UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In Re:	)	Case No. 00-31220
	)	Chapter 13
SAMUEL E. SMITH, and MELINDA D. SMITH,	)	
Debtor(s).	)	
	)	Adversary Proceeding
SAMUEL E. SMITH and wife, MELINDA D. SMITH, MICHAEL E. THOMAS and wife, TRINA E. THOMAS, and ALL OTHER PERSONS SIMILARLY SITUATED,	)	No. 00-3148
Plaintiff(s),	)	
v.	)	
TMS MORTGAGE, INC.,	)	
Defendant(s).	)	

ORDER
(1) DENYING MOTION TO DISMISS;
(2) DETERMINING THAT CLASS ACTION MAY NOT BE MAINTAINED, and
(3) GRANTING JUDGMENT FOR INJUNCTIVE RELIEF FOR PLAINTIFFS

This matter is before the court on defendant's Motion to Dismiss plaintiffs' Complaint, which challenges defendant's practice of adding a $125 charge to its Proofs of Claim for the cost of preparation thereof. A hearing on the present motion was conducted before all three of the bankruptcy judges of this

District because the issues raised in this adversary proceeding had appeared, and would continue to appear, in other proceedings in each of this court's divisions. Based upon the motion, the hearing, and the record in this matter, the court on its own initiative has determined that this adversary proceeding could and should be concluded at this time without further motions, discovery or trial. Consequently, for the reasons that follow, the court has determined that: (1) Defendant's Motion to Dismiss should be denied; (2) the class action should not be maintained; and (3) the plaintiffs are entitled to judgment for injunctive relief (including reasonable attorneys' fees) by which defendant should be ordered (a) to cease its practice of adding a $125 fee to its Proofs of Claim filed in this District and (b) to refund all such funds collected in cases presently pending in this District.

1. Motion to Dismiss

The defendant has asserted that the plaintiffs lack standing to bring this action (constitutional and statutory) essentially because they do not have a direct financial stake in the outcome of the action. This argument is based on a misconception of the nature of a Chapter 13 bankruptcy case and the mechanics of that reorganization process. The ultimate fact in these cases is that

the debtors' money is being paid to their creditors, and they have a sufficient stake in insuring that their debts are properly paid to satisfy standing requirements.

Standing is an "irreducible constitutional minimum" necessary to make an Article III "case" or "controversy" justiciable. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The standing test requires the plaintiff to satisfy three elements: (1) injury in fact to the plaintiff; (2) causation of that injury by the defendant's complained-of conduct; and (3) a likelihood that the requested relief will redress that injury. Id. The party invoking the federal jurisdiction has the burden of proving the standing test. See FW/PBS, Inc., v. Dallas, 493 U.S. 215, 231 (1990).

The debtor-plaintiffs here have suffered harm sufficient to meet the "injury-in-fact" element of the standing test. The debtors have been making payments to the Chapter 13 Trustee, and the Trustee has been distributing those payments to creditors, based in part on the proofs of claim that were filed in their cases. The Proof of Claim filed by defendant TMS included a $125 fee that TMS added to its Proof of Claim for its cost of preparation. So, part of what is being paid to TMS by the Trustee from funds paid by the debtors is this $125 fee. Despite the fact that this is a small amount of money, it does in fact have a

financial impact on the debtors. Less tangibly, but just as important, the debtors have a real interest in insuring that their debts are paid properly. Overpayment to one creditor impacts the debtors' repayment scheme and could result in extension of the debtors' Plans of reorganization or delay in receipt of their discharge.

In short, TMS' action is an "invasion of some legally protected interest which is concrete, particularized and actual or imminent, not merely conjectural or hypothetical." Lujan, 504 U.S. at 555. This is not a situation in which the debtors are attempting to assert the rights of a third party. Compare Sierra Club v. Morton, 405 U.S. 727, 740 (conservationist organization, absent evidence that organization or members would be affected in any of their activities or pastimes by proposed building of recreation area in natural game refuge, lacked standing to pursue injunction and declaratory relief).

The causation element of the standing inquiry is readily satisfied from the conclusion that the debtors have suffered a concrete and particularized harm. This is because TMS' action of placing this $125 line item attorney fee provision in its Proof of Claim is the direct cause of the economic harm to the debtors.

Similarly, the relief sought by the debtor-plaintiffs is designed to redress the specific injury alleged.

Consequently, the plaintiffs have satisfied the constitutional prerequisites of standing to bring this action, and defendant's Motion to Dismiss on that account should be denied.

With respect to the plaintiffs' statutory standing, defendant asserts that Section 549 of the Bankruptcy Code provides that only the "trustee," and not the debtor, shall have power to avoid post-petition transfers of estate property. Thus, defendant asserts that only the Trustee has statutory standing to bring this action. While Section 549 is one mechanism to avoid a post-petition transfer, no provision in the Code states that it is the exclusive means. To conclude otherwise (as defendant suggests) would produce untenable results: For example, the court, the Trustee and creditors have an interest in insuring that only the proper sums are paid to each creditor. To assume that Section 549 is the exclusive remedy would imply that other creditors could not object to the overpayment of defendant even though the payments came at their expense. Nor could the court act sua sponte to stop paying an unlawful charge -- even though Section 105 provides that the court can do anything necessary to carry out the provisions of the Bankruptcy Code. As noted above, the debtors have a real stake in

this action, and the Bankruptcy Code provides a remedy for the debtor. See Tate v. NationsBanc Mortgage Corp., 253 B.R. 653, (Bankr. W.D.N.C. 2000). Consequently, defendant's motion to dismiss must be denied.

2. Class Action Determination

The plaintiffs' Complaint (as amended) seeks to state claims for a class of individuals who have filed bankruptcy petitions in the Western District of North Carolina from whom the defendant has claimed a "bankruptcy fee." Bankruptcy Rule 7023(c) provides that the court must determine whether such a class action may be maintained:

> (1) As soon as practicable after commencement of an action brought as a class action, the court shall determined by order whether it is to be so maintained.

In order for an action to be maintained as a class action it must meet the prerequisites of Bankruptcy Rule 7023(a) and one of the criteria of 7023(b)(1)-(3).

While the prerequisites to maintaining a class action may be satisfied here, the court has concluded that this action should not be maintained as a class action for the following reasons:

(a) Each and every member of the putative class is already engaged in an independent bankruptcy action involving the

defendant. By the definition of the class, each "member" is a petitioning debtor in a bankruptcy case in this District. The relief sought involves claims filed by defendant in those independent cases. Thus, the putative class members are parties already engaged in existing independent "litigation" with the defendant, and are already represented in such bankruptcy cases by attorneys who they have engaged themselves (except for the few debtors proceeding pro se).

(b) The ultimate progression of a class action would culminate, after a "Stage I" trial of the class action, at "Stage II" in a series of individual determinations of relief to individual class members. The existing individual bankruptcy cases of each of the class members present a virtually identical forum -- at this time. So, future "Stage II" proceedings in a class action would merely duplicate presently existing proceedings -- and only after the effort and expense to all parties of the Stage I class action proceeding.

(c) The class action is not necessary here because the court can issue an Order that would have class-wide effect in the absence of a class action. The defendant's conduct for which relief is sought took place in proceedings pending before this court. The definition of the putative class demonstrates that defendant's

assessment of its "fee" was done in bankruptcy cases pending in this court. Consequently, it would be appropriate for the court to enter an Order for injunctive relief in this individual case which had effect as a general rule in other cases pending in this District. Such an order would effect "class-wide" relief without the burden of the class action (and any purely individual claims could be determined in existing individual cases).

For those reasons, the court has concluded that in these circumstances a class action is not a necessary, efficient or appropriate vehicle for resolution of the issues raised in this proceeding. Consequently, the court has determined that this action may not be maintained as a class action.

3. Judgment For Relief

The court is aware that determination of the merits of a proceeding prior to the defendant filing its Answer is generally not appropriate. But, it appears that actions such as the present one are becoming somewhat epidemic, that they are taking on the nature of a holy war, and most important, that the issue here is something that should be handled in the nature of an administrative matter regarding the administration of bankruptcy estates in this District.

The defendant has stated in its supporting Memorandum the only facts necessary to the determination here: That the plaintiffs have filed Chapter 13 bankruptcy cases in this District and that defendant filed a Proofs of Claim in their cases that included an "item in the amount of $125 specifically and visibly denominated 'Attorneys fees and costs.'" Memorandum In Support, p. 2. And, the court can note from this record that defendant has not filed a separate application for such fees and costs.

The Bankruptcy Code contains no authorization for entitlement to fees and costs against the estate by a creditor other than pursuant to an application pursuant to Section 506(b). Norton Bankr. L. & Prac. 2d, § 123:14 states that:

> Creditors in some districts routinely add a fixed fee to their proofs of claim in Chapter 13 cases to cover the cost of preparation and filing of the proof of claim itself. Because there is no provision in the Code, other than Section 506(b), for allowance of attorney fees incurred post-petition, these fees should not be allowed unless they can properly be allowed under 506(b).

This and similar cases present a number of subsidiary issues which are not determinative. Whether the "fee" for preparation of the Proof of Claim is identified as such or not, whether it is generated internally by the creditor's employees or "out-sourced," whether the cost represents the work of a professional or a non-professional, there is no authority for the assessment of any such

fee other than an application pursuant to Section 506(b) of the Bankruptcy Code. Anything other than such an application is not authorized and is not permitted.

The court is of the opinion that normally no fee or cost for preparation of a Proof of Claim is appropriate. Normally preparation of the Proof of Claim involves the simple task of filling in a few blanks on an official form. Unlike a formal pleading, it does not require an attorney's signature, and certainly does not require any professional expertise to prepare it. There may be extraordinary situations in which the preparation of the Proof of Claim is sufficiently complex to require a professional to prepare it. In such situations, the proper procedure would be to file an application for the fee or cost pursuant to Section 506(b) and Bankruptcy Rule 2016.

For the above reasons, defendant's practice of adding the $125 fee to its Proofs of Claim is improper. The appropriate remedy in these circumstances is to order the practice to cease, to require modified Proofs of Claim and to require reimbursement of amounts improperly collected by defendant.

There has been nothing alleged in this action to indicate that these plaintiffs have been injured beyond the payment of part of the $125 fee assessed or that punitive damages are appropriate.

The Complaint alleges no consequential damages or injury other than the fee itself. Further, no basis for punitive damages has been alleged or shown in any way. But, because there may be situations where such actual or punitive damages might be appropriate, the court does not believe it should foreclose such claims in appropriate cases. Consequently, the court has determined to deny such relief here without prejudice to individual claims for such injury that go beyond the mere assessment of the fee.

The court believes that it is not necessary or appropriate for this action to proceed any further for determination. The court has concluded that it is appropriate for it to enter a judgment (a) granting relief for the plaintiffs including an order requiring defendant to cease its practice its practice of assessing a fee for preparation of Proofs of Claim in this District, requiring reimbursement of any such fees it has been paid in pending cases in this District, and paying reasonable attorneys' fees to these plaintiffs' attorneys (to be determined upon application by them); and (b) denying any other relief sought (without prejudice to claims for actual damages and punitive damages, other than for the fee itself, by individual debtors in their own bankruptcy cases). This Order is also without prejudice to defendant (or any creditor

in other cases) filing an application for fees and costs pursuant to Section 506(b) and Bankruptcy Rule 2016 where appropriate.

4. Conclusion

As a matter of information, the court notes the following about the "method to its madness." This Order is a final Order and a separate Judgment will be entered contemporaneously with it so that any (or all) parties may appeal to the District Court. The court in the Tate case will enter an Order from which the parties may appeal and seek joinder with any appeal in this case. The court is informed that there are presently pending in this District five other similar actions. The court will schedule status conferences in those cases in order to explore the application of the rule in this case to those cases. Finally, the court will enter an Administrative Order consistent with the ruling in this case which will apply to all cases in this District prospectively.

The ruling in this case reflects the opinion of each and all of the bankruptcy judges of this District and it will be applied as consistently as possible by each judge in each division. The parties are requested to cooperate with the Chapter 13 Trustee to effect the relief ordered here in as efficient manner as possible.

The court is open to suggestions regarding implementation of the relief if that is necessary.

It is therefore **ORDERED** that:

1. The defendant's Motion to Dismiss is denied;

2. The plaintiffs' prayer to maintain this action as a class action is denied;

3. The defendant, TMS Mortgage, Inc., is ordered: (a) to cease immediately the practice of including a charge for preparation of the Proof of Claim in Proofs of Claim filed in the Western District of North Carolina; (b) to file an amended Proof of Claim in each pending case in the Western District of North Carolina where such charge was included, which amended Proof of Claim shall eliminate such charge; and (c) to reimburse to the Chapter 13 Trustee in each pending Chapter 13 case in the Western District of North Carolina the amount of any such charge that it has received;

4. The defendant, TMS Mortgage, Inc., shall pay to plaintiffs their reasonable attorneys' fees, which the court will determine by Supplemental Order upon filing of application for fees by plaintiffs' attorneys;

5. Except as stated in paragraphs 3, 4, and 5, plaintiffs' claims for relief in their Complaint are denied; and

6. The parties are directed to cooperate with the Chapter 13 Trustee to implement this Order.

George R. Hodges
United States Bankruptcy Judge