TESTIMONY OF CAREY D. EBERT
PRESIDENT

NATIONAL ASSOCIATION OF CONSUMER
BANKRUPTCY ATTORNEYS

"BANKRUPTCY JUDGESHIP NEEDS"

BEFORE THE SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW

JUDICIARY COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

June 16, 2009

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

My name is Carey Ebert. I am president of the National Association of Consumer Bankruptcy Attorneys (NACBA) and a practicing bankruptcy attorney in Hurst, Texas. I also serve as a chapter 7 trustee. NACBA, on whose behalf I appear today, 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 4,000 members located in all 50 states and Puerto Rico. NACBA's members represent a large proportion of the individuals who file bankruptcy cases in the United States Bankruptcy Courts.

Thank you for the opportunity to provide testimony on the need for additional bankruptcy judgeships. NACBA supports the 2009 recommendations of the Judicial Conference of the United States for additional bankruptcy judges. NACBA agrees with the Judicial Conference that additional judgeships are critical to ensure that the bankruptcy courts have sufficient judicial resources to effectively and efficiently adjudicate the rights and responsibilities of parties in bankruptcy cases and proceedings. The proposal before you today calls for a modest increase by extending 22 temporary positions to permanent judgeships, adding nine new judgeships and extending one temporary position for another five years.

New bankruptcy judgeships have not been authorized by Congress since 1992, despite a surge in consumer and business caseloads and the increased complexity of cases since the October 2005 implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Although bankruptcy filings initially declined in the wake of BAPCPA's implementation, there has been a tremendous surge in recent years. The Judicial Conference estimates that filings will again exceed the one million mark, with an increase of 27 percent in 2009 to 1,226,100 cases. [1] The state of the economy, particularly as it impacts home foreclosures, rising unemployment, and credit availability, is a major factor in the rising number of personal bankruptcies – which traditionally constitute the majority of bankruptcy cases. The economic downturn also is causing an increase in small business and corporate bankruptcies, some of which are very large, complex chapter 11 cases.

The number of filings alone is not the sole indicator of the overall workload of the judiciary or those involved with the bankruptcy process. BAPCPA created new docketing, noticing and hearing requirements that make addressing the petitions far more complex and time-consuming for bankruptcy judges. According to the Honorable Julia Gibbons, testifying on behalf of the Judicial Conference of the United States, before the House of Representative's Appropriations Subcommittee on Financial Services and General Government, "the actual per-case work required of the bankruptcy courts has increased significantly under the new law, and a new work

[1] Statement of Honorable Julia Gibbons, Chair, Committee on the Budget of the Judicial Conference of the United States, before the Subcommittee on Financial Services and General Government of the Committee on Appropriations of the United States House of Representatives, March 19, 2009, available at http://appropriations.house.gov/Witness_testimony/FS/Julia_Gibbons_3_19_09.pdf. Others estimate that there may be as many as 1.5 million bankruptcy filings this year.

measurement formula that reflects this additional work was used to develop the fiscal year 2010 budget request." [2]

While the federal judiciary has implemented a number of cost-containment measures and continues to identify and explore new initiatives to further streamline operations to reduce costs, the bulging caseload demands that additional judgeships be approved.

Rising Bankruptcy Caseload

The changes made to the Bankruptcy Code in 2005 as a result of BAPCPA were premised upon the belief that there was widespread abuse in the bankruptcy system and that many people who filed chapter 7 bankruptcy cases could afford to pay a significant portion of their debts. NACBA, its members, and many organizations representing consumers, seniors, minorities, working families and others disputed that allegation and made the case that bankruptcies were driven by what then was an uneven economic prosperity that failed to reach many middle- and low-income workers.

While there was a temporary decrease in the number of bankruptcy filings in the wake of the 2005 Act implementation, the rate of filings today is on pace to set new highs as the ailing economy continues to shed jobs, force workers to accept lower pay, increase the number of people without health insurance and force more people into foreclosure on their homes. At the same time, there has been a considerable tightening of credit, so that consumers are facing the day of financial reckoning much sooner than had been the case previously when home equity and credit card lines of credit could be tapped to hold creditors at bay.

And, the current economic downturn appears to be all-inclusive, sparing no age, education level or employment status demographic. Older Americans are filing bankruptcy in greater numbers than ever before. Personal bankruptcy filings among those 65 and older jumped 150 percent from 1991 through 2007, according to a study issued last year by AARP. [3] Although they have been known as the most thrifty among us, today many seniors are deep in debt and without a safety net.

The number of bankruptcy filings during the month of May 2009 reached 6,020 a day, up from 5,854 in April, according to a report from the Automated Access to Court Electronic Records (AACER).[4] The total number of U.S. bankruptcies filed during the first three months of 2009, the most recent time period for which data are available, increased 34.5 percent over the same period in 2008 nationwide, according to data released last week by the Administrative Office of the U.S. Courts. As might be expected, it was not only consumers seeking bankruptcy relief in

[2] *Ibid.*

[3] Deborah Thorne, Elizabeth Warren and Teresa Sullivan, *Generations of Struggle*, AARP Public Policy Institute, June 2008, available at http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf.

[4] Christine Dugas, *USA Today*, Bankruptcy filings rise to 6,000 a day as job losses take toll, June 3, 2009, available at www.usatoday.com/money/economy/2009-06-03-bankruptcy-filings-unemployment_N.htm.

the first quarter of 2009. Business filings during the first quarter of 2009 soared 64.3 percent over the first quarter of 2008.[5]

The states with the highest per capita filing rate for the 12-month period ending March 31, 2009 include: Tennessee, Nevada, Alabama, Georgia, Indiana, Michigan, Ohio, Kentucky, Arkansas and Illinois. Those states include some of the states with the highest unemployment rates and the greatest number of home foreclosures.

What does all of this mean? As Jack Williams, resident scholar at the American Bankruptcy Institute and a bankruptcy professor at the Georgia State University College of Law, so aptly put it, "In a nutshell, bankruptcies happen because financial distress happens. It is hubris to think we can manage such complex system by inserting a means test here, a credit counseling requirement there." [6] The reality is that as long as there are job layoffs, home foreclosures, uninsured or under-insured medical emergencies, divorce and other unforeseen life calamities, consumers and businesses alike will seek the protection of bankruptcy court, no matter how many obstacles are put in their way.

Increased Complexity Makes Cases More Time Intensive

Perhaps the biggest impact of the 2005 law has been the enormous increase in the costs and burdens of filing an individual bankruptcy case. While it may not have been the intention of some who voted for the bill, BAPCPA has increased documentation requirements, bureaucratic paper work, and other costs so much that honest low income and working families, not the "high rollers" at whom the amendments were supposedly aimed, are deterred or prevented from obtaining the bankruptcy relief they need. The filing fee has increased by 50 percent; there are new fees for credit counseling and education that usually total another $100; and there has been such a great increase in the documentation required to file a case that attorneys have had to increase their fees at least 50 percent.

As such, bankruptcy has gone from being a relatively low-priced proceeding that could be handled quickly and efficiently to being an expensive minefield of new requirements, and tricks and traps that can catch the innocent and unsuspecting debtor. There is simply no reason, especially in the cases of lower income debtors, that all of the documentation demanded by the 2005 amendments is necessary.

Every consumer bankruptcy attorney has had the experience of explaining these requirements to prospective clients, only to have the clients go away, discouraged, and never return. Debtors must obtain all "payment advices" for the 60 days before the bankruptcy is filed; they must obtain a tax return or transcript for the five most recent year before the petition is filed and sometimes additional years; they must provide an attorney with information detailing every penny of their income for the six months the petition is filed; they must provide bank statements to the trustee and evidence of current income; they must attend a prepetition credit counseling

[5] American Bankruptcy Institute, press release, *Total Bankruptcy Filings Increase Nearly 35 Percent Over First Quarter 2008; Business Filings Jump Over 64 Percent,* June 9, 2008, available at www.abiworld.org

[6] Tara Siegel Bernard, Downturn Pushes More Toward Bankruptcy, *New York Times*, April 4, 2009.

briefing, no matter how hopeless their situation and regardless of whether their problems were caused by imprudent credit decisions of unavoidable medical catastrophes; they must attend a financial management course in order to receive a discharge; attorneys must complete numerous additional forms, including a six page means test form that requires arcane calculations about which there are many different legal interpretations.

According to the United States trustee program, attorneys must also provide clients with pages and pages of so-called disclosures, many of which are either irrelevant to the client's case or inaccurate, which then requires additional time spent explaining why they are irrelevant or inaccurate. Moreover, trustees in some districts demand that debtors provide even more additional documents.

And if a consumer bankruptcy debtor is subject to an audit by the United States trustee, even more is demanded. The consumer is asked to provide six months worth of income documentation, six months worth of bank statements, and an explanation of each and every deposit and withdrawal from any account over those six months. Few consumers keep such records; many consumers in financial trouble operate on a cash basis because their credit cards have been cut off and they must make numerous ATM withdrawals to meet almost all of their expenses. To account for every expense paid with the cash withdrawn is often impossible. But many bankruptcy attorneys are asking for much of this information from every client because they are so afraid of being accused, after an audit, of filing false statements by an aggressive United States trustee program, as discussed below.

And, as described in a recent report from the Government Accountability Office (GAO),[7] the credit counseling requirement is not serving its supposed purpose. Even the credit counselors report, as did our members in a survey we conducted in 2006, that only 2-3 percent of the prospective debtors they see could even contemplate a debt management plan. The counseling requirement serves primarily as yet another barrier to bankruptcy, especially in those districts where judges have ruled that debtors, even those facing emergencies, cannot file their bankruptcy cases until the day after they receive the credit counseling briefing.

To make matters worse, most of the required documentation is unnecessary to the ostensible goals of the 2005 amendments. In the vast majority of cases, consumers are nowhere near the thresholds at which the abuse provisions come into play. It should be sufficient for a debtor to provide any one of several documents to show income - a recent paystub with a year to date figure on it, or a tax return or transcript for the prior year, or a W-2 form. The trustee is free, as has always been the case, to demand additional documents in the small percentage of close cases in which they might actually make a difference. And it should be made clear that if an auditor later finds minor discrepancies in the numbers, discrepancies that would have had no effect on the results of the case, the debtor and the debtor's attorney should not be publicly accused, as they are now, of making "material misstatements." Such a serious accusation should be reserved for cases in which the debtor's misstatement had a significant impact on how the case was handled.

[7] Government Accountability Office, Bankruptcy Reform: Value of Credit Counseling Requirement is Not Clear," April 6, 2007, GAO-07-203, available at http://www.gao.gov/new.items/d07203.pdf.

Of course, these are only some of the provisions in the 2005 legislation that are having the greatest impact. Among the dozens of changes made by that law, many cause significant harm to honest debtors in particular cases, including restrictions on the discharge, new requirements for chapter 13 that make it much less attractive and make it more likely that plans will fail, and provisions that make it harder for consumers to save a home from foreclosure or a car from repossession. All of these provisions also add to the workload of bankruptcy judges. If there are disputes as to whether debtors have complied with these many new requirements, that will often result in additional court hearings and judicial oversight.

The Need for Additional Bankruptcy Judgeships

As is clear from the discussion above, the rising bankruptcy caseload and increasing complexity of consumer and business bankruptcy filings impose a tremendous workload on bankruptcy judges. At a time when more and more consumers and businesses resort to bankruptcy as a way to get back on their feet, it is critical that the system run as smoothly and efficiently as possible. The Judicial Conference has worked tirelessly to identify ways in which they can streamline operations, even in the face of more cumbersome and time consuming requirements imposed by the 2005 Act. It is critical that Congress now give the Judicial Conference the resources it needs, in the form of additional judgeships, to continue its work.