Testimony

Public Hearing on Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Forms Judicial Conference Advisory Committee on Bankruptcy Rules

Mecham Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

January 23, 2015

TAB 1

Chief Judge Rebecca B. Connelly
Virginia Western Bankruptcy Court

United States Bankruptcy Court
Western District of Virginia

The Honorable Rebecca B. Connelly
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January 16, 2015

VIA EMAIL
Scott_Myers@ao.uscourts.gov
Jonathan_Rose@ao.uscourts.gov
Frances_Skillman@ao.uscourts.gov

Re: Testimony to occur on January 23, 2015 before the Advisory Committee on Bankruptcy Rules and on the proposed amendments to the Bankruptcy Rules and Forms.

Dear Mr. Myers, Mr. Rose and Ms. Skillman:

I am the Chief Bankruptcy Judge for the Western District of Virginia, serving as successor to The Honorable Ross W. Krumm. From October 1, 2000, until my appointment in July 2012, I served as a Standing Chapter 13 Trustee in Virginia. While Trustee, I was centrally involved in the drafting and adoption of a form Chapter 13 plan and local rules for use across the districts in Virginia. It was the first successful effort to obtain consensus across districts for the required form and rules regarding its use and application. The statewide, multi-district form and rules have improved access to Chapter 13 in both districts and have led to greater efficiency and understanding of Chapter 13. I believe a national form will have similar results throughout the United States.

Under the bankruptcy system of the United States, every statutorily required schedule, statement and form for consumer debtors is an official, national, form, except for the Chapter 13 plan. Without an official form for the Chapter 13 plan, a consumer debtor does not have the assistance of official instructions or the ability to use commercial software to assist in generating, testing or filing the plan.

With an official form, software vendors will be able to assist any user of the form with tools to permit information sharing among the debtor, the court, the trustee, the creditors, the government, and academics. Through plan data sharing, all parties in a Chapter 13 case will have improved access to the plan treatment. The result will be faster, more accurate and significantly less expensive notice of the plan information. As with the forms modernization project, it is important to recognize that the reporting of the data set out in a form does not dictate the manner in which the data is reported. Tools can be implemented to provide data reporting from the official form into the format currently used in the local forms that are preferred by some local courts.

The official form accurately tracks Chapter 13. Section 1322 sets forth what a debtor must do and may do under a Chapter 13 plan. Section 1325 imposes criteria for that plan to be confirmed. The official form fully complies with these sections; any Chapter 13 debtor can use this official form to exercise the rights set out under Chapter 13 and draft a plan that complies fully with sections 1322 and 1325. To be sure, a form is not law. A debtor may complete an official form plan with accurate information, yet he still may not have drafted a plan that a court will confirm. The discretion of the judge to apply section 1325 and other provisions of Chapter 13 is not altered or eliminated when a party files an official form in a case. As with any drafting, individual readers may see language edits that may be an improvement, but as to the debtor's rights to use Chapter 13 and a creditor's' rights to be apprised of the effect on its interests if that plan is confirmed, this official form fully complies with Chapter 13 law.

I have been able to successfully chart a comparison of the information from the official form with local forms and in the process have been able easily to identify how to transfer and replace the information between the official form and a local form. In addition, I have attempted to test the form by applying it in my Chapter 13 cases. I have been unable to find any Chapter 13 plan that cannot be drafted using this proposed official form.

Not only do our current rules set time periods for Chapter 13 plan confirmation that differ from those of the claims allowance process, but they also lack clarification as to the impact of, or distinction between, plan confirmation and claims allowance. For example, because a plan must be filed within 14 days of the petition (Rule 3015), and objections made within 28 days of service of that plan (Rule 2002(a)), a court may confirm a plan after less than 60 days from the petition filing date. On the other hand, because Rule 3002(c) permits a creditor until 90 days after the first date set for the meeting of creditors to file its proof of claim, a creditor has more than 60 days from the date of filing to file its proof of claim. Thus is it likely that a plan may be confirmed before a creditor has timely filed its claim. Currently circuit court decisions conflict over the extent to which plan confirmation controls the amount of a creditor's claim when plan confirmation occurs prior to the expiration of the claims filing period. The proposed amended rules and official form clarify the distinction between plan confirmation and claims allowance. First, under the amended rules the time periods for filing claims and for filing objections to confirmation of a plan are congruent. Second, the official form incorporates important text that clarifies plan confirmation and claims allowance. Thus, the new rules and official form eliminate the procedural conflict without adopting a legal position. Under the new rules and official form plan, courts will be better able to consider the impact of confirmation on the rights of those affected by the terms. This is in part because the court is more likely to have knowledge of all allowed claims at the time confirmation of the plan may occur.

Similarly, the current rules provide differing time periods and procedures to address lien avoidance; determination of the extent, validity and priority of a lien; and valuation of a secured claim. The proposed amended rules eliminate these procedural inconsistencies for addressing liens and secured claims in Chapter 13 cases. It is not clear how the rules could be effective unless an official Chapter 13 plan form containing standard provisions accompanies these rules.

Perhaps the most compelling reason for adoption of the official form Chapter 13 plan and amended rules is the U.S. Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), which emphasized a bankruptcy judge's responsibility to ensure a plan is not confirmed if it contains improper provisions. The official form and accompanying rules improve a bankruptcy judge's ability to comply with this responsibility.

Recently some judges submitted a letter expressing concerns over the adoption of an official form plan and its accompanying new rules. The letter opposes the approval of the new rules and adoption of the official form plan. I disagree with the statements made in the letter opposing the official form plan. My reasons include the following:

1. The official form Chapter 13 plan is a direct response to *United Student Aid Funds v. Espinosa*, 559 U.S. 260 (2010), and is necessary to provide due process to creditors who extend credit to debtors in multiple jurisdictions.

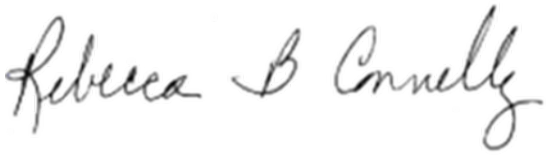
2. The official form plan protects the rights of debtors to use Chapter 13 pursuant to the provisions of the Bankruptcy Code. It is unclear to me why a debtor should be prohibited from using an official form that tracks the provisions of the Bankruptcy Code, even if adoption of an official form requires administrative changes. As a former Chapter 13 trustee, I appreciate the significance of Chapter 13 case administration. I am unconvinced, however, that the adoption of an official form prohibits or impairs the ability of a trustee or a court to perform its administrative functions.

3. The official form does not increase costs. Without an official form Chapter 13 plan, data sharing in Chapter 13 cases is impossible, thus perpetuating inefficiency and increasing costs in Chapter 13 case administration.

4. The official form does not mandate any treatment; the official form provides complete and sufficient notice to all creditors and parties in interest of all plan terms.

Please recommend for adoption the proposed rules and official Chapter 13 plan form. Thank for pursuing this important endeavor that is a vital benefit to bankruptcy practice and case administration. Thank for considering my comments.

Very Truly Yours,



Rebecca B. Connelly

TAB 2

Chief Judge Brian D. Lynch, Washington
Western Bankruptcy Court

Advisory Committee Testimony of Hon. Brian D. Lynch

I want to thank the Committee for inviting me to testify regarding the proposed mandatory national form plan. I am currently chief bankruptcy judge for the Western District of Washington. Before becoming judge on June 1, 2010, for a little over six years I served as the Chapter 13 trustee for the Portland Division of the Oregon bankruptcy court. I was active nationally in the NACTT and held leadership positions in the National Data Center and the NACTT Mortgage Liaison Committee. And before that I worked for over 25 years in a law firm, in which I had a substantial practice representing all types of consumer creditors, including mortgage lenders and car lenders, the majority of which took place in chapter 13

1. **Lack of consensus.** I want to emphasize a point made strongly by the Committee of Concerned Judges in opposition to the mandatory form plan, which is that the notion of a mandatory form plan has never had consensus support among any group, including judges and trustees. Why is that?

a. First, because the Working Group established under the aegis of the Committee never made an effort to develop a consensus, among the judges, trustees or bar, before embarking on this endeavor, they now face the problem which they could have anticipated, i.e., a lot of work on a form which does not enjoy wide support. The grass roots effort at this juncture to make the Committee aware of the extent of opposition, is in part a function of the fact that the Working Group did not face squarely at the outset the question whether the chapter 13 constituents think such a major change would be beneficial.

b. Second, despite what the proponents suggest, chapter 13 works very well in the legal communities throughout this country, and most courts, including supporters and opponents of a mandatory plan, think that their local chapter 13 plan and processes work well for the needs of their debtors and creditors. To the extent there is inconsistency, it is a function of local and circuit judicial decisions and the preferences of local counsel, trustees and judges, borne of local culture, demographics and history. As an example, in Oregon from

the outset of a form plan, plans rarely provide for paying ongoing residential mortgages through the trustee, so called conduit plans, while right across the river in Washington, virtually all plans require postpetition mortgage payments to be paid through the trustee if the mortgage is delinquent and have done so for over 25 years. Chapter 13 works well in both jurisdictions, but not surprisingly works quite differently in the details.

2. **Lack of empirical support for mandating a form plan.** Regardless of a lack of a consensus, is there some other compelling reason to undertake this wholesale change in how chapter 13 works? Are jurisdictions with form plans like the one being considered more successful in completing cases; or are cases with similar plans completed with a lot less fees and costs being incurred by debtors? There is no empirical evidence supporting either of these propositions.

The arguments in support of mandatory form plans are anecdotal and intuitive, not empirical. As trustee and now as judge, I examined the fees and costs of jurisdictions around the country. And what little evidence I did see regarding cost, suggested that form plans like the proposed mandatory form, which try to do a lot of things inside the plan, e.g., lien avoidances and secured claim modifications, was that they were often more expensive in terms of debtors' counsel fees. Specifically, the cost of debtor fees in the Portland Division where the plan is more similar to the mandatory form plan, is and has been on average one of the highest in the country, while in the Seattle Division where plan confirmation is not a contested matter, the fees are much more in the middle of the pack among trustees.

3. **Form plans do different things, and do them differently.**

a. Form plans are not a *tabula rasa* on which debtors get to craft whatever language and terms they choose. They have been crafted to funnel debtors into procedures, standard provisions and distribution schemes which have over time gained the acceptance of local courts and trustees. (This is not to say that a debtor cannot

propose special provisions, but typically they must be included in a specially called out paragraph and are often objected to by trustees.) This is particularly true when it comes to dealing with maintenance of mortgage payments, one of the more complex and important parts of confirmation.

Make no mistake. The proposed mandatory form plan is no different in trying to funnel debtors and courts into following certain processes for voiding liens, modifying claims and stripping off mortgages within the confirmation process. (Note: I would mention one major exception to this tendency. The change made by the Committee in the most recent iteration of the proposed form plan in Part 7 to allow a debtor to elect to give the trustee discretion regarding how to distribute plan payments to pay creditors would be a radical change. It arose I suspect out of the large volume of criticism laid at the prior version's distribution scheme paragraph. Giving the chapter 13 trustee carte blanche authority to determine the distribution scheme, is largely unheard of among the current generation of form plans, and arguably may not be a legally permissible plan. It would not be welcomed by most trustees. And it is at the least not transparent to creditors.)

b. The mandatory form plan reflects a policy choice that increases the complexity of the plan confirmation process by including lien avoidance, secured claim modification and lien stripping inside the confirmation process (the "kitchen sink"), as opposed to form plans which focus on getting the funds on hand with the trustee out to the creditors who the debtor wants to pay as soon as possible. The latter form plans do not have provisions for voiding liens or modifying secured claims in the plan confirmation process. As a result, those plans do not need to be served as a contested matter under Rule 7004. Issues like lien avoidance, secured claim modification and lien stripping, to the extent they apply, are left to be dealt with by motion as needed, but the confirmation process is spared of complexity and it is hoped results in a more expedited process. In turn, money is disbursed to creditors more quickly, avoiding disputes between creditors, debtors and the trustee. This is the approach adopted by

Western Washington. It has less forms, less rules and less complexity compared to the District of Oregon. It is also, as I have noted, less expensive.

Reasonable minds can differ whether one approach is preferable. But since the proponents offer no evidence or consensus that their approach is more expeditious or economical, we are left with opinion, anecdote and hypothesis for why all the courts in this country should have to adopt a form plan which funnels them into a kitchen sink approach.

4. **The illusion of uniformity.** The primary rationale for a mandatory form plan is that it will promote uniformity and consistency. But will it? Given the substantial and detailed criticism of the mandatory national form plan for its lack of detail regarding distribution schemes and conduit mortgages, to say nothing of the outright opposition to this mandatory form, is it not more likely that we will be seeing either form plan provisions crafted to implement local processes, and included by reference in Part 9, or local rules and general orders requiring certain distribution schemes and processes notwithstanding the national form plan? Will national creditors be any better off in terms of deciphering what a plan actually provides for treatment of its claim?

5. The national form plan bureaucracy. Making the adoption of form plans a national process guarantees that changes to said form will also be a slow process governed by a national committee working to compromise the various interests of constitutent groups in chapter 13, debtor, creditor, and trustee. The ability of local courts to promptly respond to new decisions within their court or circuit, or to other developments, will be lost if the process is governed by a national group whose proposed changes need to be vetted through the rule changing process.

Conclusion:

Adopting a mandatory form plan adds dubious value to the confirmation process for debtors but is likely to result in a substantial increase in cost to all bankruptcy constituencies. This is not dissimilar to the results of BAPCPA. For debtors it reduced many benefits of filing chapter 13 while increasing the administrative costs, e.g. financial counseling requirements, additional forms, and a complex projected disposable income calculation. Requiring local courts to sweep away effective local form plans and rewrite local rules to implement a new form plan and processes, is likely to produce the same problem. But unlike BAPCPA, a mandatory national form plan would be an entirely self-inflicted wound to chapter 13. The fact that 144 judges joined in a letter in letter in opposition, suggests that this concern is shared by a great many judges.

TAB 3

Judge Marvin Isgur
Texas Southern Bankruptcy Court

To the Committee:

Thank you for inviting me to testify before the Committee regarding adoption of the proposed mandatory national plan. Although I have submitted letters to the Committee both as a judge of the United States Bankruptcy Court for the Southern District of Texas and as a member of the Committee of Concerned Bankruptcy Judges, I testify only in my individual capacity.

I am completing my eleventh year as a United States Bankruptcy Judge. Westlaw reports that I have issued over 125 chapter 13 opinions. I am a frequent speaker at local, regional and national bankruptcy conferences on issues concerning chapter 13 plans. For the past 10 years, I have served as a co-chair of a statewide consumer bankruptcy conference.

When Judge Lynch and I first discussed whether to send a joint letter, we did not know whether we were two of a handful of judges who opposed the mandatory national plan. We initially joined together with 7 others, drafted a letter, and then asked our friends whether they wished to join. It is fair to say that we remain startled that 144 judges signed a single letter in opposition to the adoption of this mandatory national plan. Many other judges informed us of their opposition to the proposed national plan, but chose not to join in the particulars of our letter.

Changes to the national bankruptcy system can be brought about by many factors. Statutory changes and major case law changes are the most obvious factors. Most recently, changes occasioned by the adoption of BAPCPA resulted in Herculean and successful efforts by this Committee to meet the challenges of the act. Those efforts were not only successful, the Committee enjoyed a broad consensus amongst bankruptcy judges that there was need for action.

The adoption of a mandatory national plan is not precipitated by a similar need. And, it is apparent—merely by the existence of 144 opposing judges—that there is no broad consensus for the adoption of a mandatory national plan. Even if the few judges who support such an adoption were to quadruple in number, there would be a complete absence of consensus.

In the absence of consensus, I have asked myself whether there is a compelling need for change that should overwhelm the absence of a consensus. Although I have searched for such a need, I have found none. To be sure, I have been told that some national creditors have difficulties dealing with the various plans in force around the country. But, I have seen no empirical evidence that this is a pervasive problem; that it is costly; that it leads to endemic mistakes in the decisions that we make. Surely, we need more than an occasional anecdotal complaint to make such a major change.

I have also been told that we should strive to have uniformity, and that all plans essentially do the same thing. If all plans did do the same thing, I would respect the benefits of uniformity. So, I decided to examine that question by looking at the form plan in my own district. I asked myself this question: “Are there provisions in our local form plan that are not

implemented in the proposed mandatory national plan?" There were many, and I wish to highlight five of the most significant differences for the Committee:

1. The local plan provides for an automatic adjustment of the payments to the Trustee as changes arise in a conduit mortgage. It adopts procedures that implement the adjustment. The mandatory plan has no provision to implement automatic changes in payments to the trustee.

2. The local plan provides for adjusted priorities between adequate protection payments to car lenders, regular payments to car lenders, and the payment of attorney's fees. The mandatory plan has no provision that would allow these shifting priorities.

3. The local plan implements the adequate protection requirement of § 1325(a)(5)(B)(iii). The mandatory plan does not implement the adequate protection provision.

4. Our local plan includes a sources and uses of funds statement. The mandatory plan includes only a uses statement.

5. The local plan has a trustee-administered emergency fund. The mandatory plan has no such provision.

When I see how just one plan contains so many provisions that are not incorporated into the proposed mandatory national plan, I am forced to conclude that you are being asked to vote for uniformity at a very great cost, and on a false premise. Take the trustee-administered emergency savings fund as an example. This is a recent innovation in our local plan. Most bankruptcy judges will tell you that the biggest issue confronting us in chapter 13 cases is how to make plans more likely to succeed. Often, plans fail when debtors confront the routine financial emergencies that most of us can handle— the expense of repairing a broken down car used to get to work, the expenses associated with a death in the family, the work loss brought on by a short term illness. In many of these instances, an emergency fund could enable a family to survive the emergency without a chapter 13 failure. So, with the full cooperation of three fine chapter 13 trustees, we have decided to experiment with a fee-free trustee administered savings fund. I cannot promise you that this will work, or meet its goals. But, should this Committee preclude opportunities for local courts to implement reforms that may help solve some of our most fundamental chapter 13 problems? I urge the Committee not to restrain innovation.

I do wish to highlight two issues from the letters that I have joined in submitting.

First, the forecast of the unknown consequences of the adoption of a mandatory chapter 13 plan. The Committee of Concerned Bankruptcy Judges has highlighted a number of these

concerns. I am aware that several judges believe that our concerns are overstated. There is room for honest disagreement on these issues. I suspect that most of this disagreement comes from our differing experiences in life and on the bench.

The issue that most concerns me is whether national debtor firms will supplant the fine work that is undertaken every day by our local bankruptcy lawyers. My district has had very distasteful experiences with national mortgage firms. In one instance, we learned that the national mortgage firms were hiring local lawyers, but the local lawyers were prohibited from direct client contact. This led to poor work, unresponsive results, and huge costs inflicted on the bankruptcy system. I had the opportunity to review one of the letters sent in support of the national plan that seems to dismiss this very grave concern that I have. Although the national firm that I am referencing has offices in only six metropolitan areas, a disproportionate number of the judges signing that letter were from those areas. Of course, in those areas, the national mortgage firm would not have used local counsel. Those judges would have had different experiences from the bench than those of us that had to deal with local counsel retained by the national firm. I ask that the Committee consider the combined wisdom of my 143 colleagues in considering the potential that the Committee could be inflicting significant harm.

Second, I wish to focus on the many individualized problems with this form plan. In light of the overwhelming opposition to this plan, I do not suggest that the currently proposed plan be tweaked, and then made mandatory. However, if the Committee decides that it would be prudent to adopt a non-mandatory, model plan, this one is not ready for national use. In my district's letter, we highlight a number of problems in the plan. These problems really came to light when we looked at the sample form plan that was circulated by the Committee. I recognize that many of these consequences were not intended, but the completed sample plan would cause lenders to lose liens, result in no distributions to unsecured creditors, and derogate judicial responsibilities to the chapter 13 trustees.

Although I will not repeat the contents of that letter, please allow me to focus on that final issue. In my district, we are fortunate to have three fine chapter 13 trustees. If we tell them to utilize their best judgment in the allocation of priorities between claimants, they will do so diligently and competently. But, their competence begs the question of my responsibility. Claimants are entitled to a judicial determination of the correct priority of payments. The example that we gave is a simple one: a debtor's lawyer contacts the trustee and demands a first priority of payment pursuant to § 1326(b)(1). That section provides that "before or at the time of each payment to creditors under the plan, there shall be paid … any unpaid claim of the kind specified in section 507(a)(2) of this title…" Section 507(a)(2) provides for the payment of fees to debtor's counsel. Assume that the trustee agrees and uses all available funds to pay debtor's counsel, and that neither the car lender nor the home mortgage lender are paid until the payments to counsel are completed. What remedy do those secured creditors have? I suggest that there would be no remedy. The mandatory national plan was followed because the debtor made her required payment, and the trustee distributed it according to the trustee's best judgment. It is

certainly not a plan default. The creditors may not move to modify the plan, because they are secured creditors. Only unsecured creditors, the trustee or the debtor may seek a modification. 11 U.S.C. § 1329(a). Why would we, as judges, avoid our responsibility to make such a hard call? Unfortunately, I believe that the drafters of the mandatory national plan were trying to propose something that would work across a myriad of priority case law around the country. That emphasizes why uniformity will not work. This has been an area of great concern, but no workable national solution has been found.

The concept of a mandatory national chapter 13 plan sounds laudable. In practice, it is not needed, it will not work, and it will place our chapter 13 system at great risk. I urge the Committee to heed the advice of my 143 colleagues and decline to adopt a mandatory national plan.

TAB 4

Karen Cordry, Esq.
States' Association of Bankruptcy Attorneys - SABA

STATES' ASSOCIATION OF BANKRUPTCY ATTORNEYS

January 16, 2015

TESTIMONY ON BEHALF OF STATES' ASSOCIATION OF BANKRUPTCY ATTORNEYS IN SUPPORT OF PROPOSED RULE PROVIDING FOR UNIFORM CHAPTER 13 PLAN

My name is Karen Cordry, I am the Bankruptcy Counsel for the National Association of Attorneys General. I am appearing here today on behalf of the States' Association of Bankruptcy Attorneys of SABA, which is a group of staff-level counsel working for the States and a number of localities, who have bankruptcy issues as one of their areas of responsibility. As such, they have to deal very concretely with the complexities of the Code and the Rules on a day to day basis. I would like to express on behalf of SABA our appreciation for being allowed to appear and speak at this hearing.

We are, as regards this proposed rule, what one might call an "early adopter." We wrote to this committee almost exactly four years ago urging the adoption of a national uniform plan. Our reasons for supporting such a plan then are equally applicable today and we commend the work of this Committee in moving from a concept to an actual document and the related rules.

In a world without resource constraints, debtors could write their own perfect plans, creditors could review each document and judges, Chapter 13 trustees, and the U.S. trustee would be additional sets of reviewing eyes. In reality, even with the marked drop off in filings in recent years, the 313,000 Chapter 13 cases filed in the year ending September 30, 2014 are close to the total number of filings for *all* other federal civil and criminal cases combined. (That total was 375,000 in the year ending September 2013,which is the most recent statistics available).

Each filing generated dozens of docket entries or more, only a few of which may be relevant to a given creditor. At the same time, the dollars at stake in each case are relatively small and the likelihood of recovering any meaningful percentage of those claims is very low for most unsecured creditors. Thus, there is very little margin available for creditors to spend on reviewing documents to find those that they must actually consider.

The laws and rules for handling that case volume should be 1) clear and unambiguous, 2) predictable, 3) transparent, and 4) strictly enforced. Ideally, they should allow one to provide simple guidelines that even the newly-hired, minimum wage employees in the mail room can utilize. One value of an adversary proceeding, for instance, is that those employees can be told "If our name is in the caption on the front page, the attorney needs to see the document." By the same token, a student loan creditor could have thought that, since the Rules required an adversary proceeding to discharge their debts, the attorney could have passed up the chance to review the precise payment terms of a plan. And, in an ideal world, creditors could assume that those requirements would be strictly enforced.

The Supreme Court made clear in *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (2009), though, that creditors have no such protection. Even plan provisions that blatantly violate the Rules or the

Code will still be enforceable against creditors if they do not find them before the plan is confirmed. That ruling is perhaps the single most important reason why a uniform national plan is required.

If creditors must discover every place where a plan violates the Rules or the Code, and must do so with the resource constraints of time that exist in Chapter 13, the only practical alternative is for there to be a single uniform plan that allows them to quickly – and reliably – find out how their claim is being treated. We do not allow individual tax payers to write up their own tax return forms and then dare the IRS to find the mistakes. No more should creditors have to search through thousands of unique plan drafts to try to find where and how they are treated.

That principle does appear to have been recognized in virtually every district over the last decade. The existence of 100 or more *separate* uniform plans, though, while certainly a step forward is still only marginally better for creditors that must operate in more than one district. While we recognize that there is significant "pride of authorship" with respect to each of those plans, and some reluctance for courts that have gone through that process to face the thought of adjusting to a new form, the needs of parties (primarily, but not uniquely creditors) that operate in more than one district must be recognized.[1] For those parties, learning a new form is not a one-time job after a national rule is adopted. Instead, they must learn the process from scratch in every new district.

There are many areas of the law where it does not matter what the rule is as long as there is *one* rule that everyone knows. The concept of a uniform national plan is like that – it does not matter if secured claims are treated in Part 3 or Part 7, as long as everyone knows where to look. Having to hunt anew through each plan and hope that one has found all of the relevant provisions leaves all of the problems that led to *Espinosa* and that a uniform plan is meant to avoid. Even if a given district feels that its plan might be the "best" one available, we strongly urge this group to adhere to the old maxim that the perfect should not be allowed to be the enemy of the good.

According to the Constitution, Congress must establish "uniform laws" of bankruptcy – at the least that should encompass the use of a uniform national Chapter 13 plan. The States uniquely understand the importance of the word "uniform," since the Supreme Court has held that its inclusion in the Bankruptcy Clause was enough, standing alone, to prove that, unlike all of Congress' other powers, the States agreed to waive their sovereign immunity with respect to bankruptcy cases. While the States beg to differ on that point, at the very least, if they did agree to a waiver, the bankruptcy system should return the favor by acting in a uniform fashion.

So, our most fundamental point in today's testimony is to underscore the need for a uniform plan and to urge that the process of approving that plan be completed expeditiously. That plan will not be carved in stone; it may well need tweaking as time goes by but the best way to see what changes should be made is to implement the current draft or something similar and let it start to play out in the real world so any needed tweaks will become apparent.

That said, as to the specifics, we do have a number of broad concerns. We will be submitting more detailed comments by the deadline and we have seen prior comments by the IRS that we largely support as well. But at this point, I would like to emphasize certain overarching concerns.

1. Admissions and Local Counsel: I would be remiss if I did not mention a related topic, namely a uniform national rule on *pro hac* admissions and use of local counsel by governmental entities. Most districts provide easy access for non-local federal attorneys even though the federal government has offices all over the country and can fairly readily supply a local counsel. Those rules, though, often do not apply to other governmental entities even though they do not have the same structure. We believe this is an area that is long past due for reform and we again urge the Committee to consider how bankruptcy can be made less onerous for those who have been dragged into a forum hundreds or thousands of miles away through no choice of their own– just so they can then confront wildly varying Chapter 13 plans!

2. Plan Order: As to those plans, the first change we suggest, and the most critical, is to add in a draft

[1] One software vendor offers separate plans for each of 3 divisions in Florida's Middle District, 4 for divisions in Ohio's Northern District, 6 for divisions in Texas' Western District, and 4 plans for California's Northern District (apparently applicable by judge and not by division), as well as other plans for virtually every other district in the country. Each of those separate plans, notably, comes at a cost of $150 to $300 a piece. Thus, even debtors' counsel can bear a significant financial burden if they operate in more than one district.

uniform Chapter 13 plan confirmation order that contains a provision stating words to the effect of "This order does *not* approve any provision in the plan that fails to conform with the requirements of Rule 3015(c) and the limitations stated in Part 1 of the Plan [see point 4 below]." Rule 3015(c) attempts to deal with this issue and we have suggested language to make it somewhat stronger but, in reality, anything included in the Rule misses the point. A plan provision that ignores that part of the Rules is not necessarily any less binding under *Espinosa* than any other violative plan provision. The court *order* must itself state that it is not approving any plan provision that does not follow the Rules.

3. Spelling Out the Practical Aspects: The Rules do resolve a great many long-standing debates, particularly as regards stating whether a plan provision or a claim "controls." It does *not*, though, give any explanation as to what it means to say that the "claim" controls. There is no mechanism or timing spelled out for how or when the debtor's proposed plan must be modified so that its terms match up with the claims that are "controlling." This is particularly problematic for government claims that often not be filed until after the plan is confirmed. When and how will the plan be modified and when will there be an appraisal as to whether the plan is still feasible. These are just mechanical issues but they should be spelled out in the Rules so there is not more litigation about how to implement these policy choices. We will have a number of specific suggestions in our detailed comments.

4. Creating Default Options: The most common substantive concerns with the proposed Model Plan appears to come from districts that have made choices on several of the perennial controversies in Chapter 13 and do not wish to have the plan reopen those issues. The Plan's drafters have attempted to address that by noting in Part 1 that debtors should be aware that local rules may constrain choices that might appear to be open under the Model Plan language, and by allowing nonstandard provisions to be used if they are separately noted. While those provisions help, we would suggest that there is more that can be done to accommodate the divergent views while still maintaining the basic structure of uniformity. Specifically, we would suggest that the drafters pick out the three or four recurring areas of concern (such as whether all payments must be made by the trustee, whether the debtor must submit payments via a wage withholding order, etc.) and allow a local district-wide choice on those (and only those) options. That district-wide option can be implemented in different ways.

- One would be to leave the plan as is, but to provide that districts may use a local rule (with, preferably a uniform rule number so it can be readily found by anyone coming to that district) that states the local choice on those options and have Part 1 of the Plan state that any filer must refer to and abide by that local rule without the option for making a non-standard choice on those points.

- A second way (which we expect could be readily implemented with the assistance of the software developers) would be to have an electronic version of the plan that asks for the local option choices for those provisions (as set out in the local rule) to be input when the plan is begun and, after that is done, only shows appropriate options for that district will be shown on screen. The other option could be grayed out or it could be suppressed entirely. Again, this would be accompanied by language in Part 1 providing that, as to districts that opt to make and enforce those choices, nonstandard provisions on those topics are not allowed. That language, in turn, would be enforced by the provision in the Plan confirmation order that does not approve provisions that violate these Part 1 limitations.

SABA believes that this would go very far towards eliminating many of the concerns expressed by the districts that believe they have reached the best resolution on these points and that the decisions have become known to and accepted by the local bar. Conversely, while an absolutely uniform plan would be the most desirable option for non-local parties, it should not be that difficult for them to cope with a limited number of local default options, at least so long as those options are clearly defined and there is also a clearly defined place in the local rules where one can go to see what the district has chosen to do.

We hope this suggestion would be the last step necessary to allow all parties to agree to the wisdom of working on a single plan that can be "beta tested" and improved by the entire bankruptcy community. The basics of Chapter 13 are the same in every district; this project should be a way to make life easier for everyone after the initial break-in period.

Thank you for your consideration of our suggestions.

TAB 5

Mike Bates, Esq.
Wells Fargo Law Department

January 23rd Bankruptcy Rules Advisory Committee Hearing
Mike.T.Bates
to:
Scott_Myers
01/15/2015 04:24 PM
Cc:
Frances_Skillman, Jonathan_Rose
Hide Details
From: <Mike.T.Bates@wellsfargo.com>

To: <Scott_Myers@ao.uscourts.gov>

Cc: <Frances_Skillman@ao.uscourts.gov>, <Jonathan_Rose@ao.uscourts.gov>

Scott:

I am sending you this email to confirm that I will be unable to submit any written testimony in advance of the hearing on January 23rd. Although I will not be submitting any written testimony, my comments will address the following:

1. Wells Fargo's overall support for the proposed national chapter 13 form plan and the proposed, and associated, amendments to the Federal Rules of Bankruptcy Procedure (FRBP).

2. Wells Fargo's recommendation that the Form Plan and associated amendments to the FRBP be adopted as an integrated package.

3. Wells Fargo's recommendation that the Committee consider:

- Adding a sentence to the introductory language in Part 3.1 of the Form Plan that explicitly provides that any debt provided for in Part 3.1 is a debt provided for in the plan, regardless of whether it is paid through the trustee or directly by the debtor.

- Adding a checkbox to Part 3.1 of the Form Plan to designate whether encumbered real property constitutes a debtor's principal residence.

- Revising the language in Part 3.5 of the Form Plan to directly state that, upon

confirmation of the plan, the stay and co-debtor stay are lifted as to any *in rem* rights a lender might have with respect to property surrendered in the Plan.

- Modifying FRBP 3015(c) to limit the type of non-standard provision that may be included in the Form Plan as a nonstandard provision when that non-standard provision deviates from the express language of the Form Plan.

- Adding an Advisory Committee Note to FRBP 3002 that clarifies that the obligation of a secured creditor to file a proof of claim applies even in cases in which the debtor intends to surrender the property.

- Making two minor revisions in the Instructions for Mortgage Proof of Claim Attachment (Official Form 410A). The suggested revisions are to Part 2 (page 269 of the materials published for comment) and Part 4 (page 270 of the materials published for comment).

I appreciate the invitation to testify before the Committee and look forward to seeing you next Friday. In the interim, please let me know if you have any additional questions. Thanks.

Mike Bates
Senior Company Counsel
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TAB 6

Alane A. Becket, Esq.
Becket & Lee LLP

Written Testimony of Alane A. Becket in advance of the hearing before the Advisory Committee on Bankruptcy Rules on the proposed amendments to the Bankruptcy Rules and Forms on January 23, 2015.

Introduction

My name is Alane Becket and I am managing partner with the law firm of Becket & Lee LLP in Malvern, Pennsylvania. For almost 30 years, Becket & Lee has specialized in the nationwide representation of large issuers of consumer credit and more recently, purchasers of consumer accounts in bankruptcy matters. I have been in practice since 1992 and have extensive experience with the operational and legal challenges faced by large lenders managing and monitoring consumer bankruptcy cases. In February, 2010, I had the opportunity to testify before this Committee regarding amendments to Rule 3001, and I appreciate the opportunity to address you again.

My testimony relates primarily to my Firm's interest in the implementation of an Official Form for chapter 13 plans. Our experience managing large portfolios of unsecured accounts leads us to conclude that a standard form for chapter 13 plans is an important step in protecting the rights of both creditors and debtors.

The Current Chapter 13 Environment

Unlike the current environment of local chapter 13 practice and "culture," consumer lending and banking are no longer local endeavors. Many consumers obtain their car loans, mortgages, and credit cards after comparison shopping on the internet. The lender is often in a distant location. Regional and national banks issue far more credit cards than local banks, and many local banks issue their credit accounts through national banks. Most of these major lenders have customers in every state.

Currently, there are dozens of chapter 13 plans in use throughout the country and some estimate that there are at least 200 forms of plans. In addition, there are some jurisdictions where there is no "standard" form for plans, and thus "anything goes." I have copies of many of these variations if the Committee would like them submitted; however, I don't think this point is in dispute. Changes to local plan

forms are assimilated into our Firm's practices on an "as discovered" basis, as there is no formalized process for communicating changes in plan forms to creditors. As an experienced representative of unsecured creditors, our Firm has developed procedures for reviewing the myriad plan types; however, because of the lack of uniformity, this type of review is largely a manual and time consuming process.

Necessity for Creditors to Review Plans

As this Committee knows, confirmation of a plan is binding on all parties, even if the plan contains impermissible provisions (sometimes referred to as "illegal" provisions); thus, it is imperative that creditors have an opportunity to review plans. Review of each and every chapter 13 plan is especially critical for secured lenders, who must scour each plan searching for the appropriate section wherein their claim's treatment can be found, while also reviewing the rest of the plan for any provisions that might affect the claim or the collateral. Standardization of the format for plans is a fair and reasonable way to address the needs and rights of creditors, while still affording debtors all of the protections to which they are entitled, and adding a measure of uniformity to a process that has been the subject of much diversity.

Unsecured creditors, who are the main focus of my practice, are, generally speaking, at the bottom of the payment distribution scheme. Because of the small percentage of repayment that unsecured creditors typically receive from their claims in chapter 13 cases, it is both necessary and fair that they have a cost-effective way to review bankruptcy case information, especially in light of the very high dismissal rate, which results in wasted efforts to review plans that are ultimately not confirmed or are not completed.

The Benefit of Electronic Access

Over the past decade, the advent of electronic bankruptcy notices and electronic payment vouchers, as well as access to bankruptcy databases and PACER, have made the review and monitoring of bankruptcy cases significantly more efficient and economical. A mandatory Official Form for chapter 13 plans is another step forward in providing creditors a more efficient means to review chapter 13 cases. This is especially true in light of the proposed changes to Bankruptcy Rule

3002(c), which will reduce the time for non-governmental claims to be filed by approximately half, to 60 days after the filing of the petition in most cases.

Looking ahead, while today it may not be cost-effective for an unsecured creditor to review each and every chapter 13 plan, a standard form for chapter 13 plans would allow all parties—the courts, trustees and creditors especially—to take advantage of technology through the integration of data-enabling to court filings. Information from plans could be quickly communicated to creditors, making it easier to manage the condensed timeline and other notifications that are a part of the proposed rules accompanying the form. The cost of mailing plans would be reduced, if not eliminated. While we acknowledge that data-enabling is not a part of the Committee's proposals at this time, the process will never advance to that stage unless we take the first steps towards standardization of formats.

Opposition to the Form – Non-Standard Plan Provisions

The November 18, 2014 letter from Committee of Concerned Bankruptcy Judges to the Rules Committee suggests that there is no need for, nor benefit to, an Official Form for chapter 13 plans. I respectfully disagree. As has been noted, there is a tremendous benefit to all creditors to be able to efficiently review claim treatment in a chapter 13 case, and to know where to look for non-standard plan provisions that may affect claims.

No case more aptly demonstrates this benefit than *UNITED STUDENT AID FUNDS, INC. v. ESPINOSA*, 559 U.S. 260 (2010). In *Espinosa*, the Supreme Court was faced with a plan that improperly sought to discharge a portion of an otherwise non-dischargeable student loan. The creditor, relying on the required statutory and rule-based provisions requiring an adversary proceeding and judicial determination of undue hardship, did not object to confirmation of the plan. While ultimately ruling that the creditor was bound by the finality of the un-appealed order confirming the plan, the Supreme Court acknowledged that its ruling had the potential to encourage the inclusion of improper provisions in plans – subject to the potential for sanctions for doing so.

Because there is no Official Form for chapter 13 plans, the issue faced by the creditor in *Espinosa* was a not uncommon occurrence as creditors were sometimes blindsided by provisions in plans affecting their claims. While the Supreme

Court's ruling was a cautionary tale for debtor attorneys, variations in plan detail, format, and treatment of claims continue to plague creditors.

Part 9 of the proposed form, where "non-standard provisions" will be found, serves an important purpose in this regard. Having any "non-standard provisions" in the same location on every plan, along with the accompanying "check box" on page 1 of the form, will not only facilitate identification of those provisions, but will protect debtors who comply with the notification requirements from due process attacks on the plan. I might also suggest that the check box on page 1 be enhanced to indicate whether the non-standard provision applies to secured or unsecured creditors.

A section for non-standard provisions should also satisfy those who worry that certain provisions critical to the operation of chapter 13 in their jurisdiction are not included in the form. Any provision not otherwise in contradiction to the form or the law can be implemented through this section of the form. However, the Committee should make clear that Part 9 should not be used to circumvent the use or operation of the proposed form and that "deviations" from the form as permitted by proposed Rule 3015(c) should not be used to supplant the form.

Consumer lenders are more heavily regulated than ever and are expected to maintain accurate and up-to-date records regarding consumer accounts. The ability to review and monitor claims in bankruptcy is a benefit for creditors, a benefit to the bankruptcy system and helps bring transparency to the bankruptcy process. Improvements in process and technology will also allow educators to more easily compile the information so that Congress has an objective view of the chapter 13 bankruptcy landscape the next time legislation is contemplated. We believe the overall benefits from having standardization in the format for similar activities, such as chapter 13 plans, will outweigh any short term pain. Our experience with the implementation of the means test and accompanying form and rule changes is a good example of how imposition of new process, while potentially causing short-term disruption to established procedure, eventually becomes accepted as the norm.

The Proposed Official Form and Proposed Rule Amendments as a Package

Finally, changes to proposed Rule 3105 account for the possibility that the rule may go into effect without the accompanying form. "If there is an Official Form for a plan filed in a chapter 13 case, that form must be used."

The Chair of this Committee's memo to the Standing Committee of May 6, 2014, indicates that the Committee has considered whether the proposed form and rules should be adopted as an integrated package. We strongly oppose the adoption of the rules, most importantly, Rules 3002(c), 3012 and 3015(g), without the accompanying Official Form for plans.

Allowing requests to determine secured and priority claims in a plan, and the binding effect of that treatment via Rule 3015 is only fair and practical if a standardized form is implemented which would allow creditors to easily find and evaluate treatment. Moreover, imposing a new 60 day deadline for filing of proofs of claims will be burdensome for many creditors. This burden is somewhat offset by the benefits of having a more standardized form for chapter 13 plans for creditors to review. By unbundling the form from the rules, creditors will be shouldering all of the burden of a shorter POC deadline and the threat of having collateral valued through a plan provision, without any corresponding benefit.

Thank you for considering these comments.

TAB 7

Ronda Winnecour, Esq.
Chapter 13 Standing Trustee,
Western District of Pennsylvania

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Administrative Office of the United States Courts

Thurgood Marshall Federal Judiciary Building

One Columbus Circle, N.E., Suite k7-240

Washington, D.C. 20544

Dear Committee,

I am Ronda Winnecour, the Chapter 13 Standing Trustee for the Western District of Pennsylvania. I am writing to support the proposed Official Form for the Chapter 13 Plan and the related changes in the Federal Rules of Bankruptcy Procedure.

I chaired the first program on the Official Form Plan for the National Association of Chapter13 Trustees in January of 2013, and I wrote the first article about the proposed Form and Rules for ABI in February of 2013. Ronda J. Winnecour, *New Form Plan May Nationalize Chapter 13 Practice*, Am. Bankr. Inst. J., Feb. 2013, at 22-23, 77.

Initially, I was opposed to the Official Form. Like many Trustees, I believed a mandatory form for the Chapter 13 plan would be fine only if it was my plan form. I was wrong. I have participated in many discussions and programs throughout the country, and I am now convinced that a uniform Chapter 13 plan is necessary.

Judge Wedoff and other members of the Advisory Committee met with Chapter 13 trustees on many occasions and listened to our concerns and recommendations. I attended several of those meetings and was amazed at how receptive this Committee was to changes and suggestions. Every significant change recommended by the Chapter 13 trustees who attended those meetings has been incorporated into the present version of the form. I listened to the arguments in favor of the plan and also the vocal opposition. I realized that the only real argument made by those who oppose an official form is that it will be a change. And no one, especially Chapter 13 Trustees, wants change.

There are presently over 200 form plans in the United States. Many districts have several suggested forms, some have none at all, and the result is a chaotic body of case law based on local practice and custom.

My district, the Western District of Pennsylvania, has a mandatory plan form not dissimilar to the proposed Official Form. Our form has been required for fifteen years. Because the plan is used in every case, my staff is able to enter the plan terms into our computer system with consistency. This consistency is not available or comes at a much higher price in jurisdictions that use multiple (or no) forms.

Uniformity is a huge advantage to creditors, debtors, and debtor's attorneys, especially those who practice in more than one district. Further, the Trustees and Courts will have the benefit of a national body of case law and procedure.

As envisioned, the single greatest strength of the Official Form is that it will be data enabled. National creditors will be able to electronically upload their proposed treatment in every plan. This will reduce errors and decrease litigation costs. And Chapter 13 Trustees will be able to electronically input all of the data into their software. This will save significant administrative time. My staff will still alert the problems and errors with the debtor's proposed terms so that I can object to confirmation or resolve problems by proposing a corrective confirmation order. I have discussed this feature with the largest software provider for Chapter 13 Trustees; he believes that most Trustees will be able to absorb the entire plan into their administrative systems.

I am surprised by the vehemence of the opposition to the plan. The plan doesn't control outcomes; the confirmation order controls the outcome. Nothing stops the Trustee from objecting to terms that do not comply with local procedures or case law. And the Court can easily rectify any inconsistency in the order granting or denying plan confirmation, as well as providing local rules that clarify and incorporate local practice.

I wholeheartedly and enthusiastically support the proposed changes to the rules. They will simplify and unify Chapter 13 practice and eliminate unproductive litigation.

Specifically with regard to the current version of the proposed Official Form:

1. With regard to Section 3.1, I suggest that the provision stating "If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease…" should be amended to state "will cease as soon as practicable." There is a very real possibility that the Court will enter an order granting relief from stay during the Trustee's monthly distribution, overlapping disbursement to the affected creditor.

2. With regard to Section 3.5 concerning surrendered collateral, the second provision (allowing surrender) should contain the following sentence: "Surrender does not constitute abandonment of any interest of the estate in the collateral."

3. With regard to Part 4 concerning the Treatment of Trustee's Fees and Priority Claims there should be spaces allocated under Section 4.4 for the identification and amounts to be paid to unsecured priority creditors.

4. With regard to Part 10: Signatures, I recommend that the debtors be required to sign the plan even if represented by counsel.

I thank the Committee for the opportunity to comment and again, endorse the Uniform Plan and the proposed changes to the Federal Rules of Bankruptcy Procedure.

Respectfully submitted:

Ronda Winnecour, Chapter 13 Standing Trustee for the Western District of Pennsylvania