



Comments of The National Association of Bankruptcy Trustees
to the Proposed Amendments to the Abandoned Plan Regulations

Introduction

The National Association of Bankruptcy Trustees (NABT) is the voice of the Chapter 7 Bankruptcy Trustee community, serving its interests and that of the public at large through education, communication and promotion of the profession. Chapter 7 trustees are committed to the furtherance of the intent, purposes and spirit of the United States Bankruptcy Code. Our duties and responsibilities as set forth in detail in 11 U.S.C. § 704 have been interpreted and refined over decades by thousands of judicial opinions including substantial United States Supreme Court precedent.

These duties and responsibilities extend to all parties involved in bankruptcy cases including debtors and creditors of all types. We are statutory fiduciaries, accountable as such, to all of these parties, as well as to the courts where our cases are maintained. We are highly regulated and supervised by an agency of the United States Department of Justice, the United States Trustee Program (USTP). With certain exceptions, the USTP appoints us to one-year terms in our role as members of panels of Chapter 7 trustees which sit in all judicial districts around the country.

Creditors in Chapter 7 cases come in all sizes and forms. In terms of amounts of money owed, banks and other lending institutions clearly dominate. But in terms of economic pain suffered by the inevitable credit losses due to bankruptcy filings, it is often the “little guy” who suffers the most. A \$1,000 dishonored paycheck owed to a faithful employee can be more economically devastating than a \$1,000,000 write-off incurred by a bank. For this reason, as well as others, Congress has set forth important priorities of repayment in the Bankruptcy Code. Unpaid benefits are, of course, included in this central policy of providing certain repayment priority to employees.

Chapter 7 trustees have traditionally been culturally committed to these principles. We regularly do our best to assist and “look out for” the smallest consumer and employee creditors in the cases we administer. This is particularly true because these creditors are most often not represented.

Our concern extends to those individuals who find themselves as pension plan beneficiaries when a plan sponsor files for bankruptcy. We absolutely and without reservation support the goal of getting retirement money into the hands of beneficiaries or their successor plans as rapidly as possible and certainly more quickly than is currently the norm.

General Comment

Chapter 7 bankruptcy trustees are not inherently necessary to the administration of abandoned plans. Although the proposed rule includes a number of worthwhile provisions that would improve the status quo, the goal of speeding unpaid benefits to beneficiaries or new plans would be furthered by reducing the role of the Chapter 7 trustees as much as possible. The proposed rule recognizes this by giving Chapter 7 trustees the option of appointing a QTA (Qualified Termination Administrator) to perform the tasks necessary to terminate an abandoned plan. However, under the proposed regulations, the trustee remains responsible for the plan's termination under § 704(a)(11) of the Bankruptcy Code and remains a named fiduciary for ERISA purposes - effectively remaining responsible for oversight of the QTA until the plan termination process is complete. NABT believes that a Chapter 7 trustee's responsibilities for an abandoned plan should end with the appointment of a QTA.

There is no purpose served by the continued oversight of a Chapter 7 trustee once a QTA has taken over the termination process. In fact, it is counter-productive. Virtually all Chapter 7 trustees only infrequently are appointed to a business case with an abandoned plan. Therefore, we have little of the necessary expertise to handle or even effectively monitor the termination of an ERISA plan. On the other hand, QTA's are experienced, regulated and well versed in ERISA plan administration. Chapter 7 trustees have no such qualifications or experience. The NABT believes that the best approach is to provide that the Chapter 7 trustee is discharged from any further obligations under § 704(a)(11) upon the appointment of a QTA.

Prior to the enactment of the last bankruptcy reform legislation in 2005 known as BAPCPA, Chapter 7 bankruptcy trustees typically were not permitted to administer ERISA Plans for several reasons. The company was now out of business and its assets were to be liquidated and administered by a Chapter 7 trustee as property of the bankruptcy estate. However, such ERISA Plans are not property of the bankruptcy estate as the funds belong to the plan participants. Once the bankruptcy trustee was appointed in a Chapter 7 business case where the company had been the plan administrator, the trustee would promptly notify the Department of Labor (DOL) that there was an abandoned plan and the DOL would most often appoint a successor plan administrator. That would be the final step taken by the Chapter 7 trustee with respect to the ERISA Plan.

The Bankruptcy Code requires that Chapter 7 trustees be "disinterested" at all times. While there are numerous reported cases construing what this means, it is a rock-solid principle that a Chapter 7 trustee cannot represent the interests of both the bankruptcy estate, as well as an adverse party to the estate at the same time. The requirement that Chapter 7 trustees administer these plans in all cases has provoked a violation of this tenet.

Most notably, the bankruptcy trustee becomes the representative of both the now bankrupt company and an independent legal entity, the ERISA Plan, that the company previously administered. It is often the case that a debtor has not made all required payments to a benefit plan. Sometimes this has been deliberate. Often, the financial stress of maintaining operations has caused monies that should have been delivered to be used for debtor operations. Whether deliberate or inadvertent, a claim against the culpable parties must be made. Who should make that claim? The Chapter 7 trustee in his traditional role of trustee of the bankruptcy estate will have to examine the proof of claim filed on behalf of the benefit plan. If there exists unpaid plan contributions or if there was malfeasance on the part of the debtor, the Chapter 7 trustee — as the legal representative of both entities — must sue himself. This is obviously an untenable situation.

To cope with this unavoidable conflict, some Chapter 7 trustees are known to be considering their own elegant but simple solution. A Chapter 7 trustee for a Plan Sponsor would use the status of a person acting as a fiduciary for a Plan to cause the Plan to *itself* become a bankruptcy debtor under existing law. Those advocating such a course of action see the benefits as a) ending any dispute about Bankruptcy Court jurisdiction, and b) the appointment of a new, wholly independent Chapter 7 trustee for the plan. Such trustees do acknowledge that the Bankruptcy Code, as currently written, may be ill-equipped to cause tax-free rollovers of pension plan monies to beneficiaries. Different legislation might be needed to make such a process an efficient one to use.

One innovation that would be required would be to change 28 U.S.C. § 586(a)(1) to permit a panel of Chapter 7 trustees with benefit plan administration training, to be maintained in addition to the regular panels. Then Chapter 7 trustees with the added training could be appointed to liquidate benefit plans separate from the regular list (many Chapter 7 trustees would be reluctant, given the limited number of these cases, to get the added training, although some trustees might be willing to gain the expertise needed). The statutory distribution scheme for a Chapter 7 case would likely have to be amended to keep such a distribution as a tax-free distribution.

Additionally, there are conflicts with the Chapter 7 trustee's first order of responsibility, as set out in Bankruptcy Code § 704(a)(1), to "collect and reduce to money the property of the estate...and close such estate ... expeditiously." The ERISA Plan is not property of the estate, and administering it hinders the ability to close the estate "expeditiously."

Bankruptcy Courts routinely act on myriad motions and applications of all kinds in connection with case administration. The law has always been clear that with few inconsequential exceptions (typically ordinary course of business activities), Chapter 7 trustees can only act after Bankruptcy Court approval which is preceded by due notice and an opportunity to object and be heard afforded to all parties. The NABT is concerned that the proposed rule unfortunately seeks to curtail this long established and effective principle of seeking court approval for out-of-the-ordinary-course activity.

For example, to complete the liquidation of a case, a Chapter 7 trustee must propose what action should be taken by the Chapter 7 trustee with respect to each asset. Any asset the Chapter 7 trustee proposes to sell pursuant to a specific contract of sale is a decision that must be submitted to the Bankruptcy Court for approval. Any asset the trustee proposes to sell by auction is a decision that must be submitted to the Bankruptcy Court for approval. Any asset the trustee proposes to abandon from the bankruptcy estate because liquidation is unlikely to benefit the bankruptcy estate is a decision that must be made on notice to all interested parties or be submitted to the Bankruptcy Court for approval. Obtaining the assistance of appraisers, real estate brokers, and auctioneers is a decision that must be submitted to the Bankruptcy Court for approval. While a Chapter 7 trustee can initiate litigation to recover an intangible asset without Bankruptcy Court approval, retaining lawyers for such litigation must be submitted to the Bankruptcy Court for approval. Any proposal to settle a litigation claim, including notably any compromise of a claim against the debtor bankruptcy estate, must be submitted to the Bankruptcy Court for approval.

While the approvals needed are efficiently sought and efficiently delivered by a Bankruptcy Court to a Chapter 7 trustee, a trustee cannot act without such approval. The description of these various approvals as “comfort orders” in the proposed rule is not accurate. As described above, these orders are necessary preconditions to action by a trustee. It is true that a Chapter 7 trustee who acts in accordance with orders authorizing his actions does obtain “derived judicial immunity,” but this is a side effect of acting in accordance with well-settled law.

Understanding the milieu in which a trustee ordinarily functions in the bankruptcy system is crucial to understanding how trustees view the responsibilities given to them by 11 U.S.C. § 704(a)(11). Trustees believe that the ordinary method by which they function, to propose action beyond what might be termed actions taken in the ordinary course of business, to have that proposal be distributed to interested parties, and for the proposal to be approved if no objection is made, or to have a hearing conducted about the proposed action, is the right process for any task given to them.

The provisions of 11 U.S.C. § 704(a)(11) state that a “Trustee shall . . . (11) if, at the time of the commencement of the case, the debtor (or any entity designated by be the debtor) served as the administrator (as defined in section 3 of the Employee Retired Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator;” NABT strongly believes that Chapter 7 trustees are not made administrators by this language or by any provision of ERISA. Chapter 7 trustees are statutorily ordered to only complete the obligations of an administrator. It is this distinction that NABT believes warrants a rule that a Chapter 7 trustee acting to “perform the obligation required of the administrator” will be deemed to have completed those obligations when a QTA is appointed. The duties would be limited to assisting in the transition to the QTA.

Finally, NABT suggests that DOL provide to Chapter 7 trustees a list of approved QTA's that are available for appointment. This will further expedite the plan termination process and eliminate any future disagreement as to the qualification of the selected QTA.

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Reading 11 U.S.C. § 704(a)(11) to give Chapter 7 trustees the obligation to administer these ERISA Plans is so problematic that the NABT has sought the repeal altogether of § 704(a)(11) which became law when BAPCPA was enacted. NABT urges the DOL and the Administration to support this repeal so that Chapter 7 trustees can return to their original task of administering and liquidating property of the bankruptcy estate and leaving to other professionals the task of terminating an abandoned plan whose funds are not bankruptcy estate property but belong to the plan participants.

To the extent the proposed rule is based on a belief that, as a factual matter, Chapter 7 trustees have working knowledge of the prior operation of the debtor, that belief is wrong. Chapter 7 trustees almost never have knowledge of a business operation prior to the entity filing for bankruptcy. The ability to garner records is often dependent on the level of active cooperation of former management of the debtor. With a Chapter 7 filing, the debtor's prior management loses interest in providing extended cooperation without compensation. Consequently, while a Chapter 7 trustee is "on the scene" and has some access to the Bankruptcy Courts for subpoenas, and other forms of compulsory process, records that are not reasonably produced cannot practically be available to a Chapter 7 trustee.

Specific Comments and Suggested Changes to the Proposed Rule

Conflicts of Interest – As noted above, there is a complete conflict of interest that exists in every case where there is a reasonable likelihood that there are unpaid plan contributions due from the debtor or any other potential liability that the debtor (and now the bankruptcy estate) owes to the plan. It is also arguable that a conflict of interest exists in every case if there is a likelihood that estate assets will have to be used to administer the plan or that the administration of the plan will delay the closing of the estate and distribution to creditors. The NABT proposes a straightforward solution and change to the proposed rule: Rather than require a Chapter 7 trustee to continue to perform or complete the obligations of the administrator of a plan in all cases until the plan is terminated, the rule should provide that upon the appointment of a QTA, and upon the agreement between the QTA and the Chapter 7 trustee, as evidenced by a joint declaration or a decision of the Bankruptcy Court (or the DOL) that information needed by the QTA in the Chapter 7 trustee's possession has been tendered to the QTA and that the duties to the benefit plan have been assumed by the QTA, the responsibilities of the Chapter 7 trustee under 11 U.S.C. § 704(a)(11) have been satisfied.

Releases and "Comfort Orders" – The proposed rule prohibits the Chapter 7 trustee from seeking any release from ERISA liability from the Bankruptcy Court or otherwise. Additionally, trustees are prohibited from seeking a "comfort order" in connection with any proposed action. There are several problems with these provisions. Bankruptcy Judges will see this as a direct

infringement upon their authority. The Bankruptcy Judges have complete, albeit derivative, jurisdiction over virtually all of what we do as Chapter 7 trustees. Additionally, as described above, Chapter 7 trustees must make quick decisions and get quick judicial review and authority. The Bankruptcy Courts are set up to provide these decisions quickly and always with appropriate notice to all interested parties which we believe includes plan participants and the EBSA in ERISA matters. Next, the USTP prohibits trustees from taking virtually any consequential action without first providing the US Trustee with notice and then obtaining a court order. It is very unlikely that any Chapter 7 trustee will opt into the Abandoned Plan Program if it includes these prohibitions. However, a successful approach might be to assure that EBSA be provided with sufficient notice to object and have an opportunity to be heard regarding any proposed action and perhaps, with respect to the Chapter 7 trustees effort to obtain a release, that the notice be somewhat enhanced.

Fees and Expenses – The proposed rule indicates that Chapter 7 trustees are entitled to be compensated for their time performing their duties in connection with the termination of abandoned plans. Yet the proposed rule indicates that the rate of payment is to be consistent with the rates charged by the pension administration industry. Industry rates, however, are quite low when compared to the customary compensation earned by Chapter 7 trustees for the work we perform on all other matters of case administration. This requirement is patently unfair and therefore unacceptable to the Chapter 7 trustees. First, it discriminates with respect to the type of work performed. All the work of Chapter 7 trustees must be reasonably compensated. Reasonable compensation does not require trustees to perform services at such low hourly rates that office overhead cannot be paid without contribution from the trustee personally. Chapter 7 trustees that appoint a QTA should be paid at their customary hourly rate in connection with the transition of plan administration to the QTA. Trustee compensation is routinely reviewed by the presiding Bankruptcy Judge and EBSA would always be permitted to interpose an objection, to be ruled upon by the Bankruptcy Court, in the event it thought compensation exceeded statutory limits.

Delinquent Contributions - With respect to the responsibility of the Chapter 7 trustee to collect delinquent contributions if it makes sense financially, the NABT notes several problems with this proposal and offers a possible solution. First, QTAs do not have this responsibility — only the duty to report the delinquencies to EBSA. Chapter 7 trustees should not labor under a more exacting standard. Chapter 7 trustees should not have to wonder if, several years after the fact, the EBSA will disagree with any of the trustee's actions or activities. At most, the Chapter 7 trustee should be permitted to write a letter to EBSA notifying EBSA of the list of delinquencies that the Chapter 7 trustee has reasonably discovered.

Obtaining Records and Information - Over the years, Chapter 7 trustees have cooperated with the EBSA in connection with the administration of abandoned plans. We propose that this cooperation be included in the proposed rule. For example, a Chapter 7 trustee that opted into the Abandoned Plan Program would be required to take reasonable efforts to promptly secure the debtor's records and communicate with the EBSA in connection with any information concerning the plan that the trustee acquires from any non-privileged source. Although EBSA has its own statutory powers, Chapter 7 trustees have a number of tools available to them under

the Bankruptcy Code that can be used to obtain information and records from individuals who possess relevant information and material useful to the wind-up of a plan or an investigation of a plan sponsor or administrator who may have committed defalcation or other illegal acts.

Conclusion

The NABT appreciates the work and careful thought that went into the drafting of the proposed rule and wishes to remain engaged in appropriate discussions to resolve the issues presented above.

A handwritten signature in black ink that reads "H. Jason Gold". The signature is written in a cursive style and is positioned above a horizontal line.

H. Jason Gold

NABT Liaison to the United States Department of Labor

On behalf of the National Association of Bankruptcy Trustees