TESTIMONY OF N. NEVILLE REID ON BEHALF OF NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES IN SUPPORT OF H.R. 3553
BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
HEARING ON CHAPTER 7 BANKRUPTCY TRUSTEE COMPENSATION

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I am N. Neville Reid, and have been a chapter 7 bankruptcy trustee for 24 years and a bankruptcy lawyer for 28 years in Chicago, Illinois. I am also a partner with the Chicago law firm of Fox Swibel Levin & Carroll LLP, where I co-chair the firm's Bankruptcy, Restructuring and Creditors' Rights Group and handle a wide variety of bankruptcy, restructuring and distressed asset transactions. During my career, I have handled over 8,000 chapter 7 bankruptcy cases as trustee, performing such statutory duties as investigating disclosed assets, uncovering undisclosed assets and liquidating such assets for the benefit of the debtor's creditors, which often includes state and federal taxing authorities.

I am presenting this written testimony in support of H.R. 3553, on behalf of the National Association of Bankruptcy Trustees (NABT) and its 887 members. The NABT is the leading national association representing bankruptcy trustees throughout the country. Trustees, in turn, are the "front line" of the chapter 7 bankruptcy system: they investigate the truth of a debtor's bankruptcy petition disclosures, pursue and liquidate assets for the benefit of the debtor's creditors, make criminal referrals where they find debtor misconduct that may otherwise go undetected, and perform numerous other responsibilities that enable the bankruptcy system to function. Founded in 1982, the NABT provides support for trustees in numerous ways, including through sponsoring educational programs, publishing a quarterly journal on best practices for and legal developments relevant to trustees, and advocating for legislative changes to improve the bankruptcy system. I have been a member of the Board of Directors of NABT since 2014, currently serve as its Vice President and Co-Chair of its Legislation Committee and in the recent past have served on its amicus committee, advocating for trustees in various cases on issues related to trustee compensation.

The heart of this bill is to increase the fee that trustees receive from the federal government in bankruptcy cases in which trustees do not find any assets to administer, from the current $60 to $120 per case (commonly called a "no asset fee"), which would be the first increase of the no asset fee in 23 years. The bill will not cost the government anything because it will be funded from an equivalent $60 increase in the chapter 7 bankruptcy filing fee paid by chapter 7 debtors who elect to use the bankruptcy system to obtain a discharge of their debts. The bill leaves undisturbed the current procedure whereby a debtor who lacks the means to pay a filing fee can seek from the bankruptcy judge a waiver of the filing fee or an installment plan to pay it over time, based on the judge's determination of the debtor's ability to pay (commonly called the "in forma pauperis" or "IFP" waiver provision). [1] Thus, any debtors who cannot afford the proposed increased filing fee will still have the ability to seek relief from the bankruptcy court as the judge deems appropriate.

[1] 28 U.S.C. §1930(f)(1).

The NABT strongly urges the passage of this bill in order to lessen the economic burden that trustees have been carrying for the benefit of the bankruptcy system for at least the past 23 years, as their responsibilities under the Bankruptcy Code have substantially expanded but their compensation in real terms has decreased. As required by the Bankruptcy Code, trustees routinely investigate potential assets, including potential litigation claims, for creditors but frequently do not recover all of the value of time invested by themselves or their own law firms. It is not uncommon for trustees to incur substantial non-payment risk in pursuing potential assets for cases and write off thousands of dollars of time annually when assets don't materialize. When Congress enacted BAPCPA[2] in 2005, it in effect put in place an "unfunded mandate" by requiring trustees to perform even more responsibilities in bankruptcy cases without funding any incremental compensation for them to fulfill those responsibilities, further deepening trustees' inherent non-payment risk. Those additional duties included administering pension plans of corporate debtors, ensuring that persons to whom a debtor may owe child support have received proper notice of the debtor's bankruptcy, confirming a debtor properly understands reaffirmation agreements and the consequences of his or her bankruptcy filing, and reviewing a debtor's tax returns. Since approximately 90% of all chapter 7 cases administered by trustees are "no asset" cases in which there are no assets or proceeds available for distribution to creditors (let alone to pay the trustee anything for her time or her law firm's time invested in the case)[3], the only source of recovery for trustees in most cases they administer is the no-asset fee – and even that is not available in fee waiver cases. Yet, the no-asset fee has remained constant since 1995, during which time inflation has increased roughly 64%.[4] Thus, in real terms trustees have been required to do more for less.[5]

Despite their decreasing real compensation in the majority of their cases, year after year trustees have faithfully created enormous value for other constituencies in the bankruptcy system, including the federal and state taxing authorities and debtors themselves, at costs to those groups substantially below what the market would normally require. If a trustee is fortunate to find an asset case, collections by the trustee in that case (net of administrative expenses) are first used to pay secured and then "priority" creditors. Secured creditors include secured claims of state and federal taxing authorities that filed a pre-petition tax lien against the debtor, and priority unsecured claims include unpaid tax obligations of the debtor to taxing authorities not secured by the debtor's assets. In 2016, trustees distributed roughly $170 million in collections to state and federal taxing authorities from cases they administer.[6] Since most tax

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2 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

3 See Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Instit. L. Rev. 17 (2012), p. 49 (the "Lupica Study"). Available at: http://digitalcommons.mainelaw.maine.edu/faculty-publications/32.

4 United States Department of Labor, Bureau of Labor Statistics - *CPI Inflation Calculator*. Available at https://www.bls.gov/data/inflation_calculator.htm.

5 The decline in real terms in trustee compensation for "no asset" cases is in contrast to increases in compensation for similarly-situated bankruptcy professionals in consumer debtor cases. According to the Lupica Study, the mean debtor attorney fees charged in discharged no asset chapter 7 cases *increased* by 48% since the enactment of BAPCPA. (Lupica Study, p. 51).

6 The $170 million number was calculated by NABT using data from the US Trustee Program – Chapter 7 Trustee Final Reports ("UST Final Report Data"). Available at: https://www.justice.gov/ust/bankruptcy-data-statistics/chapter-7-trustee-final-reports CY 2016 CSV.

debt is non-dischargeable, payments to tax creditors directly benefit the debtor since with less tax debt the debtor has more income to spend on the debtor's other needs. Yet, few debtors if any have the skill, expertise or the motivation of a bankruptcy trustee to carry non-payment risk and collect assets in order to reduce tax debt; without the trustee, neither the taxing authorities nor the debtor would likely be able to reduce the unpaid tax liability. Yet again, the trustee does this at a cost to himself or herself, in that in the open market a private collection agent would normally charge a 33%-40% contingency fee to collect an asset for a creditor, but overall trustees typically receive in compensation less than 10% of the value of the total assets they collect. In 2016, for example, total fees paid to trustees or their law firms for their collection work in their cases were 8.5% of the total receipts collected by the trustees in those cases, and between 2010 and 2015 that percentage never exceeded 9.3% in any given year.[7]

The increase in the no-asset fee, while certainly not completely compensating for a trustee's write-off's in the "dead end" asset searches or for the substantial below market costs at which trustees recover millions of dollars for taxing authorities and other creditors each year, will undoubtedly help to alleviate that economic burden currently carried conscientiously by trustees. In addition, the fee increase will lower the growing risk that experienced trustees will begin to leave the trustee practice altogether given its deepening unprofitability, as has already occurred with some trustees in recent years. If more trustees do in fact leave the trustee practice, the communities they serve will lose their skill and experience that substantially benefits them, in that all dollars collected by trustees for creditors whose claims are otherwise wiped out in chapter 7 cases typically generate more economic activity in those creditors' communities. With no fee increase and the potential loss of trustees, there will be fewer veteran trustees to train and mentor new trustees, who may even grow less interested in trustee work as it grows increasingly uneconomical.

Arguments against the bill typically focus on the alleged burden on debtors from the increase in the filing fee in order to fund the no-asset fee increase. These arguments are disingenuous or misguided for numerous reasons, principally that the IFP waiver system is unaffected by this bill and therefore the bill imposes no incremental burden on otherwise truly indigent debtors. Second, such arguments completely overlook the fact that even under a higher filing fee chapter 7 bankruptcy remains an enormous bargain disproportionately beneficial to debtors. If the new filing fee goes into effect, debtors will pay $395 to file a chapter 7 bankruptcy case, but in exchange will still receive a discharge of debt that typically amounts to tens of thousands of dollars, in addition to their statutory exemptions that allow them to keep various assets. In 2016, for example, an aggregate of roughly $191 billion of debt was eligible for discharge;[8] in a typical bankruptcy case wherein a debtor is seeking to wipe out tens of thousands of dollars of debt, a $395 "price" for that discharge remains a substantial bargain in favor of the debtor. Third, such arguments essentially "prove too much" insofar as they posit that the inability of some debtors to afford the filing fee increase justifies denying any trustee fee increase. Since there will always be some debtors who may not be able to afford the filing fee increase, and may fail to convince a judge that they should receive a fee waiver or an installment plan, then there will never be a justification

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[7] UST Final Report Data.

[8] U.S. Courts BAPCPA 1X. Available at: http://www.uscourts.gov/sites/default/files/data_tables/bapcpa_1x_1231.2016.pdf. The $191 billion number is compiled from consumer debtor cases under chapters 7, 11 and 13.

for increasing the no asset fee, even after cumulative inflation post- 1995 reaches 100%, after which point trustees will have started working for "free" in no asset cases in real terms. It would be grossly inequitable to put trustees on such an economically dismal trajectory that in turn would eventually deeply discourage competent professionals from serving as trustees.

Fourth, and finally, while concern for a debtor's inability to pay an increased filing fee is certainly a legitimate social justice value that we all share -- hence the bill's preservation of the IFP waiver -- equally compelling equitable concerns favor passage of the bill. Through their investigative work, trustees frequently uncover schemes and wrongdoing that lead to prosecutions that prevent further injury or achieve justice for innocent people, even though the trustees frequently do not recover the value of their time investigating such matters and working with law enforcement to bring certain debtors and others to justice. For example, in the case *In Re Thompson*,[9] the trustee diligently investigated the debtor's financial affairs and uncovered evidence of his arson (causing the death of the debtor's elderly mother) that the US Attorney was able to use to convict the debtor and send him to jail.[10] In a series of other debtor cases, the respective trustees independently uncovered evidence in their examinations that enabled federal prosecutors to unravel a major mortgage fraud scheme that had harmed numerous individuals (*U.S. v. Helton*).[11] These examples abound nationwide in trustee practices, and every year trustees make many criminal referrals to the US Trustee and incur time and expense helping prosecutors develop the criminal cases protecting the public interest, all without any assurances of being paid for their time (and frequently not being paid for the full value of such time). The proposed trustee fee increase will help to ensure that trustees will remain in the trustee program long enough to acquire the judgment and skills necessary to keep making such valuable referrals, and thereby continue to protect the public interest.

For all of the reasons above, the NABT urges that Congress pass H.R. 3553.

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[9] Case No. 03-21328 (Bankr. N. D. Ill.).

[10] U.S. v. Thompson, Case No. 04-cr-944 (N.D. Ill.).

[11] Case No. 06-cr-00763 (N.D. Ill.).