

## Rule Changes, Supreme Court Cases and USTP Enforcement Efforts

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It is only January as I write this column, but I am already certain that 2015 will be a year filled with exciting changes in the bankruptcy world. Comprehensive revisions to Bankruptcy Rules 8001 through 8028, a new version of the means test form used by individual chapter 7 debtors, and new miscellaneous fees all took effect on December 1, 2014. The U.S. Supreme Court has selected a record six bankruptcy cases to hear this term. And, of course, the United States Trustee Program (USTP) continues its efforts to protect the integrity of the bankruptcy system and vulnerable debtors from those bankruptcy participants whose conduct violates the Bankruptcy Code and Rules.

### Bankruptcy Rule, Form and Fee Change Highlights

On April 25, 2014, the United States Supreme Court adopted amendments to the Bankruptcy Rules. The most significant of these amendments were the result of a multi-year project to bring the bankruptcy appellate rules into alignment with the Federal Rules of Appellate Procedure (Appellate Rules).<sup>1</sup>

The bankruptcy appellate rules—Bankruptcy Rules 8001 through 8028 (the Part VIII Rules)—govern bankruptcy appeals to district courts, bankruptcy appellate panels and, in certain circumstances, courts of appeal. In addition to bringing the rules into closer alignment with the Appellate Rules, the amendments were intended to incorporate a presumption favoring the electronic transmission, filing and service of court documents and to adopt a clearer style. Existing rules were reorganized and renumbered, some existing rules were combined, provisions of other rules were moved to new locations, and much of the language of the existing rules was restyled.

In addition, Rule 9023 entitled “New Trials; Amendment of Judgments” and Rule 9024 entitled “Relief from Judgment or Order” were amended to include a reference to new Rule 8008. New Rule 8008 provides a procedure for the bankruptcy court’s issuance of an “indicative ruling” when, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that it concludes is meritorious or raises a substantial issue.

Amendments to the Official Forms reflect continuing efforts by the Bankruptcy Rules Advisory Committee’s Forms Modernization Project to simplify the forms for all users. The means test forms used by individuals in chapter 7 and chapter 13 cases have changed significantly, as has the corresponding chapter 11 form.

Official Form 22A, the means test form used by chapter 7 debtors, has been replaced by three forms: Form 22A-1, “Chapter 7 Statement of Your Current Monthly Income”; Form 22A-1Supp, “Statement of Exemption from Presumption of Abuse Under § 707(b)(2)”; and Form

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<sup>1</sup> The full text of the Amended Rules, along with excerpts from the Judicial Conference and Advisory Committee Reports, can be found at [www.uscourts.gov/uscourts/rulesandpolicies/rules/congressional-package-for-congress.pdf](http://www.uscourts.gov/uscourts/rulesandpolicies/rules/congressional-package-for-congress.pdf)

22A-2, “Chapter 7 Means Test Calculation. Official Form 22A-1, to be completed by all individual chapter 7 debtors, calculates a debtor’s current monthly income and compares that calculation to the median income for households of the same size in the debtor’s state. Official Form 22A-1Supp is to be completed by individuals who are exempt from means testing. Official Form 22A-2 is to be completed only by those debtors whose income is above the applicable state median; it is the chapter 7 means test calculation. Instructions for the forms are provided at the end of Official Form 22A-1.

At its September 2014 session, the Judicial Conference of the United States approved several changes to the Miscellaneous Fee Schedule that became effective December 1, 2014. The Miscellaneous Fee Schedule, issued pursuant to 28 U.S.C. § 1930(b), establishes fees payable to the court for filing certain documents, conducting searches of court records and other court services related to bankruptcy cases.<sup>2</sup> The new schedule identifies 21 categories of fees.

In Item 14, the fee for filing an appeal or cross appeal is \$293, and an additional fee of \$207 is assessed when a direct bankruptcy appeal is accepted by the court of appeals. In addition, a new fee of \$25 per affected case has been added as Item 21 for motions to redact previously filed records. The court may waive this fee under appropriate circumstances. The Judicial Conference also endorsed a new exception to the fee for reopening closed cases in Item 11, to clarify that the reopening fee will not apply if redaction pursuant to Bankruptcy Rule 9037 is the only reason for reopening the case.

### Supreme Court Cases

Four of the six bankruptcy-related cases before the Supreme Court this term involve issues of importance to chapter 7 trustees. The first case, which was argued on January 14, 2015, is *Wellness Int’l Network, Ltd. v. Sharif*, 134 S. Ct. 2901, No. 13-935 (*cert. granted* July 1, 2014). In *Wellness*, the Court was asked to address two issues: (1) whether the bankruptcy court has constitutional authority to determine whether property in the debtor’s possession is property of the estate under 11 U.S.C § 541, and (2) whether, under *Stern v. Marshall*, \_\_ U.S. \_\_, 131 S. Ct. 2594 (2011), litigants may consent to having final judgment entered by the bankruptcy court in a matter in which the bankruptcy court otherwise lacks constitutional authority under Article III.

In *Baker, Botts, LLP v. Asarco, LLC*, 135 S. Ct. 44, No. 14-103 (*cert. granted* October 2, 2014), the Supreme Court has been asked to decide whether 11 U.S.C. § 330(a) authorizes bankruptcy courts to award compensation for the defense of a fee application. The Court’s decision will be an important one for the USTP, because we rely upon section 330 every day in fulfilling our watchdog responsibilities. The government filed an *amicus* brief, which included the USTP among the counsel for the United States. That brief struck a reasonable balance. Consistent with the position set forth in the USTP’s fee guidelines for attorneys in large chapter 11 cases, the government argued that section 330 does not bar professionals *per se* from ever recovering such fees, but there will be many instances in which such awards will be inappropriate.

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<sup>2</sup> The Miscellaneous Fee Schedule can be found at <http://www.uscourts.gov/FormsAndFees/Fees/BankruptcyCourtMiscellaneousFeeSchedule.aspx>.

For example, the government's *amicus* brief argued, no fees should be awarded:

- For unsuccessfully defending a professional's fee request.
- For defending an objection that arises because the professional's application was deficient, even when the professional responds by fixing the deficient application and securing a full award of fees.
- If the objection was frivolous and the court can use its inherent power or its power under Bankruptcy Rule 9011 to require the objecting party to pay the fees rather than taxing them to the estate as an administrative expense.

The NABT also filed an *amicus* brief supporting the petitioner, arguing that section 330 affords bankruptcy courts broad discretion to award reasonable compensation for the actual, necessary services rendered by the trustee's professionals. In addition, the NABT argued that an award of fees for defending a fee application is necessary to the administration of the estate and not prohibited under 11 U.S.C. § 330(a)(4)(A). The case is scheduled for argument on February 25, 2015.

In *Bank of America v. Caulkett*, 135 S. Ct. 674, No. 13-1421 (*cert. granted* November 17, 2014), the issue to be decided is whether, under 11 U.S.C. § 506(d), a chapter 7 debtor may strip off junior liens when the value of the senior lien exceeds the current value of the collateral. *Caulkett* and a companion case, *Bank of America, NA v. Toledo-Cardona*, No. 14-163, have been consolidated, with *Caulkett* as the lead case. The petitioner's brief was filed on January 9, 2015, and the respondent's brief is due on February 17, 2015. As of this writing, the date of argument has not been set.

## USTP Ongoing Enforcement Activities

### *Mortgage Servicers*

Since USTP Director Cliff White last spoke to the NABT regarding the National Mortgage Settlement (NMS), the NMS Monitor released his latest report on servicer compliance with the settlement. The Monitor's report is available at [www.mortgageoversight.com](http://www.mortgageoversight.com) and covers the first and second quarters of 2014. The report discusses the four remaining settling servicers—Bank of America, Chase, Citi and Wells Fargo. It also includes Ocwen and Green Tree, both of which became subject to NMS compliance monitoring after purchasing substantially all the servicing portfolio of GMAC Mortgage, the fifth settling servicer.

The monitor reported two new metric failures by Bank of America and one by Citi. The other servicers passed their metric testing during this period, including testing of the new metrics. In accordance with the settlement, both banks have implemented corrective action plans approved by the monitor and will now engage in cure testing. In addition, the monitor certified that Bank of America cured its non-compliance related to affidavits attached to motions seeking relief from the automatic stay, which was reported in an earlier report.

The report also chronicled the status of Green Tree's eight existing failures, including all three of the bankruptcy specific metrics. The monitor determined that Green Tree satisfactorily completed corrective action plans for two of the three bankruptcy metric failures and cured the

remaining bankruptcy failure. Green Tree cured one other non-bankruptcy related metric failure and completed corrective action plans for the remaining four metric failures.

The monitor reported problems with Ocwen's Internal Review Group, which the monitor determined was not independent as required by the NMS. In addition, the monitor reported that he is investigating allegations that Ocwen backdated loss mitigation communications sent to borrowers. Ocwen maintains that any backdating was the result of a faulty setting on its system and that it has taken action to remedy the situation.

### *Unsecured Creditors*

Director White also spoke to NABT members about the USTP's review of unsecured claims to determine compliance with disclosure rules such as the identification of the initial creditor and the date of the last payment on the account. Director White stated that, as part of the Program's final phase of this project, a handful of offices had been selected to measure compliance by a sample of high claims filers. Through this project the Program identified major nationwide unsecured claims filers with potential systemic issues. These issues include potential "robo-signing" of unsecured claims, failure to comply with Bankruptcy Rule 3001(c)(3) governing claims on revolving consumer debt, and the filing of claims after the expiration of all known statutes of limitations, which forces trustees to expend estate resources objecting. The Program is investigating these issues and will seek to resolve them to ensure the integrity of the claims process.

In recent months the USTP also has become actively involved in investigating whether several large banks are violating the bankruptcy discharge injunction by allegedly keeping discharged debts "alive" on consumer credit reports. The Program is investigating these allegations and is seeking discovery from the banks allegedly involved.

### Conclusion

With new rules and forms, and new and continuing challenges for the USTP as "watchdog" of the bankruptcy system, 2015 is definitely going to be an exciting year for the Program and trustees alike. I'm looking forward to it!