National Association of Consumer Bankruptcy Attorneys

Comments on Proposed Bankruptcy Rule Changes

The National Association of Consumer Bankruptcy Attorneys (NACBA) strongly supports the proposed amendments to Rule 3001 and proposed Rule 3002.1 as necessary to end the systematic abuse of the bankruptcy courts by large institutional creditors who seem to believe that they are not bound by the rules that apply to all other parties filing papers in the courts. Indeed, NACBA believes that the proposals should be strengthened to deal with particular prevalent abuses. NACBA also supports the proposed amendment to Rule 2003.

Proposed Amendments to Rule 3001.

The proposed amendment to Rule 3001 is necessary to protect the integrity of the bankruptcy court system and prevent it from becoming a part of a debt collection apparatus that values cost-cutting more than accuracy and has regularly abused debtors' rights. There is no reason to permit creditors and debt collectors to disregard the rules and forms, as well as longstanding principles of proof and documentation, simply to accommodate a business model designed to make greater profits. Indeed, the debt buyers' position is truly radical - that they should be allowed a claim even if they know they cannot prove it is owed to them or how it is calculated because they do not have documentation. Imagine what would happen if debtors engaged in similar shortcuts because they decided the Official Form Schedules were too burdensome, and disregarded the Official Forms to cut costs, stating on their schedules that they had "various items of personal property worth a total of $10,100" and claimed "all property" as exempt.

As a routine practice, debt buyers file proofs of claim without the supporting documentation already required by Rule 3001 and Official Form 10. NACBA members regularly report attempts by debt buyers to collect claims from bankruptcy debtors where the debtor has been misidentified, the claim had been settled with an earlier debt buyer, the debt was discharged in an earlier bankruptcy case, the statute of limitations has run, or the amounts claimed are incorrect. The Federal Trade Commission is studying frequent reports from consumers of the same types of issues, because of "major problems in the flow of information among creditors, debt buyers, and collectors." *See* FTC Orders Buyers of Consumer Debt to Submit Information for Study of Debt Buying Industry, http://www.ftc.gov/opa/2010/01/sci.shtm

When objections have been filed, these debt buyers very often have been unable or unwilling to provide evidence that a particular debt was assigned to them or of how the amount due was calculated. In most cases they do not even oppose the objections or argue that they have valid claims. Nevertheless, these debt buyers force debtors to use their limited resources to object to unsupported claims. . In addition, our members and court decisions have reported numerous instances where debt buyers, seeking to argue that debtors had admitted liability, have simply claimed the amount listed on the schedules as owed to the alleged assignor, raising doubts about whether they have any verifiable information about how much is owed.

Usually, creditors get away with these practices because debtors have no incentive to object. If a chapter 13 case involves a "pot plan" paying less than 100% of unsecured claims, as most do, the debtor is indifferent as to whether one creditor receives more than it is owed at the expense of another creditor, most likely an individual trade creditor such as a local merchant or medical provider. In many cases, funds will be diverted away from these legitimate creditors to

creditors submitting unsupported claims. To the extent that debt buyers' claims include late fees, over-limit fees, and other penalties, payment of those claims on a par with trade creditors, student loans, and medical providers has allowed the debt buyers to collect distributions in chapter 7 to which they were not entitled, and prevented debtors from classifying those penalties below creditors they might have wished to treat more favorably. Unfortunately, chapter 13 trustees and the United States Trustee Program have shown no interest in seeking creditor compliance with the rules and forms. But the bankruptcy system should not be indifferent to debt buyers obtaining moneys that are not due to them or that they cannot prove are due to them. Indeed, it is likely that filing such proofs of claim, for which no evidentiary support can be provided, violates Rule 9011.

While creditors may argue that the accurate filing of small consumer claims is not important enough to warrant much effort, there is no principled reason that miscalculation of $1,000,000 in a single claim is any different than a miscalculation of $100 in each of 10,000 cases. Indeed, the rationale of the debt buyers for their lack of traditional documentation relies on the same reasoning that brought us no-doc subprime loans. Because few problems seemed to surface for a while, they argue, we can forgo the time-tested methods of documentation in the interests of business efficiency.

The amendment will also help to combat rampant abuses by mortgage servicers who fail to adequately disclose and itemize charges, often unjustified, that have been added to the principal and interest due on debtors' mortgages, as well as the filing of proofs of claim by purported mortgage holders who cannot document their interests. Such proofs of claim are regularly filed by attorneys who have never reviewed the underlying documentation or history of

charges and therefore do not comply with their duty to determine whether the claims they are filing are accurate. Attorneys and creditors cannot be allowed to systematically churn out unrefined and unexamined form pleadings, instead of producing and filing carefully considered legal papers. *In re Haque*, 395 B.R. 799, 805 (Bankr. S.D. Fla. 2008).

Proposed Rule 3002.1.

Proposed Rule 3002.1 is absolutely necessary to prevent chapter 13 mortgage cures from becoming totally ineffectual due to abusive mortgage servicing practices. Numerous courts have had to try to untangle and vitiate the confusion that currently results from the addition of undisclosed charges during chapter 13 cases. The mortgage servicing industry has decided, as a matter of cost savings, that it is too expensive to computerize the accounting for chapter 13 mortgage cures. As a result, erroneous charges are added in almost every case and very frequently result in debtors receiving foreclosure notices stating they owe thousands of dollars immediately after complying with all the terms of chapter 13 plans designed to cure all mortgage defaults. The sanctions occasionally imposed by courts where debtors have the resources to litigate about these charges are shrugged off by the industry as a cost of doing business. The new rule establishes a simple and sensible procedure that will restore chapter 13's effectiveness in saving homes through mortgage cures.

As a result of these problems, many bankruptcy courts have entered orders against particular servicers, or adopted local rules or form plans to try to bring about disclosure of charges and enforce the terms of chapter 13 plans. A national rule will benefit mortgage servicers who will no longer have to follow different procedures in different judicial districts.

Proposed Amendment to Rule 2003.

NACBA also supports the proposed amendment to Rule 2003, which will prevent chapter 7 trustees from holding creditors' meetings open indefinitely to avoid the deadline for filing objections to exemptions. It will also avoid some of the problems that have resulted under both section 1308 and Rule 4003 when it is not clear whether the creditors meeting has been concluded.

Suggested Changes

Although adoption of the proposed rules amendments would be a great step forward, NACBA believes that several changes would measurably improve them.

Rule 3001

1. In light of persistent past abuses, the proposed amendment should be strengthened to require that the entity filing the proof of claim provide proof that it is the owner of the claim or, if the claim is filed by an agent of the creditor, that the agent provide evidence of agency and evidence that the creditor is the owner of the claim. Creditors will argue that it is burdensome to demonstrate ownership of the obligation and the agency relationship. However, such a requirement is the only way to ensure that an entity is actually entitled to payment through the bankruptcy process.

2. As Judge Small suggested in *In re Andrews*, 394 B.R. 384 (Bankr. E.D.N.C. 2008), the proof of claim should disclose whether the statute of limitations has run. Debt buyers routinely

file claims in which the statute of limitations under applicable state law has run. In these circumstances, the debt would be uncollectible in a state court action. However, because the statute of limitations is an affirmative defense under most state laws, debtors are required to object to proofs of claims even though the limitations period has expired. Often creditors are the only parties with information on whether the limitations period has expired. Without some notice to the debtor that the limitations period has expired, debtors may be paying claims that are uncollectible under state law.

3. The amended rule should also require attachment of all contracts on which the claim is based, and a complete history of interest, charges, and payments. Without such documents, a trustee cannot know how much of the amount claimed is for penalties, such as late charges and overbalance fees, that are classified differently in bankruptcy. *See Am. Express Bank, FSB v. Askenaizer (In re Plourde)*, 418 B.R. 495 (B.A.P. 1st Cir. 2009). Creditors may argue that such requirements would be unduly burdensome, but the rules long ignored by many creditors already require the writing upon which the claim is based - in the case of a credit card, the contract and any amendments. After all, it is only because of these writings that the creditor is entitled to collect any charges other than interest at the legal rate. It is our experience that such interest and charges often constitute the bulk of the amounts claimed by credit card creditors. Is it really too much to ask for some evidence that the creditor is entitled to what it claims?

Without such documentation the court and the debtor must put blind faith in the propositions that the creditor's computers were properly programmed to reflect various iterations of the contract and properly registered all payments and charges. Creditors may also argue that

the contract has been amended and rates were changed numerous times or that debts have been assigned multiple times. However, creditors have no one to blame for these complications but themselves. No one required them to have complex rate calculations, to amend their contracts numerous times, or to engage in multiple assignments without adequate documentation. They certainly need not engage in such practices in the future and could adopt simple, "plain vanilla" contracts, assigned pursuant to traditional methods under contract law. If the Advisory Committee recommends adoption of the rule, creditors will have almost two years to adjust before it goes into effect.

4. With respect to unsecured claims, a proof of claim that does not substantially comply with the rule should be disallowed. While Code section 502(a) provides that a claim, proof of which is filed, must be allowed absent an objection, it is well within the purview of the Supreme Court's rulemaking power to define what constitutes a proof of claim.

Rule 3002.1

5. Proposed Rule 3002.1 should provide that fees that are not disclosed as required are waived. Although there is some dispute about whether Rule 2016 currently requires an application before such fees can be recovered, an amendment to the new Rule can make it clear that it is required.

6. The Rule should also provide that creditors may not charge attorney's fees for the required notices of fees and payment changes which they already had a pre-existing obligation to

disclose under nonbankruptcy law. Outside of bankruptcy, such notices are routinely sent by mortgage servicers without attorney involvement or additional attorney's fees. The rule should not serve as an excuse for mortgage creditors to pile on yet more fees for filing bankruptcy notices, which they could file as frequently as monthly. At a minimum, the Advisory Committee Note should make that clear.

7. On line 35, the words "the chapter 13 plan and" should be inserted after "with" because the chapter 13 plan may contain other terms that are binding on the parties under section 1327(a).

8. Subsection (g) should be clarified so there is no argument that a creditor may avoid sanctions by belatedly giving notice of fees, charges or payment changes in a response under subsection (e). The current language is ambiguous and the word "or" could give rise to such an argument. One method of doing this might be to preclude inclusion in the subsection (e) response of any item that had not been the subject of an earlier notice under subsection (a) or (c). Another would be to clarify in the Advisory Committee Note that "or" means that noncompliance with any one of the three subsections would trigger the sanctions.