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U.S. Trustee Program is slammed by lawmakers

Marcia Coyle / Staff Reporter

August 13, 2007

WASHINGTON — The primary role of the U.S. Trustee Program is to serve as the "watchdog" over the bankruptcy process. But some in Congress question whether this dog barks only to deter consumer debtors.

The House recently passed an appropriations bill providing funding for the trustee program, among other federal agencies. The accompanying committee report to the bill contained a directive that had consumer bankruptcy attorneys and blogs buzzing around the country.

The House Appropriations Committee said it was concerned that "excessive resources" were being spent by U.S. trustees:

- "To dismiss cases for insignificant filing defects (thereby creating added burdens on the court and debtors associated with refilings).
- On the unnecessary use of U.S. Trustee personnel to participate in creditors' meetings that are already handled and conducted by private trustees.
- And on making burdensome requests of debtors for documentation that has no material effect on the outcome of bankruptcy cases."

Those actions, according to the committee, are making the bankruptcy process more costly and less accessible to those who need it. The committee directed the U.S. trustees to examine these problems immediately and report back two months after enactment of the funding bill on efforts to remedy them quickly.

The committee also chose a nontraditional method of appropriating funds for the program in the new fiscal year — an approach unrelated to the concerns raised in the committee report, according to a committee staffer. Nevertheless, bankruptcy attorneys and scholars said, the appropriation method could be seen as an additional warning that lawmakers are watching whether the trustees are acting in a neutral manner when enforcing the bankruptcy law.

"These are perfectly legitimate concerns, no question about it," said Robert Lawless, a nationally recognized expert in bankruptcy and corporate law at the University of Illinois College of Law.

"We hear anecdotally evidence of unreasonable document requests and unreasonable motions to dismiss," he said.

Henry J. Sommer, president of the National Association of Consumer Bankruptcy Attorneys, contends that, until 2000, the U.S. trustee system was intended to be, and actually was, "a pretty neutral monitor" of the bankruptcy system.

"But after the Bush Justice Department took over and replaced just about all of the U.S. trustees, they really changed and became almost entirely focused on what they call abuses by debtors," he said.

The Executive Office of the U.S. Trustee wouldn't comment on the funding or concerns in the House measure pending in the Senate.

But some creditors' attorneys were not so reluctant. "I think the Executive Office is being wood-shedded for carrying out the clear intent and even more clear spirit of the [2005] bankruptcy reform act," said Dean T. Kirby of San Diego's Kirby & McGuinn. "It's easier for [the committee] to say things in that report than it's going to be for them to actually amend the provisions of that act."

The U.S. Trustee Program, part of the Justice Department, was established by the Bankruptcy Reform Act of 1978. Trustees, appointed by the attorney general in 21 regions of the country, monitor the conduct of bankruptcy parties and private estate trustees, and identify and help probe bankruptcy fraud and abuse.

Representative Mike Honda, D-Calif., was the main mover behind the concerns voiced in the House funding bill. He had heard from some of his constituents — very elderly persons dependent primarily on Social Security benefits — about aspects of the U.S. Trustee Program that he felt unduly burdened legitimate debtors in dire financial straits, an aide said.

For example, U.S. trustees had moved to dismiss cases where debtors were required to submit 60 days' worth of pay stubs but one day was missing, and a pro se filer failed to list a business address of a business that had no assets but the filer had disclosed the business at the creditors' meeting. Although not required by law, he said, they unnecessarily attended Section 341 meetings of creditors, increasing the "intimidation factor," since debtors' attorneys are very outnumbered and making the meetings longer and costlier. And, in certain offices, they required almost double the number of tax returns and other documents the law requires debtors to file.

Sommer, who is also head of Philadelphia's Consumer Bankruptcy Assistance Project, agreed that those things are problems. "I represent poor people and they're going over everything with a fine-tooth comb to the point where it's ridiculous."

He seethes at what he calls the trustees' lack of scrutiny of "massive" creditor abuses in the bankruptcy process, particularly in the latest mortgage crisis.

Illinois' Lawless said it's difficult to know how widespread the problems cited by the House committee are.

"On one hand, you can say in any large organization there always will be stories," Lawless said. "But at the same time, each one of those situations affects real people, real debts and the outcome of their bankruptcy."

Lawless and others said they welcomed the committee's directive that the trustee office report to the committee on the concerns raised.

Congress is unlikely to backtrack much on the 2005 Bankruptcy Abuse and Consumer Protection Act (BACPA), agreed debtor and creditor groups, even though a House Judiciary subcommittee in May began hearings on the act's impact.

"It's hard for the Democratic Party, as the majority party, to cast too much aspersion on a bill for which so many of their members voted," said Catherine Vance, vice president of Development Specialists Inc., and a former advisor on BACPA to the Commercial Law League of America.

Recent hearings, she noted, are focusing on the credit industry overall. "We've seen some things unravel this year that were unavailable in 2005, like the student loan scandal."

Creditors' counsel Kirby agreed, noting that Hurricane Katrina triggered some changes in bankruptcy rules.

"These economic conditions could be the only impetus for some change that amounted to a liberalization of the bankruptcy laws," he said. "We could see some themed legislation dealing with the real estate or mortgage crisis."

Shortly after BACPA's enactment, Lawless said, the trustees' message was: Trust us to be reasonable. "There are lots of places in the act where someone who wants to be unreasonable can point and say the language requires it."