

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

NEIL P. OLACK  
U. S. BANKRUPTCY JUDGE  
NORTHERN AND SOUTHERN  
DISTRICTS OF MISSISSIPPI

501 EAST COURT STREET  
JACKSON, MISSISSIPPI 39201  
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August 7, 2012

VIA E-MAIL

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E., Room 4-180  
Washington, D.C. 20544

Re: Proposed Change to Rule 7008(b) of the Federal Rules of Bankruptcy Procedure

Dear Mr. McCabe:

I recently confronted a procedural issue that the Advisory Committee on Bankruptcy Rules has probably already addressed. In the unlikely event that the Advisory Committee has not yet considered the issue, I am writing to suggest an amendment to Rule 7008(b) of the Federal Rules of Bankruptcy Procedure that I believe is needed to clarify the pleading requirements for the recovery of statutory attorney's fees under 11 U.S.C. § 523(d).

As you know, Rule 7008(b) requires that a debtor plead a claim for attorney's fees in a complaint, answer, or other pleading. Barring "special circumstances," § 523(d) requires a court to award costs and reasonable attorney's fees to the debtor if: (1) the debtor prevailed in a complaint to determine the dischargeability of a debt under § 523(a)(2); (2) the debt involved a consumer debt; and (3) the creditor was not "substantially justified" in challenging the dischargeability of that debt. Section 523(d) is silent as to whether a debtor should request attorney's fees as a claim in a pleading.

Courts are divided on the issue of whether the procedures set forth in Rule 7008(b) apply when a debtor requests attorney's fees under § 523(d). Does § 523(d) override the procedures set forth in

Rule 7008(b)? Some courts have held that the debtor is not required to comply with Rule 7008(b) in order to recover attorney's fees. See In re Melcher, 322 B.R. 1 (Bankr. D.D.C. 2005); Thorp Credit, Inc. v. Smith (In re Smith), 54 B.R. 299 (Bankr. S.D. Iowa 1985); Commercial Union Ins. Co. v. Sidore (In re Sidore), 41 B.R. 206 (Bankr. W.D.N.Y. 1984); see also First Card v. Hunt (In re Hunt), 238 F.3d 1098, 1102-03 (B.A.P. 9th Cir. 2001) (holding that a request for attorney's fees included in a pre-trial order had the effect of amending the pleadings and, therefore, was sufficient to comply with Rule 7008(b)).

Other bankruptcy courts have held that a debtor must assert a request for attorney's fees in a pleading or else the claim is waived. See FED. R. BANKR. PROC. 7008(b) editor's cmt. (2011); Montgomery Ward v. Blackburn (In re Blackburn), 68 B.R. 870 (Bankr. N.D. Ind. 1987) (request for attorney's fees must be made in a way that does not prejudice the creditor); West Springfield M.E. Credit Union v. Finnie (In re Finnie), 21 B.R. 368 (Bankr. D. Mass. 1982) (the debtor's failure to request attorney's fees operated as a waiver); see also In re Bullock, 322 B.R. 176 (Bankr. M.D. Ala. 2005) (suggesting that a debtor should be required to plead a request for attorney's fees, because otherwise it would be unfair to the creditor). Moreover, among those courts that require a debtor to plead a claim for attorney's fees, there is no consensus about how a debtor may satisfy that requirement. See Hunt, 238 F.3d at 1102-03; Blackburn, 68 B.R. at 881 (holding that the request for attorney's fees, when not included in the answer, should satisfy the requisites for a motion to amend under FED. R. BANKR. P. 7015); Finnie, 21 B.R. at 371 (holding that attorney's fees must be requested by the debtor in the answer to a nondischargeability complaint).

I believe that the issue of attorney's fees can be clarified by amending Rule 7008(b), as follows (or by similar language):

**Rule 7008. General Rules of Pleading.**

\* \* \* \*

**(b) Attorney's Fees.** A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate **except that this provision shall not apply to a request for an award of attorney's fees under § 523(d).**

I am aware that the Advisory Committee on Bankruptcy Rules recently recommended the publication for comment of a proposed amendment to Rule 7008(b) that would delete the pleading requirement altogether. See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (Mar. 2012). I am not aware of the present status of that proposed rule change. I wanted to bring this split of authority to your attention anyway in order to provide you with another reason why an amendment to Rule 7008(b) is needed. Without an amendment, there is the potential

game of “gotcha,” whenever a debtor fails to include a request for attorney’s fees in the answer to the dischargeability complaint.

Thank you in advance for your consideration of this issue.

Sincerely yours,



Neil P. Olack  
United States Bankruptcy Judge

cc: Honorable Eugene R. Wedoff, Chair  
Advisory Committee on Bankruptcy Rules