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09-BK-136

To the Members of the Committee:

My name is Annabelle Patterson, and I have been practicing in the area of consumer bankruptcy law for 6 years in the State of Arkansas. More recently I have become involved in bankruptcy litigation particularly pertaining to the practices of mortgage servicers.

My comments today will focus on the proposed changes to Bankruptcy Rules 3001 and 3002.1, and why I am in favor of those changes.

I. Proposed Amendments to Rule 3001

The proposed change to Rule 3001(c) adds subsection (1) requiring creditors filing unsecured claims to provide the last account statement sent to the debtor prior to the filing of the bankruptcy as part of the Proof of Claim. From my experience as a consumer bankruptcy attorney, unsecured debts are many times sold from the original lender to third party debt collectors. In fact, I have had debtors bring in bills where the debts have been sold numerous times. It can be very difficult for a client and the attorney to make a determination as to who the original lender was. Third party collectors often do not identify the original lender and will use their own internal account number rather than the original account number for the debt. This can become very problematic when, after a debtor has been discharged, another party attempts to collect on a debt that very well may have been discharged. Requiring creditors to provide account statements should greatly assist in alleviating some of the confusion that arises when debts are sold over and over again.

More distressing are the number of claims that are filed by third party collectors that would be uncollectable in state court because those debts are barred by the applicable statute of limitations. I have filed numerous objections to claims on stale debts, and, in fact, have filed approximately 18 objections to stale claims filed by one particular creditor during the past 3 months. Almost every single claim filed by this creditor appears to be stale. Not one time has this creditor filed a response to any objection that I have filed.

Although I understand that the Statute of Limitations is generally an affirmative defense, I believe that it is a violation of the Fair Debt Collections Practices Act for third-party collectors to attempt to collect debts that are uncollectable because of an applicable statute of limitations. I simply cannot understand why an action which is in violation of Federal Law (i.e., the attempt to collect a stale claim) should be entitled to prima facie validity and allowed simply because it is filed in bankruptcy court. I believe that there should be a mechanism in the bankruptcy rules which requires creditors to disclose the date of last payment, and the date of charge-off, and that there should be stricter sanctions against creditors consistently attempting to collect on debts that would be otherwise uncollectable.

II. Proposed Rules Affecting claims Secured by Security Interest in the Debtor's Principal Residence.

Proposed Rule 3001(c), new sections 2(A) through (D), and Proposed Rule 3002.1 appear to mainly impact Proofs of Claim filed by mortgage servicers. These changes as outlined are essential to curbing systematic abuse by the mortgage industry.

For the past two years, I have spent approximately 50% of my time filing Adversary Proceedings against mortgage servicers for misstatement of fees and costs claimed against debtors in bankruptcy, and for failure to provide notice of payment changes due to escrow adjustments and interest rate changes. I have had several clients who have made all of their Chapter 13 payments, have received a discharge, and were immediately notified by their mortgage company that they owed additional money and were in default on their loans. The worst of these claimed my client was $8000.00 delinquent after she had made all on-going mortgage payments in full during her bankruptcy and had completely cured her arrearage claim.

I have reviewed many transaction histories provided by mortgage servicers. Some of the more common abuses I have found are: holding trustee payments in suspense accounts for long periods of time and failing to apply trustee payments to principal and interest payments due, using on-going trustee payments to pay fees and costs ahead of principal and interest payments, using on-going trustee payments to pay fees and costs that were never disclosed to the court, and manipulating escrow accounts and diverting escrow payments to pay fees and costs. In one case, there was $4000 in payments made by the Trustee that were simply never credited to the debtor's loan.

The Proofs of Claim are no better. Claims double-dipping escrow payments are rampant. For example, the servicer claims 5 past due payments owed which include escrow contributions, and then includes an escrow shortage on the Proof of Claim which would be made up through payment of the past due payments. Foreclosure fees and costs are claimed that are never itemized or documented in any way. Overcharges for fees and costs are common. The amounts showed owing on a mortgage loan transaction history seldom, if ever, match the amounts showed owing on a Proof of Claim.

Particularly problematic is the failure of servicers to notify the parties of changes in the on-going monthly payments due to escrow changes or interest rate adjustments. This is especially difficult in Arkansas because if a debtor is delinquent on their mortgage loan, the Trustee makes the on-going payment through the debtor's bankruptcy plan in addition to curing any pre-petition arrearage. If the servicer fails to notify the debtor or the trustee of a change to the monthly payment because of escrow adjustments or an interest rate change, the debtor will fall behind in post-petition payments. From my review of many loan transaction histories, the failure of the trustee to send in the correct amount on an on-going payment will result in that payment being held in a suspense account until sufficient funds are accumulated to satisfy the amount of an on-going payment. This can also result in the mortgage servicer charging additional late fees, inspection fees, broker price opinion fees, etc.

Many times the servicers will file post-petition claims for additional monies due that are attributable to escrow or interest changes, when the debtor has been in bankruptcy for three or four years. In this situation, the debtor must make up those payments over a much shorter time period, resulting in a much larger increase to his or her monthly payment than would have been required had the servicer timely notified the trustee of the change. The ultimate consequence of this practice is that more debtors will fail in their Chapter 13 plans and subsequently lose their homes. Also, as mentioned previously, many mortgage servicers fail to notify any party of these changes during the bankruptcy. The debtor then emerges from Chapter 13 only to be notified that he is delinquent on his mortgage payments.

More recently, I have undertaken litigation involving the standing of certain parties to be able to enforce mortgage notes. While none of these cases have yet come before the Arkansas Courts, I am challenging claims filed in the name of mortgage servicers where there is no documentation attached to the claim showing that the servicer has authority to act on behalf of the true owner and holder of the note, or in most cases, no documentation showing who the true owner and holder of the note actually is. A majority of the time, the servicers file claims showing themselves as the creditor to whom the money is owed, and attach a note and mortgage in the name of another party with no endorsements of the note or assignments of the mortgage to the party filing the claim. Many times, it appears that those filing the claims may have absolutely no idea who owns the note. In one of my pending cases, a Proof of Claim was filed and the name of the Creditor was listed as "consult investor on a loan by loan basis". Hopefully, discovery will uncover what that means.

I also would like to point out that the problems I have outlined above do not pertain to one or two mortgage servicers. My experience indicates that these practices are system-wide.

Debtors are subjected to a "financial autopsy" upon entering a bankruptcy, and that is fair enough considering that they are seeking relief from obligations that they entered into. Full disclosure of all assets and debts is demanded of every debtor entering bankruptcy. Under the current system, however, the term "full disclosure" does not seem to have any application to creditors. All a creditor has to do at this point is file a claim, and unless the debtor's attorney or the Trustee objects, the creditor is home free. As illustrated above, the current process is rife with abuse.

Speaking for my clients, I don't think any of them have an issue paying (or at least trying to pay) what is owed on a secured debt if they know that the creditor trying to collect the money is the right creditor, they are informed on a timely basis of any additional charges that are assessed against them, and they have some basis to assess the legitimacy of additional charges. Debtors don't want to lose their homes, and as a rule will do what they can to save their home. In order to do that, however, they shouldn't have to pay fees and costs that aren't justified or risk being sandbagged by mortgage servicers who fail to provide proper and timely notices.

Unfortunately, the tragedy in all of this is that there are many consumer bankruptcy attorneys who simply don't scrutinize the unsecured or the secured Proofs of Claim. Investigating these claims is not only time consuming, but can be very expensive. Many debtor attorneys are reluctant to take on these challenges when there is little hope of compensation. Unfortunately, under the current system, the debtor's attorney is charged with guarding the "henhouse" for clients that are often woefully ignorant of their own financial status and for the most part are dismal at record keeping. Many of my clients simply do not understand their mortgages or the terms thereof, and are absolutely hopeless at trying to deal with their mortgage company to try to work out a repayment agreement or get a loan modification, the ultimate result being that they end up in bankruptcy court. (When I told one of my clients that there were serious problems with the way her mortgage payments had been applied, her response to me was "oh no, my mortgage company wants to help me, so they put me in that ARMS program". She, of course, had no idea that the ARMS program meant Adjustable Rate Mortgage.)

I would ask the committee to think about these issues in terms of your own life. Suppose you took your car in for a tune-up, and when you went to pick it up you were presented with a bill for $5000.00 that contained no itemization of the work that was done. When you asked for an explanation, you were told "sorry, this bill is evidence that you owe the debt, we don't have to tell you what the charges are, and if you don't pay us we will take your car." Would you simply write out a check, or would you be in someone's face demanding an explanation? Suppose that two years later you got a bill from the same repair place for an additional $2000.00 for work they forgot to charge you for when you brought the car in two years earlier. Would you agree to pay anyone for work they failed to bill you for two years earlier? Or suppose you got a bill from another repair place for $2000.00 for work done on your car on the same date with no explanation of the work done or why the second repair place is even charging you. You call that repair place, and are again told "sorry, the bill is evidence that you owe the debt, so pay us." Would you ever pay anyone who sent you a bill if you didn't have a clue who they were or why they were charging you? Suppose you had to hire an attorney to have a knock-down, drag out fight with the repair shops, but all he was ever going to get paid was $150.00 to do so. (The no-look fee amount for a claim objection in our jurisdiction.) Do you really believe that you would ever find an attorney willing to take that case, or if you did, that he would do a good job?

The bottom line is that no one in the real world would put up with that kind of behavior or expect an attorney to engage in a fight with a giant mortgage servicer or debt collector for $150.00. But this is what happens every single day in bankruptcy court, and creditors know it and they know how the system works in its present state. A creditor may be challenged once in a while by a smart debtor's attorney, but the claims that get through without challenge far outweigh the ones that don't. Moreover, creditors that receive payments that they are not entitled to takes money out of the pockets of other creditors that may not get paid. Mortgage servicers are at a particular advantage because they are, as a rule, paid first in a

Chapter 13 bankruptcy. You cannot expect these creditors to voluntarily change their systems without some impetus to do so.

The integrity of the bankruptcy system requires a fair and level playing field for all participants. The underlying precept of bankruptcy is to secure a "fresh start" for deserving debtors. Creditors with legitimate claims should get paid if the debtor has the means to pay the debt. Debtors should not be able to discharge debts that are fraudulently obtained or are obtained when a debtor knows that he or she is insolvent. At the same time, creditors must be required to fully disclose and document the legitimacy of their claims and the amounts that are owed. Only with full disclosure required by all parties can debtors truly obtain a fresh start. I, therefore, urge you to adopt the proposed Rule Changes.

Thank you for the opportunity to address you concerning these rule changes.

Sincerely,

Annabelle L. Patterson