

**REMARKS OF**

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**BEFORE THE**

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## **INTRODUCTION**

Thank you for allowing me the time to speak with you at breakfast this morning. I always enjoy the chance to see you at your annual convention where I can talk to so many chapter 7 trustees in one place at one time.

Many thanks to your President, Kelly Hagan, for her service to the NABT and to the bankruptcy community over the past year. We are sorry to see Kelly's term expire, but we trust that we will benefit equally in our consultations and collaboration with your incoming President, Marty Sheehan.

My visit regrettably is shortened this week as I arrived only late last night and will depart early tomorrow morning. I was unable to get out of Washington earlier because I was participating in the annual meeting of the International Association of Insolvency Regulators (IAIR) which was held at the World Bank this week. IAIR's membership consists of the chief insolvency agencies from about thirty nations, including countries both with developed and developing economies. At IAIR, we covered a full host of consumer and corporate reorganization issues. It is fair to say that there was enormous interest in the work of the private trustees in the United States. That is why I brought in reinforcements for part of the meeting. Your extremely able chapter 7 colleague, Lynne Riley, along with chapter 13 trustee Kevin Anderson, provided a hands-on demonstration to the delegates of how trustees prepare for section 341 meetings and identify assets for distribution. As expected, Lynne and Kevin were wonderful ambassadors and represented all of you very well.

Lynne stands in a fine tradition of NABT leaders who have worked so productively with the USTP in tackling issues of concern to the bankruptcy community. As you know, I have such respect for the NABT's leadership that I even recruited one of your former presidents, Sam Crocker, to serve as a United States Trustee. In further testament to my belief that a prudent regulator needs to understand the industry it regulates, I also am joined here by USTP Assistant Director Doreen Solomon who served so well for so many years as a chapter 13 trustee in the district of Massachusetts. Of course, no USTP delegation at a NABT conference is complete without Suzanne Hazard whose guiding hand has been so effective and instrumental to the Program's trustee oversight for so many years. Rounding out the USTP contingent here this week is the United States Trustee for Regions 11 and 19, Pat Layng, and AUST Vince Cameron from right here in Salt Lake City.

## **FILING TRENDS AND CHAPTER 7 TRUSTEE COMPENSATION**

We meet this week during a time of a continuing decline in bankruptcy filings. Commentators cite many reasons for the decline, including the limited availability of consumer credit in recent years, record low interest rates, and the impact of the 2005 amendments to the Bankruptcy Code. Regardless of the reasons, the entire bankruptcy community must continue to adapt to a new environment. We also must be prepared to adapt to future changes. Of course, we do not know what will happen with bankruptcy filings going forward. But, if past is prologue, then we do know that filing rates will rise again. It is just a question of when.

Bankruptcy filings are down by 40 percent over the past four years. Chapter 7 filings have dipped even more than chapter 13 filings, from 72 percent of all bankruptcy cases to 68 percent over that same period. Interestingly, the percentage of chapter 7 asset cases has been on the rise, doubling from just 4 percent of chapter 7 cases in Fiscal Year (FY) 2007 to 8 percent in FY 2013. More than 70,000 asset cases closed in each of the last two fiscal years.

Unlike filings that have seen a constant downward trend, chapter 7 trustee compensation has been on more of a modest rollercoaster in recent years. From FY 2008 to FY 2010, compensation went down; it then rose from FY 2011 to FY 2012, before turning downward again in FY 2013. In FY 2013, trustee compensation from all sources – including no-asset case fees, commissions on distributions in asset cases, and fees to the trustee as professional in a case – declined by 1.3 percent. We expect trustee compensation to continue on this downward path through at least FY 2014 due to the continued decrease in filings.

The consumer bankruptcy system depends upon a highly motivated and competent corps of chapter 7 trustees. It is in the interests of all stakeholders – including creditors and debtors – for trustees to be fairly compensated. That is why any decrease in compensation is cause for concern. We in the USTP will continue to monitor trustee compensation levels and keep the NABT informed about nationwide trends.

In 2005, Congress reformed the trustee compensation structure by commanding that chapter 7 trustee compensation paid under section 330 be awarded “as a commission” calculated under section 326 as a percentage of distributions. Unfortunately, some courts still do not allow the percentage fee, but instead only permit a lower amount calculated by hourly rate. From the effective day of the 2005 law to the present, the USTP has taken an unwavering position in litigation that the commission should be awarded absent extraordinary circumstances. We have participated in cases in bankruptcy court and on appeal in support of this position.

I am pleased to report on a most significant victory that was achieved this past April in the United States Court of Appeals for the Fourth Circuit that vindicated the position the USTP has taken in litigation and in our *Handbook*. In a very clear and compelling decision, the Fourth Circuit agreed with the USTP that the 2005 amendments to the Bankruptcy Code created a presumption that, absent extraordinary circumstances, chapter 7 trustees should receive the maximum fee under section 326. We hope that the Fourth Circuit decision in the *Rowe* case is followed in other circuits. Congress made an important change to trustee compensation in 2005 and we will continue to litigate this issue so that all bankruptcy courts recognize the Congressional mandate in awarding trustee fees.

## **CONSUMER PROTECTION**

Let me talk for a few minutes about some consumer protection issues of concern to both of us.

### **Bankruptcy Petition Preparers**

There has been a steady increase in the percentage of pro se debtors in recent years, rising from 6 percent of all filings in FY 2007 to 9 percent in FY 2013. Pro se filings come with increased challenges. The proliferation of bankruptcy petition preparers targeting pro se debtors requires the Program to monitor these cases more carefully. We rely heavily on trustees to partner with us in identifying and addressing issues of petition preparer misconduct. Since FY 2010, we have averaged more than 500 motions and complaints against petition preparers annually. Our steady work in this area is in large part a testament to your efforts.

### **Mortgage Servicer Violations**

There is nothing I want more for the bankruptcy system than to declare victory in our war against mortgage servicer abuse. The USTP brought thousands of actions over the past five years to address servicer abuse, we joined with other federal and state agencies in reaching the historic National Mortgage Settlement (NMS), and the Judicial Conference approved sensible new Bankruptcy Rules that mandate disclosures and notices to help prevent future violations.

Despite all of these efforts, the mortgage servicing industry continues to show an inability, or an unwillingness, to comply with the law. Maybe the servicers think they can outlast the enforcement agencies. Maybe they think that inaccurate statements by debtors deserve harsh treatment, but inaccurate filings by mortgage servicers are mere technicalities and should be ignored. Or maybe they think that satisfying the Consumer Financial Protection Bureau's standards that don't cover bankruptcy-specific conduct will suffice. Regardless of the reasons, all of us in the USTP and consumer bankruptcy practice should find it disturbing that, in too many instances, mortgage servicers are showing disrespect for the bankruptcy system and for their customers as well.

Let me describe the current status of what has become a three-prong approach by the USTP to the mortgage servicing problem. First, we continue to monitor compliance with the bankruptcy standards contained in the NMS that bind the largest servicers. Although the independent Monitor appointed under the NMS has done an outstanding job testing discrete metrics, there are many standards not tested by the metrics and not followed by the settling servicers. These breaches of compliance will not be detected unless the chapter 7 trustees, chapter 13 trustees, debtor's counsel, and the USTP continue to scrutinize servicer filings.

The USTP has found a disturbing pattern of failure to comply with non-tested standards, ranging from failure to document claims, to excessive loan default fees, to failure to inform borrowers and trustees of payment increases. With some assistance from the Monitor, we are engaging the violating banks to negotiate remedies to cure those deficiencies. We also continue

to be engaged in separate litigation to enforce the provisions of the Bankruptcy Code and Rules that govern servicing practices.

Perhaps the most alarming indication of continued violations of the NMS and bankruptcy law involves an acknowledgement by one bank that a payment change notice filed in bankruptcy court – under an attestation of personal knowledge and review of the servicer’s records – was signed in the name of a former employee who had nothing to do with reviewing the bankruptcy account in question. Upon further investigation, we uncovered at least 500 instances of improperly signed payment change notices by that servicer in the Eastern District of Michigan alone. That’s right, the problem of robo-signing – which ignited public indignation against large banks more than three years ago – still had not been corrected. We are seeking broader discovery to get to the bottom of this problem.

Other disappointing illustrations of continued noncompliance pertain to a number of cases we have identified that contain apparent deficiencies in escrow accounting and noticing. Some large financial institutions appear to have ongoing difficulty keeping track of tax and insurance payments that are part of the mortgage escrow. These problems can cause severe problems for debtors and greatly impact the viability of repayment plans.

As the second prong of our approach, we continue to take appropriate action in cases involving the next tier of non-settling banks. We have joined federal and state agencies in trying to reach national settlements to cover those institutions not under the NMS who have failed to meet the bankruptcy standards. In June, the Attorney General announced a settlement with SunTrust Mortgage. We were an essential partner in investigating SunTrust’s conduct and negotiating that agreement, which includes servicing standards and expanded metrics for testing compliance with those standards.

Thirdly, many of our offices have confirmed to me the accuracy of stories in the *New York Times*, *Wall Street Journal*, and other news outlets that newer or rapidly growing entrants in the servicing industry exhibit the same improper practices that the largest banks committed before the NMS. Green Tree, for example, which bought a large share of ResCap’s loans that are subject to NMS monitoring, has failed eight testing metrics. Further, a recent review of our field office enforcement activities regarding boutique servicers was, as Yogi Berra would say, déjà vu all over again.

There are limits on our resources. But I have visited with many of our USTP managers, lawyers, and professional and support personnel. They tell me we can see this through. And with their commitment, so we will.

### **Unsecured Claims Review**

I mentioned to you last year that we were reviewing unsecured claims, especially those filed by high volume claims filers and claims purchasers, to determine their rate of compliance with disclosure rules, such as identification of the initial creditor and the date of the last payment made on the account. The USTP is the only national enforcer of bankruptcy law. As such, we

wanted to move forward with this project even as we continue to address the problems of the mortgage servicing industry.

We reviewed more than 22,000 claims over about a ten month period and found great variation in compliance amongst filers. We had some success in changing the practices of one filer and have seen some improvement in the performance of others. In fact, it appears that credit card and other unsecured claims filers probably are doing a better job following the Bankruptcy Rules than we saw when we started our review of the mortgage industry. Of course, that statement has many caveats since we did not do a scientific sample and we were limited in the extent of our review of individual claims.

The final phase of this project consists of two elements. First, we have selected a handful of offices that will continue to measure compliance by a sample of high claims filers. This will help measure progress and identify systemic or widespread issues that may require more robust remedial actions. Second, we produced a PowerPoint presentation that our field offices can deliver at trustee training and bankruptcy bar events. The presentation addresses effective means of claims review and how to determine if non-compliance with disclosure rules may show the infirmities with the underlying claims. Other than in exceptional circumstances involving systematic abuse in which the USTP becomes involved, it is the trustees and debtor's counsel who should bring claims objections, such as on the basis of stale or discharged debt. We hope the PowerPoint is a useful training tool that you will take advantage of in the future.

I am glad we undertook the unsecured claims project and hope that resources increasingly will allow us to test compliance. Our actions can provide consistency and raise issues as appropriate for judicial resolution that will benefit all stakeholders in the system.

## **DEBTOR COMPLIANCE AND RELATED MATTERS**

Our enforcement activity is by no means confined to the credit industry. In fact, most actions are taken to ensure that the more than one million debtors who enter the bankruptcy system – about two-thirds of them in chapter 7 – satisfy their obligations as well. More than 57 percent of the 44,000 formal and informal civil enforcement actions we took last year related to combating debtor fraud and abuse in chapters 7 and 13 cases.

Although most debtors' counsel do a good job looking out for their clients' interests, we – and I am sure you – are sometimes frustrated by the task of sorting through schedules and statements of financial affairs that are inaccurate or incomplete. In many instances, these problems should have been fixed by debtor's counsel before filing. Our debtor audit results year after year show a pattern of material misstatements in about one quarter of the consumer cases filed.

Furthermore, our section 707(b)(2) means test review is often impeded by a lack of information from the debtor. Last year, we exercised our statutory duty to decline to file motions to dismiss in 63 percent of all statutorily "presumed abuse" cases that did not voluntarily convert or dismiss. We did this because we found special circumstances, such as a medical catastrophe

or recent job loss, which justified an adjustment to the current monthly income calculation. This requires a lot of diligent inquiry. Unfortunately, debtors' counsel too often are slow to provide the necessary information we need to administer the means test fairly and to the benefit of their clients.

On the flip side of the coin, consumer lawyers recently complained to me that trustees routinely ask for too much information. Although you as trustees have independent fiduciary duties, the USTP does assess trustee performance and efficiency in seeking and reviewing documents from debtors as part of that evaluation.

I think it may be useful to convene again the NABT, the National Association of Chapter Thirteen Trustees, and the National Association of Consumer Bankruptcy Attorneys, along with the United States Trustee Program, to assess how we are using the Best Practices guide we issued in 2012. The guide was designed both to help reduce unnecessary paperwork and to sensitize debtors' lawyers to the need for prompt responses to trustees. But, given the ongoing issues, it either is not being followed as closely as we had hoped or there may be areas we should reexamine. I want to thank Rick Nelson and Kelly Hagen for agreeing to meet with NACBA and all stakeholders on this important project.

### **CREATING EFFICIENCIES FOR THE BANKRUPTCY SYSTEM**

The final topic I want to discuss with you this morning is creating efficiencies in the bankruptcy system. Not only should trustee practices be maximally efficient, particularly in this time of smaller caseloads and decreased total compensation, but there is always a premium on the USTP and other agencies to add as much value as possible from every dollar appropriated by Congress.

Last year I reported to you that we would be accelerating our efforts to consolidate on a regional basis certain functions that are performed by all of our field offices. By having certain tasks performed more centrally by fewer staff, we achieve economies of scale, greater consistency in our approach to common tasks, and enhanced quality control.

Among the tasks most amenable to this approach were the review of trustee final reports (TFR) and trustee distribution reports (TDR), the performance of trustee field exams, and trustee audit closeouts. After a substantial period of pilot testing, our functional consolidation efforts regarding TFR and TDR review were rolled out nationwide in December 2013.

I understand that there was lively discussion of the impact of this particular consolidation effort at your spring meeting. Earlier this summer, your leadership circulated a survey to solicit your opinions and description of your experiences regarding the TFR and TDR consolidation review. The report and data I received from the NABT show that your experiences nationally, for the most part, have been extremely positive. You also have helped us identify some areas where we are experiencing growing pains as well. We will work with you as we consider any changes to our consolidation protocols that may be appropriate.

I thank Kelly Hagan and Bill Schwab for putting the survey together, and I thank all of you for the useful feedback you provided. As I mentioned earlier, we have USTP representatives at the conference and I encourage you to discuss your thoughts about consolidation with them, as well as with your local United States Trustee. Doreen and Suzanne tell me they are also happy to hear your compliments as well.

## **CONCLUSION**

That completes my report from the USTP. I look forward to working with you and the NABT on these and other issues of importance to the bankruptcy system. The United States Trustee Program relies upon the NABT for sound counsel and expert information. The Program's effectiveness is enhanced by the NABT's spirit of collaboration and the cooperation of trustees in every district where we operate.

I remain grateful for your continued diligence in identifying assets for distribution, for your professionalism and sensitivity in dealing with consumer debtors who are suffering through the trauma of bankruptcy, and your strong commitment to upholding the integrity of the bankruptcy system.

May you enjoy a successful and productive annual conference. All the best to you and thanks again.

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