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Hearing on the United States Trustee Program:
Watchdog or Attack Dog?

Before the Subcommittee on Commercial and Administrative Law
Judiciary Committee
U.S. House of Representatives

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Madam Chairman Sánchez, Ranking Member Cannon, and Members of the Subcommittee, thank you for inviting me to testify before you today on the question of how the United States Trustee Program has been exercising its responsibility to administer our bankruptcy system: specifically, whether it has been acting in an overaggressive fashion—like an attack dog—rather than as a protector of the system's integrity—like a guard dog.

My name is Eugene Wedoff, and I hope that I can bring to the Subcommittee a useful important perspective on this question, a perspective drawn from working closely with the United States Trustee Program.

I have been a bankruptcy judge for 20 years, and have been an active member of several organizations dedicated to advancing the effectiveness and fairness of the bankruptcy system, including the American Bankruptcy Institute and the National Conference of Bankruptcy Judges—both of which I currently serve as Secretary—the American College of Bankruptcy, and the National Bankruptcy Conference. I have had the duty of presiding over the bankruptcy cases of United Air Lines and its related corporations, and I have previously testified before the Subcommittee on Commercial and Administrative Law during its consideration of a predecessor of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005—which I refer to as BAPCPA. But the perspective that I want to offer to the Subcommittee today comes from my appointment to the Advisory Committee on Bankruptcy Rules in 2004, just before the passage of BAPCPA.

As the members of the Subcommittee are aware, BAPCPA made substantial changes in bankruptcy practice—particularly in consumer bankruptcy practice—and these changes required a host of new and amended rules and forms for their implementation. One fundamental change made by BAPCPA was a limitation on the right of debtors to obtain a "fresh start" discharge under Chapter 7 of the Bankruptcy Code (Title 11, U.S.C.), freeing their future income from the claims of creditors. The limitation I refer to is the new presumption of abuse, added to § 707(b) of the Code. This presumption of abuse—generally referred to as "the means test"—arises under

§ 707(b)(2)(A) if the debtor's income, less allowed deductions for living expenses and specified debt payments, exceeds defined amounts. Section 707(b)(2)(C), in turn, specifically requires Chapter 7 debtors to file "a statement of . . . the calculations that determine whether a presumption of abuse arises." BAPCPA emphasized the importance of this "means test statement" by amending § 2075 of Title 28—the provision that authorizes the Supreme Court to prescribe bankruptcy rules and forms—to provide: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) . . . ." Thus, BAPCPA mandated creation of a means test form.

Ordinarily, from initial conception to adoption, the process of creating bankruptcy rules under § 2075 takes at least three years, and new forms at least two years, to allow time for publication, public comment, and review of comments by the Advisory Committee on which I serve, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and by the Judicial Conference itself. However, BAPCPA became effective 180 days after its enactment in April of 2005, and so there was a need for a vastly accelerated process of rules and form creation.

In this process, I was assigned to a working group of three persons to create a draft means test form that the Advisory Committee could consider. The other two members of the working group were Eric Frank—now himself a bankruptcy judge in Philadelphia, but then an attorney in private practice with an extensive career in representing consumer debtors—and Mark Redmiles, then the National Civil Enforcement Coordinator of the Executive Office for U.S. Trustees (the EOUST). Between April and October, 2005, when BAPCPA went into effect, the three of us spent hundreds of hours creating, revising, and debating the content of a means test form. A quick count of my email inbox from that period reflects 128 messages from Mark Redmiles alone on the subject. What emerged from our work together was a set of three forms, one for Chapter 7 of the Code, one for Chapter 11, and one for Chapter 13, designed to report information related to the means test that would be relevant in those chapters. The Chapter 7 form set out 57 lines of detailed reporting requirements on six pages of text. On October 5, our work, as promulgated by the Judicial Conference, became Official Bankruptcy Forms 22A, B, and C, available just in time for BAPCPA's effective date.

Throughout the process of creating these forms, it was never my impression that Mr. Redmiles and the EOUST saw their role as one of attacking debtors or making the process of obtaining bankruptcy relief more difficult than BAPCPA requires. To the contrary, Mr. Redmiles operated with integrity and fairness, giving each of the many issues that arose his independent judgment as to the best way of implementing the requirements of BAPCPA. His work was completely supported by the EOUST's senior leadership, including its then acting director, Cliff White, who is testifying here today.

To illustrate the basis for this conclusion, I want to ask your indulgence to discuss two important details of the means test: a safe harbor for below-median income debtors and expense deductions for housing and transportation. I point to these details because they raised questions that BAPCPA does not clearly answer, and as to which

Mr. Redmiles and the EOUST took positions that made the means test forms easier for debtors to use, despite reasonable arguments to the contrary.

The safe harbor. Section 707(b)(7) of the Code, added by BAPCPA, provides, in effect, that only debtors with above-median income can be subject to a means test presumption of abuse. However, it accomplishes this result in what might be seen as a roundabout way: if a debtor's income is equal to or below the median, § 707(b) denies all standing to assert the presumption. Specifically, for those whose income does not exceed the median, no one—not judges, U.S. trustees or bankruptcy administrators, case trustees or any other party in interest—is allowed to file a motion under § 707(b)(2), the paragraph that sets out the means test presumption. But creating the safe harbor from the means test deduction in this indirect way, by denying standing, left a question for the means test forms. Like the proverbial question about whether a tree falling in the forest makes a noise if no one is there to hear it, the question for the means test form was whether a presumption of abuse can arise if no one is able to assert it.

The answer to this question had a huge impact for below-median income debtors. Section 707(b)(2)(C), as I noted earlier, requires Chapter 7 debtors to file "a statement of . . . the calculations that determine whether a presumption of abuse arises." In order to show that their income does not exceed the applicable median, a debtor has to complete a maximum of 14 lines—less than a page and a half of the form. If that showing of below-median income conclusively establishes that a presumption of abuse does not arise, then the debtor would not have to complete the remaining four and a half pages of detailed deductions for living expenses and debt payments. However, if there can be a presumption of abuse even though no one can assert it, then every debtor, regardless of income level, would have to complete the entire form. This latter view has been advocated by major creditor groups that supported BAPCPA. In a comment submitted to the Rules Committee on February 15, 2007 (06-BK-055), The American Bankers Association, the American Financial Services Association, America's Community Bankers, the Consumer Bankers Association, The Financial Services Roundtable, and the Independent Community Bankers of America advocated that "Form 22A [should] require all debtors to provide the need-based calculations," because the § 707(b)(7) safe harbor "contains no exemption from the requirement that the needs-based calculation be completed."

From the beginning of the process of adopting the means test forms, the EOUST took the contrary position—that if a presumption cannot be asserted it effectively does not arise—thus allowing lower income debtors to avoid substantial additional collection and reporting of expense and debt payment data. The EOUST adhered to this position despite critical comments from the credit industry. The forms that went into effect in October 2005 and those in effect now, direct debtors not to complete the balance of the form if their income does not exceed the median.

Housing and transportation deductions. For debtors whose income does exceed the minimum, the second question arose, involving the debtor's expenses for housing and transportation. BAPCPA created this question in § 707(b)(2)(A)(ii)(I) of the Code, which provides that one part of a debtor's deductible expenses shall be "the debtor's applicable monthly expense amounts specified under the . . . Local Standards

. . . issued by the Internal Revenue Service." The Local Standards that the statute refers to are published on the IRS's website, and they include various amounts for housing and transportation, depending on the debtors' family size and county of residence (for the housing deduction) and number of vehicles leased or purchased (for the transportation deduction). The question arises because, in applying its Local Standards in the collection of delinquent taxes, the IRS uses the Local Standard amounts as caps on taxpayers' actual expenses. Thus, in determining how much income is available for tax payments, the IRS requires taxpayers to establish exactly what expenses they incur for housing and transportation, and allows a deduction either in that amount or the applicable Local Standard amount, whichever is less. However, because § 707(b)(2)(A)(ii)(I) provides that the debtor's monthly expenses "shall be" the amounts specified under the Local Standards, the statute appears to adopt the Local Standards as allowances, not caps. So read, BAPCPA directs debtors in bankruptcy to claim deductions in the Local Standard amounts without having to show that their actual expenses meet or exceed those amounts.

In general, our working group attempted to implement a policy that the Advisory Committee applies to all of its work: avoid resolving ambiguous statutory provisions in rules or forms and instead preserve such questions for resolution by the courts. However, with the means test forms, this policy could not always be put into effect. For example, with the safe harbor issue noted above, there was a need to instruct below-median income debtors either to complete the deduction portions of the form or not complete them. So here, the forms needed either to direct debtors to itemize their actual housing and transportation expenses (rent or mortgage payments, insurance, maintenance, utilities, taxes, fuel, public transportation costs, etc.) so that these amounts could be compared to the Local Standards, or else to omit such reporting requirements, with the Local Standard amounts always used to determine the appropriate deductions. Again, from the beginning of our work, Mark Redmiles and the EOUST read the statute in the manner easier for debtors to comply with, and in a manner that gave some debtors a larger deduction. Again, creditor interests that had supported BAPCPA disagreed, as reflected in Comment 06-BK-055, which I referred to earlier, and a separate comment, O6-BK-051, submitted on behalf of the Financial Services Roundtable, each of which argued for Local Standard deductions no greater than a debtor's actual expenses. The Advisory Committee and the Judicial Conference adopted the position supported by the EOUST, and that is the position adopted by the means test forms currently in place.

Conclusion. To conclude my testimony today, let me put my observations in the blunt language of the title of this hearing: The process of developing the means test forms provided a clear opportunity to "attack" debtors with what I believe would have been substantially greater reporting requirements than those now in the means test forms. The United States Trustee Program did not mount this attack. To the contrary, the program took principled and independent contrary positions. Mark Redmiles, in particular, worked constructively and creatively with Eric Frank and me to read BAPCPA fairly and devise forms that would—to the extent of our ability—both honor its language and produce workable results. I came away from the process with great respect both for Mark—and the work of the EOUST generally—in assisting the Advisory Committee on Bankruptcy Rules.

As a postscript, I was pleased to learn that in August of this year, Mark Redmiles was appointed to the position of Deputy Director of the EOUST. I am confident that he is bringing to that position the same integrity and independent thought that he brought to the Advisory Committee.

I would be happy to answer any questions about this testimony.

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