not want an increase in the bankruptcy filing fee. The Deficit Reduction Act of 2005 (P.L. 109-171) was also another missed opportunity. The filing fee for chapter 7 was raised significantly, but none of the increased funds were used to compensate trustees.

In early 2008, the Senate Judiciary Committee reported out S. 1638, a bill to increase compensation for federal judges. Senators Richard Durbin (D-Ill.) and John Kyl (R-Ariz.) added an amendment increasing our compensation by an additional \$60 per case. We are hopeful

to modify the automatic stay and be allowed to foreclose their mortgages, all requiring appearances in court. I must value the real properties covered to see if there is any equity for the estate (or for the debtor). These motions could average as many as six per week, each requiring a court appearance or pleading (noncompensable). The number of “no asset” cases of former businesses usually end in a treasure hunt for records, continued hearings, requests for document production and even filing lawsuits to enforce the duties under the Code or to recover property. The bankruptcy process was sufficiently complicated without the passage of BACPA, but now the duties of the trustee are further enlarged and expanded, creating substantive new burdens without compensation. In addition to the requirement already mentioned of having the debtor supply tax returns and pay advices (stubs) to ensure compliance with the means test obligations, anywhere from 5 to 30 percent of cases require time and effort to secure compliance with such

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demands. Additional or continued hearings are necessary when the debtor does not follow the rules and the trustee must schedule another hearing just to get and review the tax returns and financial information. As a trustee, I am committed to communicating a presumption of “abuse” to the U.S. Trustee after reviewing the income-revealing documents.

### **Hon. Margaret Dee McGarity (E.D. Wis.)**

I wholeheartedly support just compensation for the men and women who are a vital part of the bankruptcy system, and I am here at my own expense because of my commitment to the court system I work for. I have been a bankruptcy judge for slightly over 20 years, and before that I practiced law in Milwaukee, which included serving as a chapter 7 trustee in bankruptcy, the first time in January of 1978 under the former Bankruptcy Act.

My experience as a trustee has no resemblance to what it means to be a trustee today. Offices require regular updates of hardware and software to manage their cases and to interface with the court system. This is the electronic age: We can't go back, and I am not suggesting we do. There is additional oversight now, with reports and audits; accountability is good, but it is not compensable. The 2005 Act requires additional duties for trustees, such as notifying domestic-support obligation claimants about state agency services. These duties not only have nothing to do with the bankruptcy or adjudicative process, they are not compensated. They should be, but not at the expense of the courts. The trustees I worked with long ago were at the top of our profession. Many are today. But as time has gone on, these experienced trustees have often told me, “I can't afford to do this anymore.” With the changes in technology and the law since 1994, no one should be surprised at this. I have heard that nontrustee law practice, or other business for nonlawyer trustees, has had to support the trustee portion of the business. They can do this for a while, and they do so because there are many very dedicated trustees who enjoy the work and believe it is valuable. Many experienced trustees are still working in the system, and the

courts and creditors depend on them, but this situation cannot continue.

### **Prof. Jack F. Williams, ABI Resident Scholar**

During the time from the last fee increase, a bankruptcy trustee's duties and responsibilities have increased substantially. Typically, a bankruptcy trustee is charged with a large number of important duties, among them the administration, investigation, and oversight of a bankruptcy case. Bankruptcy trustees undertake various investigatory and audit functions and prepare reports of their findings. In many districts, the bankruptcy trustee engages in follow-up investigations regarding the new means testing, a requirement added by the 2005 amendments and generally administered by the U.S. Trustee. For example, the bankruptcy trustee may be tasked with assisting the U.S. Trustee by gathering and/or verifying information and or documentation for the U.S. Trustee's implementation of the new means test (including Current Monthly Income (CMI) data, tax returns, and documentation of certain expenses on Form 22A), additional §341 meeting questioning imposed by the 2005 amendments, domestic support obligations (DSO) noticing, confirming credit counseling, and monitoring misconduct issues concerning attorneys, petition preparers and debt-relief agencies (DRAs). Many, but not all, of these trustee duties are found in Bankruptcy Code §704 (11 U.S.C. §704). These duties are not only important for the orderly administration of a bankruptcy case, but absolutely essential to preserve the integrity of the bankruptcy system. The bankruptcy trustee also serves as the “face” of the bankruptcy process, meeting with each debtor that files a chapter 7

bankruptcy case. For the vast majority of Americans, this is the “face” that they assign to the federal judicial process. It is essential that we continue to attract highly competent, honest, and fair-minded individuals to serve as bankruptcy trustees. ■



*ABI Resident Scholar Jack Williams testifies in support of increased bankruptcy trustee compensation.*