

REMARKS OF  
CLIFFORD J. WHITE III  
DIRECTOR  
EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

AT THE 43<sup>rd</sup> ANNUAL MEETING OF THE  
NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES

San Francisco California  
July 10, 2008

## **I. INTRODUCTION**

Thank you very much for inviting me to join you today. This is the third annual NACTT meeting I have had the privilege to address. I look forward to this event each year because it provides me an important opportunity to share with you information on the activities of the United States Trustee Program that may be of interest to chapter 13 trustees. I must admit though that, this year, I am enjoying this trip even more than usual since I had the chance to catch a baseball game in Oakland last night with Russell Brown and a few others who invited me to join them.

I am happy to report this morning that the relationship between the United States Trustee Program and the NACTT is strong and continues to get stronger. I believe that the strength of that relationship has enhanced our ability to carry out our respective missions. I also am acutely aware that our joint accomplishments are due, in significant part, both to the high performance of individual chapter 13 trustees and to the caliber of leadership of the NACTT.

I congratulate Robin Weiner on her successful term as your President. She has represented you and the bankruptcy system with the highest level of professionalism. I have appreciated her candor, insights, and knowledge. Thank you, Robin, for your outstanding service.

I also am looking forward to working with your new President, Martha Bronitsky. I have met numerous times with Robin, Martha, and others in the NACTT leadership. Martha has exhibited the same qualities of integrity and professionalism we have seen in her predecessors. And, as much as I admire Robin, I have to say that Martha has one attribute that Robin is lacking: Martha is a Red Sox fan! Although her primary loyalty is to the San Francisco Giants, Martha is a dual citizen of Red Sox Nation. Most importantly, she is a sworn enemy of the Evil Empire, now known as the New York Yankees.

I appreciate that the leadership of the NACTT has always been willing to meet regularly with me and others in the Executive Office. I have depended on their honest and fruitful dialogue in the past, and I will continue to depend on that in the coming year.

## **II. CHAPTER 13 TRUSTEE COMPENSATION**

Let me share with you a good example of the productive relationship that exists between our organizations. On the morning of the first day of your convention last year in Baltimore, I met with Robin and others in the NACTT leadership. At that time, Robin told me that one of her goals as President was to revisit the calculation of trustee compensation. I advised her that we would consider modifications to the compensation system that were reasonable and consistent with the statute.

Robin stayed focused on that goal and, together, we have worked to refine the methodology for calculating benefits. As you know, by law, the Attorney General sets chapter 13 trustee compensation. By delegation, I exercise that authority. Under title 28 of the United

States Code, chapter 13 trustees may not be paid more than the highest rate of basic pay for senior government officials designated as Executive Level V. Trustees also receive the cash value of comparable benefits.

Although the statute seems rather straight-forward, the calculation of the cash value of comparable benefits is complicated by many factors. Some government employee benefits simply do not translate perfectly to your role as trustees. For example, almost all federal employees, except those confirmed by the United States Senate, are subject to time and attendance restrictions. While your operations are overseen and evaluated by U.S. Trustees, you are not federal employees. You do not submit leave slips to the U.S. Trustee for approval, evaluations of your performance are very different from federal employee appraisals, and you exercise independent fiduciary responsibilities. Unless we fundamentally change the character of our relationship, there will never be a precise equivalency of benefits.

Although we traditionally have adjusted your compensation on an annual basis in accordance with the federal Executive Schedule pay raise, it has been several years since we made a comprehensive analysis of trustee benefits. As we considered the benefits calculation, we concluded that, among other things, some benefits available to federal employees cost trustees more money to purchase. For example, retirement and disability benefits generally cost more for private employees than for federal employees who are covered by a broader retirement system.

Accordingly, I am pleased to report that:

- First. The cash value of benefits for chapter 13 trustees will be increased effective October 1, 2008, from 28 percent of basic pay to 33.5 percent of basic pay. At today's pay, that is an increase of \$7,678. I am told that this is the largest increase in benefits ever provided to chapter 13 trustees during the 30 years the Justice Department has set the amount.
- Second. The Program will review the cash value of benefits at least every three years, probably with the assistance of an actuarial consultant.

### **III. VOLATILE BANKRUPTCY ENVIRONMENT**

I am especially pleased to announce the chapter 13 trustee compensation increase because I know how demanding your work is in this volatile bankruptcy environment. Each of us has worked long and hard for the betterment of the bankruptcy system, especially over the past few years. And, there appears to be no let up in sight. The challenges just keep coming and we are obligated by law to meet those challenges every time they are presented.

#### **A. Bankruptcy Filings Rates**

There is no better reminder of the volatile environment in which we operate than the changes we see every week in bankruptcy filings. The United States Trustee Program now estimates that total filings will increase by 28 percent in fiscal year 2008 to a little over one

million cases. In chapter 13 alone, filings have increased by 16 percent, which currently represents 36 percent of all filings.

We need to prepare ourselves to meet the growing demands that additional filings will present in the foreseeable future.

#### B. Budget Reductions

The burdens have been made heavier by the budget constraints each of us has faced. With plummeting caseloads in the aftermath of bankruptcy reform, we understand that some of you had to take steps to lower the expenses of your trustee operations, including by laying off staff.

We too have had to greatly tighten our belts. As most of you probably have heard, the Program is operating under severely reduced funding this year. This was the result of our inclusion in an Omnibus Appropriations law passed in December that funded most of the Government. We, along with other components of the Justice Department, were adversely impacted.

We took three emergency steps to cope with the budget shortfall:

- First, we imposed a hiring freeze and left vacant about 100 authorized positions.
- Second, we significantly reduced our information technology budget, albeit reluctantly, since as a field based organization we rely heavily on constant IT improvements.
- And, third, we temporarily suspended our debtor audit program. I am pleased to report, however, that we were able to resume the audits on a limited scale on May 12<sup>th</sup>.

Despite our budget reductions, I am confident that each of us will do what we always do, and what we must continue to do: faithfully carry out the law and uphold the integrity of the bankruptcy system.

#### IV. **MORTGAGE SERVICER VIOLATIONS**

Beyond the administrative challenges presented by increased filings and budget constraints, we also face very substantive challenges to the integrity of the bankruptcy system. Each of us plays a critical role in protecting the system. It is our duty to insist upon truthfulness and accuracy by all parties who come before the bankruptcy court. Debtors and their counsel who submit sloppy and inaccurate, or outright fraudulent, schedules should be sanctioned. And creditors and their counsel who submit sloppy and inaccurate, or outright fraudulent, proofs of claim or motions for relief from stay also ought to be sanctioned.

For many years now, the United States Trustee Program has pursued a balanced approach to its enforcement efforts – redressing abuse of the system by debtors, but also protecting honest debtors who fall prey to those who attempt to take advantage of their dire financial straits. The consumer protection element has been especially pronounced in our enforcement of the Bankruptcy Code provisions that protect homeowners.

A. NACTT “Best Practices”

I know that the NACTT has been hard at work protecting homeowners who are victims of lenders who improperly inflate their claims or who seek to foreclose on property without a proper showing of arrearages.

I commend Debra Miller and her colleagues who have worked so hard to devise a list of “best practices” for trustees and mortgage creditors. I know that Debra has publicly expressed some lingering frustration about progress with the mortgage industry and the court system. I congratulate her, and the NACTT, on your perseverance and for leading the way to real reform to enhance the integrity of the system.

Debra is doing a good job of getting the word out about the challenges you are facing. As I am sure you all know, she recently was a key witness at a hearing of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts. You also may know that her advice has been sought in recent weeks by policymakers and industry leaders. Among other things, Debra has branched out by assisting the Department of Housing and Urban Development in developing best practices for lenders to achieve loss mitigation and to stave off foreclosure for debtors in bankruptcy. I commend Debra for this important public service.

B. USTP Mortgage Servicer Initiatives

I too participated in that Senate hearing with Debra. In my prepared statement, I described the Program’s criminal and civil enforcement efforts to protect homeowners. In fact, subsequent to the Senate hearing, the United States Trustee Program participated in a news conference held by the Deputy Attorney General and the Director of the FBI on “Operation Malicious Mortgage.” That Operation involved the arrest, indictment, or conviction of 406 criminal defendants who defrauded homeowners and lenders, including cases referred by our Program. FBI Director Mueller described three major mortgage fraud schemes: lending fraud, foreclosure rescue scams, and mortgage-related bankruptcy schemes. As all of us know, bankruptcy is often used as a means to advance other kinds of fraud.

On the civil enforcement front, the United States Trustee Program has compiled a strong record of success. As most of you are well aware, a major focus of our work has been to address mortgage servicer abuse in chapter 13 cases. These cases usually involve creditors filing proofs of claim and motions for relief from stay that reflect inflated or impermissible charges. In the most extreme cases, the debtor makes all the payments required in chapter 13 and, after emerging from bankruptcy, is hit with a new bill for previously undisclosed charges. If those new bills are

not paid, then the lender may foreclose on the property and the entire chapter 13 process will have been for naught.

In many cases, creditor abuse is best addressed by the private trustees who object to claims, or by debtors' lawyers who dispute loan agreement terms. The U.S. Trustee Program's focus should be, and has been, on systemic, multi-jurisdictional abuse that puts the integrity of the bankruptcy system as a whole at risk.

Your help, though, is critical to this endeavor. Let me ask once again that you refer to your United States Trustee any case in which you suspect that a mortgage servicer has systematically and repeatedly filed inaccurate financial information with the court and a debtor has been harmed. We rely heavily upon you, our chapter 13 colleagues, and the debtors' bar for referrals of cases that merit pursuit by the United States Trustee.

Currently, we have numerous pending court actions and are investigating scores of additional mortgage servicer abuse cases. These cases typically are resource intensive and raise complex issues of law. In one case, we completed seven days of trial, examined 22 witnesses, and reviewed thousands of pages of documents. We have had to defend our standing and our authority to seek sanctions. One lender has suggested that as long as it cures every defective filing after a debtor, trustee, or United States Trustee files an action, then it is immune from civil sanctions. We do not see it that way, and we will continue to enforce the law in the face of those who challenge our investigations and court actions.

#### C. Review of Proofs of Claim by Chapter 13 Trustees

It has been suggested by some that one of the most important ways we can police the system against mortgage creditor abuse is to require greater scrutiny of proofs of claim by chapter 13 trustees. Of course, the Bankruptcy Code and the *Chapter 13 Handbook* already provide that trustees have a responsibility to ensure that claims are proper.

I know that Debra Miller told the Senate Judiciary Subcommittee that she and many of you are quite diligent in reviewing proofs of claim to ensure adequate documentation and to ferret out inappropriate charges, such as outrageous inspection fees. We all know, however, that local chapter 13 practice on claims review is inconsistent. Neither you nor we should substitute ourselves for debtors' counsel who ought to be zealously defending their clients against inaccurate accounting by creditors. But we should consider whether there are more effective ways we can oversee the process to detect and address mortgage servicer abuse.

Accordingly, I have asked the NACTT to work with the Program to develop enhanced guidelines and policies on the review of proofs of claim. Our goal should be to better protect homeowners and to hold servicers more accountable. Program guidance is always best when it is the product of a collaborative effort with trustees. So I look forward to partnering with you in developing the necessary new standards.

I am delighted that the NACTT already is providing significant assistance in standardizing the claims review practice. The focus of the next panel session on mortgage claims in chapter 13 is both timely and warranted. The guided breakout discussions should be especially productive. I commend Judge Waldron, Kevin Anderson, and others who have been instrumental in creating the educational program for this conference.

## V. DEBTOR AUDITS

Another important area I want to spend a few moments discussing with you is one that has received a fair amount of attention recently. In May, we issued our first annual report on debtor audits. Although I believe the report is clear in its content, many in the bankruptcy community have expressed surprise at the results of the report and have sought additional information.

Under BAPCPA, the United States Trustee is required to contract with independent auditors to verify the accuracy of financial information provided by debtors in their schedules and statements of financial affairs. We conduct both random audits and audits of debtors with unusually high income or expenses. If a filing contains a “material misstatement,” then the auditor must file a report with the court identifying the material misstatement. It is then up to the case trustee, United States Trustee, or creditor to decide whether to take additional action.

In our fiscal year 2007 report, we noted that reports of audit had been filed in more than 3,500 cases. At least one material misstatement was reported in 30 percent of those cases. It is important to remember that before an auditor files with the court a report indicating a material misstatement, the auditor provides the debtor or counsel with an opportunity to explain the discrepancy or to supply additional information which may negate the finding. Moreover, the auditor’s court filing specifically identifies the misstatement so other parties can evaluate its significance.

We set the numerical parameters for material misstatement so as to capture inaccuracies or omissions that deprive the United States Trustee, the private trustees, the court, and creditors of adequate information to decide whether to conduct further investigation, recover assets, or seek or impose relief against the debtor.

I want to emphasize that we should not expect that every material misstatement is actionable. As you know very well, a trustee has to weigh the costs and risks of pursuing an action against a debtor. And, with respect to an enforcement action, there are many considerations, including whether the debtor promptly amended the incorrect schedules and whether the debtor acted recklessly or with an intent to deceive. With experience, we will refine our definition of material misstatement. But let me be clear: the material misstatements are inaccuracies or omissions of significance. We are not capturing trivial mistakes.

Last year, the independent Rand Corporation strongly endorsed the use of debtor audits as part of our broader effort to detect fraud, abuse, and errors in the bankruptcy system. Rand

advised that, over time, we could study the results of the debtor audits to develop reliable red flags that would guide our selection of cases for further investigation.

If the Rand Corporation is correct, then debtor audits ultimately will benefit everyone in the bankruptcy system, including debtors. If we have a more sophisticated means of identifying cases that reflect fraud or abuse, then the USTP can cast a smaller net. And, after a case is selected for further inspection, we can be more surgical in asking only for the information that is most likely to tell us whether the debtor did something wrong. This will make us more efficient and effective. Plus, the discovery burden on debtors would be lessened.

Debtor audits will provide us with much valuable information. However, we should not rush to a definitive conclusion about the incidence of wrong-doing based upon just one year of results. Nor should we be complacent about a 30 percent material misstatement rate that may suggest that the bankruptcy community has more work to do to raise the level of compliance.

## **VI. STREAMLINING TRUSTEE OVERSIGHT**

The final matter I want to discuss with you is USTP oversight of chapter 13 trustees and their operations. I know that you are acutely aware that we employ a number of oversight mechanisms, including annual budget reviews, annual independent CPA audits, and annual trustee performance reviews.

I ask today for the assistance of the NACTT as we in the U.S. Trustee Program undertake an assessment of our trustee oversight systems with the goal to streamline processes. For example, we may consider adjustments to the trustee performance evaluation instrument. It also may be prudent to consider changing the annual review to a biannual review, as we did for chapter 7 trustees. Steps have already been initiated to examine the budget process. A joint committee on this issue has been put together and will begin its work shortly.

The purpose of trustee oversight is to ensure the integrity of the chapter 13 process by making certain that trustees satisfy their fiduciary obligations and operate at a high level of performance. We need to focus on bottom line results and eliminate unnecessary procedures and processes that do not help us to achieve that absolutely critical goal.

## **VII. CONCLUSION**

As I indicated at the beginning of my remarks, we in United States Trustee Program rely upon the NACTT to help us do our jobs better. I hope I can rely on your continued good faith and diligence in tackling mortgage servicer abuse, streamlining trustee oversight, and addressing other areas of mutual interest and responsibility.

I congratulate you on your outstanding service. I know that this conference will help equip you to move forward.

My best wishes to all of you.