U.S. House of Representatives
Committee on the Judiciary

TESTIMONY OF
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UNITED STATES TRUSTEE : "WATCH DOG OR ATTACK DOG"

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

PRESENTED
OCTOBER 2, 2007

My name is Mary Powers and I am an attorney who for the majority of my twenty year legal career practiced bankruptcy law. I was fortunate to begin my career as confidential law clerk to the Honorable Beryl E. McGuire, Chief Judge for the United States Bankruptcy Court for the Western District of New York. After that I worked for two well respected Buffalo law firms, representing debtors, creditors and creditor committees in a variety of bankruptcy matters. In 2002, I applied for the position of Trial Attorney in the Buffalo office of the United States Trustee ("UST"). At that time, I was very happy at my law firm, received challenging work, was well compensated and, above all, was respected by my colleagues just as I respected them for their integrity and dedication to their clients. There was only one legal position which would have prompted me to leave this wonderful working environment and that was a position with the Department of Justice's United States Trustee's Office. I felt my background was ideal, but more importantly, I felt that it would be an honor and a privilege to serve the Department of Justice in its mission to promote the integrity and efficiency of the bankruptcy system. It was a chance, for the lack of a better phrase to "wear the white hat". I felt very fortunate to have been offered the position. Over time, it became clear to me however, that what I was doing had very little to do with "justice" and, as such, my personal passion and enthusiasm slowly eroded. In February 2007, not wanting to spend the remainder of my career doing something that I had trouble believing in, I resigned. I have never once regretted that decision.

Upon my arrival, I came to understand more clearly what was meant by "civil enforcement "and that the UST was now considered a litigating component of the Department of Justice. I had enough experience at that time to realize that the Buffalo office did not have the resources to be a true "litigating force", but I was optimistic that I could still make a difference, elevating the level of practice and protecting both debtors and creditors. During my years, little focus or training emphasized creditor abuse. I quickly came to understand that ferreting out abuse by debtors was of primary importance. I screened numerous filings. Through inquiries of debtors and their attorneys, I confirmed what I could have intuitively guessed from being a Buffalo and Western New York native. The majority of filings were not abusive. Buffalo's poor economy caused loss of jobs, loss of medical benefits and often marital dissolution, due in large part to financial setbacks. These factors were at the heart of the vast majority of filings. This became very apparent when the UST implemented a reporting system (one of many) known as SARS ("Significant Accomplishments Reporting System"). Every action taken by staff was to be documented in this system. Every entry where no action was taken referred to a "mitigating factor" which obviated the need for any action. "Cancer", "job loss", "divorce" were noted frequently, demonstrating what I knew to be the case: that Western New Yorkers were down on their luck. When an abusive filing was found, dismissal or conversion to Chapter 13, was pursued with vigor, but always

understanding that the judges in the Buffalo Bankruptcy Court were very aware of the harsh economic realities in Western New York and gave debtors every consideration. Initially it never occurred to me that those in Washington and New York would not trust the assessments of seasoned lawyers, those hired by them for their expertise and experience. I thought it was common sense and easily understood that regions and individual districts differed significantly in their bankruptcy demographics. I learned later that I was quite naïve in that belief.

I became aware that the debtor abuse “numbers” for the Buffalo office were low and that offices that had low numbers were perceived as not looking hard enough to find abuse. This became very apparent when then Director Lawrence Friedman on a visit to the Buffalo office pulled one of our “inquiry” files and concluded on its face that a debtor examination should take place and he would “show us how it was done”. He told us that as the debtor was a retired teacher it was likely he had a boat, although none was listed. I was not familiar with the link between retiring teachers and boats, but I assured him I would investigate and do a detailed document request for his review prior to his return to conduct the examination of the debtors. Our independent investigation revealed no intentional omission of assets on the debtors’ schedules. The examination done by Mr. Friedman also revealed nothing. The debtors were sincere and honest and nothing warranted the dismissal of their case. The case was flagged by our office for one more appropriately in Chapter 13 which is my recollection of what ultimately happened in the case. I feel certain that this result, as had occurred with other similar cases, would have occurred without the burdensome document requests and a lengthy examination of the debtors. Buffalo is a small community of bankruptcy practitioners and my experience led me to know that for many cases aggressive pursuit was unnecessary to achieve the same result. Unfortunately, as we did not conduct as many unnecessary examinations as other districts , we appeared less aggressive. Again, I felt that we understood the practice in our district best and there was no need to put the debtors and their attorneys through unnecessarily burdensome “hoops” if the same result could be achieved in a more timely and cost efficient manner for all involved. I felt that treatment of attorneys and debtors in that manner raised our credibility with the bench and bar, fostered cooperation and promoted a much more efficacious system. Unfortunately, the opinions of those in the “trenches” in the individual offices seemed to matter very little. Although, the same information could be easily obtained at a meeting of creditors, we would have gotten more “credit” from the powers that be had we engaged in costly examinations and document requests. Our “SARS” report, a seeming “report card”, certainly wasn’t impressive to those who measured success in terms of dismissals and conversions only. Unfortunately, we could not manufacture “abuse” where little existed. Even when we did obtain a conversion to Chapter 13 and the total amount of unsecured debt deemed nondischargeable was entered as the result, in truth, most of that debt would be ultimately discharged because the majority of Chapter 13 payment plans were of a very low percentage. If the case was dismissed, it was likely very little of that debt was collectible either. We understood however, that it was partially these numbers that the Office of the United States Trustee relied upon to justify its existence and demonstrate success. Feeding the SARs machine at times seemed as important as practicing meaningful law.

The lack of autonomy and inability to exercise discretion as well as the pressures to produce “numbers” was exacerbated after the passage of BAPCPA in October of 2005. Admittedly, the UST was forced to comply with a new law everyone was struggling to understand and certainly there would and should be uniformity in policies regarding application, but again the same pressures to produce presumed abuse under the “means test” was paramount. I remember one pivotal moment for me after the passage of the new bill. I, through the Assistant UST in the office, learned that the US Trustee in the region asked about a specific case. My first thought was that despite a multi-level screening process, something big must have been missed. When I reviewed the filing, I realized that the case wasn’t flagged because the debtor was only slightly over the median and had a blended family with six children and all the legitimate expenses that accompany a family of that size. You didn’t need the means test to figure that out. Common sense and living in the real world would have sufficed. More importantly, I was incredulous that someone at the level of a UST would not have something more important on her plate than this insignificant case from Buffalo. It was clear that “babysitting” was the order of the

day and that the most important focus of the UST was accounting for “debtor abuse” and raising the numbers for statistical purposes. It was that day when I knew I could not spend the rest of my career in a micromanaging bureaucracy. I also knew that the satisfaction that would arise from pouring over cell phone bills and determining if “grandma” was part of the household would be nonexistent, especially when ultimately it would make very little monetary difference to creditors. As one well respected Buffalo attorney told me, the UST had come to be known as the “useless Trustee’s office”, not a flattering nickname, but one I sadly understood.

The most unfortunate aspect of this to me was that the Office of the United States Trustee employed many intelligent, hard working individuals all over the country, many of whom I was fortunate to work with and to meet. Those individuals produced many wonderful initiatives over the years. Many of them expressed frustrations similar to those I have expressed, but obviously only one who left government employment would feel free to speak. In closing, it is my belief that the mission of the Office of the United States Trustee is admirable however, the current execution of the mission is flawed, an impediment to the functioning of the system and does very little to promote the integrity of the system.