Department of Justice

STATEMENT OF

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U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING CONCERNING

OVERSIGHT OF THE UNITED STATES TRUSTEE PROGRAM

PRESENTED

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Statement of Director Clifford J. White III
Executive Office for United States Trustees
U.S. Department of Justice
Before the Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
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Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before you to discuss the activities of the United States Trustee Program (USTP or Program). On behalf of our nearly 1,100 dedicated staff across the country, I can report that the Program is achieving its mission to enhance the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public.[1]

The Program employs attorneys, financial analysts, and support staff in 92 field office locations across the country, as well as in the Executive Office in Washington, DC. We perform a broad array of administrative, regulatory, and enforcement functions that are essential to the effective and fair operation of the bankruptcy system which, in Fiscal Year 2015, served nearly 819,000 debtors and their creditors. The USTP covers more than 300 court sites where bankruptcy judges conduct hearings and more than 400 sites where administrative proceedings are held.

Since our last oversight hearing in May 2015, the USTP has continued on a steady path of vigorous and balanced enforcement of the Bankruptcy Code. We take actions against debtors, creditors, and others who attempt to compromise the integrity of the bankruptcy system; work to ensure greater accountability by management and professionals in business chapter 11 cases; and faithfully adhere to the statutory mandates governing the Program.

Congress established the USTP as a neutral "watchdog" of the bankruptcy system.[2] Among other things, we advocate for the faithful application of the law against parties who seek

[1] The USTP has jurisdiction in all judicial districts except those in Alabama and North Carolina. In addition to specific statutory duties and responsibilities, United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title." 11 U.S.C. § 307.

[2] *See* H.R. Rep. No. 595, 95th Cong., 2d Sess. 88 (1977) (United States Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena.").

to advance their own economic interests to the detriment of other stakeholders in a case. We also urge greater transparency and disclosure on issues ranging from executive bonuses to conflicts of interest by professionals to corporate governance.

Civil Enforcement and Means Testing

A core function of the USTP is to combat bankruptcy fraud and abuse. The majority of our actions address abuse by debtors who attempt to conceal assets, evade the repayment of debts when they have disposable income available to pay them, or commit other violations. Similarly, we combat fraud and abuse committed by attorneys, bankruptcy petition preparers, creditors, and others against consumer debtors by pursuing a variety of remedies, including disgorgement of fees, fines, and injunctive relief.

In Fiscal Year 2015, the Program took nearly 32,000 civil enforcement actions, including court filings and out of court actions, with a potential monetary impact of $1 billion in debts not discharged and other relief. Since we began tracking our results in 2003, we have taken more than 686,000 actions, with a potential monetary impact in excess of $16.3 billion.

Means Testing

One of the major responsibilities of the United States Trustees is to administer and enforce the "means test." The means test was enacted more than ten years ago under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and its primary purpose is to help determine the eligibility of individuals for chapter 7 bankruptcy relief. Under the means test, all individual debtors with primarily consumer debt and income above their state median are subject to a statutorily prescribed formula, based partially on allowable expense standards issued by the Internal Revenue Service for its use in tax collection, to determine disposable income.[3] A case with disposable income above $214.17 per month is presumed abusive and may be dismissed.

The effectiveness of the means test largely depends on the United States Trustees to identify cases that are presumed abusive under the statutory formula and to file actions to dismiss those cases when appropriate. In fact, the USTP is required by law to file with the court either a motion to dismiss a presumed abusive case or a statement explaining the reasons for declining to file such a motion (*i.e.*, special circumstances that justify an adjustment to the current monthly income calculation). Common reasons to decline filing a motion to dismiss include recent job

[3] By statute, disabled veterans whose debts were incurred primarily while on active duty or while performing a homeland defense activity are excepted from the means test. On December 18, 2015, the President signed the National Guard and Reservists Debt Relief Extension Act of 2015, which exempts qualifying reservists and National Guard debtors called to active duty or to perform a homeland defense activity for not less than 90 days from the means test. This exemption is set to expire on December 19, 2019.

loss or continuing medical debt. Unfortunately, consumer debtors' counsel often do not provide information about these special circumstances and frequently the USTP must engage in a labor-intensive investigative process before deciding whether to take an action within the time constraints set forth in the Bankruptcy Code.

In the exercise of discretion given to us by Congress, in Fiscal Year 2015, the USTP declined to file a motion to dismiss in about 68 percent of presumed abusive cases that did not voluntarily dismiss or convert to a chapter 13 repayment plan. The percentage of declinations was less than 35 percent in the year after the means test was enacted, but in recent years has exceeded 60 percent. This trend suggests that the objective criteria of the means test are now well established and that debtors' counsel file presumed abusive cases primarily because those cases satisfy statutory exceptions.

It is important to note that even if a case is not presumed to be abusive under the means test, the law permits the USTP to take action under a bad faith or a totality of the circumstances analysis.[4] For example, the case of a debtor who retains luxury items, incurs debt on the eve of bankruptcy, or fails to disclose fully the information required by the Bankruptcy Code and Rules may be subject to dismissal based on motion of the United States Trustee.

Consumer Protection

The USTP continues to play an active role in the Department of Justice's (DOJ) efforts to protect Americans from financial fraud and abuse. United States Trustees take civil enforcement actions against creditors, lawyers, bankruptcy petition preparers, and other parties who act improperly towards debtors.

Creditor Violations

The USTP's approach of addressing multi-jurisdictional violations through a coordinated enforcement effort that holds creditors accountable and protects consumers has proven effective. Since the Program's last oversight hearing, the USTP entered into two national settlements with financial institutions. To date, we have entered into 12 national settlements that have addressed a range of violations, including the collection of discharged debt, improper disclosure of privacy protected information, the filing of inaccurate and inflated claims, and failure to provide court-required notices. The settlements reflect a litigation strategy to combat national systemic violations of the Bankruptcy Code and Rules with national solutions.

[4] 11 U.S.C. § 707(b)(2) provides for dismissal under the means test. 11 U.S.C. § 707(b)(3) provides for dismissal under a "bad faith" or "totality of the circumstances" test.

In February, the USTP participated in a settlement between the DOJ and its federal and state partners with HSBC Bank resolving a panoply of mortgage loan origination and servicing claims, including the servicing of loans of borrowers in bankruptcy. The agreement provides for $470 million in relief to consumers, as well as payments to federal and state parties. It also binds HSBC to mortgage servicing standards and independent monitoring of its compliance with the agreement.

Although we continue to pursue a number of additional actions with our federal and state partners, we also investigate and enter into national settlements that are confined to bankruptcy-specific violations and do not involve other regulatory and enforcement authorities. For example, we recently identified cases involving major national banks that, years after entering into the $25 billion National Mortgage Settlement, were still failing to comply with bankruptcy law. In particular, some banks systematically failed to timely and accurately notify bankruptcy customers about changes in mortgage payments and to provide timely and accurate escrow analyses.

In November 2015, the USTP announced an $81.6 million settlement with Wells Fargo to address the bank's failure to provide homeowners in bankruptcy with legally required notices, thereby denying homeowners the opportunity to challenge the accuracy of mortgage payment increases. These failures, which affected nearly 68,000 homeowners, violated federal bankruptcy rules that took effect in December 2011 and imposed more detailed disclosure requirements to ensure proper accounting of fees and charges on homeowners in bankruptcy.

In addition, just a few weeks ago, Wells Fargo agreed to pay $3.5 million to about 8,000 borrowers in bankruptcy for its failure to timely provide notice of mortgage payment changes. The work of the independent reviewer installed under the USTP's November 2015 settlement with Wells Fargo identified a systemic problem with the mailing of payment change notices to borrowers after the date of filing. As a result, some borrowers were billed for mortgage increases without receiving the period of advance notice mandated under the Bankruptcy Rules. Further, notices filed with the bankruptcy courts reflected the incorrect date of mailing to the borrowers. Wells Fargo now has changed its practices and soon will remediate the affected debtors.

Even as we continue to investigate violations within the mortgage arena, we also have launched investigations into the conduct of creditors who engage in the buying and selling of unsecured consumer claims. Systemic violations ranging from the robo-signing of court documents, the collection of discharged debt, and abuse of process through filing high volumes of stale debt claims are among the matters being reviewed, and some of these matters are in the latter stages of investigation.

By leveraging the resources of our 92 field offices to engage in discovery and other litigation around the country, we can amass representative evidence, detect patterns of violations, and then seek global resolution of problems of national scope. Generally, these resolutions are court-approved and ordered, and include monetary payments and other relief to debtors, changes to internal practices, and long-term compliance monitoring by an independent party acceptable to the USTP and paid for by the creditor. All agreements can have variations, but we have developed what we consider to be an effective investigative strategy and formula for resolving broader systemic misconduct.

Our success as an enforcement agency is demonstrated not only by the settlements we have achieved to date, but by the reaction we have received from the financial community, which has begun to self-report to us on operational flaws they have detected through their own internal compliance reviews or when localized USTP inquiries or enforcement actions have led them to the discovery of broader problems. While we are prepared to litigate when necessary, this trend is a welcome outgrowth of the success of our enforcement efforts and may augur well for the future consensual and efficient resolution of larger scale violations.

Professional Misconduct

The USTP has a long history of rigorous enforcement of the Bankruptcy Code and Rules against attorneys and others who fail to perform their duties to their consumer clients. For example, in Fiscal Year 2015, we filed nearly 900 court actions against professionals and non-attorney bankruptcy petition preparers who failed to provide services in accordance with law. Most recently, the USTP has launched investigations into allegations of consumer debtors' counsel operating nationally who solicit clients through the Internet and may be engaged in improper practices. Our investigation and enforcement strategies will be patterned after our success in addressing mortgage servicer misconduct and will reflect a coordinated national approach that is designed to identify and ensure complete and effective relief for harm inflicted on debtors, creditors, and the bankruptcy system.

Criminal Enforcement

Criminal enforcement is another key component of the Program's efforts to uphold the integrity of the bankruptcy system. In Fiscal Year 2015, the Program made 2,131 bankruptcy and bankruptcy-related criminal referrals. We cooperate with our federal and state law enforcement partners, including as an active member of the President's Financial Fraud Enforcement Task Force and more than 75 local bankruptcy fraud working groups, mortgage fraud working groups, and other specialized task forces throughout the country. Approximately 25 attorneys throughout the Program are designated as Special Assistant U.S. Attorneys to assist U.S. Attorneys' offices in the prosecution of bankruptcy and bankruptcy-related crimes. In addition, many other staff–including attorneys, bankruptcy analysts, and paralegals–are

frequently called upon to assist with investigations and to provide expert or fact testimony at criminal trials.

Part of the success of the Program's criminal enforcement work is a result of our expansive training of federal, state, and local law enforcement personnel, USTP staff, private trustees, and members of the bar and other professional associations. In Fiscal Year 2015, the USTP presented more than 100 training programs that reached approximately 3,700 personnel. Notable among these programs was the launch of a series of bankruptcy fraud training conference calls for FBI agents that were created in partnership with the Financial Institution Fraud Unit of the FBI's Criminal Investigative Division.

Chapter 11 Business Reorganization Issues

The Program carries out significant responsibilities in business reorganization cases. These responsibilities include such matters as appointing official committees of creditors and equity security holders, objecting when appropriate to the retention and compensation of professionals, reviewing and objecting to disclosure statements to ensure adequate information is provided to stakeholders, appointing trustees and examiners when warranted, enforcing the statutory limitations on insider and executive compensation, and moving to dismiss or convert about one-third of chapter 11 cases each year because they are not progressing towards financial rehabilitation. We do not substitute our business judgment for that of incumbent management (*i.e.*, the debtor-in-possession (DIP)), but the role of the USTP is critical to protecting the interests of all stakeholders by advocating for strict compliance with the law and promoting management and professional accountability.

Professional Fees

The USTP plays a key role in ensuring that professionals who are employed and paid by the bankruptcy estate (and ultimately by creditors) satisfy the statutory standards set forth in section 330 of the Bankruptcy Code. Even though all parties can object to the payment of fees, professionals rarely attack other professional's fees except as a tactic to gain an advantage in a case. As a result, the USTP generally is alone in reviewing and objecting to applications that include excessive or questionable fees.

Attorney Fee Guidelines in Large Chapter 11 Cases

In November 2013, the USTP published new guidelines for attorneys' fees in large chapter 11 cases. The USTP lacks statutory authority to promulgate binding rules in this area, so the guidelines serve only as a public statement of the criteria the USTP will use in evaluating whether attorneys have met their statutory burden to receive compensation from the estate. In

particular, the guidelines address disclosures professionals should make to demonstrate that the requested fees reflect market rates.

In September of 2015, the Government Accountability Office (GAO) issued a report on the implementation of the USTP's fee guidelines.[5] Significantly, the GAO did not recommend any changes to the guidelines or their implementation. Not surprisingly, however, the GAO did find that practitioners held mixed views on the guidelines. In our formal response to the GAO, we commented that the report provided a helpful compilation of stakeholder observations that demonstrated that initial opposition to the guidelines was yielding to compliance and improved billing practices.

The USTP's experience to date demonstrates that the guidelines have been effective. Among other things, they have highlighted instances of disclosures that do not comply with statutory standards. For example, applications showed instances where firms that provided pre-petition fee discounts to their client did not extend those same discounts after the client filed for chapter 11 relief. Issues such as these have been resolved largely through modification of the retention or fee application once the concern was raised by the United States Trustee.

As we continue to review compliance, the USTP will increasingly expect firms to provide more complete and responsive information, especially regarding comparable billing data. We intentionally have avoided litigation whenever possible and hope to continue to do so. But, to avoid future objections to fee applications, law firms will be expected to provide more substantive explanations of apparent rate disparities.

The Supreme Court's Decision in Asarco v. Baker Botts

The major legal development on the professional compensation front this past year was the Supreme Court's June 2015 decision in *Asarco v. Baker Botts.*[6] In its decision, the Court held that law firms cannot recover fees for defending objections to their fee applications in bankruptcy court. Law firms almost immediately challenged the boundaries of the *Asarco* decision. The lead case to test the issue was *Boomerang Tube* in the District of Delaware.[7] In that case, the firm sought to enter into agreements with the debtor or committee under 11 U.S.C. § 328 for the payment of fees for fee application defense. The USTP objected and, in January

[5] U.S. Gov't Accountability Office, GAO 15-839, *Corporate Bankruptcy: Stakeholders Have Mixed Views on Attorneys' Fee Guidelines and Venue Selection for Large Chapter 11 Cases* (September 23, 2015). The GAO report also addressed venue selection for large chapter 11 cases. Among the findings were that 18 of 25 judges interviewed by the GAO stated that professional fees were a factor in venue selection.

[6] *Baker Botts, L.L.P. v. ASARCO, LLC*, 135 S. Ct. 2158 (2015).

[7] *In re Boomerang Tube, Inc.*, 548 B.R. 69 (Bankr. D. Del. 2016).

2016, the bankruptcy court sustained our objection to the retention application and held that such agreements are not permissible under the Bankruptcy Code as interpreted by *Asarco*.

Additional test cases in other districts are expected, and the USTP again will be actively engaged in cases to vindicate the Supreme Court's ruling. The USTP has posted on our website a series of questions and answers related to *Asarco* so that firms have full knowledge of our likely response should they attempt to narrow the application of the Court's decision.

Financial Reporting

Among our basic responsibilities in chapter 11 is to ensure proper financial reporting by the DIP. Chapter 11 monthly operating reports provide critical information that allow courts, creditors, and the USTP to assess progress toward financial rehabilitation and compliance with bankruptcy requirements. These reports often are the source of USTP motions to convert or dismiss cases or to seek other relief.

The USTP currently is engaged in a formal rulemaking to standardize uniform mandatory monthly operating reports for non-small business cases. We published a Notice of Proposed Rulemaking in November 2014, and received widely divergent comments on how to devise uniform reports that could accommodate both individual chapter 11 debtors as well as larger businesses. Some urged that we mandate detailed reports that exceed the filing requirements of the Securities and Exchange Commission, while others encouraged much sparser reporting. So that we could gather additional information, we reopened the comment period on the rulemaking and held a public meeting in February 2016 where various constituencies provided oral testimony and answered follow-up questions. The additional information received during the public meeting has been extremely valuable in preparing the Final Rule.

Corporate Governance

The United States Bankruptcy Code, unlike many other insolvency systems around the world, permits incumbent management of a chapter 11 debtor to remain in control of the company absent unusual circumstances. When fraud or gross mismanagement is suspected, the USTP will file a motion to replace management in favor of an independent chapter 11 trustee to run the business or to appoint an examiner to conduct an independent investigation. These motions generally face considerable resistance to the appointment or scope of investigation.

One recent success story is our appointment of an examiner in the *Caesars' Entertainment* case in the Northern District of Illinois.[8] Though there was a lengthy dispute over

[8] *In re Caesars' Entertainment Operating Co*., No 15-011145 (N.D. Ill. filed Jan. 15, 2015). All of the major stakeholders consented to the need for an examiner, but the scope of the investigation was contested.

the scope of the investigation, which is typical of most examiner appointments, the United States Trustee ultimately appointed an examiner whose investigation was widely praised for providing a potential roadmap for a more efficient resolution of the case.

The USTP faces significant obstacles in seeking to remove management in favor of a neutral trustee. One of these hurdles is the high burden of proof required in certain districts in which some of the largest cases are filed. Instead of the traditional "preponderance of the evidence" standard applied generally throughout the Bankruptcy Code,[9] entrenched management may continue to operate chapter 11 debtors unless there is "clear and convincing" evidence of wrong-doing.[10]

Among the most common arguments made by DIPs against the appointment of a trustee is that the bad management was dismissed right before or after the bankruptcy filing, so previous transgressions are not relevant. Unfortunately, that argument has prevailed even in cases in which senior officers hand-picked by the discredited prior management are placed in control of the company. In other cases, the DIP asserts that a sale or other pivotal transaction is imminent and that the appointment of a trustee will upset delicate negotiations, or the DIP negotiates dubious loan covenants that imperil the financial condition of the company if management is replaced. Not surprisingly, in many of these cases, the sale or other critical transaction never materializes and there is further diminution of the estate. Incumbent management and their professionals stay in power longer and get paid handsomely for their services while creditors often suffer.

Despite the obstacles placed in our way, the USTP will continue to move for the appointment of examiners or chapter 11 trustees where there are concerns about possible fraud or where incumbent management committed or is tainted by prior acts of misconduct. We do not believe the Bankruptcy Code requires a higher standard of proof for removing entrenched corporate management than it does for imposing draconian relief on consumer debtors.

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[9] In *Grogan v. Garner*, 498 U.S. 279 (1991), the Supreme Court held that a creditor needs only to prove by a preponderance of the evidence that an individual debtor obtained credit by fraud and thereby have the creditor's claim excepted from the bankruptcy discharge under 11 U.S.C. § 523(a)(2). Similarly, courts generally apply a "preponderance" standard in imposing a denial of the discharge of all debts under 11 U.S.C. § 727. This relief is often referred to as the "death penalty" in bankruptcy cases.

[10] The American Bankruptcy Institute (ABI) Commission to Study the Reform of Chapter 11, on which the Director of the USTP served as a non-voting *ex officio* member, favored a statutory amendment to clarify that the burden of proof for ordering the appointment of a trustee under section 1104 is "preponderance of the evidence." The Commission's position is consistent with the USTP's view that "preponderance" is the correct standard under current law.

Transparency and Disclosure by Companies and Professionals

The linchpins of the bankruptcy system are transparency and disclosure. All legal systems require those attributes, but the bankruptcy system does more so than others because a bankruptcy case is not a two-party dispute. Rather, it involves a multiplicity of interests. The Bankruptcy Code carefully balances the rights of all parties and guarantees openness in court procedures.

A major reason for the creation of the USTP was to establish a neutral party without a financial interest in the outcome of the case to ensure consistent application of the law. Often, we are the only party to ask the court to "turn on the lights" so that all stakeholders, including the public, can see what is transpiring and have access to critical information.

Disclosure of Conflicts of Interest

One aspect of our chapter 11 practice where we have seen significant issues over the past year relates to the disclosure of conflicts of interest by professionals seeking to be retained by a bankruptcy estate or by an official committee of creditors. Professionals are required to reveal their connections to all parties involved in a case so that the court, the USTP, and other parties can evaluate whether the professionals have any disabling conflicts of interest. For example, it is not unusual for a law firm that seeks retention as debtor's counsel to also represent a creditor in an unrelated matter. Although such representation is not *per se* disqualifying, such connections must be fully disclosed so a determination can be made as to whether the connection is a disqualifying conflict of interest that should prevent retention.

In Fiscal Year 2015, the USTP filed approximately 500 formal objections to retention on the basis of inadequate disclosure or conflicts of interest. This is an area of practice of increasing significance as law firms, financial advisory firms, and other professional firms grow in size and complexity.

Sealing of Records

Another noteworthy issue addressed by the USTP is the sealing of records. There is anecdotal evidence that private practitioners are filing a growing number of motions to seal documents. The USTP interprets the sealing provisions of section 107 of the Bankruptcy Code and Bankruptcy Rule 9018 as setting a high bar for the court to deviate from the presumption in favor of open court records and proceedings.

We often will object, for instance, to executive bonus motions that do not provide information about the nature, amounts, and possible recipients of bonuses or that seek to seal

such information. While it might sometimes be appropriate to withhold the names of executives, it is not good practice to withhold other information that is needed to reasonably evaluate a bonus motion. Disclosure of the organizational level of an executive and the precise benchmarks that the executive must achieve to receive the bonus are essential for parties to make informed decisions on whether to object to the compensation.

We also disfavor sealing examiner reports, other than brief temporary seals so that parties, and the court if necessary, can resolve any objections to the public disclosure of privileged or otherwise protected information. In one case, an entire report was sealed for the avowed purpose of incentivizing a settlement. The USTP filed papers with the court supporting the unsealing of the report.

Post-Confirmation Trusts

Finally, the USTP has focused more attention on post-confirmation trusts. Though the USTP has limited authority to police the conduct of post-confirmation trusts, such instruments are becoming common features of large corporate reorganization plans that provide for resolutions of claims, litigation, and other activities and allow monies to be collected and then distributed to creditors. The ABI Commission to Study the Reform of Chapter 11 noted in its report that transparency has been compromised by the increased use of post-confirmation trusts to resolve core economic issues affecting both debtor and creditor rights. The Commission made several recommendations, including that more detailed disclosure of the corporate governance of the trusts, standards for resolving claims and distributing proceeds, and mechanisms for creditors to object to trust administration and seek court relief should be required. We believe these are valid recommendations and that such disclosures may be required under existing law.

The USTP objects to disclosure statements that contain inadequate information about the corporate governance of trusts. In one recent case, the USTP objected to a disclosure statement because it neither provided copies of the final post-confirmation trust agreement nor otherwise disclosed the critical terms of the trust. Among other things, the objection also took issue with the failure to adequately explain the process by which the post-confirmation trustee would be selected. Ultimately, the DIP amended the disclosure statement to provide the requested disclosures.

Appellate Practice

One of the most important roles the Program plays in the bankruptcy system is to identify and raise issues for review on appeal, thereby ensuring that the law is shaped, interpreted, and applied evenly in all judicial districts. When substantial rights and financial interests of creditors large and small are affected, the clearer the standards and the law, the better for stakeholders –

not only in the case at hand but in the larger marketplace as well. Predictability is good, both in law and in business.

The Program has participated in more than 325 appeals to bankruptcy appellate panels, district courts, courts of appeals, and the Supreme Court in the past three Fiscal Years. Many of the appeals we participate in arise from enforcement actions we have prosecuted, but we also intervene as *amicus* in many other cases. In all of our litigation activities, but especially in deciding our position on bankruptcy appeals, the USTP is guided by its role to define the boundaries of bankruptcy practice so that monied interests in the case do not exercise power beyond what Congress allows. Sometimes, our strict adherence to the Bankruptcy Code puts us on the side of large creditors. In other instances, we favor the position of other stakeholders, such as the corporate debtor's employees. And still other times, we are the sole objector to agreements made by creditors and incumbent management that favor their stake in the case over the interests of other creditors who lack the financial wherewithal to challenge.

An example of our role in advocating for the most faithful reading of the Bankruptcy Code arose in the *Jevic Holding Corporation* case.[11] In that case, the USTP lost as *amicus* in the Third Circuit on the issue of whether a settlement and structured dismissal may be used to distribute estate funds without following the Bankruptcy Code's priority scheme. We sided with the fired employees who held priority claims and yet were paid nothing in the settlement. The Program argued that the issue has potentially broad implications for a number of creditor practices in corporate reorganization cases. The USTP was a signatory on the brief filed by the Solicitor General urging the Supreme Court to grant *certiorari* in the case. In June, the Court accepted the case for review.

Private Trustee Oversight

One of the core duties of the United States Trustees is to appoint and supervise the private trustees who administer consumer bankruptcy estates and distribute dividends to creditors. The Program also trains trustees, evaluates their overall performance, reviews their financial accounting, and ensures their prompt administration of estate assets.

In Fiscal Year 2015, United States Trustees oversaw the activities of approximately 1,400 private trustees appointed by them to handle the day-to-day activities of approximately 1.8 million ongoing cases. These trustees distributed more than $10 billion from the assets of estates.

Chapter 7 trustee compensation continues to be a matter of concern. In 1994, Congress provided for payment of $60 per case to the private trustee from the fees paid by the debtor upon

[11] *Czyzewski v. Jevic Holding Corp.*, No. 15-649 (U.S.).

filing a bankruptcy petition. Chapter 7 trustees also may receive an additional amount in cases with assets based upon a percentage of the distributions made to creditors. The $60 amount paid to trustees has not been increased in 22 years.

Nationwide, in Fiscal Year 2015, total chapter 7 trustee compensation from all sources–including no-asset case fees, commissions on distributions in asset cases, and fees to the trustee as professional in a case–declined by 5.9 percent (factoring out one anomalous case). This is the third consecutive year of decreased income for trustees. Accordingly, we believe an increase in the $60 basic fee is appropriate, but do not endorse any specific proposal for achieving this increase.

Credit Counseling and Debtor Education

Individual debtors must receive credit counseling before filing for bankruptcy relief and personal financial management instruction before receiving a discharge of debts. These requirements are intended to ensure individuals make informed financial decisions before entering bankruptcy and to provide debtors with the tools to avoid future financial catastrophe when they exit bankruptcy. United States Trustees are responsible for the approval of providers who meet statutory qualifications to offer credit counseling and debtor education services to debtors. There currently are approximately 120 approved credit counseling agencies and 200 approved debtor education providers.

Fiscal Year 2016 Appropriation and Fiscal Year 2017 Appropriation Request

The amounts appropriated by Congress to the USTP are offset by a portion of the fees paid by bankruptcy debtors that are deposited into the United States Trustee System Fund (the "Fund"). Approximately 61 percent of the Program's revenue is derived from quarterly fees in chapter 11 reorganization cases; 38 percent from filing fees paid in chapters 7, 11, 12, and 13 cases; and one percent from interest earnings and miscellaneous revenues.[12]

In the past ten years, the USTP has taken on additional duties under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, greatly expanded its national consumer protection initiatives (including investigating mortgage servicer misconduct and fraudulent legal service providers), and undertaken more complex litigation. We are doing more without a commensurate increase in funding. In fact, the USTP's budget for Fiscal Year 2016 is $30 million, or 13 percent, below its Fiscal Year 2007 funding level when adjusted for inflation. The USTP has absorbed this differential in funding from its base resources.

[12] Revenues fluctuate with the number of filings each year. Filings in USTP jurisdictions reached a peak of nearly 1.7 million cases in Fiscal Year 2005, plummeted for the next two years, and then rose precipitously for three years before beginning a five-year decline. Recent trends show the decline in filings is slowing.

In Fiscal Year 2016, the USTP was appropriated $225.9 million. This funding level is below current services and, following a nearly flat budget in Fiscal Year 2015, has presented significant resource challenges for the Program. As an immediate step, the Program reduced expenditures by $2.2 million in order to cover fixed increases for rent, salaries, and other expenses, which constitute upwards of 90 percent of the USTP's budget. Most of the required savings are being achieved through the suspension of outside audits of debtors. Additionally, over the past four years, the USTP has sustained a net loss of more than 100 employees or about 10 percent of total staff.

If funding levels continue on the same trajectory, the USTP will have to make difficult operational decisions that will impact our overall performance and mission. The USTP will be forced to consider significant reductions in enforcement against fraud; diminution in numerous core activities, such as the oversight of trustees, credit counseling agencies, and debtor education providers; reductions in investments in information technology and staff training that provide longer term efficiencies; and other operational and infrastructure reductions, including the closing of section 341 meeting sites.[13]

The Fiscal Year 2017 President's Budget request for the Program totals $229.7 million. This reflects the cost of current services and a $2.1 million enhancement to provide additional security at sites where section 341 meetings are held, which are required by the Bankruptcy Code to take place in every case. We currently maintain more than 400 sites for these critical administrative proceedings where debtors are placed under oath and testify as to their financial condition. The section 341 meeting is often the only proceeding a consumer debtor has to attend. The USTP has maintained such a large number of sites in order to maximize accessibility to the bankruptcy system, thereby minimizing the time and costs of travel required of debtors to satisfy their obligation to appear, as well as of their professionals and creditors.

Section 341 meetings potentially can be quite combustible because tensions between debtors and creditors, ex-spouses, and others sometimes run high. Just over one-half of our meeting rooms are in secure federal facilities, and the others are located in less secure space. Last year, the USTP allocated $1 million to commence a pilot to expand security by posting Federal Protective Service guards at 16 meeting locations. The pilot is continuing and has been received favorably. Absent the additional funding included in the President's Budget request, the USTP will need to consider whether to forego additional security enhancements or close sites that are located in more remote areas and serve a smaller number of debtors and other parties.

[13] Section 341 of the Bankruptcy Code requires the U.S. Trustee to convene a meeting of creditors in every bankruptcy case. At the section 341 meeting, the debtor must appear and answer questions under oath from the U.S. Trustee, any trustee appointed in the case, creditors, and other parties in interest regarding the debtor's financial condition.

The President's Budget request for Fiscal Year 2017 also contains a proposal to increase offsetting revenues collected into the Fund. The proposal provides an increase in quarterly fees paid by the largest 10 percent of chapter 11 debtors, thereby excluding practically all small businesses. The increase would be capped at one percent of disbursements made per quarter by the debtor or $250,000, whichever is less. This amount represents only a small portion of the total cost of chapter 11 case administration. The proposal also contains a provision whereby the Director of the USTP may decrease the amount after three years. It is expected that this proposed fee increase will offset future appropriations and rebuild the Fund.

Conclusion

The United States Trustee Program has successfully achieved its mission over the past year and plays an increasingly vital role in promoting integrity, efficiency, and transparency in the bankruptcy system. Despite operating in an environment of limited resources, Program attorneys, financial analysts, and other dedicated staff continue to produce results year after year and undertake new initiatives to ensure that the Bankruptcy Code is faithfully enforced so that the bankruptcy system works as Congress intended for all stakeholders – debtors, creditors, and, most importantly, the American public. I am honored to work alongside them.