

Testimony

**Public Hearing on Proposed Amendments to
Bankruptcy Rule 3015 and New Rule 3015.1
Judicial Conference Advisory Committee on Bankruptcy Rules**

September 27, 2016

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Tab 1

Jenny L. Doling, Doling Shaw & Hanover

**WRITTEN SUBMISSION OF TESTIMONY
For September 27, 2016 Hearing**

**Jenny L. Doling, Attorney
DOLING SHAW & HANOVER, APC**

Judge Ikuta and Members of the Committee:

Thank you for the opportunity to testify before the Rules Committee today regarding the proposed rules under consideration.

I have been a bankruptcy attorney in the Central District of California, the largest district in the country, for the past 16 years, primarily representing debtors in chapter 7, chapter 12, and chapter 13 cases. The Central District of California has adopted a single chapter 13 plan form for the District. However, there are five (5) divisions within the district and each division has its own set of rules with regard to the chapter 13 plan. These rules are usually promulgated by the chapter 13 trustees.

My concerns with the adoption of Rule 3015.1 Requirements for Local Form Plans Filed in a Chapter 13 Case arise from the disparity in treatment of the Local Rules already in existence. If a single plan form is adopted for an entire district (as is the case now), then a single set of rules and requirements for implementation of that plan should also be adopted and enforced *district-wide*. Furthermore, the Plan and Rules adopted must be compliant with the U.S. Bankruptcy Code. Although a bankruptcy court may adopt local rules, that authority is carefully circumscribed. A local rule may not enlarge, abridge or modify any substantive rights. Any conflicts between the U.S. Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code. *American Law CenterPC v. Stanley*, 253 F.3d 438 (9th Cir. 2001).

For instance, a common problem debtors face in the Central District (and nationwide in various formats) is that the local plan requires the debtor to propose an estimated percentage to be paid to the general unsecured creditors. The Order Confirming Plan, however, converts the proposed estimate into the plan with a fixed term and a fixed percentage dividend. It is no longer treated as an estimate in the debtor's plan. No where in the Code or Rules is a percentage to unsecured creditors required to confirm a chapter 13 plan. The Code refers to dollar amounts. Allowing a local plan form or local rule to add substantive requirements conflicts with the Code and should be prohibited. Not only are debtors unable to specify a dollar dividend on general unsecured claims, the fixed term of the plan imposed by the court's Order Confirming Plan binds the debtor to a plan duration that even exceeds the Applicable Commitment Period.

The harsh consequence to debtors is that their case will likely be denied confirmation or, even worse, dismissed. Even where debtors who have paid all that is required to be paid under the Code, and for the length of time required under the Code, trustees file motions to dismiss the cases if the percentage set in the confirmation order has not been met. The proposed percentage is only an estimate for informational purposes. There is no legal basis to support converting it to a fixed term of the plan.

Furthermore, Rule 3015.1(c), as proposed, requires a debtor to indicate whether or not the plan contains a non-standard provision. This portion of the rule is rendered useless when in practice every non-standard provision is stricken by request of the chapter 13 trustee.

The Committee Note incorporates the goal to promote consistency among Local Forms and clarity of content of chapter 13 plans. However, there is no remedy available to either debtors or creditors if the local practice in a district does not conform to the changes proposed by Rul 3015.1.

Attachments:

Request of Jenny L. Doling to testify at September 27, 2016 Hearing.



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August 23, 2016

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure of the
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Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE, Suite 7-240
Washington DC 20544

Re: Request to Testify
Public Hearing of the Judicial Conference of the U.S. Advisory Committee
on the Federal Rules of Bankruptcy Procedure on the
Currently Proposed Amendments to FRBP 3015 and New FRBP 3015.1 at
Pasadena, CA on September 27, 2016

Dear Ms. Womeldorf:

I respectfully request that I be allowed to testify at the above scheduled hearing.

I have been in private practice representing consumer and small business bankruptcy debtors since 2000. Our firm has represented thousands of clients in bankruptcy matters. I serve as the National Association of Consumer Bankruptcy Attorneys (NACBA) State Chair for Central California (the largest district in the United States). I am on the board of the Inland Empire Bankruptcy Forum (IEBF) and I serve on the Bar Advisory Committee to our Central District of California Judges. We meet quarterly at the U.S. Bankruptcy Court in Los Angeles, California. In addition, I am a professor of bankruptcy law for the California Desert Trial Academy. I have also been a frequent panel speaker for bankruptcy organizations such as: the National Conference of Bankruptcy Judges (NCJB), the National Association of Chapter 13 Trustees (NACTT), and the National Association of Consumer Bankruptcy Attorneys (NACBA). Probably most important for my request to testify is that I am also on the Central District of California Chapter 13 Committee formed by our judges to address the proposed National Plan, drafting of a local plan, and rule changes.

Given my intimate experience in representing clients in bankruptcy and my active affiliation with the aforementioned organizations and committees to address the proposed amendments, I believe my testimony would be valuable. I wish to testify about the impact of the proposed rules on mandatory local plans (including those already in place in many courts), as well as some of the remaining problematic provisions in the proposed National Form Plan. I anticipate being able to share important data obtained from NACBA's members regarding the content of mandatory local plans and the procedures related to those mandatory local plans. Furthermore, I believe my access to the Central District of California data and personal experience in the Central District of California



Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
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(again, the largest district in the Country), puts me in a unique position to offer testimony.

I hope and expect that my testimony will be informative to the Committee.

Thank you for your consideration. I look forward to hearing from you.

Sincerely,

DOLING SHAW & HANOVER, APC

/s/ Jenny L. Doling

Jenny L. Doling, Esq.
JLD/rc

Tab 2

United States Bankruptcy Judge Roger Efremsky and

United States Bankruptcy Judge Marvin Isgur

**JOINT WRITTEN SUBMISSION OF TESTIMONY
For September 27, 2016 Hearing**

**United States Bankruptcy Judge Roger Efremsky and
United States Bankruptcy Judge Marvin Isgur**

Judge Ikuta and Members of the Committee:

Because we hold similar views on whether Bankruptcy Rules 3015 and 3015.1 should be adopted, we join in this written submission of testimony. Although the two of us were part of the group that drafted the November 18, 2014 letter that was signed by 144 bankruptcy judges opposing the adoption of a national plan, and were 2 of the nine signatories to the February 10, 2015 compromise proposal submitted to this Committee, we now testify in our individual capacities.

Initially, we each opposed the adoption of a national form plan. As we spoke with trustees, creditors, debtor's attorneys and our fellow judges, we became convinced that the bankruptcy system would benefit by ending the confusion caused by the hundreds of variants of chapter 13 plans around the United States. Although many districts presently have district-wide plans, many others have multiple plans or no plans at all.

Although a single national plan would have solved the confusion issue, the price of that solution was far too high. Many of us believed that the national plan would be injurious to conduit mortgage programs, would stifle innovation and would prevent local adaptation. Moreover, the broad opposition amongst bankruptcy judges foretold a problematic implementation of a single national plan.

We concluded that the orderliness of having a single plan in each district would substantially reduce confusion while preserving the need for local adaptation and innovation in the chapter 13 plan process. Accordingly, the two of us have concluded that Rule 3015.1 provides the best alternative.

Although the comments to date have largely focused on Rule 3015 (rather than Rule 3015.1), we briefly comment on Ryan W. Johnson's July 18, 2016 letter and on what we have heard may be possible (but unfiled) opposition to Rule 3015.1.

With respect to Mr. Johnson's comment on surrender and the lifting of the stay, we strongly disagree that a fee would be required or appropriate. Plan confirmation will cause the stay to be lifted without a separate motion. *See* 11 U.S.C. § 1325(a)(5)(C) and 11 U.S.C. § 362(c)(1) read in conjunction with 11 U.S.C. § 1322(a)(11). Mr. Johnson's reference to Bankruptcy Rule 9013 is inapposite. By filing a proposed plan (under both current and contemplated rules), the Debtor is seeking an order confirming the plan. Under Mr. Johnson's reading of Rule 9013, the plan is itself a motion. We simply do not read Rule 9013 as encompassing the treatment of a plan, an explicit Congressional requirement of Chapter 13.

Mr. Johnson also expressed concern over the consequences of a stay termination under § 362(e). Many of us have long believed that the stay does not apply to surrendered collateral. The provisions (in both the national plan and in any local plan) would clarify that the consequence of surrender would be a termination of the stay. The termination provisions of § 362(e) do not apply, because § 362(e) contemplates motions by creditors respecting their collateral. The automatic termination under § 362(e) is only “with respect to the party in interest making such request.” Under Chapter 13, a plan may only be proposed by the Debtor. 11 U.S.C. § 1321. Accordingly, it will be the debtor “making such request.” Therefore, the § 362(e) termination of the stay would not apply to any creditor in the case. We have no objection to a comment clarifying this, but also see no need for such a comment. We strongly oppose the requirement that a separate motion be filed. This would unnecessarily burden creditors, debtors and the Court with a motion to lift the stay on collateral that the debtor surrenders.

Respectfully, we do not understand the issue raised by Mr. Johnson with respect to § 363(d) or § 363(e). Before the stay is lifted by plan confirmation, those provisions appear inapplicable. After the stay is lifted, they would potentially apply in a limited number of cases. In general, those provisions limit actions by a debtor to use, sell or lease property that has been surrendered, if the use, sale or lease would be inconsistent with a termination of the stay. After the court has approved the surrender of the collateral, we see no harm in such limitations. After all, no debtor is forced to surrender collateral.

We understand that there are a few consumer bankruptcy lawyers who would prefer to have no national mandate for chapter 13 plans. This past fiscal year, there were over 300,000 new chapter 13 bankruptcy cases filed in the United States. The Rules Committee has long recognized that uniformity in presentation assists Bankruptcy Judges in providing “just, speedy and inexpensive” determinations in chapter 13 bankruptcy cases. Although these efforts at uniformity have recently been directed at creditors (for example, the uniform reporting of home mortgage claims on a mandatory form), we believe that the adoption of a single plan form in each district will also further this goal. We note that each district’s uniform plan (and the national plan) will give every debtor an opportunity to add special provisions tailored to the needs of a particular case.

The two of us strongly support the proposed amendments to the Federal Rules of Bankruptcy Procedure, and thank the Committee for its continued diligence in improving the administration of chapter 13 bankruptcy cases in the United States.

Tab 3

Norma L. Hammes, Gold and Hammes

ORAL TESTIMONY OF NORMA L. HAMMES, ESQ.
Before the Bankruptcy Rules Committee on
September 27, 2016

Good morning, Judge Ikuta and Members of the Committee. Thank you for this opportunity.

I am here to speak against the adoption of the proposed “compromise” rule amendment that would allow local districts to opt out of using the National Chapter 13 Plan, instead mandating use of a single local plan adopted by the district.

Certainly, there is a justifiable purpose in having a model plan. It can lay out a standard structure within which the debtor can express his or her proposed plan, which must meet the tests of §§ 1322 and 1325(a)¹. However, when a model plan goes beyond providing a structure for provisions – to mandating content of the provisions – that is when things go wrong.

NACBA recently undertook a project to review local plans, because if the opt-out rule is approved these are the plans which are likely to be locally mandated. Leading the task, I reviewed the content of about 70 local plans. And, earlier this month NACBA surveyed its members about their experiences with their local plans. We received 128 detailed responses from 39 states, Puerto Rico, and the District of Columbia, totaling 60 separate districts.

What I found was disheartening and revealed that many required provisions and procedures substantially abridge debtors’ bankruptcy rights and enlarge creditors’ rights in violation of 28 U.S.C. § 2075 and F.R.B.P. 9029.

If a Chapter 13 debtor passes the Form 122C “means test” and the “Best Interests of Creditors” test under the Code², the debtor is entitled to propose a Chapter 13 plan that pays nothing on general unsecured claims. I found that a high number of plans did not allow debtors to do that. Rather than allowing the debtor to select a dollar amount (including zero) for a dividend on general unsecured claims (which the national plan does allow), these local plans often hard-wire an overestimation of the trustee’s fees into the plan payments and create a surplus which is paid to unsecured creditors. I believe this is a violation of 28 U.S.C. § 2075.

34% of the respondents to NACBA’s survey said that they are prohibited from filing any zero dividend plans by rules or enforced “preferences” of either the judge or the trustee; and many respondents expressed deep regret about this, knowing that their clients really could not afford to pay the dividend which was not, in fact, required by law.

My review of plans and the survey results found many other problems with mandated local plans, as well. Many plans offer only one or two options for revesting, rather than allowing all options available in the Code. Certain plan provisions to require pointless plan modifications

later on in the case, imposing unnecessary costs on debtors. And, plans often require separate motions for processes that are permitted to occur within a proposed plan, adding even more costs for debtors.

It is argued that the debtor's right to propose the plan under § 1321 is protected because most local plans have a separate section where the debtor can propose additional provisions that may deviate from the model plan. However, in many courts around the country (including my own) that right is illusory since any debtor who proposes additional provisions is subjected to significant procedural hurdles.

In my own experience, since the district model plan became mandatory in our division in February 2016, the judges in our division have refused to confirm any plans (including uncontested plans, with no objections to them) that contain any additional provisions – no matter how insignificant. These cases remain unconfirmed despite the fact that the only remarkable aspect about them is that the debtors had the temerity to propose additional provisions consistent with the Code. Since most debtors' attorneys do not begin receiving payment on their allowed fees until their cases are confirmed – this is a pretty effective way to punish the debtors' bar for conscientiously representing their clients.

It is crucial that under either the national plan or local plans, debtors be protected from procedural burdens (or call it what it is – punishment) for exercising their rights to propose additional provisions which comply with the Code. I'm reminded of Henry Ford's quote: "They can have any color car they want as long as it's black." A one-size fits all local Chapter 13 plan that the debtor is required to sign in order to avoid punishment – particularly a plan abridges the debtor's rights – cannot possibly meet the test of having been proposed by the debtor under § 1321.

Thank you for your time.

¹ All code sections not otherwise stated are sections within title 11, U.S.C.

² Herein, reference to the "Code" means the Bankruptcy Code, title 11, U.S.C.

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~
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August 24, 2016

Rebecca A. Womeldorf, Secretary
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Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE, Suite 7-240
Washington DC 20544

Re: Public Hearing of the Judicial Conference of the U.S. Advisory Committee
on the Federal Rules of Bankruptcy Procedure on the
Currently Proposed Amendments to FRBP 3015 and New FRBP 3015.1 at
Pasadena CA on September 27, 2016

Dear Ms. Womeldorf:

I hereby respectfully request that I be allowed to testify at the above scheduled hearing.

Since 1978, I have been in private practice representing consumer and small business bankruptcy debtors, and I am a Bankruptcy Law Specialist certified by the State Bar of California Board of Legal Specialization. My husband, James Gold, and I practice here in San Jose, California, and we have represented thousands of consumer and small business bankruptcy debtors. We have witnessed many changes in the bankruptcy system over the past 38 years, including the implementation of the 1978 Code, substantial changes to it during the 1980s and 1994, and most recently the adoption of BAPCPA in 2005. Over that time, Jim and I have litigated several important issues regarding Chapter 13, including reported cases at the Ninth Circuit, Seventh Circuit, Fifth Circuit, and the U.S. Supreme Court.

Along with our colleague, James "Ike" Shulman, my husband and I formed the National Association of Consumer Bankruptcy Attorneys ("NACBA") in 1992. NACBA's membership includes debtor attorneys and trustees from across the country and Puerto Rico. Our more than twenty years of advocacy for the rights of consumer bankruptcy debtors has been recognized at the national level of the bankruptcy community. In addition, NACBA continues its activity as an amicus party in appellate cases nationwide and at the U.S. Supreme Court.

Ike served as NACBA's first president, and I served as the second president (from 1997-2001). I was a Director from its inception until 2009. Since then, I have continued to remain active on NACBA's Legislative Committee, and I chair NACBA's Webinar Committee.

With regard to the issue under consideration by the Committee, I serve on NACBA's Committee which is tasked with the review of the proposed rules and National Form Chapter 13 Plan. I wish to testify about the impact of the proposed rules on mandatory local plans (including those already in place in many courts around the country), as well as some of the remaining problematic provisions in the proposed National Form Plan. I anticipate being able to share important data obtained from NACBA's members regarding the content of mandatory local plans and the procedures related to those mandatory local plans.

I believe that my testimony will be informative to the Committee.

Thank you for your kind consideration, and I hope to hear from you soon.

Sincerely,

GOLD and HAMMES

A handwritten signature in cursive script that reads "Norma Hammes".

NORMA HAMMES

Tab 4

James “Ike” Shulman

ORAL TESTIMONY OF JAMES "IKE" SHULMAN, ESQ.

Before the Bankruptcy Rules Committee on

September 27, 2016

Judge Ikuta and Members of the Committee:

I want to thank you for this opportunity to testify regarding the proposed rules under consideration.

Initially, I, along with many of many colleagues, believed that the proposed National Form Plan, would bring many much-needed changes to bankruptcy courts across the nation. This was particularly true in those jurisdictions where the existing, approved Chapter 13 local form plans unfairly curtailed debtors' rights or created unjustified burdens on debtors and/or debtors' counsel. Examples of such burdens in local form plans include requirements that valuations of secured claims must be accomplished by separate motion and not be permitted within the plan itself, limitations on debtors' ability to propose specified dollar amount dividends to be paid on non-priority, unsecured claims, and restrictions on debtors' vesting rights under 11 U.S.C. § 1322(a)(9).

I understood that, while the proposed National Form Plan might not include all of the provisions that I personally would recommend as a debtors' attorney, it did offer an approach which would provide a much better balance between debtors' and creditors' rights than is offered by many current local form plans.

Unfortunately, proposed Rule 3015.1 would undo this achievement by permitting individual bankruptcy court districts to ignore the National Form Plan and instead substitute a single, mandatory local plan with no built-in safeguards ensuring balance. While the proposed Rule does require that adoption of such local district plans be done after "public notice and an opportunity for public comment", my own experience with such procedures gives an indication of how such procedures can prove more illusory than real in protecting debtors' rights.

In late 2012, I was invited to participate in a process to review changes to our local form plans and make recommendations for the adoption of a new, district-wide local plan. The group reviewing those proposals included bankruptcy judges, trustees and attorneys representing every Division within the Northern District of California. The group held a lengthy, in-person meeting at which many plan provisions were discussed in detail, with considerable progress being made toward consensus approaches. At the conclusion of this meeting, the judge who hosted the meeting announced that our review would continue and that we all would get the details later. Approximately one month later, however, the participants were abruptly advised that no further

meetings would be held, and the Oakland and San Francisco Division judges proceeded to approve a mandatory local form plan shortly thereafter. That plan ignored many of the suggestions offered during our review process.

I recount this history to make the point that adoption of proposed Rule 3015.1 makes it much less likely that a fair balancing of rights will be achieved than would have resulted from the adoption of the National Form Plan with no opt-out provision.

I believe you will have already heard testimony today from some of my colleagues, identifying the barriers faced by debtors through provisions in many local form plans today. Debtors who propose nonstandard provisions, consistent with the Bankruptcy Code, routinely receive trustee objections, even though those local form plans contain express language purporting to permit optional provisions. Once objections are filed, plan confirmation is often subject to lengthy delay. The result is that debtors who take literally the Code's statement in Section 1321 that "The debtor shall file a plan" often find their rights abridged when offering optional provisions.

For these reasons, I urge the Committee to reject proposed Rule 3015.1. However, in the event the Committee decides to approve this Rule, I offer suggested language, in Attachment A, to add to the Rule. This language specifically provides that confirmation of plans utilizing certain nonstandard provisions shall not be unduly delayed.

I thank the Committee for this opportunity today.

Attachments:

A. Proposed Amendment to Rule 3015.1

B. Request of James "Ike" Shulman to testify at 9/27/16 Hearing

ATTACHMENT A

PROPOSED AMENDMENT TO RULE 3015.1

add the following at the end of Rule 3015.1(e):

(3) Confirmation of a plan utilizing nonstandard provisions addressing any of the following matters shall not be unduly delayed as a result of such utilization:

(A) Provision of a specified dollar dividend to be paid on non-priority, unsecured claims; or

(B) Provision of a vesting election consistent with 11 U.S.C. § 1322(a)(9).

ATTACHMENT B

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August 25, 2016

Rebecca A. Womeldorf, Secretary
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Re: Public Hearing of the Judicial Conference of the U.S. Advisory Committee
on the Federal Rules of Bankruptcy Procedure on the
Currently Proposed Amendments to FRBP 3015 and New FRBP 3015.1 at
Pasadena CA on September 27, 2016

Dear Ms. Womeldorf:

I hereby respectfully request that I be allowed to testify at the above scheduled hearing.

I have been in private practice representing consumer and small business bankruptcy debtors since 1986, and am a Bankruptcy Law Specialist certified by the State Bar of California Board of Legal Specialization.

Together with my colleagues, James Gold and Norma Hammes, I formed the National Association of Consumer Bankruptcy Attorneys (“NACBA”) in 1992. NACBA’s membership includes debtor attorneys and trustees from across the country and Puerto Rico. Our more than twenty years of advocacy for the rights of consumer bankruptcy debtors has been recognized at the national level of the bankruptcy community. In addition, NACBA continues its activity as an amicus party in appellate cases nationwide, and at the U.S. Supreme Court.

I served as NACBA’s first president, and as a Director from its inception until 2004. I have served as Chair of NACBA’s Legislative Committee since 1992. On behalf of consumer bankruptcy debtors, I have testified before Congress and the National Bankruptcy Review Commission. I have served as Chair of the Chapter 13 Committee for the San Jose Division of the Northern District of California, three separate times since its creation nearly 30 years ago.

In 2004, I was selected by the Bankruptcy Judges of the Northern District of California to serve on the Court's Bench-Bar Liaison Committee, and in 2006 I was chosen to Chair that committee. Also in 2006, I was appointed to the Northern District Bankruptcy Court's Advisory Committee on Rules.

With regard to the issue under consideration by the Committee, I serve on NACBA's Committee which is tasked with the review of the proposed rules and National Form Chapter 13 Plan. I wish to testify about the impact of the proposed rules on mandatory local plans (including those already in place in many courts around the country), as well as some of the remaining problematic provisions in the proposed National Form Plan.

I hope and expect that my testimony will be informative to the Committee.

Thank you for your kind consideration.

Sincerely,

A handwritten signature in blue ink that reads "James 'Ike' Shulman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

JAMES "IKE" SHULMAN