

**Remarks by**

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**at the**

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## **Introduction**

Thank you for inviting me to join you for lunch in the fine city of Boston – home of the greatest professional sports teams in the world, the Red Sox, Patriots, Celtics, and Bruins.

Let me begin by commending you for the outstanding leadership you have selected for the NABT. On behalf of the United States Trustee Program, I wish to thank Robert Furr for a productive year and for working with the USTP on so many matters of importance to both of our organizations, and to the bankruptcy system as a whole. To Jim Boyd, congratulations on your elevation as President of the NABT. Based on our past working relationship, I am confident that we will collaborate on many worthwhile projects over the next twelve months.

This is a special summer for me because, among other things, both the NACTT and NABT held their annual meetings in Boston. My wife and I hail from the South Shore, which consists of those towns between Cape Cod and Boston. So, I am happy to be able to welcome all of you to my home town and to offer services as a tour guide.

Unlike at the chapter 13 trustee convention, there is not a group pilgrimage to the shrine known as Fenway Park for a baseball game. But you can still take a day tour and touch the famed Green Monster. I also hope you will take advantage of your time here to celebrate America's history by walking the Freedom Trail through Boston. Just follow the Red Line down the streets and you will see the story of America's revolutionary period. And, if you have extra time, please travel 30 miles south of here, to Plymouth, near my home town. You can go back in time to the 1600s and visit Plimoth Plantation, the Mayflower, and many other historic sites relating to the Pilgrims.

## **Bankruptcy Filings and Chapter 7 Trustee Compensation**

We meet this year during a challenging time for the bankruptcy system and for chapter 7 trustees. One of your most pressing difficulties is finding the resources necessary to meet a continuing avalanche of chapter 7 filings. Let me provide some data:

- Total filings so far this fiscal year are up about 36 percent over last year. This follows an increase of 31 percent in Fiscal Year 2008. Only twice before have we experienced back to back years of 30 percent plus increases. And, if this trend continues, next year will mark the first time since bankruptcy filing numbers were recorded that we will have had three consecutive years of increases in excess of 30 percent.
- Chapter 7 filings are up even more dramatically. We are on track for a 47 percent increase over last year. This follows an increase of 41 percent in Fiscal Year 2008.
- By the way, chapter 11 filings make chapter 7 increases look modest. Chapter 11 filings are up so far this fiscal year by 84 percent over last year. Chapter 11 filings

in the Southern District of New York are up by more than 240 percent and filings in Delaware are up by more than 300 percent.

It is not easy to cope with increases of this magnitude. The challenge is compounded by volatile trustee economics. As you are very well aware, the no asset fee has not been increased in 15 years. After rising for several years, total trustee compensation went down by about three percent in Calendar Year 2008. Trustee compensation from asset cases went down last year by about 14 percent. Available data suggest that compensation from asset cases may continue downward for the next two years. It is too early to know whether this decrease will prove to be a three year blip or a longer-term trend. But all of us who care about the health of the bankruptcy system need to be alert to changes in trustee economics because the whole system depends upon having a robust corps of competent and professional chapter 7 trustees.

I know that this association has worked very hard on trustee compensation matters, and has been looking at creative solutions that will improve the compensation scheme for trustees without unduly burdening others in the system. In addition, we have litigated along with you in numerous cases to make sure that bankruptcy courts properly apply the 2005 change to the statute so trustees generally can count on compensation at the full commission limits. I appreciate your perseverance in the face of the current economic crunch.

### **Mortgage Fraud and Abuse**

Even though I know some of you here today also attended the NACTT conference, I want to address a couple of very important topics that I covered there. Although the chapter 13 and chapter 7 trustees have different bankruptcy practices, there are many challenges in common.

In almost every speech I have given over the past two plus years, I have discussed mortgage fraud and abuse. The mortgage meltdown that has plagued our economy has had an impact on our bankruptcy system. There is probably no issue that I personally have devoted more attention to over the past year than combating mortgage scams, both civilly and criminally. In fact, the number of criminal referrals we made to United States Attorneys in these types of cases nearly doubled between 2007 and 2008.

Let me spend a few minutes describing our initiative in this area and providing some examples of our recent progress. We view our initiative as having three prongs. They are not all new. Some have been staples of our work for a long time. Importantly, chapter 7 trustees have been key partners for us in tackling each prong.

First, we combat debtor fraud. For example, one of our Assistant United States Trustees recently prosecuted a debtor, his attorney, and other co-conspirators who perpetrated a sham sale of the debtor's house so they could siphon off the loan proceeds and the debtor could continue to live rent free.

Second, we combat foreclosure rescue schemes. Like you, we are in a good position to uncover these types of operations because the bad actors often disguise themselves as bankruptcy

petition preparers. I doubt there is a trustee here who has not come across a case in which a distressed homeowner was bombarded with offers to help stave off foreclosure, paid a handsome sum to a con artist who performed no useful services, and still lost the family home to foreclosure.

The third prong is our newest prong, even though it is already more than two years old. We continue to combat mortgage servicer violations of the Bankruptcy Code. We aim to hold mortgage servicers to the same standard of completeness and accuracy in their filings that we do the debtors who owe them money.

We have undertaken a significant amount of litigation in this area. For example, several weeks ago, the bankruptcy court in the Northern District of Ohio ruled in our favor on a complaint against Countrywide Home Loans, Inc. The judge found that Countrywide's conduct in preparing court filings was "reckless" and reflected "an indifference to the truth."

On July 31<sup>st</sup>, the bankruptcy court issued a decision on remedies. The court affirmed its broad equitable powers and imposed additional paperwork requirements that must accompany Countrywide's proofs of claim. The court did not impose our more robust request for an independent auditor and other corrective measures. Countrywide has appealed the bankruptcy court decision.

Our experience in a number of cases has taught us that the issue of remedies is a very difficult one for bankruptcy courts to address. Based upon the evidence we amass, bankruptcy courts will find liability and inveigh against improper industry practices. Securing the right remedy, however, has proved more difficult than obtaining a finding of liability. But we will continue to press on in our efforts to expose significant mortgage servicer violations and to seek meaningful relief that will make the victims whole and spur the industry to correct its deficiencies once and for all.

We are particularly encouraged by a recent district court decision handed down in the Eastern District of Louisiana, upholding the bankruptcy court's imposition of sanctions against Wells Fargo for systematically filing flawed proofs of claim. The UST filed an amicus brief in that case, and I am gratified that the court agreed with us that the bankruptcy judge acted within her powers when she required Wells Fargo to audit and amend its proofs of claim.

In another significant case in the Southern District of Florida, the district court recently reversed the bankruptcy court's dismissal of the United States Trustee's adversary proceeding against Countrywide. The district court found that the United States Trustee had standing. In reversing the bankruptcy court, the district court held that we could seek sanctions for Countrywide's past misconduct, including injunctive relief to prevent future harm caused by Countrywide's practices and conduct.

We also recently prevailed in a case involving HSBC. In that case, the court criticized HSBC's use of a third-party electronic system to manage defaulted loans in bankruptcy, stating that its "thoughtless mechanical employment of computer-driven models and communications to

inexpensively traverse the path to foreclosure offends the integrity of our American bankruptcy system.”

Let me provide one final example of our mortgage servicer and creditor abuse enforcement efforts. I am pleased to tell you that only a few weeks ago, a bankruptcy court approved our settlement agreement with a major lender to resolve complaints involving the bank’s improper disclosure of more than 2,500 Social Security numbers on proofs of claims filed in bankruptcy courts in 48 judicial districts. Under that agreement, the bank will notify affected debtors, file appropriate papers to correct the court filings, and take remedial steps to prevent a recurrence of these impermissible breaches of privacy.

This case is just one of many that we have taken in recent months against creditors who have failed to comply with legal requirements to protect the personal information of their customers in bankruptcy.

We rely very much on referrals from trustees who are on the front lines and confront evidence of improper mortgage company or other creditor practices. I commend you for your past efforts and urgently ask for your continued assistance.

### **Language Assistance Plan**

Next, I will cover another important priority that I also discussed with our chapter 13 colleagues – outreach to non-English speaking debtors. I hope you are seeing enhancements in our ability to accommodate these debtors at section 341 meetings. We have contracts in place to provide tele-interpreter services in as many as 196 languages. The service is free and is readily available in nearly 250 meeting rooms. We have distributed conference quality speaker phones to the vast majority of these locations to make it easier for the interpretation and recording. We also are exploring options for providing service at locations that are not within our direct control.

I strongly encourage you to make full use of the tele-interpreter services. Signage is being posted in meeting rooms to make sure that debtors know the service is available free of charge, and our offices are engaging in outreach efforts to make sure the local bar is also aware of the free service. Your assistance in helping to spread the word would be greatly appreciated as well.

I am told that even those trustees who are like me, and are sometimes reluctant to try new things, are finding the service easy to use. Interpreters are readily available and the section 341 meetings proceed efficiently. There is no need to put cases with interpreters at the end of your docket. All debtors can be treated the same, with dignity, and have the same opportunity to hear questions and provide answers in their native language.

### **Technology in Section 341 Meetings**

A third important topic common to the United States Trustees, chapter 13 trustees, and chapter 7 trustees is the use of technology at section 341 meetings. Some bankruptcy judges have

raised with me the issue of improved technology in section 341 meeting rooms. They suggest that greater use of technology not only would support the court's long-term goal of going "paperless," but also would allow trustees to conduct meetings more efficiently and thoroughly.

While there can be no compromise of the security of personal information, to the extent that we can overcome security problems, and to the extent we can avoid high costs, we are willing to explore better use of technology at section 341 meetings.

To that end, I am pleased that the NABT will join the USTP and NACTT on a working group we are assembling. Being able to draw on your expertise and experience will be extremely helpful as we consider our options. The overall goal is to determine how automation and technological advances can result in savings for both trustees and practitioners, as well as improve the delivery of services and streamline document production at section 341 meetings.

Your expertise and perspectives will be put to very good use on this new working group. Let me give special thanks to Darlene Anderson, Lynne Riley, and Rick Nelson who have agreed to participate in the technology working group.

### **Paperwork Reduction**

While I am on the topic of going "paperless" and streamlining document production, let me touch on two additional initiatives. We all want to achieve efficiency and paperwork reduction. Sometimes that has to be balanced against the need for thoroughness and compliance with the law. For example, BAPCPA imposed some new document production requirements on debtors. In addition, sometimes you and the United States Trustee need to ask for additional papers in order to investigate and do your jobs. That is why, for example, we ask debtors who are selected for a statutorily required debtor audit to produce additional evidence supporting their schedules.

In recent Congressional testimony, one witness expressed opposition to statutory paperwork requirements and also to additional document requests sometimes made by trustees and United States Trustees.

We in the Program have done a lot over the past few years to streamline our means test review and to be more targeted in our document requests. I know that with experience under the 2005 law you have been able to achieve such efficiencies as well. But, as important players in the bankruptcy system, and in a spirit of responsiveness to all constituency concerns, I continue to urge you to minimize paperwork requirements where consistent with your statutory obligations and your duty as a fiduciary for the bankruptcy estate.

### **Uniform Final Reports**

Before leaving the topic of paperwork, let me update you on the Uniform Final Reports. As you know, the 2005 bankruptcy law required the United States Trustee Program to develop a series of uniform final reports. Over a period of many months of consultation with the NABT and

others – and only after waiting for the court system to expand the DXTR download to allow the reports to be produced electronically – we published a final rule on October 7, 2008, with an effective date of April 1, 2009.

The rules were accompanied by a series of forms that comport with the new rule. During initial implementation, various parties requested more changes. To the extent those changes affect the forms and not the rule, we have tried to accommodate those suggestions. Any suggestions that alter the rule would require a very lengthy notice and comment period under the Administrative Procedure Act and cannot practically be adopted.

I am pleased to tell you that the NFR, TFR, and TDR have been “tweaked” to accommodate virtually all the suggestions. These new forms go into effect on September 1, 2009 (although they may be used prior to that date), and they are currently available on our Web site. We also will tweak the no asset report a little later in the fall.

This has been an extraordinarily time consuming process. But we accomplished our goal and satisfied the statutory requirement to issue uniform reports that capture more data that will be of use to scholars, policy-makers, and the public. Thanks again to the NABT leadership and to each of you for your patience and assistance along the way.

### **Schwab v. Reilly**

The final issue I wanted to talk with you about is an important case that may be decided by the United States Supreme Court in the next term. Chapter 7 trustee William Schwab was assigned to a case in which the debtor claimed exemptions that were facially valid. The kind of exemption was permissible, the asserted value placed by the debtor on the asset did not appear unreasonable, and the amount claimed as exempt was within allowable limits at the valued amount. After trustee Schwab learned that the property had an actual value in excess of the asserted amount, he planned to sell the asset and distribute proceeds within the exemption amount back to the debtor. But the debtor blocked the sale by successfully arguing to the bankruptcy, district, and circuit courts that an exemption not objected to within 30 days after the section 341 meeting was property of the debtor and not of the estate.

All of us here know the adverse practical affect of the lower court rulings. Chapter 7 trustees would have to object to exemptions in a large percentage of cases because they rarely would be able to get an appraisal within the 30 day time limit. That would mean a substantial amount of unnecessary work in no asset cases. And I do not need to remind you that, in most cases, the extra work would be done for no extra fee beyond the \$60 no asset fee.

Trustee Schwab filed a petition for a writ of certiorari. The NABT filed an amicus brief in support of that petition. The Supreme Court granted the writ of certiorari last April.

I am pleased to tell you that, on July 17th, the Solicitor General of the United States also filed an amicus brief in support of trustee Schwab. Oral argument in the case has been scheduled for November 3<sup>rd</sup>.

Let me tell you that the Solicitor General receives many, many requests to weigh in on Supreme Court cases in which the Government is not a party. On bankruptcy matters, we are often consulted and understand that the Government must carefully evaluate a host of factors before deciding whether to participate. The fact that the SG is often called the “Tenth Justice” conveys a special responsibility on the Justice Department in making the decision to participate in a Supreme Court case.

In the case we are discussing, Schwab v. Reilly, the United States Trustee’s actions were not at issue and no federal claim was at issue. But the Solicitor General realized that the exemption statute had been wrongly interpreted at the courts below, and that both the integrity and the efficiency of the bankruptcy system would be enhanced by a different court result.

I join you in anxiously awaiting the outcome in the Supreme Court. But regardless of the ultimate outcome, I am very gratified that the Solicitor General has weighed in on this matter which may lack glamor, but which does touch on the ability of chapter 7 trustees to do their jobs effectively for the benefit of the bankruptcy system.

### **Conclusion**

Thank you for your patient listening. I leave you with an expression of my sincere respect for the good work that you do, the integrity with which you do it, and benefit to the entire bankruptcy system that flows from it.

Please enjoy your time in the city where America’s fight for independence really began. Eat lots of lobster, enjoy the clam chowder, and have a Boston Creme donut for breakfast every day.

Best wishes and thank you.

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