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Recording Date – April 11, 2017

Recording Availability – November 21, 2017

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	Tuesday, April 11, 2017	12:00 PM to 1:15 PM	Current Topics from the Office of the United States Trustee

AGENDA

- 12:00 PM** Introductions/Lunch
- 12:10 PM** Presentation: ‘Current Topics from the Office of the United States Trustee’, by Sarah Flynn, Seattle Office of the United States Trustee; Hilary Bramwell Mohr, Seattle Office of the United States Trustee; Thomas Buford, Assistant United States Trustee
- 1:15 PM** Evaluations & Adjourn

SPEAKER BIOGRAPHY:

Sarah Flynn, Seattle Office of the United States Trustee - Sarah Flynn is a Trial Attorney in the Seattle Office of the United States Trustee. Prior to joining the program in 2013, Sarah clerked for Judge William Stocks in the Bankruptcy Court for the Middle District of North Carolina. Sarah graduated from the University of Texas School of Law.

Hilary Bramwell Mohr, Seattle Office of the United States Trustee - Hilary Bramwell Mohr joined the Seattle Office of the United States Trustee as a Trial Attorney in January 2016. Prior to that, she was a partner at Riddell Williams P.S. whose practice focused primarily on creditors’ rights litigation and bankruptcy matters. Hilary graduated from Seattle University School of Law, *summa cum laude*, in 2007, after working for a local nonprofit organization for several years.

Thomas Buford, Assistant United States Trustee - Thomas Buford is the Assistant United States Trustee for cases filed in the Western District of Washington and the District of Alaska. Thomas joined the United States Trustee Program in 2006. Prior to that, he clerked for Judge Catharine Aron in the Bankruptcy Court for the Middle District of North Carolina. Thomas attended Washington University School of Law in St. Louis, Missouri, and Hendrix College in Conway, Arkansas.

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King County Bar Association – Bankruptcy Law Section Meeting: Outline of Materials Presented

Date: 4/11/17

Location: King County Bar Association, 1200 Fifth Avenue, Suite 700, Seattle, WA 98101

Time: 12:00 p.m. to 1:15 p.m.

Topic: Current Topics From the Office of the United States Trustee

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I. Introductions

II. Overview of Topics to be Presented

- Disclosure Statement Issues
- Employment and Compensation of Professionals
- Recent Issues the UST's Office has Experienced
- Healthcare Cases

III. Disclosure Statement Issues

A. Disclosure of Absolute Priority Rule Issues in a Debtor(s) Disclosure Statement

- Overview of the Absolute Priority Rule ("APR") in individual chapter 11 cases.
- 11 U.S.C. § 1129(a)(15) requires Debtor to contribute post-petition income to plan payments.
- In re Zachary: APR applies in the Ninth Circuit.
- APR requires one of 3 things:
 - o Debtor propose 100% Plan and pays in full.
 - o Debtor gets consensual plan approved; no objections received to confirmation.
 - o Debtor pays 'new value'. Cannot be DMI required by § 1129(a)(15)

- Does APR need to be raised by creditor or will judges and/or UST raise *sua sponte*?
Extended discussion on this point.
 - Issues with DS disclosures of APR issues and pre-trial report, ballot summaries in the WDWA.
 - Does *In re Zachary* stand for the proposition that Debtor's cannot exempt any property in an individual chapter 11?
- B. § 1129(a)(15) Issues in Individual Chapter 11 Debtor Disclosure Statements
- In respect to § 1129(a)(15)'s relation to the APR, DMI should be calculated based on a forward looking means test. If DMI as calculated by chapter 13 test isn't accurate, explain why.

IV. Employment and Compensation of Professionals

- Can only employ professionals if they are 'disinterested' and don't hold an interest adverse to the estate. 'Disinterested' is defined in § 101 of the Code.
- Look to 11 usc 3217 FRBP 2014 and LR 2014-1 for other requirements of employment application (i.e. scope, compensation, all connections to best of applicants knowledge contained in a declaration). Can't be conclusory (i.e. no conflicts). Continuing duty based on new found facts.
- In Ninth Circuit, failing to disclose is sanctionable. Even if no actual conflict exists.
- Also have to file statement of attorney compensation received prior to filing form (for compensation received 1 year prior to filing for services rendered in preparation of the case).
- Always disclose. Err on the side of caution. It's better to ask for permission than forgiveness when a professional's fees are on the line.
- Example of banking relationship that came to late in a case that was not disclosed and the problems that caused (i.e. disgorgement).

V. Recent Issues the UST's Office has Experienced.

- Re-emergence of split fee model in chapter 7. Split-fee model has to be reasonable between pre and post-petition services (the UST has seen a lack of an even split where attorneys won't get enough upfront – everything is paid from post-petition funds). Also puts debtor's attorney in ethical bind b/c they should be telling Debtor not to pay pre-petition fees, not trying to actively collect pre-petition fees owed to them by the Debtor. Also need to disclose in Rule 2016 Statement.
- Supplemental Statement required by Rule 2016(b) often neglected.
- Unbundling of 341 Meetings in consumer cases. Allowable? Almost never. Ethical? Almost never. Would require wealth of disclosure and informed consent from client. Prohibited most other places.
- Other items the UST has been litigating: (1) failure to obtain actual ink signatures; (2) failure to submit 4002 documents in a timely manner; (3) failure to file financial

management certificates; (4) bank accounts not on Schedule A and B but are in the 4002 documents provided; (5) uniform request to pay in installment fees – must make a specific showing; and (6) consistency between B22, SOFA, and other info in schedules is often lacking. Attorneys are required to do a reasonable investigation.

VI. Healthcare Cases

- Many amendments to the Code in 2005 by BAPCPA that relate to healthcare cases.
- What is a healthcare business? Look to the definition in the Code of course, but generally speaking, anytime there are patient records at issue.
- Court must consider whether or not to appoint patient care ombudsman. *See 11 U.S.C. § 331*. Attorney should consider ahead of time whether one should be appointed as well (totality of circumstances test). UST takes care of selecting Ombudsman. Court will generally issues OSC to show why ombudsman is not necessary. Ombudsman are expensive, if you don't think you need one, explain why.
- Need to identify and secure patient records. Time consuming and expensive. *See 11 U.S.C. § 351*. Have to give tons of notice before destroying them. Have a game plan before you file with what to do with the records. Practice tip: may be requirements outside of the Code – check with debtor. Check state law – can a non-debtor (i.e. trustee) even be in possession of those records? Consider immediate motion to abandon.
- Who pays for an ombudsman? Code permits that secured creditors can be surcharged for these costs. UCC may consider whether to negotiate a carve-out to deal with these records. Probably can obtain an administrative expense claim for the amount of the carve-out?
- Ch. 7 Trustee role in these cases, like all cases, is a fiduciary to creditors. However, here, there is also a duty to protect patients so creditor recoveries may be reduced.
- Consumer privacy ombudsman. Sales of personally identifiable information. Consider if you need one.

VII. Conclusion