Comments of the National Association of Consumer Bankruptcy Attorneys on Proposed Changes in Fed. R. Bankr. P. 3001 and Proposed Official Forms

The National Association of Consumer Bankruptcy Attorneys (NACBA) appreciates this opportunity to submit comments on the proposed amendments to the Bankruptcy Rules and the proposed new Official Bankruptcy Forms. The importance of these amendments cannot be overstated. Every day, news reports remind us of the enormous problems that have been caused by the failure of creditors to adhere to traditional methods of record-keeping and claim documentation.

Two of the fundamental purposes of bankruptcy, to restructure and pay debts, cannot be carried out with integrity unless there is accurate and trustworthy information about the amounts owed and the entities to which those amounts are owed. For too long, bankruptcy courts have struggled to carry out their functions without such information being submitted by creditors. By now, it should be clear that those who say there is no problem are failing to confront the reality that is apparent to virtually everyone.

As bad as the problems have been in the mortgage servicing industry, they pale in comparison to the abuses that our members have seen in the credit card and credit card debt buying arena. We regularly see claims filed without any showing of entitlement of the claimant to collect, claims filed that are unenforceable because the statute of limitations has run, claims filed where the debtor has settled with a previous debt buyer of collection agency, claims arising from identity theft, and claims filed on debts discharged in prior bankruptcy cases.

And we are not alone in seeing these problems. The United States Trustee Program recently settled a case involving thousands of claims filed on Capitol One debts that had been discharged in prior bankruptcy cases. *See* http://www.justice.gov/ust/eo/public_affairs/press/docs/2011/pr20110118.htm

Bank employees have acknowledged that banks sell debt even though many of the accounts contain errors. See David Segal, "Debt Collectors Face a Hazard: Writer's Cramp," N.Y. Times (Nov. 1, 2010), available at http://www.nytimes.com/2010/11/01/business/01debt.html. (5,000 out of 23,000 accounts had errors).

Consumers Union recently issued a report detailing a long list of problems in collections and lawsuits by debt buyers. http://www.defendyourdollars.org/pdf/Past_Due_Report_2011.pdf The report recommended that all debt collection lawsuits, which are analogous to proofs of claim include 1) Proof of indebtedness signed by the consumer; 2) the date that debt was incurred and date of last payment; and 3) a chain of title if debt has been sold. In addition, the report recommended that a lawsuit include:

- Amount of the debt;
- Name of the creditor;
- Name of the original creditor;

- Original debt;
- Date debt was incurred and date of last payment;
- Itemization of the total principal, interest, fees and other charges added to the debt;
- An explanation of how the debt amount was calculated;
- Each payment credited to the debt, including credits against interest, fees and charges;
- All other debits or charges to the account; and
- Explanation of the nature of the fees, charges, debits, by source and amount.

A recent FTC report found similar problems. http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf It cited a study that found an astoundingly high percentage of suits that were filed on time-barred debts. *Id,* p.29. The report recommended that states should consider requiring that debt collection complaints include much of the same information listed above. *Id,* iii.

Protecting the Integrity of the Claim Process

The problems discussed above are not surprising, considering the admitted practices of the debt-buying industry. Those who sign legal documents have no knowledge of the truth of the statements contained in those documents Nor do they have the knowledge that would qualify them as custodians of records and give them some faith that the computer data upon which they rely is true. In light of this fact, it should be made clear that someone who signs a proof of claim under penalty of perjury cannot simply rely on a computer screen with no knowledge about the records on which it was based.

Just as the robo-signers in the mortgage cases should not be permitted to attest to the existence of assignments they have never seen, those who sign proofs of claim should not be permitted to sign proofs of claim when they have no actual knowledge based upon documents establishing a chain of title that the entity filing the proof of claim owns the claim. Especially if the claimant is excused from attaching documents establishing ownership and amount, the person signing the proof of claim must at least have reviewed those documents. A comment to the rule or the amended Proof of Claim Form could so state.. Otherwise, if someone can sign the form with no real knowledge at all other than data prepared by unknown persons in an unknown manner, the new language about the information being true and correct is meaningless. It will be the classic "garbage in - garbage out" scenario.

Amendments to Rule 3001

The proposed amendments to Rule 3001 are actually quite modest and, at best, barely adequate to deal with the widespread problems. And we do not know why one particular class of creditors, credit card companies and debt buyers, should be excused from the requirements applicable to all other creditors. The comment to the rule give no reason for this extraordinary treatment. Is it only that providing documentation is inconvenient for them? If so, that seems a poor reason for deviating from longstanding practice.

In terms of the statement required by Rule 3001(c)(3), it should help debtors at least identify the debt and determine whether the statute of limitations has run. However, additional information should be added, similar to that recommended by the Consumers Union Report. At a minimum, a proof of claim attachment should give the full chain of title. Many debts are sold several times before the proof of claim. As discussed above, no person should sign a proof of claim without reviewing the full chain of title, so that information should be easily available.

If a debtor or trustee does request the writing upon which the claim is based, the rule gives no guidance on how long a claimant has to comply with the request, or the consequences of noncompliance. And if there is no deadline, it will be hard even to say when there has been noncompliance. The very foreseeable result will be claimants routinely ignoring requests for documents until an objection or other legal proceeding is filed. Then the documents will belatedly be provided, perhaps at a hearing that would not have been necessary had they been provided earlier. All of this will lead to wasteful expenditures of court resources and attorney's fees that consumer debtors can ill-afford (or alternatively, attorney's fees charged to the estate, at the expense of other creditors.) The rule should set a deadline for the documentation to be provided, and the comment should make clear that failure to provide the documentation renders the claim incomplete and not entitled to prima facie validity.

Without these changes, the current games of "gotcha" will continue. Debtors will object to claims because they do not know if the claimant has rights to the debt or whether the claim is otherwise valid and enforceable. No documents will be forthcoming before the hearing. Claimants will argue that the debtor listed the original creditor on the schedules, perhaps as undisputed, and therefore should be precluded from objecting.[1]

The comment should also make clear that the documentation required includes the documents evidencing the chain of title and the contract(s) upon which the claim is based. Without such contracts, in most states, the finance charges and other fees would be usurious and unenforceable, because only the legal rate of interest would be allowed. Creditors may complain that this is difficult because interest rates changed from time to time, but if that is the case it was the result of their own actions, and complications that they themselves caused should be no excuse for relieving them of providing these essential documents. Similarly, a transaction record is required, just as it would be on an open trade account.

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[1] Debtors' counsel routinely use credit reports to double-check that all claims are listed and, as a matter of practice, routinely list any possible claim to avoid § 523(a)(3) issues. Without contract documents that debtors almost never have, counsel has no way to know whether the amounts claimed are valid, which only becomes a significant issue in a small minority of cases (usually high percentage chapter 13 plans.) If counsel lists all such debts as disputed, some judges find that abusive, but if the debt is not listed as disputed, some courts find that an admission. It is not clear what a debtor's attorney should do if there is no way to know if the amount claimed in a collection letter or bill is correct. These kinds of issues should not relieve creditors of proving their entitlement to be paid, and if they are required to provide that proof before a hearing, as the rule seems to contemplate, the system will work to pay those who are entitled to be paid without unnecessary objections and litigation.

Requiring adequate documentation of claims is not just something that will allow debtors to determine whether they should object to a claim. It is also, perhaps even more, necessary to protect the rights of other creditors. Undocumented debt buyer claims consume a large proportion of all distributions to unsecured creditors in consumer cases. To the extent those claims are erroneous or not enforceable, the biggest losers are other creditors with legitimate claims. Trustees need the information provided by the proposed rule to carry out their duty to protect these creditors by objecting to questionable claims when they would diminish distributions to other creditors. 11 U.S.C. §§ 704(a)(5); 1302(b)(1).

Changes in Official Forms

NACBA strongly supports the adoption of the proposed changes to Official Form 10 and the proposed new attachment and supplement to Form 10. These forms will provide necessary information in a uniform format that will help debtors and trustees. We do have a number of suggestions to enhance the effectiveness of the forms in achieving this goal.

First, Official Form 10 should somewhere, ideally on the face of the form but at least in the instructions, state that the open end credit statement or mortgage attachment is required. This is perhaps not necessary for creditors that are large businesses with counsel, but the debt buying industry includes smaller players who may not be familiar with the rules. Also, mortgages are sometimes held by individuals who are not familiar with bankruptcy procedures.

With respect to the mortgage attachment, it should apply to all residential mortgages. Although it is not common for debtors to own more than one piece of real estate, the reasons for the attachment would apply equally to each mortgage against residential property.

The mortgage attachment should include a line in Item 2 of Part 3 to subtract amounts due to be refunded to the debtor's account. We have had persistent problems in judicial foreclosure states with the omission of refunds due from sheriff's sale deposits paid by the mortgagee for a sale that was not conducted because a bankruptcy intervened. It is extremely common for the proof of claim to include the whole deposit, even though a refund is due from the sheriff that should be credited to the account. *See, e.g., Hannon v. Countrywide Home Loans, Inc. (In re Hannon)*, 421 B.R. 728 (Bankr. M.D. Pa. 2009). Other similar issues undoubtedly arise elsewhere.

The mortgage creditor should also attach its payment history. This is not difficult for such creditors to do, since it ordinarily can be printed out from their computer systems. Often, disputes about amounts due result from discrepancies between payments a debtor believes were sent and payments reflected in the creditor's records. A payment history will often lead to such disputes being nipped in the bud.

The committee note to the form should make clear that local rules can require additional information. While a national form will provide a great deal of information in a useful uniform format, local laws regarding foreclosures vary so widely that there will always be places where

some other information is necessary (such as information regarding sheriff's refunds in many judicial foreclosure states if the form were not changed.)

The notes to both the attachment and the supplement should also make clear that the forms are not intended to express any opinion that creditors are entitled to collect any of the types of fees listed, which must be determined by the contract and applicable law. In particular, the forms should not be deemed to take a position on whether it is proper to assess attorney's fees for preparation of a proof of claim.

The note to Form 10 Supplement 2 should make clear that creditors are not authorized to charge additional fees for sending a notice of a change in payments or assessment of additional fees or charges. Creditors must notify debtors of all these items under nonbankruptcy law and cannot collect fees for such notice. The fact that the notices are required in bankruptcy should not be an excuse for creditors to tack on fees that they could not collect for similar notices outside of bankruptcy.