Testimony of

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Chapter 13 Standing Trustee
Middle District of Tennessee
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Subcommittee on Administrative Oversight
and the Courts
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"Oversight of the Implementation of the
Bankruptcy Abuse Prevention Act"

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Testimony of
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Mr. Chairman, members of the Sub-Committee, distinguished witnesses, I am delighted to have the opportunity to meet with you today to discuss a topic that has been the focus of my professional life for the last eighteen months, the impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. As a chapter 13 trustee for the past 25 years, and as the Chair of the Legislative and Legal Affairs Committee of the National Association of Chapter Thirteen Trustees, I have been observing the genesis of this law with great interest and concern since its birth in 1997, its eight year evolution and finally the end result as a bill signed into law on April 20, 2005. Since it's effective date on October 17, 2005, my colleagues and I have struggled to comply with its provisions, attempted to discern your intent, uncover its meaning and comply with the obligations that it places on us and others.

I appear today as the representative of the National Association of Chapter Thirteen Trustees, (NACTT) a national organization created to further the education of the consumer bankruptcy practitioner, to provide assistance and support to decision makers and the courts, and to impart the highest of professional standards to all of our members.

The NACTT is not simply a trustee organization. While virtually all of the standing trustees in the country are members of the NACTT, so too are national and local creditors, bankers, finance companies, and health service managers. Our membership also includes a significant number of debtors' attorneys and consumer advocates. As both a trustee organization and as a multi-faceted bankruptcy organization, the NACTT has worked hard to be broad based in its approach on

recommendations for legislation and improvements to the bankruptcy process. The suggestions that we made as Congress crafted the BAPCPA were presented, not with the intention of altering basic policy decisions of Congress, but in recognition of the practical impact the legislation would have on the day to day administration of consumer bankruptcy across the United States. We met with staff members of this Committee, not to advocate for one group or another, but to counsel caution in the actual drafting of the law. Now is an appropriate time for us to look back on the past fourteen months and see where we have landed.

From the moment that the President signed BAPCPA into law, we have worked diligently and tirelessly to educate trustees and members of the bankruptcy bar on the provisions of the new law. We created more than 10 hours of educational DVDs for dissemination across the country regarding the impact of the new law on trustees, debtors, creditors and the court. Our members hosted seminars and training sessions, some large, some small, but all focused on getting the entire system prepared for the dramatic changes BAPCPA would bring. Our members were directly involved in presenting educational programs which reached, by our count, more than 10,000 practitioners and their staffs. We were expected to create new forms, rewrite our software, retrain our employees, and assist in the development of new rules and procedures. We did so with professionalism and commitment.

We were not without assistance in our efforts. Working directly with the dedicated professionals of the United States Trustee Program, we sought to develop consistent national positions on matters that would inevitably become part of the new paradigm of consumer practice. The leaders in the USTP worked with us as we retrained, retooled, rebudgeted and restaffed in an effort to meet the challenges of the new law. The USTP helped us establish the means to provide financial management education programs for debtors in cases we administer. Each month the number of debtors we educate is growing. In many ways, our work with this agency has never been more important or more mutually supportive than in the past eighteen months.

As we look back on the last eighteen months, we must face some stark truths about the new law; recognize that some of our worst fears as "in-thetrenches" participants in the process did not materialize but also recognize that some significant problems have developed as a result of the new law. We think that it is appropriate to look to you for guidance and assistance.

We believe Congress intended the trustee play a greater and more significant role in maintaining the integrity of the system.1 We also believe that the goal of encouraging or compelling debtors who "can pay" to pay more was not met, largely through cumbersome drafting or misguided attempts to standardize the process. The language used by the crafters of BAPCPA has, in many ways, resulted in unexpected outcomes and unintended consequences.

We believe that the language used to present a new national policy on bankruptcy and the forgiveness of debt was confusing, needlessly complex, and inconsistent. Problematic language has led to inconsistent judicial interpretations of the new law. We have been forced, as trustees, to struggle against our long standing desire to increase payments to general unsecured creditors when we are faced with Congressional language that compels a contrary result. The confusion in the text of the law has resulted in debtors and creditors, in similar situations, being treated differently depending upon where the bankruptcy is filed. As a group, we ask this committee to take a look at some of the very difficult language used to articulate this policy and correct those drafting errors where possible.

1 For example, BAPCPA requires the debtor to submit to the chapter 13 Trustee copies of the debtor's tax returns (§521(e)(2)); the Trustee is required to provide notices to holders of Domestic Support Obligations and State child support enforcement agencies of the filing and the

discharge (§1302(d)); the Trustee must verify if the debtor has made preconfirmation adequate protection payments and, if so, how much was paid (§1326(a)(1)(C)); the Trustee is expected to review debtors' financial conditions annually during the pendency of a chapter 13 case (§521(f)(4)).

EXAMPLES OF DRAFTING ISSUES AFFECTING CHAPTER 13

Congress wanted debtors who file bankruptcy to receive a prepetition briefing outlining the opportunities for credit counseling.2 Clearly it was contemplated that the briefing would take place prior to the filing of the petition, but the language requiring this is not totally clear: ("...during the 180-day period preceding the date of filing of the petition...") Was it Congress' intent that the briefing take place before the filing or at least on full day prior to the filing?3

If a debtor files a chapter 13 petition without having obtained a prepetition briefing and thus having failed to satisfy the requirements of §109(h), has a petition been filed?4

Congress intended that debtors provide to the court information necessary to administer the case. To compel compliance, § 521(i) provides that a debtor's

2 Congress indicated that what debtors must have is a "briefing". Common parlance has referred to this as "credit counseling" and the implementation of §109(h) has supported the common parlance. See In re Hawkins, 340 B.R. 642 (Bankr. D.D.C. 2006)("Congress did not explain what it meant by 'available credit counseling' and 'a related budget analysis' . . . leaving the court to guess as to what must be addressed specifically in a credit counseling session . . .")

Compare In re Mills, 341 B.R. 106 (Bankr. D.D.C. 2006) (Because of the language of the statute, the briefing must occur at least one calendar day prior to the filing.) with In re Warren, 339 B.R. 475 (Bankr. E.D. Ark. 2006) (A briefing must simply occur prior to the actual time of filing, even if the briefing occurred on the same day as the filing.)

4 Compare In re Ross, 338 B.R. 134 (Bankr. N.D. Ga. 2006) (The filing of a petition by a debtor having failed to satisfy the briefing requirement was the filing of case which gave jurisdiction to the court to dismiss the case.) with In re Salazar, 339 B.R. 622 (Bankr. S.D. Tex. 2006 (The filing of a petition by a debtor having failed to satisfy the briefing requirement did not file a case and the petition would be struck.).

failure to file all of the information5 required will result in an automatic dismissal. If a case is "automatically" dismissed, is there any necessity for a court order? If, after a plan is confirmed, it comes to light that a debtor did not file all of the information required in § 521(a)(1), what is the effect of § 521(e) on a trustee's distributions after the 46th day?6

We think it clear that Congress intended to deprive debtors filing a second or third petition within a year of the dismissal of a previous case with the same type of relief as that provided to first time debtors. The language used to effect a limit on second time filers in §362(c)(3) is confusing and inconsistent with the parallel provision dealing with third time filers in the following subsection. Was it Congress' intent to limit the extent of the termination of the stay as indicated in the statute?7

Chapter 13 was amended to prevent the "cramdown" of a purchase money security interest in a motor vehicle incurred within 910 days of the filing of the petition. While this has the confusing effect of diverting funds formerly available to unsecured creditors to the "unsecured" portion of an auto lender's

5 It is interesting and confusing to note that the statute does not apply if a debtor fails to file the required document; the statute applies if the debtor fails to file "the information."

6 See, e.g., In re Riddle, 344 B.R. 702 (Bankr. S.D. Fla. 2006).

Compare In re Jupiter, 344 B.R. 754 (Bankr. D. S.C. 2006) and In re Jumpp, 334 B.R. 21 (Bankr, D. Mass. 2006) (When the stay terminates for a repeat filer, the entire stay terminates) with In re Moon, 339 B.R. 668 (Bankr. N.D. Ohio 2006) and In re Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006) (When the stay terminates for a repeat filer, the stay only terminates "as to the debtor" and the debtors' property, not as to property of the estate.)

claim, it appears that, as a matter of policy, Congress has determined that auto lenders are to be preferred over medical care providers, hospitals, local vendors, and older taxes. In doing so, the drafters created a "hanging sentence" at the end of §1325(a)8. The strict application of the language in this "hanging sentence" has led some courts to conclude that Congress intended to require a debtor to either pay the claim in full or to surrender the motor vehicle collateral in full satisfaction of the claim.9 Reading the exact same language, other courts have concluded to the contrary.

In a clumsy effort to place an objective test to determine a chapter 13 debtor's disposable income, Congress grafted the "means test" (the method used to determine if a debtor has filed an abusive chapter 7 petition), in the "disposable income test" of §1325(b). We had previously counseled caution in this approach and it appears that our concerns were well founded. The confusing language of § 1325(b) has led to a vast divergence of opinion on how the "disposable income test" is supposed to work. Some courts have concluded that if a debtor's plan proposes to pay to the unsecured creditors what the "means test" proposes, a debtor is free to do so, even if the debtor has actual

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Courts have had a difficult time in dealing with this provision, in part because it is almost impossible to cite. It has been referred to as the "hanging paragraph" or §1325(a)(*) by some courts.

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Compare In re Brown, 346 B.R. 868 (Bankr. N.D. Fla. 2006) and In re Gentry, 2006 WL 3392947 (Bankr. E.D. Tenn. Nov. 22, 2006) (Because the statute provides that §506 does not apply to 910 car claims, there is no basis for there to be an unsecured portion of the claim when the debtor elects to surrender the collateral, thus the collateral can be surrendered in full satisfaction of the claim) with In re Zehrung, 351 B.R. 675 (W.D. Wisc. 2006) and In re Duke, 345

B.R. 806 (Bankr. W.D. Ky.) (It could not have been Congress' intent to preclude a creditor secured by a 910 car claim from asserting a deficiency when the debtor elects to surrender the collateral to the creditor.

income that demonstrates he or she is capable of paying more to creditors.10 Other courts have felt that Congress' definition of "disposable income" is not the same as "projected disposable income", freeing the court from reliance upon the "means test" requirements.11 This cornerstone of chapter 13 is now inconsistently applied, jeopardizing the equitable and fair nature of chapter 13.

GIVE TRUSTEES THE TOOLS TO ACCOMPLISH THEIR TASKS

Trustees are expected to keep the system honest, to monitor the performance of debtors in their plans, to review pay advices, tax returns and annual budgets, and to seek modifications when appropriate. Also, trustees must review plans which may have four different disclosures of a debtor's income for every case filed.12 Trustees are involved in virtually all of the cases that are interpreting the new law, and are involved in most of the appeals. Trustees must have educated staff, with adequate training to review tax returns and seek modification of plans.

The new law has resulted in some decline in filings across the country creating additional challenges to trustees in dealing with limited resources.

10 See, for example, In re Quarterman, 342 B.R. 647 (Bankr. M.D. Fla. 2006) and In re Alexander, 344 B.R. 742 (Bankr. E.D.N.C. 2006). Note that "Current Monthly Income" as defined has virtually no relationship or connection to what a debtor is actually earning or can afford to pay. 11 See, for example, In re Grady, 343 B.R. 747 (Bankr. N.D. Ga. 2006) and In re Kibbe, 342 B.R. 411 (Bankr. D.N.H. 2006)

Debtors must disclose their Current Monthly Income, their income and expenses, their net monthly income and their projected future income. How these different amounts are to impact upon a chapter 13 plan is unclear.

Reductions in caseload is manageable, but now debtors have repeatedly proposed to make payments directly to secured creditors, seeking to avoid the trustee's commission on such payments.13 Even though the tasks to be performed by the trustee (including the extensive monitoring of the case and the notification of Domestic Support Obligation claimholders) are the same, if the law permits a debtor to avoid the costs of the system, trustees will not have the ability to meet the expectations of Congress in enacting BAPCPA.14 The services of a chapter 13 Trustee are more than that of a mere disbursing agent, and the impact of BAPCPA confirms this. 15 To fulfill congressional expectations, and to make the system work, the Chapter 13 Trustees suggest that Congress make clear that, absent some compelling justification other than avoiding the cost of administration, the trustee is to make all of the distributions under a confirmed chapter 13 plan.

The new law has created new challenges, new problems, and requires new skills. The NACTT is committed to meeting these challenges and implement the new law as outlined by Congress. We encourage you to examine the confusing and inconsistent provisions of the law with an eye towards assisting

13 Pursuant to 28 U.S.C. §586(e) the commission of the chapter 13 Trustee is determined by the "payments received by such individual under plans..." If the trustee is not receiving the payments, then the trustee is not entitled to the commission. 14 See, e.g. In re Lopez, 350 B.R. 868 (Bankr. C.D. Calif. 2006); In re Clay, 339 B.R. 784 (Bankr. Utah 2006); In re Vigil, 344 B.R. 624 (Bankr. D. N.M. 2006) (Statute specifically permits confirmation of plans where debtors make direct payments to creditors to avoid the trustee's commission).

See, In re Perez, 339 B.R. 385 (Bankr. S.D. Tex. 2006) (Court outlines all of the practical benefits of a local rule that requires the chapter 13 Trustee to make disbursements under a plan).

courts and practitioners in meeting the obligations under the law. We pledge to work with you as you do so.