PREPARED STATEMENT OF

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ON BEHALF OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES

BEFORE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

REGARDING

2009 BANKRUPTCY JUDGESHIP RECOMMENDATIONS OF THE JUDICIAL

CONFERENCE OF THE UNITED STATES

JUNE 16, 2009

Mr. Chairman and Members of the Subcommittee on Commercial and Administrative Law:

My name is David S. Kennedy, I am the Chief Bankruptcy Judge for the Western District of Tennessee and have been a bankruptcy judge for approximately 29 years. I appear before you today as a representative of the National Conference of Bankruptcy Judges.

I am honored to be here to discuss the federal judiciary's bankruptcy judgeship needs and thank you for the opportunity and privilege to testify to the need for additional judicial resources. Although I am here today as a representative of the National Conference of Bankruptcy Judges, my goal is to share with you my experiences and perceptions as a participant in the Judicial Conference bankruptcy judgeship process and related matters and also to provide my personal and professional observations from inside the thorough process that the Judicial Conference undertakes, performs, and carries out before making a judgeship recommendation to Congress. Having served six years on the Judicial Conference Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), I have been a member of many judgeship onsite survey teams and currently serve as the bankruptcy judge representative to the Judicial Conference. It goes without saying that it is important that there be sufficient judicial resources to enable the bankruptcy courts to timely balance the competing and countervailing interests of debtors, creditors, and other parties in interest, and to ultimately timely adjudicate bankruptcy cases and proceedings fairly and efficiently.

More specifically, the Judicial Conference has recently recommended that Congress authorize 13 new additional bankruptcy judgeships in the following judicial districts: AR (E and W) - (1); FL (M) - (1); GA (N) - (2); MI (E) - (3); MS (N) - (1), NV - (1), CA E - (1); WV (S) - (1) FL (N) - (1); and NC (W) - (1). The Judicial Conference also has recommended that Congress convert 22 existing temporary bankruptcy judgeships to permanent status in 15 judicial districts

and extend two existing temporary bankruptcy judgeships for five years. All these recommendations are based upon criteria discussed hereinafter through a process established by the Judicial Conference and its Bankruptcy Committee with great input from the Federal Judicial Center. Because Judge Lynn, on behalf of the Judicial Conference, is addressing the very rigorous weighted caseload standards, I will focus instead on how the current workload affects the courts and how carefully the Conference evaluates districts' requests for judgeships.

The work of the bankruptcy judges today is more complex and more time consuming than ever before. Attorneys for debtors and creditors also are more sophisticated. Bankruptcy judges know the increased volume of work that is reflected on the court's dockets; and in individual bankruptcy cases, the work is significantly above the levels from almost two decades ago. Furthermore, the existing case weight formula does not take into account approximately 35 additional proceedings (*i.e.*, new motions) that have been added by virtue of the enactment of the 2005 Bankruptcy Act. Please see "Attachment A" for a list of these new motions.

This is an important consideration to keep in mind as many cases filed under the 2005 Bankruptcy Act result in the filing of these newly created motions that come with statutorily prescribed short time fuses (*i.e.*, some of these motions are very time sensitive). For example, under new section 362(c)(3) and (4) of the 2005 Bankruptcy Act, an individual debtor who has had one or more cases dismissed within the prior year must file a motion to extend or impose the automatic stay, as appropriate, and the court must hear that motion within the first 30 days of the filing of the case. The automatic stay under section 362(a) is one of the main benefits to the protections of the Bankruptcy Code for debtors, creditors, and bankruptcy trustees. The section 362(c)(3) or (4) hearing determines whether or not the debtor (or bankruptcy trustee) will be granted an automatic stay or creditors will be able to take action against the debtor (*e.g.*, pursue state court lawsuits) or the debtor's property (*e.g.*, repossession or foreclosure). These

types of motions are therefore very important and extremely time sensitive. Since other time sensitive matters cannot be delayed on the docket, many bankruptcy judges, staff, and court security officers sometimes end up in court hearings late into the evening. Many judges also are working on other matters over the weekends reading advance sheets and preparing for upcoming hearings to ensure that all participants in the bankruptcy court are afforded timely access to the court and receive prompt judicial decisions.

In addition to voluminous case filings and the increased Bankruptcy Code requirements for each case, in the current economic climate the courts are seeing some of the largest and most difficult cases come across their dockets. Along with landmark cases, there are also many honest but unfortunate financially distressed consumer / individual and small and large business debtors who also seek the protection under the Bankruptcy Code to ensure that they are afforded an opportunity, for example, to keep their home, minimize the impact that financial stress can have on their families, and reorganize their businesses. To these debtors, the nation's bankruptcy courts are a place of last resort.

The courts' current overloaded dockets affect more than the judges. Members of the court staff and court security officers also are overworked in their efforts to assist the judges to attend to every matter on the docket in a timely and fair manner. The full docket means that court staffs are fielding more inquiries from debtors and creditors taking their time away from processing the case work that they are each assigned. The volume of cases coupled with the increased number of pro se debtors, as well as creditors acting pro se, also increases the work for chambers and other court staff as they must field calls without crossing into substantive territory. The court staff is prohibited from rendering legal advice; nevertheless they must deal with each pro se party on many occasions to assure them that the process they are undergoing is the usual process under the Code and Rules. Frequently, calls and inquiries from pro se

parties come up with each and every entry on their individual case docket sheets. These implications of the 2005 Bankruptcy Act have not been taken into account in the measurement of the courts' workload, but the implication is clear: the pro se parties' questions and issues must be addressed.

Beyond the effect on pro se debtors and creditors, those debtors and creditors who are represented by counsel also feel the effects of a crowded docket. For example, a represented debtor or creditor may have instituted a complaint that is set in the ordinary course within the time periods prescribed by the Code and the Federal Bankruptcy Rules, but due to the crowded dockets, and in order to give the cause proper consideration, the final ruling on the matter may be deferred for an extended period of time through multiple continuances of the original setting. Ultimately, delay for the debtors and creditors in the process makes it more difficult to achieve the judicial goal set forth in FED. R. BANKR. P. 1001 of a just, speedy, and inexpensive resolution of the many matters that arise under the Code (*e.g.*, delayed discharges).

Creditors who participate in the bankruptcy system seeking their fair share of payments from the debtor's repayment plans also are affected. A creditor seeks to be paid in whole or in part as soon as possible given the insolvency of the debtor; any delay in rendering a final decision in matters directly affecting, for example, a secured creditor's objection to confirmation of the debtor's plan, will impact that creditor's bottom line. The time value of money plays into the picture here and though I am not an economist, the implications for all parties and most definitely creditors are impacted by not achieving the speedy resolution of the matters before the court.

There also is the perception that a litigant should be able to carry with them from the court proceedings, even though they might not have a decision that was made in their favor, that they had their day in court before an attentive judge. It is important that all parties –

debtors and creditors – who are facing financial distress are able to feel that they have been able to fully express their concerns and that the court has taken those concerns into full consideration. An overcrowded docket may prevent a judge from completely addressing the litigant's needs as perceived by the litigant. In my years on the bench, I have often seen the palpable tension that is eased when a debtor or creditor is able to fully express themselves in open court and can feel that they have had their day in court. That is, they had the attention and consideration of an impartial and attentive judge.

Despite what we all know from our workload is a great need for additional bankruptcy judges, the Conference analyses these needs closely. Being mindful and sensitive to the fact that bankruptcy judgeships are somewhat expensive, the Judicial Conference looks seriously and thoughtfully at the number of judgeships necessary to carry out the statutory mandates of the Bankruptcy Code, its accompanying relevant Title 28 provisions of the United States Code, and the Federal Rules of Bankruptcy Procedure before making a recommendation to Congress. The weighted case filing data is one of a number of many factors. In the last two decades I have served on a number of judgeship surveys and can readily assure the members of this Subcommittee that the process is a thoughtful, thorough, and detailed one. In addition to the raw case filing data used to determine the case weights for a district, the Judicial Conference's Bankruptcy Committee and the AO review extensively the information that is readily on hand (*e.g.*, local rules and standing orders, and other relevant demographic and social data), before ordinarily sending an onsite survey/visit team to the requesting district for an in-depth analysis of the overall situation in the district relevant to the judgeship requirements.

Each survey team consists of a judge from the Bankruptcy Committee, in more recent years, the judge selected has sometimes been a judge from the Bankruptcy Judge's Advisory Group, the senior economist of the AO Bankruptcy Judges Division, and one or more staff

attorneys from the AO Bankruptcy Judges Division. There is a significant amount of research that goes into the survey before the team ever visits the district. This research includes, for example, information of the geography, demographics, and industrial makeup of the district. In addition to information readily available from sources such as the U.S. Census Bureau and the U.S. Bureau of Labor Statistics, each court selected for an onsite visit is asked to provide specific items of information for review by the team prior to its visit. The requested information includes a detailed statement describing each judge's calendaring practices, the court's trial hours, a listing of the 10 most time-consuming chapter 11 cases on each judges' docket, and the frequency and use of status conference, etc.

Once the survey team arrives in the district, it reviews many aspects of the local court's and the individual judge's practices, from calendaring to docket management. Effective case management practices are very important. The discussions often focus on the local court's processes to handle the category of cases and proceedings that are not currently specifically addressed in the case weight formula resulting from the 2005 Bankruptcy Act or mega chapter 11 cases. The survey team generally interviews local judges, key court personnel, members of the local debtor/creditor bar, the U.S. trustee (or bankruptcy administrator), panel trustees, and others including local industry leaders and economists or academics. The interviews are usually modeled on a predetermined set of questions so that everyone addresses substantially the same issues from their various perspectives. The survey team looks at a number of factors in making an analysis including the court's filing trends; travel requirements; the nature and mix of the courts' caseload; geographic, economic, and demographic factors in the district; the effectiveness of case management efforts by the court; the effectiveness and alternatives that technology offers the court; the availability of alternative solutions and resources for handling

the court's work load; the impact that approval of requested additional resources would have on the court's per judgeship caseload; and any other pertinent factors.

Before leaving the requesting district, the judge member of the survey team meets with the judges of the local court and furnishes a candid oral preliminary evaluation of the court's practices. Suggestions for improvements and ways to achieve greater efficiencies and productivity typically may be discussed. After the onsite survey, the survey team reviews the data gathered and carefully and methodically considers all factors and all methods, which could assist in, or resolve the need for, additional assistance. After a consensus is reached, the survey team's recommendation is documented, shared with the circuit and district affected, and presented to the Bankruptcy Committee's Subcommittee on Judgeships which accepts, rejects, or modifies the team's recommendation and forwards its decision to the members of the Bankruptcy Committee who accept, reject, or modify the judgeship subcommittee's recommendation. The Bankruptcy Committee then forwards its recommendation to the Judicial Conference. The Judicial Conference then accepts, rejects, or modifies the Bankruptcy Committee's recommendations. The recommendations of the Judicial Conference are, as you know, forwarded to Congress with the request that the judgeships be authorized, if appropriate.

While this process is well reasoned and carefully balanced, it also can at times be a difficult process for its judgeship survey team participants. For example, it is difficult to tell a court that its request for another judge is being denied, particularly when the judges in that court are working so hard. Nevertheless, the reality is that hard decisions must be made and the answer to the court's request for help sometimes must be "No."

The districts whose requests are ultimately recommended also can be frustrated in that the courts whose recommendation is approved and transmitted to Congress have and continue to struggle under a caseload too large to handle while waiting for these additional judgeships to

be authorized. The reality of such a situation is extremely difficult for the bankruptcy judge and staff. Because they are dedicated to the profession and to the administration of justice, it is difficult to deal with this type of situation.

Bankruptcy courts have made great strides in the efficient processing of cases and proceedings. Automation has served us well. The courts realize that efforts in this regard must never stop and the judiciary has numerous initiatives to ensure that progress in this area continues to be made. However, the reality is that, even with increased efficiency and automation, we need additional bankruptcy judges to provide for the proper administration of the bankruptcy system now. We are not just asking our bankruptcy judges to do more - it is required. In sum, the need for the bankruptcy judgeships is very real and the need is acute.

It has been said that it is very important that each litigant before the court believes in the fairness of the process. No one likes to lose and to that end, even in the face of an unfavorable decision, it is critical that the parties understand the judicial decision to be entirely fair and impartial. Although the appeals process exists as the safeguard to deal with the legal correctness of the bankruptcy judge's decision, if the court is overloaded and the process is perceived to be partial as a result, the entire judicial system suffers. Public confidence issues may result. Sufficient judicial resources can ensure that the process is fair and impartial for all litigants.

In conversations with fellow bankruptcy judges around the country, I consistently hear that the bankruptcy system is under stress. We bankruptcy judges need your help in order to accomplish the judicial goal set forth in FED. R. BANKR. P. 1001 "to secure the just, speedy, and inexpensive determination of every case and proceeding." Adequate judicial resources are crucial. We again are nearing historic case filing levels, and need the additional resources

requested in order to continue to provide fair and accessible justice to all parties in bankruptcy cases and proceedings.

The assistance of Congress and, more particularly, this Subcommittee that has been given to the bankruptcy judiciary many times in the past is desperately needed again. In asking for your help, I assure you that this recommendation for new bankruptcy positions and the conversion of these temporary to permanent positions is made only after the bankruptcy judiciary and the Judicial Conference has taken earnest and sincere steps to maximize all other programs, resources, and alternatives, to meet the judicial districts' judgeship needs before asking for your assistance.

In summary, the need for 13 additional judgeships, the 22 conversions to permanent status, and the enlargement of two temporary positions is very real and acute. The bankruptcy system indeed is under stress.

Thank you for all your consideration – past, present, and future.

I am happy to attempt to answer any questions that you may have.

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