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Subject Comment on proposed bankruptcy rule amendments

From: David C. Andersen, Chairman of the Debtors Bar of West Michigan

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The following is a comment on the proposed amendments to bankruptcy rules which would require document production in every consumer bankruptcy case. As Chairman of the Debtors Bar of West Michigan, having a full time 3 attorney volume practice in chapter 13 and chapter 7 consumer work, I would like to comment on the experience in my district where the chapter 13 trustees require that each debtor produce multiple documents prior to plan confirmation.

Just this past year, the chapter 13 trustees in my district, the Western District of Michigan, have adopted some kind of "policy" that lists about 18 different categories of documents that each debtor must produce at the 341 meeting. Failure to produce even one document will result in adjournment of the meeting and/or adjournment of the confirmation hearing on the plan.

What follows is an analysis of what has taken place in our district as it relates to the drop in chapter 13 case filings which we debtors attorneys attribute to the harshness of the rules that now apply to all chapter 13 cases.

Here is a % analysis of chapter 13 filings over the past decade for the Western District of Michigan. See attached pdf. graph. The statistics are extremely troubling.

WESTERN DISTRICT OF MICHIGAN % OF CHAPTER 13 TO TOTAL 7 & 13 CASES:

<u>Year</u>	<u>ch. 7</u>	<u>ch. 13</u>	<u>total 7&13</u>	<u>% 13 of tc</u>
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2004	13696	3280	16976
2003	13076	3762	16838
2002	11829	3697	15526
2001	10596	3307	13903
2000	8298	2865	11163
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1994	4489	1640	6129

Chapter 13 cases now comprise only 19% of consumer cases in this district. That is a drop from 22% a year ago (3% down in 1 year, the biggest drop ever) and over 6% less than in 2000. A 1% loss of chapter 13 cases translates to about 170 cases per year based on total current filings of 7 and 13 cases.

A 3% loss could translate to over 500 cases "lost" just this past year.

Comparing year 2000 to 2004, chapter 13 has slipped by 6.4% which at current filing rates could translate to a loss of over 1,000 cases per year had the District kept the same filing rate as in 2000.

Implications to unsecured creditors are significant. Depending on how much is paid to unsecured creditors per average chapter 13 case, the losses to unsecured creditors are certainly in the millions of dollars in this district alone, due to the drop in chapter 13 filings!

Many of us have the belief that chapter 13 should be the preferred chapter for all concerned, that people should pay their debts if they possibly can, and that it will be better for their future, better for creditors, better for their credit, and they will feel better about it in the long run. However, the "word on the street" among many debtors and their attorneys is that chapter 13 should be avoided if at all possible. Several prominent reasons emerge. Within the past few years, and especially this past year, the trustees have significantly changed their approach to chapter 13 cases. The following are major concerns shared by many members of the debtors bar:

Document Production Now Required in Every Chapter 13 Case. Debtors attorneys have now been given a long list of documents to be produced by each and every single chapter 13 debtor that appears at a 341 meeting. If even one document is missing, the case is adjourned, the case will not be confirmed, and the case may be dismissed. This is true even if the plan complies with the chapter 13 laws in all other respects, the debtor has appeared at the 341 meeting and has answered all questions asked, is making all plan payments, and the case otherwise looks "good." Fewer and fewer cases are now confirmed at the first date set for confirmation. Many confirmation hearings are adjourned. Many cases now require several confirmation dates.

The requirement to produce documents of interest to the trustee is something each debtor must live with under the Code. But making a long list that applies to each and every debtor makes the whole process cumbersome, burdensome, and more expensive (copy costs, paralegal time and attorney time). The lack of "routine" confirmation of chapter 13 now discourages many attorneys from advising chapter 13 over 7 when there is a choice.

Should confirmation of plans be "routine?" It is a given that a chapter 7 debtor need only show up at the 341 meeting with documents in hand, answer questions truthfully, and then wait for the discharge. This is routine in every sense of the word. To the extent that the chapter 13 confirmation process is more arduous than the routine process in a chapter 7, debtors and counsel will steer clear of 13 and are now doing so. Trustees in chapter 7 cases also request documents. This has had the effect of raising attorney fees charged for chapter 7 cases. But because there is no confirmation process, and subsequent document followup by the debtor has little effect on other aspects of the case, the document production requirement has hurt our chapter 13 practice far more than our chapter 7 practice.

It is the strong opinion of the debtors bar in West Michigan that the long list of documents that is now being requested in each and every case is more harmful to

the process in the long run. No one in the debtors bar has suggested that the trustee does not have the right to request documents of interest in a particular case. We all agree that the trustee has a right and duty to review documents of interest in the particular case when the documents are relevant to property, income, debts and confirmation issues. The problem is the global burden of a long checklist for every debtor that makes each case more cumbersome and expensive.

Why is document production cumbersome and burdensome? It may be suggested that the list of documents only calls for debtors to produce what is readily available. However, the reality is that debtors typically do not keep many of the documents that are on this list. To make this point, let us take a sample of 100 debtors and give them all a list of all these documents to bring at their 341 meeting. How many of the 100 will have all the documents on the list? The answer to the debtors bar is obvious! There will be very few who will have them all. The vast majority of this sample will be missing at least one, two or more documents on the list. The result will be that most of these 100 debtors will have their plans postponed, adjourned, and not confirmed.

Right now, in the Western District of Michigan, debtors attorneys and staff spend hours for each case educating each debtor about what documents are required, how to find them, getting them delivered to the office, scanning or copying, and providing them to the trustees.

This scenario plays out every week at 341 meetings and confirmation hearings. In a great effort to get plans confirmed, debtors counsel now must pay for additional staff hours for the sole purpose of obtaining and scanning or copying documents for the trustee. This has significantly increased the costs of administering chapter 13 plans because of document production. When one adds up the time and expense, one needs to consider these steps: time needed to contact clients, remind them to furnish documents and explain how to obtain them, follow up with clients if they are not all received (frequently they are furnished piecemeal), scan or copy costs, fax or send to the trustee, and attorney time for appearing at adjourned meetings and court hearings. The additional cost burden on each case could well be in the hundreds of dollars for each case. The additional cost makes each case more costly, more cumbersome and less of an effective tool for debtors to obtain bankruptcy relief.

Each debtor makes a choice as to what chapter to file. Attorneys help and advise each debtor. Each debtor wants to do what is best. Many debtors are interested in paying their debts. A significant percentage of debtors could choose either chapter 7 or 13 and are interested in payment plans. But many attorneys among the debtors bar in Western Michigan have shifted in their view of chapter 13 since these document production requirements have been implemented. While some attorneys do not file chapter 13 plans because they don't know how, many of the debtors bar who have done substantial chapter 13 work have now shifted their view and have now decided that chapter 13 is no longer a good option for anyone who can qualify for and obtain relief under chapter 7. Other "disadvantages" of chapter 13 contribute to this attitude, but the document production has a chilling effect on chapter 13 in this

district.

It is suggested that a long list of documents to be produced in each case elevates form over substance, causes unneeded expense, and results in apathy and discouragement among debtors and counsel. We as debtors counsel believe that things have gone too far when it is easier to buy a home than confirm a payment plan!

The long list of documents required in each case is a significant obstacle to plan confirmation. This long list has been implemented only recently. It has caused discouragement and cynicism among the debtors bar toward chapter 13. This may well account for the 3% drop in the chapter 13 percentage just this past year.

Aggressive Action by Trustees. This past year we also saw hundreds if not thousands of motions to dismiss chapter 13 plans. Many motions were based on "missing" documents, documents that debtors could not produce, and for turn over of tax returns and tax refunds. Audits of the tax returns furnished by debtors resulted in many motions to increase payments. Failing to furnish copies of all returns has resulted in a flood of dismissal motions.

Motions to dismiss or amend plans filed by the trustees are difficult to defend. Many debtors do not keep receipts. Many do not keep copies of their tax returns. When faced with a motion to dismiss, many debtors give up and let the plan fail.

Trustees have a duty to monitor the plans and ensure that debtors are paying their disposable income. But to the extent that trustee actions are perceived as hostile and adversary, these actions may be just as detrimental in the long run as they are beneficial to the unsecured creditors. It is suggested that chapter 13 administration should not be adversarial and that hostility, or the perception of hostility and adversity, has the impact of turning debtors and their counsel away from chapter 13.

The Choice of Chapters: 13 or 7? Although chapter 13 offers a "super discharge," this provision has minimal effect on the choice between 13 and 7. The typical debtor is not guilty of fraud or other intentional misconduct. Cram down on car loans makes chapter 13 attractive to certain clients, and saving a home may make chapter 13 the only choice for some. But there are other disincentives for chapter 13 plans that are significant: the inability to save for retirement; the turn over of tax refunds; the likelihood of increased payments over the first 3 years due to pay raises; and now there is a perception among the bar that the process is cumbersome, and from beginning to end is more adversarial than administrative.

Debtors who are paying into a plan need encouragement and reward. When they don't get it, they lose their motivation to stay in their plans. A question we may ask ourselves, then, is how we can improve the practice environment for chapter 13 without sacrificing the quality of disclosure and payments of disposable income? A list of documents to be produced in each case is not the answer.

From 2003 to the year to date numbers of 2004, chapter 13 cases in the Western District of Michigan has dropped from 22.3% to 19.5%, almost 3 percentage points in one year. Although there has been an erosion of chapter 13 filings over the past 5 years, the most precipitous drop has occurred this past year. The word "on the street" among the debtors bar is that chapter 13 has become so much more difficult, time consuming, and burdensome, that we may not be helping our clients by advising chapter 13, we would actually be hurting them, when there is a debatable choice. In fact, many attorneys discourage chapter 13 as the chapter of choice.

Many of the debtors bar have commented that this is not right, that this is unjust, that people who want to pay their debts should be rewarded and not punished, that they should be encouraged, and not discouraged. Many of us believe that chapter 13 should be the chapter of choice, not the chapter to avoid. Many of us believe that a debtor who opts for chapter 13 should benefit from this choice, not be penalized.

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CH 13 FILING STATS WD MI and ED MI PDF.pdf Comment to Proposed Bk Rule re Documents pdf.pdf

US Bankruptcy Court Western District of Michigan Case Statistics by Year and Chapter

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1995	5283	1861	7144	26.0%
1994	4489	1640	6129	26.8%

US Bankruptcy Court Eastern District of Michigan Case Statistics by Year and Chapter

<u>Year</u>	<u>ch. 7</u>	<u>ch. 13</u>	<u>total 7&13</u>	<u>% 13 of total 7's and 13's</u>
2004	31956	14772	46728	31.6%
2003	30799	14649	45448	32.2%
2002	27085	12583	39668	31.7%
2001	23123	9382	32505	28.9%

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February 2, 2005

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A 3% loss could translate to over 500 cases "lost" just this past year. Comparing year 2000 to 2004, chapter 13 has slipped by 6.4% which at current filing rates could translate to a loss of over 1,000 cases per year had the District kept the same filing rate as in 2000.

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