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March 10, 2010

09-BK-159

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

Dear Mr. McCabe:

We write to share our views regarding the amendments proposed by the Judicial Conference's Advisory Committee on Bankruptcy Rules to Federal Rule of Bankruptcy Procedure 3001, pertaining to proofs of claim, and the newly proposed Federal Rule of Bankruptcy Procedure 3002.1, pertaining to claims secured by a security interest in the debtor's principal residence.

As you are probably well-aware, the filing and documentation requirements exponentially increased for consumer debtors as a result of the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act.¹ Pursuant to these amendments, consumer debtors and their attorneys must file extensively detailed statements and provide supporting documentation, including payment advices and tax returns at the risk of having the bankruptcy case dismissed. At a hearing held before the Subcommittee on Commercial and Administrative Law on May 1, 2007, Henry J. Sommer, President of the National Association of Consumer Bankruptcy Attorneys, testified:

Bankruptcy has gone from being a relatively low-priced proceeding that can be handled quickly and efficiently to being an expensive minefield of new requirements, tricks and traps that can catch the innocent and unsuspecting debtor.

...

Every consumer debtor must obtain all payment advices for the 60 days before the bankruptcy is filed, a tax return or a tax transcript for the most recent year and sometimes additional years. They must provide an attorney with information detailing every penny

¹ Pub. L. 109-8 (2005).

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of their income for the 6 months before the petition is filed; they must provide bank statements to the trustee and evidence of current income. . . .

Attorneys must complete numerous additional forms, including a 6-page means test form that requires arcane calculations about which there are many different legal interpretations, and this is on top of the 20 or 30 pages of forms that were already required in every bankruptcy case. . . .

And if a consumer debtor is subject to an audit they have to provide even more, including 6 months worth of income documentation, 6 months of bank statements and an explanation of each and every deposit and withdrawal from any account over those 6 months.²

And, as observed both by the Judiciary³ and Appropriations⁴ Committees of the House of Representatives, the United States Trustee Program has enforced these requirements with particular exuberance.

With respect to policing creditor abuses in consumer bankruptcy cases, however, we believe there is a need for more enforcement tools. In the last Congress, the Subcommittee on Commercial and Administrative Law held a hearing at which it received testimony about creditor

²*Second Anniversary of the Enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Are Consumers Really Being Protected Under the Act?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. 19-20 (2007) (prepared testimony of Henry Sommer, Pres., National Association of Consumer Bankruptcy Attorneys).*

³*See, e.g., United States Trustee Program: Watchdog or Attack Dog?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. (2007).*

⁴*See, e.g., H. Rep. No. 110-240, at 49 (2008).* The House Appropriations Committee observed:

The Committee is concerned that excessive resources are being expended on efforts by the United States Trustee Program to dismiss cases for insignificant filing defects (thereby creating added burdens on the court and debtors associated with refilings); on the unnecessary use of U.S. Trustee personnel to participate in creditors' meetings that are already handled and conducted by private trustees; and on making burdensome requests of debtors to provide documentation that has no material effect on the outcome of bankruptcy cases. Such actions by the U.S. Trustee Program are making the bankruptcy process more costly and therefore less available for those who need it. The Committee directs the U.S. Trustees to immediately examine these problems and report back two months after enactment of this Act on efforts to remedy them as soon as possible.

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abuses in consumer bankruptcy cases.⁵ Specifically with respect to proofs of claim, a witness testified:

Courts have found creditors regularly filing false proofs of claim, and even bogus affidavits in connections [sic] with motions for relief from stay, types of fraud that have caused many families to lose their homes.⁶

Some courts have likewise expressed similar concerns about this problem particularly with respect to bulk debt purchasers.⁷ In addition, a recent academic study found substantial discrepancies between mortgage debt scheduled by debtors and creditors' proofs of claim.⁸

⁵*United States Trustee Program: Watchdog or Attack Dog?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. 117 (2007) (prepared testimony of Paul Uyehara, Community Legal Services of Philadelphia)

⁶*Id.*

⁷*See, e.g., In re Hess*, 404 B.R. 747, 751 (Bankr. S.D.N.Y. 2009) (noting "a larger problem for this and other bankruptcy courts across the country" in that two of the three claims at issue in this cases were filed by "LVNV, one of numerous bulk-claims purchasers that regularly file stale claims in bankruptcy courts"); *In re Andrews*, 394 B.R. 384, 387 (Bankr. E.D.N.C. 2008) ("The phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system.").

⁸Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 123-24 (2008). Based on data collected from 1,700 chapter 13 cases, the author concluded:

[M]ortgagees' behavior significantly threatens bankruptcy's purpose of helping families save their homes. Despite unambiguous federal rules designed to protect homeowners and ensure the integrity of the bankruptcy process, 4 mortgage companies frequently fail to comply with the laws that govern bankruptcy claims. A majority of mortgage companies' proofs of claim lack the documentation necessary to establish a valid debt. Fees and charges on bankruptcy claims often are identified poorly and sometimes do not appear to be legally permissible. On an aggregate level, mortgage creditors assert that bankrupt families owe them at least \$ 1 billion more than the families who file bankruptcy believe they owe. 5 Although infractions are frequent and irregularities are sometimes egregious, the bankruptcy system routinely processes mortgage claims that do not comply with legal procedures. Far from serving as a significant check against mistake or misbehavior, the bankruptcy system routinely processes mortgage claims that cannot be validated and are not, in fact, lawful.

Id. (footnotes omitted).

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In response to some of these concerns, we have sponsored legislation in the last Congress⁹ as well as in the present Congress¹⁰ that, in pertinent part, would require greater disclosure and court review of claims secured by a chapter 13 debtor's principal residence. H.R. 1106, "Helping Families Save Their Homes in Bankruptcy Act of 2009," which we introduced last year, provides that neither the debtor nor the debtor's house would be liable for a fee, cost, or charge incurred while the chapter 13 case is pending unless the holder of the claim complies with certain filing and disclosure requirements.¹¹

Section 502(a) of title 11 of the United States Code ("Code") provides that a proof of claim is "deemed allowed, unless a party in interest . . . objects." Federal Rule of Bankruptcy Procedure 3001(f) further provides that a proof of claim executed and filed in accordance with the bankruptcy rules "shall constitute prima facie evidence of the validity and the amount of the claim." Section 502(b), in turn, sets forth various grounds for which a claim may be disallowed. In pertinent part, section 502(b)(1) provides as a basis of objection that a claim may be disallowed if it "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured."

In our view, the proposed amendments to Federal Rule of Bankruptcy Procedure 3001 and new Rule 3001.2 impose necessary and proper procedural requirements with respect to a creditor seeking payment from a bankruptcy estate. Indeed, the requirement that a proof of claim be supported by written documentation (or an explanation why such documentation does not exist) for a claim based on writing has long been an inherent part of bankruptcy procedure, antedating the enactment of the Bankruptcy Reform Act of 1978.¹² The proposed amendments appear to be intended to "secure the just, speedy, and inexpensive determination of every case and proceeding."¹³

⁹See, e.g., H.R. 3609, 110th Cong. § 2 (2007).

¹⁰See, e.g., H.R. 200, 111th Cong. § 5 (2009).

¹¹H. Rep. No. 111-19, 111th Cong., at 37 (2009).

¹²Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY ¶3001.RH[1] n. 2 (15th ed. rev'd 2009) (noting that former Bankruptcy Rule 302© "was substantially identical to the provisions of Rule 3001©); Fed. R. Bankr. P. 3001 Advisory Committee Note (1984) (noting that Fed. R. Bankr. P. 3001© "is similar to former Bankruptcy Rule 302© and continues the requirement for the filing of any written security agreement and provides that the filing of a duplicate of a writing underlying a claim authenticates the claim within the same effect as the filing of the original writing").

¹³Fed. R. Bankr. P. 1001.

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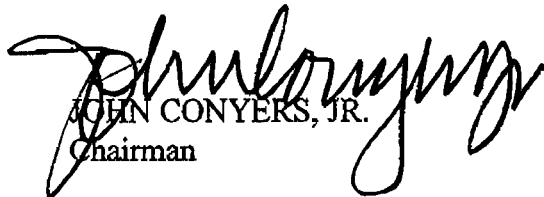
The proposed amendment to Rule 3001(c)(1) – requiring the last account statement sent to the debtor prior to the filing of the bankruptcy petition be filed with the proof of claim – appears to be a logical amplification of current Rule 3001. It is “intended to assist debtors and trustees in gauging whether such claims are untimely under an applicable statute of limitations.”¹⁴ As such, it would help facilitate analysis under Code section 502(b)(1).

Similarly, new Rule 3002.1 that, in pertinent part, requires an itemized statement of interest, fees, expenses and charges to be filed with the proof of claim. This requirement appears to be intended to ensure that the claim is appropriately documented, which is a goal that we support as evidenced by legislation that we have sponsored as described earlier in this letter.


In sum, we consider these proposed amendments to be intended to protect the integrity of the bankruptcy claims process and thereby support them generally.

We appreciate your attention to our comments.

Sincerely,



JOHN CONYERS, JR.
Chairman



STEVE COHEN
Chairman, Subcommittee on Commercial
and Administrative Law

cc: The Honorable Lamar Smith
The Honorable Trent Franks

¹⁴Eugene Wedoff, *Proposed New Bankruptcy Rules on Creditor Disclosure and Court Enforcement of the Disclosures – Open for Comment*, 83 AM. BANKR. L. J. 579, 583 (2009).