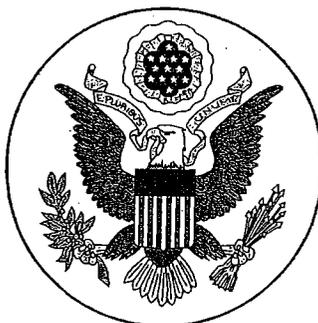


JUDICIAL CONFERENCE OF THE UNITED STATES

**STATEMENT OF
THE HONORABLE THOMAS S. ZILLY**

**SENIOR JUDGE, UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**



**FOR THE
SUBCOMMITTEE ON ADMINISTRATIVE
OVERSIGHT AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

**HEARING ON
OVERSIGHT OF THE IMPLEMENTATION OF THE BANKRUPTCY
ABUSE PREVENTION AND CONSUMER PROTECTION ACT**

December 6, 2006

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700

**STATEMENT OF SENIOR JUDGE THOMAS S. ZILLY
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES**

Mr. Chairman and members of the subcommittee, I am Senior Judge Thomas S. Zilly of the United States District Court for the Western District of Washington and chair of the Judicial Conference's Advisory Committee on Bankruptcy Rules. I am submitting this statement on behalf of the Judicial Conference of the United States, the policy-making arm of the federal courts, to report on the actions taken by the federal judiciary to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act").

I welcome this opportunity to share with you some of the highlights of the hard work that the federal judiciary has done in implementing this comprehensive legislation within a relatively brief period of time. The provisions of the Act generally took effect on October 17, 2005, only six months after its enactment. The Act exceeds 500 pages in length and affects virtually every aspect of bankruptcy cases. Among other things, the law:

- Requires that debtors complete and pass a "means test" to be eligible to file for relief under Chapter 7;
- Specifies that individual debtors may not file a bankruptcy case unless they have received a credit counseling briefing by a nonprofit agency approved by the bankruptcy administrator or U.S. trustee for the district;
- Specifies that Chapter 7 and Chapter 13 debtors may not receive a discharge of their debts unless they have completed a financial management course approved by the bankruptcy administrator or U.S. trustee for the district;
- Makes extensive changes in Chapter 13 that affect the content of repayment plans, timing of confirmation, exceptions from discharge, length of time that the debtor must pay under a plan, and a number of other areas of Chapter 13 practice;
- Places additional duties on debtors-in-possession and trustees in Chapter 11 cases, alters the requirements for individual debtor Chapter 11 cases, and expedites the handling of small business Chapter 11 cases;

- Makes Chapter 12 reorganization for family farmers a permanent feature of the Code and adds family fishermen as a new group entitled to use Chapter 12;
- Includes new provisions governing health-care businesses;
- Adds a new Chapter 15 to the Code governing cross-border insolvencies that incorporates the Model Law on Cross-Border Insolvency drafted by the U.N. Commission on International Trade Law;
- Amends the appellate structure to allow certain appeals from decisions of bankruptcy judges to be taken directly to the courts of appeal;
- Requires significant changes in the form for reaffirmation agreements;
- Increases bankruptcy filing fees and reapportions them among the Treasury, the Department of Justice, and the Judiciary;
- Authorizes bankruptcy courts to waive filing fees for certain low-income debtors;
- Requires a significant increase in case management by bankruptcy judges;
- Substantially expands the statutory duties and the responsibilities of bankruptcy administrators and U.S. trustees;
- Requires bankruptcy administrators and U.S. trustees to conduct random audits of Chapter 7 and Chapter 13 cases to determine the accuracy, veracity, and completeness of the financial schedules and statements filed by debtors;
- Places additional responsibilities and liabilities on the attorneys for debtors;
- Requires the judiciary to collect and report new statistical data; and
- Authorizes 28 new temporary bankruptcy judgeships, which represents about half the number of bankruptcy judgeships requested by the Judicial Conference.

Implementing these provisions within the six months provided under the Act presented the federal judiciary with an unprecedented challenge. The Act's wide-ranging demands raised significant coordination problems that required not only the attention of judicial officers throughout the federal judiciary but also of officials within the Executive Office for United States

Trustees and other agencies, including the Internal Revenue Service, the Department of Health and Human Services, and the Census Bureau. A major segment of the federal judiciary, consisting of countless numbers of district court judges, bankruptcy court judges, bankruptcy court staff, Administrative Office staff, and Federal Judicial Center staff, was required on a short timetable to modify or develop new rules, forms, court procedures, computer software programs, statistical reports, manuals, and training programs, and to address a host of other tasks.

The added demands of the Act have increased the already enormous pressures to cope with the day-to-day responsibilities in the administration of justice, straining the federal judiciary's personnel and resources. Though the challenges were many and daunting, I am pleased to report that the judiciary has faithfully fulfilled its responsibilities and met the statutory deadlines.

I have attached a report on the impact of the Act, which was prepared by the Administrative Office for the United States House and Senate Committees on Appropriations, dated August 2006. The report summarizes many of the tasks that the judiciary accomplished in implementing the Act. I have also attached an internal Administrative Office document, which contains a detailed record of the major actions taken as of July 10, 2006, to fulfill the Act's requirements. The document was intended to be used solely as an internal management tool. But it also serves as a record that accurately captures the immense scope and magnitude of the federal judiciary's undertakings in executing the Act's provisions. A brief perusal of the 92-page report substantiates the extent of the federal judiciary's labors. I would like to highlight several of them.

Changes in Operating Procedures

Following a careful review of the Act, the judiciary developed guidelines and procedures addressing various new provisions added by the Act, such as those authorizing waiver of Chapter 7 filing fees, handling copies of debtor-tax returns filed with the court, nationwide noticing of creditors, and routing fraudulent statements to the Department of Justice. Significant changes were also initiated to reprogram the judiciary's Case Management/Electronic Case Files system (CM/ECF), which is now operational in virtually all bankruptcy courts. This system serves as the judiciary's docket, recording every action taken in cases filed in the federal courts.

Training

The Federal Judicial Center and the Administrative Office have instituted training programs for bankruptcy judges, bankruptcy clerks and bankruptcy administrators, and court staff, including case administrators in the clerks' offices, who will use the revised CM/ECF system. Court personnel have been trained at specifically-designated seminars, at conferences, and via the "FJTN," the Federal Judicial Center's closed-circuit television broadcast channel.

Bankruptcy Administrator Program

The Administrative Office has worked directly with the six bankruptcy administrator offices in the states of Alabama and North Carolina to prepare them to handle all the new duties and responsibilities required of them under the Act. These courts do not participate in the United States Trustee Program and are responsible for handling the trustees' duties themselves. First, the Act was analyzed to identify all the new duties, whether they are explicitly imposed on bankruptcy administrators by the Act or are needed to maintain parallel treatment with new duties imposed on United States trustees. The bankruptcy administrator offices were then

notified of the changes in the law, changes in the courts' operating procedures, and changes to the bankruptcy administrators' own duties and responsibilities, such as overseeing means testing and small business Chapter 11 cases, certifying consumer credit counseling and financial management courses, and taking on new audit and reporting responsibilities. The Administrative Office has maintained regular contact with each bankruptcy administrator office. In addition, current bankruptcy administrator procedures and manuals have been revised substantially, and changes have been made to their automated case management systems.

Statistics

The judiciary's statistical systems have been substantially modified, both to adjust to the many changes in the bankruptcy system required by the Act generally and to comply with § 601 of the Act, which requires the Administrative Office to collect information and produce a new set of reports on consumer debtor cases. After the Judicial Conference approved amended and new bankruptcy forms, the Administrative Office worked closely with bankruptcy clerks to reprogram the case management system, design extraction programs, and build an entirely new enterprise data system capable of receiving and processing the data. The judiciary has recently begun collecting all the new required data and expects to produce the reports mandated under the Act within the specified deadlines.

Federal Rules of Bankruptcy Procedure

I would like to briefly report on the actions taken by the Advisory Committee on Bankruptcy Rules (the "Advisory Committee" or "Committee") to develop rules and Official Forms implementing the Act.

The Rules Enabling Act rulemaking process is set out in 28 U.S.C. §§ 2071-2077. It is a

painstaking and time-consuming process that ensures that the best possible rules are promulgated. Soon after the Bankruptcy Act's enactment, the Advisory Committee decided that a two-track process was necessary to promulgate rules implementing the Act because its impending effective date of six months did not provide sufficient time to proceed under the regular rulemaking process, which ordinarily takes three years. Similar actions have been taken in the past to implement changes in or additions to the rules necessitated by amendments to the Bankruptcy Code. Under the first track, temporary interim rules were issued that apply to bankruptcy cases during a transitional period until the promulgation of national permanent rules. The Committee addressed two tasks: (a) identify which rules-related provisions in the Act required an immediate response; and (b) develop interim rules and forms addressing these time-sensitive provisions well before the October 17, 2005, deadline so that the courts would have adequate time to implement them. Under the second track, permanent national rules implementing the Act would be promulgated based on the interim rules. The Committee would monitor the courts' experiences with the interim rules and forms, simultaneously proceeding with the regular rulemaking process and inviting public comment beginning in August 2006 on converting the interim rules to permanent federal rules.

Under the first track, interim rules were circulated in August 2005 to the courts with a recommendation that they be adopted without change as part of a standing or general order. Recommending interim rules and authorizing Official Forms without going through the regular Rules Enabling Act rulemaking process was an unavoidable expedient compelled by the Act's effective date. To meet the Act's deadline, the Advisory Committee devoted substantial time and effort in developing interim rules and forms that faithfully implemented the Act. It worked

closely with the Executive Office for United States Trustees. It consulted with experts who participated in the legislation, who at times disagreed among themselves over the meaning of particular provisions in the Act, making the Committee's job all the more difficult. It reached out to many corners of the bar for assistance. It relied on its members' varied experiences, including members who represent creditors and others who represent debtors in their private practice. All these efforts were undertaken in an open fashion to ensure that the process remained transparent, a hallmark of the rulemaking process. The bankruptcy courts incorporated virtually all the interim rules into their local rules. The interim rules were well received by the bench and bar.

The Advisory Committee has initiated the second track, publishing proposed amendments to the Federal Rules of Bankruptcy Procedure based on the interim rules for public comment in August 2006 for a six-month period ending February 15, 2007. The Committee also published for comment additional proposed rule amendments not included as part of the time-sensitive interim rules package.

In accordance with the regular rulemaking process, the Advisory Committee will review public comments and any statements submitted on proposed amendments to 32 existing rules, 8 new rules, 20 existing Official Forms, and 5 new Official Forms implementing the Act at its March 2007 meeting. If approved, the Committee will transmit the proposed rules and forms to the Committee on Rules of Practice and Procedure (Standing Committee) in June 2007 with a recommendation that they be approved and submitted to the Judicial Conference at its September 2007 session. If approved by the Standing Committee and the Conference, the proposed rules will then be submitted to the Supreme Court for its consideration. (Changes to the Official Forms, however, do not have to be approved by the Court and most of them took effect in late

2005. Additional changes may be made to the forms in light of public comment.) The Court has until May 1, 2008, to prescribe the rules and transmit them to Congress. The rules then will take effect on December 1, 2008, unless Congress acts otherwise.

At each stage of the rulemaking process, the proposed rule amendments and forms have been subjected to exacting scrutiny. Participation of the bench, bar, and public in the rules process ensures that the procedural rules implementing the Act, which were initially adopted as interim rules, will be the best that we can conceive.

As part of its review of the proposed rules amendments, the Advisory Committee has under study the concerns raised by Senator Charles E. Grassley and Senator Jeff Sessions in their March 13, 2006, letter to the late Chief Justice William Rehnquist about pleading requirements involving a motion to dismiss, the effect of an attorney's signature on a pleading, and the means-testing forms. (A copy of the letter and the Committee's response are attached.) In addition, the Committee has reviewed § 319 of the Act as it relates to the sense of Congress that Rule 9011 be modified.

At its September 2006 meeting, the Advisory Committee considered the Senators' concerns and specifically addressed the concern about the attorney's responsibility to investigate the accuracy of underlying facts contained in the petition, pleadings, or written motions. The Committee agreed, subject to reconsideration in light of forthcoming public comment, to revise the "Voluntary Petition" consistent with the Act in cases involving an individual debtor whose debts are primarily consumer debts to include a warning under the attorney's signature that the signature constitutes a certification that the attorney has no knowledge, after an inquiry, that the information in the schedules filed with the debtor's petition is incorrect. The Committee is

studying whether Rule 9011 itself should also be amended to address these concerns, and if so, whether the amendment should be limited to Chapter 7 cases only, or whether it should be extended to all Chapters for cases filed by individuals whose debts are primarily consumer debts. The Committee has also implemented changes to the means test form, which became effective as Official Forms on October 1, 2006.

The amount of work required of the judiciary as a whole to implement the Act has been immense and costly, especially considering the short timeframe available to accomplish the extensive revisions required of the existing systems. The judiciary has responded admirably to the demands placed on it by the new legislation. I believe that the steps taken and those that are under further review will ensure that the Act will be fully implemented according to the intent of Congress.

Thank you.