



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

July 28, 2023

Honorable Jerrold Nadler
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Nadler:

On behalf of the Judicial Conference of the United States, the policymaking body of the Federal Judiciary, I write to propose amending title 11 of the United States Code (the Bankruptcy Code) to address certain structural concerns related to the compensation of chapter 7 debtors' attorneys. We respectfully request that you consider this proposal and support the enactment of corresponding legislation.

This proposal, which was approved by the Judicial Conference at its September 2022 meeting, is intended to promote greater access to justice by facilitating the representation of chapter 7 debtors by counsel. Under current law, a chapter 7 debtor must complete complex legal documents, under penalty of perjury, to commence a bankruptcy case. The completion of these documents necessitates knowledge to a significant extent of bankruptcy law as well as other Federal and state laws. The debtor must also appear at a meeting of creditors to testify under oath. As a result of the time and legal expertise needed to commence a chapter 7 bankruptcy case and to provide guidance to the debtor during its pendency, counsel fees can exceed a thousand dollars, funds that a financially distressed debtor can ill afford to pay up front in a lump sum.

Nevertheless, current law prohibits post-petition collection of unpaid attorney fees for legal work performed in connection with filing a chapter 7 bankruptcy case.¹ An

¹In *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004), the United States Supreme Court held that a chapter 7 debtor's attorney fees cannot be treated as an administrative expense, meaning that the debtor's attorney cannot be prioritized ahead of other creditors and instead are entitled to receive the same pro rata share of estate assets as other unsecured creditors. Several circuits have also held, both before and after *Lamie*, that any prepetition agreement to pay attorney's fees is subject to the automatic stay and any fee still owed at the time of the petition is dischargeable along with other debts. See, e.g., *Rittenhouse v. Eisen*, 404 F.3d 395 (6th Cir. 2005); *In re Fickling*, 361 F.3d 172 (2d Cir. 2004); *Bethea v. Adams & Assoc.*, 352 F.3d 1125 (7th Cir. 2003); *In re Biggar*, 110 F.3d 685 (9th Cir. 1997).

attorney who is owed money by a debtor for such prepetition work when the case is filed is treated as an unsecured creditor of the debtor and often paid only pennies on the dollar or not paid at all for the prepetition work. A significant prepetition retainer or flat-fee payment could solve this issue, but many debtors seeking relief under chapter 7 are unable to afford such a payment. Debtors considering filing for chapter 7 relief who are unable to afford a prepetition retainer or fee have limited options if they wish to hire an attorney, all of which either impose costs on the attorney or negatively impact the debtor, and therefore have had a chilling effect on attorneys' willingness to represent chapter 7 debtors.² As a result, many debtors resort to filing without an attorney, and pro se debtors are much less likely to receive a discharge than debtors who are represented by counsel.³ Others file with the assistance of non-attorney petition preparers, who are prohibited from providing legal assistance and some of whom overcharge. Still other debtors enter into "limited-scope representation" agreements for the "unbundling" of legal services, under which the attorney limits the services to be provided to the client (e.g., only filing the petition) and then leaves the client to their own devices to complete the bankruptcy process. Bankruptcy courts, in turn, have spent considerable time in otherwise straightforward chapter 7 cases wrestling with the legality of, and appropriate parameters for, these payment structures.

The Judicial Conference supports amendments to the Bankruptcy Code that would (1) except from discharge chapter 7 debtors' attorney fees due under any agreement for payment of such fees; (2) add an exception to the automatic stay to allow for post-petition payment of chapter 7 debtors' attorney fees; and (3) provide for judicial review of fee agreements at the beginning of a chapter 7 case to ensure reasonable chapter 7 debtors' attorney fees. Such legislation would ensure that chapter 7 debtors' attorneys are treated similarly to the way that attorneys who represent debtors under other chapters of the Bankruptcy Code are treated and provide chapter 7 debtors with greater access to justice and access to the bankruptcy system. This proposal comports with a 2019 report by the Commission on Consumer Bankruptcy, created by the American Bankruptcy Institute, a nonpartisan, non-profit organization of bankruptcy professionals, which recommended creating a mechanism to allow post-petition collection of debtors' attorney fees in chapter 7 cases.⁴

² These options include delaying the debtor's filing until the anticipated fees are paid, filing without prepayment of fees, bifurcating the legal services to be provided, or filing for chapter 13 (which permits debtors to pay attorney fees in installments over the duration of a chapter 13 plan) instead of chapter 7.

³ For example, a 2011 study found that chapter 7 debtors represented by counsel were nine times more likely to obtain a discharge than their *pro se* counterparts. Angela K. Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1974 tbl.3b (2011).

⁴ The Judicial Conference's recommendation is similar to option 2 in the American Bankruptcy Institute Consumer Commission's Report. AM. BANKR. INST., *THE FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY*, at 95-98 (2019).

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Thank you for your consideration of this proposal. We would welcome an opportunity to review and provide substantive or technical feedback on any legislation related to the compensation of chapter 7 debtors' attorneys. If we may be of further assistance to you in this or any other matter, please do not hesitate to contact me or the Office of Legislative Affairs, Administrative Office of the United States Courts, at (202) 502-1700.

Sincerely,

Roolyn R. Manshoff

Roslynn R. Mauskopf
Secretary

Identical letter sent to: Honorable Steve Scalise
Honorable Hakeem Jeffries
Honorable Jim Jordan