

Successful Projects in 2014 Include Training, Percentage Fee Policy and Unsecured Claims Review

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By the time this article is published, Calendar Year 2014 will have drawn to a close, and I will have completed my 22nd year with the United States Trustee Program (Program). What keeps my job in the Office of Oversight exciting after all these years is the wide variety of trustee oversight matters we address each year. This year's accomplishments, which I share in this article, illustrate my point.

While this article focuses on issues that affect chapter 13, Cliff White, Director of the Executive Office for U.S. Trustees (EOUST), provided a comprehensive summary of the Program's recent activities in his written statement before the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law. The oversight hearing scheduled for September 19, 2014, was postponed, but Director White's written statement was posted on the Judiciary Committee's Web site at <http://judiciary.house.gov/index.cfm/hearings?ID=0BEA6BB1-A167-477A-9706-7184089A8C0E> and on the Program's Web site at http://www.justice.gov/ust/eo/public_affairs/testimony/index.htm. For a full view of the Program's responsibilities and accomplishments, I encourage you to read the Director's statement.

Training

The Program puts a high priority on training our staff so they stay up to date on issues that affect trustees, including legal issues and technological advances, and can conduct annual standing trustee training. In years when budgetary constraints did not allow in-person training, we conducted training using remote tools such as LiveMeeting and videoconferencing. In August 2014, however, we were able to offer in-person training to Program attorneys and analysts involved in standing trustee oversight. Topics included legal issues, case administration, financial oversight, employment law and professional responsibility, and speakers included several standing trustees and local attorneys. In addition to discussing current bankruptcy issues and case law, such training provides a forum for trustees and Program staff to exchange information and suggestions that may improve trustee practice.

The Program also places a high priority on training trustees. Those of you who have been trustees for a while know that the Program periodically conducts national seminars for newer standing trustees at the National Bankruptcy Training Institute, located at the National Advocacy Center in Columbia, S.C. We do not plan to provide chapter 13 trustee training in FY 2015, but we are looking at conducting a seminar in FY 2016, particularly because we have more than the usual number of new standing trustees. We have seen an increase in trustee resignations over the past three years, with three resignations in FY 2012, three more in FY 2013 and six in FY 2014. Moreover, we have already been advised of five resignations to come in FY 2015. Some trustees retire, other trustees go on to other positions and still others, we are pleased to note, become bankruptcy judges. While not all of the standing trustees who left were replaced, by FY 2016 we

expect to have appointed at least 10 new standing trustees since our last newer trustee training in 2012.

Audits

Chapter 13 standing trustees prepare annual reports that show the activity in the trust account and the expense account for the fiscal year. This annual report is audited annually by an independent accounting firm. To ensure independence in auditing, the audit services agreement precludes a trustee from being audited by the same firm for more than five years.

In the spring of 2014, the Program bid out audits for 120 standing trustees—two-thirds of the total number of trustees. While the retention of a new audit firm generally results in significantly more work for the standing trustee during the first year, we believe the benefits resulting from new auditors justify this requirement.

Timing of Collection of Percentage Fees on Receipts

In July 2012, the Program informed standing trustees that they could collect and retain a percentage fee on receipts in cases that dismiss or convert prior to confirmation. This policy conclusion was the result of a detailed analysis of 28 U.S.C. § 586(e)(2) as part of our brief filed in *In re Antonacci*, No. BK-S-08-23349-LBR (Bankr. D. Nev., Dec. 27, 2011).

In 2014, the Program further modified our policy implementing 28 U.S.C. § 586(e)(2), to address when the standing trustee may collect the percentage fee. Effective in FY 2015, standing trustees collect the percentage fee from all payments received under the chapter 13 plan at the time of receipt of the payment. This is a change from the prior practice of earning the percentage fee upon receipt of payment but collecting it upon disbursement. Interestingly, this is a return to the policy in place over 25 years ago.

The Program and the standing trustees have reached out to bankruptcy judges and the bankruptcy bar to inform them of this policy change and to explain that it affects only the timing of collection of the percentage fee. In many ways, this change leads to a more transparent system—the percentage fee is collected at the time of receipt using the percentage fee in effect at time of receipt.

Some jurisdictions have form plans or local rules containing language that affect the timing of collection. For example, some plans or rules state that “the trustee shall collect the percentage fee upon disbursement.” This language was likely added to assist in implementing our former policy, but now is inconsistent with our statutory interpretation. We are working with local bankruptcy communities to modify that language as needed to implement the new policy. We have also redesigned the standard forms used by standing trustees to report activity to the U.S. Trustee.

Throughout the implementation period, we worked closely with the NACTT and software vendors on the substantial programming changes required. We appreciate the NACTT’s assistance in educating the trustees and bankruptcy community about the policy change, coordinating pilot programs to ensure the software worked as anticipated and assisting in the development of new forms.

Unsecured Claims Review

As EOUST Director White noted at the NACTT's Annual Seminar last July, the Program reviewed claims filed on unsecured consumer revolving debt to determine compliance with amendments to Bankruptcy Rule 3001(c)(3) that took effect in December 2012. The Program reviewed thousands of proofs of claims (POCs) filed by various creditors or their filing agents, uncovering great variations among claims filers.

Based on these findings, the Program developed informational resources for our staff to use to assist private trustees in reviewing POCs under the amended rule and a presentation for local outreach at bar association meetings. We also gave a presentation about the rule amendments at a roundtable attended by a variety of entities that file unsecured claims. Whether due to enhanced oversight or simply to increased familiarity with the rule, many major creditors began to improve their practices by filing compliant or amended POCs.

Program staff have significant expertise in identifying violations of Rule 3001(c)(3), but we welcome and rely upon additional information from trustees and others in the bankruptcy community. Our current focus is on high-volume claims filers. We are interested in systemic or egregious rule violations, claims filed on discharged debt, a pattern or practice of filing invalid claims, and a pattern or practice of improper privacy protected information disclosures. We ask trustees to notify the U.S. Trustee when they encounter these abuses, because debtors may lack the resources or economic incentives to dispute claims.

Effective Communications

A working group of bankruptcy judges, U.S. Trustees and chapter 13 standing trustees has been looking into ways to enhance case administration through direct communication within the ethical parameters of the Rules of Professional Conduct, the Code of Conduct for United States Judges and Bankruptcy Rule 9003. The working group recently developed an Effective Communications Guide that provides suggested best practices for improving communications among judges, standing trustees and U.S. Trustees while avoiding *ex parte* communications prohibited by applicable ethical standards and rules.

The guide is an excellent resource and has been shared with the Board of Governors of the National Conference of Bankruptcy Judges. As of this writing, the guide has been disseminated to the NACTT for inclusion on the NACTT Web site.

Mortgage Servicer Violations

A centerpiece of the Program's consumer protection efforts has been vigorous enforcement of the Bankruptcy Code and Rules against mortgage servicers who inflate their claims or otherwise fail to comply with bankruptcy requirements of accuracy, disclosure and notice to their customers in bankruptcy. Initially the Program focused on obtaining court decisions against mortgage servicers, their attorneys and their agents. It became clear, however, that there was a protracted, widespread and national problem, so the Program changed its strategy and took a broader approach.

Director White has spoken on more than one occasion about the National Mortgage Settlement (NMS), which was entered into in 2012 and required the five settling servicers to pay

\$25 billion in assistance to homeowners and penalties, and to adhere to a uniform and comprehensive set of mortgage servicing standards. The Program's work on this settlement continued in 2014 as we served as the federal co-chair of the NMS Monitoring Committee, which monitors the servicers' compliance with the settlement, including the bankruptcy-related servicing standards.

In addition, in December 2013, 49 state attorneys general, the District of Columbia and the Consumer Financial Protection Bureau (CFPB) announced a settlement with Ocwen Financial Corporation and Ocwen Loan Servicing to address systemic misconduct with respect to its mortgage servicing practices. Under the settlement, Ocwen must pay \$125 million to borrowers who lost their homes to foreclosure and provide \$2 billion in first lien principal reductions. In addition, Ocwen must implement new servicing standards similar to those required under the NMS, with compliance overseen by the NMS monitor. Although the Program was not a signatory to the settlement, we developed servicing standards to address bankruptcy specific issues that were incorporated into the settlement.

Most recently, in June 2014 the Department of Justice, the Department of Housing and Urban Development, the CFPB, 49 states and the District of Columbia reached an agreement with SunTrust Mortgage Inc. to address mortgage origination, servicing and foreclosure abuses. Under the agreement, SunTrust will pay nearly \$1 billion, including \$500 million in consumer relief for homeowners, and adopt the NMS servicing standards. SunTrust, like the other settling servicers under the NMS, must make significant changes in how it services mortgage loans, handles foreclosure and ensures the accuracy of information provided in bankruptcy court. The Program amassed evidence of SunTrust practices and helped develop an additional metric to ensure customers' privacy protected information is not disclosed in bankruptcy filings, and will ensure SunTrust implements the bankruptcy specific servicing standards.

Conclusion

On a national level, the Program continued its efforts to identify creditor abuse and make the bankruptcy system more transparent to all stakeholders. We hope that our policy changes regarding trustee practices and our training efforts have also helped to make the bankruptcy process more transparent and case administration more efficient. We worked closely with the NACTT on many of these projects in 2014, and we look forward to continuing our positive working relationship in the future.