COMMERCIAL LAW LEAGUE OF AMERICA®

February 12, 2010

Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment to Rule 3001 of the Federal Rules of Bankruptcy Procedure (August 12, 2009)

Dear Secretary McCabe:

The Commercial Law League of America ("CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and reorganization. Its membership consists of nearly 2,500 individuals. The Bankruptcy Section of the CLLA is made up of approximately 500 bankruptcy lawyers and bankruptcy judges from virtually every state in the United States. Its members include practitioners with both small and large practices, who represent divergent interests in bankruptcy cases.

The CLLA has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable and efficient administration of state-law collection and bankruptcy cases for all parties-in-interest. Members of the CLLA have testified on numerous occasions before Congress as experts in the collection, bankruptcy and reorganization fields.

The CLLA submits this comment with respect to the proposed amendments to Fed. R. Bankr. P. 3001[1]. The proposed amendments would require, among other things, that additional supporting information and documentation be filed with proofs of claim in individual debtor cases, and would authorize bankruptcy courts to impose sanctions against creditors that fail to provide the required information and documentation.

[1] Stephen Sather with Barron, Newburger & Sinsley, PLLC in Texas and David Leigh with Ray, Quinney & Nebeker, P.C. in Salt Lake City contributed to the drafting of this Comment.

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The proposed amendments to Rule 3001 would unnecessarily reduce, if not eliminate, the intended flexibility of the current proof of claim process in at least two (2) ways. First, the amendments to Rule 3001 require that a creditor *must* provide certain information and documentation with its proof of claim. Specifically, the proposed amendments require that (i) a claim based upon an open-ended or revolving consumer credit agreement *must* include the last account statement sent to the debtor prior to the debtor's petition date; and (ii) a proof of claim *must* include an itemized statement of interest, fees, expenses and other charges included in the claim.

This proposed new requirement for additional information and documentation can likely be traced, at least in part, to the concerns raised by Judge Tom Small in *In re Andrews*, 394 B.R. 384 (Bankr. E.D. N.C. 2008) (See *Memorandum to Advisory Committee on Bankruptcy Rules*, dated February 17, 2009 (the "Memorandum"), contained in *The Rules Committee Agenda Materials for Advisory Committee on Bankruptcy Rules* the, March 26-27, 2009, http://www.uscourts.gov/rules/Agenda%20Books/Bankruptcy/BK2009-03.pdf, pp. 91-102). In the *Andrews* case, two debt buyers each filed proofs of claim in the amounts of $3,287.92 and $1,405.11 in a Chapter 13 case in which the debtor's plan did propose to pay a dividend to general unsecured creditors. The debtor objected to the claims filed by the debt buyers on the basis that they were each barred by the statute of limitations, and requested sanctions against the creditors pursuant to Fed. R. Civ. P. 9011 when the creditors withdrew their claims.

Although the court in *Andrews* declined to award sanctions against the creditors, the court did suggest that the Rules Committee consider the issue in order to "alleviate the significant burden on individual debtors and on the bankruptcy system caused by the large number of undocumented, stale claims being filed by the bulk purchasers of charged-off debts." *Andrews*, 394 B.R. at 389.

In the Comments to the proposed amendments to Rule 3001, the Rules Committee stated:

> The Working Group came to the conclusion that a better solution is to require, in the case of an open end credit account, the attachment of the last account statement sent to the debtor prior to the filing of the petition (or an explanation of why that statement is not available). Imposing such a requirement could have several beneficial effects. The statement would document the most recently reported account balance and applicable interest rate. It would also provide some indication of how recently payment was sought on the account, which could help address the

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> claim staleness issue addressed below. The statement would provide the debtor with the name of the creditor with whom she was dealing prior to bankruptcy, who may well be someone different from the claim purchaser who is filing the claim and whose name is likely unknown to the debtor. Finally, the ability to attach the statement would tend to show that the claim had in fact been assigned to the claimant.

Memorandum, p. 5.

Contrary to concerns raised by Judge Small in the *Andrews* case, the CLLA does not believe there is a "significant burden on individual debtors and on the bankruptcy system caused by the large number of undocumented, stale claims being filed by the bulk purchasers of charged-off debts." The CLLA believes that there are already current safeguards in place to "protect" debtors against non-legitimate claims. For example, by signing a proof of claim, a creditor represents under the penalty of perjury that the proof of claim is true and accurate. Moreover, a creditor that files a false or fraudulent proof of claim is subject to a $500,000 fine or imprisonment up to five (5) years.

The CLLA likewise does not believe that the additional information and documentation required by the proposed amendments to Rule 3001 would add any significant benefit to debtors in the claims process either. For example, in most cases, debtors already have in their possession the last account statement issued prior to the filing for bankruptcy, and, in fact, will use that statement in the preparation of their bankruptcy Schedules. Accordingly, requiring a creditor to provide this information and documentation to a debtor again in connection with a proof of claim would provide debtors with no new information with which to evaluate a creditor's claim. Even in those cases cited by the Rules Committee in support of the proposed amendments, the documentation submitted by the creditors in those cases contained sufficient evidence on their face to enable the debtors to determine that the creditors' claims were in fact time barred, and in those cases, like the majority of cases, no additional documentation was needed to put the debtors on notice that the creditors' claims were not legitimate.

Second, the proposed amendments to Rule 3001 unnecessarily reduce or eliminate the intended flexibility of the current proof of claim process by eliminating a creditor's opportunity to provide further evidence of the legitimacy of its claim in the event that the claim is subsequently challenged by a debtor or trustee. Proposed Rule 3001(c)(2)(D) provides that any required information not attached to a proof of claim may not be considered in any contested matter or adversary proceeding in the case.

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This same proposed Rule further provides that the court may "award other appropriate relief, including reasonable expenses and attorney's fees." This harsh sanction is a significant change from the current state of the law which allows a creditor that files an incomplete claim the opportunity of establishing its claim by competent evidence. See e.g., *Caplan v. B-Line, LLC*, 572 F.3d 838 (10th Cir. 2009). See also, *eCast Settlement Corp. v. Tran*, 369 B.R. 312 (S.D. Tex. 2007).

In addition to reducing or eliminating the intended flexibility of the current proof of claim process, the CLLA also believes that proposed Rule 3001(c)(2)(D) is contrary to the overriding purpose of the bankruptcy process as a whole, as well as that of the Federal Rules of Bankruptcy Procedure and the Bankruptcy Code. Indeed, the bankruptcy process is an equitable process. See e.g., *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 960 (6th Cir. 1993) (providing that the discharge of debts is an equitable remedy). Furthermore, the Bankruptcy Code is designed, in part, to ensure the fair and efficient distribution of assets and the Federal Rules of Bankruptcy Procedure are intended to promote the "just, speedy, and inexpensive determination of every case and proceeding." See Fed. R. Bankr. P. 1001.

It would hardly be equitable to allow Debtors to discharge and otherwise avoid legitimate debts simply because a creditor's timely-filed proof of claim failed in some respect to comply with rigid technical requirements. Indeed, as one Court recently questioned:

> Have the Debtors attempted to disallow claims they truly question or do not owe so that they, in good faith, can pay creditors with allowed claims more under their confirmed plans, or are they just trying to reduce their obligations under their plans and seek earlier discharge?

In re Cluff, 313 B.R. 323, 342 (Bankr. D. Utah 2004), *aff'd*, 2006 U.S. Dist. LEXIS 71904 (D. Utah 2006).

The proposed amendments would also likely affect the speed, efficiency and cost of the bankruptcy process as well. Under the proposed amendments, debtors would have every incentive to object to claims based upon alleged violation of rigid technical rules, if for no other reason, than to try and negotiate reduced claims with creditors. In addition, costs for creditors and debtors in bankruptcy would surely increase, particularly for those creditors who otherwise would file their proof claim without the assistance of legal counsel, but who now must weigh the cost of legal representation with the high costs of possible sanctions. In those cases, creditors with relatively small claims may opt to forego the filing of a proof of claim altogether, rather than incur legal costs or the risk sanctions for an improperly filed proof of claim.

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In conclusion, the CLLA does not believe that the proposed amendments to Rule 3001, as currently drafted, should be approved. The proposed amendments unnecessarily reduce, and even eliminate, the intended flexibility of the current proof of claim process. The proposed amendments also violate, at least in part, the overall purpose of the bankruptcy process as a whole, as well as that of the Federal Rules of Bankruptcy Procedure and of the Bankruptcy Code. The CLLA appreciates this opportunity to respond to the proposed amendments to Rule 3001, and would respectfully request full consideration of its Comment set forth herein.

Respectfully submitted,

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