

A Closer Look and Analysis of Federal Rule of Bankruptcy Procedure 9037

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Protecting the private information of members has become critical in today's financial climate. In light of the deluge of identity theft cases mounting, steps must be taken at every level to protect the privacy of our members – including debtors who have filed for bankruptcy protection. Due to privacy-related concerns, national rules were recently implemented concerning the filing of documents in federal court containing private information.

Specifically, on December 1, 2007, Federal Rule of Bankruptcy Procedure 9037, entitled “Privacy Protection for Filings Made with the Court” became effective. Rule 9037 prohibits certain personal information pertaining to “individuals” from being disclosed in documents filed with the Court on or after December 1, 2007.¹ Specifically, Rule 9037(a) provides in relevant part that *no* document may be filed by any person in *any* Bankruptcy Court that contains the following information concerning an individual:

- (1) The individual's **social security number** or **taxpayer identification number** *except* the last four digits;
- (2) The **birth date** of any individual *except* the year of the individual's birth;
- (3) Any **minor's name** *except* the minor's initials; and
- (4) Any **financial-account number** *except* the last four digits.

These rules relate to the filing on *any* document that might reveal this information including, but not limited to, proofs of claims, exhibits, declarations, motions, or any other document. If a document to be filed already has private information printed on it (such as a loan agreement to be used as an exhibit), the private information must first be redacted (i.e., blacked out with a marking pen or otherwise made unreadable) before it is filed.

Many Districts have local rules or Orders that have been in effect even longer than Rule 9037. For example, General Order 168 went into effect in the Bankruptcy Court for the Southern District of California on November 24, 2003.² The non-disclosure requirements of General Order 168 are nearly identical to the non-disclosure requirements set forth in Rule 9037(a), and many other Districts can be expected to have implemented similar Orders or local rules.

¹ Similar amendments were made to Federal Rules of Civil Procedure 5.2, Federal Rules of Appellate Procedure 25, and Federal Rule of Criminal Procedure 49.1.

² Effective December 1, 2003, the United States Bankruptcy Courts were required to implement procedures to comply with the policy of the Judicial Conference of the United States and the E-Government Act of 2002 on privacy and public access to electronic court files. The Northern District of Texas implemented their equivalent “Public Notice” on November 24, 2003.

Rule 9037 sets forth other important rules and procedures. Perhaps one of the most important for purposes of this article is subdivision (g), which provides that, “*An entity waives the protection of subdivision (a) as to the entity’s own information by filing it without redaction and not under seal.*” This may mean that, if any document filed by a member/debtor contains personal information listed in subdivision (a) (e.g., the debtor’s social security number), then the debtor has waived the protections of subdivision (a). Subdivision (g) does not set forth any timing requirements; that is, a debtor who files a document containing personal information *after* a non-compliant document is filed by the creditor still presumably waives the protections of subdivision (a).

The Effect of Non-Compliance: Potential Contempt Sanctions

The failure of creditors, debtors and their counsel to comply with Rule 9037(a) (and, where applicable, local rules or procedures such as California’s Southern District’s General Order 168) appears to have been widespread. Recently, contempt sanctions were issued by one Court against two credit unions that had failed to comply with the requirements of Rule 9037(a). The Judge ordered the credit unions to pay \$500 to the member/debtor as compensatory sanctions plus pay for one year’s worth of credit monitoring for the member (approximately \$140), and ordered that the attorneys’ fees of the members’ counsel be paid by the credit unions, in the total amount of \$2,250. Furthermore, as to one of the credit unions, the Judge also imposed “coercive sanctions” in the form of mandatory additional training and guidelines to its employees, or face fines of \$100 per day.

The Judge in the *Jacobsen* case issued the civil contempt sanctions pursuant to the Court’s inherent power, stating that, “[T]his Court’s power is limited in that these sanctions must either compensate for harm cause [sic] by the contempt or be designed to coerce future compliance.” During the hearing, the Judge noted that, since criminal contempt sanctions were not being sought, she could not issue any sanctions that might punish the creditors—as opposed to imposing civil sanctions which are designed to compensate the debtor and coerce compliance with the Court’s orders and rules of procedure.

Indeed, it appears that bankruptcy attorneys may be searching for ways not only to protect their clients’ privacy, but also to profit from the mistakes of creditors or others who may have inadvertently disclosed personal information. For example, some debtors’ attorneys are contemplating ways in which they might file class-action lawsuits against creditors in the Bankruptcy Court. However, there does not appear to be any right on the part of debtors or others to seek contempt sanctions on a class-wide basis in Bankruptcy Court, since the contempt power is one that may be exercised only by the Court.

Debtors’ attorneys also appear to be searching for non-bankruptcy laws upon which to base private claims. Some debtors’ attorneys claim that the violation of Rule 9037(a) and other applicable privacy laws constitute “negligence per se” or violations of

non-bankruptcy law, such as the Gramm-Leach-Bliley Act. However, an aggrieved debtor would presumably need to establish causation and damages in order to prevail under those laws, which would be difficult. Furthermore, in those instances (of which there appear to be many) in which the debtors and/or his or her counsel has also disclosed private information, recovery under any law may be impossible if the debtor has waived the protections of subdivision (a).

Possible Solutions

For debtors, creditors or others contemplating filing any document in a bankruptcy case that have not yet done so, the solution to the above problem is simple: immediate compliance with Rule 9037's non-disclosure requirements, and a change in practices and procedures designed to automatically comply. This applies not only to Proofs of Claims³ and other pleadings, but also extends to the *attachments* that often accompany them. Thus, attachments such as financial account statements must be scrutinized in order to ensure that, among other things, applicable redactions are made and only the last four digits of the account or social security number are visible.

For those who have already filed documents containing personal information, the solutions are perhaps more complicated. First, a list of all such documents filed, and the cases in which they were filed, should be drawn up. It may be helpful to distinguish between "active" and "closed" cases (keeping in mind that Chapter 13 cases may remain active for years). Second, the Clerk of the Bankruptcy Court in which the filing was made should be contacted to determine if there is an expedited procedure for restricting public access to the offending document. For example, Bankruptcy Courts in all Districts have the capacity to "turn off" access to any document filed through the CM/ECF system. In the Southern District of California, the Clerk of the Bankruptcy Court has restricted all public internet access to claims in closed cases. Disabling access to sensitive information via the internet is the primary goal in order to be in compliance with the statute; however, if a document was filed over-the-counter, then the document can still be accessed by the public. An aggrieved debtor may nevertheless be hard-pressed to be able to prove causation in any civil trial.

In the event that an expedited procedure does not exist and a creditor has already filed a document containing private information, the creditor may need to file a Motion to Restrict Public Access pursuant to Bankruptcy Code section 107(b) and/or Federal Rule of Bankruptcy Procedure 9037(d) in order to obtain a Court Order authorizing the clerk to disable internet access to the document containing the private information. A creditor may even elect to go farther than that by filing a Motion to Seal the document pursuant to Federal Rule of Bankruptcy Procedure 9037(c).

In light of heightened concerns relating to personal privacy and identity theft, we recommend always erring on the side of caution in disclosing any information which might be considered to be private and potentially useful to an identify thief. For those

³ Proof of Claim Form B-10 was revised December 1, 2007, consistent with the new privacy considerations. The Official Form can be obtained online at www.uscourts.gov.

that have complied with the statute since its inception you are the lucky ones! For the others, early, proactive action may help avoid contempt sanctions if it can be demonstrated that the party is taking immediate and active measures to remedy the problem.

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