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COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

09-BK-135

February 16, 2010

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Advisory Committee on Bankruptcy Rules – Proposed Amendments to the Federal Rules of Bankruptcy Procedure (3001 and 3002.1)

Dear Members of the Advisory Committee on Bankruptcy Rules,

I write to share my views about proposed amendments to the Federal Rules of Bankruptcy Procedure currently under the Advisory Committee's consideration (*Proposed Amendments to the Federal Rules of Bankruptcy Procedure* (August 2009) ("Proposed Amendments"). Specifically, I am concerned about proposed new provisions of Rule 3001 (Proposed Amendments at 16-18, ll. 1-40) and new Rule 3002.1 (Proposed Amendments at 20-24, ll. 1-80), which will govern proof of claims and their filing. I believe the proposed changes are likely to impose additional but unnecessary burdens on unsecured creditors in consumer bankruptcy cases. These added burdens may discourage or impair the ability of legitimate parties to participate in the claims process. In addition, the changes are likely to increase litigation and its attendant costs, imposing further burdens on bankruptcy judges and trustees at a time at which the bankruptcy system is already overtaxed.

The proposed amendments make several important changes to Rule 3001(c). First, they require creditors to attach the last billing statement sent to the debtor before the filing of the bankruptcy petition (3001(c)(1)). Second, they require creditors to include in their proof of claim a statement itemizing interest, expenses or charges if the debtor is an individual (3001(c)(2)(A)). Third, they permit a court to impose sanctions on a creditor who fails to provide the information these amendments require when the debtor is an individual. Finally, they bar creditors from using the omitted information in any adversary proceeding or other contested matter without court approval (3001(c)(2)(D)). The proposed new Rule 3002.1, meanwhile, adds additional hurdles to the proof of a chapter 13 claim based on a principal-residence mortgage and incorporates the same new sanctions regime proposed for Rule 3001.

I question whether there is any evidence, beyond a few anecdotes, to indicate that there is a widespread problem – inadequately addressed by existing rules and procedures – of creditors who file unsupported claims in consumer cases. To my knowledge, no substantial evidence of such a problem has been presented to Congress. In any case, creditors, like other parties, already are restrained by Rule 11 and are subject to Federal criminal penalties if they file fraudulent claims. Indeed, it was a case involving false bankruptcy claims that led Congress to make the 1996 revisions to 18 U.S.C. sec. 1001. It is my understanding that the proofs of claims filed in the overwhelming majority of cases are valid claims that substantially match the debtor's schedule of debts filed – under penalty of perjury – with the petition. The Rules of Procedure already allow for an orderly process by which a debtor can object to a particular proof of claim and thereby put the burden of proof on the creditor. Absent strong evidence of a widespread problem that the current rules and safeguards are ill-equipped to meet, the Advisory Committee should not adopt the proposed amendments to Rule 3001(c).

For similar reasons, the Advisory Committee should also evaluate the proposed amendments in light of the directive that bankruptcy rules be construed to secure the “just, speedy, and inexpensive determination of every case and proceeding.” The proposed amendments will impose new requirements for all unsecured claims and for claims based upon principal-residence mortgages. As a result, they will open up the potential for litigation over compliance and the imposition of new sanctions and attorney's fees for failure to abide by the requirements. To the extent that the new rules will affect valid claims or increase the time or cost of determining the validity of claims, they will work against the speedy and inexpensive determination of claims. They will also increase the burdens upon bankruptcy judges and trustees as they work with limited resources to administer increasingly high caseloads. The Committee should therefore carefully examine not only whether there is a need for the proposed amendments but also the effects those rules will have overall on the processing of unsecured claims.

Further, even were there a widespread problem of unsupported claims, the proposed amendments may still not represent the appropriate solution. The Rules Enabling Act provides that rules of procedure shall not be drafted in a manner that affects substantive rights. *See* 28 U.S.C. sec. 2075 (rules shall “not abridge, enlarge, or modify any substantive right”). Through Bankruptcy Code section 502(a), Congress has provided that a proof of claim shall be “deemed allowed” unless a party in interest objects. Further, in Code section 502(b), Congress has specifically delineated the substantive bases upon which a Bankruptcy Court may disallow a proof of claim. The effect of the proposed amendments, however, will be to permit courts to disallow claims for reasons stated in the Rules of Procedure but not listed in Section 502(b).

For these reasons, the question arises whether the proposed amendments exceed the Committee's authority under the Rules Enabling Act. I do not at this time take a position on this question. Were the amendments, in fact, to affect any substantive right, it would be an *ultra vires* act for the Judicial Conference to adopt them. The Committee should therefore evaluate with care the question of whether the proposed amendments fall within the ambit of the Rules Enabling Act.

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Finally, I am concerned that the proposed amendments will intrude on consumers' privacy interests. To require that creditors always file debtors' billing statements, thereby making them publicly available, will unnecessarily expose the private details of each consumer's activities, such as purchases from a particular store, even if personally identifiable information such as home address information is removed. I hope that the Advisory Committee will consider this important issue as well.

Thank you again for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Lamar Smith". The signature is written in a cursive style with a large initial "L" and "S".

Lamar Smith
Ranking Member