TESTIMONY
of
A. JAY CRISTOL

Chief Judge Emeritus
United States Bankruptcy Court
Southern District of Florida

Hearing on the United States Trustee Program:
"Watch Dog or Attack Dog?"

before the
Subcommittee on Administrative and Commercial Law
House of Representatives Judiciary Committee

October 2, 2007

My name is A. Jay Cristol. I am a United States Bankruptcy Judge in the Southern District of Florida. This is my 23rd year on the bench. I served as chief judge from 1993 to September 1999. Prior to my appointment to the bench I was a civilian lawyer for 25 years with an extensive bankruptcy practice and service as a trustee in bankruptcy.

I also served twenty years in the Reserve Judge Advocate Generals Corps where, among other assignments, I lectured in the Pentagon and elsewhere to lower ranking enlisted personnel and military legal assistance lawyers on financial management and bankruptcy.

I am proud of the bankruptcy system of the United States of America and believe it was intended to be the most compassionate and, at the same time, most effective system in the world because it goes beyond the ancient concept of looking only to the distribution of assets to creditors and offers the honest debtor a fresh start. When the 1978 Code and its amendments were enacted the bankruptcy judge was elevated from a referee in bankruptcy to pure judge status and the administrative tasks were ultimately transferred to the U.S. Trustee who should have been more accurately named the U.S. Bankruptcy Administrator.

The program worked well for many years under the directorships of Gerry Patchen and others.

In answer to the question, "Watch Dog or Attack Dog?" the answer is the U.S. Trustee is not one dog. It is a pack of dogs.

In the area of chapter 11 reorganizations the U.S. Trustee staff at local levels provides extremely valuable assistance to the Courts. In this area the U.S. Trustee is a beloved Lassie or a Rin Tin Tin. Sadly, in the area of chapter 7 and chapter 13 the U.S. Trustee program is a pit bull.

Let me be quick to say the local Assistant United States Trustees and their staffs are generally competent and understanding and the regional Assistant U.S. Trustees generally are the same. The problem, as I see it, comes from the top. As I mentioned, the program ran well when Gerry Patchen was Director. Over the tenure of the past two directors, Lawrence Friedman and Clifford White, the policies sent from Washington to the soldiers in the field have turned the U.S. Trustee program in the area of consumer debtors into the pit bull.

I do not mean to make *ad hominem* attacks on Mr. Friedman or Mr. White. I respect them both as to their integrity and professional talents. It should be noted that Mr. White was honored in 2006 with a Presidential Rank Award for Meritorious Senior Professional Service.

The problem, as I see it, is the perspective of Mr. Friedman and Mr. White, whose distinguished career has been served in the office of the Federal Prosecutor. These gentlemen seem to view all debtors with suspicion through prosecutorial eyes as dishonest crooks trying to beat the system and perceive debtor's lawyers as disreputable and untrustworthy

Nothing is further from the truth. In my more than two decades on the bench I have observed that almost all consumer debtors seeking relief in the bankruptcy court are honest, decent, hardworking citizens who suffered a catastrophic financial tragedy, seldom of their own making, such as serious medical disaster and no health insurance, loss of employment, dissolution of a marriage or some financial mistake or misfortune. The consumer lawyers who represent them are generally competent and well-meaning without blemish on their character.

Yes, there are a few bad apples in the barrel. Prior to the U.S. Trustee's much publicized "National Civil Enforcement Initiative" most of the bad apples were caught by the system. Some got away, just like things happen in all segments of our society.

The U.S. Trustee boasts in its Annual Reports of a small number of anecdotal success stories, most of which would have come to the same result without intervention by the U.S. Trustee. The total numbers boasted about are infinitesimal against the total numbers of bankruptcy filings.

Likewise, the U.S. Trustee reports of the initiative yielding "millions in debts not discharged." The most recent report for fiscal year 2005 speaks of yielding $583 million in debts not discharged. There is substantial difference between debts not discharged and debts collected. The U.S. Trustee offers no figures on debts collected. The old adage "You cannot get blood from a stone" is especially applicable here. Very little of the non-discharged debts are collected so what has been accomplished?

The report claims a better than 99% success rate in the 1112 complaints filed to deny or revoke discharge. It fails to mention how many cases are won by default.

Think about it. A destitute, honest debtor that has appropriately turned over all his or her property to the panel trustee, except for exempt property, which in many states is meager, is served with a lawsuit filed by the United States of America, represented by highly skilled, well-paid lawyers. In these circumstances most debtors have neither the money nor the will to fight. In many instances their remaining exempt property will not even cover the amount of a retainer to a competent attorney. It is not Goliath against David, it is more like Goliath against an ant.

And what is the benefit to society of most of these undischarged debts or denials of discharge? Without discharge and the fresh start it provides, these victims of the existing initiative find it difficult to get a job, get credit or climb out of the deep pit in which they are trapped. They are denied a fresh start and the opportunity to re-enter society as productive citizens.

The new law codified some useful procedures to assist panel trustees and the court in administering cases. The mean-spirited streak that permeates the new law provides draconian penalties for the most minor and insignificant failures to comply with the even unimportant statutory requirements. The U.S. Trustee is enamored of these harsh penalties and swings its

sword with a vengeance. When local U.S. Trustee lawyers follow some of the policies set by Washington, I sense a feeling of embarrassment by the U.S. Trustee's attorneys at what they have been directed to do. Some specific examples are:

Consumer bankruptcy attorneys have the experience of explaining the new requirements to prospective clients, only to have the clients go away discouraged, and never return. Debtors must obtain all "payment advices" for the 60 days before the bankruptcy is filed; they must obtain a tax return or transcript for the most recent year before the petition is filed; they must provide information on every penny of their income for the six months prior to when the petition is filed; they must provide bank statements to the trustee and evidence or other current income; they must attend a pre-petition credit counseling briefing, no matter how hopeless their situation and regardless or whether their problems were caused by imprudent credit decisions or unavoidable financial catastrophes; attorneys must complete numerous additional forms, including a six-page means test form that requires arcane calculations about which there are many different legal interpretations. According to the United States Trustee program, attorneys must also provide clients with pages and pages of so called "disclosures", many of which are either irrelevant to the client's case or inaccurate, which then requires much additional time spent explaining why they are irrelevant or inaccurate. U.S. Trustee policy sees no problem denying a debtor bankruptcy because their income calculated on the statutory method as the average over the last six months is too high when, in fact, the Debtor lost their job and their income is zero. But if an expenses element on the mean test is higher than the actual number, the U.S. Trustee's policy has the *chutzpah* to ignore the statutory calculation and wants to use the actual number.

The recent GAO report states that the credit counseling requirement is not serving its supposed purpose. Even the credit counselors report that only 2-3% of the prospective debtors they serve could even contemplate a debt management plan. The counseling requirement serves primarily as yet another barrier to bankruptcy, especially in those districts where judges have ruled that debtors, even those facing emergencies, cannot file their bankruptcy cases until the day after they receive the credit counseling briefing. Why not the same day?

If a debtor's papers contain minor discrepancies in the numbers, discrepancies that would have had no effect on the results of the case, the debtor should not be publicly accused, as they are now, of making "material misstatements." Such serious accusation should be reserved for cases in which the debtor's misstatement had a significant impact on how the case was administered. There is no valid reason for the U.S. Trustee to persecute debtors.

The new law makes it harder for consumers to save a home from foreclosure or a car from repossession and the U.S. Trustee policy seeks the harshest implementation of these provisions. Result: honest people become homeless. Families are broken up. The victims lose their jobs because they have no car to drive to work.

The problems of consumer debtors are only exacerbated by the aggressive anti-consumer stance of the United States Trustee program. The independent decisions of career personnel and

local offices have been subordinated to central directives from a politicized central office dedicated to serving the political interests of the administration - in this case by effectively becoming an arm of the administration's corporate backers in the financial services industry and trying to make bankruptcy as difficult and unattractive as possible. Spending enormous resources in going after minor document defects in papers filed by consumer debtors has done nothing to address the widespread fraudulent claims and charges of mortgage companies in bankruptcy and other creditor abuses. Most documents filed by debtors' attorneys are not as poorly and inaccurately prepared as the unsupportable documents filed in great profusion by creditors – yet the U.S. Trustee spends little or no time on creditor wrongdoing.

The U.S. Trustee was supposed to be a neutral monitor of the system and, for many years, it was. More recently, it seems to devote almost all resources to going after consumer debtors. They give great scrutiny to consumers' filings, but almost none to creditors' activities. The neutrality has been maintained in North Carolina and Alabama under the Bankruptcy Administration System under judicial control.

It appears that the U.S. Trustee sees its mission to deny people relief through bankruptcy. They file dismissal motions for minor defects, which makes things especially difficult for pro se debtors. The U.S. Trustee should be helping not hindering these people. Dismissal motions filed for things like credit counseling a few days early, or one or two missing pay stubs, when it is obvious that such omissions are of no significance.

A final sad example is my case *In re Jean Raul Petit-Louis*, a pauper. He did not own real estate. He did not own a car. He had no money and little more than the clothes on his back. He lost his job and could not pay his rent in public housing where he lived in a tiny apartment. Upon getting back to work he was in danger of eviction because of the few dollars of unpaid rent. He could only keep a roof over his head if the debt was paid, which he could not do, or if it was discharged. Petit-Louis ("Little Louie") could not speak English and could not obtain credit counseling in Creole, the language he understood. Of ten U.S. Trustee approved credit counselors in southern Florida not one had a Creole speaking counselor. The U.S. Trustee had not carried out its statutory obligation to provide credit counseling in a meaningful way. Instead of agreeing to a waiver of the requirement as allowed by the statute, the U.S. Trustee sought to bar Little Louie from bankruptcy relief and when I granted a waiver the U.S. Trustee filed a lengthy motion to reconsider followed by an appeal and a threat to Little Louie that they would appeal all the way to the Supreme Court. Eventually, Little Louie voluntarily dismissed his case. Although he maintained the Court had jurisdiction to grant relief, it became clear to him and his pro bono counsel that the U.S. Trustee would use its unlimited resources to continue litigating the dispute, even if it required litigating the issues all the way to the Supreme Court.

I have submitted a number of cases of similar actions by the U.S. Trustee against other Little Louies.

I will close by warning Little Louie and other poor but honest debtors with the words of Cicero: *Fear not those who do evil in the name of evil but heaven protect us from those who do evil in the name of good*.

APPENDIX TO TESTIMONY
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Appendix to A. Jay Cristol Testimony

1. A. Jay Cristol cases:

<u>*In re Petit-Louis*</u>, 344 B.R. 696 (Bankr. S.D.Fla. 2005)
<u>*In re Petit-Louis*</u>, 338 B.R. 132 (Bankr. S.D.Fla. 2005)

Debtor spoke only Creole and no credit counseling was available at the time in Creole. UST filed motion to dismiss, arguing that debtor must obtain counseling in language he did not understand. Court denied dismissal and UST moved for reconsideration. Court again denied dismissal. Court stated: "The U.S. Trustee's disregard for non-English speaking residents seeking counseling in the Southern District of Florida, a district which the U.S. Trustee admits 'presents its own unique set of language issues', evidenced the failure of the Office of the U.S. Trustee to comply with its duties in determining whether counseling services are adequate in this district. If the U.S. Trustee fails to manage the bankruptcy counseling system in a non-discriminatory fashion, the Court has the authority and indeed the responsibility to allow a debtor access to the bankruptcy system by waiving a requirement which, in practice, is inappropriately excluding him on the basis of his lack of English language ability."

<u>*In re Morgan*</u>, 2007 WL 2298010 (Bankr. S.D.Fla. 2007)

The debtor performed "means test" calculation, taking the housing ownership expense deduction for his residence which was free and clear of all liens and encumbrances. Chapter 13 trustee objected to above-median-income debtor's proposed plan, as failing to satisfy "projected disposable income" test. The Court held the debtor is allowed a deduction for the mortgage/rental expense. "The plain meaning of the statute and its use of the term "applicable" instead of "actual" evidences Congress' intent to set the Local Standards as a fixed allowance rather than a cap. The Court must assume that Congress said what it meant and meant what it said. Had Congress wished the Standards to act as a cap rather than an allowance, it knew what language to use."

<u>*In re Benedetti*</u>, 2007 WL 2083576 (Bankr. S.D.Fla. 2007)

UST moved to dismiss debtor's Chapter 7 case, as presumptively abusive under a properly performed "means test" calculation. Specifically, the UST objected to the "means test" calculation performed by debtor on the grounds that debtor had improperly deducted vehicle lease payments on motor vehicle that she intended to, and actually did, surrender. The court held that debtor who, on date bankruptcy petition was filed, was contractually obligated to make automobile lease payments to creditor asserting an interest in one of her two motor vehicles was entitled to deduct her obligations on this motor vehicle lease in performing "means test" calculation, even though she intended to surrender vehicle and would not actually be making these lease payments. "Using a

‘snapshot’ view of the Debtor's expenses on the date of filing makes sense in the context of a Chapter 7 case. The application of the provisions of sec. 707(b)(2) involves an evaluation of the Debtor's financial condition on the petition date such that a post-petition surrender of collateral is irrelevant and inconsequential. The means test is statutorily defined as a mechanism for determining whether a presumption of abuse arises in a Chapter 7 case, with reference to expenses ‘as in effect on the date of the order for relief.’ 11 U.S.C. § 707(b)(2)(A)(i) and (ii). The test has been described as a “snapshot” on the petition date rather than an evolving progress report on the Debtor's finances. *See In re Nockerts*, 357 B.R. 497 (Bankr. E.D.Wis. 2006).”

2. *In re Meza*, 2007 WL 1821416 (E.D. Calif. 2007)

UST moved to dismiss the case because the debtor’s certificate of counseling was from an unapproved agency. The bankruptcy court found the debtor substantially complied with counseling requirements and denied the motion. (Debtor had been in a credit counseling plan with a debt consolidation service pre-petition.) UST appealed and the District Court affirmed.

3. *In re Jones,* 352 B.R. 813 (Bankr. S.D.Tex. 2006)

Debtors obtained credit counseling about 190 days before case was filed. UST moved to dismiss because counseling was not obtained within 180 days before petition. Court found that it had to dismiss case but stated, “if the US Trustee has any discretion (akin to "prosecutorial discretion" in other functions of the Justice Department), the Court would hope that the US Trustee would decline to prosecute a motion to dismiss under the circumstances presented in this case. A debtor who obtains credit counseling only 190 days prior to filing a bankruptcy petition and who delays filing a bankruptcy petition to try to implement the lessons learned in counseling certainly seems to meet the objective of the statute, if not the literal requirement. And unless the US Trustee has unlimited resources, it would seem that limited resources would be better put to other litigation.”

4. *In re Romero*, 349 B.R. 616 (Bankr. N.D.Calif. 2006)

Debtors filed bankruptcy to stop a wage garnishment of their only income and asked for deferral of credit counseling due to exigent circumstances. They obtained counseling within time permitted by court. UST filed a motion to dismiss arguing the wage garnishment was not an exigent circumstance. The court denied the motion, stating: “In this case, Debtors faced imminent garnishment of their only income. The only way to stop the wage garnishment from taking effect was for Debtors to file bankruptcy by July 10. Debtors requested credit counseling from an approved agency on July 7, but were unable to obtain the requested services until seven days later. I determine that the looming wage garnishment constitutes exigent circumstances permitting a temporary waiver of the credit

counseling requirement."

5. *In re Bricksin*, 346 B.R. 497 (Bankr. N.D.Calif. 2006)

The debtors obtained counseling more than 180 days before the case was filed. The court denied the UST motion to dismiss, stating: "The Court finds that application of the statutory scheme to dismiss this case, as the Trustee urges, would produce a result at odds with Congressional intent. The intent behind these statutory amendments is to encourage debtors to seek alternatives to the bankruptcy process and to promote debtor awareness of the effects of a bankruptcy filing by requiring pre-petition credit counseling. Debtors had received extensive pre-petition credit counseling and then -- during the 180-day period prior to filing for bankruptcy -- were proceeding with their repayment plan, and making very substantial payments to creditors. While failing to comply with the law's technical letter, the Debtors were clearly in compliance with its spirit. The Court finds that the Debtors' need for a bankruptcy filing was not and could not have been obviated by additional credit counseling. Debtors were keenly aware of the implications of the bankruptcy filing. Indeed, CCCS had advised the Debtors that their only viable option was to file for bankruptcy. . . . Debtors have already paid for and completed two credit counseling sessions. It would be inequitable for this Court to hold that these Debtors' technical non-compliance with the law, despite their very best efforts, warrants dismissal of this case, which would require these Debtors to start all over, to pay another $ 299.00 filing fee, and potentially deprive them of the protection of the automatic stay."

6. *In re Koliba*, 338 B.R. 39 (Bankr. N.D.Ohio 2006)

Debtors and attorney failed to sign bankruptcy petition before it was filed electronically. UST moved to dismiss case. The court stated, "in this case, absolutely nothing has been put forth or even alleged which would tend to show that the Debtors are not honest, and thus not deserving of the protections of the Bankruptcy Code. On the other side of the coin, the UST did not offer any satisfactory explanation as to how an objective of bankruptcy law would be furthered by dismissal. For example, it did not allege that the dismissal of the Debtors' case would be in the best interest of the Debtors' estate or their creditors." The motion was denied.

Question for Judge Cristol:

What is the policy of the U.S. Trustee regarding the means test?