

LEGISLATIVE COMMITTEE ANNUAL REPORT

August 6, 2024

The Legislative Committee (the “Committee”) submits this report to the NCBJ Board of Governors, summarizing its ongoing activities during the past six months and its plan for the immediate future. The Committee will continue to monitor these items and provide further information as needed.

A. Eligibility Threshold for Subchapter V and Chapter 13 Debtors

Since 2023, the Committee was focused on preventing a second lapse of the then-existing debt limits for subchapter V and chapter 13 debtors which had been in place for over four years and were due to sunset on June 21, 2024. Absent a legislative fix, the subchapter V debt limit would drop from \$7,500,000 to \$3,024,725, and the chapter 13 threshold of \$2,750,000 for both secured and unsecured debt would be replaced by a two-part test that limits eligibility to a maximum of \$465,275 for unsecured debt and \$1,395,875 for secured debt. The Committee traveled to Capitol Hill in January and March 2024 to meet with key members and staffers on the House and Senate Judiciary Committee to highlight the looming sunset and the uncertainty it presented to those working in the bankruptcy community. In April, a bi-partisan group of senators from the Senate Judiciary Committee (consisting of Senators Richard Durbin (D-IL), Lindsey Graham (R-SC), Sheldon Whitehouse (D-RI), Chuck Grassley (R-IA), Christopher Coons (D-DE), and John Cornyn (R-TX)) introduced S. 4150, the *Bankruptcy Threshold Adjustment Extension Act*, to push the sunset date out to 2026. It was a one sentence bill that changed the sunset from two years to four years. Due to its simplicity and perceived lack of opposition, the sponsors hoped to swiftly advance the bill through the Senate via unanimous consent before sending it to the House of Representatives. Unfortunately, Senator Rand Paul (R-KY) placed a hold on the bill and steadfastly rejected calls to remove it. Despite ongoing outreach efforts by Kentucky bankruptcy judges as well as from Senator Paul’s colleagues, his office refused to provide an explanation for his opposition and resisted repeated requests for dialogue. As a result, the debt limits lapsed on June 21, 2024 and reverted back to their original levels.

In mid-July, Senator Durbin introduced an amendment to the *National Defense Authorization Act* (“NDAA”), a must-pass piece of legislation, that would retroactively restore the debt limit to the pre-sunset levels. A similar retroactive fix was required in 2022 when Congress previously failed to extend the debt limit in a timely manner. Although early reports suggest there is support for the amendment, passage is not guaranteed through this legislative vehicle. Generally, amendments to the NDAA must be germane to national defense and members in both the House and Senate Armed Services Committee could conceivably strike the amendment for this reason. At this stage, however, we are led to believe that the leadership of the Senate Armed Services Committee does not oppose the amendment.

As a back-up to the NDAA, members of the House Judiciary Committee are working on a stand-alone bill that would retroactively restore the debt limits. The expectation is that the bill would be marked-up by the House Judiciary Committee, sent for a vote on the House floor, and then referred to the Senate where it could stand a greater chance of passage since it was already vetted by the House. Given that few legislative days exist prior to the November elections, the Committee

expects that any movement on a stand-alone bill is most likely to occur during the lame-duck session of Congress.

Until the debt limit is restored, the Committee will continue working hard to keep this issue at the forefront of the legislative agenda of the respective judiciary committees. The Committee is preparing information to highlight the negative ramifications of a narrowing window of eligibility at a time when small business bankruptcies are markedly increasing. And consistent with the recommendations of the ABI Subchapter V Task Force, the Committee is also looking for opportunities to make the debt limit permanent as the erratic movement of debtor eligibility standards over the past four years has substantially eroded the predictability and reliability of the bankruptcy system. Committee members who will be in Washington DC on other matters will return to the Hill in August and September to meet with Congressional staffers to monitor progress and serve as a resource for any additional questions or comments that may arise.

B. Restoring Chapter 7 Trustee Fee Increase and Extending Temporary Bankruptcy Judgeships (HR 9154)

On July 25, 2024, Rep. Glenn Ivey (D-MD-4) introduced HR 9154, the *Bankruptcy Administration Improvement Act* (“BAIA”) of 2024, which is co-sponsored by Ben Cline (R-VA-6), Lance Gooden (R-TX-5), and Henry “Hank” Johnson (D-GA-4). The bill attempts to fix the shortcomings of the BAIA of 2020, which sought to provide chapter 7 trustees with a supplemental \$60 in base compensation for each assigned case. Under current law, the supplemental fee is funded through a waterfall created from all U.S. Trustee (“UST”) quarterly fees collected in chapter 11 cases. After the UST annual appropriation is funded from the quarterly fees, any additional amounts go to a separate pool which pays chapter 7 trustees up to an additional \$60 per case. The waterfall funded supplemental payments to the chapter 7 trustees in the first year of enactment, but the subsequent decline in chapter 11 filings failed to generate enough revenue to continue the payments in later years.

The current bill scraps the waterfall and provides that chapter 7 trustees would receive up to \$120 in every case, funded directly from the case filing fees. The extra \$60 comes at the expense of the UST. To make up for that loss, the bill proposes to increase the UST quarterly fee for debtors with disbursements of \$1,000,000 or more from 0.8% to 1.1%. The Committee was told the increase sufficiently covers the UST annual appropriation.

The bill also extends by five years the current lapse date for 26 temporary bankruptcy judgeships in the following districts: District of Delaware (7); District of Maryland (3); Eastern District of Michigan (2); Southern District of Florida (2); Middle District of Florida (1); District of Puerto Rico (2); District of Nevada (1); Eastern District of North Carolina (1); Middle District of North Carolina (1); Eastern District of Tennessee (1); Eastern District of Virginia (1); Southern District of Georgia (1); District of New Jersey (1); Northern District of New York (1); and the District of South Carolina (1). Because the next lapse date is not until January 2026, the bill would preemptively address an issue the Committee is forced to confront every five years.

Though the NCBJ Board of Governors historically supports the extension of temporary judgeships and it previously backed the BAIA in 2020, the Committee will closely study HR 9154 before

making a further recommendation to the Board. A 37% increase in the rate charged for UST quarterly fees is significant, and the Committee seeks to understand how this could impact future filings and whether the burden will be shared proportionately among debtors according to their size. The Committee expects to report back to the Board of Governors after it completes its examination.

C. Bifurcation of Fees in Chapter 7 Cases

The Committee continues to educate Congressional staff about the growing issues related to the bifurcation of attorneys fees in chapter 7 cases. The Judicial Conference of the United States (“JCUS”) previously requested that Congress adopt legislation to address the issue, and the National Bankruptcy Conference offered two different statutory amendments to remedy the situation. As of this date, however, no bill has yet to materialize.

D. Venue/Case Management (S 4095/S 4096)

The Committee is also watching two competing Senate bills introduced in the wake of the March 2024 JCUS policy recommending random case assignment in an effort to curb the appearance of “judge shopping” for any civil action seeking to bar or mandate state or federal actions. Senators Mitch McConnell (R-KY) and Charles Schumer (D-NY) introduced S 4095 and S 4096, respectively, as a response to the JCUS action. The McConnell bill is particularly noteworthy because it contains language that would implement bankruptcy venue reform, but as of this writing, it has garnered only two co-sponsors and is likely to remain with the Senate Judiciary Committee for the foreseeable future. The Schumer bill has garnered 43 co-sponsors, but none are from the Republican party. It also sits in the Senate Judiciary Committee. The Committee will remain vigilant to see if either bill gains traction.

E. Other Noteworthy Legislation

Each Congress, numerous bills are introduced which may impact the bankruptcy system or bankruptcy judges. Although the Committee monitors many of these bills, the remainder of this report shall focus on legislation that has garnered notoriety on the Hill or could significantly change the manner by which federal bankruptcy judges conduct their day-to-day activities:

1. Supreme Court Ethics, Recusal, and Transparency Act of 2023 (HR 926 and S 359)

In February 2023, two related bills were introduced by Senator Whitehouse and Representative Johnson, seeking to impose a code of conduct on the justices of the Supreme Court, establish procedures to receive and investigate complaints of misconduct by the justices, and mandate disclosures of gifts, income, or reimbursements made by parties or amicus to any justice. The bill also contains several provisions affecting bankruptcy judges. First, it requires the JCUS to issue a code of conduct for federal judges within 180 days of enactment. Unlike the existing Code of Conduct, the bill requires the new draft to be available for public notice with an opportunity to comment in accord with 28 U.S.C. §2071. Second, it modifies 28 U.S.C. § 455 by adding disqualifying events for when: (a) a judge, their spouse, their minor child, or a privately-held

entity owned by such person received income, a gift, or reimbursement from a party within six years of the case filing; or (b) a party to a proceeding spent substantial funds in support of the judge's appointment. The judge is tasked with a duty to know the personal financial interests of their spouse and minor children and has a duty to immediately notify the parties if the judge becomes aware of a disqualifying event. Lastly, the bill provides a new procedure for parties seeking to file disqualification motions. Disqualification will be determined by a reviewing panel of three federal judges selected at random. The reviewing judges cannot sit on the same court as the judge who is the subject of the motion, nor can there be more than one judge on the panel serving within the same circuit as the judge at issue.

A hearing on the Senate bill occurred on June 14, 2023, and it was favorably reported out of the Senate Judiciary Committee with an amendment. As of September 2023, it remains on the Senate legislative calendar. Despite the activity in the upper chamber, the House version of the bill remains in the House Judiciary Committee and is unlikely to gain traction before the end of this Congress.

2. Judicial Ethics and Anti-Corruption Act of 2023 (HR 3973/S 1908)

Similar to the Whitehouse/Johnson legislation, this bill would (among other things) require the Supreme Court to adhere to a binding code of conduct and bar federal judges from owning individual stocks, securities, and commercial real estate, while making exceptions for certain assets such as mutual funds. The bill was introduced by Representative Pramila Jayapal (D-WA-7) in the House and Senator Elizabeth Warren (D-MA) in the Senate. Each was referred to their respective judiciary committee,¹ but as of this time, no further action has occurred.

3. Justice is Blind Act of 2023 (HR 3534)

The *Justice is Blind Act of 2023* requires a federal judge (together with any spouse or dependent child) to place specified investments into a qualified blind trust within 90 days of enactment or their appointment to the bench. The judge may not dissolve the trust until 180 days have elapsed after the end of their tenure on the bench. The investments covered by the bill include any financial interests in a security, commodity, future, or comparable economic interest acquired synthetically (including a derivative), but it excludes U.S. Treasuries and widely-held investment funds that are diversified and registered as a management company under the Investment Company Act of 1940. It also excuses a spouse or dependent child who receives compensation from their primary occupation through a covered financial interest from placing that interest into a blind trust.

The bill is sponsored by Representative Adam Schiff (D-CA-30) and has 25 Democratic co-sponsors, but it has not progressed beyond the House Judiciary Committee.

¹ The House bill was also referred to the Committees on Oversight and Accountability, Rules, Financial Services, Agriculture, and House Administration.

4. Bankruptcy Venue Reform Act of 2023
(HR 1017)

On February 14, 2023, Rep. Zoe Lofgren (D-CA-18) re-introduced the *Bankruptcy Venue Reform Act* in the House.² It was referred to House Judiciary and no action is presently scheduled. A related bill has yet to be introduced in the Senate.

F. Updates on Other Previously-Reported Legislation

The following bills were introduced in the 117th Congress (2021-2022). Because of their potential impact on the federal judiciary and/or the bankruptcy system, the Committee is monitoring any effort to revive them. As of this report, however, none of the bills have been introduced in the current Congress.

1. The Open Courts Act of 2021
(S 2614/HR 5844)

The *Open Courts Act of 2021* (“OCA”) is intended to modernize and secure the federal judiciary’s Public Access to Court Electronic Records (“PACER”) system and make federal judicial filings freely available to the public. It enjoyed bi-partisan support in both the House and Senate. The OCA would require the U.S. Court system to consolidate federal court records into one integrated system for all district courts, bankruptcy courts, and courts of appeal. It would also make court records freely available to the public by eliminating the PACER paywall. It is unclear how much the new system would cost, or how it would be paid for, which has generated significant concern from the Judiciary, especially if the “pay-go” will require an increase in existing filing fees or the creation of new ones. Media reports indicate PACER currently provides revenue to support the court system in the approximate amount of \$142 million per fiscal year.

Update: The OCA has not been reintroduced in the current Congress, but discussions are ongoing between the AO and Congressional staff.

2. Judiciary Accountability Act of 2021
(S 2553/HR 4827)

The *Judicial Accountability Act of 2021* (“JAA”) was introduced in July 2021, partly in response to high profile Congressional testimony from a former law clerk and a former federal public defender, both alleging instances of sexual harassment. The JAA would, among other steps, grant the federal judiciary’s workers the same statutory protections against harassment and discrimination enjoyed by other government employees. The bill would also institute a confidential nationwide reporting system for misconduct and create a Commission on Judicial Integrity staffed, in part, by members selected by the President and in consultation with Congress to oversee workplace misconduct investigations and provide whistleblower protections. The Judiciary

² The bill boasts seven Democrats and two Republicans as co-sponsors: Greg Stanton (D-AZ-4), Jared Huffman (D-CA-2), Joe Neguse (D-CO-2), James P. McGovern (D-MA-2), Kathy Castor (D-FL-14), Anna G. Eshoo (D-CA-16), Ted Lieu (D-CA-36), Ken Buck (R-CO-4), and Pete Sessions (R-TX-17).

opposes the bill. Judge Mauskopf, as then secretary of the Judicial Conference of the United States, wrote that the bill:

fails to recognize the robust safeguards that have been in place within the Judiciary to protect Judiciary employees, including law clerks, from wrongful conduct in the workplace, including protections against discrimination, harassment, retaliation, and abusive conduct. . . . Further, the bill interferes with the internal governance of the Third Branch; creates structures that compete with existing governing bodies and authorities within the Judiciary; and imposes intrusive requirements on Judicial Conference procedures.

3. Consumer Bankruptcy Reform Act of 2022 (S 4980)

This bill was introduced in September 2022 by Senator Warren. It generally revises consumer bankruptcy law by establishing a new chapter 10 for individual debtors with not more than \$7.5 million in debt. The bill eliminates the ability of individual debtors to file for bankruptcy under chapter 7 liquidation and repeals chapter 13, which requires individual debtors to comply with a repayment plan to receive a discharge of debt.

G. Court Consolidation Legislation

Over the past year, the JCUS Committee on Court Administration and Case Management spent considerable time and effort developing a pilot program to promote the voluntary consolidation of bankruptcy court clerk’s offices with their district court. Although the status of the program and its voluntary nature remain unclear, the Committee remains on watch for any legislative effort to modify or amend 28 U.S.C. § 156 that might facilitate a streamlined consolidation process against the wishes of the affected bankruptcy court. Section 156(d) currently provides that “[n]o office of the bankruptcy clerk of court may be consolidated with the district clerk of court office without the prior approval of the Judicial Conference and the Congress.” The Committee believes this language was adopted to make court consolidation the exception, not the rule. Consequently, the Committee will alert the NCBJ Board of Governors and membership if it becomes aware of any legislation that would dilute the approval requirements necessary to proceed with an involuntary consolidation of court units.

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As always, the Committee will continue to actively monitor legislation for bills that may affect the NCBJ membership and will take further action as circumstances warrant.

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