

“I Feel Poorer”

A Chapter 7 Trustee’s Definition for the “IFP” Acronym Under BAPCPA

By Raymond J. Obuchowski



On April 20, 2005, President Bush signed into law the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005."¹ The enactment of BAPCPA resulted in many substantive changes for the chapter 7 trustee in the administration of consumer and business bankruptcy cases. Most of the substantive changes for chapter 7 trustees have been well-chronicled.² However, one of the changes that escaped scrutiny was the modified statutory treatment for the payment, or more accurately, the waiver, of the filing fee to commence a chapter 7 case.³

As a result of Section 418 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. 109-8, § 418, 119 Stat. 23, 109) which added sub-section (f) to 28 U.S.C. § 1930, bankruptcy courts may now waive the filing fee in an individual debtor's chapter 7 case. In pertinent part, this new section provides:

Under the procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981) applicable to a family of the size involved and is unable to pay that fee in installments. For purposes of this paragraph, the term "filing fee" means the filing fee required by subsection (a), or any other fee prescribed by the Judicial Conference under subsections (b) and (c) that is payable to the clerk upon the commencement of a case under chapter 7.⁴

Congress's effort to increase judicial accessibility for the truly needy debtor may be laudable, however this effort has created an unfunded mandate directly adverse to the interests of chapter 7

trustees. The Congressional mandate allowing for waiver of the bankruptcy filing fee directly eliminates the funds presently available and necessary to pay the chapter 7 trustee for their administration and handling of the case.⁵

I. Historical Outlook on *In Forma Pauperis* cases in the Bankruptcy Courts.

Prior to October 17, 2005, an individual filing for bankruptcy could not proceed *in forma pauperis*. See *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).⁶ As noted by the Court in *In re: Stephenson*, 205 B.R. 52 (E.D.Pa. 1997):

Under the Bankruptcy Act, a debtor could not receive a discharge unless filing fees were paid. Bankruptcy Act of 1898, §§14(b)(2) & 14(c)(8), 11 U.S.C. §§32(b)(2) & (c)(8) (repealed). The constitutionality of that provision was upheld by the Supreme Court in *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973). The *Kras* Court, observing that obtaining a discharge of one's debts was not a constitutional right, upheld the statutory fee requirements as not violative of due process or equal protection rights and found that the general statute providing *in forma pauperis* relief in federal courts, 28 U.S.C. §1915, was not applicable in bankruptcy. Contemporaneously with the enactment of the Bankruptcy Reform Act of 1978, the *Kras* decision was essentially codified in 28 U.S.C. § 1930(a) which excepts bankruptcy filing fees from the federal *in forma pauperis* statute, 28 U.S.C. § 1915.⁷

As noted above, 28 U.S.C. §1930, which addresses bankruptcy fees provides, in part, that a party commencing a case under Title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court certain fees based upon the chapter for which relief was being sought.⁸ Further, an individual commencing a voluntary case or a joint

case under Title 11 may pay such fee in installments.⁹

In general, *in forma pauperis* proceedings in federal court are governed by 28 U.S.C. §1915. However, the application of §1915 has been limited by 28 U.S.C. §1930 when dealing with bankruptcy proceedings. Prior to October 17, 2005¹⁰ many courts considered the issues regarding *in forma pauperis* requests in procedural contexts other than filing fees at the commencement of the case,¹¹ and the outcomes varied. As the Bankruptcy Court noted in *In re: Hobby*:

[T]here has been much controversy and discussion about whether bankruptcy courts can waive filing fees at all, and if so, which ones may they waive. See e.g., *In re: Fitzgerald*, 167 B.R. 689, 691 (Bankr. N.D. Ga. 1994)(holding that §1930 prohibits the waiving of filing fees in any bankruptcy proceeding), *Harris v. M.E.I. Diversified, Inc.*, 156 B.R. 814, 815 (Bankr. E.D. Mo. 1993)(same), *In re: Rogers*, 147 B.R. 16, 17 (Bankr. E.D. Va. 1992)(same); cf. *In re: Perroton*, 958 F.2d 889, 896 (9th Cir. 1992)(determining that the bankruptcy court is not a "court of the United States" under §1915(a) and therefore cannot waive fees under that statute). But see, *In re: Brooks*, 175 B.R. 409, 412 (Bankr. S.D. Ala. 1994)(holding that the bankruptcy court is a part of the district court under 28 U.S.C. § 151 and has the authority to rule on *in forma pauperis* motions by order of reference), *In re: McGinnis*, 155 B.R. 294, 296-97 (Bankr. D.N.H. 1993)(holding that 28 U.S.C. § 157(b), which grants the bankruptcy courts jurisdiction to hear cases under title 11 and enter appropriate orders therein, also authorizes those courts to hear *in forma pauperis* motions brought by creditors), cf. *In re: Fitzgerald*, 192 B.R. 861, 862 (Bankr. E.D. Va. 1996)(holding that the prohibition against waiving fees applies only to the filing of a bankruptcy petition and not other proceedings in bankruptcy court).¹²

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The *Hobby* court ultimately determined, like others under the law prior to BAPCPA, that bankruptcy courts may waive a variety of fees in bankruptcy proceedings but were specifically excluded from waiving the fee associated with the filing of a chapter 7 bankruptcy petition.

The Courts reviewing 28 U.S.C. § 1915(a) determined there are two threshold requirements which had to be met prior to the waiver of a filing fee. The party seeking to proceed *in forma pauperis* must first submit a financial affidavit listing all assets, and second, the party must not be able to pay the filing fee. A third requirement, relevant to appeals, limited waiver to cases in which the trial court certified in writing that the appeal was taken in good faith.¹⁵ The requisites under § 1915(a) were ultimately incorporated into similar *in forma pauperis* provisions under 28 U.S.C. § 1930, first in conjunction with pilot programs commenced in 1993, and subsequently under BAPCPA.

II. The Fee Waiver (In Forma Pauperis) Pilot Program and Report.

In 1993, Congress, as part of the judiciary appropriations act, directed the Judicial Conference of the United States to implement and study in up to six districts the effect of waiving the filing fee for individual Chapter 7 debtors who were unable to pay the fee in installments. The pilot program was operated from October 1, 1994, through September 30, 1997, in the following six districts: the Southern District of Illinois, the District of Montana, the Eastern District of New York, the Eastern District of Pennsylvania, the Western District of Tennessee, and the District of Utah.¹⁴ In 1998, the Report regarding the pilot program was issued,¹⁵ with some of the key findings:

- Overall, 3.4% of chapter 7 debtors in the pilot districts applied for a fee

waiver, and 2.9% were actually approved (85.6% of those who applied);

- The percentage of debtors who applied for a fee waiver ranged from a low of .3% in the Western District of Tennessee to a high of 8.3% in the Eastern District of Pennsylvania;
- Over one-half of the fee waiver applications filed and granted in the six pilot districts were in the Eastern District of Pennsylvania, where legal services and pro bono representation were widely available to Chapter 7 debtors;
- Fee waiver applicants were more likely to have filed pro se than other Chapter 7 debtors;
- Attorneys had been paid in 6.4% of the cases, and non-attorney petition preparers had been paid in another 6.0% of the cases.
- Availability of fee waivers had little or no effect on total filings or the chapter mix of filings in the pilot districts.¹⁶

It was unclear whether chapter 7 trustees were paid the normal 11 U.S.C. § 330 fee during the pilot program through the Report.¹⁷ Inquiry of trustees serving in one of the pilot districts failed to confirm that § 330 fees were or were not paid during the program, but subsequent discussions with Elizabeth C.

Wiggins, the Report's Project Director, confirmed that the § 330 fees had been paid in the normal course.¹⁸ The Report recognized the costs associated with implementation of a national program (in lost filing fees and additional personnel costs) could be between \$4.7 million to \$7.7 million per year,¹⁹ but noted that "the rate could vary greatly according to the eligibility standard employed, the public's and bar's awareness of the program, the degree

of scrutiny given the applications, and the overall chapter 7 filings."²⁰ In any event, the Report suggested methods by which a national program which over time would have staggering costs could be funded.²¹ None of these were incorporated under BAPCPA.

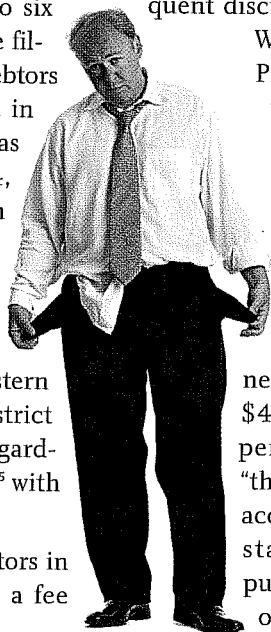
The pilot program also obliged many districts having to consider as a matter of first impression the standards for waiver of the bankruptcy filing fee. "To fill this vacuum pilot district courts have drawn on the rather considerable jurisprudence under 28 U.S.C. § 1915."²² The pilot district courts also had to consider and reconcile the prohibition of the payment of attorney fees when payment of the filing fee was allowed by installment.²³ As noted in the Report, courts even within the same pilot district were divided over whether waiver of the filing fee should be prohibited when the debtor has paid an attorney.²⁴ Ultimately it appeared that the courts' consideration of the "totality of the circumstances" in each case would be sufficient to address the concerns even when counsel had been paid.

The FJC Report thoroughly evaluated and examined the Pilot Program and the users of the program and provided forecasts for the future of fee waivers in the context of a national program and its potential costs. Nowhere in the Report was it suggested that payment to chapter 7 trustees for their services in administering cases be eradicated, and the only concession by trustees, through questionnaires, was their willingness to forego a fee only when all other professionals donated their time as well. (i.e. - no attorney fees paid).

III. BAPCPA and the fee waiver provisions

A. The Numbers.

A total of 163,222 chapter 7 cases were filed nationally in the period since the effective date of BAPCPA, of October 17, 2005 through June 30, 2006. Of the 163,222 cases filed, IFP or fee waivers have been granted in 3424 cases.²⁵



Effectively, chapter 7 trustees have not been paid a total of \$205,440.00 for services rendered during this period. The national average of cases in which the filing fee has been waived is 2.09%. The Fifth Circuit has had the lowest average at 1.02% while the Ninth Circuit had the highest average at 4.36%. Broken down by district, Puerto Rico reported no IFP waivers or 0.00% while Vermont had the highest percentage at 9.77% of the Chapter 7 cases filed.

The breakdown of the IFP filings since the enactment of BAPCPA follows (*see chart right and on following page*):

From October 17, 2005 through December 31, 2005, filing fees were waived in 429 cases. The number of cases in which the filing fee was waived increased by 268% through March 31, 2006, and increased by an additional 61% over the prior quarter for the period ending June 30, 2006.²⁷ The national average of filing fees waived being 2.1174% of chapter 7 cases filed is clearly within the contemplated projections of the FJC Report. However, if IFP cases continue to increase by 60% over the quarter ending June 30, 2006, with a presumed leveling of 40% the following quarter, filing fees will have been waived in slightly less than 10,200 cases, and more than \$611,000.00 in chapter 7 trustee § 330 compensation will have been lost.²⁸

B. The Courts.

Judicial review of 28 U.S.C. § 1930(f), since October 17, 2005, as reported in decisions upon fee waivers, is limited.²⁹ The Courts in applying § 1930(f) are guided by interim procedures or guideline promulgated by the Judicial Conference on August 11, 2005.³⁰ The application of § 1930(f) commences with the review of whether the Debtor "has income of less than 150 percent of the income official poverty line (as defined by the Office of Management and Budget...) applicable to a family of the size involved and is unable to pay that fee

October 17, 2005 through June 30, 2006

	Ch. 7 cases filed	IFP fee waived cases	Percentage of cases in which filing fee waived
First Circuit			
Maine	426	8	1.8779%
New Hampshire	560	8	1.4286%
Massachusetts	2265	60	2.6490%
Puerto Rico	592	0	0.0000%
Rhode Island	587	12	2.0443%
Total	4430	88	1.9865%
Second Circuit			
Connecticut	1398	37	2.6466%
New York			
Eastern	2870	69	2.4042%
Northern	2235	19	0.8501%
Southern	2064	66	3.1977%
Western	1999	25	1.2506%
Vermont	225	22	9.7778%
Total	10791	238	2.2055%
Third Circuit			
Delaware	343	14	4.0816%
New Jersey	3802	171	4.4976%
Pennsylvania			
Eastern	1743	133	7.6305%
Middle	1537	40	2.6025%
Western	3019	98	3.2461%
Total	10444	456	4.3661%
Fourth Circuit			
Maryland	2243	91	4.0571%
North Carolina			
Eastern	1362	13	0.9545%
Middle	1134	2	0.1764%
Western	1242	8	0.6441%
South Carolina	835	27	3.2335%
Virginia			
Eastern	2084	28	1.3436%
Western	1279	27	2.1110%

West Virginia			
Northern	521	7	1.3436%
Southern	593	22	3.7099%
Total	11293	225	1.9924%
Fifth Circuit			
Louisiana			
Eastern	497	6	1.2072%
Middle	286	6	2.0979%
Western	1045	3	0.2871%
Mississippi			
Northern	696	6	0.8621%
Southern	1020	1	0.0980%
Texas			
Eastern	1083	11	1.0157%
Northern	2199	33	1.5007%
Southern	2151	31	1.4412%
Western	1884	14	0.7431%
Total	10861	111	1.0220%
Sixth Circuit			
Kentucky			
Eastern	1575	48	3.0476%
Western	1986	67	3.3736%
Michigan			
Eastern	7303	86	1.1776%
Western	2834	19	0.6704%
Ohio			
Northern	5468	63	1.1522%
Southern	4598	76	1.6529%
Tennessee			
Eastern	2204	15	0.6806%
Middle	1715	13	0.7580%
Western	1568	16	1.0204%
Total	29251	403	1.3777%
Seventh Circuit			
Illinois			
Central	1960	9	0.4592%
Northern	6247	163	2.6093%
Southern	944	19	2.0127%

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October 17, 2005 through June 30, 2006			
	Ch. 7 cases filed	IFP fee waived cases	Percentage of cases in which filing fee waived
Seventh Circuit (continued)			
Indiana			
Northern	2308	8	0.3466%
Southern	3558	40	1.1242%
Wisconsin			
Eastern	2688	112	4.1667%
Western	1292	28	2.1672%
Total	18997	379	1.9951%
Eighth Circuit			
Arkansas			
Eastern & Western	1338	13	0.9716%
Iowa			
Northern	677	11	1.6248%
Southern	1197	8	0.6683%
Minnesota	2566	59	2.2993%
Missouri			
Eastern	2184	25	1.1447%
Western	2430	31	1.2757%
Nebraska	1228	47	3.8274%
North Dakota	270	2	0.7407%
South Dakota	361	3	0.8310%
Total	12251	199	1.6244%
Ninth Circuit			
Alaska	230	17	7.3913%
Arizona	2619	63	2.4055%
California			
Central	6279	84	1.3378%
Eastern	2929	97	3.3117%
Northern	2202	115	5.2225%
Southern	1399	44	3.1451%
Hawaii	425	10	2.3529%
Idaho	1047	14	1.3372%

Ninth Circuit (continued)			
Montana	468	18	3.8462%
Nevada	1489	40	2.6864%
Oregon	2527	90	3.5615%
Washington			
Eastern	1297	61	4.7032%
Western	2725	148	5.4312%
Total	25636	801	3.1245%
Tenth Circuit			
Colorado	3587	17	0.4739%
Kansas	1949	107	5.4900%
New Mexico ²⁶	1081	32	2.9602%
Oklahoma			
Eastern	368	6	1.6304%
Northern	746	13	1.7426%
Western	1070	5	0.4673%
Utah	1665	43	2.5826%
Wyoming	288	14	4.8611%
Total	10754	205	2.1945%
Eleventh Circuit			
Alabama			
Middle District	648	13	2.0062%
Northern	2164	21	0.9704%
Southern	346	12	3.4682%
Florida			
Middle District	4506	94	2.0861%
Northern	671	12	1.7884%
Southern	2358	31	1.3147%
Georgia			
Middle District	1348	19	1.4095%
Northern	5461	101	1.8495%
Southern	862	14	1.6241%
Total	18364	317	1.7262%
D.C. Circuit			
District of Columbia	150	2	1.3333%
Total	150	2	1.3333%
National Totals	163,222	3455	2.1174%

in installments."³¹ While application of this standard would appear non-controversial, at least one court has questioned, or more accurately raised for clarification, "[w]hat is the 'official poverty line defined by the Office of Management and Budget?'"³²

The second requisite of 28 U.S.C. § 1930(f) is that the Debtor be unable to pay the filing fee in installments. This determination regarding the ability to pay is to be based upon the totality of the circumstances.³³ One of the major changes between pre-BAPCPA installment fee cases and waiver cases is the Judicial Conference guideline regarding the payment of attorneys' fees. Previously, the filing fee had to be paid in full before the debtor could pay an attorney or any other person who rendered services to the debtor in connection with the case.³⁴ The Guidelines now provide, in part, "A debtor is not disqualified for a waiver of the filing fee solely because the debtor has paid (or promised to pay) a bankruptcy attorney, bankruptcy petition preparer, or debt relief agency in connection with the filing."³⁵ While the removal of the prohibition of payment to the debtor's attorney appears clear, such payment may still be considered in the "totality of circumstances" as well as factors including: collateral sources of payment; existence and value of exempt property; exigent circumstances for filing;³⁶ and the possibility of future needs.³⁷ Further, the review of current expenditures in considering "totality" will not necessarily be controlled by the IRS guidelines.³⁸

The burden to prove entitlement under the totality of circumstances falls squarely upon the debtor. The courts have made clear that the debtor has the burden of showing that the application for waiver of the filing fee should be granted,³⁹ and that such burden is by a preponderance of the evidence.⁴⁰ Further, the requisites of 28 U.S.C. § 1930(f) are conjunctive and not disjunctive, where the debtor fails to meet both factors, the request for waiver of the filing fee must be denied.⁴¹

IV. Summary and comment.

Chapter 7 trustees will continue to face difficult challenges with administration of bankruptcy cases under BAPCPA, but none will be more trying from the trustee's business perspective than the total lack of any § 330 compensation in IFP cases, combined with the continued failure of Congress to address the long awaited increased of § 330 fees. Trustees who exercise "business judgment" and decline IFP cases may find that the U.S. Trustee's office will seek reprimand or removal, when all that is being sought by the trustee is fair and reasonable compensation. Still the Courts are not blind to the trustees' dilemma in IFP cases. Bankruptcy Judge Lamar W. Davis Jr., while noting that "[b]eing a chapter 7 trustee is a difficult and risky business"⁴² in review of § 1930(f), further stated:

I agree with the Chapter 7 Trustees' contention that a fee of \$60.00 for services this extensive is frequently insufficient to cover the true cost of a Trustee's time and effort. It is even clearer that abuse may occur in a bankruptcy case without a Trustee's active and diligent involvement and that participation should be compensated. The cumulative effect of a liberal application of 28 U.S.C. § 1930(f)(1) could be detrimental to the operation of an effective, transparent, and abuse-free system for bankruptcy relief. Given the terms of the statute, however, I am not free to require the payment of a fee in all Chapter 7 cases. Rather, I must balance the public policy concerns for ensuring an efficient, fair bankruptcy system with Congress's clear command to permit bankruptcy relief to an honest but impoverished debtor. In doing so, I conclude that the discretion to waive a filing fee should be sparingly exercised.⁴³

As the bar and the public become more familiar with the availability of fee waiver, Chapter 7 trustees will need to aggressively review and, to the extent

necessary, oppose such applications to insure that waivers only occur in the truly dire cases. If such cautious review does not occur, and courts automatically grant such requests, chapter 7 trustees will clearly find themselves saying *I'm Feeling Poorer*. ■

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Footnotes:

- ¹ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) [hereinafter BAPCPA or 2005 Act] (to be codified at 11 U.S.C.) (amending Bankruptcy Code).
- ² See Samuel K. Crocker and Robert H. Waldschmidt, *Impact of the 2005 Bankruptcy Amendments on Chapter 7 Trustees*, 79 Am. Bankr. L.J. 333 Spring 2005.
- ³ Section 418- Bankruptcy Fees. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).
- ⁴ 28 U.S.C. § 1930(f)(1).
- ⁵ Currently the chapter 7 trustee, in a "no asset" case is compensated under the statutory authority of 11 U.S.C. § 330(b)(1), which provides, in part: "There shall be paid **from the filing fee** (emphasis supplied) in a case under chapter 7 of this title \$45 to the trustee...and (b)(2) "to pay \$15 to trustee serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such \$15 shall be paid in addition to the amount paid under paragraph(1).
- ⁶ *In re: Isaac*, 2005 Bankr. LEXIS 2691, (Bankr. N.D. Ga. Nov. 17, 2005)
- ⁷ 205 B.R. at 55.
- ⁸ The filing fees for a chapter 7 as the source for payment of chapter 7 trustee are derived from a combination of statutory sources. Presently, the filing fee for a chapter 7 under § 1930(a) is \$245.00. There is also an administrative charge of \$39.00, and lastly a charge under 28 U.S.C. § 1930(b) of a \$15.00 trustee surcharge as prescribed by the Judicial Conference of the United States. The current total fee for the commencement of a chapter 7 case is \$299.00. The fees have varied over the past 20 years in which significant increases have occurred during the past 3 years.
- ⁹ 28 U.S.C. § 1930(a).
- ¹⁰ There are three periods of time in which *in forma pauperis* decisions should be classified: First, decisions arising prior to October 1, 1994; next, decisions arising after October 1, 1994, such date being the operative date of a pilot *in forma pauperis* program conducted in six judicial districts for a three year period; and lastly, those decisions arising after October 17, 2005 under BAPCPA.
- ¹¹ Requests for *in forma pauperis*, were made by both debtors and creditors as it applied to adversary proceeding filing fees for objections to discharge or exception to discharge, and generally as to appeals. Appeals had an additional requirement relative to good faith and frivolity.
- ¹² 2005 Bankr. LEXIS 1183 at *8 (E.D. Va, 2005).
- ¹³ See *In re: Hobby*, 2005 Bankr. LEXIS 1183 (E.D. Va 2005). Cited therein *In re: Fitzgerald*, 192 B.R. 861, 862 (Bankr. E.D. Va. 1996); *Fromal v. Jackson (In re: Fromal)*, 1995 U.S. App. LEXIS 8910, * 2-* 3 (4th Cir. 1995), *In re: Shumate*, 91 B.R. 23, 26 (Bankr. W.D. Va. 1988); and, *Burrell v. Letterlough*, 150 B.R. 369 at 373. See also 28 U.S.C. §§ (a)(1), (a)(3).
- ¹⁴ Implementing and Evaluating the Chapter 7 Filing Fee Waiver Program - Report to the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States, Federal Judicial Center,

1998, page 1. Hereinafter referred to as the "FJC Report" or "Report."

¹⁵ See footnote 14. The report is available at: <http://www.abiworld.org/research/ifp.html>.

¹⁶ The Report findings were also summarized in a Department of Justice Memorandum entitled *Bankruptcy By the Numbers - The Impact of the Coming Fee-waiver Provision* by Edward Flynn of the Executive Office of the United States Trustee and Gordon Bermant of Burke Virginia.

This report is available at: http://www.usdoj.gov/ust/eo/public_affairs/articles/docs/abiOIjulnumbers.html

¹⁷ The FJC Report references at 28 in the paragraph entitled "Accounting of Costs and Lost Revenues Associated with the Program," the payments to case trustees. This would support the belief that § 330 fees were paid in the ordinary course.

¹⁸ The author was advised by Ms. Wiggins that the Pilot Program failed to have specific funding provisions for the payment of the panel trustees, however there were sufficient funds within the Program which allowed for the trustees to be paid.

¹⁹ See footnote 16.

²⁰ See FJC Report at page 68.

²¹ See FJC Report at 68.

The Bankruptcy Committee endorsed the recommendation of its IFP subcommittee that the most straightforward way to fund a national program would be for Congress to increase the judiciary's appropriation by this amount, which represents approximately 2/10 of 1% of the judiciary's total fiscal 1997 appropriation.

If monies are not directly appropriated to cover the costs of the program, the subcommittee suggested and the committee secondarily endorsed requesting authorization for application of the United States Treasury share of the filing fee to cover the cost of the program. Currently, the general fund of the U.S. Treasury receives \$ 15 from the filing fee for each Chapter 7 case. In fiscal 1997

alone, the general fund received approximately \$13,892,745 from Chapter 7 bankruptcy filings. Thus, lost revenue due to waived fees would be recovered if the judiciary could retain this portion of the fee for all non-IFP cases in a special fund designated as "no year" money. From the fund, \$160 would be allocated for each IFP case among the entities who would have benefited from the filing fee (e.g., the judiciary would receive \$70, the U.S. trustee system would receive \$30 dollars, the case trustee would receive \$60). The drawback to this approach is that the fund may be insufficient to cover the costs of the program in subsequent years if the ratio of IFP to non-IFP cases dramatically increases. Designating the fund's receipts as "no year," however, would enable the judiciary to better respond to moderate filing fluctuations.

²² See *Shepardson* at 56 citing *In re: Merritt*, 186 Bankr. 924, 929 (Bankr. S.D. Ill. 1995); *In re: Koren*, 176 Bankr. 740, 742-45 (Bankr. E.D. Pa. 1995).

²³ Federal Rule of Bankruptcy Procedure Rule 1006(b)(3).

²⁴ FJC Report at 71. As more specifically set forth in footnote 79:

Judges in the pilot courts also published a number of opinions on the issue. *In re: Stephenson*, 205 B.R. 52 (Bankr. E.D. Pa. 1997) (payment of attorney fees by a family member did not automatically bar IFP status; Rule 1006(b)(3) "suspended" for pilot districts); *In re: Koren*, 176 B.R. 740 (Bankr. E.D. Pa. 1995) (payment of attorney fee by debtor's son did not automatically bar IFP status; Rule 1006(b)(3) not applicable to IFP applications); *In re: Caldwell*, 203 B.R. 666 (Bankr. W.D. Tenn. 1997) (Rule 1006(b)(3) must yield to IFP statute); *In re: Shannon*, 180 B.R. 189 (Bankr. W.D. Tenn. 1995) (granting IFP status after debtor was unable to pay fee in installments even though debtor had promised to pay an attorney \$100, and stating that compensation to attorney was only one factor to consider in determining whether fee should be waived); *In re:*

Dotson, 179 B.R. 85 (Bankr. W.D. Tenn. 1995) (granting IFP status despite debtor's promise to pay attorney, where debtor appeared unable to pay and attorney had agreed to remain on case whether or not he was paid); *In re: Beecham*, 181 B.R. 335 (Bankr. W.D. Tenn. 1994) (denying IFP status for failure to show inability to pay in installments, and further finding that Rule 1006(b)(3) strictly barred court from waiving filing fee where debtor had paid attorney \$500 via a loan from sister); *In re: Thompson*, 177 B.R. 890 (Bankr. W.D. Tenn. 1994) (denying IFP status for failure to show inability to pay in installments, where debtor exhibited financial ability to pay attorney \$500 via funds from spouse); *In re: Takeshorse*, 177 B.R. 99 (Bankr. D. Mont. 1994) (denying IFP status; finding ability to pay filing fee when debtor had paid attorney \$450; Rule 1006(b)(3) applied). See also *In re: Clark*, 173 B.R. 142 (Bankr. W.D. Tenn. 1994) (stating that the court will consider a totality of the pre- and post-petition facts and circumstances in determining whether or not to waive the filing fee).

²⁵ The information for this article was collected by the author through the CM/ECF court site for each District. The report obtained through CM/ECF was for the period of October 17, 2005 to June 30, 2006, for only Chapter 7 cases whether open or closed. The data from the Court generated report was copied to an Excel spreadsheet and the data searched for the term IFP for the determination of the number of waiver cases. Unfortunately, CM/ECF presently does not have available to the public information regarding the actual number of applications for waiver filed, and correspondingly the number of applications which were denied. It is the author desire to follow up with part two of this article, after consultation with each court, to determine the second side of the statistical story. The author has also received information that the Administrative Office is collecting similar statistical information, but understands the AO is not yet satisfied with

the reliability of the information it has received.

²⁶ The author received an independent report for New Mexico, which did reflect the number of applications filed, approved and denied, and whether the debtor was pro se, had a bankruptcy petition preparer, or counsel. Unfortunately, the author found the report differed with the CM/ECF report which through April 2006 appeared to report fee waiver cases as "installment" cases. This would appear to justify the AO's concern regarding the reliability of the total reporting, although this was the only District where the author noticed such differences.

²⁷ From October 17, 2005 to December 31, 2005 there were 16,266 chapter 7 cases filed. January 1, 2006 to March 31 2006 saw 60,025 chapter 7 cases filed, an increase of over 369% from the prior quarter, and 86,931 cases filed in the period of April 1, 2006 to June 30, 2006, being a further increase of 69% over the prior quarter.

²⁸ The author has made the assumption that the learning curve for the filing of waiver applications will continue to increase in the third quarter of 2006, with a leveling in the fourth quarter. The author has also assumed that the '330 fees remain at \$60.00, without the long awaited and anticipated increase to \$100.00, in which case the lost compensation during 2006 would exceed \$779,000.00.

The Congressional Budget Office Cost Estimate of April 4, 2005, upon S. 256, in addressing fee waivers stated:

Section 418 would permit a bankruptcy court or district court to waive the chapter 7 filing fee and other fees for a debtor who is unable to pay such fees in installments. Based on information from the AOUSC, CBO expects that, in fiscal year 2006, chapter 7 filing fees would be waived for about 3.5 percent of all chapter 7 filers and that the percentage waived would gradually increase to about 10 percent by fiscal year 2009.

The author believes his assumptions to be reasonable in view of the FJC Report and CBO estimates, and in fact, may understate the problem and potential lost compensation for chapter 7 trustees.

²⁹ *In re: Bradshaw*, Case No. 06-50413, (E.D. Tenn, August 25, 2006).

³⁰ *In re: Nuttall*, 334 B.R. 921, 922 (W.D. Mo. December 27, 2005); *See also In re: Bradshaw*. The Judicial Conference guidelines may be found at <http://www.uscourts.gov/bankruptcycourts/jcusguidelines.html>.

³¹ 28 U.S.C. '1930(f)(1).

³² *In re: Shawn Nelson*, Case No. 06-60001-7, (D. Montana, January 5, 2006). After a rather thorough review of Section 673(2) of the Omnibus Budget Reconciliation Act of 1981 [42 U.S.C. §9902(2)], and Internet materials from the U.S. Department of Health & Human Services regarding the distinction between the poverty guidelines and the poverty thresholds, the court concluded: "As the poverty guidelines are used for eligibility and poverty thresholds are used for statistical purposes, the Court concludes, based upon the above discussion, that the poverty guidelines are to be used in determining the official poverty line, even though 11 U.S.C. § 1930(f) does not specifically state one term or the other and even though §1930(f) references the language "official poverty line defined by the Office of Management and Budget," which has been interpreted by HHS to mean poverty thresholds." The Court determined the Debtor met the income guideline, but then in review of the second factor of whether the debtor was unable to pay the fee by installments determined that the Debtor had net monthly income of \$910.00 and stated no reason why he could not pay the fee in installments.

³³ *See In re: Lineberry*, 2006 Bankr. LEXIS 1397 *16 (W.D. Va. Roanoke Div. May 1, 2006), reciting the Judicial Conference of the United States Interim Procedures Regarding the Chapter 7 Fee Waiver Provisions of the Bankruptcy Abuse

Prevention and Consumer Protection Act of 2005. promulgated August 11, 2005.; *In re: Burr*, 344 B.R. 234; 2006 Bankr. LEXIS 1008 *3 (Bankr. W.D.N.Y. June 2, 2006).

³⁴ F.R.B.P. 1006(b)(3).

³⁵ The Judicial Conference Guidelines further stated at footnote 5: Inability to pay the filing fee in installments is one of the requirements for a fee waiver. If the attorney payment prohibition were retained, payment of an attorney's fee would render many debtors ineligible for installment payments and thus enhance their eligibility for the fee waiver. Deletion of this prohibition from the rule, which was not statutorily required, ensures that debtors who have the financial ability to pay the fee in installments will do so rather than request a waiver.... In the installment application, debtors must certify they will not make additional payment or transfer any additional property to an attorney or other person for services in connection with the case until the filing fee is paid in full.

³⁶ *In re: Mildred K. Robinson, et. al.*, Case Nos. 06-40288; 06-40471; 06-40472; 06-40481; 06-40563, (Bankr. S.D. Ga July 2006) citing therein: *In re: Nuttall*, 334 B.R. 921, 923 (Bankr. W.D. Mo 2005).

³⁷ *See Bradshaw*.

³⁸ *See Nuttall*, 334 B.R. at 924; and, *Bradshaw* where the Court stated: "Congress has given no directive that the court apply the IRS standards to applications to proceed *in forma pauperis* in contrast to the 11 U.S.C. §707(b) means test where the use of the IRS standards is expressly mandated."

³⁹ *See Nuttall*, 334 B.R. at 923.

⁴⁰ *See In re: Burr*, 344 B.R. at 234.

⁴¹ *In re: Shawn Nelson, id.*

⁴² Citing *In re: Fisher*, 210 B.R. 467, 469 (Bankr. D. Minn. 1997).

⁴³ *In re: Mildred K. Robinson, et. al.*, Case Nos. 06-40288; 06-40471; 06-40472; 06-40481; 06-40563, (Bankr. S.D.Ga July 2006).