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1/22/12

Honorable Randy D. Doub, Chief Judge
Honorable J. Rich Leonard
Honorable Stephani W. Humrickhouse

c/o Stephanie J. Edmondson
1760-A Parkwood Blvd
Wilson, NC 27893-3564

Draft letter to our judges

Honorable Judges:

I write to respectfully request our Court to please raise our Chapter 13 presumptive "base fee".

Whether the Court realizes it or not, we debtor attorneys are all hurting out here. As the Court is aware, filings are off, and filings being off, we are generating less attorney fees. Less attorney fees makes it more difficult, if not impossible, to financially afford to keep our trained and knowledgeable staff. And, ever staffer we lose puts at risk the quality of our services and our ability to meet the need for services if and when filings do pick up. This is bad. It is bad for us and it is bad for this Court and our bankruptcy system as a whole.

When we lose good, trained staff, we can't get them back. By necessity, the staff we lay off are forced to apply for and then settle into new non-bankruptcy-law related jobs. As a result, their skills, knowledge and experience, are lost to the bankruptcy bar forever.

The real problem lies in understanding that under BAPCPA, the law and procedures became a magnitude more complex, more complicated, more cumbersome, more demanding, and more dominated by "red tape".

Unlike a McDonald's restaurant, we can't hire and fully train an employee in a couple of weeks. For us, it's more like 2 to 3 years, and in many cases, even longer. When we lose a knowledgeable and skilled staffer, we not only lose all knowledge and skill, we also lose our entire investment in the training of that person. Worse still, our entire system of bankruptcy loses that person as a component part of what makes this complicated, but vitally important, system of bankruptcy law work.

There is only so much that we debtor attorneys can do to stem the bleeding caused by these losses. With the base fee set at $3,000, we just don't have the money to keep everybody employed during downturns like this.

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I realize that this problem, taken in isolation, is not a justification for raising the "base fee". However, the truth is that an immediate increase in the base fee, arguably long overdue, would go a long way toward giving us the resources to stay the course and hold onto our good people until things pick up.

The real problem is that the base fee of $3,000 was never enough, and as a result, we have, all along, had to shave things "close to the bone" to make ends meet. So close to the bone that there really has not been much of a financial cushion, if any, to depend on. And now, in this horrific economy, we are really feeling the pinch.

For my part, to make do with a $3,000 "base fee", I have depended upon a volume practice and literally thousands of hours spent perfecting systems to increase efficiency. I simply can't imagine how, in this bad economy, smaller volume, arguably less efficient, players are making it. I suspect that many are not.

With the "base fee" set at $3,000, our debtor bankruptcy bar is, in my estimation, headed for real trouble. The sad truth is that, if you are not already an established, knowledgeable debtor bankruptcy attorney, fully conversant in Chapter 13 practice, the price of entry into debtor bankruptcy practice is simply not worth it. I don't know whether the Court has noticed or not, but many, if not most of the seasoned Chapter 13 attorneys are aging out. At age 61, I am actually one of the younger ones. Our aged bar is looking squarely down the gun barrel of retirement, death and disability, and with us gone over the next 3 to 10 years, who will there be to train, or even answer questions for, the next generation.

It is an unfortunate reality that the Court needs us aged folks to train the younger attorneys. A couple of us are already doing so. But, that's not enough. Over and over, we see the carnage of young attorneys attempting to breach the knowledge and skill barrier necessary to sustain a debtor bankruptcy practice, without a guide or mentor, much less in-depth training. For many, it's like handing them the wheel of a airliner and expecting them to fly. It is tragic to watch. The truth is that, with the increased complexity wrought on us by the new bankruptcy law, it is almost impossible for these young attorneys to train themselves or to avoid tripping on the many, hidden, legal land mines strewn in their path. It can be done, but, in my experience, not without significant trauma. Most often, it leads to an exit, nay, an escape, from the practice of bankruptcy law. What a shame? New blood, lost, and why?

Two reasons predominate: (1) There isn't any in-depth training available, and (2) The $3,000 base fee "just ain't worth it". And, we don't even have to look to young attorneys incipient to bankruptcy law to see that it "just ain't worth it". If the Court would, look around, and ask this question: "Why aren't more Chapter 11 attorney taking on Chapter 13 cases?". The answer is the same. It just isn't worth it. Recently, I asked an excellent Chapter 11 attorney about this and that was exactly the answer I got. I then asked him this follow up question: "How much would the base fee have to be to get you interested in Chapter 13 work?" His answer was "at least $5,500 to $6,000 as case".

Your honors, I love doing bankruptcy law; and I will make you a deal. If you will get our base fee up to some reasonably higher level, I will start a school in my law firm to teach interested young lawyers, in depth, how to practice consumer debtor bankruptcy law. I have taught my 8 associate attorneys, and I am willing to expand on that model to provide some sort of "internship" for licensed attorneys who are willing to spend the time and effort to attend. I figure I can train 5 new attorneys per year. Over 5 years or so, that's 25 attorneys who would then have

a fighting chance to succeed as viable, successful, consumer debtor bankruptcy attorneys. I have the experience and the knowledge to pull this off. I think my track record speaks for itself. I have the systems, forms, checklists, tracking sheets, memos, handouts, motions, etc. in place to help these attorneys achieve the level of competency and excitement about bankruptcy law that they simply cannot achieve without the help of experienced attorneys.

So, what's a reasonable "base fee"? I would be lying to you if I told you something lower than $4,500. Do I expect the Court to do that high? No. But I do feel that $4,000 is more than justifiable.

If the Court will bear with me, I will now lay out my reasoning, and I thank the Court in advance for its kind consideration in slogging with me through these arguments.

First off, I would mention in passing, that the Court has not addressed this issue for almost 6 years. The last time was in the spring of 2006.

My hope is that the Court will agree the issue is ripe for consideration.

Second, I will preface by admitting that I have been told that the issue of our Chapter 13 "base fee" is on the agenda of our Local Rules Committee for its February meeting. So, why do I write the Court? Because without the backing and support of this Court, I fear that the issue may not be given the serious and immediate consideration it deserves.

As debtor attorneys, we come to you hat in hand. We know that the Court cares about us and wants to make sure that we survive and thrive. We need the support of the Court; and we need it now.

Argument 1:__

The work required of consumer debtor attorneys for the proper handling of the average Chapter 13 case is at least 3 times more than the work required prior to BAPCPA.

As all parties are aware, the new law added whole new levels of complexity to the system, as well as a lot more "red tape".

In 2006, we surmised that the work would be about 2 times as much. We now have the experience to know that it is really more like 3 times as much work.

Some of the proof of this can be gleaned from the fact that so many attorneys have started taking on Chapter 13 work, only to quickly stop doing so.

Additional proof can be gleaned from the fact that virtually no Chapter 11 attorneys have entered the Chapter 13 work, the expressed feeling being that "it's just not worth it".

More specifically, the length of the attached "Bankruptcy Processing and Signing Checkoff" (the form used by my office in every Chapter 13 case) attests to the huge amount of work involved and steps necessary to just get a Chapter 13 case filed. And, this does not encompass any of the tasks required thereafter and throughout the life of the Chapter 13 representation. (See Exhibit "A")

Using $1,600 as a baseline (the base fee prior to BAPCPA), this fact alone would dictate, or at least justify, a base fee of **$4,800**.

Argument 2:

The current economic climate has significantly increased the cost of providing a "free" initial consultations.

As I am sure the Court is aware, consumer debtor attorneys, out of necessity, have to offer a "free initial consultation". It's just the way it is. If we don't, the potential client goes to another attorney who does.

Each of these consultations takes, on average, at least 1 hour, and sometimes 2.

It used to be that we would retain approximately 1 out of every 3 people who came to us for help. Therefore, we used to burn 3 hours of staff time doing initial interviews to net 1 new client.

Because of high levels of unemployment, failed mortgage modification programs, delayed foreclosures that allow mortgage arrearages to increase to unaffordable levels, and other factors, this ratio have increased significantly. Currently, I estimate that the correct ratio is more like 5 potential clients seen to net 1 new client.

Why? Here are the main reasons:

(1) Many of the people who come to see us are unemployed, with no income. As such, there is no money to pay for a Chapter 7 attorney fee and no income to sustain a Chapter 13 plan.

(2) Homeowners who come to see us are, on average, 6 to 12 months, or more, behind, making the cost of catching up the "pre-petition" mortgage arrearage that much more unaffordable.

The bottom line is that, of the decreased number of people who do come to see a debtor bankruptcy attorney, there are more and more that we simply can't help.

Financially, the bottom line is that we are filing less cases and spending more staff resources culling out the few who we can help. When all is said and done, taking into consideration that we have to book, follow up with, get paperwork from, meet, and spend at least 1 hour interviewing 5 people from every 1 client we net, this change, by itself, has driven up the average expense of each case filed by probably $300 to $500. This extra cost is not sustainable based on a $3,000 base fee.

And, in this seemingly intractable economy, there is no end in sight for this elevated cost.

Argument 3:

Because of BAPCPA, we have to hire, for lack of a better term, smarter staff, and hiring smarter staff costs significantly more.

The new law is so much more complex, complicated and cumbersome than the old law that we are having to hire smarter staff to better insure that at the end of the day, the staff will "get it". This fact stands in stark contrast with practice under the old law.

This is especially so with respect to staff involved in the procedural and substantive law aspects of the representation. Staff we used to hire starting at $18,000 to $25,000 per year, depending upon experience and duties, we now have to pay $22,000 to $35,000. This is not the result of inflation. Rather, it is the result of our recognition over the last 6 years that hiring staff of less than a certain caliber is a losing proposition. We have hired, tried to train and had to "let go" more staff that we wish to recount, simply because, ultimately, they couldn't comprehend and apply everything they needed to know.

As a result, we have had to pay higher and higher salaries across the board, a huge, unanticipated expense.

Argument 4:

Inflation over the last 6 years has lowered that value of the $3,000 base fee to not more than $2,670.

This is based upon the assumption that since 2006, total inflation is at least 11%.

Just to combat the effect of inflation alone would seem to dictate an increase in the base fee to at least $3,370.

Argument 5:

On average, we don't collect the full $3,000 "base fee".

In setting the base fee at $3,000, the Court indicated that, at the time, $3,000 was the "reasonable value" of the core services required. However, debtor attorneys in the Eastern District, on average, only collect about 75 to 90% of the $3,000 base fee. In most cases, this result derives from factors like loss of employment, medical expenses, divorce and other issues which are not at all under control of the debtor attorney.

This being the case, debtor attorneys are, on average, being paid less than the "reasonable value of the services required". Using a collection rate of 85% as a good measure of the average amount collected, the base fee would have to be increased to **$3,529.41** to insure that debtor attorneys, on average, collect $3,000.

In December, 2011, the American Bankruptcy Institute, together with the National Conference of Bankruptcy Judges, issued the final report entitled "The Consumer Bankruptcy Fee Study." The full report can be accessed "online" at http://www.abiworld.org/Fee_Study/CFSFinalReport_Final_Dec7.pdf

Based upon the sampling of cases encompassed by this study, the average fee collected in Chapter 13 cases filed in the Eastern District of North Carolina was, in "discharged" cases, only $2,614.70, and in "dismissed" cases, only $1,677.00. Upon the assumption that 50% of all Chapter 13 cases get "dismissed" before "discharge", it would seem fair to average the "discharged" and "dismissed" numbers, yielding an average collected in this sampling of only $2,145.85. This equates to a collection rate of 71.5%. On the assumption that the sampling of cases referenced is representative of the average of all cases, it would arguably have taken a "base fee" of **$4,195.80** to insure that debtor attorneys, on average, collected $3,000.

Argument 6:

There is plenty of precedent for increasing the Chapter 13 base fee to $3,500, $4,000 or higher.

As mentioned above, in December, 2011, the American Bankruptcy Institute, together with the National Conference of Bankruptcy Judges, issued the final report entitled "The Consumer Bankruptcy Fee Study."

Among other facts, this report provides a detailed listing of the various Chapter 13 "base fees" by jurisdiction. Per this report, there are 40 jurisdictions that currently provide for a "base fee" of at least $3,500, and 10 jurisdictions with the "base fee" set at $4,000 or higher, and 4 jurisdictions at $4,500 or higher.

And, this does not include the Middle District of North Carolina which district just raised its "base fee" to $3,500.

Argument 7:

The fact that Judges and Trustees have not received a salary increase should not constitute the basis for denying an increase to debtor attorneys.

Debtor attorneys are fully aware that Judges and Trustees are undercompensated. As debtor attorneys, and for the record, we have always been fully supportive of increasing the salary of Judge and Trustees. Acting through the National Association of Consumer Bankruptcy Attorneys (NACBA), we have consistently advocated for and supported any and all legislative efforts to increase the salaries of Judges and Trustees.

If we debtor attorneys had anything to say about it, this problem would already have been solved. Hopefully, the Court will not hold the shortfalls of Congress against deserving consumer debtor attorneys.

Argument 8:

Representing debtors in business-related cases a losing proposition under a base fee of $3,000

Understandably, the Court might respond that we should keep time on these cases and apply for extra fees on an hourly basis.

The problem is that most consumer debtor attorneys are not set up to keep time. Our whole business model is based around "flat fees" and for good reason. Consumer debtors have limited funds available. Flat fees allow us to provide more and better services than would be possible if we had to spend a substantial part of the debtor's limited funds accounting for our time on an hourly basis.

Furthermore, the truth is that, most of the time, we don't know how much work a business case is going to require until we are well into it.

The truth is that there are some business-related cases small enough or functionally simple enough to represent for the regular "base fee". The problem is caused by the ones that are not that small or turn out to be a lot trickier or more complicated to handle than originally

anticipated.

At the same time, I fully understand that what is and what is not a business case, and which business is big enough to warrant additional fees, etc., are not easy questions to answer, and that, therefore, the Court is hesitant to provide a separate, higher flat fee for these cases. Presumably, that is the reason the Court, back in 2006 nixed the separate, higher fee previously in effect for business cases.

However, the reality is that we consumer debtor attorneys cannot afford to continue to work these cases at a loss. We are faced with a choice. Represent these debtors at a loss or turn them away.

Unfortunately, in this economy, a significant portion of the would-be clients coming to see us are in failed or failing businesses, and the reality is that they need representation too. For many of them, a Chapter 7 or a Chapter 13 filing is just the thing.

To try to provide the Court with an approach to setting a flat fee in these cases that makes sense, some attorneys and myself sat down and asked ourselves the hard questions. For example, what constitutes a business case? What easily identifiable elements make one business case more work than another? Which of these elements should trigger higher fees? How much of a flat fee "add on" should be allowed based upon the presence of various elements? Can this issue be reduced to a formula that is both easy to apply and one that "on average" makes sense based on real-life experience representing business owners?

The attached "Chapter 13 Attorney Fees: Proposed Add-Ons for Debtors In Business" provides a practical solution. As the Court can see, this would provide specific easily identifiable guidelines for determining what is and what is not a business case. It goes on the identify elements that would seem to bear an identifiable relationship to the amount of extra work involved. Lastly, it places values on these elements. This proposal is designed to both make sense and be easy to apply. Overall, it provides a sliding scale of "add ons" for the business-related cases depending upon which elements are present in a particular debtor's situation.

It is our hope that in considering whether a higher "base fee" is justified, the Court will also consider adopting these guidelines, or something similar, so as to provide deservedly higher compensation in business-related cases.

Respectfully submitted,

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John T. Orcutt