

Sam Crocker Unplugged

The Greek philosopher Heraclitus is quoted as saying, “Change is the only constant in life”; also translated, “The only constant is change.” My mother used to say, “The more things change, the more they stay the same.”

Heraclitus is also credited with a more poetic, allegorical expression of this concept: “No man steps into the same river twice, for it’s not the same river and he’s not the same man.” Willie Nelson wrote and sang, “Time rolls on like a river...” I say, “If you step in twice, regardless of whether it’s the same river, you will get wet both times.”

As I reflect back on my time in the bankruptcy community, I am struck by all that has changed. The following chronology summarizes important events in my career as a bankruptcy practitioner:

1978: Began practicing law.

1984-2010: Became panel trustee and specialized my practice exclusively to bankruptcy law. Acted as a chapter 7 trustee, representing primarily myself and other trustees, as well as debtors in chapters 7 and 11.

1988: United States Trustee Program (USTP) began operating in my jurisdiction.

1989-2010: Began to get appointments and serve as trustee in chapter 11 cases, which became an increasingly large component of my practice.

1998-2010: Wrote quarterly Recent Cases article for NABTalk magazine.

1999-2010: Served as Director on NABT Board.

2007-2008: Served as President of NABT.

2011-2018: Serve as U.S. Trustee (UST) for Region 8 (Tennessee and Kentucky) and as a member of the USTP Private Trustee Working Group and Trustee Liaison Committee.

2014-2018: Serve as UST for Region 20 (Kansas, New Mexico, and Oklahoma) in addition to Region 8.

On April 28, 2018, I will retire from the USTP. That’s roughly 40 years of participation in the U.S. bankruptcy system, in various roles. That experience has allowed me to view the system from distinctly different perspectives. I have witnessed significant changes, happening often and regularly enough to substantiate Heraclitus’ time/change theory. While maybe not “constant,” the dynamic of change, whether potential or actual, has been an ever-present force during my bankruptcy practice tenure.

I can also argue the truth of my mother’s maxim. Representatives of particular bankruptcy philosophies and constituencies are always at work to effectuate changes to better the system,

which is effectively counter-balanced by resistance from competing constituencies with opposing notions of what is “better.” However, in the midst of this push and pull, some fundamental, over-arching principles remain unchallenged. The more things change, at least in detail, the more they stay the same in general purpose and ideal.

I will now discuss what I consider to be the major events affecting the U.S. Bankruptcy system during my career, essentially following my above chronology. This discussion will be primarily limited to matters that directly concern panel trustee practice. It neither purports nor attempts to be a thorough investigation or scholarly review. It is meant only as an anecdotal description of important, recurring trustee issues discussed in their historical context. It also represents my personal opinions, and not necessarily those of the USTP.

The Bankruptcy Code of 1978

I started practicing around the same time bankruptcy law underwent its most sweeping change in decades. The Bankruptcy Code of 1978 (“Code”) replaced the Bankruptcy Act of 1898 as the uniform-bankruptcy law of the U.S. The Code was more than a “fix” of the prior law. It was the origin of a new system. The Code radically revised longstanding responsibilities and relationships among key bankruptcy system players, while introducing a new player with a vital function to fulfill.

Before the Code was enacted, private trustees were appointed and supervised by the bankruptcy judges. Many commentators and practitioners considered this problematic, certainly in appearance if not reality, since the judges also decided cases and other matters where the trustee was a party, including determination of trustee fees. This perceived problem was addressed by creation of a new government agency independent of the judiciary, to hire, monitor and supervise trustees: the United States Trustee Program (USTP). Though created as part of the Code, the USTP was initially limited in its operation to a few “pilot” districts to test how well it worked.

The Code made another significant change that immediately affected trustees. Under the Act, the judges could appoint anyone they chose as a Chapter 7 trustee, in any frequency. The Code provided for “panels” of trustees to handle all chapter 7 cases. Panels were created everywhere, not just in USTP pilot districts. I remember it well because my partner at the time, Bob Waldschmidt, was appointed to the first trustee panel in Nashville.

In 1984, I became a member of the Nashville panel. That was four years before the USTP began to operate in Tennessee. The judges still appointed and supervised the trustees, but the trustees received appointments on a regular rotation that gave each of them a roughly equal share of cases. This and similar administrative matters were overseen by the Estate Administrator, an employee of the court.

This pre-USTP time period amounted to a hybrid system, with essentially the same panel of trustees that exists today coupled with court supervision of case administration. Through these years, the judges initially reviewed and decided administrative matters, regardless of whether any party objected.

The USTP expanded virtually nationwide in 1987-1988. It is fair to say that a significant level of uncertainty existed between trustees and the USTP in those early days. I experienced it first hand from the private trustee perspective. In retrospect, and after being on the USTP side, I compare those days to the days after the birth of my first child, when no instructions came with the baby.

The USTP set about to effectuate the broad statutory mandate to supervise trustees. I think neither side knew exactly what to expect, what to do, or the best way to get it done. That took time and effort to sort out before it began to come together. There will always be a natural tension between the regulator and the regulated, but it benefits both to respect and understand what each other does. I have watched that begin to happen and continue to grow from my time with NABT through my USTP days, improving the system for everyone in the process.

Post-Code, Pre-BAPCPA Amendments

After the enactment of the Code, but before the next major revision of American bankruptcy law in 2005, there were several amendments to specific Code provisions. These amendments were very important, not only as substantive changes to the law, but as indicators of evolving policy concerns and positions, many of which came later to fruition. Though I encourage examination of these post-Code, pre-BAPCPA amendments in both their historical and legal context, I will note and discuss only one of them, which involves what I believe to be the most longstanding and vital issue trustees continue to face.

A 1994 amendment raised compensation for trustees in all cases they administered. The no asset fee went from \$45 to \$60, and the § 326 commission percentages were also increased. That was the last time trustees received a raise. The lack of any compensation increase since 1994, in spite of NABT's continuing dedicated efforts to obtain one, has certainly and profoundly impacted trustees and their practices immeasurably.

I am a decades-long, very close observer of this situation, from both the actor (NABT) and monitor (UST) perspectives. My personal assessments and opinions are thereby based on myriad experiences over those years. Without talented and dedicated independent fiduciaries to administer cases, the present U.S. bankruptcy system cannot properly function. Private trustees are absolutely fundamental to the proper operation of an essential social, cultural, and economic institution - the American bankruptcy system.

BAPCPA

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) became law in 2005, with most of its provisions immediately effective. Like the 1978 Code, BAPCPA was a major revision of the existing bankruptcy law. However, unlike the Code, it was more of a statutory "fix" than the creation of a new system. Said another way, the basic structure of the Code remained after BAPCPA, but with significant changes based on statutory amendments.

The post-BAPCPA Code reflects answers to philosophical and policy concerns much different from those on which the Code was premised. The notion of a "means test" to enter chapter 7 and

the expanded definition of an abusive bankruptcy filing are but two examples of such differences. I will not comment otherwise on these and other controversial aspects of BAPCPA, and will continue to limit this article specifically to important trustee issues. I will say I am sometimes surprised at how BAPCPA, thirteen years after the controversies that attended its inception, operates as smoothly as it does today.

There was much in BAPCPA that significantly affected private trustee practice - some positive, some not. I remember NABT being directly responsible for the “commission” language change in Section 330, as well as the language in § 507 which made sure trustees received payment priority over domestic support obligation (DSO) recipients from funds they collected for DSO claimants. Both of those provisions were beneficial to trustees. I also remember, after passage but before the effective date of BAPCPA, USTP Director Cliff White’s speech at the NABT convention in New York in which he formally stated the USTP position of support for trustees per the amended commission language. I remember that promise coming true in Ninth Circuit Bankruptcy Appellate Panel and Fourth Circuit cases when the issue was tested. The appellate courts found for the trustee, citing the USTP position as an important factor in their decisions.

I encourage anyone interested in the impact of BAPCPA on chapter 7 trustees to look at the article by Bob Waldschmidt and myself published in Volume 79, Issue 2, 2005 American Bankruptcy Law Journal, and also published in NABTalk. That article, written before BAPCPA became effective, discusses the statutory changes that appeared to directly affect trustees and predicted how BAPCPA would play out upon application.

Beyond BAPCPA

So where does that leave us today? What is a panel trustee to do in the face of all that actual past change, and potential future change? Bob and I concluded our BAPCPA article this way: “...the basic role of the chapter 7 trustee remains the same: to serve as the “representative” of the bankruptcy estate...and to administer that bankruptcy estate...in accordance with the intention of Congress.” That summarizes an unchanging aspect of the American bankruptcy system over my many years of work, and indeed even from well before my time.

Trustees deserve respect and fair compensation for the work they do to perpetuate this institution. The operational ability of the entire system was built on the fundamental notion of the propriety and effectiveness of independent fiduciary administration of debtors’ estates. Panel trustees are the independent fiduciaries appointed and overseen by the USTP to meet the fundamentally important duty of estate administration. Though they struggle with smaller caseloads and no raises, they continue to step in the river, over and over, as time and change roll on, keeping the system afloat in the process.

Sam Crocker has served as the United States Trustee for Region 8 (Tennessee and Kentucky) since 2011 and Region 20 (Kansas, New Mexico, and Oklahoma) since 2014. The views expressed in this article are his own and do not necessarily reflect the views of the United States Trustee Program.