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March 12, 1999

Peter G. McCabe
Assistant Director, Office of Judges Program
Administrative Offices of United States Courts
Suite 4-170
Columbus Circle, NE
Washington, DC 20544

Re: Proposed Rules Change

Dear Mr. McCabe:

I previously forwarded the enclosed articles to Judge Kressler for his review and comment. In his response, he provided me with your name and address and he indicated that the rules committee will give serious consideration to proposed changes in the Bankruptcy Rules once submitted. By this letter I am formally submitting a proposal to the Rules Committee through your office regarding rules changes relative to attorney fees.

I have also submitted my article to the NACTT Quarterly for publication along with the companion article written by Morgan D. King, Esq. that was published in the NACTT Quarterly in July of 1996.

My proposal is simple. The code as it stands is sufficient. The motivation for attorneys to file more Chapter 13's and scuttle massive revisions to the Bankruptcy Code lies with increased attorney fees. I believe I have outlined a comprehensive, balanced and fair system that will elevate the practice of law throughout the national bankruptcy bar and increase the total number of Chapter 13 filings countrywide.

I would ask that you review this proposal and submit it to the rules committee for consideration. I have also asked the local rules committee of the NDNY to consider these changes.

I look forward to your comments. If there is anything else I should do to assist the rules committee or otherwise formally present this proposal to them, please advise, otherwise, I look forward to your prompt consideration of the proposal.

Very truly yours,

By: Wayne R. Bodow

cc. Judge Kressler

INADEQUATE COMPENSATION OF DEBTORS' ATTORNEYS IS IMPAIRING THE CHAPTER 13 SYSTEM

By Morgan D. King, Esq.[1]

THERE is a certain natural tension between debtors' attorneys and Chapter 13 trustees, and it sometimes seems the attorney is viewed with suspicion, perhaps even as an obstacle to the smooth running of the machine instead of as a vital leg in the debt adjustment system. There should be no doubt, however, that debtors' lawyers in Chapter 13 play a crucial part in the system, and that without quality representation by lawyers the system would, quite simply, fail.

When the system operates as intended the result provides debt recovery for creditors on the one hand, and debt relief to consumers on the other. This happens when each entity in the system (judge, trustee and private attorney) understands and appreciates the objectives and roles, as well as the duties and burdens of the others, resulting in a *unity of professional goals.*

A dialogue in which information, problems and solutions may be shared among the professionals in the system facilitates this unity of goals. In this spirit the remarks that follow are intended to apprise Chapter 13 trustees of some of the concerns of private attorneys who practice in the Chapter 13 system.

There is evidence that recent budget cutbacks for funding the Chapter 13 offices are beginning to impair the trustees' ability to provide the level of services necessary to make their leg of the system function as well as it should. Accordingly, Chapter 13 trustees may be so preoccupied with their own problems that they are not noticing problems developing in another leg . . . the debtors' bar. However, these problems bear directly on the success or failure of the trustees' endeavors.

DEBTORS' LAWYERS OPERATE ON A SHOESTRING

Public policy is that debtors' lawyers are entitled to earn the same level of compensation as lawyers practicing in other, comparable areas of consumer law.[2]

However, despite this explicit public policy, the evidence is clear that this is not happening, and in fact too many consumer debtor attorneys are not being adequately compensated for their services. This evidence comes from anecdotal information, studies, surveys and reported cases.[3]

CONSEQUENCES TO THE SYSTEM

Consumer debtor attorneys are not being adequately compensated. The consequences of this go far beyond the mere pecuniary interest of lawyers in private practice, and in fact impact on the rights of debtors to quality legal representation, impair the recovery of debt by creditors, and interfere with the smooth administration of the Chapter 13 system. Accordingly, the financial health of consumer bankruptcy lawyers should be deemed an important concern not only of the private bar but of the trustees and courts charged with oversight of the system.

Some of the negative consequences of inadequate compensation of debtors' attorneys are discussed below.

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[1]The author, a member of the California Bar, received his J.D. from the University of California School of Law, Davis, 1971, and undergraduate degree from University of California, Berkeley, 1968. He is a practicing bankruptcy attorney in Dublin, California, and presently serves as chairman of the *Committee on Compensation of Bankruptcy Attorneys* for the National Association of Consumer Bankruptcy Attorneys (NACBA), and is a member of the American Bankruptcy Institute *Committee on Professional Compensation.* He is the author of numerous articles and books on legal topics, with particular emphasis on tax remedies in bankruptcy. In addition to membership in NACBA, ABI and various bar bankruptcy sections, he is an associate member of the National Association of Chapter 13 Trustees. He self publishes his book, *Attorney Fees in Consumer Bankruptcy Cases*, chapter 1 of which will appear as an article in the 1996 *Norton Annual Survey of Bankruptcy Law.*

[2]Comment, *Attorneys Fees in Bankruptcy*, 19 Conz. L. Rev. 333, 334 (1983/84).

[3]American Bankruptcy Institute *National Report on Professional Compensation in Bankruptcy*, 1991; The Altman Weil Pensa *Survey of Law Firm Economics* (Altman Weil Pensa Publications, Inc. (1993) (revealing that average compensation of bankruptcy attorneys across the nation is third from the bottom out of 14 specialties studied); Consumer Bankruptcy News, Vol. 3, September 1994; The NACBA 1996 *Survey of Consumer Bankruptcy Attorneys;* Morgan D. King, *Compensation of Debtors' Attorneys in Consumer Bankruptcy - The Failure of Public Policy* (Norton Annual Survey of Bankruptcy Law, 1996); *In re* Commercial Consortuum of California, 135 B.R. 120 (Bankr. C.D. Cal. 1991).

CHANNELING DEBTORS AWAY FROM CHAPTER 13

Public policy encourages Chapter 13 as the preferred bankruptcy remedy,[4] and in fact Chapter 13 filings have increased slightly in recent years.[5]

However, the numbers of Chapter 13 filings may be substantially below their potential because a great many lawyers appear to be channeling their clients away from Chapter 13 and into Chapter 7 instead. The reason is that many private attorneys believe they cannot be adequately compensated for their services in Chapter 13. "Chapter 7 cases present less obstacles for consumer bankruptcy practitioners to set and receive their fees."[6]

The evidence of this channeling is appearing from numerous sources.[7] For example, the New Mexico law firm of Behles-Giddens conducted a survey of compensation issues in 1995. This survey was presented as a report by Jennie Behles, Esq. to the ABI Symposium on Professional Compensation in Montana. Among its findings was that 32% of the responding lawyers believe that fee caps in Chapter 13 cases cause lawyers to steer their clients into Chapter 7, instead.[8] This evidence has been corroborated by the survey of debtor attorneys conducted by the National Association of Consumer Bankruptcy Attorneys (NACBA) in 1996. It is further supported by anecdotal evidence coming into the NACBA Committee on Compensation from across the country; for example, one report disclosed that two high-volume firms in Chicago, Illinois, recently filed approximately 700 bankruptcy cases in one month; of these, only one was a Chapter 13. The reason given for this was that the firms involved believe they cannot be adequately compensated representing debtors in Chapter 13 cases.

There are a few areas where the opposite is happening; that is, some lawyers channel their clients away from Chapter 7 and into Chapter 13 because of artificial fee caps imposed by local rules pertaining to compensation in Chapter 7. However, the extent of this channeling is apparently substantially less than the channeling away from Chapter 13.

In either event, it must be viewed as wholly unsatisfactory from a public policy standpoint that debtors are being funneled into either Chapter 7 or Chapter 13 not because of the merits of their respective financial affairs, but rather because of economic pressures on their attorneys respecting compensation for legal services.

Across the board, the most serious problem is lawyers steering their clients away from Chapter 13. This must be a concern to creditors, in particular. It should be noted that leaders in the creditor side of the system commenting at the 1995 ABI National Symposium on Professional Compensation in Montana made it clear they view reorganization as a plus for the credit industry, and remarked favorably on the clear relationship between professional compensation and the quality of lawyering on the one hand, and the success of reorganization efforts on the other.

IMPAIRMENT OF QUALITY OF LEGAL REPRESENTATION

It may be assumed as a given that only an adequately compensated lawyer is able to provide excellent legal services.

The problem is that quality lawyering is expensive, and the reason it is expensive is because of the kinds of resources that are necessary to support the lawyer doing bankruptcy work. A law firm that undertakes to represent debtors in Chapter 13 requires a well-trained, highly motivated and well-compensated staff, usually including paralegals; expensive legal research resources, and a high level of investment in law office technology such as computers, photocopy equipment, etc.

The hidden costs of bankruptcy practice must also be considered. These include high phone-answering requirements, enormous demands on paper supplies, unusually high wear and tear on photocopy equipment, higher than average malpractice insurance premiums, and a higher than average investment in advertising. In fact, many lawyers have concluded that the overhead cost of handling consumer bankruptcy cases is considerably higher than for most other areas of consumer law.[9]

When a lawyer is unable to obtain timely and adequate compensation for his work, the quality of the work

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[4] In 1993 debtors paid some $350,764,265 to unsecured creditors through Chapter 13; SOURCE: *Selected Statistics Regarding Bankruptcy Case Filings*, prepared by National Association of Consumer Bankruptcy Attorneys (NACBA), Norma Hammes, Esq., ed. [from information provided by the Administrative Office of the U.S. Courts].

[5] As a percentage of all bankruptcy filings Chapter 13 cases have increased from 24.1% in 1981 to 28.1% in 1993; SOURCE: *Selected Statistics, Id.*

[6] *Consumer Bankruptcy News*, supra., Vol. 1 Issue 14.

[7] See transcript of proceedings, *ABI Symposium on Professional Compensation*, 1995, at 74; *Consumer Bankruptcy News*, Vol. 4 (May, 1995) at 6; National Association of Consumer Bankruptcy Attorneys *Survey on Compensation*, 1996.

[8] Survey, Jennie Behles, ed. Ms. Behles is a director of the Council for Certified Bankruptcy Specialists and is a fellow of the American College of Bankruptcy. The report is based on an extensive survey of Chapter 13 trustees and debtor attorneys.

[9] NACBA *Survey on Compensation*, 1996.

suffers. A large number of lawyers responding to the NACBA 1996 survey indicated that problems with compensation impair their ability to deliver quality legal services, and the 1995 Behles-Giddens survey revealed that 54% of attorneys believe that fee caps result in a decrease in the quality of legal services provided for the debtor. And, a startling fact is that the malpractice rate among bankruptcy lawyers is the third highest of all fields of consumer law,[10] indicating a problem with the quality of legal services being provided in the field of consumer bankruptcy law.

INABILITY TO PROVIDE POST-PETITION COUNSELING OR SERVICES

Across the nation only 32.89% of filed Chapter 13 cases are successfully completed.[11] Why so many fail to complete their plans is a subject of concern that has caught the attention of the National Bankruptcy Review Commission. To date, there appears to have been few, if any, empirical studies attempting to identify the causes of the high failure rate.

Intuitively, however, we may presume that one reason is the debtor's need for postpetition financial and budget counseling.

Debtors' attorneys could do more to meet this need. However, without adequate financial resources, they are unable to do so. In the present financial shoe-string environment, the typical debtor's lawyer reaches his limit of ability to provide services the moment the plan is confirmed.

"A Day on Capitol Hill" meeting in Washington, D.C. with members of Congress and staff on issues on behalf of NACTT. Left: Jason Mahler with Rep. Zoe Lofgren (D-16-CA); Kathleen McDonald; George Stevenson and Jerry O'Donnell.

ENCOURAGING "FORM-FILERS" OPERATING ON HIGH VOLUME

Because the profit margin is so thin on each case (and this presumes there is any profit at all in handling Chapter 13 cases . . . a dubious presumption) the economic pressure on Chapter 13 practitioners is to do a high-volume business which minimizes the level of professional resources that may be devoted to each case. In other words, in order to make a profit any individual representing debtors in Chapter 13 is virtually forced to take as many cases as possible and keep the level of professional services invested in each case to an absolute minimum. The result is that each individual case is given a superficial level of lawyering, at best.

This is contrary to the tradition of quality in delivery of legal services that is expected in this country. The message that one receives in one's legal education is to give each case one's best; the message given by the Chapter 13 system is just the opposite . . . *to give each case one's least.*

This pressure toward high-volume, cheap lawyering has two unfortunate consequences.

First, it discourages quality lawyers from representing debtors in Chapter 13, and impairs the ability of those quality lawyers who do stay in the system to provide quality services in each case.

Second, it encourages an unprofessional culture which fosters high-volume "form-filer" entities to spring up and exploit the market. Thus, in some areas there are lawyers who file massive quantities of cases without adequate attention to each case. And worse, in many areas so-called independent paralegals and other legal service schemes spring up which generate massive volumes of cases using aggressive advertising methods. These entities typically provide virtually no legal services at

[10] American Bar Association study, 1985, as reported in *Legal Malpractice Report*, Vol. 3, No. 2 (1992), published by Long & Levit, San Francisco, CA.

[11] NACTT, *Statistical Data Survey*, 1994.

all, and in too many cases damage the debtor's right to a fair chance at debt adjustment through Chapter 13, while disrupting the orderly processing of cases through the trustee's offices and the courts. The empirical evidence is clear that in all too many cases such entities routinely fail to provide competent services to the debtor.[12]

WHAT TRUSTEES CAN DO

If we accept the premise that adequate compensation for doing Chapter 13 work improves the quality of lawyering on behalf of the debtor, then it would seem that more Chapter 13 cases will succeed, and more money will be recovered by creditors. And, of course, more debtors will receive the quality of representation to which they are entitled under the law.

Accordingly, it seems fitting that Chapter 13 trustees should be sympathetic to the needs of the debtors' bar for timely and adequate compensation. Although there are limitations to what Chapter 13 trustees can do to help improve the situation, some suggestions are made here.

1. *Treat fees as priority administrative expenses - pay off first.*

One of the causes of inadequate compensation is the delay in payment of fees built into the typical Chapter 13 plan. The delay costs the lawyer in terms of risk of loss, and in loss of value of money over time. The risk of loss arises to some extent from dismissal or conversion of cases in which substantial portions of the attorney's fees remain to be paid. Collection of such fees following a dismissal or conversion is typically not feasible.

As a consequence, many lawyers report that they collect much less of their billable time in Chapter 13 than in any other kind of work,[13] and Judge Keith Lundin[14] in 1992 testified before the Senate Judiciary Committee's Courts and Administrative Practices subcommittee that attorneys in his district typically collect only 62% of awarded fees.

Jennie Behles, in her report to the ABI Symposium in Montana reported:

> [A] factor that has not been considered in setting these fees is collectability. Collectability is a real problem in consumer cases. If you think that $1,500 is a reasonable fee, that's fine. But what this survey shows is that out of that $1,500 somebody's probably collecting $1,000. That has an effect on keeping good attorneys in the system.[15]

Trustees can help ameliorate this problem by, among other things, developing payment formulas that expedite and shorten the time required to pay off the balance of the attorney's fees in the plan.

Another helpful policy is to send refund checks for dismissed cases to the attorney, and encourage the attorney to seek priority administrative expense status for his fees. This was suggested by Hon. Keith Lundin in his treatise on handling Chapter 13 cases. If the fee is declared an administrative expense pursuant to 11 U.S.C. §503(a), then if the case is dismissed the trustee must deduct these fees from any refund check due to the debtor and send the fees directly to counsel pursuant to §1326.

2. *Oppose fee guidelines and fee caps that limit recovery of fees.*

Jennie Behles reported to the ABI at the 1995 Symposium that her firm's survey indicated " . . . we found out from the survey that effective lawyering increases distribution to creditors. So, we need to make sure that any guidelines that we use in these cases don't get good lawyers out of the system." And, a substantial number of responses from the 1996 NACBA survey revealed that many consumer lawyers are convinced that unfair fee guidelines have discouraged them from handling Chapter 13 cases, and the 1991 ABI National Report On Professional Compensation discovered evidence that inadequate compensation was causing lawyers to decline bankruptcy work or leave the system entirely.

Other evidence generated by these and other reports and studies indicates that such guidelines are actually unnecessary, and that across the board ordinary market mechanisms, such as competition, market rates, advertising and state bar ethical guidelines, are just as effective at keeping fees within reasonable boundaries. Furthermore, such guidelines may indirectly violate the Lodestar formula, which is the formula adopted by majority rule in the bankruptcy courts for awarding compensation based on reasonable hourly rates and the actual amount of time reasonably necessary to handle the case.

Accordingly, trustees can help improve compensation of debtors'

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[12]Hon. A. Jay Cristol, *The Nonlawyer Provider of Bankruptcy Services: Angel or Vulture?* 2 Am.Bankr.Inst.L.Rev. 353 (in which Professor Cristol concludes that as a rule such providers are more akin to vultures than angels).

[13]NACBA Survey, 1996.

[14]Judge, U.S. Bankruptcy Court, Nashville, Tenn.

[15]Transcript, *ABI Symposium, supra*, at 24.

attorneys by opposing restrictive fee caps on prepetition fees and on total amounts of fees being paid through the plan.

3. Support efforts to provide for interest on deferred fees.

The almost universal practice among nonbankruptcy attorneys is to charge interest for delayed payment of compensation. And, it is not uncommon in Chapter 11 cases for debtor's counsel to receive a Lodestar enhancement to compensate for the loss of the value of such compensation due to deferred payment.[16]

Delays in payment of the fees provided for in the plan cause a substantial loss of the value of the money eventually received by the attorney. But typically attorneys fees scheduled for payment through the plan are not coupled with interest to compensate for this delay.

It may, of course, be argued that general unsecured creditors are not entitled to interest, so why should the debtors' lawyers be entitled to it? But this misses the point . . . if public policy is to assure that debtors' attorneys are paid commensurate with their nonbankruptcy colleagues doing comparable work, then as a matter of public policy they are entitled to interest on their deferred compensation.

One of the recommendations of the 1991 ABI Report on Professional Compensation is that:

> The Bankruptcy Code should be amended to expressly provide that reasonable compensation for delay in payment may be awarded to trustees and professionals where the court finds, after notice and hearing, that the delay and amount of compensation involved are material. The survey reveals that the courts are expeditiously hearing and ruling on fee applications, but that delays, engendered by lack of available estate funds and other causes not the fault of the professional, are common.[17]

4. Encourage simplified fee application procedures.

Another significant cause of inadequacy of compensation in Chapter 13 is the time and effort necessary to apply for additional fees when additional services are required. In fact, a substantial number of consumer bankruptcy attorneys indicate that they simply cannot invest the time and resources necessary to make fee applications. In other words, it costs more in the value of time than the lawyers can recover by making the effort.

This problem was identified at the 1995 Symposium on Compensation, and has been documented by the 1996 NACBA Survey on Compensation.

The problem of unnecessarily burdensome fee application requirements has been identified by some courts. For example, the court in *In re Zwern*, a Chapter 13 case out of Colorado, discussed the tension arising out of the " . . . economics and difficulties of the fee allowance process for a Chapter 13 practitioner." Said the court:

> Regrettably, this tension is exacerbated by Congress' mixed message in the Bankruptcy Code. Congress encourages Chapter 13 filings but fails to relieve Chapter 13 practitioners of the administrative burden associated with fee allowance under §330. However, in the absence of further amendments in the Bankruptcy Code both counsel and this Court are left with their respective obligations.[18]

Any efforts that trustees can make to simplify the fee application process may be a substantial help in solving this problem.

5. Encourage efforts to reduce the need for a lawyer's participation in non-legal aspects of the system.

For example, the vast majority of motions for relief from stay are merely questions of money . . . did the debtor pay his postpetition mortgage payments, or not? If not, how much time does he or she need to catch up? There is utterly no need at all for a lawyer to invest time or resources in representing the debtor in those cases . . . there are no legal questions involved, and the level of "negotiation" that may be required in such cases can typically be done quite efficiently between the debtor and the creditor.

Yet too often the lawyer is expected to invest substantial time and resources in sorting out these problems and attending court hearings . . . doing essentially nothing more than financial baby-sitting . . . and all too often not being compensated for his time and effort. Does this really need to be happening?

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[16] In re D.W.G.K. Restaurants, Inc. 106 B.R. 194 (Bankr. S.D. Cal. 1989); In re Dodge, 104 B.R. 491 (Bankr. S.D. Fla. 1989). See also discussion in In re Consortium of California, 135 B.R. at 123.

[17] *ABI Report, supra*, at xvii.

[18] In re Zwern, 181 B.R. 80, 86 (Bankr. D Colo. 1995).

6. *Be more sensitive to the costs of comparable services standard.*

Congressional intent is clear that bankruptcy attorneys should be paid on a level commensurate with their nonbankruptcy colleagues performing comparable legal services.[19] This standard has been incorporated into the standards of review provided for in 11 U.S.C. §330(a) (3)(E).

Yet how many trustees are familiar with market rates and billing practices outside the field of bankruptcy? If the level of knowledge among trustees is comparable to that of bankruptcy judges, it is pretty dismal; the 1991 ABI Report on Compensation found that a large number of judges have no knowledge whatever of nonbankruptcy compensation, and the majority have only a smattering of familiarity.

Trustees should encourage local lawyers to provide evidence of nonbankruptcy billing rates and billing practices in order to facilitate fair and realistic appraisals of their compensation and billing needs.

CONCLUSION

A fundamental problem with Chapter 13 from the lawyer's point of view is the split personality of the system . . . because of its relatively recent statutory origins it is in some respects akin to a governmental or bureaucratic public service, and yet at the same time is set up to function like a traditional legal remedy with judges, an adversary system, and official published legal opinions.

Thus, on the one hand the system would like to shuffle the public through a quick clerical process designed to conform all cases to a pre-determined profile, minimizing the distinctive features of each debtor's situation; on the other hand, it invites lawyers to step in and represent a debtor in the traditional manner of lawyering . . . that is, to assure that the debtor is not run over by the system . . . in fact to assure that the distinctive features of his or her client's situation are emphasized, not minimized, and that decisions are not made in a cookie-cutter fashion, but just the opposite . . . are made in an adversary manner designed to advance the interests of the individual client. The system is motivated to force the debtor to bend to the needs of the system; but on the contrary, the lawyer's duty is to force the system to bend to the client's needs.

This split personality may be seen by looking at whose compensation is actually at risk in the Chapter 13 process. When a case requires attention, the courts and the trustees and their respective employees get paid the same, regardless of whether that attention is actually given. When a Chapter 13 case fails, the judge and the trustees and their respective employees still get paid and still collect their benefits . . . *it is only the debtor's lawyer who loses a portion of his compensation.* And this risk of loss by the debtor's lawyer is accepted by the system as altogether fitting and appropriate (not, however, by the debtor's lawyer).

This split personality creates an environment in which the lawyer is felt to be almost more of an impediment than a necessary and esteemed part of the system. And this, in turn, creates a culture in which the lawyer's expectations of being paid adequately for his services are deemed unseemly, unnecessary, even unethical. A lawyer who actually presumes to be properly compensated all too often is forced to "rock the boat," and before long is viewed in a manner akin to the leper at the courthouse.

Lawyers representing debtors in Chapter 13 do not like the feeling of being treated like lepers when it comes to being compensated. But far more serious than the lawyer's mere feelings is the effect of inadequate compensation on the system itself. The system will never achieve its full potential, as originally envisioned, until the debtors' bar is able to perform its proper function in a tradition of excellence in the delivery of legal services. And this can only happen with appropriate reform in the philosophy, culture and procedure of compensation of debtors' lawyers.

[19] Notes of the Committee on the Judiciary, House Report No. 95-595; In re Manoa Fin. Co., 853 F.2d 687 (9th Cir. 1988); Charles Jordan Tabb, *The History of The Bankruptcy Laws in the United States*, 3 Am.Bankr.Inst. L. Rev. 5, 25 (Spring, 1995).

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AN INCENTIVE BASED BANKRUPTCY SYSTEM WILL CREATE BALANCE FOR DEBTORS AND CREDITORS

By: Wayne R. Bodow Esq.

The impetus to overhaul the bankruptcy code, I believe, originates from the success of Chapter 13. Today, Chapter Thirteen Trustees distribute more than one billion dollars annually to unsecured creditors, funds those creditors likely would never have collected.[1] Bankruptcy rules should support additional incentive fees to debtor's attorneys. Unfortunately, inadequate compensation of debtors' attorneys is impairing the Chapter 13 system. [2] (I suggest that Morgan King's article be reprinted.) Other minor incentive oriented changes to the Bankruptcy Code need to be created through congressional action to encourage debtors to file Chapter 13[3]. As a debtor's attorney, I believe that the banking community is correct in their assumption that more Chapter 13 cases should be filed. In my practice, in contrast to the local norm where 80% of the consumer filings are Chapter 7, I have filed approximately an equal number of Chapter 13 and Chapter 7 cases for over a decade. Yet in some communities the norm for consumer filings are lopsided in favor of Chapter 13! No significant changes in the national mix of consumer filings resulted from the 1994 amendments requiring language that the debtors be informed of alternatives to chapter 7. Indeed the frustrated creditors cry that it is improper for a debtor to have a free choice of filing either a Chapter 7 or Chapter 13. Yet, I believe that today the debtor's attorney strongly influences this decision.

Chapter 13 works today because the prospective debtor's decision to choose chapter 13 is incentive based but the incentives need to be further expanded. The incentives today fit into three easily divided categories: the right to cure; the right to "cramdown" and the need to protect assets otherwise known as the best interest of creditor's test. [4] Debtors are

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[1] See NACTT Quarterly, Vol. 10, No. 1, October 1997 Chapter 13 Disbursements.

[2] See NACTT Quarterly, Vol. 8, No.4, July, 1996 Inadequate Compensation of Debtors' Attorneys is Impairing the Chapter 13 System By Morgan D. King, Esq.

[3] This is perhaps the subject of an additional article that would seek to explain case law that if overturned by Congressional action, would create policies which in turn would create further incentives for filing Chapter 13's. Examples: Treating real property tax liens as unsecured debts when property is abandoned; full lien release when secured portion of claim is paid; easing the requirements of creditor notice to "verifiable good faith efforts"; Inheritances should escape the grasp of the Trustee; the "Rash" outcome should be changed as there is still no way to determine real market value absent the sale; why super discharge should be retained; allowing discriminatory treatment of a claim for restitution; treatment of student loans as long term debt; and, allow the discriminatory treatment of co-debtor debt.

[4] Unfortunately the provisions of HR 3150-Committee Report would significantly change the best interest of creditor's test and eliminate "cramdown". To comment from the debtor's perspective on the details of HR3150 would require an extensive exposé of 15 or more pages. Instead I refer the reader to two separate articles: COMMENTS OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES TO PROVISIONS OF HR3150-COMMITTEE REPORT By Henry E. Hildebrand, III NACTT Legislative Affairs Committee Chairman published January issue of NACTT Quarterly and STATEMENT OF THE NATIONAL BANKRUPTCY CONFERENCE presented by Professor Alan N. Resnick of the Hofstra University School Of Law to the United States House of Representatives Committee on the Judiciary found at http://www.house.gov/judiciary/5382.htm .. Also see the National Consumer Law web site at http://www.consumerlaw.org/announcements/s1301crit.html Critique of S.1301 "Consumer Bankruptcy Reform Act of 1998", A Bill That Would Devastate America's Consumer Bankruptcy System.

highly motivated when they file to save their homes from foreclosure. Debtors are encouraged to file when they can correct an abuse. They file to right mistreatment i.e. to pay only the value of the security at the time of filing. They occasionally file to avoid negative outcome of losing an asset that would be liquidated in a Chapter 7. They rarely choose to file under a threat of a 707b test. The reason 707b does not work is not because of the ambiguousness of the word "substantial." There is simply a natural resistance to the words "you have no other alternative". Yet the most persuasive reasons people choose to file Chapter 13 have been overlooked! Surprisingly, these are pride, dignity, and self-esteem. Debtors are embarrassed and emotionally traumatized because their crisis is not simply a financial matter. Financial problems lead to discord in their marriages and all their relationships have often reached the maximum of tolerable tension.

When I, in a Counselor role, touch this emotional button and then offer a solution through the magic of Chapter 13 they sigh, a sense of relief then with gratitude I often hear "thank you, my dignity has been restored." Debtors choose Chapter 13 because the Chapter 13 solution can create a forum for a myriad of problems that can be resolved without fronting large legal fees. The debtor's attorney can readily address a panacea of solutions and seek payment upon their resolution through the Chapter 13 Plan. Outside of a Chapter 13 context most consumer rights issues are too petty to be profitably addressed by an attorney. Consumer rights are universally enhanced by allowing access to the legal system for minor grievances or gross grievances that would be barred due to the high cost of legal representation.

A significant increase in Chapter 13 filings will never occur without the encouraged support of the consumer bankruptcy attorneys. Chapter 13 could further enhance consumer rights by enabling debtor attorneys' a fair incentive based compensation when violations of their clients' rights have been successfully remedied. Under today's Code when a side by side comparison is made between Chapter 7 and 13 the results will clearly demonstrate that Chapter 13 achieves better results in more than half of the potential fact patterns. Unfortunately, in my community, the attorneys who predominately file more Chapter 7 cases than Chapter 13 earn more money than I do! Chapter 7 is easy work for most attorneys. Most importantly in a chapter 7 practice the debtor's file is closed within a reasonable time. By contrast a Chapter 13 file remains active for the term of the plan. Numerous problems must be addressed for each client over a three to five year period. In my filing district I own one of the few practices dedicated to Chapter 13. I typically file or defend more than 40 motions per month. In addition to myself, two well-paid paralegal employees and an attorney work full time at this effort! At best the fees generated in my motion practice covers the cost of maintaining it. My profit is realized from new petition fees, and the small amount of negligence cases generated from this broad-based client contact. Because, I defend motions to dismiss and lift stays my plans have the highest completion rate in my district. My staff and I work long, often unpredictable hours resolving new crises without appropriate economic incentive. We provide this service often for the receipt of a label "good Samaritan." Yet it is a well known that economic motivation is the most dynamic factor for change.

Fee structure should be uniform across the nation.[5] After all the Constitution states in Article One Section 8 ".... That Congress is empowered to make **uniform** laws of bankruptcies through-out the United States." Today local rules often mandate fee structure under the theory that there is wide economic disparity between different regions of the country. [6] The Bankruptcy Code § 330(a)(4)(B) "... allows reasonable compensation to the debtor's attorney in connection with the bankruptcy case based on a **consideration of the benefit and necessity of such services to the debtor...".** The King article refers to an ABI survey showing that effective "lawyering" increases distribution to creditors.[7] Consequently, fee guidelines should encourage lawyers to use the system rather abandon it. It is therefore necessary to design a variable economic component within the fee structure process. It would be desirable to continue the current policy of awarding flat fees, i.e. fees that do not require application, contemporaneous time records and judicial review. By not continuing this flat fee policy a significant burden would be added to the courts and further discourage the less meticulous record keepers from practicing in this area of law.

To meet these parameters I suggest the following fee structure for Chapter 13. The fee should be bifurcated and made only partly an administrative priority expense. The first $1500.00 could be paid either direct or through the Trustee as an administrative priority expense. After the first $1500.00 has been paid the debtor's attorney should continue to receive the balance of his fee pro-rata with secured creditors until the minimum balance of his fee has been paid. I believe this minimum should be set at $2000.00. This fee should be reduced based on the recommendation of the Trustee when the unsecured dividend is below 10% for non-business cases. The Trustee would be required to start distribution of attorney's administrative priority claim through the Trustee's next scheduled distribution of funds following the date set for the 341 meeting, whether or not this meeting is attend by the debtor. This distribution to the debtor's attorney pre confirmation should be limited to $500.00 from the combination of paid direct funds and funds from the Trustee. Allowance of a nominal payment of $500.00 pre confirmation through the Trustee or the debtor would encourage attorneys to accept Chapter 13 retainers without a down payment. Many debtors have difficulty is raising the filing fees, yet Chapter 13 would offer immediate relief.

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[5] An issue identified as a need for the creation of the **Advisory Committee on Bankruptcy Rules** was attorney employment and compensation but this was perhaps limited to ...the vagueness of the statute with respect to connections. Clearly this committee could further address the need for uniformity of procedures for compensation. See Consumer Bankruptcy News, Vol.8; Issue 11 February 25, 1999 – Professor Ken Klee' s Comments "The Rational Behind the Changes"

[6] See footnote 8 in King article " Survey, Jennie Behles, ed. Ms.Behles is a director of the Council for Certified Bankruptcy Specialists and is a fellow of the American College of Bankruptcy. The report is based on an extensive survey of Chapter 13 trustees and debtor attorneys.

[7] See footnote #2.

The Chapter 13 Trustee should recognize the debtor's attorney's role in assisting the Trustee in his duty to ...advise and assist in performance under the plan.[8]
The Trustee should pay an additional incentive fee to the debtor's attorney of 3% of all funds disbursed. A score of years have past since Congress initiated the Chapter 13 fee structure. The growth of Chapter 13 has forced the Trustees to rely on debtor's attorney to create more efficiency for the system. This "incentive fee" would recognize the debtor's attorney continuing administrative role in the Chapter 13 process.

An appropriate procedure to award this "incentive fee" to the Debtor's Attorney should be ultimately designed by the Advisory Committee on Bankruptcy Rules. The attorney should clearly meet or exceed a standard that demonstrates that they vigorously defend their clients rights, that have a balanced [9] bankruptcy practice, stay current with the law, and show some competency in other areas of law which more often than not are intertwined with the debtors bankruptcy. The process should include the recommendation of the Chapter 13 Trustee, plus a standard of review by the United State Trustee's Office with final approval from the Bankruptcy Judge.

Additionally, an administrative priority payment should be allowed for all work completed post confirmation through either motion or adversary practice undertaken by the debtor's attorney. My experience indicates that at least two court appearances are necessary to resolve lift stay and motions to dismiss. Consequently I suggest that the debtor's attorney be paid $50.00 for each of his first three court appearances plus a minimum of $200.00 through the plan upon the successful resolution on behalf of the debtor of motions to dismiss or lift stay. Additionally the Court should have discretion to award greater fees when the work product is justified. Local rules should establish other fees to be awarded the debtor's attorney for work related to sanctions and modifications of plans or matters outside of the bankruptcy forum.

There should be a separate variable fee reviewed and approved only by the Chapter 13 Trustee of an amount not greater than $5000.00 for business filings. For business and commercial Chapter 13 filings where fees sought are over $5000.00 there should be a required fee application subject to review under the standards set by the United States Trustees Office. Only half of the approved fee should be allowed as an administration priority expense with the balance being paid pro rata with secured creditors in the plan. The same additional incentive fee should be paid to the debtor's attorney in business cases, 3% of all funds disbursed by the Trustee. The same uniform rules should be applied to post confirmation practice in business cases.

It is very clear that the changes envisioned in the bankruptcy Code will require any attorney who continues to practices in bankruptcy law will incur greater costs, which will

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[8] 11 USCS § 1302 (b) (4). Also S. Rept. No. 95-989 to accompany S.2266, 95th Cong., 2d Sess. (1978) p.139.) " ...The chapter 13 trustee must also assist the debtor in performance under the plan by attempting to tailor the requirements of the plan to the changing needs and circumstances of the debtor..."

[9] By "balanced" I refer to filing a statistically recognized balance between chapter 7 and chapter 13 cases under the Bankruptcy Code the does not have a means testing requirement.

by necessity be passed to the consumers. In order to ensure that there is a competent bar available across the country who not only meet these standards[10] but who is also willing to endure said requirements, it will be necessary to provide them with adequate compensation. If the current rules are amended to properly compensate these professionals, the end result will be the filing of more Chapter 13's than Chapter 7's.

This fee structure would not be a windfall to debtor's attorney, but would encourage more attorneys to redesign their practice of law to include effective Chapter 13 representation of there clients. The $2000.00 fee paid is now a National Average. A portion of the fee would be paid more slowly, pro rata with secured claims. A plan paying $200.00 per month to the Trustee would allow an additional $6.00 per month to compensate the attorney for his administration role of servicing the debtor's needs throughout the life of the plan. On a billable basis this translates to fielding one telephone inquiry per quarter by the attorney or one telephone inquiry fielded by a paralegal per month. Only after 5 years of filing 10 case per month with an average plan payment of $200.00 per month would a debtor's attorney recover the cost of a paralegal necessary to meet the otherwise non-recoverable cost of a Chapter 13 practice.

Concluding remarks

I believe that **policy** type changes in the Bankruptcy Code should be made that will positively influence the decision to file Chapter 13. Chapter 7 filings will automatically be discouraged simply because Chapter 13 will create a significantly better result for the debtor. **Fortunately, we do not need Congressional Authority to change the rules for fee structure payments to debtor's attorneys.** Fee structure changes alone would encourage more Chapter 13 cases to be filed.

I support the National Association of Consumer Bankruptcy Attorneys statement in that it presents a positive approach to bankruptcy reform. Although widely distributed the following statement needs to be republished in as many forums as possible.

The Bankruptcy Story in the 105th Congress and the Need for a new story in the 106th

- The so-called "bankruptcy reform" legislation of the last Congress failed because it was an extreme bill undertaken at the behest of the credit card companies.
- To resist this well-financed attempt to buy legislation, a broad-based group of seniors, women, consumer and labor organizations assembled to let Congress and the public know of the problems connected with this legislation.
- These groups were successful; and once the media caught on to the radical way in which the bill tried to alter our consumer bankruptcy laws--which affect millions of working families in America-- the bill lost momentum and failed.

[10] See footnote #3.

- If bankruptcy reform is to happen in this Congress, it will happen only if Congress follows the historical model of successful bankruptcy legislation in 1978, 1984 and 1994 - when diverse groups sought middle ground and had the backing of moderates in both parties.
- In seeking to find a workable middle ground, lawmakers must seek a balance between creditors and debtors, between rooting out abusers of the bankruptcy system and making possible the rehabilitation of good faith petitioners who seek to honorably deal with their debts while providing for their families.
- Finally, balance in bankruptcy reform is only possible if we begin to take real steps in reforming the excessive and profligate lending practices of credit card companies-whose easy and almost unlimited credit to our young people, the elderly and working families is setting the stage for massive personal bankruptcies in the years to come.
- To Members and staff of the 106th Congress: DO NOT SIGN ONTO ANY BANKRUPTCY BILL until you have studied the issues and heard from all concerned groups who seek balanced and fair legislation.

LET'S DO IT RIGHT THIS TIME--LET'S WORK TOGETHER FOR BALANCED BANKRUPTCY LEGISLATION IN THE 106th!

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[1] Wayne R. Bodow is an associate member of the National Association of Chapter Thirteen Trustees. He is Board Certified in Consumer Bankruptcy Law by the American Bankruptcy Board of Certification. Wayne maintains a consumer bankruptcy practice in the Northern District of New York.

I have written to Peter McCabe at the Administrative Office of the United States Courts requesting that consideration be given to the establishment of uniform rules for attoney fees in Chapter 13 as outlined herein. I also have forwarded this article to the local rules committee in the Northern District of New York and to the respective Judges of that district.

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JUDICIAL CONFERENCE OF THE UNITED STATES
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EVIDENCE RULES

August 12, 1999

Wayne R. Bodow, Esquire
Attorney at Law
1925 Park Street
Syracuse, New York 13208-1030

Dear Mr. Bodow:

Thank you for the articles addressing attorney fees in Chapter 13 cases. The articles were sent to the chair and reporter of the Advisory Committee on Bankruptcy Rules for their consideration.

We appreciate your interest in the rulemaking process.

Sincerely,

for Peter G. McCabe
Secretary

cc: Honorable Adrian G. Duplantier
Professor Alan N. Resnick
Professor Jeffrey W. Morris